EMPLOYMENT TRIBUNALS

Claimant: **Mr James Thomas**

Respondents: **J Toomey Motors Limited**

Heard: **East London Hearing Centre**

On: **2 to 5 May 2017 & 9 May 2015 in chambers**

Before: **Employment Judge G Tobin**

Members: **Ms L Conwell-Tillotson**
Mr L O'Callaghan

Representation

Claimant: **In person**

Respondent: **Mr P Strelitz (counsel)**

RESERVED JUDGMENT

It is the unanimous decision of the tribunal that:

1. **The claimant was not subject to race discrimination.**

2. **The claimant's complaints of harassment on the grounds of sex are all out of time and it is not just and equitable for these complaints to proceed.**

3. **The claimant was not wrongfully dismissed (i.e. dismissed in breach of contract).**

4. **Consequently, all of the above claims are dismissed.**

REASONS

The case

1. Proceedings were commenced in the employment tribunal on 15 September 2016. The claimant claimed, amongst other things, direct race discrimination, sexual harassment and notice pay (i.e. wrongful dismissal or breach of contract). A

response was duly entered. The claim was summarised by Employment Judge Prichard in his full note for the preliminary hearing held on 14 November 2016 and also in the preliminary hearing summaries of EJ Allen (sent to the parties on 17 January 2017) and EJ Gilbert (promulgated on 8 March 2017).

2. The issues to be determined at the hearing have been identified by the parties as follows:

Section 13 Equality Act 2010 ("EqA") race discrimination

2. Did the claimant suffer any, or all, of the following treatment by the respondent:

i. Suspended the claimant on the day that PD's email was received, namely Saturday, 28 May 2016.

ii. Glenn Fuller demanding that the claimant give his demonstration car to a customer, Mr St Pierre, whilst claimant was on a day off on 4 or 11 or 18 or 25 November 2015.

iii. Glenn Fuller openly admitting in front of Chris Yates, Mark Flynn, Yiannis Zographos and Zena Brown that he (Glenn Fuller) had a personal vendetta against the claimant, on 4 or 11 or 18 or 25 November 2015.

iv. Glenn Fuller mentioning to the claimant constantly from 1 October 2015 that the claimant "cost Glenn Fuller a £10,000 holiday".

v. Glenn Fuller intentionally and unfairly arranging the claimant no appointments during an event known as The Sales Event on 11 March 2016.

vi. Glenn Fuller between September 2015 to May 2016 twice denying the claimant sales of staff purchases the claimant had conducted, namely [in relation to] Stephanie and John, by Glenn Fuller taking control of the deals and ensuring that the deal was completed in his name, even though one of the deals was the claimant's own trade car.

vii. Glenn Fuller demanding on 27 May 2016 that the claimant remained after his contracted hours and threatening the claimant with disciplinary action if he left.

viii. Glenn Fuller purposefully delaying the claimant from visiting the claimant's daughter in hospital after the claimant's contracted hours had been completed on 27 May 2016 by demanding that the claimant take a sales call at 18:07, and threatening the claimant with disciplinary action if he left without locking up.

ix. Glenn Fuller twice attempting to "short-change" the claimant on his commission between September 2015 and May 2016 by intentionally miscalculating the claimant's commission by placing minus signs on actual profit made.

x. Glenn Fuller denying the claimant chance to complete a deal on a motor vehicle and then allowing another employee, Amy Taylor, of the respondent to complete that deal between September 2015 and May 2016.

xi. [*Withdrawn by claimant during the course of the hearing*]

xii. Glenn Fuller not allowing the claimant to load the claimant's details onto Auto SLM in order that Glenn Fuller could tactically distribute them elsewhere on 28 May 2016.

xiii. Glenn Fuller taking the claimant's demonstration car away from the claimant on 23 or 24 May 2016 at a point when Glenn Fuller knew that the claimant needed that motor vehicle.

xiv. [*Withdrawn by claimant during the course of the hearing*]

xv. Glenn Fuller constantly reminded the claimant from September 2015 to May 2016 that he could be dismissed for absolutely no reason as the claimant had not served a continuous period of 2 years.

3. If the claimant suffered any or all the above, did it or they amount to less favourable treatment on the grounds of race?

4. Can the respondent show that it took all reasonable steps to prevent Glenn Fuller from doing that thing; or, from doing anything of that description?

5. Did the claimant resign in response to some or all of the above complaints?

<u>S26 EqA sexual harassment</u>

6. Did the respondent engage in the following alleged unwanted conduct of a sexual nature by:

i. Glenn Fuller constantly coming out of his office to look at female customers' breasts or bottoms?

ii. Glenn Fuller making disgusting comments over the PA system to groups of females passing the respondent showroom from 1 April 2015, in the presence of Carol Smith, [Zena] Brown, Chris Yates, Yiannis Zographos, Mark Flynn and the claimant.

iii. Glenn Fuller commenting to Amy Taylor in front of an office full of people, including Chris Yates, Yiannis Zographos, Mark Flynn, Marc Bailey, Amy Taylor and the claimant "*did your boyfriend stick it in the wrong hole last night?"* between August 2015 to October 2015.

iv. Glenn Fuller stating to Amy Taylor while she was rubbing her eye and whilst he was watching pornography on his mobile phone "*you better watch it girl, there be something in your eye soon*" between February 2016 and April 2016 in front of Amy Taylor, Mark Flynn and the claimant.

v. Glenn Fuller making comments about sexual acts to Zena Brown and Carol Smith whilst at the Christmas party on 10 December 2015 to 20 December 2015, such as teabagging and naming different words for female genitalia.

vi. Glenn Fuller pressuring Amy Taylor to share a hotel room with him after the Christmas party referred to in [6]v above.

vii. [*Withdrawn before the hearing*]

viii. [*Withdrawn before the hearing*]

ix. Glenn Fuller making the "wanker" sign behind Mark Fitzgerald's back between June 2015 and September 2015. [*The second part of this allegation was withdrawn before the hearing*].

x. [*Withdrawn before the hearing*]

xi. [*Withdrawn before the hearing*].

7(a). Are any or all of the complaints of sexual harassment out of time? If so, should the tribunal exercise its discretion so as to consider each or all of the complaints? [*although this issue was inserted as 7(a), it is a jurisdiction point, so it must be considered <u>before</u> we consider the substance of the allegations themselves.*]

7. Did any of the above in paragraph [6] violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant having regard to the factors listed in section 26(4) EqA.

8. Can they respondent showed that it took all reasonable steps to prevent Glenn Fuller from doing that thing; or, from doing anything of that description?

