Case Nos: 2601914/2020
2600301/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr M Jarosinski

Respondent: Nestle UK Ltd

Heard: Via Cloud Video Platform in the Midlands (East) Region

On: 15th, 16th, 17th, 18th, 19th, 22nd, 23rd, 24th and 25th November 2021

Before: Employment Judge Ayre, sitting with members Mrs Barrowclough and Mr Goldson

Representatives:
Claimant: In person
Respondent: Ms R Thomas of counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claim for wrongful dismissal (notice pay) is dismissed upon withdrawal.

2. The claim for direct race discrimination fails and is dismissed.

3. The claim for harassment related to race fails and is dismissed.

4. The claim for victimisation fails and is dismissed.

5. The claimant was unfairly dismissed.

6. The claimant contributed 100% to his dismissal through his conduct. There was also a 100% chance that he would have been dismissed had a fair procedure been followed. Accordingly, no basic or compensatory awards shall be made.

REASONS

Background

1. The claimant was employed by the respondent from 1 April 2009 until 16 December 2020 when he was dismissed with immediate effect.

2. On 12th June 2020, following a period of Early Conciliation that lasted from 26 April 2020 to 26 May 2020, the claimant presented a complaint of race discrimination to the Tribunal - claim number 2601914/2020 ("**the First Claim**").

3. The claimant presented a further claim on 8th February 2021 after Early Conciliation lasting from 19th to 28th January 2021, claim number 2600301/2021 ("**the Second Claim**"). The Second Claim included complaints of unfair dismissal, race discrimination, for notice pay, holiday pay, and 'other payments'.

4. The two claims were subsequently consolidated.

5. The claimant is a Polish national. He complains, in summary, that over a period of time between 2012 and December 2020, he was discriminated against because of his nationality in relation to his pay, and the way he was treated by a number of managers, members of the respondent's HR team and his trade union representatives. He also alleges that his dismissal was discriminatory.

6. There have been four preliminary hearings in these claims. The second preliminary hearing took place on 15th March 2021 before Employment Judge Brewer, and the claimant was represented at that hearing by Mr Bruce Frew of counsel. At the second preliminary hearing a list of issues was agreed in relation to the First Claim. Mr Frew subsequently produced a List of Issues for the Second Claim, on behalf of the claimant.

The Proceedings

<u>Strike out application</u>

7. Prior to the final hearing, the claimant applied for strike out of the response to the claim. In summary, the claimant's grounds for applying for strike out were that:

    a. The respondent had changed the witness statements of two of its witnesses by providing two versions – one signed before the date for exchange of witness statements, and one signed after that date. The claimant was asked whether there were any other differences in the two versions of the statements and said that he thought there were not;

b. The respondent's conduct in defending the claims was scandalous, unreasonable and vexatious;

c. The respondent had put forward a false defence to the claims;

d. The respondent had concealed evidence by redacting documents supplied to the claimant in response to his Subject Access Request;

e. The respondent had used the ET litigation process to intimidate the claimant;

f. The respondent had fabricated evidence; and

g. The respondent had been found to have unfairly dismissed another employee and was facing other complaints of unfair dismissal.

8. The respondent resisted the application for strike out. Ms Thomas submitted, in summary, that:

a. Many of the claimant's complaints in support of his application for strike out related to disputes between the parties, and the proper way to deal with those was by hearing evidence and cross-examination;

b. Documents are often redacted before they are sent to those making Subject Access Requests, to protect the confidentiality of other individuals, and disclosure in response to Subject Access Requests may not be the same as disclosure in ET proceedings;

c. In relation to the allegation of intimidation, the respondent has not made any application to strike out the claim or for costs. The respondent's conduct of the proceedings has been reasonable;

d. The allegation of fabrication of evidence is based upon the claimant making illicit recordings without the respondent's knowledge;

e. The fact that there may be other claims against the respondent is an entirely inappropriate basis upon which to consider strike out, and the claimant's case should be considered on its merits only;

f. The claimant's application was at best entirely premature and the Tribunal needs to hear the evidence. There are no grounds for criticising the respondent other than on the basis that the respondent intends to defend the claim; and

g. There is no reason why a fair trial is not possible.

9. Having considered the application made by the claimant, and the submissions of both parties, the unanimous decision of the Tribunal is that the response should not be struck out.

10. The starting point for the Tribunal in reaching its decision was Rule 37 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("**the Rules**"), and in particular sub paragraphs 37(1) (a), (b) and (e). We are satisfied that none of the grounds for strike out set out in these sub paragraphs apply in this case.

11. Strike out is a draconian sanction, and not to be applied lightly. We appreciate that the claimant is not legally represented in the proceedings, although note that he has had advice in relation to the claims, having been legally represented at one of the Preliminary Hearings.

12. The Tribunal spent the first day of the hearing reading the witness statements and relevant documents. Having done that, it cannot be said in our view that the response to the claims has no reasonable prospect of success. There are clearly substantial disputes of fact in the claim and the Tribunal needs to hear the evidence in order to resolve them.

13. We can find no evidence that the respondent's behaviour in conducting the litigation has been scandalous, vexatious or unreasonable. The respondent has defended the claim as it is entitled to do in the face of numerous and at times emotive allegations. Any allegation of discrimination is serious and the allegations made by the claimant against the respondent are serious. There is nothing in the respondent's conduct of the litigation that strikes us as unreasonable.

14. We consider that it is possible to have a fair trial in these claims. Witness statements have been prepared and exchanged, there is a bundle and the parties are ready to proceed.

15. We are not persuaded by the claimant's arguments that the respondent has knowingly put forward a false defence. If the claimant takes issue with points made in the respondent's response to the claim, this can be raised in cross examination of the respondent's witnesses and in submissions.

16. Similarly, we are not persuaded that the respondent has concealed evidence. It is in our experience standard practice to redact documents that are disclosed in response to Subject Access Requests, to protect the personal data of others, and in any event, there are also unredacted versions of the redacted documents in the bundle.

17. There is no evidence before us of any intimidation of the claimant by the respondent in the conduct of these proceedings. Nor is there any evidence of fabrication of evidence by the respondent. Disputes about evidence can be dealt with in cross examination and submissions. The fact that witness statements have been signed and dated twice on

different occasions is not a ground for strike out, particularly since the claimant could not identify any change in the content of the witness statement.

18. Finally, we accept Ms Thomas' submission that when deciding whether to strike out the response, our focus should be on these proceedings and not on any other proceedings that the respondent may be involved in.

Admissibility of covert recordings

19. At the outset of the hearing the claimant sought to introduce into evidence a number of covert recordings that he had made on his mobile telephone. Transcripts of those recordings were in the bundle of documents, including transcripts of:

    a. A meeting on 6 May 2020;
    b. A telephone conversation between the claimant and Amera Muthana on 28th August 2020 following the claimant's return to work;
    c. A telephone conversation between the claimant and Emma Wright on 8th September 2020; and
    d. A telephone conversation between the claimant and Dean Peplow on 9th September 2020.

20. The claimant also wanted to rely upon covert recordings and transcripts of conversations that had taken place between the claimant and his trade union representatives, which included some without prejudice discussions.

21. We gave the parties the opportunity to make representations in relation to the covert recordings. Having considered those representations we decided to admit into evidence the covert recordings set out at paragraph 19 above. Although we were concerned that the recordings had been made without the knowledge or consent of those who were being recorded, they were potentially relevant to the issues that the Tribunal had to determine.

22. We also took into account that in discrimination claims it is rare for respondents to admit that discrimination took place. The tone of conversations between the claimant and some of the alleged discriminators in conversations that the alleged discriminators did not know were being recorded could assist the Tribunal in deciding whether there has been discrimination.

23. The respondent would, in our view, not be prejudiced by the admission of the recordings as its witnesses could comment on the covert recordings whilst giving evidence.

24. In contrast however, none of the trade union representatives who had been covertly recorded by the claimant were present at the hearing to give evidence or to make representations as to the admissibility of the recordings. We were concerned that conversations between trade

union representatives and the members that they are advising are, generally, confidential, and that the recordings, we were told, contained some content that was 'without prejudice'. We were also not persuaded that recordings of conversations between the claimant and his trade union would be relevant to the issues that the Tribunal had to determine. For those reasons we decided not to admit the covert recordings of conversations with the trade union.

25. The Tribunal therefore listened to the four recordings referred to at paragraph 19 above only.

Witness evidence

26. We heard evidence from the claimant. The claimant submitted seven character references and a combined witness statement from two former employees of the respondent, Niall Langan and James Linehan. The Tribunal heard oral evidence from the claimant, from Mr Langan and from Mr Linehan.

27. Mr Langan and Mr Linehan gave evidence on day 2 of the hearing and were cross examined by Ms Thomas on behalf of the respondent. On the morning of day 6 of the hearing, the claimant asked to be permitted to read out a statement purportedly prepared by Mr Linehan in which he objected to a question that had been put to him by Ms Thomas in cross examination.

28. The Tribunal read the statement and having considered it concluded that the question put by Ms Thomas was, in light of the evidence given by Mr Linehan, entirely appropriate. The evidence of Mr Linehan was not directly relevant to the issues that the Tribunal had to decide, and it was, in our view, neither appropriate nor relevant for the additional statement to be introduced into evidence.

29. The character references were not directly relevant to the issues that the Tribunal had to determine. The claimant indicated that he had not arranged for the character referees to attend the hearing, and that he was content for their statements just to be read by the Tribunal. Ms Thomas indicated that she was happy with that approach. By agreement therefore, the Tribunal read the 7 character references but did not hear oral evidence from the referees.

30. We also heard evidence from the following witnesses on behalf of the respondent:

    a. Alessandro Drago, Filing and Packing Production Manager;
    b. Amera Muthana, Area Quality Manager and the claimant's line manager;
    c. Emma Wright, HR Business Partner;
    d. Emerson Favrin, Factory Manager; and
    e. Dean Peplow, Quality Assurance Manager.

31. There was an agreed bundle of documents running to 1087 pages. On days four and seven of the hearing the claimant produced additional documents which we admitted into evidence.

32. Both parties produced written submissions, for which we are grateful.

33. During the hearing, at the claimant's request, we took breaks every forty minutes. We also adjourned to give the claimant time to read the respondent's written submissions.

The Issues

34. At the start of the hearing, we spent time discussing the issues that the Tribunal would need to determine. The respondent had prepared a List of Issues. The claimant did not agree the respondent's List of Issues and wanted to rely instead upon the issues set out in the orders of EJ Brewer made at the Preliminary Hearing on 15 March 2021, and in the List of Issues prepared by Bruce Frew who represented the claimant at that hearing.

35. We went through the different lists of issues, and prepared a final list of issues, combining all three. That list is set out below and is the one that the Tribunal has worked to.

<u>Time Limits: section 123 of the Equality Act 2010</u>

36. Were the complaints raised in the First Claim about acts or omissions prior to 27 January 2020 brought in time?

37. This involves considering the following: -

    a. Was the First Claim presented within three months (plus any time added on for early conciliation) of the alleged act of discrimination?
    b. If not, was there a continuous act of discrimination extending over a period? If so, when did that period end?
    c. If so, was the claim made to the Tribunal within three months (plus early conciliation) of the end of that period?
    d. If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

<u>Direct Race discrimination: section 13 of the Equality Act 2010</u>

38. Did the respondent treat the claimant less favourably than it treated or would treat others because of race by: -

    2012

    a. Reducing the claimant's pay following a transfer of his employment from Nestle Hayes to Nestle Tutbury in 2012?

    2013

b. Dean Peplow not awarding the claimant a pay increase?

c. Dean Peplow not awarding the claimant Reward points given to other technicians?

2014

d. Dean Peplow not awarding the claimant a pay increase in April 2014 after the claimant challenged over his award in 2012.

2015

e. Dean Peplow not awarding the claimant a pay increase.

2016

f. On 23rd February 2016 Dean Peplow ignoring the claimant's application for the role of Conformance Manager, giving the role to a British applicant with no managerial experience.

g. On 1 October 2016 Dean Peplow failing to award the claimant a pay increase from April 2016.

