Case Numbers: 2206071/2019
2200216/2020

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Z		**(1) Commerzbank AG** **(2) Mr L Vogelmann** **(3) Ms H Jackson** **(4) Mr G Booth** **(5) Ms Y Mehta** **(6) Q**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 19-27 October 2019; 28 October, 23 December 2019 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Ms C Ihnatowicz**
Mr D Clay

On hearing Ms S Chan, counsel, on behalf of the Claimant and Ms C McCann, counsel, on behalf of the Respondents, the Tribunal unanimously determines and orders that:

(1) The Claimant's complaints under the Equality Act 2010 are not well-founded.
(2) The Claimant's claim under the Working Time Regulations 1998 for compensation in respect of annual leave entitlement said to have been outstanding on termination of his employment is not well-founded.
(3) Accordingly, the proceedings as a whole are dismissed.
(4) Any application consequential upon this judgment relating to any restricted reporting order and/or anonymity order made in the proceedings shall be presented within the period of six weeks commencing on the day on which this judgment is sent to the parties.

REASONS

Introduction

1 The First Respondent ('the Bank') is a major international bank with headquarters in Germany which trade in, *inter alia*, investment banking. It has a substantial City of London presence, located in Gresham St ('the London office').

2 The Second Respondent, Mr Lars Vogelmann, was at all material times employed by the Bank at the London office as Head of Operations, Client LifeCycle Management ('CLM'), a Director-level position.

3 The Third Respondent, Ms Hope Jackson, was at all material times engaged by the Bank at the London office in a contractor capacity as HR Business Partner.

4 The Fourth Respondent, Mr Gary Booth, was at all material times employed by the Bank at the London office as Vice-president, Senior Specialist Projects.

5 The Fifth Respondent, Ms Yogita Mehta, was at all material times employed by the Bank at the London office as COS Workflow Co-ordinator, a Vice-president-level role.

6 The Sixth Respondent, Q, was at all material times employed by the Bank at the London office as a Senior 'Know Your Client' ('KYC') Reviewer, a Vice-president-level role.

7 The Claimant, who was born on 18 August 1977, is a black British man of Nigerian descent. He was continuously employed by the Bank as a KYC Analyst at the London office from 1 May to 21 November 2019, when his employment was terminated summarily, with payment in lieu of notice.

8 By his claim forms presented on 31 December 2019 and 21 January 2020 the Claimant brought numerous claims under a variety of jurisdictions[1]. A lengthy, painful and disproportionately costly case management history followed, which we prefer not to attempt to summarise. Suffice it to say that some claims were added by amendment and many were withdrawn. The result was that what remained were complaints under the Equality Act 2010 ('the 2010 Act') of sexual harassment, harassment related to sex, direct sex and race discrimination and victimisation and, under the Working Time Regulations 1998 ('the 1998 Regulations'), a claim for compensation in respect of annual leave entitlement alleged to have been outstanding on termination. All claims were resisted.

9 In the course of case management restricted reporting and anonymity orders were made. The Claimant secured an anonymity order under the Employment Tribunals Rules of Procedure 2013, r50, read with the Sexual Offences (Amendment) Act 1992, based on his assertion that he was the victim of

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[1] Initially, seven Respondents were named: the claim against the Seventh Respondent, Mr Artur Kowalik, a KYC Reviewer, was withdrawn at the last case management hearing.

a sexual assault by Q. We note that this protection is stated to be life-long and appears to apply regardless of the findings which the Tribunal makes on his allegations. Q's protection (she is anonymised under r50 only) applies only until promulgation of our judgment, subject to any application for its extension.

10 Ultimately, the scope of the dispute was agreed between the parties in the form of a list of issues (abbreviated to 'LOI' below), which is annexed.

11 The case came before us on 19 October 2021 for final hearing, with eight days allowed (the matter had been listed for 10 days commencing on 15 October but a shortage of judicial resources had made a start before 19 October impossible). Ms Susan Chan, counsel, appeared for the Claimant and Ms Claire McCann, counsel, for the Respondents. We are grateful to both for their helpful contributions.

12 Having read into the case on day one, we heard evidence and argument on liability over days two to seven and then reserved judgment. Our private deliberations occupied day eight and a further day in chambers, on 23 December 2021.

The Legal Framework

The 2010 Act

13 Direct discrimination is defined by the 2010 Act, s13 in (so far as material) these terms:

> **(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.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

14 In *Nagarajan* v *London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu v Akwiwu* [2014] EWCA Civ 279, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the earlier legislation) effected no material change to the law.

15 The 2010 Act defines harassment in s26, the material subsections being the following:

> **(1) A person (A) harasses another (B) if –**

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

(2) A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if –

(a) A … engages in unwanted conduct of a sexual nature …,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourable than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in sub-section (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.

16 In *R (Equal Opportunities Commission) v Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the 'related to' wording in the legislation then in force (the Sex Discrimination Act 1975) was satisfied if an 'associative' connection was shown between the relevant protected characteristic and the conduct under consideration. Burton J, sitting in the High Court, did not question the concession. The EHRC Code of Practice on Employment (2011) deals with the 'related to' link at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic.[2]

17 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are set by the other elements of the statutory definition. Two points in particular can be made. First, the conduct must be shown to have been unwanted. Some claims will fail on the Tribunal's finding that the claimant was a willing participant in the activity complained of or at least indifferent to it.

18 Secondly, the requirement under subsection (4) for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect dictates an objective approach – albeit one which takes account of a subjective factor, the perception of the complainant. Here the Tribunal is equipped with the means of weighing all relevant considerations to achieve a just solution.

[2] To similar effect, see *Hartley v Foreign & Commonwealth Office Services* UKEAT/0033/15 (HH Judge Richardson and members), paras 23-24.

19 Central to the objective test is the question of gravity. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry v Grant* [2011] ICR 1390 CA (para 47):

> **Furthermore, even if in fact the [conduct] was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' … is a distortion of language which brings discrimination law into disrepute.**

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

20 By the 2010 Act, s27 victimisation is defined thus:

> **(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 –**
> **…**
> **(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) … making a false allegation … is not a protected act if … the allegation is made … in bad faith.**

21 When considering whether a claimant has been subjected to particular treatment 'because' he has done a protected act, the Tribunal must focus on "the real reason, the core reason" for the treatment; a 'but for' causal test is not appropriate: *Chief Constable of West Yorkshire v Khan* [2001] ICR 1065 HL, para 77 (*per* Lord Scott of Foscote). On the other hand, the fact of the protected act need not be the sole reason: it is enough if it contributed materially to the outcome (see *Nagarajan*, cited above).

22 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(c) by dismissing B;**

(d) by subjecting B to any other detriment.