<u>Notice pay</u>

9. Was the claimant entitled to notice pay that he did not receive?

10 to 14. [*Withdrawn before the hearing*]

<u>Compensation</u>

15. [*This is an issue for remedy, if appropriate*]

The relevant law

3. The relevant applicable law for the claims which we considered is as follows.

4. Under s4 EqA, a protected characteristic for a claimant includes race, which includes: (a) colour; (b) nationality; and (c) ethnic or national origin. S4 also provides that someone's sex is a protected characteristic.

5. S13(1) EqA precludes direct discrimination:

> *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.*

6. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

7. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

8. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence, this can be distilled into a 2-strage approach:

    a. Has the claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent had committed unlawful discrimination?

    b. If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

9. The Court of Appeal in *Igen* emphasised the importance of *could* in (a). The claimant is nevertheless required to produce evidence from which the tribunal could conclude that discrimination has occurred. The tribunal must establish that there is prime facie evidence of a link between less favourable treatment and, say, the difference of race and that these are not merely two unrelated factors: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the employment tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

10. The test for harassment is set out in s26 of EqA:

> (1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of –
>
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive

environment for B…

(4) In deciding whether contact has the effect referred to in subsection (1)(b), each of the following must be taken into account –

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

11. For allegations of harassment, there is no necessity to look for a comparator. As described in *Rayment v MoD [2010] EWHC 218 (QB), [2010] IRLR* the standard for harassment is conduct that is "oppressive and unacceptable". The definition approaches the matter from the claimant's perspective. Therefore, if a victim had made it clear that s/he found the conduct unwelcome, the continuation of such conduct will constitute harassment. Only if it would be unreasonable to regard the conduct as harassment at all will there be a defence here, but the test for connections between the conduct and the effect have been loosened so that unwanted conduct no longer has to be *on the ground of* the victims protected characteristic to fall within the definition, but only *related* to it – or indeed to the protected characteristic of someone else, as in this instance.

12. Claims of discrimination in the employment tribunal must be presented within 3 months of the act complained of, pursuant to s123 EqA. Complaints of discrimination often extend over a period of time, so s123(3)(a) goes on to say that "conduct extending over a period is to be treated as done at the end of the period". Employment tribunals have a discretion to extend the 3-month period if they think it "just and equitable" to do so: s123(1)(b)

13. So far as the claimant's claim notice pay is concerned, this is a claim for *wrongful dismissal*, which is a particular type of breach of contract claim relating to the notice period. A dismissal, without notice or with inadequate notice, will constitute a wrongful dismissal unless the employer was acting in response to a serious breach of contract by the employee. Similarly, where the employer repudiates to contract (for example by fundamentally breaching the implied term of trust and confidence) the employee can resign without notice and claim a constructive dismissal. In order for a constructive dismissal claim to succeed the claimant must establish that:

a. there was a fundamental breach of contract on the part of the employer;
b. the employer's breach caused the employee to resign; and
c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

The evidence

14. After a short case management conference and a review of the list of issues, we (i.e. the tribunal) retired to read the statements and documents that had been identified for preliminary reading. We were presented with a bundle of documents well in excess of 350 pages. This included the witness statements. The employment judge advised the parties at the commencement of the hearing that we may not read any document that had not been specifically been referred to us.

15. Most of the witnesses we heard from were salesman. Many were charming, charismatic and robust in their accounts. Indeed, this was particularly the case for the claimant and Mr Fuller, who were the main protagonists. We regarded it as key to see through any "sales-pitch". The two cases were diametrically opposed. It was not possible to reconcile the two versions of events so, we needed to ascertain which account, if any, we accepted and why.

16. We heard evidence from the claimant and two witnesses, Mark Flynn and Yiannis Zographos. Both were erstwhile work colleagues and were no longer employed by the respondent. On the respondent's behalf, we heard from Barry Ives and Mark Fitzgerald, both current directors, and Glenn Fuller. Mr Fuller was the former General Manager of the respondent's Brentwood branch, which is where the claimant worked and where the events complained of occurred. The respondent adduced witness statements from Amy Taylor and Mike Kember, although they were not called to give evidence. Both were former colleagues of the claimant and both have left the respondent's employment. The respondent also adduced a statement from Zena Brown, who was, and we believe still is, a human resources manager at the respondent's Brentwood branch. We attached less weight to this written evidence as these individuals' evidence was not able to be directly challenged by the claimant nor were they available to answer questions from us.

17. We did not regard the claimant's evidence is reliable. We believed that he embellished the truth, for example, when he gave evidence that his child was in hospital on 27 May 2015; in his evidence in respect of the "sales day"; and when he made a jokey comment about ISIS bombing Mr Fuller's flight. We will expand upon these points later in our determination.

18. However, as particularly damming of the claimant's credibility, on the first page of this statements, and in his evidence, he said that Mr Fuller called him "*a black cunt*[1]". We do not accept that such a phrase was used. This is a very serious allegation. If this abuse was used, we believe that this point would have been raised immediately or, at the very least, far earlier than first appearing in the claimant's statement. This racial abuse was not mentioned in the claimant's grievance letter; it was not referred to in the claim form; nor was it mentioned at any of the 3 preliminary hearings. It is just not credible that the claimant steadfastly rejected attributing race discriminatory motives to Mr Fuller in his grievance letter, if it was the case that Mr Fuller called him a "*black cunt*". The claimant accused Mr Fuller of sexual harassment and theft and fraud in his grievance letter so his contention that he "*did not want to rock the boat*" is resoundly rejected. The claimant also said that Mr Fuller mocked people of Indian, African and other ethnic backgrounds by impersonating their accents. Again, the first time this allegation appeared was in the claimant's witness statement and given what we subsequently determined to be the weak and unmerited basketful of allegations identified in the list of issues, the late appearance of these accusations, convinced us that the claimant would hurl any allegation against his former line manager to advance his claim.

19. We determined that we could not rely upon the evidence of Mr Flynn and Mr Zographos. Both were close friends of the claimant to such an extent that they

[1] The employment judge would not allow the word "cunt" to be used during the course of proceedings; although the parties and witnesses were in no doubt of the identity of this word. This word is, however, referred to in full in this determination so it stands as a fuller record of proceedings.

refused to speak to Ms Taylor and sent her to Coventry. This was following the claimant's dispute with Ms Taylor and in respect of matters that did not affect either of them. There is evidence in the bundle indicating that when she started work with the respondent, the claimant, Mr Flynn and Mr Zographos called Ms Taylor names, such that she said she went home crying. This may have been because she lacked direct car sales experience or that they perceived she was treated more favourably by management than they were, or because she was the only woman in the sales team. There is insufficient evidence to come to any form of conclusion about why these 3 salesmen treated Ms Taylor in such a manner, but note that this treatment was orchestrated by the claimant and we have taken this ill-treatment into account when we have assessed the credibility of the claimant and his witnesses.