2018

h. Andy Allcock threatening the claimant on 5 February 2018.

i. Amera Muthana doing nothing about the incident on 5 February when the claimant reported it.

j. Dean Peplow failing to award the claimant a pay increase in April 2018.

k. Dean Peplow doing nothing about the incident at paragraph h above when the claimant reported it to him on 4 September 2018.

l. Dean Peplow ignoring the claimant's concerns about food safety breaches, acting arrogantly towards the claimant, and treating him unfairly in a restructuring programme on 4 September 2018.

m. Amera Muthana being overbearing in supervision of the claimant on 4 September 2018.

n. Fran Insigrini placing the claimant on a disciplinary process for a minor coding defect on 12 December 2018.

o. Gavin Parker giving the claimant an informal written warning on 12 December 2018. The claimant relies upon the "FD Process Technical Operator" and the "Shift Manager on 4 August 2019" as his comparators in relation to this allegation

2019

p. Amera Muthana accusing the claimant of being obstructive during a restructuring programme and downgrading his performance evaluation as a result, on 3 March 2019. The claimant relies upon Jenny Oakhill as his comparator for this allegation.

q. Eric Heusler failing to support the claimant when the claimant told him on 14 March 2019 that he was being intimidated by Andy Allcock and other managers.

r. Dean Peplow refusing to award the claimant a pay increase in April 2019 and failing to comply with the respondent's salary scale guidelines for 2019.

s. Dean Peplow refusing to investigate the claimant's complaints about the conduct of Amera Muthana on 10 September 2019.

t. Amera Muthana verbally attacking the claimant in the presence of Rob Cruise on 17 October 2019.

u. Eric Heusler failing to investigate the claimant's concerns about hostile working conditions on 16 December 2019.

2020

v. Amera Muthana failing to follow up the claimant's occupational health report dated 14th February on 20 February 2020.

w. Dean Peplow using the claimant's disputed and discriminatory performance evaluation to exclude the claimant from an annual pay increase in April 2020.

x. During a meeting on 6 May 2020 failing to address the claimant's allegations of discrimination and failing to address the conflict between the claimant and his manager.

y. Failing to follow its absence management process and discretionary sick pay policy on 10 July 2020.

z. Emma Wright telling the claimant on 8 September 2020 that he would be receiving a reduction of 100% as he had been overpaid company sick pay.

aa. Brian Goulding seeking to justify the respondent's exclusion of the claimant from company sick pay on 11 September 2020.

bb. Not giving the claimant notice of a disciplinary hearing prior to 16 December 2020.

cc. Not giving the claimant the right to be accompanied to the meeting on 16 December 2020.

dd. The process which led to the claimant's dismissal.

ee. Dismissing the claimant on 16 December 2020. In respect of this allegation the claimant relies upon John Rideout, Andy Allcock, Jenny Oakhill and Denise Holden as comparators.

39. Determining the allegations of direct discrimination will involve the following questions:-

a. Did the respondent do the things set out in paragraph 38 above?

b. If so, did the respondent's treatment amount to a detriment?

c. If so, did the respondent treat the claimant less favourably than it would have treated others in comparable circumstances. Specifically:

i. Where the claimant has identified an actual comparator, has the claimant been treated less favourably than that individual?
ii. Is there any material difference between the circumstances of the claimant and those of that individual?
iii. Where the claimant has not identified an actual comparator, has the claimant been treated less favourably than a hypothetical comparator in materially the same circumstances?

d. If so, was that because of the claimant's race (his Polish nationality)?

i. Has the claimant proved facts from which the Tribunal could conclude that the less favourable treatment was because of his race?
ii. If so, has the respondent shown that such treatment was not because of the claimant's race?

<u>Harassment on the grounds of race : section 26 of the Equality Act 2010</u>

40. Did the respondent treat the claimant as set out at paragraphs 38 h, I, k, l, m, n, o, s, t, u, v, x, aa, bb, cc, dd and ee above?

41. Did the respondent do the following things:

2014

a. Did Dean Peplow threaten the claimant on 17 October 2014 by telling him that if he raised a grievance this would be reflected in his performance evaluation, which in turn affects pay?

2018

b. Did Dean Peplow act aggressively towards the claimant in a QA meeting on 23 October 2018 when the claimant objected to Mr Peplow accusing Polish workers of dishonesty.

2019

c. Did Dean Peplow put the claimant's request for mediation on hold on 4 November 2019?

2020

d. Did Dean Peplow attack the claimant's credibility in public and speak to him in an unacceptable and demeaning manner on 8 January 2020?

e. Did Dean Peplow try to force the claimant to sign his disputed performance evaluation on 31 January 2020 and threaten that if the claimant did not sign the evaluation he would not receive his annual bonus?

f. Did Dean Peplow tell the claimant on 9 September 2020, in response to the claimant's request to take half a shift off, that he would only support him if he agreed to an "urgent mental state assessment"?

42. If so, was this conduct related to race?

43. If so, was the conduct unwanted?

44. If so, did the conduct in question have the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, taking into account the claimant's perception, the circumstances of the case, and whether it was reasonable for the conduct in question to have that effect?

<u>Victimisation : section 27 of the Equality Act 2010</u>

45. Did the claimant do the following acts and, if so, were they protected acts falling within section 27 of the Equality Act:

a. Raising a grievance referring to the Equality Act on 20 August 2014 ("**the First Protected Act**")?

b. Challenging his pay increase on 3 April 2016 ("**the Second Protected Act**")?

c. Raising a grievance in May 2019 ("**the Third Protected Act**")?

d. Bringing proceedings in the Employment Tribunal under case number 2601914/2020 in June 2020 ("**the Fourth Protected Act**")?

Allegations relying on the First Protected Act

46. Did the respondent do the following things:

    a. Did Dean Peplow not award the claimant a pay increase in April 2014 following his challenge over the 2012 award?

    b. Did Dean Peplow threaten the claimant on 17 October 2014 by saying that if he raised a grievance this would be reflected in his performance evaluation, which in turn effects pay?

    c. Did Dean Peplow not award the claimant a pay increase in April 2015?

    d. Did Dean Peplow ignore the claimant's application for the role of conformance manager on 23 February 2016 and give the role to a British applicant with no managerial experience?

Allegations relying on the First and Second Protected Acts

47. Did the respondent do the things set out in paragraphs 38 g, i, j, k, l, m, n, o, p, q and r above?

Allegations relying on the First, Second and Third Protected Acts

48. Did the respondent do the things set out in paragrahs 38 s,t, u, v, w, y, z, aa and bb above, and the following:

    a. Did Mark Oliver fail to deal with the claimant's concerns over the management process on 6 June 2019?

    b. Did Amera Muthana give the claimant a poorer evaluation on 27 January 2020 which caused the claimant to receive no pay increase?

Allegations relying on the Fourth Protected Act

49. Did the respondent do the things set out in paragraphs 38 bb, cc, ee, dd and x above?

50. If the respondent did any of those things, did the acts complained of amount to a detriment to the claimant?

51. Did the respondent believe that the claimant had or may bring proceedings under the Equality Act 2010 or give evidence or information in connection with proceedings under the Equality Act 2010, or do any other thing for the purposes of or in connection with the Equality Act 2010 or make an allegation that someone has contravened the Equality Act?

52. If so, did the respondent subject the claimant to the detriment because the claimant had done a protected act or because the respondent believed that the claimant had done or may do a protected act?

Unfair dismissal : section 98 of the Employment Rights Act5 1996

53. Was the claimant dismissed for a potentially fair reason pursuant to section 98 of the Employment Rights Acct 1996? The respondent contends that the claimant was dismissed due to a fundamental and irretrievable breakdown in the working relationship between the claimant and the respondent.

54. Was this a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held ("**SOSR**")?

55. Was the claimant's dismissal reasonable in the circumstances, having regard to the size and administrative resources of the respondent, and to equity and the substantial merits of the case:

    a. Was there a fundamental and irretrievable breakdown in the working relationship?

    b. What attempts had either party made to resolve the working relationship?

    c. Had trust and confidence reached an irretrievable position?

    d. Was SOSR the real reason for the claimant's dismissal? The claimant suggests that it was an attempt to manage the claimant out of the business with the creation of a hostile and humiliating work environment?

    e. What process did the respondent follow to dismiss the claimant?

    f. Did the respondent carry out any investigation into the allegations against the claimant?

    g. Was the claimant provided with the allegations prior to dismissal?

    h. Was the claimant provided with an opportunity to answer the allegations?

56. If the Tribunal finds that the dismissal was procedurally unfair, should there be any reduction in compensation to reflect the possibility that the claimant would have been dismissed in any event, in accordance with the principles set out in *Polkey v AE Dayton Services Ltd [1987] ICR 142?*

57. Did the claimant cause or contribute to the dismissal by his own blameworthy conduct and if so would be just and equitable to reduce the claimant's compensation? By what proportion?

Bonus and holiday pay

58. The claimant alleged that he should have been paid a bonus in March 2021, and that the bonus was normally 3% of his earnings. He also alleged that he was entitled to be paid additional holiday pay in respect of his notice period. It was agreed that the allegations in relation to bonus and holiday pay were issues of remedy and that they would be considered by the Tribunal when considering what remedy to award the claimant, should he win his claim.

Withdrawal of notice pay claim

59. The respondent and the claimant both told the Tribunal that the claimant had been paid his notice pay. Employment Judge Ayre indicated to the parties that the claim for notice pay would be dismissed upon withdrawal. Neither party objected.

Findings of Fact

60. The claimant was employed by the respondent from 1 April 2009 to 16th December 2020 when he was dismissed with immediate effect.

2012

Transfer from Hayes to Tutbury

61. The respondent is an international food manufacturer with a very diverse workforce. The claimant is a Polish national and until 2012 worked at the respondent's factory in Hayes. In 2012 the respondent announced that the Hayes factory would be closing. The claimant applied for a role as a Quality Assurance Technician at the respondent's factory in Tutbury. The reasons for his application were firstly the proposed closure of the Hayes' site, and secondly that he had had a disagreement with his Area Manager in Hayes and was in his view, experiencing harassment similar to that he subsequently alleged he experienced from the managers in Tutbury.

62. Prior to his transfer to Tutbury the claimant was employed as a Quality Specialist, which was a Level 2 role within the respondent's pay and grading structure. The role he applied for and was offered in Tutbury was as a Quality Assurance Technician. This role was also a Level 2 role but was broader than the Quality Specialist one.

63. The respondent's pay and grading structure contains different pay rates for employees working in or around London, and in the regions. Hayes fell within the London pay band, which is higher than the regional pay band, and also attracted London weighting. Tutbury falls within the regional pay band and does not attract London weighting.

64. The respondent publishes pay scales each year. The pay scale for 2012 [p.182] provides three 'zones' for each Level : an Entry Zone, for those who are new to a role, a 'Target Zone' and an "Enhanced Zone'.

For 2012 the Entry Zone for a Level 2 employee in the region was £19,000 - £24,000, the Target Zone was £21,000 to £29,000 and the Enhanced Zone was £27,000 to £31,700.

65. The claimant was offered the role in Tutbury on a salary of £20,000 plus shift allowance and contractual overtime. His basic salary was towards the bottom end of the Entry Zone. This was because he was new to the role of Quality Assurance Technician, not having performed it before.

66. We were surprised, given the claimant's length of service, his previous work in a quality role and his undoubted capabilities, that he was placed so low on the respondent's pay scale. The claimant's basic salary was reduced from £25,018.56 pa at Hayes to £20,000 pa at Tutbury.

67. Prior to the transfer the claimant's gross monthly pay was £2,084.88 [p.827]. After the transfer it went down to £1,666.67 but he began to receive a shift allowance of £499.99 a monthl and contractual overtime of £353.02 a month. The claimant's monthly take home therefore increased by almost £500 to £2,519, but he was now working nights and overtime as well.

68. There was no evidence before us to suggest that the decision to place the claimant towards the bottom of the respondent's Level 2 pay scale was linked to his nationality. Although the other Quality Assurance Technicians were paid more than the claimant this was because they were already in post, were not new to the role, and had more experience in the position.

69. Pay increases for employees who are considered to be 'staff', which included the claimant, are not guaranteed but are linked to performance. There is no inflationary pay rise and no guaranteed progression up the pay scale. The normal practice is that an employee has to be a good performer in order to qualify for a pay increase, so an employee who receives a poor performance rating does not get normally get a pay rise.

70. The respondent publishes Salary Review Guidelines each year, which set out the suggested range of pay increases. There are different ranges of increase for different performance ratings. Managers have some discretion within the range to decide how much to award. For example, if an employee is towards the lower end of the pay scale they are likely to be awarded a higher pay increase.

71. Every year the claimant's performance was reviewed in line with the respondent's performance review process. In January performance is reviewed for the previous calendar year and the employee is given scores ranging from 1 (the lowest) to 3 (the highest). Scores are given for the 'how' which covers the employee's behaviours, and the 'what' which covers their technical skills in the role and whether they have achieved their objectives.

