EMPLOYMENT TRIBUNALS

Claimant: **Mr H Gohil**

Respondent: **Continental Automotive Trading UK Limited**

Heard at: **Birmingham**

On: **18, 19, 20, 21, 22, 25, 26, 27, 28 & 29 September 2023, 20 and 21 November 2023 (in chambers)**

Before: **Employment Judge Flood**
Mr D McIntosh
Mr J Sharma

Representation
Claimant: Mr Holland (Counsel)
Respondent: Dr Ahmed (Counsel)

RESERVED JUDGMENT

Direct discrimination

1. The complaints of direct race discrimination (contrary to 13 of the Equality Act 2010 ("EQA")) and set out at paragraph 1 of the List of Issues below are not well founded and are dismissed.

Harassment

2. The complaints of race related harassment (contrary to section 26 of the EQA) and as set out at paragraphs 2.1, 2.2 and 2.3 of the List of Issues below are well founded and succeed.

3. The complaint of race related harassment (contrary to section 26 of the EQA) and as set out at paragraphs 2.4 of the List of Issues below is not well founded and is dismissed.

Victimisation

4. The complaints of victimisation (contrary to section 27 of the EQA) and as set out at paragraphs 4.1, 4.2, 4.3, 4.6 and 4.10 of the List of Issues below are well founded and succeed.

5. The complaints of victimisation (contrary to section 27 of the EQA) and as set out at paragraphs 4.4, 4.5, 4.7 and 4.9 of the List of Issues below are not well founded and are dismissed.

6. The complaint of victimisation (contrary to section 27 of the EQA) as set out at paragraphs 4.8 of the List of Issues below is dismissed upon withdrawal.

Detriment for making protected disclosures

7. The complaints of being subjected to detriment for making protected disclosures (contrary to section 47B of the Employment Rights Act 1996 ('ERA') and as set out at paragraphs 4.1, 4.2, 4.3, 4.6 and 4.10 of the List of Issues below are well founded and succeed.

8. The complaints of being subjected to detriment for making a protected disclosure contrary to section 47B of the ERA and as set out at paragraphs 4.4, 4.5, 4.7 and 4.9 of the List of Issues below are not well-founded and are dismissed.

9. The complaint of being subjected to detriment for making a protected disclosure contrary to section 47B of the ERA and as set out at paragraphs 4.8 of the List of Issues below is dismissed upon withdrawal.

Unfair dismissal

10. The complaint of being dismissed for making a protected disclosure contrary to section 103A of the ERA is well-founded and succeeds. The claimant was unfairly dismissed.

REASONS

The Complaints and preliminary matters

1. By a claim form presented on 17 December 2021, the claimant ('C') brought complaints of unfair dismissal (both ordinary and automatic unfair dismissal on the grounds of having made a protected disclosure/raised health and safety concerns); race discrimination and victimisation. The claim form included an application for interim relief under sections 128 & 129 of the Employment Rights Act 1996 ('ERA'). This application came before Employment Judge Gaskell on 4 January 2022 who refused the application for interim relief and went on to make orders for further particulars of the complaints to be provided by way of a Scott Schedule. This was provided by C and is shown at pages 71-89 of the agreed bundle of documents ('Bundle').

2. The respondent ('R') defended the claim by way of a response dated 1 March 2022.

3. There was a preliminary hearing for case management before Employment Judge Battisby on 18 March 2022. In advance of that preliminary hearing the claimant's counsel had prepared a draft list of issues for discussion which was shown at pages 101-106, which R had commented on. This was discussed and following that hearing, further clarification was subsequently provided by C on 4 April in accordance with orders made by Employment Judge Battisby (shown at pages 107-8). At the outset of the final hearing, this was discussed and finalised and a copy was provided of the final list of issues to be determined by the Tribunal ('List of Issues') was provided to the parties which was agreed (which confirmed that one complaint had been withdrawn). The claimant confirmed that he was no longer pursuing the application to amend his claim as referred to in an order following a hearing before Employment Judge Murdin on 14 February 2023. This List of Issues set out below and was referred to throughout the hearing.

4. An agreed bundle of documents was produced for the hearing running to 1,869 pages ('Bundle') and where page numbers are referred to below, these are references to page numbers in the Bundle. In addition, on 17 September 2023, C submitted a 50 page supplementary bundle of documents ('C Supplementary Bundle') and applied to adduce such documents to the Tribunal. R also presented a further 42 page bundle ('R Supplementary Bundle') making a similar application. Much of what was contained in these additional bundles was not objected to by the other party. Once the Tribunal had carried out its pre-reading any outstanding matters relating to the admission of the documents in these bundles was considered. The Tribunal determined that both parties would be permitted to admit the documents contained in their respective supplementary bundles, on the basis that the contents could be document necessary for the fair disposal of the proceedings and no prejudice was caused by admitting the disputed documents.

5. The Tribunal has used the initials of various individuals to identify them as they are defined in the List of Issues set out at paragraph 6 below and the findings of fact.

6. The hearing was adjourned on the tenth and final day of the hearing after hearing oral submissions (written submissions having been provided and considered). It was not possible for the Tribunal to meet to deliberate until late November 2023 and having made its decision it has taken some further time to prepare and finalise this written judgment (given the large number of disputed allegations). The Tribunal apologises to the parties for the delay in the issuing of its written judgment and reasons.

The Issues

7. The issues to be determined by the Tribunal were as follows:

Direct discrimination- Section 13 Equality Act 2010 ('EQA')

1. Was C directly discriminated against as identified in s13 EQA because of his race (British Indian – NOT conceded by R) in that R treated C less favourably than they would treat others because of a protected characteristic (race), by:

    1.1. In R's Birmingham HR office, on July 15th 2020, PJ used the expression 'Indian Bill' to describe an Indian man in his village.

    1.2. In R's Birmingham HR office on July 15th 2020 PJ explained to C why he thought 'BAME society deserved COVID due to their inability to follow simple instructions'.

    1.3 When on 12th November 2021 C read as part of the grievance proceedings that PJ explained that he had used the term 'Indian Bill' in conversations and stated that, 'Indian' is just a title'.

    1.4. During the C's grievance appeal hearing, on 2nd December 2021 another managing director fully accepted the use of 'INDIAN BILL' and comments such as 'Jamaican Bob', Chinese Jiang', 'Pakistani Mo', are acceptable.

    1.5. C was dismissed.

    Out of the three Software Team Leaders, C was the only Indian, the other two team leaders were White.