20. Mr Flynn currently works with the claimant. We believe that Mr Flynn deliberately tried to mislead us when he said he saw Mr Fuller type Mr Taylor's grievance letter. This was a serious allegation of falsifying important correspondence and one which he was not able to substantiate at a basic level. From questioning where Mr Flynn was positioned, he could not possibly tell what Mr Fuller was typing.

21. Mr Fuller was the pivotal witness for the respondent. He is no longer employed by the respondent and he was not a named party to these proceedings. He was not subject to a witness order and he would not have been individually liable for any compensation in these proceedings. Therefore, although he had an interest in clearing his name, this was his only interest in these proceedings and his attendance at the hearing was voluntary. We believe he gave a clear and credible account. We do not believe that he embellished his version of events. We believe that he bore no grudge against the claimant for the ISIS comment because he accepted that this was a joke that had misfired and that the claimant could not have known about his friend's death and Mr Fuller's fear of flying. We are not satisfied that Mr Fuller used the phrase "*black cunt*". We pressed him on this point, and he was very frank in admitting that he did use the word "*cunt*" but not in any racially connected way and "*not in front of the ladies*". This response, and other responses, had a ring of truth. We are satisfied that Mr Fuller gave honest evidence at the hearing.

22. We determined that Mr Fitzgerald and Mr Ives gave credible evidence. Mr Fitzgerald, was completely out of his depth in investigating the claimant's grievance. He admitted and recognised his shortfalls, which helped us conclude that he gave honest evidence. Mr Fitzgerald thought that he had done the best he could in difficult circumstances. This would not be an adequate defence in a case of unfair dismissal, for example, where we expect an employer to undertake a competent investigation; it is however, a revealing and credible response in a discriminatory context. The claimant requested that Mr Fitzgerald investigate his grievance because he said that he trusted Mr Fitzgerald and revealingly the claimant maintained that confidence in Mr Fitzgerald's integrity at the hearing.

Our findings of fact

23. We set out the following findings of fact, which we determined were relevant to finding whether or not the claims and issues identified above have been established. We have not decided upon all of the points of dispute between the parties, merely those that we regard as relevant to determining the issues of this case as identified

above. When determining certain findings of fact, where we consider this appropriate, we have set out why we have made these findings.

24. The respondent is part of a wider group of companies. The claimant worked at the Brentwood dealership. Based on the respondent's figures, which were produced part-way through the hearing, the respondent employed 417 staff; 23% of the workforce was female, 3.6% of the workforce was non-white, of which, 1.44% was Black/Afro Caribbean.

25. The claimant defined himself as British Black/Black Caribbean. He commenced work for the respondent on 21 February 2015. He was employed as a Sales Advisor based at the Brentwood branch. The claimant was an outstanding salesperson and was the respondent's top salesperson at his dealership.

26. The claimant was due to be promoted to a Sales Controller. This was to be the number 2 sales position in the Brentwood branch, under Mr Fuller who was effectively head of sales. The claimant knew of this promotion (as his grievance letter reports that he was told by Mr Ives on the afternoon of Friday 27 May 2016). Unknown to the claimant, the financial package for his promotion (with the appropriate authority) had been resolved that day and Mr Ives telephoned Mr Fuller to ask him to tell the claimant the "*good news*". During the course of this telephone conversation there was an altercation in the showroom involving the claimant and Ms Taylor. Mr Kember witnessed the events in close proximity, Mr Fuller heard the commotion from his office and Mr Ives overheard some of the exchange as Mr Fuller had placed his telephone on loudspeaker.

27. Mr Fuller described an incident in which the claimant made a "vicious" verbal attack on Ms Taylor, which we accept. This was collaborated by Mr Ives and we have read a near contemporaneous complaint from Mr Kember about the incident. Although Ms Taylor does not describe the exchange in detail, in her interview transcript of 6 June 2016 she referred to "*absolutely inappropriate behaviour*" towards her from the claimant. During the incident, Mr Fuller intervened and told the claimant, Ms Taylor and Mr Kember to "*go home*."

28. Following the exchange, Mr Fuller and Mr Ives discussed what had happened. Mr Ives broached possible suspension and gave Mr Fuller permission to suspend the claimant. Mr Ives requested Ms Taylor's telephone number from Mr Fuller and he called her as he thought she might be distressed.

29. By coincidence, the following morning (Saturday 28 May 2016), before 9am and before the claimant arrived at work, Mr Fuller took "*an angry phone call*" from a customer, Mr Durrell [referred to as PD in the list of issues], who accused the claimant of misleading him on the interest rate as part of a car purchase. Mr Fuller asked Mr Durrell to put his complaint in writing to the claimant. We accept that it was the respondent's standard procedure for customers' complaints to be addressed only after they were put in writing. Significantly, Mr Fuller asked Mr Durrell to direct his complaint to the claimant in first instance. Mr Fuller thereupon informed the claimant of Mr Durrell's complaint and an email from Mr Durrell duly arrived around 9.30am.

30. Mr Fuller reported that the claimant had a poor demeanour that morning. He attributed this to the aftermath of the incident that occurred the evening before.

Around 9.30am Ms Taylor telephoned Mr Fuller (as she was not working that day) to complain about the claimant's behaviour during their exchange of the previous evening. She informed Mr Fuller that she would be submitting a grievance. A short while later (sometime around 10am) Mr Kember informed Mr Fuller that he would also be submitting a grievance in respect of the claimant's behaviour.

31. Based upon the incident the evening before, the claimant's demeanour that morning and the 2 pending grievances, Mr Fuller decided to suspend the claimant. Mr Fuller was very clear in evidence, which we accept, that the Durrell complaint had no influence on his decision to suspend the claimant. Mr Fuller discussed his decision again with Mr Ives by telephone prior to suspending the claimant and he convened a meeting with the claimant, with Ms Brown in attendance, between 10.30am and 11am. Mr Fuller then suspended the claimant at this meeting.

32. After the suspension meeting, around 12 noon that day (i.e. 28 May 2016), Mr Fuller spoke to Mr Ives are reported that a written complaint had now been received from Mr Durrell. Mr Ives asked that the email be sent to him so that he could consider this on the Monday.

33. Mr Fuller confirmed the suspension in writing on 31 May 2016, which was the Tuesday. This letter was sent to Mr Ives for approval and thereafter passed on to the claimant.