72. A score of 1 is given where an employee is not meeting expectations. If an employee scores a 1 in either the 'what' or the 'how' they will not normally receive any pay increase. Employees have to be scored 2:2 (ie a 2 for the 'how' and a 2 for the 'what') or above to qualify for a pay rise.

2013

Pay review

73. When the claimant transferred from Hayes to Tutbury in 2012 he reported initially to Matthew Taylor, who in turn reported to Dean Peplow. In early 2013 Matthew Taylor conducted the claimant's performance evaluation ("**PE**") for 2012 [pp.296-303.] Mr Taylor scored the claimant as a 1 for the 'how' and a 1 for the 'what'.

74. The respondent's Salary Review Guidelines for 2013 [p.185] provided that employees who received any score of 1, including a 1:1, would get no pay increase. As a result of his PE score, the claimant did not get a pay increase in 2013. There was no evidence before us that the decision not to award the claimant a pay rise in 2013 was linked in any way to the claimant's nationality.

75. The claimant identified four comparators who he said were paid more than him and who were awarded higher pay increases. These comparators were referred to as Employees A, B, C and D.

76. All four comparators did get pay increases in 2013, ranging from 2.8 to 4%. The reason for this was that they all scored highly in their PEs, receiving scores of 2 and 3. None of the claimant's comparators received a score of 1 for that year.

77. Employee A was awarded a pay increase of 4%, having achieved a score which Mr Peplow believed to be 3:2, although he no longer had access to the PE scores for Employee A, who has since moved out of the Quality department. Employee B received a 2.8% pay increase, having received a PE score of 2:3. Employee C was awarded a 3.5% increase for a score of 3:3, and Employee D a 2.8% increase for a score of 2:3.

Reward points

78. The respondent operates a system whereby managers can give employees 'Reward Points' for good performance. The claimant alleged that in 2013 other Quality Assurance Technicians were awarded 'Reward Points' by Mr Peplow, whereas he was not. Mr Peplow told us that, whilst he was good at thanking his team, he was not good at awarding Reward Points, and that this was a joke in his team. Mr Peplow could not recall whether he had awarded Reward Points in 2013, and if so who he had awarded them to and why. We accept his evidence on this issue given the length of time that has passed.

79. There is no evidence that the claimant was not awarded Reward Points because of his nationality. There was however evidence of Mr Peplow giving the claimant recognition when he performed well. Mr Peplow awarded the claimant Instant Recognition for his contribution to work to identify missing allergen labelling on 23 September 2020 [p.721].

80. In September 2013 the claimant raised a grievance about his salary [p.326]. The grievance was considered by Dean Peplow who met with the claimant on 17th October 2013 to discuss it. Following that meeting Mr Peplow wrote to the claimant informing him that he was not upholding the grievance [p.330]. The claimant appealed against the outcome of the grievance [p.329] and his appeal was heard by Gavin Burton, who was at that time the Factory Manager. Mr Burton did not uphold the appeal but acknowledged that the process followed in relation to the claimant's offer of a transfer to Tutbury and the provision of his new contract could have been better. [pp.331-2].

81. During 2013 the claimant's relationship with Mr Peplow became challenging, causing Mr Peplow to form the view that the claimant was quite competent, but that his behaviours spoiled his competence.

2014

Pay Review

82. The claimant's performance evaluation for 2013 was carried out in early 2014 by Victoria Good, who was on the respondent's graduate training programme and covering Matthew Taylor's role whilst he was out of the business for personal reasons. Ms Good, with input from Matthew Taylor, scored the claimant a 2 for the 'what' and a '1' for 'how' [pp.304-310].

83. The respondent's Salary Review Guidelines for 2014 [p.186] stated that employees receiving a PE score of 2:1 would get a 0% pay increase. In line with these guidelines the claimant was not awarded a pay increase in 2014.

84. In 2014 the claimant's comparators received pay increases of between 2 and 3.8% because they received scores of 2 and 3. Employee A, who had moved to the Production team, received a 2% increase. Employee B received a 3% increase for a rating which Mr Peplow believes was a 2:3. Employee C received a performance rating of 2:2 and a 3.8% pay increase, and Employee D got a 3% increase for a score of 2:2.

85. There was no evidence before us to suggest that the decision not to aware the claimant a pay increase in 2014 was because of his nationality or because the claimant had previously challenged his pay award. Rather it was because of the claimant's performance and was in line with the respondent's salary review guidelines.

17 October 2014

86. The claimant alleged that on 17 October 2014 Dean Peplow threatened him by telling him that if he raised a grievance this would be reflected in his performance evaluation, which in turn effects pay. Mr Peplow denied this. He could not recall the specific conversation, which is understandable given the time that has elapsed since it took place, but recalled having spoken to the claimant about his behaviours generally and having explained to him that they were having an adverse impact on his rating.

87. Mr Peplow's conversation with the claimant appears to have had a positive effect as the claimant's behaviour subsequently improved for a period of time.

88. We preferred and accepted Mr Peplow's evidence on this issue. We found him to be an honest and credible witness. We find that Mr Peplow did not threaten the claimant on 17th October 2014 or indeed on any other occasion.

2015

89. The claimant's performance evaluation for 2014 was carried out in early 2015 by Matthew Taylor [pp.312-317.]. The claimant had been given six objectives for 2014 and had not started any of them. There had also been issues with his behaviours in 2014. Mr Taylor and Dean Peplow had provided feedback to the claimant during the year about his behaviour and his communication style, but this had not changed. Mr Taylor commented in the performance evaluation that in order to develop the claimant needed to take time to consider how he communicated information and focus on building relationships.

90. The claimant was given a performance rating of 1:1 by Mr Taylor, which he refused to accept.

91. The respondent's Salary Review Guidelines for 2015 [p.188] provided that there should be no pay increase for employees receiving scores of 1. The claimant was therefore not awarded any pay increase in 2015. This was due purely to his performance and was not linked in any way to his nationality.

92. The claimant's comparators received pay increases of between 2 and 4% that year, because they had all received scores of 2 and 3. Employee A, working in Production, got a pay increase of 2%; Employee B also got a 2% increase, which Mr Peplow believes was because B got a rating of 2:2; Employee C received a performance rating of 2:3 and a 4% pay rise and Employee C scored 3:2 and got a 3% increase.

2016

93. In February 2016 Victoria Good, who was covering for Matthew Taylor, conducted the claimant's performance evaluation for 2015 [pp.318-324]. 2015 had been a good year for the claimant and he was awarded an overall score of 2:2. As a result of his performance he

qualified for a pay increase and with effect from 1st April 2016 he was awarded a 5% pay increase [p.348].

94. By 2016 the gap in pay between the claimant and the other Quality Assurance Technicians had grown, as a result of the differences in performance. The claimant remained unhappy about the level of his pay and Mr Peplow was keen to try and reduce the gap and to reward the improvement that the claimant had made in his performance in 2015.

95. The claimant was therefore awarded an exceptional pay increase that year totalling 14%, which took his basic pay to £22,890 and had a knock on effect on his shift allowance and contractual overtime. As the increase was an exceptional one, outside of the respondent's Salary Review Guidelines for that year, it needed to be approved by both local HR and then Group HR. This took some time, and the pay increase was finally approved in December 2016 and backdated to October 2016 [p.358].

96. The claimant was therefore awarded two pay increases in 2016. The first, which took effect on 1 April 2016, increased his basic salary to £21,000. The second, which took effect on 1 October 2016, increased his basic salary to £22,890.

97. The claimant alleged that on 1 October 2016 Dean Peplow failed to award the claimant a pay increase from April 2016. We accept that the claimant's pay increase in October 2016 was not backdated to April 2016. The reasons for that were firstly, the claimant had already received a pay increase in April 2016 and secondly, the pay increase in October was an exceptional one. There was no evidence before us to indicate that the decision not to backdate the October pay increase was linked to nationality.

98. The claimant's comparators received pay increases of between 0 and 3% in April 2016. Employee A, still working in Production, got a pay increase of 3%. Employee B did not receive any pay increase because they received a PE score of 1:2. Employee C got a 2% increase, with a PE score of 2:3 and Employee D also got a 2% increase with a PE score of 2:2. The claimant's pay increase in 2016 was significantly higher than those of any of his comparators.

99. In February 2016 the respondent had a vacancy for a new Conformance Manager. The claimant applied for the position but his application was unsuccessful. The role was offered to Victoria Good, who was on the respondent's graduate training programme and considered to be an excellent performer.

100. The claimant alleged that Mr Peplow ignored his application. We find that Mr Peplow did not ignore the claimant's application. It was considered but he was not successful. A big part of the role was managing people, and it was considered that the claimant did not have the necessary people management skills. The decision to offer the role

to Ms Good was due to her performance and qualifications and not linked to nationality in any way.

101. Ms Good did not accept the role and subsequently it was offered to Amera Muthana who then became the claimant's line manager in September 2016.

102. Shortly after Ms Muthana joined the respondent she was told by another manager that there was an issue and was asked to speak to the claimant about it, which she did. During that conversation, which took place on the shop floor in front of others, the claimant said that Ms Muthana did not know what she was doing and had no business telling him what to do. Ms Muthana was shocked that a member of her team would speak to her like that in front of others. She took the claimant aside and asked him not to speak to her like that again.

2017

103. In January 2017 Ms Muthana carried out the claimant's performance evaluation for 2016 [pp.359-363]. Ms Muthana wanted to give the claimant a score of 2 for both the 'how' and the 'what', to give him a boost. She was overruled by Mr Taylor who was concerned about the claimant's behaviours and wanted to give him a 1 for the 'how'.

104. Ms Muthana tried, during 2017 and subsequently, to support the claimant as much as she could. For example, in 2017 she supported the claimant in his aim to be promoted to Shift Manager. She gave him time to shadow a Shift Manager, to work in a different department and to go on training which would help with his application. The claimant's application for Shift Manager was not successful. The reasons given to Ms Muthana were that it was considered that the 'jump' from Quality Assurance Technicican to Shift Manager was too large, and that during the interview the claimant did not demonstrate the listening skills required for the role as he did not listen to what was being said to him.

105. The claimant was encouraged instead to consider the role of Cell Leader, and Crystel Stouvenel agreed to mentor him. Ms Stouvenel reported to Ms Muthana that the claimant would not listen to what she said during the mentoring sessions or take on board the feedback that she gave him. Eventually Ms Stouvenel decided not to mentor the claimant any longer as she felt no progress was being made.

2018

106. In February 2018 an incident occurred at work involving the claimant and Andy Allcock, who was employed as Production Manager. The incident followed a night shift during which another employee, Ms J Oakhill, had inspected parts but not all of the production line. As a food manufacturer the respondent has to carry out regular allergen cleans and checks to ensure that there are no allergens present on the production line.

107. On the night in question, Ms Oakhill was working alone. It was her responsibility to complete allergen checks on the line during the shift. She inspected some parts of the line but did not have time to inspect them all so asked a Quality Assurance Operator, Ms Holden, to complete the inspection. Ms Holden filled in the inspection checklist putting Ms Oakhill's initials next to the checks that Ms Oakhill had carried out.

108. The allergen clean was not completed on the night shift, so was handed over the following shift, which was one that the claimant was working. The claimant discovered the issue and reported it to Ms Muthana and to Ms Holden's line manager, Andy Allcock. He asked that the matter be investigated.

109. An investigation was carried out into the incident. Mr Allcock and Ms Muthana discussed it with Ms Oakhill and Ms Holden. Ms Oakhill should not have delegated responsibility for carrying out the checks to Ms Holden as Ms Holden was not qualified to do them. Ms Oakhill apologised for what had happened and was clearly upset. Both Ms Oakhill and Ms Holden were considered to be high performers, and indeed Ms Holden subsequently went on to be promoted.

110. There had been a failure to follow the correct process, but it was felt that no disciplinary action was required. Instead, Ms Muthana had a coaching conversation with Ms Oakhill, who was someone Ms Muthana trusted and viewed as a high performer. That was in our view an entirely reasonable management response to the situation. The actions of Ms Oakhill did not amount to misconduct, rather she had made a bad decision for which she apologised. Moreover, there were mitigating circumstances, in that Ms Oakhill had been left to run the shift on her own that evening.