23 A ‘detriment’ arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL.

24 Employees are protected against victimisation and harassment by the 2010 Act, ss39(4) and 40(1) respectively.

25 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

26 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation[3], including *Igen Ltd v Wong* [2005] IRLR 258 CA, *Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing v Manchester City Council* [2006] IRLR 748 EAT, *Madarassy v Nomura International plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned that it is possible to exaggerate the importance of the burden of proof provisions, observing (judgment, para 32) that they have “nothing to offer” where the Tribunal is in a position to make positive findings on the evidence.[4] But if and in so far as it is necessary to have recourse to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer’s explanation relied upon at the hearing, must be considered.

27 The 2010 Act, s123(1) enacts a jurisdictional limitation period for the presentation of claims in the employment sphere of three months starting with the date of the act or event complained of. The effect of the early conciliation provisions enacted more recently is to extend the period by the time taken up with conciliation. By s123(3)(a) ‘conduct extending over a period’ is to be treated as done at the end of the period. The Tribunal has a discretion under s123(1)(b) to substitute for the three-month period such other period as it thinks just and equitable.

[3] The language of s136 was new but did not change the effect of the burden of proof provisions.
[4] See to like effect the judgment of Lord Leggatt JSC in *Efobi v Royal Mail Group Ltd* [2021] ICR 1263 SC, especially at para 38.

The 1998 Regulations

28 The effect of reg 14 of the 1998 Regulations is to entitle a worker whose employment ends part-way through a leave year to compensation where the leave entitlement accrued up to termination is greater than the leave taken up to that date. Nothing turns here on the wording of the provision: the parties are divided only on the relevant facts.

Oral Evidence and Documents

29 We heard oral evidence from the Claimant and read the supporting statement in the name of his wife. On the Respondents' side, we heard from Q, Ms Mehta, Mr Booth, Mr Vogelmann and Ms Jackson.

30 Besides the testimony of witnesses we read the documents to which we were referred in the agreed bundle of documents, which ran to over 1,400 pages, and the supplemental bundle produced by the Claimant, which contained over 170 pages.

31 We also had the benefit of two chronologies, two cast lists and the written closing submissions of both counsel.

The Primary Facts

32 The evidence was extensive. We have had regard to all of it. Some of it could not possibly assist us to decide the claims before us. We have reminded ourselves that it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts which it is necessary to record, either agreed or proved on a balance of probabilities, we find as follows.

Background

33 As is well-known, the financial services sector, in which the Bank operates in tightly regulated. Its statutory regulator is the Financial Conduct Authority.

34 The Bank's CLM Department had, at the relevant time, a headcount of 83, a little under 10% of the Bank's total London staff. It was led by Mr Vogelmann. His deputy was Mr Booth.

35 A core responsibility of the CLM Department was to conduct 'Know Your Client' ('KYC') checks. These formed a key part of the Bank's anti-money-laundering processes.

36 The Claimant was employed as a KYC Analyst. His primary function was to carry out KYC checks. Analysts' checks were subject in every case to scrutiny and review by KYC Reviewers. Their work was also liable to be reviewed separately in the course of quality assurance and/or compliance checks and/or as part of internal and/or external audits. Accordingly, it was of fundamental importance that KYC Analysts should be able and willing to accept and learn from constructive feedback.

37 Having conducted the relevant KYC checks, Analysts would present their cases for review. Reviewers (allocated by the responsible team leader) would score the work, awarding outcomes according to set criteria and adding bespoke additional feedback as appropriate. Scores were expressed as percentages, which translated into results. The desired result was a 'Pass'. On the negative side, the Reviewer's options included 'Fail', 'Risk Fail', 'Procedure Fail' and 'Admin Error' (the last two being much less serious than the first two).

38 The temporal context of this case is of some importance. The Claimant's employment fell within a period of acute pressure for the Bank as it was in what was, perhaps euphemistically, referred to as a 'remediation' process following critical scrutiny by the regulator.

39 We heard unchallenged evidence, which we accept, concerning the diversity of the Bank's workforce. Ms Mehta told us that the CLM Department in London included 12 nationalities and 19 ethnicities.

40 Ms Mehta was involved in, and supportive of, the Claimant's appointment.

41 Newly recruited Analysts were required to pass what was known as an accreditation process, which depended on their work achieving an average score of 90%. The Claimant was denied accreditation at the first attempt and his challenge to that decision was considered and rejected by Ms Mehta. He was one of four Analysts recruited at about the same time who were initially unsuccessful and, of those four, the highest-scoring. He passed his accreditation at the second attempt in late August 2019, thanks to a score of 90% awarded by Ms Lola Ogunfowora, a woman of Nigerian origin then working on an agency basis as a Reviewer (see further below).

42 The Claimant's employment was subject to a six-month probationary period. On 1 November 2019 he was told that he had passed his probation.

43 The Claimant alleged that on one occasion Mr Vogelmann, who is German, made a racial comment about Germans. What was put to Mr Vogelmann, and he accepted, was the he once remarked in the office that the (London) business would benefit from having more German speakers. There were at the time only two in the CLM Department.

44 At one stage the Claimant's pleaded case included complaints of sex-based harassment based on remarks by Ms Ogunfowora to the effect that: (a) Women were "taking over the world"; (b) She would not be subservient to any man and would challenge any man who treated her as inferior; and (c) It was the Claimant's choice to get married just as it was his choice to work for the First Respondents. At a case management hearing EJ Brown expressed the view that such comments (if proved) seemed to be about the empowerment of women and that harassment claims based on them had little reasonable prospect of success. Accordingly, she made deposit orders in relation to each. The deposits were not paid and the claims were automatically struck out.

Sexual harassment by Q (LOI, paras 1-3)

45 We are satisfied that the Claimant's case under this head is simply false. We accept the evidence of Q that she once commented to him in the office that she could see his vest through his shirt and that it was an interesting look (or words to that effect). She told us that the shirt was very thin and the vest seemed to be of a material resembling fishnet tights. The remark was not made in a suggestive manner. Nor did it come across as a criticism. Nor did it cause any apparent offence to the Claimant or elicit a negative reaction from him. Nor was it repeated. And it was entirely in keeping with the friendly, good-natured, casual exchanges (not infrequently on the subject of dress and fashion) which were commonplace between the two.

46 We greatly regret to say that in our judgment the balance of the Claimant's case on sexual harassment, which included an exceedingly serious allegation of sexual assault, is, in its entirety, pure invention. The acts and events on which he relies did not happen. There was no treatment of him by Q which could conceivably have been seen as amounting to harassment of any kind.

Harassment by Q (s26(3)) (LOI, para 9c)

47 This claim alleged 'less favourable treatment' because the Claimant rejected the alleged sexual harassment of him by Q. Since there was, on our finding, no such harassment and no such rejection, it would be sufficient to leave the matter there. But for completeness we will add some brief further findings.