34. Ms Taylor and Mr Kember submitted written grievances to Mr Fuller on 31 May 2016. It is not clear what precise time Ms Taylor's grievance was sent. We reject the claimant's submission that Mr Fuller forged Ms Taylor's grievance letter. We accept Mr Fuller's account that Ms Taylor sent her grievance via a messenger app. Mr Fuller forwarded the grievance to Zena Brown at 11am. Mr Kember's grievance was sent at 11.10am.

35. On 1 June 2016 the claimant lodged a grievance. He complained about Mr Fuller's suspension of him in emotive terms and said that this was a deliberate effort to undermine his promotion. The claimant attributed Mr Fuller's behaviour to his ISIS joke, which he said provoked the response identified in sssue 2(iv). The claimant said that prior to Mr Fuller's upcoming holiday, he (i.e. the claimant) made a comment in jest, where he warned Mr Fuller to be vigilant of terrorists. The claimant referred to Mr Fuller as "*wanting to get back at me*" because Mr Fuller had lost a friend in the 9/11 tragedy in New York. The claimant said that "*I believe this was the trigger and in no way believe his behaviour to be racially motivated…*"

36. The claimant made no reference to race discrimination in his grievance. He did indicate instances of sexual harassment and inappropriate behaviour, including the issues 6(i) to 6(ix). The claimant's grievance letter proceeded to make allegation of fraud and theft against Mr Fuller. He accused Mr Fuller of "*operating in a rogue manner installing a dictatorship at Brentwood*" and of having a "*Napoleon complex*".

37. In early June 2016 then, there were 3 live investigations. These were:
    (a) the 27 May altercation which gave rise to 2 complaints/grievances by Ms Taylor and Mr Kemble; and
    (b) the Durrell complaint against the claimant; and
    (c) the claimant's grievance against Mr Fuller.

38. Although the claimant's grievance against Mr Fuller was the last in the chronological sequence, Mr Ives said that he referred the claimant's complaint to Mr Fitzgerald to investigate as a priority as he was so advised by the respondent's human resource consultants. Mr Fitzgerald was appointed as the investigating officer at the request of the claimant. Dealing with the claimant's grievance before proceeding with a disciplinary investigation against him was consistent with the ACAS Code of Practice and guidelines on investigating disciplinary cases and ensuing grievances.

39. Because the Durrell complaint involved a possible referral to the Financial Conduct Authority the respondent gave this priority and Mr Ives reserved this investigation to himself. Ms Taylor and Mr Kemble's complaints were side-lined and were not investigated at this time.

40. On 2 June 2016 Mr Fitzgerald met with Mr Fuller to discuss the claimant's grievance. This was the respondent's first material step in investigating the claimant's grievance. Thereafter, Mr Fitzgerald undertook the following steps:

    i. On 6 June 2016 he met with the claimant and Ms Taylor.
    ii. On 10 June 2016 he interviewed Carol Smith and Mr Flynn.
    iii. He met with Mr Fuller again on 13 June and also Mr Kember and Mark Bailey.

    So far as we could tell, Mr Fitzgerald spoke to all relevant witnesses and, significantly, the claimant has raised no criticism of Mr Fitzgerald's investigation in this regard.

41. The claimant was invited to attend a disciplinary investigation meeting with Mr Ives which occurred on 15 June 2016. This investigatory meeting was in connection with the complaint from Mr Durrell in respect to the alleged interest rate irregularity for the car purchase loan agreement.

42. On 22 June 2016, the claimant was invited to a disciplinary hearing by Neil Rickwood, the respondent's Finance Director. The issue for the disciplinary hearing related solely to the customer's complaint arising from the Durrell credit agreement. The disciplinary hearing was set for 27 June 2016, although this was rescheduled for 2 July 2016 to allow the claimant more time to prepare.

43. The claimant resigned on 30 June 2016 by letter with immediate effect. This followed 2 attempts by the respondent to set a disciplinary hearing for the Durrell complaint. The claimant's resignation was after Mr Fitzgerald completed his investigation of the claimant's grievance by between 1 or 2 weeks. No further steps had been taken in respect of the claimant's grievance. The claimant's resignation was with immediate effect.

44. On 13 July 2016 the claimant met with Mr Ives to discuss his resignation and his grievance. This was approximately 1 week after the claimant commenced a new job.

Our determination

45. According to the respondent's own figures, this is not a particularly diverse workplace. Mr Fitzgerald and Mr Ives seemed perplexed by our interest in the

composition of the respondent's workforce. We are satisfied that this is an employer with little understanding of equal opportunity policies, its implementation and progressive employment practices. Nevertheless, we do not draw any adverse inferences from the figures because the statistics are not so disparate as to cause significant concern. We do note, however, that this is not a particularly diverse workplace.

46. We dealt with the allegations of race discrimination first. There are 13 incidences of race discrimination. In chronological terms, the first alleged incidents of race discrimination occurred from around September 2015. This was over 7 months after the claimant's appointment. We note that Mr Fuller was involved in recruiting the claimant and that prior to his grievance of 1 June 2016 the claimant had not made any complaint about Mr Fuller's conduct or behaviour. Although Mr Flynn and Mr Zographos said they had witnessed Mr Fuller's behaviour towards the claimant, neither had previously raised any formal concerns or complaint. Mr Flynn described himself as mixed race and said that he never been on the receiving end of any racial abuse or discriminatory remarks from Mr Fuller. We regarded Mr Flynn as a useful comparator, particularly as he was a salesman and significantly not as successful as the claimant.

Time limits

47. Proceedings were issued on 15 September 2016. We have not seen the ACAS conciliation certificates so it is therefore difficult to calculate the conciliation period. The ACAS conciliation period will extend time limits for the parties to attempt to resolve their differences without the need for employment tribunal proceedings: ss 18A & 18B of the Employment Tribunals Act 1996 ("ETA") and the Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure Regulations 2014. There are two different methods of calculating the extension and there is not sufficient information for us to calculate the effect of the extension of the time limits under the early conciliation rules. So therefore, we have applied the most generous extension for the claimant, i.e. we have given the claimant the benefit of the doubt by calculating the conciliation period at 1 month. By this analysis any act complained of occurring *before 16 May 2016* is out of time.

48. The claimant resigned and treated himself as constructively dismissed on 5 July 2016. Even without any extension of time for the conciliation period, the claim for notice pay was brought within 3 months of the effective date of termination, as required by s3 ETA and the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994.