    In the alternative, C relies on a hypothetical white comparator for his direct discrimination claim who had the same level of experience and CV as the Claimant.

Harassment- Section 26 EQA

2. Did R engage in unwanted conduct related to a relevant protected characteristic (race), and did the conduct have the purpose or effect of; (i) violating C's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for C by:

    10.1. In R's Birmingham HR office, on July 15th 2020, PJ used the expression 'Indian Bill' to describe an Indian man in his village.

    2.2. In R's Birmingham HR office (PJ) on July 15th 2020 explained to C why he thought 'BAME society deserved COVID due to their inability to follow simple instructions'.

2.3. when on 12th November 2021 C read as part of the grievance proceedings that PJ explained that he had used the term 'Indian Bill' in conversations and stated that, 'Indian' is just a title'.

2.4. During the C's grievance appeal hearing, on 2nd December 2021 another managing director fully accepted the use of 'Indian Bill' and comments such as 'Jamaican Bob', Chinese Jiang', 'Pakistani Mo', are acceptable.

2.5. Was it reasonable for the conduct to have that effect?

Victimisation- Section 27 EQA

3. Did R. victimise C by subjecting C to a detriment because C did a protected act, namely any of the following:

3.1. Submitted Grievance One (date submitted May 19th, 2021) about race discrimination (above) submitted via Email to CF (Head of VNI Human Relations). C subjected to 'Indian Bill' comment and colleague H Sehmar ('HS')(IT Manager). C told LT (Vice President Human Relations BU) and WM (HR Country Head - UK & Head of HR CTG Ltd).

3.2. Grievance Two was sent via email directly to the CEO (N Setzer ('NS')) on Oct 26th 2021

3.3. Emails with the C's manager CR about race discrimination (in relation to same incidents as above).

4. Were the following detriments suffered by C because he did a protected act?:

4.1. C was treated in a hostile manner as part of a redundancy consultation (July 28th, 2021) (by CR)

Throughout all consultations, CR the consultation manager, was unwilling to engage and/or listen to any mitigating reasons given by claimant.

CR repeatedly interrupted C when he was trying to explain his skills, experience, knowledge, expertise, etc.

CR repeatedly told C 'we need to move on' during consultations.

C asked questions surrounding his pooling, why other team leaders, software engineers, etc were not even 'at risk', claimant was told he was pooled as one/unpooled.

CR repeatedly refused to assess C even after claimant stated he had more skills, experience and knowledge to offer, more years in the business.

C overheard CR tell CT (Head of HR) he was not looking forward to this call. Throughout consultations, CR repeatedly sighed when C was talking.

CR confirmed new roles in the restructure, but C was denied opportunity to apply for these roles. The Claimant was not provided any job descriptions in relation to these roles.

C was told only his work was moving offshore, especially given when restructure announcement (July 16th, 2021) stated all development would be best cost location. C was later pooled as two.

4.2. C was told 3 times in 1st consultation (July 28th, 2021) (by CR) that he was already redundant.

4.3. C as part of the consultation was insultingly told (by CR) that his skills and experience were irrelevant and that he did 'web applications and nothing else'.

4.4. C's grievance panel (November 12th, 2021) failed to make findings that another worker was harassed when he heard the comment 'Indian Bill' said by PJ.

4.5. Senior Management destroyed a recording of a grievance meeting held on July 21st, 2021, which could have assisted the C's grievance and case, in which another employee, HS, made allegations of hearing the term 'Indian Bill' which could have assisted the C's grievance.

4.6. C was unfairly pooled and ultimately selected for redundancy and dismissed on December 10th, 2021. C should also have been pooled with the other two Software Team Leaders (N Baker ('NB') and M Coles ('MC')). NB, MC and C all reported to CR.

C should have in the alternative, been pooled alongside Senior Software Engineers and/or Software Engineers.

Out of the three Software Team Leaders, C was the only Indian, the other two team leaders were White.

In the alternative, C relies on a hypothetical white comparator for his direct discrimination claim who had the same level of experience and CV as C.

4.7. R failed to provide prompt redress in answer to the C's 'Grievance No1' which was submitted on May 19th, 2021. The outcome was given on November 12th, 2021.

4.8. ~~R failed to answer C's appeal submitted on November 24th, 2021.~~

4.9. Grievance One Appeal Meeting took place December 8th 2021. Hearing Manager - D Smith ('DS')(Managing Director, Continental Tyre Group Ltd, Country Head UK & Ireland). Grievance One Appeal Outcome delivered by post February 25th, 2022

4.10. C was dismissed.

Whistleblowing

5. The parties agree the alleged disclosures were made to the employer under s43C ERA. Did C make the following disclosures and were they qualifying disclosures in that they contained information that tended to show that a person has failed, is failing, or was likely to fail to comply with any legal obligation to which he is subject (S43B(1)(b) ERA 1996)?

5.1. Grievance 1 submitted May 19th , 2021 via email to CF

5.2. ~~Grievance 2 submitted October 26th, 2021 via email to the CEO (Nikolai Setzer)~~

5.3. Emails with C's manager CR about race discrimination (in relation to same incidents as above.). C emailed CR (7th August 2020) to discuss 'Indian Bill' incident. CR and C spoke via Telco. CR told C, 'he would speak to senior management, but he had to be careful. You don't bring easy things to me do you'. C emailed CR several times for updates (between Oct 2020 – Feb 2021).

5.4. When C complained in his grievance (June 2nd 2021) that engineers had no health and safety training and safety equipment.

5.5. When C complained in his grievance (June 2nd 2021) that there was a leak in the Birmingham Office roof above the server room, water falling onto electrical equipment.

5.6. When C complained on 19th May 2021 and in his grievance (June 2nd 2021) that 'Production Staff were painting offices during work hours without H&S training and without safety equipment.

5.7. When C complained on 19th May 2021 and in his grievance (June 2nd 2021) that C was left burnt by a faulty hand dryer which R failed to repair.

5.8. When C complained to Head of HR and Head of R & D about tax fraud in relation to personal mileage on January 20th, 2021 and January 29th, 2021 and in Grievance 1.

5.9. When, in June 2020, C disclosed to CT Head of HR via email that furlough calculations were incorrect impacting all furloughed

staff. C provided calculation, many months to resolve salary issue. This again was raised in Grievance 1.

5.10. C complained in Grievance 1 that a vulnerable worker was being compelled to return to the office too early in Sept/Oct 2020 during COVID, when he should have been isolating.