111. The claimant however thought otherwise, and he wanted formal disciplinary action to be taken against his colleagues. We were struck by how the claimant appeared, on this and other occasions, to think that he knew better than his managers how to deal with the situation. When his managers did not take the action that he wanted them to take he would not let the issue drop.

112. The claimant spoke to Andy Allcock about the incident and subsequently complained to Amera Muthana that Mr Allcock had intimated him during that conversation Ms Muthana told us that her experience of Mr Allcock was that he can be very direct and blunt in his communication style, and that he is not always the Quality's Team's best friend because he is focussed on getting the product out of the door.

113. Ms Muthana spoke to Mr Allcock's line manager, Crystel Stouvenel, about Mr Allcock's behaviour towards the claimant. Ms Stouvenel told Ms Muthana that she was aware of Mr Allcock's behaviour and was addressing it with him. She told him that Mr Allcock was aware that he needed to curb his temper and was seeking help with anger management.

114. We find that Mr Allcock did speak to the claimant in February 2018 in a way that the claimant found to be inappropriate. There was no evidence however that this was linked in any way to the claimant's nationality. On the contrary, there was evidence from Ms Muthana that Mr Allcock had spoken to her and others in similar ways.

115. Ms Muthana did not 'do nothing' about the incident when the claimant reported it. She dealt with it in an entirely appropriate way by speaking to Mr Allock's line manager who assured her that the behaviour was being addressed.

116. The claimant was awarded a pay increase of 2% [p.394] in 2018 because Ms Muthana gave him a score of 2:2 for his performance in 2017. It cannot therefore be said, as the claimant alleges, that Dean Peplow failed to award the claimant a pay increase in April 2018.

117. The claimant made several allegations about the behaviour of both Dean Peplow and Amera Muthana on 4 September 2018. He alleged that Mr Peplow did nothing when he reported the incident involving Mr Allcock to him, and that he ignored the claimant's concerns about food safety breaches, acted arrogantly towards the claimant and treated him unfairly in a restructuring. He also alleged that Ms Muthana was overbearing when supervising him on 4 September 2018.

118. These allegations were made in general terms. They were in our view lacking in detail and not supported by any documentary evidence.

119. Mr Peplow did not recall being made aware of an issue between the claimant and Mr Allcock. He did recall a restructuring in the factory during 2018 which affected some of the Quality Assurance Coordinators. The claimant was not affected by the restructuring but asked Mr Peplow for more information about it and complained that the respondent had been unreasonable by not telling him more about it. The claimant also expressed an interest in voluntary redundancy. Mr Peplow explained that the claimant's role was not affected.

120. Ms Muthana could not recall an incident involving supervision of the claimant on 4 September. She did however recall an incident in August of that year involving some pallets that were causing an obstruction. Ms Muthana sent an email to a number of colleagues, involving the claimant, in which she wrote "*In case Michal did not confirm, there are 91 pallets implicated". T*he claimant replied *"Please don't micro manage. This is highly unprofessional*".

121. Ms Muthana replied explaining that she was ultimately responsible for quality in the area and would manage as she saw fit. The claimant responded: "*I found this extremely unprofessional and undermining...I will discuss my concerns with Dean...I found your concerns highly prejudice and will not be tolerate that type of accusations..."*

122. This exchange was, in our view, typical of the way in which the claimant responded to Ms Muthana, for whom he appeared to have no

respect or consideration. He did not appear to recognise or accept that her role was to manage. On more than one occasion he challenged her authority publicly and was critical of her. This caused the relationship between the claimant and Ms Muthana to become very strained and Ms Muthana found it very difficult to manage him.

123. We found Ms Muthana and Mr Peplow to be credible and honest witnesses, who treated the claimant with patience, respect and dignity. We were particularly impressed by what we heard during the covert recordings made by the claimant, when they did not know that they were being recorded and thought that they were alone with the claimant. Both of them came across during those conversations as professional, calm and reasonable, in the face of unreasonable behaviour (and, in the case of Mr Peplow, allegations of harassment) from the claimant.

124. Where there is a conflict of evidence between the claimant and Ms Muthana and Mr Peplow we prefer their evidence to that of the claimant. It was clear to us that the claimant holds very strong views which he would not move from, and which in our view affected his recollection and interpretation of events. He was not willing to accept that there could be another version or interpretation of events than his own.

125. We can find no evidence to support the claimant's allegations about the alleged behaviour on 4 September and, on the balance of probabilities, we find that these incidents did not occur.

126. Dean Peplow did not ignore the claimant's concerns about food safety breaches or act arrogantly towards him. Nor did he treat the claimant unfairly in a restructuring programme on 4 September 2018. Similarly, there was no evidence before us of Ms Muthana being overbearing in supervision of the claimant on 4 September.

127. In October 2018 there was a Quality Assurance team meeting following the restructure. During this meeting there a discussion about capacity in the team as several staff were off sick and others were on holiday. Mr Peplow told the team to keep talking to and supporting each other. The claimant alleged that Mr Peplow behaved aggressively towards him during this meeting and accused Polish workers of dishonesty. We find that Mr Peplow did not behave aggressively towards the claimant and that there was no mention of Polish workers during the meeting.

128. In December 2018 there was an incident involving the claimant when the wrong code was put on a finished product. This could have caused problems with the traceability of the product (the ability to trace the product). The production operators were at fault for putting the wrong code on the product, but the claimant was also at fault for not noticing the mistake, because checking codes was part of his role.

129. A disciplinary investigation was carried out into both the claimant and the production operators. The outcome of the disciplinary process

was that no formal disciplinary action was taken but that both the claimant and the production operators involved received informal warnings [pp.405-9].

130. The claimant complained that the respondent's disciplinary policy did not contain the right for the employer to give an informal disciplinary warning and that giving him an informal warning amounted to an act of race discrimination. We were surprised by this allegation as, in our experience, most employees would be pleased that they did not receive a formal disciplinary warning, and that their employer chose to deal with the issue informally.

131. There was, in our view, nothing untoward or inappropriate in the respondent's treatment of this incident. There was certainly no evidence of the claimant being treated in this way because of his nationality. Quite the contrary, other employees (namely the production operators) were treated in the same way and also received informal warnings.

2019

132. 2018 was, for several reasons, a difficult year for the claimant, and this was recognised both by Ms Muthana and the claimant. In January 2019, ahead of his performance evaluation, the claimant sent an email to Ms Muthana saying, in effect, that he expected her to give him a 2:2 rating in the review, [p.433]. He also made it clear that he would not sign the review unless he got such a rating.

133. The tone of the email sent by the claimant to Ms Muthana on 21 January [p.433] is entirely inappropriate. It appears to us to be threatening towards Ms Muthana and demanding of a particular rating. In the email the claimant shows no respect either for the performance evaluation process or for his manager.

134. The claimant's performance evaluation for 2018 was carried out in March 2019. Ms Muthana described it as a 'horrible conversation'. She needed to tell the claimant that his behaviours did not justify a 2 rating. There had been a number of incidents during 2018 where the claimant's behaviour and approach had caused genuine issues in the team. These behaviours could not be ignored.

135. Not only were the claimant's behaviours during 2018 of concern, but the claimant had also not achieved his goals for 2018. Ms Muthana therefore awarded him a score of 1:1. After the meeting however, she reflected on the claimant's performance and asked Mr Peplow and HR to change the rating for the 'what' to a 2. She was advised that it was not possible to change the rating at that stage. Even if the rating had been changed however, it would not have made any difference to the outcome of the claimant's pay review or his bonus.

136. The claimant refused to sign the performance evaluation for 2018 because he disagreed with the scores given to him [367-9].

137. As the claimant had received a score of 1:1 for his performance in 2018 he was not eligible for a pay increase in 2019. The claimant's comparators received pay increases of between 2 and 3%. Employee A (in Production) received an increase of 3%; Employee B got PE scores of 3:2 and a pay rise of 3%, and Employee C received scores of 2:2 and an increase of 2%.

138. The decision not to award the claimant a pay increase in 2019 was because of his performance rating. It was nothing whatsoever to do with the claimant's nationality and was in line with the respondent's Salary Review Guidelines. There was no evidence before us to support the claimant's allegation that Mr Peplow failed to comply with the respondent's salary scale guidelines for 2019.

139. Similarly there was no evidence to suggest, as the claimant alleged, that Ms Muthana downgraded the claimant's performance rating as a result of him being obstructive during the restructuring programme. The claimant relied upon Ms Oakhill as a comparator in relation to this allegation. There was however no evidence before us to suggest either that Ms Oakhill was in materially the same circumstances as the claimant or that the claimant was treated less favourably than her.

140. We are satisfied that the claimant's performance rating in March 2019 was based upon his performance during 2018 and was not linked to his nationality.

141. The claimant alleged that on 14th March 2019 he told the then factory manager, Mr Heusler, that he was being intimidated by Mr Allcock and other managers. He adduced no evidence in support of this allegation. The claimant wrote to Mr Heusler on 12th March 2019 [p.436] and made no mention of Mr Allcock or other managers intimidating him. In his letter to Mr Heusler he again expressed an interest in voluntary redundancy. He also commented that he believed that his relationships with the head of department and his line manager were damaged beyond repair.

142. We find, on balance, that the claimant has not discharged the burden of proof in relation to this allegation.

143. This was not the first time that the claimant had received scores of 1 in his performance evaluation. Ms Muthana therefore suggested that a development plan be put in place to help him to improve. The claimant did not respond well to this suggestion. This was the first time that Ms Muthana had to implement a peformance improvement plan ("**PIP**") for a member of her team and she was not familiar with the process. She asked HR for advice. Unfortunately the HR advisor that she contacted was also unfamiliar with the process.

144. As a result, there was a delay in Ms Muthana processing the PIP. On 8 May 2019 she wrote to the claimant inviting him to a performance improvement meeting on 14th May. The claimant did not receive the letter in time, so the meeting did not go ahead.

145. The meeting was rearranged for 1 July 2019 but the claimant refused to attend it. He said that he wanted to raise a grievance but to try and resolve matters informally first.

146. In the meantime, the claimant's union representative asked the respondent for a meeting to discuss the issues, and an initial meeting was arranged for 6 June 2019.

147. Meetings took place on 6th June and 12th July between the claimant, Ms Muthana, Mark Oliver from HR and Mark Holmes from Unite who was supporting the claimant. The meetings were intended to be mediation meetings to try and improve the relationship between the claimant and Ms Muthana, which by that time was very strained. The claimant had previously complained to both Mr Peplow and Mr Heusler about the way in which Ms Muthana managed her team, and this was having an impact.

148. During the meetings the claimant's performance rating was discussed in some detail. The claimant's union representative encouraged Ms Muthana and the claimant to draw a line in the sand and move on, which Ms Muthana appeared happy to do. The claimant did not appear to be listening to what Ms Muthana was saying during the meeting. After an adjournment however, he agreed to draw a line in the sand and make a fresh start, with the support of his union representative. On 8 August 2019 the claimant sent an email to Ms Muthana in which he wrote "..*I agreed to a fresh start" and* referred to closing the case and moving on [pp.472-3].

149. Subsequently however the claimant went back on the agreement that had been reached. He asked the respondent to provide written confirmation that the PIP had been withdrawn. Mark Oliver from HR replied that, as far as he was concerned, the claimant had never been put on a PIP [p.472]. The claimant insisted that he receive written confirmation that the PIP had been withdrawn and that he would not agree to drop a formal grievance until he received this. Mark Oliver sent a letter to the claimant, but the claimant was not happy with the wording used in the letter.

150. The PIP process was put on hold indefinitely and at no point after these meetings did the respondent seek to put the claimant on a PIP.

151. The claimant alleged that Mr Oliver failed to deal with the claimant's concerns over the management process on 6 June 2019. We find that he did not. On the contrary, Mr Oliver attended two mediation meetings to try and resolve the claimant's concerns and subsequently wrote to the claimant about the PIP in response to the claimant's concerns.

152. On 4 September 2019 the claimant raised a grievance to Mr Peplow about the aborted PIP process [p.495]. Most employees would have been pleased that the PIP process had been aborted. The claimant could not let it go however and remained fixated on it for a long time.

153. A grievance meeting took place on 10 September [p.498], conducted by Dean Peplow, to whom the grievance was addressed. During the Tribunal hearing, the claimant suggested that Mr Peplow should not have heard the grievance. We note however that neither the claimant nor his trade union representative who accompanied him to the grievance meeting, complained about Mr Peplow's involvement at the time or suggested that someone else should hear the grievance.