The race discrimination complaints

49. Of the 13 incidents of alleged race discrimination in chronological order, 2(iv) relates to alleged ongoing and continuous complaining from Mr Fuller about the cost of his "lost" holiday from 1 October 2015. The claimant said that this went on until May 2016 but that he could not remember the last occurrence. The claimant could not account for how many times Mr Fuller raised or moaned about his holiday other than saying that it was a regular feature of their relationship following his misjudged joke. 4 addition complaints relate to an unspecified period between September 2015 and May 2016. 3 relate to disputes about earnings and commission from sales – issues

2(iv), 2(ix) and 2(x). Issue 2(xv) relates to incidents when the claimant said that he was constantly reminded that he could be dismissed for absolutely no reason because of the application of the unfair dismissal time limit. Given that the claimant has not been able to identify any of these incident as occurring in the second part of May 2016, at the latest, we consider that all of these complaints, alleged to have extended over a period of time are, prima facie, out of time based on the limited information available from the claimant.

50. Issues 2(ii) and 2(iii) are approximately 6 months out of time, occurring as they did on one of the possible dates identified in November 2015. These allegations concerned Mr Fuller allegedly demanding the claimant give his demonstration car to a customer (Mr St Pierre) and Mr Fuller purportedly admitting to 4 individuals that he had a personal vendetta against the claimant.

51. Issue number 2(v) surrounding appointments for The Sales Event occurred in mid-March 2016 so this is over 2 months out of time.

52. Therefore, 8 of the 13 complaints of direct race discrimination are, prima facie, out of time. On the basis of calculating the full allowance for the conciliation period, those claims starting from 23 or 24 May 2016 and culminating with the claimant's suspension – issues 2(xiii), 2(vii), 2(viii) and latterly 2(i) and 2(xii) - are in time.

53. Given that the race discrimination is set to have extended over a period of time, then we have treated the time limits for these complaints as running from the last act of race discrimination complaint of, which was the claimant's suspension on 28 May 2016. Therefore, pursuant to s123(3)(a) EqA, we have jurisdiction to consider all of the claims of race discrimination.

The sexual harassment complaints

54. There were 2 sexual harassment complaints where the claimant contended proceedings had been issued within the statutory time limit, as extended by our calculation for the ACAS conciliation period. This was the allegation that Mr Fuller ogled female customers' breasts or bottoms – issue 6(i) – and the allegation Mr Fuller made "disgusting comments" over the PA system to groups of passing females – issue 6(ii). In evidence, the claimant said that these instances of discriminatory conduct extended over a year-long period commencing in July 2015 and ending in July 2016 (which was after the claimant had left his employment). The claimant was not able to identify when a single incident occurred, nor was he able to identify when the last instance of such discriminatory behaviour happened. The evidence on these allegations amounted to little more than vague assertions of unacceptable behaviour. This is not good enough. It is difficult to hold anyone to account with such generalised accusations. Mr Fuller denied such sexual misconduct and without specifics it is difficult to progress further over purported discriminatory conduct. As with the examples of race discrimination allegations, on the balance of probabilities, we are not convinced that such behaviour occurred during the period from mid-May 2016 onwards, which was just before the claimant's suspension. The claimant raised his grievance on 1 June 2016, so if any of these incidences were recent then he should easily have been able to identify when they occurred. The fact that the claimant was not able to identify a single incident of sexual harassment as occurring

in the two weeks or so before his grievance leads us to the firm conclusion that these 2 complaints are out of time.

55. Allegation 6(iii) is that Mr Fuller made a comment to Ms Amy Taylor at some time over a 3-month period, the last date being approximately 7 months beyond expiry of the statutory time limit.

56. Allegation 6(iv) relates to another comment to Ms Taylor some during a 3-month period, the last possible date being anything from over 2 weeks to 1½ months out of time. The mid-point in the timeline for this allegation would be 2 months out of time. The comments related to allegations 6(v) and 6(vi) occurred at the Christmas party and were some 5 months out of date. Finally, the "wanker" gesture about Mr Fitzgerald occurred over another 3-month period, at least 8 months before the last date proceedings should have been issued.

57. We regard every single one of the complaints of sexual harassment to be out of time. They range from Mr Fuller allegedly making a "wanker" gesture at Mr Fitzgerald to Mr Fuller ogling females and making comments on the PA system. We are not convinced that this alleged sexual misconduct formed part of a continuous pattern of discriminatory treatment because, having heard the evidence, we do not believe these occurrences happened as alleged, or possibly at all. Even if these incidents occurred, and if they were part of a continuous course of discriminatory conduct, then the last date that we can identify, at a midpoint, is at least 2 months out of time.

58. There is the obvious difference in the protected characteristics; in addition, the harassment allegations are on a completely different statutory basis to those of direct discrimination. The direct discrimination occurrences were allegedly directed towards the claimant, yet in contrast, the harassment events were directed towards various females, which offended the claimant. The claimant did not raise any objections to this purported sexual misconduct on the multiple occasions they were said to have happened. Indeed, the claimant did not report any sexual harassment misconduct at any time prior to his suspension. The claimant only raised these complaints to support his attack upon Mr Fuller once he had been suspended.

59. We looked at the veracity of the allegations. We read carefully the interview notes following the claimant's grievance and particularly those for Ms Taylor. Significantly, Ms Taylor denies that these incidents occurred. Somewhat ironically, Ms Taylor only levels criticism against the claimant for what appears to amount to his bullying behaviour towards her. There is evidence in the bundle from Carol Smith that indicates a sexist attitude by Mr Fuller (although not in relation to the PA system), but we have not heard any evidence from Ms Smith nor have we been presented with the precise details of the incidents that she refers to. The Christmas party was perhaps a raucous affair. Indeed, alcohol at Christmas often fuels wholly inappropriate behaviour. Nevertheless, there is a dearth of credible information backed by a contemporaneous record or complaint to enable us to make findings with any precision in respect of these out of time complaints. The allegations of harassment looked weak at the outset and as we looked into the circumstances, we were struck by a lack of any precision to enable us to make any factual findings. Therefore, significantly, our findings of fact have not dealt with any of these complaints.

60. Time limits should be adhered to and that is our starting point. Nevertheless, we do have discretion to accept complaints out of time if it is *just and equitable* to do so. The claimant made no contemporaneous objection or complaint. At no stage did he inform Mr Fuller that these alleged comments were unwelcome or to desist. He did not subsequently raise any of these allegations until he was suspended. He could and should have issued proceedings within the appropriate time limit (as extended) if he wanted to pursue a remedy. He chose not to issue proceedings. To say that he was unfamiliar with the time limit requirements is an inadequate explanation. We require a clear and compelling explanation over and above an unfamiliarity with the employment tribunal requirements and this was absent. It is somewhat rich that the claimant seeks to make a claim largely from the poor treatment that he said was directed towards Ms Taylor when he treated Mr Taylor badly by calling her names and telling his colleagues – Mr Flynn and Mr Zagraphos – to ignore her at work. Consequently, we determine that it is not just and equitable for these complaints to proceed to a conclusion.