48 The pleaded treatment was the act of marking the Claimant down as a 'Risk Fail'. Q did indeed, on reviewing the case of 'Client B', an investment fund manager, which the Claimant had handled as Analyst, note a 'Risk Fail'. She also recorded some 'Procedure Fails' and 'Admin Errors'. In her feedback sent to him on 24 October 2019 she explained that the 'Risk Fail' was because an 'AML (anti-money laundering) letter' had not been obtained. The Respondents' written policy in force at the time stated that an AML questionnaire or letter was required as part of the information to be collected on any investment fund manager. The Claimant immediately queried the feedback, drawing attention to very recent advice from an authoritative source given to another Analyst explaining that an AML letter could be dispensed with in a case where the only financial products were exchange traded funds ('ETFs'). The advice went on to say that in such a case the Analyst needed to note in the Relationship Profile Summary ('RPS'), a due diligence document which the Reviewer would scrutinise, the reason why the AML letter was not required.

49 The same day, conscious that Client B dealt in ETFs and noting the recent advice from a reliable source, Q sent an email to the Claimant agreeing that the AML letter could be dispensed with but asking him to note on the RPS the reason why. As she explained to us, and we accept, she could not approve the case until this step was taken. Unfortunately, five days passed before the Claimant complied with her simple request, whereupon she duly approved the case. She also updated the Assessment Spreadsheet to show the outcome, namely a 'Pass'.

50 Although it did not feature in his pleaded case or the LOI, the Claimant's complaint as developed before us seemed to shift to new ground, focusing on the Q's alleged failure to remove the 'Risk Fail' from the Reviewer Checklist document. Since the point was explored in evidence, we add the following findings for what they are worth. On 14 November 2019 the Claimant sent an email to Q asking her to remove the 'Risk Fail' from the Checklist document. She was, as he knew, leaving the Respondents the following day. She replied promptly, pointing out, rightly, that the Reviewer Checklist would not be taken into account in assessing his work because the Assessment Spreadsheet (showing the 'Pass') contained the definitive record of all completed cases. There were then some further exchanges, in which Ms Mehta was involved. It seems that, while the Reviewer Checklist could not have been amended retrospectively, it would have been technically possible for a second, revised Reviewer Checklist to be prepared. That could then have been uploaded to the system by means of a particular software programme. These steps were not taken. Q did not have access to that programme and had never had cause to use it. She was also very busy clearing her desk and arranging to hand over her work to her successor. We find as a fact that the paperwork in relation to Client B, in its final form, contained no conceivable risk of causing prejudice of any kind to the Claimant.

Direct sex discrimination by Ms Mehta (LOI, paras 4-5)

51 The Claimant makes two claims under this head: first, that Ms Mehta allocated the Claimant's files to Ms Ogunfowora after promising him that she would not do so; second, that she failed to investigate a grievance raised by him against Ms Ogunfowora. We will deal with them in turn.

52 The first complaint is based on an assertion which is not made out on the evidence. We are satisfied that Ms Mehta did not make the promise on which the Claimant relies. We find that, on a date which we are not able to identify with precision, he did ask her to assign his cases to Reviewers other than Ms Ogunfowora and she replied that she would do her best to oblige him. But, as the responsible manager, she could not, and did not, guarantee that his wish would be honoured since allocations would necessarily depend on the volume of work and availability of Reviewers, which fluctuated from time to time. We think it much more likely than not that the conversation happened in the fourth quarter, or at least well into the third quarter, of 2019. Ms Ogunfowora reviewed three cases analysed by the Claimant and passed them all. The last was assigned to her in early November 2019. It was the Claimant who sent it to her for review, in circumstances of some urgency. This may have been before or after his conversation with Ms Mehta to which we have just referred.

53 For the purposes of the first complaint, the Claimant compares himself with a female colleague, Divya Bhaskaran. The comparison fails because we accept Ms Mehta's evidence that, contrary to the Claimant's assertion, she was never asked by Ms Bhaskaran not to assign her cases to a particular Reviewer, Mr Osa Osagie. For what it is worth, we also accept the Respondents' evidence that none of Ms Bhaskaran's cases was ever assigned to Mr Osagie.

54 As to the second complaint, we find as a fact that no formal grievance was raised. The Claimant did express concern about Ms Ogunfowora's treatment of him and others in an email sent on the afternoon of 20 November 2019, the day before his dismissal. That was his first written expression of concern about her. In that message he made no allegation of discrimination. Nor did he say that he wished his remarks to be treated as a formal grievance. He asked only to be advised as to what steps had been taken to prevent recurrence of the treatment complained of.

Harassment related to sex by Ms Ogunfowora (LOI, paras 9a and 9b)

55 On 14 November 2019 a conversation took place at the Claimant's desk involving the Claimant, Ms Mehta and Ms Ogunfowora. The context was that Ms Ogunfowora had given the Claimant some feedback concerning a piece of work he had done on the case of Client F and asked him re-do it and he was refusing to do so, seemingly because he did not accept the feedback. Ms Mehta was present because she was anxious to see the problem solved and the task duly completed. Ms Ogunfowora stated that the Claimant was not following her feedback. She exhibited a degree of frustration but was not hostile or impolite. The Claimant's allegation (made for the first time in particulars filed on 15 June 2020) that she "yelled" at him and referred to him as "this boy" is, we find, false.

56 A further uncomfortable conversation occurred between the Claimant, Ms Mehta and Ms Ogunfowora on 18 November 2019, also at the Claimant's desk. Again, Ms Ogunfowora sought to explain a work-related matter to the Claimant, to which he was resistant. At one point Ms Ogunfowora used his mouse in order to demonstrate something on his monitor. The Claimant became bad-tempered and told Ms Mehta that he did not want "this girl" (he was referring to Ms Ogunfowora) to mark his cases. He used the words "this girl" at least twice. Ms Ogunfowora raised a formal complaint the following day, referring in particular to his having called her "this girl" and more generally to his repeated rejection of her feedback. The Claimant's allegation (also made for the first time in particulars filed on 15 June 2020) that she treated him in a demeaning way and called him "this boy" is also, we find, false.

Direct race discrimination excluding dismissal (LOI, para 8)

57 The only complaint under this head was that based on the alleged failure to investigate the Claimant's grievance against Mr Artur Kowalik. By the end of the hearing before us, the Claimant's case was that he had sent a written formulation of that grievance (which he called a 'report') to Mr Booth by email very soon after 16:54 hrs on 20 November 2019, the day before his dismissal. We find as a fact that no such email was sent and no such 'report' was delivered.

Direct sex and race discrimination, victimisation: dismissal (LOI, paras 6, 7, 11, 12)

58 The narrative which follows seeks to summarise the dismissal and the main events which led up to it. It includes some duplication of findings already made under other headings.

59 We have mentioned that the Claimant did not pass his accreditation at the first attempt. He complained about that to Ms Mehta and they met to discuss the matter on 7 August 2019 but she did not accept his criticisms and the Reviewers' marks were unchanged. He also pursued complaints of religion or belief discrimination in these proceedings against the two Muslim Reviewers who had awarded those marks, but those claims were struck out at an interlocutory stage.