154. Mr Peplow considered the claimant's grievance and did not uphold it [p.502]. The claimant wanted Ms Muthana to be the subject of an investigation. In Mr Peplow's view there was no need for an investigation. He already knew what had happened with the PIP and formed the view that there was nothing more to investigate. The matter had been closed by the respondent agreeing to abandon the PIP, mediate and draw a line in the sand.

155. This was an entirely reasonable approach for Mr Peplow to take and was not linked in any way to the claimant's nationality. This allegation is a further example of the claimant being unwilling to accept management decisions or put things behind him and focus on the future.

156. The claimant appealed and the appeal was dealt with by Eric Heusler, who at the time was the factory manager. Mr Heusler carried out his own investigation into the matters raised in the appeal and interviewed Crystal Stouvenel, Dean Peplow, Mark Oliver and Amera Muthana. He produced a well-reasoned and comprehensive outcome letter and invited the claimant to a meeting on 19 December to discuss his outcome.

157. Mr Heusler concluded, in summary, that there had been a delay between the performance evaluation meeting and the initiation of the PIP process; that the PIP process had been designed to support the claimant to improve his performance, and that Ms Muthana had wanted to help and support the claimant.

158. Mr Heusler did not fail to investigate the claimant's concerns. On the contrary he did a very thorough investigation and interviewed a number of people. Mr Heusler was just one of a number of managers at the respondent who invested time and effort in trying to resolve the claimant's concerns. There was no evidence before us of the manner in which Mr Heusler dealt with the claimant's grievance appeal being influenced by nationality.

159. Mr Heusler concluded that the claimant was unable to move past the fact that he had been sent a letter suggesting that he be put on a PIP. He acknowledged that Ms Muthana could have handled the situation better, but this did not satisfy the claimant.

160. On 17th October following a Quality Fail the claimant asked the production operators to carry out a number of checks which weren't necessary or standard process. The operators became frustrated with

the claimant but the claimant was adamant that the checks should be carried out. The operators' manager, Cliff Stubbs, a man described by Ms Muthana as being someone that not many people can make angry, approached Ms Muthana, angry, asking why the claimant was asking his staff to do all these extra checks. Ms Muthana challenged the claimant and asked him to explain his thinking.

161. To her credit Ms Muthana accepted that she had been angry during the conversation because the claimant would not listen to what she was saying. She did not, however verbally attack the claimant as he alleged. There was no evidence that Ms Muthana's behaviour was linked to the claimant's nationality. Rather, it was due to the intransigence of the claimant and his refusal to listen to her.

162. The claimant alleged that on 4 November Dean Peplow put a request that he had made for mediation on hold and that this amounted to an act of racial harassment. On 17th October the claimant sent an email to Ms Muthana, copying in Mr Peplow, requesting a meeting to discuss what he referred to as Ms Amera's "unprofessional" approach, the fact that he felt "very uncomfortable' and a "very antagonistic working environment".

163. Mr Peplow replied the following day asking the claimant to organise a meeting. In his email he stated explicitly that the meeting was not a mediation meeting, as he did not consider that there was anything to mediate about. Instead, he considered that the purpose of the meeting was to discuss the development plan and support the claimant in improving his performance.

164. The claimant sent a further email on 4 November asking for a meeting to discuss concerns he had regarding inappropriate conduct and unhealthy working relations. At the time the grievance appeal process was ongoing, and Mr Peplow responded that the meeting would not take place until that process had concluded.

165. The reason the meeting did not take place was to allow the grievance process to conclude. This was not conduct that was linked to the claimant's nationality but was a reasonable practical step in the circumstances.

2020

166. The claimant alleged that on 8th January 2020 Mr Peplow attacked the claimant's credibility in public and spoke to him in an unacceptable and demeaning manner. Mr Peplow could not recall this conversation. Having heard Mr Peplow give evidence, and the way in which he spoke to the claimant, particularly during the covert recordings, we find it very unlikely that Mr Peplow would have spoken to the claimant in an unacceptable and demeaning manner. The claimant's allegation was vague and lacking in detail and he has not discharged the burden of proving that this incident took place.

167. On 27 January 2020 Mr Muthana and the claimant met to carry out his performance review for 2019. In light of the deterioration in the relationship between the claimant and Ms Muthana, Ms Muthana was extremely anxious going into this meeting. It was therefore agreed that she would be accompanied by a member of the respondent's HR team, and that the claimant would have his union representative present. The fact that third parties were present during what was essentially a normal management meeting was in our view a strong indication that the relationship between Ms Muthana and the claimant had broken down. Ms Muthana was scared of the claimant given his behaviour towards her in the past.

168. During the meeting there was a discussion about the claimant's performance and about the fact that he had not completed the goals that had been set. Notwithstanding this, as others in the team had also not achieved their goals either but had been given a score of 2 for the 'what', the claimant was given a '2' for the 'what' element of the review. He was given a '1' for the 'how' due to his challenging behaviours.

169. Ms Muthana's rating of the claimant was not linked to the claimant's nationality, nor to any previous complaints of discrimination that he had raised. Her scores were based upon her genuine views of the claimant's peformance.

170. The claimant again refused to accept his scores. The claimant alleges that the PE was 'disputed and discriminatory'. We find no evidence that it was discriminatory, although we accept that the scores were disputed. There was nothing whatsoever in either the claimant's or Ms Muthana's evidence that suggested any of her behaviour was motivated by the claimant's nationality. By that stage he was an extremely challenging employee to manage, and she was finding it difficult.

171. The respondent's Salary Review Guidelines for 2020 [p.196] stipulated that anyone receiving a score of 1 in their performance evaluation should not receive any pay increase. The claimant's scores were 1:1 and he was therefore not awarded any pay increase. This was in line with the Salary Review Guidelines and there was no evidence to suggest that it was linked to the claimant's nationality. By the time of the 2020 pay review, Employees A and D were no longer employed by the respondent. Employee B got a performance rating of 3:2 and a pay rise of 3%. Employee C got a 2% increase for a 2:2 rating.

172. The respondent has a policy that if an employee does not sign their annual performance evaluation, then the employee will not receive a bonus payment. The claimant refused to sign his performance evaluation in 2020, and as a result would not be paid any bonus. Mr Peplow wanted to encourage the claimant to sign his performance evaluation so that he could receive a bonus. On one occasion in late January 2020 Mr Peplow saw the claimant in a meeting room with a union representative. He knocked on the door and went in to ask the claimant to sign his performance evaluation so that he could get a

bonus. The claimant refused. There was, in our view, nothing untoward in Mr Peplow's behaviour. He was acting in what he thought was the claimant's best interest, to get him a bonus.

173. Shortly after the performance evaluation in January, the claimant asked Ms Muthana to refer him to occupational health, saying that he was feeling stressed and burned out. The claimant was referred to occupational health who produced a report on 20 February [pp546-550] following an assessment of the claimant on 14 February. The report indicated that the claimant was fit for work and showed good resilience, but that the ongoing disputes were impacting his wellbeing. Occupational health recommended that the claimant contact the respondent's Employee Assistance Programme ("**EAP**").

174. After receiving the report Ms Muthana spoke to the claimant and suggested that he contact the EAP and that he also use a company known as Headspace for support. Thereafter it was for the claimant to make contact with the EAP and Headspace. Ms Muthana did not fail to follow up on the recommendations of the occupational health report in February 2020.

175. By this stage relationships between the claimant, Ms Muthana and Mr Peplow had become difficult. Larry McGlinchy, the Regional Officer of the claimant's trade union Unite, suggested a meeting between the claimant, HR, the union and the claimant's managers to try and find a way forward.

176. That meeting took place on 6 May 2020. Emma Wright from HR took minutes of the meeting, which she acknowledged were not verbatim. The claimant recorded the meeting covertly without telling anyone and without seeking permission to do so. Present at the meeting were two senior Unite officials, Kerry Goodman and Emma Wright from the respondent's HR team, Mr Peplow, Ms Muthana and the claimant. There was a lot of senior resource invested in this meeting and in trying to find a solution to the issues the claimant was facing.

177. During the meeting Mr Peplow spent some time going through in detail slides that he had prepared explaining the respondent's concerns about the claimant's behaviours by reference to the Nestle Leadership Framework. This was designed to try and help the claimant to understand why he was repeatedly receiving performance ratings of 1 for his behaviours, in a safe environment where he had the support of two Unite officials.

178. There was also discussion of a development plan to assist the claimant to improve his performance. At one point in the meeting progress appeared to have been made, and the claimant said [p.982] that he was happy with the development plan going forward. He then however said that before he could agree to move forward, he needed to understand what he called the "root cause" of the problems. He was encouraged by the union to focus on the future, but refused to do so.

He kept going back to the old issues and wanted instead to focus on what had happened in the past.

179. At the end of the meeting, which lasted approximately an hour, the claimant said that "*we're going nowhere at this moment*". The meeting ended.

180. Everyone in the meeting has invested their time and energy in supporting the claimant and trying to find a solution. Their intentions were entirely good. The claimant showed no appreciation whatsoever of this and was unwilling to move forward – yet again.

181. The claimant did not raise any allegations of discrimination during the meeting. The claimant subsequently alleged that the respondent failed to address his allegations of discrimination during the meeting. The respondent cannot be criticised for not discussing something that was not raised.

182. The claimant also alleged that the responded failed to address the conflict between the claimant and his manager during this meeting. The conflict, and the differing views of the claimant's performance, were at the very heart of the meeting. The respondent did not fail to address them.

183. There was no evidence before us that the respondent's behaviour in this meeting was influenced by the claimant's nationality, and nothing from which we could draw an inference that it was.

184. On 12 June 2020 the claimant issued his first claim in the Employment Tribunal.

185. On 19 May 2020 the claimant asked Ms Muthana for special leave between 5th and 13th June to enable him to travel to Poland for medical assessments [p.578]. Ms Muthana agreed to the claimant's request. The claimant was due to return to work on 23 June but did not do so because he was unwell.

186. On 27 May the respondent communicated to staff that it was making temporary changes to the way in which its discretionary company sick pay ("**DCSP**") would be administered as a result of the Covid 19 pandemic. The changes had been discussed and agreed with the recognised trade unions, GMB and Unite, who had collective bargaining rights at Tutbury.

187. A new process was put in place and this process had to be followed before an employee could receive DCSP. The process involved a form being completed and then reviewed by an HR Business Partner, a trade union representative and where possible the Factory Manager. Eligibility for pay would then be assessed based on the employee's past attendance record, and medical evidence.

188. The claimant's eligibility for DCSP was assessed. Ms Muthana was keen for him to receive full pay during his sickness absence as he had

previously had an exemplary attendance record. However, following a review of the claimant's case by the local panel including the factory leadership team, the unions and HR, it was decided that the claimant would not be entitled to sick pay for his period of absence. The claimant was told of this by letter dated 10 July 2020 and appealed against the decision.

189. The claimant was, by mistake, paid full pay in August 2020 in respect of his absence. This was due to an error and resulted in an overpayment to the claimant of £3,730.04.

190. When the respondent realised its mistake, it sought to recover the overpayment from the claimant. Emma Wright from HR called the claimant on 8 September to explain the situation. She suggested a repayment plan so that the claimant would not have to repay what was a relatively large sum of money in one month. The claimant refused to consider a repayment plan, stating that he considered the exclusion of him from the sick pay scheme to be illegal. As a result, the full overpayment was deducted from the claimant's salary in September. The monies deducted from the claimant's salary in September 2020 were however repaid to the claimant in December 2020.

191. We find that the claimant has not discharged the burden of proving that the respondent failed to follow its absence management process and discretionary sick pay policy on 10 July 2020. The changes to the policy had been negotiated with Unite and the GMB and published to the workforce, and the claimant appears to have been treated in line with the new policy. In any event there is no evidence that the decision not to pay the claimant DCSP was linked to his nationality. We note that, despite the claimant's behaviour towards Ms Muthana she advocated strongly for him to receive DCSP.

192. Emma Wright's phone call to the claimant on 8 September was not linked to the claimant's nationality. It was merely her performing her normal duties and trying to help the claimant by offering a repayment plan.

193. The claimant alleged that on 11 September 2020 Brian Goulding sought to justify the respondent's exclusion of the claimant from company sick pay. There was no evidence of this before us, other than the bare assertion of the claimant. We find on the balance of probabilities that this did not happen.

194. On 9 September 2020, the day after his telephone conversation with Ms Wright, the claimant sent a text message to Ms Muthana [p.712] in which he referred to not having had much sleep and to being distressed. He asked for time off because there was a Preliminary Hearing in the First Claim the following day.