6. Did C reasonably believe the disclosure of information was made in the public interest?

7. Was C subjected to detriment(s) (set out above as detriments under victimisation)?

8. If so, was this detrimental treatment on the ground that he had made a protected disclosure(s)?

9. In addition, was the making of any proven protected disclosure the principal reason for C's dismissal i.e. automatic unfair dismissal contrary to s.103A ERA 1996?

Unfair Dismissal

10. Can R show a potentially fair reason for dismissal? (In this case R alleges redundancy. C alleges that the real reason for dismissal was for a reason that is automatically unfair, namely race discrimination (race/colour and/or s103A and s104 ERA and or victimisation).

11. Did C's role fall within the definition of redundancy under s139 ERA in that it had ceased?

12. Did R fail to adopt an appropriate selection pool which C states should have consisted of CR and himself?

C should also have been pooled with the other two Software Team Leaders (NB and MC). NB, MC and C all reported to CR.

C should have in the alternative, been pooled alongside Senior Software Engineers and/or Software Engineers.

13. Did R engage in a reasonable consultation process with C?

14. Did R consider whether there were any other suitable alternative roles to offer C?

15. Was the decision to dismiss C on the ground of redundancy within the range of reasonable responses and fair in all the circumstances having regard to s98(4) ERA? (This only applies if there is no finding of automatic unfair dismissal).

16. In the alternative, R will argue C was dismissed for some other substantial reason, namely a business reorganisation and that the

dismissal fell within the range of reasonable responses and was fair in all the circumstances.

Unfair dismissal under s100(1) (c) ERA

17. In the alternative was the reason for dismissal (or, if more than one, the principal reason) for the dismissal that being an employee at a place where there was no such representative or safety committee, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

Remedy for unfair dismissal

18. If there is a compensatory award, how much should it be? The Tribunal will decide:

    18.1. What financial losses has the dismissal caused C?
    18.2. Has C taken reasonable steps to replace their lost earnings, for example by looking for another job?
    18.3. If not, for what period of loss should C be compensated?
    18.4. Is there a chance that C would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason (Polkey)?
    18.5. If so, should the C's compensation be reduced? By how much?
    18.6. Did C raise his disclosures in good faith?
    18.7. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
    18.8. Did R or C unreasonably fail to comply with it?
    18.9. If so, is it just and equitable to increase or decrease any award payable to the C? By what proportion, up to 25%?
    18.10. If C was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
    18.11. If so, would it be just and equitable to reduce C's compensatory award? By what proportion?
    18.12. With regard to the compensatory award does the statutory cap of fifty-two weeks' gross pay or £88,519 for dismissals effective on or after 6 April 2020 apply?
    18.13. What basic award is payable to the C, if any?
    18.14. Would it be just and equitable to reduce the basic award because of any conduct of C before the dismissal? If so, to what extent?

Time limits

19. Given the date the claim form was presented (17 December 2021) and the dates of early conciliation (from 2 to 6 December 2021), any complaint about something that happened before 3 September 2021 may not have been brought in time.

20. Were the discrimination and victimisation complaints made within the time limit in s123 EQA? The Tribunal will decide:

20.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

20.2. If not, was there conduct extending over a period?

20.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

20.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

20.5. Why were the complaints not made to the Tribunal in time?

20.6. In any event, is it just and equitable in all the circumstances to extend time?

21. Was the claim for detrimental treatment made within the time limit in s48 ERA? The Tribunal will decide:

21.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

21.2. If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

21.3. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

21.4. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Findings of Fact

8. The claimant attended to give evidence and called three additional witnesses, Mr A Singh Reehal ('AS') a former colleague of C working at R until June 2017; Mr H Sehmar ('HS') IT Manager at R and Mr M Baker ('MB') former colleague of C working at R as a Software Engineer until 10 December 2021. Mr P Jennings ('PJ'), Managing Director of R; Ms C Thompson ('CT'), Head of HR of R; Mr C Reeder ('CR'), Head of Software and Platforms at R ; Mr C Freyman ('CF'), former Senior Vice President Human Relations, Vehicle Networking and Information (VNI) of R 's associated company, Continental Automotive Technologies GmbH ('Continental GmbH') until 31 December 2021; Mr L Trilken ('LT'), Head of BA HR Smart Mobility at Continental GmbH; Ms C Anderton ('CA'), Human Relations Manager at ContiTech UK Limited, an associated company of R; Ms W McEwen ('WM'), Head of HR for Continental Tyre Group Limited an associated company of R and Country HR Head for the group of companies in the UK; Mr B Patel ('BP') former Head of Research and Development ('R&D') at R; Mr D Smith ('DS'), former Managing Director of Continental Tyre Group in the UK and Mr N Heslington ('NH') Managing Director of Zytek Automotive Limited, a further associated company of R all attended to give evidence for R.

9. We considered the evidence given both in written statements and oral evidence given in cross examination, re-examination and in answer to questioning from the Tribunal. We considered the ET1 and the ET3 together with relevant numbered documents referred to below that were pointed out to us in the Bundle.

10. To determine the issues set out above, it was not necessary to make detailed findings on all the matters heard in evidence. We have made findings though not only on allegations made as specific discrimination complaints but on other relevant matters raised as background. These findings may have been relevant to drawing inferences and conclusions.

Credibility

11. In general, we found that C and his witnesses were straightforward and reliable in the evidence that they gave, in particular the claimant, HS and MB. Those three witnesses gave evidence that was internally consistent, consistent broadly with other witnesses and with the contemporaneous documents. The claimant and HS were able to answer questions put to them clearly and directly. We were less convinced by the evidence of AS which did not seem to have any contemporaneous supporting evidence. His account of the incident in question was simply restated in terms of what had been said by him to other witnesses by the claimant's other witnesses. In relation to R's witnesses, there were 10 separate witnesses dealing with very different parts of the claim. We had difficulties accepting the reliability of key evidence given by PJ and CR. It was at times inconsistent both internally (with both on certain matters giving different accounts of key

matters in response to questioning than in their witness statement).Their evidence was also occasionally inconsistent with the other witnesses and with the contemporaneous documents. The entirely different account given by PJ at the hearing of the key 15 July 2020 conversation was particularly concerning and shed some doubt on what PJ was saying about other matters. CR's assertion on a number of occasions that he simply 'could not recall' various crucial conversations alleged to have taken place (which we find to be supported by contemporaneous emails) we also found particularly troubling. If his contention was that such conversations did not take place, we would have expected a more positive statement to this effect, rather than a failure to recollect. We could not determine whether CR was being deliberately untruthful about his account about the e mails sent and replied to by C and surrounding conversations or whether he had simply forgotten that such discussions took place. At times we also found that the evidence of BP was lacking in sufficient detail around the actions that he personally took. The evidence of CT was on many matters credible and reliable, although her inability to recall what had been said in meetings she attended and discussions that had taken place with PJ was concerning. We also accepted the claimant's submission that the late production of the Redundancy Policy during the hearing and the insistence by CT, BP and CR that they all had explicit reference to it (without a single mention being made of it in any of the contemporaneous documents or indeed their own witness statements) was damaging to their overall credibility on in particular how the redundancy process was carried out. In general, we found that CF, LT, WM, CA, DS and NH gave consistent and plausible evidence on the matters they addressed. Whilst they were not able to recall every event, we found them honest in their answers and their evidence was internally consistent and broadly consistent with other witnesses where any detail was available.