<u>The substance of the allegations in respect of race discrimination and our determination on the in-time complaints</u>

First tranche – allegation 2(iv) and 2(iii)

61. The claimant was inconsistent about the comment or joke that he has made in respect of ISIS. We pressed him to tell us what was said exactly and he was evasive to the point that we could not be sure what was actually said. The claimant said that Mr Fuller regularly taunted him, saying that he caused him (i.e. Mr Fuller) to lose a holiday of a lifetime and/or that the claimant owed him £10,000 for the holiday. Mr Fuller had won a golfing holiday in Mexico. He was a keen golfer. The holiday included an all-expenses-paid flight. During early November 2015, the claimant made a comment about ISIS bombing Mr Fuller's aeroplane. We accept that this was supposed to be a joke, and that no harm was intended, but it was ill-advised. Mr Fuller said he was a very anxious flyer and that he had previously lost a friend in the 9/11 incident in New York. So, the claimant's "joke" had a very unsettling effect on him. Over a period of time, Mr Fuller had become very anxious and he suffered panic attacks. Ultimately, Mr Fuller could not go on the holiday. Mr Fuller said that the claimant could not have realised the distress that he subsequently caused when he made the comment. The claimant discussed this with Mr Fuller on a number of occasions. Mr Fuller said that this was a joke that had gone wrong and that he accepted there was no malice from the claimant. Mr Fuller said it was a disturbing incident for him, which we accept, so he did not want to dwell on it and told the claimant this. This sounds credible and we accept Mr Fuller's account.

62. We do not accept the claimant's account that he was barracked because of his racial background (or for that matter because of his sex also as claimed at the hearing). By claiming (direct) sex discrimination at the hearing, it is clear that the claimant did not understand his claim. His complaint was, in part, one of sexual harassment as identified previously. The claimant had never claimed that he was treated less favourably because he was a man. His sexual harassment claim centred on the offence arising from Mr Fuller's purported sexist behaviour. So by claiming, in his statement, that he had been treated less favourably because he was a man, the claimant added credence to the respondent's defence that the claimant would say anything to cast Mr Fuller in a bad light.

63. The claimant's allegation of race discrimination arising from his ISIS comment just does not make sense. This incident gave rise to the first instance of alleged less favourable treatment. There was absolutely nothing to corroborate that Mr Fuller took against the claimant. In evidence Mr Fuller said that the claimant did not know about his friend who had been killed on 9/11 and he also said that the claimant did not know about his unease at flying; particularly as Mr Fuller said that he had previously flown to far off destinations. The tribunal questioned Mr Fuller robustly on this point and we were satisfied that he had not taken offence by the claimant's joke. Indeed, there was no malice or hostility from Mr Fuller, which we found surprisingly, given the circumstances. We conclude that Mr Fuller merely regarded the claimant's ISIS comments as a joke that went wrong, because the claimant could not know of his circumstances. Mr Fuller was surprisingly magnanimous on this point. He attributed the joke to mere banter.

64. In any event, even if we were to accept that there was less favourable treatment as a result of this comment (which we do not), the obvious explanation would be to attribute such less favourable treatment to the claimant's offending comment rather than to the claimant's race. This allegation is wholly unmeritorious. It does not withstand even the most cursory examination.

65. We accept Mr Fuller's evidence when he said that he did not have a personal vendetta against the claimant – on the grounds of his race, or for any other reason. This allegation appears to flow from the proceeding one. Mr Fuller was involved in recruiting the claimant and he gave the claimant a favourable report so that he passed his probationary period. The claimant was the respondent's top salesperson and Mr Fuller benefitted financially from the claimant's sales achievements. The claimant did not raise any concerns about Mr Fuller's purported race discrimination against him until he commenced these proceedings, which undermines his case. Mr Yates was not called to give evidence, nor was any written account made available for us. Ms Brown's written evidence, for its limited worth, stated she could not recall any such incident. We state above that in all instances where there is a conflict between the evidence of the claimant and Mr Fuller, we prefer the evidence of Mr Fuller. We do not regard the evidence of Mr Flynn and Mr Zographos is as independent or unbiased. Consequently, we reject their accounts has not being credible.

66. When considering the full circumstances of these 2 allegations we do not find that there is less favourable treatment. Consequently, the *Barton/Igen* 2-stage approach is not engaged. Even if there was any less favourable treatment that could be attributed to Mr Fuller, we would not consider that the burden of proof has shifted to the respondent to prove a course of conduct that was not discriminatory because an non-discriminatory explanation was readily discernible – the claimant's ill-advised comments. We determine that these two allegations are without any merit.

Second tranche – allegation 2(ii), 2(vi) and 2(ix)

67. A second tranche of allegations arises in respect of one incident on 4 or 11 or 18 or 25 November 2015, 2 claims in respect of commission payments from September 2015 to May 2016 and a claim that Mr Fuller threatened the claimant constantly that he could be dismissed without reason.

68. In allegation 2(ii) the claimant said that Mr Fuller demanded that he give his demonstration car to a customer, whilst the claimant was on a day off. The car in question was to be given to the claimant's customer, Mr St Pierre. The claimant received the benefit of a company car – a "demonstrator" – and it was a term of the claimant's contract of employment that he would surrender his vehicle if called upon to do so. Mr Fuller's response was that there was no alternative unallocated car available, so he asked the claimant to give up his demonstrator. This was for the claimant's customer who was unhappy with his car. Mr Fuller said that it was logical, and his practice, that the salesperson who sold the vehicle would give up their car, given their established relationship with the customer. This makes sense and sounds fair and non-discriminatory. In response to Mr Fuller's evidence, the claimant said that his objection was that he was asked to give up his car *when he was on his day off*. Such a distinction is frankly ludicrous. The claimant was on-site when Mr St Pierre came in. Mr St Pierre was unhappy with his car and he needed a replacement. To suggest that another salesperson should have surrendered their car for the claimant's customer, when the claimant was present but was on his day off, is an artificial and thoroughly irrelevant distinction. The fact that the claimant raised no complaint at the time undermines this weak claim even further. In this instance, the claimant relies upon a hypothetical comparator. When looking at this incident in the round, under the first stage of the *Barton/Igen* test, the burden of proving that this was not a discriminatory act does not transfer to the respondent as this allegation is rejected. There was no merit in this contention.