60 The challenge to the accreditation outcome was part of a pattern of behaviour that the Claimant exhibited throughout his employment at the Bank. He appeared constitutionally resistant to constructive criticism and feedback and reacted to it in an increasingly direct and confrontational way as time passed.

61 On 4 November 2019, the Claimant had a brief discussion with Ms Mehta as to whether a particular case (that of Client E) could count as an 'approval' for the purposes of his monthly target. She explained, for reasons which he appeared to accept at the time, that it could not. He then complained that she did not appreciate his hard work, to which she replied that she did and that she valued his commitment. She went on to say that he was "lucky" to have passed his probation. He immediately questioned the remark, and she apologised and explained that she meant only that he was in a happier situation than others who were yet to pass their probation. He appeared to accept the explanation and she left the conversation thinking that everything had been resolved.

62 Ms Mehta accepted before us that her use of the word "lucky" had been unfortunate.

63 The Claimant was on sick leave on 5 and 6 November 2019. Asked by Ms Mehta what was wrong he stated (by a text of 6 November) that he had food poisoning and back pain but his main problem was "low mood" and feeling "worthless" as a result of her remark about him being "lucky" to have passed his probation.

64 Following some consecutive days of pre-booked annual leave, the Claimant returned to work on 12 November.

65 On the same day at 09.30 Ms Mehta and the Claimant had a scheduled 'catch-up' meeting. She gave notice that the Reviewer of Case E (discussed on 4 November) would be present. He objected but the Reviewer attended and the meeting was uneventful.

66 Later on 12 November Mr Kowalik showed Ms Mehta an email sent to him by the Claimant at 09.29 that day. The email concerned the relationship between the Claimant and Mr Kowalik and in particular an incident which had happened on 11 October 2019, more than a month before. This was the first Ms Mehta knew of any difficulty between the two. Mr Kowalik explained that he had spoken to the Claimant on 11 October and told him that he did not appreciate his jokes and felt bullied by him. He added that he had made a warning remark to the effect that he would (or might) "crush" him but had apologised and the episode had ended with the two shaking hands and agreeing to move on.

67 A little later on 12 November 2019 Ms Mehta had an unscheduled meeting with the Claimant ('the first unscheduled meeting'). Mr Kowalik was present initially but left, it seems, at an early stage. The Claimant covertly recorded the meeting, without the permission of the other participants. Ms Mehta raised the matter of Mr Kowalik. He asserted that he felt threatened by the "crush" remark. He said something obscure about a previous employer and a suggested link between the earlier employment and his difficulty with Mr Kowalik. He did not claim to have raised an allegation of discrimination against his previous employer or imply that he had done so. He said that he intended to take his concern about Mr Kowalik to HR.

68 A further meeting ('the second unscheduled meeting') took place between Ms Mehta and the Claimant on 12 November 2019. Again, the Claimant recorded it covertly and without permission. The Claimant wanted to know about the grievance procedure and Ms Mehta reminded him that it was contained in the staff handbook which had been provided to him with his contract. Again, the Claimant made an opaque reference to his previous employer. It emerged that he had not known Mr Kowalik when with that employer. Ms Mehta attempted to explore the background history but, beyond stating that he had left his previous employer of his own accord, the Claimant declined to provide any more information. Ms Mehta said that she intended to involve Mr Booth. Again, the Claimant did not say or imply that he had raised an allegation of discrimination against his previous employer.

69 More generally, and for the avoidance of doubt, we accept Ms Mehta's evidence that she was not aware of the Claimant having made an allegation of discrimination against his previous employer (if he did) until after these proceedings were instituted.

70 The Claimant asserted before us that there was a third unscheduled meeting between him and Ms Mehta, which he had not recorded, in which he had told her that he had raised an allegation of race discrimination against his previous employer. We reject that assertion as false. There was no such meeting and no such conversation.

71 On 13 November 2019 Mr Booth and Ms Mehta held a meeting with Mr Kowalik. Mr Kowalik explained that he had felt bullied by the Claimant and that he had responded inappropriately (a reference to the "crush" remark). He was asked to set out a brief history in writing, which he did the same day. In it he gave examples of the Claimant's jocular remarks and personal comments to which he took exception, described the confrontation (on 11 October) and its apparent resolution with a shaking of hands and said that there had been no communication since apart from one occasion when the Claimant had challenged his feedback on a particular case in a "rude and aggressive" way.

72 The same day, Mr Booth and Ms Mehta had a meeting with the Claimant. Again, the Claimant recorded the meeting covertly and without permission. The Claimant stressed the "crush" comment (he said that the word had been used three times) and complained that the apparent resolution (on 11 October) had been extracted from him by some form of duress. He seemed to deny making offensive or personal comments to Mr Kowalik. More generally, he expressed the

wish to transfer to another team. Mr Booth remarked that in his view Mr Kowalik could have conducted himself “much, much better” but also reminded the Claimant of the need to interact with colleagues in a careful and considerate way. He did not rule out a transfer but stressed that his priority was to resolve the difficulty without one. It was agreed that the Claimant would, like Mr Kowalik, set out his account in writing.

73 Later on 13 November 2019 a meeting was held between Mr Booth, Ms Mehta, Mr Kowalik and the Claimant. Mr Booth said that he expected Mr Kowalik and the Claimant to treat each other in a professional way and respect each other’s boundaries.

74 On 14 November 2019 the Claimant sent an email to Mr Booth asking for time to prepare his written account discussed the previous day. Mr Booth agreed and added that the contributions on both sides would not be shared directly.

75 On 18 November 2018 a meeting took place between the Claimant, Mr Vogelmann, Mr Booth and Ms Mehta. The Claimant again covertly recorded without asking for the permission of the other participants. Very late in the Tribunal proceedings, he produced a partial recording of less than three minutes’ duration. He told us that the recording had been accidentally halted by some physical contact with the touch screen (the mobile phone having been in his pocket). He also told us that the timing of the disclosure of the (partial) recording was attributable to (a) his initial view that the evidence was “irrelevant” and (b) his recent discovery that he was under an ongoing duty of disclosure, even where the deadline for exchange of documents had passed. He rejected Ms McCann’s suggestion that he had suppressed part of the recording because it contained material which was unhelpful to his case.

76 At the start of the meeting the Claimant asked for Ms Mehta to leave. She did so. In the discussion that followed (in which the Claimant returned to the subject of his alleged sense of grievance over her comment about him being “lucky” to have passed his probation) Mr Vogelmann said that, in light of his request of 13 November, he could move to the Financial Institutions (‘FI’) team. The Claimant accepted the proposal with some enthusiasm. Mr Vogelmann emphasised that the FI team worked under a lot of pressure and that the move was conditional upon him improving his behaviour and getting his head down. He did not beg him not to pursue a grievance against Mr Kowalik but conveyed the hope and expectation that the move to another team would serve as an informal resolution enabling all concerned to draw a line under recent events and move on. The Claimant gave no sign of seeing matters differently. The meeting ended with handshakes and Mr Vogelmann and Mr Booth left believing that the problem was solved.