12. We made the following findings of fact:

12.1 The claimant is British Asian and started work on 2 January 2008 with R initially as a Senior Software Engineer based at R 's office in Coventry. On 1 June 2018 his job title was changed to Software Development Team Lead, and this was confirmed in writing to him on that date (page 160). There was some discussion during the hearing as to whether this was the role being performed by C (with CR suggesting that he was unaware that C was in such a role). We were satisfied that C was indeed performing the role of Software Development Team Lead at the time of the events in question.

12.2 R is a company that develops vehicle emissions testing equipment for garages to carry out MOT tests and also develops diagnostic equipment for the automotive aftermarket. It acts as a sales organisation for the UK and Ireland selling a range of products and services produced by the wider Continental AG group (which has over 200,000 employees based at 210 locations worldwide) and its

subsidiaries in production facilities outside of the UK. R also sells products sourced from third parties and is the legal entity that hosts the key account management and quality key account management working in the UK supporting different business units of Continental AG. PJ performed a key role in the overall management of R and was responsible for regional sales within the UK and Ireland for the Smart Mobility business unit of the wider Continental group. He was also responsible for various sites in the UK including Birmingham, Coventry and Bridgwater. The R&D function of the wider Continental group sat functionally outside R's business unit reporting to senior management outside the UK. The head of R&D in the UK, BP reported functionally to managers elsewhere but had a 'dotted line' reporting line to PJ as Managing Director of R. Although R&D sat functionally outside PJ's remit, unusually the costs of this function for both R and other legal entities within the wider Continental group all sat within R 's legal entity.

Contracts and relevant policies

12.3 C's contract of employment was shown at pages 124-133. Various policies in place at R at the relevant time were also included in the bundle including the Discipline and Grievance Policy at pages 137-144 and the Code of Conduct at pages 161 to 173. At pages 33-42 of R Supplementary Bundle, we were referred to an Equal Opportunities Policy (dated as at 22 November 2017) and a Whistleblowing and Internal Complaints policy(version date 10 July 2023). We accepted that the Equal Opportunities Policy was in place at the time, although we did not accept that a specific Whistleblowing policy was. We accepted the claimant's evidence that he was unaware of the contents of any such policies.

12.4 On day 6 of the hearing, R disclosed a document titled Redundancy Policy which was said to have been a policy in use at R at the time these events took place. Whilst no objection was made to the admission of the document, C wholly disputed that this policy was in force at the time of his dismissal. It contained the following relevant provisions:

"**Redundancy selection**

Selection pool

In a redundancy situation, we will identify how many roles are at risk and will determine a fairly defined pool from which we will select employees for redundancy. The pool will normally consist of employees who carry out the same, or similar work and perform jobs that are interchangeable, whether or not in the same department or location. However, this may not always be the case, for example where

redundancies are expected to involve the whole organisation or just one specific role.

Selection criteria

We will, as far as is possible, ensure that selection criteria are objective and supported by documentary records, data or other evidence such as attendance records or sales figures. We will take all reasonable steps to construct a fair and robust set of criteria following appropriate consultation."

12.5 CT gave evidence that this policy had been introduced on 1 August 2020 and that prior to this that R followed the ACAS guidelines when dealing with redundancy situations. CT was asked about metadata which suggested that the print or save date for the document produced was in fact 14 July 2021 and it was suggested to CT that this was the date that the policy came into force. We accepted that some version of this policy was created on 1 August 2020, but we were not satisfied that this policy had been published more widely in R 's organisation or was in use at this time. In reaching this conclusion, we rely on our findings of fact about the restructuring that was being planned from April 2021 onwards and announced in July 2021. We did not accept that any of the managers that were involved in the restructuring taking place had seen or referenced this policy at the relevant time and so conclude it was not a policy that was widely or generally in use.

Issues arising during the claimant's time working in the USA

12.6 Between 2009 and 2011 C was regularly travelling to the USA to carry out his duties for R and in 2011 he transferred internally to one of R 's group companies in the USA. He worked initially in Silicon Valley, San Jose, California and then Allentown, Pennsylvania. Towards the end of his time working in the USA in 2014, C alleged that he was subjected to racist comments from a senior manager in his office, J Gabard ('JG'). He contends that during a conversation about his previous experience and work with companies in India, that JG said to C that all Indians were stupid. The claimant alleged he complained about this incident to a local HR Manager in the USA, G Christ ('GC') who did not deal with the matter and informed him that must have misunderstood and that he should get on with his job and not pursue a complaint given the seniority of the manager involved. The claimant e mailed his manager at the time, J Soanes ('JS') to complain about this incident (and other issues relating his move from California to Pennsylvania) on 21 May 2014 (page 225-226) which recounted the claimant's experiences as above.

12.7 The claimant subsequently relocated back to the UK in August 2014 to take up his position as Senior Software Engineer at the Coventry

Office (see letter at page 259). There were difficulties with his move back to the UK at this time including with his immigration status and when C sought assistance from GC, he was informed that she did not have the time to deal with his exit questions and that any issues were the problem of C and the UK entity. At page 255 we saw an exchange of e mails involving GC and C at the time where C was told not to ask for assistance again and C responded that he would not as in his view GC, *"just like [JG] have an issue helping people like me".* Whilst it was not essential to make a finding of fact on this matter, we did accept the claimant's account of what took place whilst he was working in the USA which was supported by the claimant's contemporaneous e mails. We find that this negative and upsetting experience may have also been a relevant factor in how C responded to later events that are within the scope of the issues this Tribunal must determine.