195. Ms Muthana sought advice from Mr Peplow and he agreed, to support Ms Muthana, that he would call the claimant.

196. We have listened to the transcript of this call which we found to be very telling, particularly since Mr Peplow did not know he was being recorded until half way through the call. Throughout Mr Peplow was polite, calm and supportive of the claimant, even though the claimant behaved unreasonably during the call and accused Mr Peplow of harassing him.

197. The behaviour and tone of Mr Peplow and the claimant during this telephone call appeared to us to be indicative of the relationship between the two of them. Mr Peplow tried to support the claimant by offering him the whole shift off on full pay, rather than the half shift that the claimant had requested. The claimant interpreted this gesture incorrectly. There was absolutely nothing untoward in Mr Peplow's offer of the whole shift off, or in the way he conducted the conversation that day.

198. Mr Peplow asked the claimant if he would be willing to undergo an occupational health review to assess his fitness for work. He did not insist on one taking place, nor was the offer of time off conditional upon the claimant agreeing to a review. There was no insistence on a 'mental state assessment' as the claimant repeatedly suggested.

199. Mr Peplow's conduct during this call was not in way linked to the claimant's nationality. He was quite simply trying to support and help the claimant. By this stage the claimant was interpreting everything the respondent did in a negative light.

200. The claimant subsequently raised a grievance about Mr Peplow's conduct during the call on 9th September [pp.716-7]. The grievance was considered by Mr Drago, Area Manager of the Dalston factory, at grievance meetings on 9 October and 5th November 2020 [pp737-740 and 752-755]. During the meeting on 5th November the claimant told Mr Drago that Ms Muthana was a "*two-faced snake*" and Mr Peplow was a "s*ociopath bully*", phrases which the claimant stood by in his evidence to the Tribunal. The claimant showed no remorse for using these phrases, nor any understanding of the severity of the language that he was using. The claimant also told Mr Drago that he believed his relationships with his managers had broken down.

201. On 17th November Mr Drago wrote to the claimant to inform him of his decision on the grievance [p769 – 771]. Mr Drago concluded that:

a. He agreed that the situation with the claimant's sick pay was distressing, and would recommend that the decision around the loss of pay should be clearly explained to him;

b. The language used by Mr Peplow during the telephone call was neither degrading nor humiliating. It was entirely fair and reasonable for Mr Peplow to offer a referral to occupational health in light of the claimant's comments about his health;

c. The claimant had not been forced to take a mental health assessment in return for time off;

d. Mr Peplow had followed the respondent's guidelines by suggesting an occupational health referral; and

e. There was no evidence of wrongdoing, bullying or harassment towards the claimant by Mr Peplow.

202. Mr Drago was concerned by the amount of anger and resentment that the claimant held, and that the claimant had told him that his relationships with Ms Muthana and Mr Peplow had completely broken down. He formed the view that the claimant was now reacting to any interaction with Mr Peplow negatively, and that the relationships could not be fixed.

203. The claimant appealed against the grievance outcome and Eduardo Favrin who was new to the factory, having only transferred in August 2020, was appointed to hear the appeal. In his grievance appeal the claimant accused Mr Peplow of acts of violence, alleged that the respondent was supporting the process of discrimination, harassment and victimisation at all levels of the organisation, and named a large number of people who he said were guilty of discrimination, including six members of the respondent's HR team and two union officials. He also referred to psychological violence and 'demanded' an investigation.

204. Mr Favrin met with the claimant twice – on 8th and 16th December 2020 [pp 777-786 and 797-799]. Mr Favrin was accompanied during both meetings by Paul Morrisey from HR. Emma Wright took notes during the first meeting but was not present during the second one.

205. Mr Favrin was coming to the situation new and was keen to understand the situation and how it could be resolved for himself.

206. During the first meeting the claimant told Mr Favrin that he thought the trust was broken, that there was a hostile working environment, and that the relationships and trust between himself and both Ms Muthana and Mr Peplow were broken beyond repair. He accused Ms Muthana of 'backstabbing' and referred to Mr Peplow as a sociopath, a bully and a pychopath.

207. The claimant also told Mr Favrin that he had been recording conversations [p.784] and that there was 'no return' from the breakdown in his relationship with his line manager.

208. Mr Favrin asked the claimant why he was accusing others of discrimination, and the claimant said that other employees had falsified documents and yet been given a pay rise. He also accused Mr Peplow of coercion during the call on 9 September.

209. After the meeting on 8th December Mr Favrin was very concerned about the claimant's health and wellbeing and Mr Morrissey approached occupational health.

210. Mr Favrin also reviewed the transcript of the call between the claimant and Mr Peplow on 9th September which had led to the grievance. He concluded that Mr Peplow was trying to support the claimant during that conversation by offering him the whole shift off on full pay. He decided not to uphold the claimant's grievance appeal.

211. He then went on to consider what the claimant had told him about his relationships with his colleagues, and in particular that the claimant had accused a wide range of people, including HR and his own union representatives, of discrimination and cover up. He concluded that in light of the claimant's comments about his relationships with Ms Muthana and Mr Peplow being broken, the relationships were at a point where they could not be repaired.

212. Mr Favrin also formed the view that, whatever the respondent did, it would not be able to repair the relationship unless it did exactly what the claimant wanted, and that the situation would continue to escalate.

213. He was concerned that the claimant was using words such as 'psychological violence', 'coercion', 'two faced snake' and 'psychopath' to describe his managers and their behaviour. The claimant was also accusing the organisation as a whole of being complicit in if not encouraging discrimination. He took the view that these were very serious allegations and that there was no evidence to back them up.

214. Mr Favrin concluded that the claimant's reaction to the conversation with Mr Peplow on 9 September was evidence that the claimant was reading ulterior motives and discrimination into every interaction.

215. He considered whether the claimant could be moved to a different department, as Mr Drago had suggested, but concluded that this would not be possible. He believed that for the claimant, the problem was the respondent itself, Nestle, and that wherever he worked within the organisation the same issues would arise. He was also concerned that the claimant had covertly recorded conversations with his managers, which he saw as further evidence of the breakdown in trust and relationships.

216. Mr Favrin decided to dismiss the claimant due to the total breakdown in relationships between the claimant and his colleagues, in particular his managers. The decision to dismiss was his alone, but having taken the decision in principle, he took advice from Mr Morrissey on UK employment law as he had only recently begun working in the UK.

217. Mr Favrin decided to inform the claimant of his dismissal after he had told him of the outcome of the grievance appeal. The claimant was therefore invited to a meeting on 16th December. He was offered the right to be accompanied at that meeting. He did not know that the meeting would be a dismissal meeting. He thought the purpose of the meeting was to discuss his grievance. He had no idea going into the meeting that dismissal was a potential outcome.

218. The respondent is a large organisation with a dedicated HR function. Mr Favrin did not provide a reasonable explanation as to why the claimant was not warned what the meeting was about or given the opportunity to prepare for it.

219. We find that the respondent did not give the claimant notice of the disciplinary hearing or follow a fair process when dismissing the claimant, but that this was not linked to the claimant's nationality.

220. Similarly the decision to dismiss the claimant was not linked to nationality, but was instead due to the irretrievable breakdown in relationships between the claimant and his line managers.

221. The claimant named 4 comparators : Andy Allcock, John Rideeout, Jenny Oakhill and Denise Holden. There was no evidence that any of those comparators were in the same situation as the claimant. None of them had broken relationships with their managers. Rather each of them had done things which the claimant personally considered to be misconduct or gross misconduct, but in respect of which the respondent had taken a different view.

222. A significant amount of time and resource was invested by both the respondent and the claimant's trade union in trying to find a solution and a way forward. At the meeting on 6 May 2020 there were two senior Unite reps, including the Regional Officer, two of the respondent's managers, and two members of HR, all trying to find a way forward for the claimant.

223. It was striking to us that the claimant seemed to show no appreciation whatsoever for the steps taken by both his employer and his trade union to support him. For example, on one occasion Amera Muthana stayed late one Friday evening, leaving her two children home alone until 7.30 pm, to secure funding so that the claimant could attend a training course that he wanted to undertake. The claimant did not even thank her for her efforts or acknowledge that she had done anything to support him. Instead, he chose to criticise her because at one stage early on in the process she had commented that if they couldn't secure funding he may have to withdraw from the course. It was entirely due to Ms Muthana's efforts that the funding for the course was secured and the claimant was able to attend the course.

224. We were extremely impressed by the conduct, demeanour, and evidence of all the respondent's witnesses, particularly Dean Peplow and Amera Muthana who showed great patience, tolerance, fortitude and consideration for the claimant, despite the fact that he had repeatedly insulted them and described Mr Peplow as a psychopath and sociopath bully, and Ms Muthana as a two faced snake. These were comments that he stood by at the hearing.

225. The claimant showed no consideration for the feelings of his colleagues, nor any understanding of the impact of his behaviour on others. He focussed entirely on his perceptions and feelings and was unable to accept any other point of view.

226. The claimant was offered the right to appeal against the decision to dismiss him but did not exercise that right.

Time limits

227. The claimant issued the First Claim in the Employment Tribunal on 12 June 2020.

228. The claimant was aware of the Equality Act and discrimination legislation generally from at least 2013. He specially mentioned the Equality Act in a letter he wrote in November 2013 [p.329].

229. The claimant was a member of the trade union Unite and was supported by them during the course of his employment with the respondent. He told us in evidence that he had sought legal advice from Unite in 2013 or 2014 and had been advised at that time of the three month time limit for bringing claims in the Employment Tribunal. The claimant was therefore aware of the right to bring a claim in the Employment Tribunal and of the three month time limit for doing so since 2014 at the latest.

230. When asked why he did not present his claim earlier, the claimant said that he had been trying to resolve things internally.

The Law

Strike out

231. Rule 37 of the Rules provides that:

"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –

(a) That it is scandalous or vexatious or has no reasonable prospect of success;
(b) That the manner in which the proceedings have been conducted by or on behalf of the claimant or respondent (as the case may be) has been scandalous, unreasonable or vexatious; …
(e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response…"

232. Strike out is a draconian sanction and not one that should be applied lightly.

Direct discrimination

233. Section 13 of the Equality Act provides that:

"*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others"*

234. Section 23 of the Equality Act deals with comparators and states that: "*there must be no material difference between the circumstances relating to each case."* *Shamoon v chief Constable of the Royal Ulster Constabulary [2003] ICR* is authority for the principle that it must be the relevant circumstances that must not be materially different between the claimant and the comparators.

235. When determining questions of direct discrimination there are, in essence, three questions that a Tribunal must consider:
   a. Was there less favourable treatment?
   b. The comparator question; and
   c. Was the treatment 'because of ' a protected characteristic?

Harassment

236. Harassment is defined in section 26 of the Equality Act as follows:

"*(1) A person (A) harasses another (B) if –*
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) The conduct has the purpose or effect of –
(i) Violating B's dignity, or
(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

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

237. In deciding whether the claimant has been harassed contrary to section 26 of the Equality Act, the Tribunal must consider three questions:

   a. Was the conduct complained of unwanted:
   b. Was it related to nationality; and
   c. Did it have the purpose or effect set out in section 26(1)(b).

Richmond Pharmacology v Dhaliwal [2009] ICR 724.

238. The two stage burden of proof set out in section 136 Equality Act (see below) applies equally to claims of harassment. It is for the claimant to establish facts from which the Tribunal could conclude that harassment had taken place.

239. In *Hartley v Foreign and Commonwealth Office Services [2016] ICR D17* the EAT held that the words 'related to' have a wide meaning, and that conduct which cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it. The Tribunal should evaluate the evidence in the round, recognising that witnesses will not readily accept that behaviour was related to a protected characteristic. The context in which unwanted conduct takes place is an important factor in deciding whether it is related to a protected characteristic (*Warby v Wunda Group plc EAT 0434/11*).

Victimisation

240. Section 27 of the Equality Act states as follows:

> "*(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
> *(a) B does a protected act, or*
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act –*
> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*
>
> *(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith…*"

241. Although Tribunals must not make too much of the burden of proof provisions (*Martin v Devonshires Solicitors [2011] ICR 352*, in a victimisation claim it is for the claimant to establish that he has done a protected act and has suffered a detriment. There needs to be some evidence from which the Tribunal could infer a causal link between the protected act and the detriment, for example, the detriment occurs soon after the protected act, or others were not treated in the same way.