77 Later on 18 November 2019 the Claimant entered into the public spat with Ms Ogunfowora (his second bad-tempered exchange with her in four days, both of which were witnessed at close hand by Ms Mehta), rejecting her feedback and calling her “this girl”. Fuller findings on both episodes are recorded above.

78 A further development was the receipt by Ms Mehta on 18 November of an email from Mr Zoltan Batyi, Deputy Head of the International Desk, which strongly criticised the Claimant's analysis work on a particular case. In particular, Mr Batyi found fault with his failure to register and act upon feedback already given to him and his needless escalation of the case to a manager in Frankfurt (which required the personal intervention of Ms Mehta and another colleague in order to get the matter completed and approved).

79 On 19 November 2019 the Claimant spoke with Ms Mehta after the daily morning team meeting, informing her of his intention to "blow up" the incident of the day before with Ms Ogunfowora. We reject as false the Claimant's claims (LOI, para 11(e)) that he also told Ms Mehta that he was being discriminated against by Ms Ogunfowora on the ground of his sex, that he cited a number of alleged instances of her mistreatment of other male colleagues and that he said in terms that he intended to raise a formal grievance. It was not until well into Ms McCann's cross-examination that the Claimant stated for the first time that, covertly and without Ms Mehta's permission, he had recorded this conversation. We directed that it be disclosed. On the morning of day four he produced what he said was the recording. Some muffled, indistinct noises could be heard but nothing more. It contained no evidence as to when, or in whose presence, it was made. The Claimant said that the recording had failed because his mobile phone had been "on mute". He offered no explanation for his failure to give disclosure at the proper time.

80 Ms Ogunfowora sent an email to Ms Mehta on the morning of 19 November 2019 raising an "official formal complaint" about the Claimant. She asserted that he reacted defensively to her comments when reviewing his cases and only read her feedback "to respond, instead of reading to understand". This had resulted in a "series of altercations" and the "last straw" had been the incident on the previous day, when he had said (she quoted directly): "I don't want this girl to mark my cases, I don't want this girl touching my mouse, tell this girl not to talk to me." We find no evidential basis for the Claimant's suggestion that Ms Mehta solicited this complaint.

81 Later the same day Ms Mehta copied Ms Ogunfowora's formal complaint to Mr Vogelmann and Mr Booth for their information.

82 Also on the morning of 19 November Ms Mehta noted that the Claimant was talking to team members away from their work stations and distracting them from their duties.

83 The Claimant further claims (LOI, para 11(a) and (b) and (g)) that he had a meeting with Mr Booth on 19 November, in which he made allegations of discrimination and harassment by Q, Ms Ogunfowora and others and mentioned a grievance and claim against his previous employer. We are satisfied that those claims are false: there was no such meeting and no such conversation.

84 The Claimant left work at lunchtime on 19 November, saying that he was unwell.

85 The same day, Mr Vogelmann set up a meeting for the following day, 20 November, to consider the Claimant's conduct, to be attended by Mr Booth and Ms Jackson. Material summarising the Claimant's recent behaviour, collated by Ms Mehta, was circulated to the invitees. By this point, Mr Vogelmann was minded to dismiss him.

86 The meeting just referred to duly took place on the morning of 20 November. In the course of the discussion, Mr Vogelmann and Mr Booth took the decision to terminate the Claimant's employment. Their shared view[5] was that his performance was adequate but his attitude and behaviour were unacceptable. He was unable to accept feedback. He was disruptive and divisive. And on recent evidence his conduct was getting worse. It was agreed that the dismissal would be effected that day and Ms Jackson was asked to prepare an appropriate letter in draft.

87 On the afternoon of 20 November the Claimant sent an email to Ms Mehta raising again the incident of 18 November between him and Ms Ogunfowora. It complained that she had acted inappropriately but made no allegation of any breach of the 2010 Act.

88 Also on 20 November the Claimant sent an email to Mr Booth referring to the meeting of the day before and stating that he was happy to "go with" what had been agreed at the meeting of 18 November. He added that preparation of his written account of the episode with Mr Kowalik was still a "work in progress."

89 The Claimant claimed before us that, "soon after 16:54" on 20 November 2019, he sent an email to Mr Booth "detailing [his] interactions with Mr Kowalik". We are satisfied that he sent no such email then or at any other time.

90 In the event, the dismissal meeting took place on 21 November 2019, not 20 November as originally planned. It was held in the meeting room on the lower ground floor at about 4.00 p.m. Those present were the Claimant, Mr Vogelmann, Mr Booth and Ms Jackson. The Claimant was not told in advance what was to be discussed. The meeting was brief. Mr Vogelmann told the Claimant at once that he was being dismissed and asked Mr Booth to explain the reasons. He started to do so but the Claimant rapidly became argumentative and disruptive. He stopped Mr Booth from speaking and challenged the Respondents' legal right to dismiss him. He took out his mobile phone and demanded the email addresses of those present. He asked if the Respondents were recording the meeting and was told that they were not. He also claimed that he had presented a formal complaint to Mr Booth alleging discrimination and harassment (including sexual harassment) and that he had failed to deal with it. Mr Booth stated, rightly, that this assertion was untrue: no such complaint had been presented. Ms Jackson handed the letter of dismissal to the Claimant and said that he could collect his personal belongings before leaving. The meeting broke up very soon afterwards. Mr Vogelmann and Mr Booth followed him to his desk where, despite instructions to the contrary, he switched on his computer and sent at least one email to his personal email address. He became increasingly agitated and eventually it was necessary for

[5] The decision was jointly taken. Strictly, Mr Vogelmann alone had authority to dismiss.

security staff to be called. Having collected his personal effects he was then escorted from the building.

91 The Claimant covertly recorded the dismissal meeting without the permission of the other participants. The recording which he disclosed ended part-way through the meeting, before Mr Booth's challenge to his claim to have presented an unanswered complaint of discrimination and harassment. He told us in evidence that the recording mechanism had somehow been accidentally cut off.

92 The Claimant relied on an email on his personal email account which he sent to Mr Booth, copied to Mr Vogelmann, timed at 16:09 on 21 November, complaining (with no particulars whatever) of racial discrimination by Ms Mehta, sexual harassment by Q and "bullying and harassment" (no perpetrator was named). His evidence that this message was composed and sent just before the meeting cannot be reconciled with turnstile data produced by the Respondents that he was making his way back to his desk (*after* the meeting) by 16:11.

93 Having returned to his desk, the Claimant sent an email to Mr Booth from his mobile phone timed at 16:21 which read: "For mal (sic) complaint raise race discrimination".

94 We heard evidence and speculative submissions about the precise timing of the generation and delivery of the two emails just mentioned. There was some suggestion that a poor internet connection may have resulted in an unusual gap between the times when they were sent and received. We prefer not to speculate. It is sufficient to record that we are entirely satisfied that both emails were generated *after* the Claimant had been told at the meeting of 21 November that he was being dismissed.