12.8 On 16 July 2014 whilst corresponding with JS about the difficulties with the move, C brought up his complaint about racism (page 266) stating:

"Also, [JG] is making life difficult for me since I made this complaint to [GC] about his racism, constantly picking at me.

I know when we spoke about this last time after I sent you that email about my onboarding experience, you said you would speak to UK HR and [PJ] and see what can be done on that side.

Has anything come of that please?"

JS responded the same day (page 265) stating:

"Had a chat with both HR and [PJ], nothing can be done.

Sorry H, I know its not what you want to hear but we all think its best that you leave it as this will jeopardise your move back to the UK."

When asked about this during cross examination, PJ could not recall JS raising the issue of racism with him, just difficulties with the practicalities of the claimant's move back to the UK and agreed that he suggested C should raise these with the USA company direct. Although again not of direct relevance, this incident where C made a complaint of racism and was informed by managers that he should not pursue it as it might cause him difficulties, was very troubling to the Tribunal. Again, we have no doubt that this experience informed how C felt about later issues that took place in particular how complaints of racism would be handled. The claimant did not make any complaint about PJ at this time.

Complaint against PJ in November 2012

12.9 The Tribunal also heard about an incident that arose in 2012 when a grievance was raised against C by a former employee. Mrs L Watkins

('LW') had been the HR Director of a family owned and run business that R purchased earlier that year. There was a restructure following that purchase which meant that LW had to apply for a joint role of Head of HR of the combined business and she was ultimately unsuccessful. LW raised a grievance on 20 November 2012 about PJ making comments about her age and alleged that her age was a factor in the selection (page 1718) which was subsequently investigated by Mr H Ernst who was the claimant's line manager at the time. At pages 1712-4 we saw notes of a grievance meeting held with LW and at page 1718-7 the outcome provided to LW by Mr Ernst. LW's complaint about the selection process was not upheld but in relation to the complaints about the age comments, he found that PJ had addressed LW about her age and stated:

"*This is not in line with appropriate behaviour as it has to be and our company want its employees to behave. I will take the necessary disciplinary steps to deal with this subject. Please apologize for this embarrassment of one of my employees. I will take care to avoid such behaviour to happen again"*

PJ was never informed of this grievance or its outcome and was not subject to any disciplinary action, formal or informal because of it, despite this assurance being provided.

Car jacking incident and alleged comments

12.10 The Tribunal also heard evidence about alleged comments made by PJ to AS following an incident when he was subject to a 'carjacking' on 22 March 2014. AS told us that he was attacked and had his company car stolen at gunpoint at the weekend and came into work the following Monday and recounted the incident to PJ in his office. AS alleged that PJ was unsympathetic to him about the incident and did not ask him whether he was OK. He also alleged that when asked about the perpetrators, PJ said "*they must have been Black or Asian*". It is also alleged that PJ was more concerned about how this incident would affect company car insurance premiums. PJ recalls this incident and contends that he did ask AS how he was. He told us AS seemed unconcerned about the incident and made a comment about the incident affecting the company's car insurance premiums when AS stating that it did not matter as it was a company car and would be covered by insurance. He denies making any comment of the kind suggested about the race of the perpetrators. Although background and not directly relevant, we find that PJ did not make comments of that nature to AS, although we accept that he was unsympathetic to AS and did make a comment to the effect that the company's insurance premiums would go up. There was no contemporaneous documentary evidence supporting such a comment or of a complaint being made by AS.

‘Tramp’ comments

12.11 We also heard about an incident which took place on 27 March 2017. PJ admitted that he made an inappropriate comment about an employee referring to him as a ‘Tramp’ on this date. The employee subsequently submitted a complaint and at page 304 we saw notes of a meeting held as part of the investigation that took place following that incident. The employee decided not to pursue a formal complaint about the matter

‘Indian Bill’ comments prior to July 2020

12.12 We heard much evidence at the hearing about occasions when PJ used the term ‘Indian Bill’. PJ gave evidence that he used the expression on four occasions at work and that this was in reference to someone who lived in PJ’s village, but that each time this was phrase used as by PJ solely in the context of describing how other people referred to this person. He explained that in April 2019, in his home village in Warwickshire that there was a community campaign taking place (which he chaired) to raise funds to buy the village pub on behalf of the community. He explained that some time later in 2019, a fellow villager had asked him whether he had asked ‘Indian Bill’ whether he wished to contribute as he was ‘not short of money’. PJ said he told this individual that he did know the person referred to and that it was not appropriate to use this terminology to describe someone, even if the person used this term themselves.

12.13 It was around the same time, that PJ recalls having two conversations one with C and subsequently another with HS about the use of this phrase. He said that he recalled a brief informal conversation with C in the Coventry office where he told C about the use of this term , telling C that although much progress had been made against racism that there were still places where people think it is acceptable to refer to someone by their ethnicity. Whilst C did not recall this conversation in evidence, he did mention an earlier conversation with PJ where the term was used during his appeal meeting with NH on 2 December 2021 (see paragraph 11.117 below). We find that this conversation did take place as PJ recalls.

12.14 PJ said he had a similar conversation with HS in the Birmingham office which had arisen when HS told PJ that his sons were attending a grammar school in Shropshire (which was the same one that PJ had attended). PJ alleges that HS told him during this conversation that his sons had experienced racism at the school at which point PJ expressed his surprise as he felt that schools were good at combating discrimination or bullying on ethnic grounds. He then told on he went on recount his story about the use of the phrase by someone in his village, again in the context that it was unacceptable to use the phrase. HS gave evidence that much of this conversation did not take place at

all. He did recall a conversation he had with PJ about his sons attending the same grammar school that PJ had attended and PJ expressing his surprise. However, HS said that he did not suggest that his sons had experienced racism (as they had not) and said that the remainder of that conversation and the use of the phrase Indian Bill in this context did not take place. We preferred HS's evidence on this matter and find that during this conversation PJ did not discuss the term 'Indian Bill' with HS. PJ appears to be conflating various conversations and we were also concerned that this evidence by PJ was an attempt to place his later comments to HS in a different context i.e., that it was in a conversation where he was expressing views disapproving the use of such comments. We found that on this element PJ's evidence was unreliable and we were not able to accept it.

12.15 On 5 September 2019, HS attended a meeting with PJ and CT during which issues of recruitment in IT were discussed. PJ told us that during that meeting he again used the term 'Indian Bill' in a discussion about his suggestion to HS that R recruit apprentices to fill roles in the IT department. He said that he suggested asking the individual that he and HS had previously talked about *"the one that people called 'Indian Bill' "*. PJ told the Tribunal that as HS expressed the strong view that he needed someone more experienced that the discussion went no further.