242. It has been suggested by commentators that the three stage test for establishing victimisation under the pre-Equality Act legislation, endorsed by Baroness Hale in *Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] ICR 841* can be adapted for the Equality Act so that it involves the following questions:

a. Did the alleged victimisation arise in any of the prohibited circumstances set out in section 27?
b. If so, did the respondent subject the claimant to the alleged detriment(s)?

c. If so, was the reason the claimant was subjected to the detriments that the claimant had done, or might do, a protected act?

243. Following the decision of the House of Lords in *Nagarajan v London Regional Transport [1999] ICR 877* it is not necessary in a victimisation case for the Tribunal to find that the employer's actions were consciously motivated by the claimant's protected act. Victimisation may occur if the discriminator was subconsciously affected by the protected act, and it had a 'significant influence' on his or her treatment of the claimant. An employer can be liable for an act of victimisation even where the motives for the treatment of the claimant are benign.

Time limits

244. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination may not be brought after the end of:

> "*(a) the period of 3 months starting with the date of the act to which the complaint relates, or…*
> *(c) Such other period as the employment tribunal thinks just and equitable.*

245. Section 123 (3) states that:

> "*(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(c) Failure to do something is to be treated as occurring when the person in question decided on it.*"

246. In discrimination cases therefore, the Tribunal has to consider whether the respondent did unlawfully discriminate against the claimant and, if so, the dates of the unlawful acts of discrimination. If some of those acts occurred more than three months before the claimant started early conciliation the Tribunal must consider whether there was discriminatory conduct extending over a period of time (i.e. an ongoing act of discrimination) and / or whether it is just and equitable to extend time. Tribunals have a discretion as to whether to extend time but exercising that discretion should still not be the general rule.

Burden of proof

247. Section 136(2) of the Equality Act 2010 sets out the burden of proof in discrimination claims, with the key provision being the following:

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

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

248. There is, in discrimination cases, a two stage burden of proof (see *Igen Ltd (formerly Leeds Careers Guidance and others v Wong [2005] ICR 931* and *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* which is generally more favourable to claimants, in recognition of the fact that discrimination is often covert and rarely admitted to. In *Igen v Wong* the Court of Appeal endorsed guidelines set down by the EAT in *Barton v Investec*, and which we have considered when reaching our decision.

249. In the first stage, the claimant has to prove facts from which the tribunal could decide that discrimination has taken place. If the claimant does this, then the second stage of the burden of proof comes into play and the respondent must prove, on the balance of probabilities, that there was a non-discriminatory reason for the treatment. This two stage burden applies to all of the types of discrimination complaint made by the claimant.

250. In *Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913* the Court of Appeal held that "*there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage."*

251. The Supreme Court has more recently confirmed, in *Royal Mail Group Ltd v Efobi [2021] ICR 1263,* that a claimant is required to establish a prima facie case of discrimination in order to satisfy stage one of the burden of proof provisions in section 136 of the Equality Act. So, a claimant must prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.

252. In *Glasgow City Council v Zafar [1998] ICR 120*, Lorde Browne-Wilkinson recognised that discriminators ' do not in general advertise their prejudices: indeed they may not even be aware of them'.

253. The Tribunal has the power to draw inferences of discrimination where appropriate. Inferences must be based on clear findings of fact, and can be drawn not just from the details of the claimant's evidence but also from the full factual background to the case.

254. It is not sufficient for a claimant merely to say 'I was badly treated' or 'I was treated differently'. There must be some link to the protected characteristic or something from which a Tribunal could draw an inference. In *Madarassy v Nomura International plc [2007] ICR 867* Lord Justice Mummery commented that: "*the bare facts of a difference in status and a difference in treatment only indicate a*

possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

255. In *Deman v Commission for Equality and Human Rights and others [2010] EWCA Civ 1276*, Lord Justice Sedley adopted the approach set out in *Madarassy v Nomura* that 'something more' than a mere finding of less favourable treatment is required before the burden of proof shifts from the claimant to the respondent. He made clear, however that the 'something more' that is needed to shift the burden need not be a great deal. Examples of behaviour that has shifted the burden of proof include a non-response or evasive answer to a statutory questionnaire, or a false explanation for less favourable treatment.

256. Unreasonable behaviour is not, in itself, evidence of discrimination (*Bahl v The Law Society [2004] IRLR 799*) although, in the absence of an alternative explanation, could support an inference of discrimination (*Anya v University of Oxford & anor [2001] ICR 847.*

257. In harassment cases the shifting burden of proof rules will apply in particular where the conduct complained of is not obviously discriminatory, and the Tribunal has to consider whether the reason for the conduct is related to the protected characteristic relied upon by the claimant – in this case his nationality.

Unfair dismissal

258. In an unfair dismissal case, such as this one, where the respondent admits that it dismissed the claimant, the respondent must establish that the reason for the dismissal was one of the potentially fair reasons set out in section 98(1) or (2) of the Employment Rights Act 1996.

259. Section 98(1) provides that: "*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*"

260. Section 98(4) states as follows:

> *"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
> *(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking)*

the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) Shall be determined in accordance with equity and the substantial merits of the case. "

261. Where a Tribunal finds that a claimant has been unfairly dismissed, the respondent can be ordered to pay a basic award and a compensatory award to the claimant. Sections 119 to 122 of the ERA contain the rules governing the calculation of a basic award and include, at section 122(2) the power to reduce a basic award to take account of contributory conduct on the part of a claimant:-

> "*Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*. "

262. The rules on compensatory awards are set out in sections 123 and 124 of the ERA and include, at section 123(6) the following:-

> "*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*."

263. The leading case on contributory conduct is *Nelson v BBC (No.2) 1980 ICR 110* in which the Court of Appeal held that, for a Tribunal to make a finding of contributory conduct, three factors must be present:-

a. There must be conduct which is culpable or blameworthy;
b. The conduct in question must have caused or contributed to the dismissal; and
c. It must be just and equitable to reduce the award by the proportion specified.

264. 'Culpable or blameworthy' conduct can include conduct which is 'perverse or foolish', 'bloody-minded' or merely 'unreasonable in all the circumstances' (Nelson v BBC (No.2))

Conclusions

Direct race discrimination

265. In considering whether the respondent directly discriminated against the claimant on the grounds of race, and specifically because of his nationality, we have reminded ourselves of the burden of proof in discrimination claims. We have asked ourselves the question: has the

claimant adduced evidence from which we could, in the absence of an alternative explanation, conclude that the respondent's treatment of the claimant was because of his nationality?

266. We are unanimously of the view that he has not. There was no evidence whatsoever to suggest that the way in which the respondent treated the claimant was influenced in any way by his nationality.

267. The claimant's case is comprised of mere assertions, unsupported by any evidence, that things that happened to him during the course of his employment that he didn't like were because of his nationality.

268. We have taken into consideration the fact that it is extremely rare for a respondent in discrimination claims to admit that there has been discrimination, and of our power to draw an inference that behaviour was because of nationality. We have concluded that this is not a case in which any adverse inference can be drawn against the respondent.

269. The respondent is an international company which has an extremely diverse workforce. Far from being prejudiced against the claimant the respondent was, in our view and based upon the evidence before us, trying to help the claimant to succeed, at considerable time and cost. For example:

a. Ms Muthana went out of her way to secure funding for a training course that the claimant wanted to attend, staying late and leaving her children home alone to do so;

b. Ms Muthana granted the claimant special leave in 2020 and pushed for him to receive full sick pay for the time that he was off sick in 2020;

c. Ms Muthana supported the claimant's application for promotion;

d. She also tried to get the claimant's performance evaluation improved;

e. Mr Peplow was instrumental in getting the claimant a 14% pay increase one year because the claimant had fallen behind his colleagues;

f. Mr Peplow offered the claimant a whole shift off on full pay in September 2020, when the claimant had only asked for half a shift off;

g. Mr Peplow gave the claimant a recognition award, despite the fact that the claimant had raised a grievance about Mr Peplow's behaviour towards him.

h. Ms Muthana, Mr Peplow and members of the respondent's HR team spent time preparing for and meeting with the claimant and

his trade union representatives (including the regional officer) in May 2020 to try and resolve the claimant's concerns and find a way forward. Mr Peplow prepared slides for that meeting to assist the claimant and his representatives to understand the respondent's concerns about the claimant's performance and what he needed to do to improve.

270. We were impressed by the tone and demeanour of Ms Muthana both during her evidence to the Tribunal and during the covert recordings made by the claimant. The claimant was a very challenging individual to manage and showed no respect whatsoever for Ms Muthana. We found Ms Muthana to be a very credible witness who was extremely patient and kind when dealing with the claimant. There was nothing whatsoever to suggest that Ms Muthana's behaviour towards the claimant was motivated in any way by prejudice or the claimant's nationality.

271. We were also impressed by the evidence of Mr Peplow. He came across during his evidence and during the covert recordings made by the claimant as a very reasonable and supportive manager, who genuinely wanted the claimant to succeed. He gave the claimant recognition, at a time when the claimant had raised a grievance about him, arranged for the claimant to have a 14% pay increase in 2016 in recognition of the fact that the claimant had fallen behind his peers, and communicated calmly and in a friendly manner with the claimant. There was nothing whatsoever to suggest that his behaviour towards the claimant was linked in any way to the claimant's nationality.

272. We have asked ourselves the following questions in relation to each of the allegations of direct race discrimination:

a. Was the claimant less favourably treated?
b. Than his actual or hypothetical comparators?
c. Was that treatment because of nationality?

<u>Allegations relating to pay on transfer from Hayes and in subsequent years</u>

273. We accept that the claimant was paid less than his comparators when he transferred from Hayes to Tutbury, and that in most subsequent years he received lower pay increases than them. We also accept that this amounted to less favourable treatment. We note however that in 2016 the claimant received more favourable treatment than his comparators when his pay was increased by 14%.

274. We find that Employees A,B,C and D were not in materially the same circumstances as the claimant and therefore they are not appropriate comparators. Employees A, B, C and D were not new to the role of Quality Assurance Technician in 2012, like the claimant was. They also received better performance ratings than the claimant, and it was the performance ratings that determined their pay rises.

275. We therefore also find that the reason the claimant was treated less favourably than Employees A, B, C and D was his performance, and not because of nationality.

Reward points in 2015

276. There was no evidence before us of who had received Reward points in 2015, and no evidence to suggest that any of the decisions made by Mr Peplow in relation to Reward points were made because of nationality.

Application for conformance manager role in 2016

277. There was no evidence before us upon which we could conclude that Mr Peplow ignored the claimant's application. We accept that the role was offered to someone else, and that this amounts to less favourable treatment of the claimant. We find, however that the reason the role was offered to someone else was because she was better qualified than the claimant who was a poor performer. The decision not to award the claimant the role was because of his performance and the fact that the successful candidate was a better performer. It was not because of nationality.

Incident with Andy Allcock in February 2018

278. We accept that there was a disagreement between the claimant and Mr Allcock in February 2018. There was no evidence before us however to suggest either that Mr Allcock would have treated a hypothetical comparator who was not of Polish nationality differently, or that Mr Allcock's treatment of the claimant on that occasion was because of nationality.

279. We do not accept the claimant's evidence that Ms Muthana 'did nothing' about the incident. Moreover, the manner in which Ms Muthana dealt with the claimant's complaint was in our view appropriate and not less favourable treatment because of nationality.

Alleged incidents on 4 September 2018

280. The claimant's allegations about the behaviour of Ms Muthana and Mr Peplow on 4th September 2018 were lacking in specification. He has not discharged the first stage of the burden of proof in relation to these allegations, and there is no evidence before us to suggest that the behaviour of Ms Muthana and Mr Peplow on this (or indeed any other occasion) was because of the claimant's race.

Disciplinary process in 2018

281. There was no evidence that the claimant was treated less favourably than colleagues, or that the disciplinary process was instigated or the claimant given an informal warning because of nationality. Others involved in the incident were also investigated and received the same informal warning as the claimant.

Allegations re alleged conduct of the respondent in 2019

282. The claimant's performance rating in 2019 was a direct result of his performance and his behaviour towards Ms Muthana and was not because of nationality. Jenny Oakhill is not an appropriate comparator in relation to this allegation as her performance and behaviour were not the same as the claimant's.

283. The claimant has failed to discharge the first stage of the burden of proof in relation to the allegation that Mr Heusler failed to support him when the claimant allegedly told him on 14 March 2019 that he was being intimidated. We find, on the balance of probabilities, that this incident did not occur.