The claim under the 1998 Regulations

95 The Claimant took five days' leave plus the three bank holidays which fell between 1 May and 21 November 2019. He gave oral evidence to the effect that the three days of annual leave on 7, 8 and 11 November were, by agreement, converted to sick leave. That evidence, we find, was false.

Secondary Findings and Conclusions

Rationale for primary findings

96 This has been an exceptionally troubling case to hear. A very large part of the Claimant's case has been met with the stark denial that the acts on which he bases his claims ever happened. On many other points, he is accused of distorting or exaggerating events to the extent that his account bears no real relation to reality. His complaints are, for the most part, of a kind which leaves no possible room for a finding that they may rest on an error or a misunderstanding. In the main, we are compelled to decide between completely irreconcilable accounts of events, one of which must be put forward by a witness (or more than one) who is knowingly and deliberately giving sworn evidence which is wholly untrue. The implications of this are not lost on us. On the Respondents' case, the Claimant has

simply made up allegations and has even manufactured a document and tampered with audio recordings in order to substantiate claims and secure legal remedies upon them. We agree with Ms Chan that the Tribunal must reflect with extreme care before making findings of such serious wrongdoing against anyone, and particularly someone who makes his living in financial services. Having done so anxiously and at length, we have reluctantly been driven to the conclusion that the Respondents are right. In our view, the Claimant has shown himself to be a witness contemptuous of his duty to tell the truth and unworthy of belief. Salient among our numerous reasons are the following.

97 In the first place, the Claimant's account of events was in numerous instances inherently implausible. One striking example was his claim in his oral evidence that, immediately after being subjected by Q to an act of sexual harassment, he stepped into a lift with her. His evidence that he was willing to share a lift with her (challenged in fact by Q, who told us that she never used the lift) severely undermined his own case on the allegation. Another implausible feature of his case related to the secret recordings. He showed himself most adept as using his mobile phone to record conversations but claimed that: (a) he had been unable to make any recording of the (disputed) meeting with Mr Booth on 19 November 2019, (b) the recording of the meeting with Mr Vogelmann and Mr Booth on 18 November had been curtailed by accidental contact with the touch screen, (c) the alleged recording of his conversation with Ms Mehta on 19 November had failed because the phone was "on mute" and (c) that the recording of the dismissal meeting on 21 November "stopped" of its own accord owing to some unexplained malfunction just before the point at which (as we have found) Mr Booth pointed out the falsity of the Claimant's claims to have raised prior complaints of discrimination and harassment. In our view, his evidence on these points was not credible. It was false and entirely tactical, being designed to improve his case mainly by explaining the absence of material which he knew to be harmful to it.

98 Second, we have had regard to the timing of the Claimant's allegations. (We are of course mindful that the fact that a complaint is not made at once may not call into question its veracity. There are often good reasons why workers may hesitate before raising concerns. But the evidence shows overwhelmingly that the Claimant was not one who was reluctant to complain. Quite the reverse.) Two examples will suffice. First and most strikingly, there is the fact that he did not complain about the alleged sexual harassment by Q, including an exceedingly serious criminal act, until 21 November 2019, after he had been dismissed. The pleaded explanation, that he did not want to cause "further upset" because Q had recently lost her mother and because he feared that reporting her conduct might result in retaliatory action on any future case reviewed by her, is not plausible. The latter point, which could not be reconciled with his fearless routine challenges to feedback by other Reviewers, was subsequently quietly dropped. The former was made even more implausible by later particulars in which he claimed that "in or about October 2019", after the sexual harassment and sexual assault, he was even willing to accept Q's invitations to join her for lunch because of his sympathy for her loss. Second, it is noteworthy that it was not until he filed further particulars of his case in June 2020 that the Claimant first alleged that Ms Ogunfowora had referred to him as "this boy" on 14 and 18 November 2019 and that he had responded (apparently on 18 November only) by referring to her as "this girl" to

draw attention to her prior use of inappropriate language towards him. Again, we consider that this was a late tactical adjustment designed to counter the inconvenient fact that she had raised an immediate, and truthful, complaint about his gratuitous and offensive reference to her as "this girl" and that her complaint would be substantiated by eye witnesses.

99 Third, we have considered the internal consistency of the Claimant's behaviour and evidence. Again, telling instances can be found in connection with the allegations against Q. In particular, there were many and considerable differences between the accounts of the various alleged events given in the Claimant's claim form, further particulars, witness statement and oral evidence. These inconsistencies extended to the dates on which they were supposed to have happened. To give one example, the date of the alleged sexual assault was variously given as "exactly two months ago" (in the post-dismissal email of 21 November 2019), 11 October, "the third week of October" and finally, 18 October.

100 Fourth, we have had regard to contextual facts which appear inconsistent with the Claimant's allegations. Among others, notable examples appeared to point to a relaxed, friendly work relationship between the Claimant and Q between the alleged sexual assault in October 2019 and her leaving less than a month later. So, for example, she quoted in unchallenged evidence the warm message which he had written in her leaving card. We also heard evidence about the fact, which the Claimant was not in a position to deny, that, on 15 November 2019 (less than a month after the alleged sexual assault by Q), he invited himself out to lunch with her and another colleague. Self-evidently, this seemed to further undermine the core allegation against Q. Sensing the danger, he then created more credibility problems for himself by weaving a fantastic tale about his having brought a Nigerian dish to work on his birthday (which was in August and happened to fall on a Sunday) and Q wishing to taste the dish and his having invited the entire team to a Thai restaurant. (In fact, the lunch, which was attended only by Q, the Claimant and the other colleague, was held at a Vietnamese restaurant.) This ludicrous account did not assist him. It only served to make the Respondents' case for them that he was a witness who saw the preparation of evidence as a means of presenting a narrative calculated to further his interests, entirely without regard to whether it was true or even bore any relation to the truth.

101 Fifth, we have considered the extent to which the Claimant's case was contradicted or called into question by contemporary records, or the absence of such records. One illustration is his evidence concerning the email which he claimed to have sent to Mr Booth on 20 November 2019. This alleged email has never been produced. The Respondents say that it never existed. It was not relied on as a protected act but as material "background", evidencing his intention to present a formal grievance against Mr Kowalik. Mr Booth produced a screen shot demonstrating that the Claimant has sent only two emails to him on 20 November, timed at 12:24 and 14:46. Undeterred by this inconvenient evidence, the Claimant did not hesitate to denounce the screenshot as a fabrication. In his witness statement (para 144) he said that he had sent the email to Mr Booth "at 17:10". This was problematic for him because the Respondents produced turnstile records which showed that he had left the building at 16:57. Also in the bundle was an email from Mr Booth to him timed at 16:54 the same day, which did not

acknowledge the message on which he relied. This left the Claimant in the hopeless position of being forced to contend that, between "after 16:54" and 16:57 he had written an email to Mr Booth detailing his complaints about Mr Kowalik, closed down his computer and left the building. Equally striking is the absence of *any* evidence to substantiate or at least support the Claimant's evidence about the (phantom) meetings with Ms Mehta on 12 November and Mr Booth on 19 November.