12.16 HS agreed that during that meeting on 5 September 2019, PJ described an individual living in his village who ran a business supplying apprentices, describing him as 'Indian Bill' and whilst saying this he laughed. HS said that he looked at CT whilst this comment was made, and she was also laughing. HS told us that he found such comments as "*deeply offensive"* describing this as a *"racist, offensive, derogatory comment, labelling someone*". HS told us that he wanted to leave the meeting but that given that it was PJ and CT, the HR director, he did not feel able to. HS said that the discussion continued with PJ suggesting that HS utilise an apprentice supplied by the business operated by the individual in his village as a replacement for an employee who had recently left. HS said he tried to explain that this would not work as he needed a skilled IT professional to carry out the work but would not be averse to recruiting an apprentice in the future if his team was fully staffed. HS said that this matter was not discussed again until he received an e mail from PJ on 11 November 2019 once again suggesting that he recruited an apprentice and forwarding a chain of e mails with an individual called Bill Jaspal. HS told us he then realised that this was the individual that PJ had earlier referred to as 'Indian Bill'. He responded on 12 November 2019 suggesting that this idea would not work, and he did not then hear of this suggestion again. (emails at page 3-6 C Supplementary Bundle). HS agreed that no complaint was made about this at the time. CT accepted that she was at the meeting but had no recollection of PJ using that term.

12.17 We entirely accepted HS's account of this conversation and found his evidence reliable and plausible. His account of this occasion has been given on many separate occasions and he has remained consistent and clear as to what took place. His recollection and response to this was striking and entirely convincing. On the other hand, CT simply has no recollection of the conversation at all, and PJ's account was not convincing for similar reasons as set out above. We found that this was the one and only occasion that PJ used this phrase in HS's presence.

Period of Covid restrictions March 2020 onwards

12.18 On 26 March 2020 the first national lockdown in the UK came into effect. R had already on 16 March 2020 sent a frequently asked questions ('FAQ') document to its employees (page 324-5) and on 7 March 2020 instructed those of its employees who could work from home in line with the guidance at the time (see page 323-4). During this time, R communicated with employees regularly and had team calls and set up a core team to handle R 's response of PJ, CT and A Jones ('AJ') R 's Quality Systems Manager. On 15 May 2020, C compiled a list of questions that staff had in the Coventry office into an excel spreadsheet and sent this by e mail to CR, N Baker ('NB') and M Coles ('MC') (page 354). On 18 June 2020, AJ sent an e mail to staff about plans for returning to work in line with government guidance (page 360-1).

Pension/furlough issues raised by the claimant

12.19 R made use of the furlough scheme in respect of its employees during this period. The claimant was placed on furlough leave from 10 June 2020 until 1 July 2020 and was sent a letter on 9 June 2020 confirming this period of furlough (page 358-9). On 22 June 2020 C e mailed CT (page 362) querying whether pension contributions on his payslip were correct as follows:

"I have received my June payslip this morning which includes my furlough payment and top up. However, I don't believe the pension contributions are correct.

Can you please provide how you calculated these, then I can work out if this is correct or not."

12.20 There was then an exchange of e mails between C and Ms V Birch ('VB') of R 's HR team about this matter where she clarified that an error had been made and that the shortfall would be paid into his pension, which C accepted (page 363). The claimant sent a further e mail to CT on 20 August 2020 attaching a spreadsheet he had prepared about further queries he had raised with her by telephone that day about whether his payslip was correct (page 422). CT

passed this to VB to deal with (page 421) who decided to carry out an audit into the matter and CT responded to C on 25 August 2020 stating that she had not had time as yet to deal with it (page 423). We saw correspondence by e mail between VB, CT and R 's financial advisers between 20 August and 10 September 2020 (pages 374-8) where advice was sought about the matter and how to resolve it. C e mailed again on 3 September 2020 (page 425-6) again raising issues about the fact that an earlier deficit in pension contributions had not been paid into his pension account (causing a loss in value) and that in respect of his furlough pay, that as per his calculations salary sacrifice should also be paid into the pension. In this e mail he stated:

"This needs to be closed off in this pay run as I have pension issues and payment issues that need to be fixed since June."

12.21 CT responded that VB was sorting out his pension shortfall for September pay but that the furlough issue was "*complicated*", and that R was "*trying to get a definitive answer on this*". The claimant sent a further email on 7 September with some more calculations explaining the issue arising with salary sacrifice and furlough pay (page 424-5) complaining that furlough pay had been calculated after salary sacrifice, that the normal salary sacrifice (gross) should have been paid into the pension scheme which had not happened. C set out how this issue affected him in detail and added in this e mail:

"Obviously, I'm not sure about other furloughed staff but it could be that everyone is effected by this"

He went on to acknowledge that the issue was *"tricky".*

12.22 On 10 September 2020, VB completed her audit into the issue and concluded that C had been correct and that he and two other employees had not received the correct pension contributions. On 11 September 2020, CT emailed C to confirm that following investigations, that the company had concluded that the salary sacrifice should have gone into the pension payment as C suggested and that this was being actioned by VB (page 422). On 20 October 2020 R sent a letter to C confirming the outcome of its pension audit and that the shortfall would be paid into his pension in October (page 471). During cross examination C accepted that the furlough scheme was new to everyone at this time and that it was being developed in a rapidly changing environment

12.23 On 6 July 2020 BP e mailed all the employees in its Coventry office, informing them that R was looking to re-open the Coventry office and return employees back to work after the lockdown (page 396). This e mail confirmed that he had been working with AJ to put guidelines in place for safe working. This e mail went on to say:

"I am aware that we have all adapted to working from home, but we do need to get back into the office. To help with the return to office planning can you please let me know the earliest date you can start working from the office?"

We saw two responses in the bundle from employees raising concerns and questions about their own circumstances and whether it was safe for them to return to work (page 393-297). This included an e mail from MB who copied C who was his line manager (page 394-5). MB indicated his willingness to return but raised specific questions about risk assessments and health and safety guidelines. He referred to an excel spreadsheet created by staff in Coventry (presumably the document sent by C referred to at paragraph 11.18 above) and said that no responses had been provided. It suggested that once the return to work plan had been put in place that a group call be arranged so that employees could discuss their concerns.