69. Between September 2015 and May 2016 on 2 dates that the claimant could not remember, the claimant said that Mr Fuller took control of deals so as to ensure he lost the commission payments that he said he was due. We heard evidence from all of the respondent's witnesses in respect of staff sales and commission and we were satisfied that no commission was paid by the respondent in respect of staff sales. The respondent offered a substantial discount on car purchases to members of staff and, because the deals were favourable, there was a limit on staff purchases. The sales staff were offered a nominal amount for completing the appropriate paperwork. The claimant did not accept this explanation. He maintained that commission should have been paid on all car purchases at the standard rate, which was not consistent with the staff discount arrangement. Mr Fuller said that he could not remember the 2 transactions raised but he denied these "sales" would have resulted in extra revenue generated by the claimant. We accept this account, it was clear, credible and consistent with the respondent's other witnesses. The claimant was being disingenuous to say that he financially lost out on this transaction. We reject this allegation, it is completely ill-founded.

70. Over this same period of time, the claimant said that Mr Fuller attempted twice to miscalculate the claimant's commission by placing minus signs on the profit he had made. The claimant said that the figures were correct, but minus signs had been placed on actual profit made on the spreadsheets given to him. The respondent provided the sales staff with spreadsheets precisely so they could check their figures. It was always Mr Fuller's practice to ensure that his sales staff could see their figures before the payroll run so that mistakes could be corrected. Mr Fuller said that he had done this to "*head off*" problems so as to save time correcting administrative errors. He also wanted to keep his sales staff motivated and eliminate possible upset at any shortfall error in commission. We were entirely satisfied with this explanation. Given the context, it is absolutely pointless why Mr Fuller would

seek to annoy the claimant on something that would be so easily corrected. Mr Fuller's financial interest was in keeping a strongly motivated sales force. To annoy his best salesperson, for discriminatory or other motives, which would be easily remedied is counter-productive and this allegation is nonsensical. We do not find that there was less favourable treatment.

71. Allegation 2(xv) and the claimant's evidence lacked any real specifics about what was said and when or where. This may have emanated from a conversation with Mr Fuller or with someone else, but we do not make any findings of fact in respect of this alleged detriment. We accept Mr Fuller's evidence. Consequently, this allegation is rejected.

Third tranche – allegation 2(v)

72. The Sales Event occurred on 11 March 2016. The claimant contended that Mr Fuller intentionally and unfairly did not arrange any appointments for him during that event. The claimant proffered evidence of a photograph of a sales board indicating that the claimant had no appointments scheduled. We do not know when this photograph was taken and claimant could not assist us in this regard. We were very dissatisfied with this evidence. The claimant's complaint arose from the photograph because he could not remember how many appointments or bookings he had by the actual start of the event. The first mention of this complaint was in the claimant's grievance complaint, which was over 2½ months later.

73. We accept the evidence given by the respondent's witnesses, which said that appointments were scheduled by call centre staff and the allocation of appointments was outside Mr Fuller's control. If Mr Fuller did have control over the distribution of appointments then we accept his evidence that he would have allocated appointments to the claimant. This might have been the harder sales leads or it could have been the easier sales, or even a mix, because, as was emphasised by Mr Fuller throughout the course of proceedings, the claimant was an excellent salesperson. He made the respondent lots of money and his results earned Mr Fuller good commission. We easily accept that Mr Fuller would not have ignored the claimant, or refused to allocate him any appointments if he had any control over the allocation of sales appointments. This allegation cannot succeed on its merits and gets nowhere near to the level of shifting the burden of proof because we reject the factual contentions underpinning the allegation.

Fourth tranche – allegations 2(xiii), 2(vii) and 2(viii)

74. The next set of allegations arises just before the incident that led to the claimant's suspension. This started with allegation 2(xiii) in which the claimant said that Mr Fuller took away the claimant's demonstration car on 23 or 24 May 2016 at a point when Mr Fuller knew that the claimant needed that car. Notwithstanding that this allegation is very similar to allegation 2(ii) this related to a different incident and arose out of the claimant damaging his car (as opposed to a customer needing it). The car was demonstrator and it was perfectly reasonable for Mr Fuller to insist that the car was not driven whilst it was damaged and that the car was repaired at the first convenient opportunity. In any event, another car was available so we could not determine any real detriment other than transferring the claimant's property from the car that he damaged into the replacement vehicle. The allegation gives the

impression that no alternative call was available, which is not true. Curiously, the claimant's statement did not refer to why he needed that particular car. We are satisfied that Mr Fuller was not aware that the claimant's child had gone to hospital. We note that the claimant had changed his story during his evidence. First, in cross-examination, he said that he needed the car to collect his daughter from a hospital appointment. Then, this story changed to his daughter having an accident and going to A & E. This was not an honest account, initially, at least, and we are not convinced that the claimant's daughter required hospital treatment on 23 or 24 May 2016 because the claimant also used this excuse for wanting to leave early later that week. So we reject the factual basis of the allegation. As with the previous allegations, this does not reach the threshold where the respondent needs to discharge the burden that the conduct complained of did not arise for a discriminatory reason.

75. Four or five days later are allegations 2(vii) and 2(viii) in which Mr Fuller supposedly demanded the appellant remain after his contracted hours to take a sales call at 6:07pm and purportedly threatened the claimant with disciplinary action if he left without locking up. These two allegations are 2-sides of the same complaint. We note that the claimant initially worked until 7pm (at his request) and often work late. We accept that Mr Fuller put a sales call through to the claimant just after 6pm, but we cannot see any detriment in this regard because Mr Fuller, in effect, gave his best salesman a lead. On 27 May 2015, the claimant may well have wanted to get off early and he may have been irritated by the sales call that Mr Fuller put through to him, but he did not object. The claimant's daughter was never an in-patient in hospital and we do not believe that she attended Casualty as an outpatient because, so far as we could ascertain, that was said by the claimant to have occurred sometime earlier in the week. So, we believe, the claimant was dishonest when he told us that he needed to visit his daughter in hospital on the evening of 27 May 2016.

76. The argument with Ms Taylor broke out shortly before closing time and the protagonists and Mr Kemble were sent home. So we do not accept that Mr Fuller demanded that the claimant stay late on 27 May 2016, nor that he take a sales call. We do not accept that Mr Fuller threatened the claimant with disciplinary action if he left without locking up. As mentioned previously in all conflicts of evidence we are reluctant to accept the claimant's account and in this instance, we do not believe the facts as alleged by the claimant, which supposedly underpin these allegations.

Suspension

77. The penultimate discriminatory incident complained of was the claimant's suspension – allegation 2(i). It was the claimant's case that the Durrell complaint was instrumental in his suspension of 28 May 2016. We think the claimant relied upon this because somehow he felt that this gave Mr Fuller the excuse to suspend him when such a suspension was unwarranted. The claimant was suspended for the reasons that we set out in paragraph 31 above. The claimant was suspended by Mr Fuller. The decision to suspend the claimant was made by Mr Fuller on 28 May 2016. It was clear from Mr Ives evidence that he was keen to suspend the claimant on 27 May 2016 when he heard the altercation between him and Mr Taylor that evening. Had it been Mr Ives decision (in all or in part), then the claimant would have been suspended at least early the next morning and this would have been solely on

the basis of Mr Ives perception of the claimant's behaviour in the fracas with Ms Taylor.