102 Sixth, we have borne in mind the Claimant's late and suspicious disclosure of documentary evidence. We have already referred to his production of the (phantom) recording of the meeting of 19 November 2019. Another, more striking, instance was his revelation at a case management hearing before EJ Brown on 9 September 2021 that he held a 'work diary' containing notes of relevant meetings. The judge remarked that it was "outrageous" that this material had not been disclosed before. We do not feel able to place any confidence in the entries in the 'work diary'. The Claimant put forward as informal corroboration a note in it which he claimed to have written on the evening of 18 November, listing as an *aide-memoire* allegations of gender-based harassment on the part of Ms Ogunfowora which he planned to raise with Ms Mehta on the following day, 19 November.[6] The note is curious for two reasons. First, it is not in its natural place, appearing *before* what purports to be a note made earlier on 18 November concerning the meeting between the Claimant, Mr Vogelmann and Mr Booth. Second, it seems to prompt the Claimant to ask Ms Mehta how misconduct allegations had been dealt with "per HR advice". An arrow from "HR" points to a name, "Anne-Marie". Ms McCann drew attention to an obvious difficulty with this entry, namely that it appears to conflict with the Claimant's evidence before us that he telephoned Ms Anne-Marie Burgess of HR on the morning of *19 November* and, having told her that he had been complaining to Ms Mehta about Ms Ogunfowora for six months without success, was advised to email Ms Mehta to ask what steps she had taken to forestall the treatment which had caused him to make these complaints. Asked how his note could refer to advice not given until the day after it (the note) was written, the Claimant told us that his reference was to *prior* telephone advice which he had received from Ms Burgess. But that was not, to our minds, a remotely convincing answer. If he had received advice from Ms Burgess which was fresh in his mind at the time when he wrote the note, what possible reason could he have to contact her the very next day to ask for the selfsame advice? We heard nothing from the Claimant to unlock this puzzle. Nor is there anything in his witness statement to suggest that his (alleged) conversation with Ms Burgess of 19 November involved retreading familiar ground. Rather, it reads as though (on his own case) he was telling her his story for the first time. Another factor causing us to disbelieve the Claimant's evidence in relation to the 'work diary' was the complete absence of any reference to it in either claim form or in the copious particulars of his case or in the voluminous correspondence. These sources can be mined for numerous references to documentary evidence in his possession which, the reader was promised, would substantiate this or that allegation, but nowhere does the precious resource of the 'work diary' get a single mention. Finally, the 'work diary' is notable for what it does *not* contain. If, as he claimed, it was his standard practice to note in it key meetings and communications, why does it contain no reference to many

[6] Of course, it could not, as a matter of law, stand a true corroboration: Ms Chan rightly did not attempt to argue that it could.

of the controversial events which we have explored? With regret we conclude, on a less than marginal balance of probabilities, that the 'work diary' evidence was, in material part, manufactured in the course of these proceedings in an effort to bolster the claims[7] and that the Claimant chose to take this disgraceful course because he recognised that, without improvement, the original would not advance his case in the slightest degree.

103 We have not had recourse to the burden of proof provisions. We have had the evidence carefully explored and tested before us and the advocates have fully equipped us with the means to make findings and reach conclusions.

Sexual harassment by Q (LOI, paras 1-3)

104 Our primary findings dispose of the entire case on sexual harassment. There was none. The Claimant's case here is pure invention.

Harassment by Q (s26(3)) (LOI, para 9c)

105 This allegation of harassment against Q also fails comprehensively on our primary findings. The requisite background facts (a sexual advance, or any unwanted conduct of a sexual nature, by Q, rejected by the Claimant) never happened. It follows that the treatment complained of (marking his work as a 'Risk Fail') was not 'because of' events within the protection of the 2010 Act, s26(3). Moreover (for what more it is worth), that treatment was rationally and plausibly explained: Q followed the written policy, which stated that an AML letter was required, but reconsidered when the recent advice was drawn to her attention.

Direct sex discrimination by Ms Mehta (LOI, paras 4-5)

106 These claims are also defeated on the facts. As to the first (LOI, para 4), there was no detrimental treatment because Ms Mehta never promised the Claimant that she would not assign any case of his to Ms Ogunfowora and in any event he was not disadvantaged by the assignment of three of his cases to her (the last, at his request). Nor did the assignment of those three have anything whatsoever to do with the Claimant's sex. There is simply nothing before us to suggest that it did. The circumstances of the comparator cited by the Claimant (Ms Bhaskaran) were, as we record in our primary findings, entirely different.

107 The second complaint (LOI, para 5) also fails. There was no grievance to investigate. The Claimant did raise concerns on 20 November 2019 about Ms Ogunfowora's treatment of him and others but did not allege discrimination in any form. He only asked what steps he needed to take to prevent any recurrence of the treatment complained of. Had his employment continued, it might have been a detriment to deny him a response within a reasonable period, but given the decision to dismiss taken that day and implemented the next, the absence of a response was plainly no detriment. In any event, the fact that no action was taken in response to the email of 20 November was nothing whatsoever to do with the

[7] The 'work diary' also purported to substantiate the alleged conversation between the Claimant and Mr Booth (not merely the Claimant's plans to hold such a conversation) on 19 November 2019. That conversation, as we have recorded, never happened.

Claimant's sex. Again, there is no possible reason to suppose that it was. A female employee in like circumstances, whose superiors had decided to dismiss her as a divisive and disruptive figure would plainly have been treated exactly as he was. The Claimant's attempt to compare himself for the purposes of this claim with Ms Ogunfowora is hopeless. He did not raise a formal grievance; she did. And in any event, there is no evidence that, by the time of his dismissal on 21 November, the Respondents had taken any more action on her grievance (issued on 18 November) than on his.

Harassment related to sex by Ms Ogunfowora (LOI, paras 9a and 9b)

108 The complaints of sex-related harassment against Ms Ogunfowora based on the exchanges on 14 and 18 November 2019 again fail on our primary findings. As to the first (LOI, para 9a), we have noted that the Claimant's account, given for the first time in particulars of 15 June 2020, was false. We are satisfied that Ms Ogunfowora's conduct towards him on 14 November, even if unwelcome, came nowhere near to treatment capable of satisfying the demanding language of the 2010 Act, s26(1)(b).

109 We make the same assessment in relation to the episode of 18 November and would only add that it was the Claimant, not Ms Ogunfowora, who crossed the line set by the statutory language, particularly by his loud and angry denunciation of her as "this girl".

110 For good measure, we would add that we see no basis for supposing that Ms Ogunfowora's behaviour on either occasion was motivated to any extent by, or otherwise in any way related to, his sex or hers. Accordingly, even had the gravity threshold been met, these claims would have fallen for want of the requisite link under the 2010 Act, s26(1) with the relevant protected characteristic.