Conversation between Claimant and PJ on 15 July 2020

12.24 We heard much about the conversation that took place between C and PJ in the Birmingham office on this date. C attended the office on that occasion to collect a new laptop and to return a signed copy of his furlough letter. We saw an e mail exchange between Ms E Stokes ('ES') of R 's HR where she chased C to return his furlough letter and C referred to having to attend the office to collect a laptop and so would bring his signed letter in then (page 399-400). On the claimant's arrival he went to the HR office where ES and CT were based.

12.25 The claimant's recollection of the incident was that on his arrival CT was on the telephone and he spoke to ES to say he was there to sign his furlough letter and she then printed it out and he signed it. He said that PJ then entered the office said hello to him and asked him how he was with C replying that he was good commenting that he was "*staying safe, how about you?".* The claimant said that PJ then responded, "*could be better if people stopped spreading bloody COVID*". The claimant then alleged that PJ then used the phrase 'Indian Bill' referring to someone in his village who he had been discussing this with. The claimant then alleged that PJ

"told me, his views on BAME Society, why we deserved COVID"

and that PJ said it was

"due to blatant arrogance, ignorance, inability to follow basic instructions, generations all living together, spreading it and so we deserve it"

The claimant said he was *"shocked, offended, degraded and disgusted"* and that PJ's comments made him feel *"like a vulnerable, lower class person"* and that he then left to go home immediately. He clarified at the hearing that he felt such comments were directly racist and directed to him as someone of Indian background.

12.26 PJ's recollection of the conversation which he recounted in his witness statement was that he had a conversation with C "*about the press coverage of people from the BAME community being more susceptible to catching Covid 19 and becoming ill and dying compared to the non BAME community*". He contended that there was a discussion with C about this press coverage and "*whether the susceptibility was based around the ethnicity or the living in high density housing as well as living in multigenerational households where the younger people could be unknowingly be passing on Covid-19 to their parents and grandparents*" . PJ could not recall referring to the individual who lived in his village or using the phrase 'Indian Bill' but acknowledged that if it did come up it may have been in reference to giving an example of "*someone from the BAME community living in low density housing"*. PJ said he "*absolutely denied*" saying that the BAME community deserved Covid-19. During cross examination, PJ gave further evidence that although he could not recall who brought up the conversation about Covid 19, that C instigated the discussion about the spread of Covid in BAME communities and that the claimant:

"stated that Covid was spreading within BAME communities because Britain was a racist country"

PJ told us that he responded to this comment and that he went on to disagree with C and challenged him on the conclusion that the problem was due to racism. He said this was a "*heated discussion*" and there was *"tension"*. This was the first occasion upon which these additional details of the conversation with C were provided (witness statements having been exchanged in March this year). PJ was then asked why he did not provide this information before (or did not even correct his own witness statement when sworn in earlier that day). PJ stated that he had further recollected the conversation as the hearing went on and felt he should provide further information. He denied that this part of the discussion was made up. The claimant having already completed his evidence when PJ gave this evidence was not asked about this, but it was submitted by his representative that this conversation did not take place.

12.27 Later that same day, C sent an e mail to ES asking her to send him a copy of his signed furlough letter as he left his copy behind (page 399). He concluded this e mail with the following comment:

"BTW, nice BAME chat hey, not"

ES responded very quickly that day (page 398) confirming she would send over a scanned copy of the letter to C and further commented:

"That was a very awkward conversation considering you were there as well, not good".

The claimant then replied as follows:

"Totally agree, it was not nice, in fact degrading. Its like we are to blame for all society problems.

How do we deserve COVID…People are dying, we should be helping not blaming.

Anyway don't want to get into it.

This is not the first time I've had to listen to this kind of conversation.

Nothing will change unless people change, it's that simple."

12.28 We find that PJ did use the phrase 'Indian Bill' during the conversation with C on 15 July 2020 as part of a conversation about the spread of Covid 19. We find that this was used in the context of reasons for the possible spread of Covid 19 one of which being low density housing with a reference being made to someone PJ knew who did not live in high density housing. We were not satisfied that when PJ used this phrase on this occasion that he also said that he did not think this was an acceptable term to use but simply used the term to describe someone he knew in a different context.

12.29 We also find that PJ did either expressly or impliedly suggested to C during this conversation that the BAME community were at fault or were somehow to blame for the higher spread of Covid 19 in that community and that this was "*deserved*".

12.30 We also entirely accept that C was shocked and offended about the comments made by PJ on this day.

12.31 We make these findings because:

12.31.1 The claimant has been broadly consistent from the point the detail of this allegation was made and throughout these proceedings about what he says took place that day. PJ has provided differing accounts of the conversation. We heard some quite extraordinary evidence only at the hearing itself which changed the whole context of how this conversation was said to have taken place namely in light of a comment by C himself about Britain being racist.

12.31.2 The only contemporaneous documentation we have around this time are the e mails between C and ES relating to C signing his furlough letter. These e mails are highly cogent evidence of what took place just hours earlier. It confirms that someone else who was present that day heard what she described as an "*awkward conversation*" given that C was present and that this was "*not good*". The claimant's response to ES makes explicit reference to the words "*blame*" and "*deserve*" which suggests to us that these words/comments were the ones used. This also supports the reaction of C as he states that he found the conversation "*degrading*".

12.31.3 On at least 3 occasions before this PJ admitted that he had used the phrase 'Indian Bill' and he also acknowledged that he had discussed issues around the spread of Covid in BAME communities on this day. The claimant's account of how this conversation unfolded is much more plausible than that of PJ's. The complete shift in the account of the conversation that day by PJ during cross examination casts real doubt on the reliability of this evidence.

12.32 On 27 July 2020 BP sent a further e mail to the employees at the Coventry office re returning to work stating that as restrictions are lifted that "*we need to get back to some level or normality*". It set out a proposed plan for employees to return on particular days of the week phased over a 2 month period. MB responded positively to this but raised a few questions (page 402).

Disputed messages between C and CR

12.33 The claimant gave evidence that on 5 August 2020 he e mailed his line manager, CR on 6 August 2020 to complain about the incident with PJ that took place on 15 July 2020. At page 414-5 we saw a copy of an e mail headed *"RE: Can we please talk?" .* The e mail contained the following statement:

"I want to discuss something that happen to me in the HR office. Paul said a few things to me which I found degrading and upsetting.

I would have raised it sooner plus I didn't feel comfortable writing it down so can we please talk about this and I will explain why."