78. In any event, it is obvious that the claimant's suspension amounted to less favourable treatment. There is no actual comparator in this instance so the claimant relies upon a hypothetical comparator. We reject the contention that the claimant was suspended on the grounds of his race. Mr Ives commenced a conversation with Mr Fuller in which he was favourably disposed towards the newly promoted claimant. He heard part of an exchange which so concerned him that he suggested that Mr Fuller suspend the claimant immediately. Mr Ives said that he perceived the claimant had completely overstepped the mark. Such was the claimant's conduct that Mr Ives felt compelled to speak to Ms Taylor immediately so as to comfort or reassure her. So, Mr Ives was anxious to suspend the claimant and this was on grounds that bore no relation to the claimant's protected characteristic. So, as regards suspension, Mr Ives is a useful barometer.

79. Nevertheless, it was Mr Fuller who made the decision to suspend the claimant and he set out his reasoning in detail, which we accept. It is obvious that he thought about the claimant's suspension carefully. It would have been easy for Mr Fuller to heap on his justification to suspend by adding the Durrell complaint to the factors identified in paragraph 31. However, the fact that he relied only on the claimant's attitude that morning, the incident the previous evening and the reaction of Ms Taylor and Mr Kemble makes Mr Fuller's explanation all the more credible. An examination of the context of the claimant's suspension does not get us past the first stage of the *Barton/Igen* test.

80. Finally, in respect of allegation 2(xii), it was an inevitable consequence of suspension that the claimant was asked to leave the office immediately. We understand that the claimant might be irked that he could not finish his tasks before he left, but denying the claimant access to his computer following his suspension was not an act of race discrimination and it was misguided to say that it could be.

Wrongful dismissal and/or race discrimination

81. Mr Fitzgerald had sent the transcripts of his investigatory interviews to Mr Ives sometime during mid-June 2017. Mr Fitzgerald did not provide an investigatory report nor did he make recommendations arising from his investigation. So, Mr Fitzgerald provided Mr Ives with little more than raw data consisting of, so far as we can see, more than 139 pages of interview transcripts and nothing else. This was not a competent investigation of an employee's grievance because the material was not distilled and the veracity of the complaints were not scrutinised. There were no grievance recommendations. The claimant did not know this and, so far as he could tell, the investigation was still ongoing.

82. Mr Fitzgerald had no training in conducting an investigation, although he said in evidence that he had some experience in this regard. In any event, he was supported by the respondent's human resources service, although there seemed to be surprisingly little engagement with Ms Brown, the respondent's designated human resources practitioner, during the investigation. We are surprised why this investigation was so ineptly handled. The claimant was a senior employee and it is just not good enough to approach such serious complaints in this amateurish way.

Mr Fitzgerald did indicate in evidence that he felt out of his depth. We have considered Mr Fitzgerald's role carefully and our criticism is based on his ineptitude rather than any attempt to provide a predetermined conclusion. Mr Fitzgerald's lack of training and proper engagement with his role as an investigating officer was further demonstrated by his style of questioning, which proffered answers and inferences, rather than rely on open questioning. Unfortunately, there seemed to be very little engagement from Mr Ives – at least "on the record" – following the receipt of the investigatory material.

83. Nevertheless, the delay following receipt of the grievance was not long. Given that the claimant was subject to a disciplinary investigation and disciplinary action in respect of the Durrell complaint, Mr Ives delay in dealing with the grievance is understandable. Of most significance, the claimant did not complain of any delay, he voiced no concerns about the length of time it had taken to investigate his grievance. The claimant did not request a progress report or chase Mr Fitzgerald formally or informally.

84. The claimant resigned on 30 June 2016. This was just after the respondent re-scheduled the disciplinary hearing. The claimant gave no explanation for his resignation in his resignation email. At the hearing, the claimant maintained that he resigned on notice in support of his claim for payment of his notice period.

85. The claimant's resignation email was entitled "Formal Resignation" and read as follows:

> "It was just to inform you that as of immediately I will be resigning from my position held at Toomey Vauxhall Brentwood.
>
> Can you kindly arrange for the collection of your demonstration vehicle, along with the Tensor card at the earliest possible convenience as I no longer have a secure facility to house the vehicle.
>
> I trust that all payments relating to basic wage and commission up to and including today will be paid to me as agreed.
>
> I will forward the reasons for my resignation in due course."

86. This was an immediate resignation – it said so. It was clear that the claimant was not going to attend his disciplinary meeting nor would he be available for work during his notice period, if so required. The claimant requested that his employer collect his car without delay and, if there was any possible doubt that this resignation was immediate, then such doubt was extinguished by the claimant's request for payment up to the date of his email. The claimant did not forward reasons for his resignation "in due course".

87. About two weeks after his resignation the claimant met with Mr Ives to discuss his resignation and his grievance. We believe Mr Ives' account of this meeting that the claimant withdrew his grievance and said that he wanted to move on. We note that he had recently started a new job elsewhere. In any event, the claimant had no contractual right to have his grievance concluded because he was no longer employed by the respondent. Mr Ives said that he should have obtained written confirmation from the claimant of the grievance withdrawal but, we believe, he was

just satisfied that he felt the matter was over and he did not want to raise potential difficulties.

88. We accept that Mr Ives subsequently spoke to all concerned and that no further formal action was taken. Very shortly afterwards, Mr Fuller, Ms Taylor and Mr Kemble left the respondent's employment.

89. So, in respect of a possible constructive dismissal, we determined the claimant resigned rather than submit to disciplinary procedures. We believe the claimant did so to avoid the consequence of any adverse disciplinary finding against him, including possibly dismissal. We believe he felt that this would damage any possible future reference, particularly as one might be required by the FCA.

90. There was no fundamental breach of contract by the respondent. The claimant had allegedly misled a customer about interest rates and this was a very serious matter because the respondent was regulated to offer credit facilities. Mr Durrell's complaint might have had repercussions with the FCA. The respondent did nothing wrong by progressing the Durrell investigation and ensuing disciplinary action promptly. It was this that gave rise to the claimant's resignation, and not the complaints against Mr Fuller. We suspect the Fuller complaints were merely a smokescreen to bide the claimant time to secure another job before disciplinary action progressed too far. In any event, the allegations against Mr Fuller were without any merit whatsoever. It follows from the above that we conclude that the claimant did not resign in response to some or all of his complaints of race discrimination.

Employment Judge Tobin

8 June 2017