Direct race discrimination excluding dismissal (LOI, para 8)

111 As noted above, the only complaint of direct race discrimination rests on the alleged failure of the Respondents to investigate the Claimant's alleged grievance against Mr Kowalik. That claim is unsustainable given our finding that the grievance relied upon was not delivered to Mr Booth on 20 November 2019 (or at all). The detriment asserted did not happen.

Direct sex and race discrimination, victimisation: dismissal (LOI, paras 6, 7, 11, 12)

112 It is convenient to start with the dismissal-based victimisation claims, on which the Claimant appeared to place principal reliance. At the start of the hearing before us these relied on seven protected acts (LOI, para 11(a)-(g)), but Ms Chan in her closing submissions abandoned two, subparas (c) and (d), accepting that they were communications made *after* the dismissal. On the strength of our primary findings, we are satisfied that no protected act is made out. As to (a), (b) and, in so far as it relates to alleged remarks made at an alleged meeting between the Claimant and Mr Booth on 19 November 2019, (g), there was no such meeting and no protected act. The same goes for (g) in so far as it relies on alleged remarks at the second unscheduled meeting with Ms Mehta on 12 November

and/or the alleged third unscheduled meeting with Ms Mehta on 12 November. At the former, the Claimant's obscure reference to his previous employer did not constitute or include an assertion, express or implied, that he had raised an allegation of discrimination against that employer; as to the latter, we have found that the alleged meeting never happened. Item (e) also falls: on our primary findings the Claimant told Ms Mehta on 19 November that he wished to "blow up" the incident with Ms Ogunfowora of the day before but made no complaint, express or implied, of discrimination by her and did not say that he intended to raise a formal grievance against her. As to (f), the Claimant's email to Ms Mehta of 20 November was not, on our primary findings, a protected act. Rather, it was a complaint about the way in which Ms Ogunfowora was said to have treated him and "colleagues". There was no express or implied allegation of discriminatory treatment based on sex or race, or on any other protected characteristic.

113 Ms Chan contended that, even if no protected act was shown, the victimisation claims should prevail on the basis that the treatment of which the Claimant complained was done because the Respondents *believed* that he had done, or might do, a protected act (or more than one) (see the 2010 Act, s27(1)(a)). We remind ourselves that the treatment in question was the invitation (without warning) to attend the dismissal meeting, the dismissal itself and the act of escorting him from the building following the dismissal. We are satisfied that those three events are indivisible and not sensibly seen as open to separate analysis. All three were steps taken to implement the decision of Mr Vogelmann and Mr Booth, taken on 20 November 2019, to dismiss the Claimant the next day. Did Mr Vogelmann and Mr Booth (or either of them) believe that the Claimant had done, or might do, a protected act? If so, did that belief materially influence the decision to dismiss?

114 We reject the suggestion (if made at all) that Mr Vogelmann or Mr Booth believed that the Claimant had made an allegation of discrimination or otherwise done something falling within the scope of the 2010 Act, s27(2). He had not done so and they had no reason to think that he had. The slightly less straightforward question is whether they believed that he might in future do a protected act. We have no doubt that the reason they give for dismissal is the true reason. It is that they judged that it had become necessary to remove him and that doing so involved little risk given that he had not been employed for sufficient time to qualify for protection against unfair dismissal. Their view that dismissal was necessary was based on their perception that: (a) in the three weeks since passing his probation, he had become an increasingly disruptive and divisive presence to the prejudice of the atmosphere in the office and the orderly running of the business generally and (b) there was every prospect of his behaviour continuing and, if anything, getting worse, and (c) his conduct and its consequences were particularly harmful and intolerable given the vital need for the LCM Department to focus its energies on producing the improvements which the current 'remediation' measures implemented at the behest of the regulator required. We find that it is highly unlikely that Mr Vogelmann or Mr Booth turned their minds to the possibility of the Claimant invoking his anti-discrimination rights if he was permitted to remain in his post. He had not raised those rights or done anything to suggest that he might. It was not in question that the organisation was thoroughly diverse racially and there was a healthy gender balance. There was no undercurrent of racial or

gender-based division. There was nothing of substance to prompt Mr Vogelmann or Mr Booth to worry about allegations of discrimination being made. In the circumstances, we conclude that, if (which we strongly doubt) they even thought about that subject, it played no material part in their decision-making. Their central concern was simply that he would continue to be fiercely resistant to feedback and to engage in harmful and distracting conflicts with colleagues.

115 For these reasons the victimisation claim fails.

116 The complaint (LOI, para 6) that the dismissal was an act of sex discrimination is unfounded. Granted that the incident of 18 November 2019 between the Claimant and Ms Ogunfowora was *one* factor in the minds of Mr Vogelmann and Mr Booth, he was obviously not dismissed 'because of' his sex or because of her sex. Sex had nothing to do with the dismissal. A female whose circumstances were otherwise the same as the Claimant's would obviously have been dismissed as he was. There is not the first beginning of a valid comparison with Ms Ogunfowora. She (an agency worker) was performing satisfactorily and the Respondents had no reason to consider dispensing with her services. The sex discrimination claim is hopeless.

117 The same goes for the dismissal-based race discrimination claim (LOI, para 7). The Claimant was not dismissed because he was not Polish or because he was British Nigerian. Race had nothing to do with the dismissal. He was dismissed for the reason summarised in our analysis of the victimisation claim above. Self-evidently, a person of different race would have been treated exactly as the Claimant was. The comparison with Mr Kowalik is untenable. The Respondents had no reason to consider dismissing him. This claim is as hopeless as the sex discrimination claim.

The claim under the 1998 Regulations

118 Given our factual findings above, the Claimant's claim under the 1998 Regulations inevitably fails. It was agreed that his annual leave entitlement up to the date of termination was 17 days, inclusive of three bank holidays. He took eight days' leave (of which three were bank holidays) and so was entitled to compensation for nine day's pay. It was common ground that he received payment which, on that basis, was correctly calculated.

Outcome and Postscript

119. For the reasons stated, the claims are dismissed in their entirety.

120. Since all claims have been comprehensively defeated on the facts, we have not found it necessary to engage formally with the question of jurisdiction (to which neither counsel gave any real attention in evidence or argument). But we record for completeness that, had we done so, we would have held that, if and to the extent that any claim was brought outside the primary three-month limitation period as extended by the ACAS conciliation period, it was of time and accordingly outside the Tribunal's jurisdiction. There was no unlawful conduct at all and the concept of 'conduct extending over a period' (the 2010 Act, s123(3)(a)) is inapplicable. And

there could be no possible reason to exercise the discretion to substitute a longer period than the primary period in respect of any claim already found to be without merit.

121. Para (4) of our Judgment (strictly a case management direction) was included at the request of Ms McCann, to which Ms Chan raised no objection.

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EMPLOYMENT JUDGE SNELSON
14 Feb. 22

Judgment entered in the Register and copies sent to the parties on 14 Feb. 22

.. for Office of the Tribunals