284. The reason Mr Peplow did not investigate the claimant's complaints about Ms Muthana's behaviour further in September 2019 was because Mr Peplow was already in possession of the relevant information, and considered that an investigation was not necessary. This decision was not because of nationality.

285. Similarly, Ms Muthana's behaviour towards the claimant in October 2019 was not because of nationality. Rather it was a reaction to the claimant's very difficult behaviour towards Ms Muthana and a number of his colleagues.

286. Mr Heusler did not fail to investigate the claimant's concerns in December 2019. On the contrary, Mr Heusler carried out an investigation, interviewed a number of people and reported on his findings in an outcome letter to the claimant.

Allegations in 2020

287. We find, for the reasons set out in our findings of fact above, that Ms Muthana did not fail to follow up on the claimant's occupational health report in February 2020. In any event, there was no evidence to suggest that Ms Muthana's behaviour towards the claimant was because of nationality, and nothing that could cause us to draw an inference that it was because of nationality.

288. There was nothing in the conduct of the meeting on 6 May 2020 that could be said to be less favourable treatment of the claimant. Rather, a number of managers and trade union representatives invested their time and energy in trying to support the claimant to understand the concerns about his performance and help him to improve them. The very purpose of the meeting was to try and resolve the conflict between the claimant and his managers. The claimant did not mention any allegations of discrimination at this meeting, so the respondent can not be criticised for failing to deal with them.

289. We find, on balance, that the respondent did not fail to apply its absence management process and discretionary sick pay policy on 10 July 2020. Ms Muthana pushed for the claimant to be paid full pay and

he was eventually paid it, albeit not until December 2020. There was no evidence before us to suggest that the decision made on sick pay was because of nationality, and nothing to cause us to draw an infererence to that effect.

290. When Ms Wright telephoned the claimant on 8 September 2020 it was to offer him the opportunity to arrange a repayment plan, to avoid a 100% deduction in one month. The claimant refused to discuss a repayment plan and that was why the 100% deduction was made. This was not linked in any way to the claimant's nationality.

291. The allegation against Mr Goulding is vague and there is nothing in what the claimant has told us in relation to this allegation to suggest that Mr Goulding was motivated by nationality in his dealings with the claimant. The claimant has failed to discharge the first stage of the burden of proof in relation to this allegation.

292. It is accepted by the respondent that it did not give the claimant notice of a disciplinary hearing prior to 16 December 2020, although the claimant was, we find, offered the right to be accompanied at the meeting. The manner in which the process which led to the claimant's dismissal was carried out by the respondent was of concern to us and, for the reasons set out below, rendered his dismissal unfair.

293. We have considered very carefully whether the process that the respondent followed, and/or the decision to dismiss were linked in anyway to nationality. We have reminded ourselves that unreasonable conduct in itself does not lead automatically to a finding of discrimination, but may be evidence from which we can draw an adverse inference against the respondent.

294. In this case however we find that there was an alternative and non-discriminatory explanation for the respondent's conduct. The claimant had, by that time, become unmanageable. He had made vicious and unsubstantiated allegations against Ms Muthana and Mr Peplow and accused a large number of the respondent's employees of discrimination. He had reached the point where, every time the respondent did something that he did not like, he considered it to be a racist act. He refused to move on from incidents that had occurred years ago, or to see anyone else's perspective. He had caused a total breakdown in the relationship between himself and the respondent, and that was what caused the respondent to dismiss him.

295. His dismissal, and the process that led to his dismissal, were not in our view discriminatory.

296. We also find that John Rideout, Andy Allcock, Jenny Oakhill and Denise Holden were not appropriate comparators. None of them were in materially the same circumstances as the claimant.

297. For the above reasons, all of the claims for direct race discrimination fail and are dismissed.

Harassment

298. Many of the allegations that the claimant has pleaded as complaints of direct discrimination have also been argued, in the alternative, as complaints of harassment. In addition, the claimant argues that a number of additional acts amounted to unlawful harassment:

a. An alleged threat by Dean Peplow on 17 October 2014. We find that there was no threat by Mr Peplow on this occasion.

b. Alleged behaviour of Mr Peplow in a meeting on 23 October 2018. Again, we find that this did not happen, as we prefer Mr Peplow's evidence on this issue.

c. The decision of Mr Peplow not to go ahead with a requested mediation meeting in November 2019 was not a decision related to race. It was an entirely reasonable decision as the claimant had an outstanding grievance that was still being dealt with.

d. The allegations about Mr Peplow's behaviour on 8 January 2020 are vague and lacking in specification. Having listened to Mr Peplow give evidence, and speak to the claimant during the telephone conversation on 9 September which was covertly recorded, we do not believe that Mr Peplow would speak to the claimant in the manner alleged.

e. Mr Peplow did encourage the claimant to sign his disputed performance evaluation on 31 January 2020. He did this in the presence of a trade union representative and the reason he did so was because he wanted the claimant to receive a bonus, and knew that the respondent's policy was not to pay bonus to employees who didn't sign their performance evaluations. This behaviour does not fall within section 26(1)(b) of the Equality Act and was not linked to nationality.

f. Mr Peplow did not tell the claimant on 9 September 2020 that he would only support him if he agreed to an urgent mental state assessment. Mr Peplow behaved with integrity and respect towards the claimant during that telephone call, and was merely trying to support the claimant. His behaviour was not related in any way to nationality.

299. We accept that many of the complaints of harassment refer to conduct on the part of the respondent that was unwanted by the claimant.

300. We also accept that the claimant genuinely felt upset by the way in which he was treated by the respondent, but we do not find that the conduct of the respondent was designed to violate the claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The actions of the respondent

were the actions of a reasonable employer faced with an underperforming and intransigent employee.

301. We also find that, taking into account the circumstances of the case, as well as the claimant's perception, it was not reasonable for the conduct that the claimant complains about to be considered to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment. The claimant interpreted reasonable management actions in an unreasonable way.

302. For the reasons that we have set out above, we also find that the behaviour of the respondent was not related to nationality in any way. The respondent has provided alternative and genuine business reasons for treating the claimant in the way that it did – those reasons being related primarily to the claimant's performance and behaviour.

303. The claim for harassment therefore fails and is dismissed.

Time limits

304. As we have not upheld any of the allegations of discrimination it has not been necessary for us to make any findings in relation to time limits. However, had we had to do so we would have found that it was not just and equitable to extend time in relation to any incidents that were prima facie out of time because:

a. The claimant has been aware of the Equality Act and the three month time limit since at least 2014;
b. The claimant has received advice from his trade union (including in relation to time limits) since at least 2014; and
c. The claimant did not give any compelling reason as to why he had not issued proceedings earlier.

Victimisation

305. The claimant relied upon four protected acts:

a. Raising a grievance referring to the Equality Act on 20 August 2014 ("**the First Protected Act**")

b. Challenging his pay increase on 3 April 2016 ("**the Second Protected Act**")

c. Raising a grievance in May 2019 ("**the Third Protected Act**")

d. Bringing proceedings in the Employment Tribunal under case number 2601914/2020 in June 2020 ("**the Fourth Protected Act**").

306. We find that the First Protected Act, a letter to Mr Burton dated 20 August 2014 [p.337] does amount to a protected act within section 27 of the Equality Act, as it contains a complaint of discrimination.

307. There was no evidence before us of the claimant having challenged his pay increase on 3 April 2016. There was an exchange of emails between November 2016 and February 2017 relating to the claimant's pay increase in 2016 [pp.350-356] but these did not contain any complaint of discrimination or anything else falling within section 27 of the Equality Act. We therefore find the Second Protected Act relied upon by the claimant does not amount to a protected act within section 27.

308. Similarly, there was no evidence before us of the claimant having raised a grievance in May 2019. The claimant did send emails in May 2019 requesting a mediation meeting to clarify his concerns [pp.461-2] but these did not contain any complaint of discrimination or anything else falling within section 27 of the Equality Act. Similarly, in September 2019 he wrote to Mr Peplow asking for help in resolving an issue he had [pp.495-6] but again there was no mention of discrimination. We therefore find that the Third Protected Act relied upon by the claimant does not amount to a protected act within section 27.

309. Clearly the Fourth Protected Act, the issuing of the First Claim, falls within section 27. There are, therefore two protected acts that the claimant can rely upon: the First Protected Act in August 2014 and the Fourth Protected Act in June 2020.

Allegations of victimisation relying on the First Protected Act

310. The claimant alleges that the respondent subjected him to four detriments because of the First Protected Act:

a. Not awarding him a pay increase in April 2014. This allegation relates to events that took place before the First Protected Act. It cannot therefore be said that the reason for the decision not to award the claimant a pay rise in April 2014 was the First Protected Act, which did not occur until August 2014. In any event, the reason the claimant was not awarded a pay rise in April 2014 was his performance.

b. Dean Peplow allegedly threatening the claimant on 17th October 2014. We have made a finding of fact that Mr Peplow did not threaten the claimant on 17th October 2014. Accordingly this complaint must fail.

c. Not awarding the claimant a pay increase in April 2015. The reason the claimant was not awarded a pay increase in April 2015 was because of his performance and was not because the claimant had done a protected act.

d. Dean Peplow allegedly ignoring the claimant's application for the role of conformance manager. As set out above, we find that Mr Peplow did not ignore the claimant's application. The reason the claimant was unsuccessful in his application was

because of his performance and the fact that there was a better qualified candidate.

Other allegations of victimisation

311. The claimant has also complained that a number of the allegations of direct discrimination and harassment, as set out above, are also argued in the alternative as complaints of victimisation.

312. The respondent has provided a reasonable and non-discriminatory explanation for all of the conduct complained of by the claimant, and there is no evidence to suggest that the respondent's conduct towards the claimant was because of either the First Protected Act or the Fourth Protected Act.

313. The claim for victimisation therefore fails and is dismissed.

Unfair dismissal

314. The claimant was dismissed due to a total breakdown in the relationship between the claimant and the respondent. We accept the evidence of Mr Favrin, who we found to be a credible and thoughtful witness, and who came to the matter relatively fresh, having only recently started working at the Tutbury factory. Through his behaviour the claimant had made the working relationship untenable. The respondent had taken considerable steps to try and repair the relationship, through the meetings in 2019 and in May 2020, but the claimant refused to build bridges or to put the past behind him. Instead, he maintained the position that he was right, and refused to compromise. This left the respondent in an invidious position. It had to take account not just of the claimant's position, but also that of his managers who the claimant had accused of being a two faced snake and a sociopath bully.

315. In the circumstances, we find that there had been a fundamental and irretrievable breakdown in working relationships and in trust and confidence. We find that the claimant was dismissed for some other substantial reason, and that the respondent has proved a fair reason for dismissal.

316. We have then gone on to consider whether the dismissal was fair within section 98(4) of the Employment Rights Act. We note that the ACAS Code of Practice on Discipline and Grievance does not apply to dismissals for some other substantial reason, but that does not absolve the respondent of any responsibility for following a fair procedure.

317. There was, in our view, no good reason why the respondent could not have told the claimant that it was considering dismissing him, so that he could prepare for and make representations on the subject at the meeting on 16 December. There was no reason for the respondent to believe that the claimant would not attend a meeting.

318. The claimant was given no notice of the purpose of the meeting on 16 December, nor any warning that the respondent was considering dismissing him. As a result, he was totally taken by surprise on the day.

319. The size and administrative resources of the respondent are considerable. The respondent is a large international employer with a dedicated HR department. There was no good reason why the claimant could not have been told the true reason of the meeting so that he could prepare.

320. There was no investigation conducted by the respondent prior to the decision to dismiss, and the decision was taken without the claimant having any input to it.

321. For these reasons we find that the dismissal of the claimant was unfair on procedural grounds.

322. We also find however that there was a 100% chance that the claimant would have been dismissed had a fair procedure been followed. The claimant was unrepenting in his views about Ms Muthana and Mr Peplow, and about the way in which he perceived he had been treated. He maintained those views in the Tribunal hearing and would not, in our view, have departed from them at a formal dismissal meeting.

323. We also find that the claimant's conduct, in making the accusations that he did about his managers and others in the respondent's organisation, and his behaviour towards Mr Peplow and Ms Muthana over a lengthy period of time was culpable and blameworthy. He showed a total lack of appreciation and recognition for all of the steps that were taken to support him.

324. This behaviour directly caused the respondent to dismiss him. We therefore make a 100% finding of contributory conduct.

325. The claimant was unfairly dismissed but is not entitled to either a basic or a compensatory award.

22 December 2021

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Employment Judge Ayre