We also saw a copy of a response from CR that same day stating that CR was in back to back meetings and whether it could wait for his "HRD" which was scheduled for the following Monday afternoon. It finished:

"Is everything ok?

I'm a little concerned about what's happened"

When asked about why he did not write down the allegation explicitly in the e mail, C told us that he wanted to discuss it with CR first.

12.34 CR had no recollection of receiving the claimant's e mail or replying to it. An allegation was made during the hearing by Dr Ahmed that these e mails (and the subsequent e mails in October 2020) were 'fake' and 'doctored' by C. It was suggested that R had conducted a search of its system and could find no record of these e mails being sent or received. The claimant was asked why he had not produced the metadata for such e mails (when this had been requested) to which he responded that he did not have it as he did not have access to the system. He explained that he had saved the e mails as a pdf document in November 2021 prior to leaving R and sent this document (and the e mails) to his yahoo account whilst serving his notice where he saved the pdf to his files. He said that this pdf document had been sent to R as part of the disclosure process and that the metadata for this document shows that it was created in November 2021. The allegation about the e mails being fake was apparently one which was first raised during the hearing itself. However, neither CR, PJ nor CT gave evidence that they believed that C had faked the e mails. We find that these e mails are genuine and were sent by both C and CR at this time. We find this because:

12.34.1 The e mails appear to be in the usual format with no unusual or suspicious matters on their face.

12.34.2 The e mails are not only those sent by C but those sent by CR to C in response. CR although not recollecting the emails said that this was the sort of e mail he might send and contained language similar to that he might use.

12.34.3 The e mails do not set out any detail about the incident itself of what was said or done but just make oblique reference to it. If C had been doctoring a document to support his case, it is probable that perhaps more explicit reference to what he wanted such e mails to show would be contained in there.

12.34.4 Most crucially, R has produced no actual evidence to support a contention that these e mails are faked. It was only when asked about this in cross examination that CR explained that he had looked for these e mails in his archive and the e mail system and did not find them. For the Tribunal to make such a key finding on a serious matter such as alleged forgery of evidence, we would at least expect R to have produced detailed oral evidence from whoever was responsible for conducting the search of R 's system setting out what steps were taken and what the results of their actions were. It may have even considered making an application to adduce expert evidence on this matter from a forensic IT expert. Moreover, some form of documentary evidence (e.g., printouts of

e mails sent and received by the two individuals on these dates) supporting the searches said to have been carried out and what the outcome was might have assisted. R asks the Tribunal to make a hugely damaging finding of fact that C has forged documents to support his claim purely on the basis that one party to the exchange cannot recall it; a bare assertion that a search of its systems has taken place and the e mails could not be found; and the failure of C to provide metadata. This would be an entirely perverse finding of fact for the Tribunal to make and on that basis, we were not prepared to make it.

12.34.5 None of the claimant's witnesses were prepared to assert that they believed that these e mails had been faked.

12.35 On 10 August 2020 C attended his performance appraisal (referred to as an HRD) meeting with CR. C told the Tribunal that during this meeting he made a complaint to CR about the incident which took place on 15 July 2020, how it made him feel and how upset he had been. The claimant said that CR told him, he would raise it, saying it was a sensitive matter being the Managing Director and stated:

"H, you don't bring easy things to me do you".

CR denied ever having a conversation with C where a complaint about the incident involving PJ was made, although accepted the HRD could have occurred around this time. He stated in his witness statement that C "*did not ever*" approach him in August 2020 (or at any other time) about racism of PJ and if he had he would have remembered it. We accepted the claimant's evidence that he told CR about what had happened on 15 July 2020 on 10 August 2020 as his evidence was more credible on this matter.

12.36 On 12 August 2020 C contacted CT and they subsequently had a teams call (see messages exchanged between the two at page 213). The claimant apologised during this e mail exchange for being a "*Moaning Myrtle*". CT confirmed during this call that she had never seen the list of questions complied by Coventry staff earlier that year. The claimant asked her to get in touch with MB (who was his direct report) regarding some concerns he had about returning to work in light of his own health and living with vulnerable parents and said that BP had not responded to concerns raised by MB earlier. CT spoke to MB that day and during that phone call raised that there had been no response to the detailed questions he had sent to BP earlier in July. He forwarded that e mail to CT that same day (page 410). CT discussed compiling a response to MB with PJ and AJ by e mail that same day (page 410) and on 13 August 2020 she responded to MB with her responses (page 417).

12.37 On 2 September 2020 there was a group call held with all employees in the Coventry office about returning to work and at pages 431-440 was a presentation delivered to staff by PJ on this date. The presentation was prefaced with a comment that the meeting was not "*An opportunity to debate the decision*" i.e. the decision that there would be some return to work, or to "*be disrespectful or to question the integrity of the management decision*" but rather an opportunity to ask questions, find out more about the measures put in place and how individual concerns could be addressed. The presentation went on to explain that the "*new normal*" would be a balance of working remotely (for a maximum of 2 days per week) and in the office but that the business had decided that "*employees are to be working in the office wherever possible by 1st October 2020*". It stated that R wanted to provide reassurance to those who were worried. It referred to the negative impacts on the business of remote working and set out government guidance on working safely. There was also a specific slide on those who were at risk stating:

"If you have any concerns about your potential risk as per the NHS guidance you should speak to your line manager who will work with you to find a reasonable solution."

12.38 On 3 September 2020, BP circulated a document by e mail which provided responses to the questions raised by employees in Coventry in May (pages 427-430).

12.39 During the hearing we also heard evidence about the circumstances around another employee of R, V Sadler who had a number of health issues and died with Covid 19 on 11 January 2021. There was no suggestion made by C that R was in any way at fault in terms of VS contracting Covid 19, but his circumstances came up in relation to an allegation made by C that R was pressuring employees to return to work against their wishes. At page 458 we saw a copy of an e mail sent by VS to his manager on 29 September 2020 confirming his request to retire at the end of the year on health grounds and asking to work from home 3 days a week until then with two days each week taken as annual leave. We also saw the e mail sent by that manager to ES, PJ and CT referring the request to them and confirming that she would discuss the request to work from home with CT and PJ as she was not in agreement with it. The claimant gave evidence that he recalled a conversation with VS around September/October 2020 where VS told him that PJ and his line manager were trying to force him to return to the office and that C informed VJ that he should make a complaint at which time he became upset. At page 468 there was a further e mail between VS's manager and HR on 7 October 2020 where she confirmed that it had been agreed with VS that he would work one day in the office, one from home and one day as annual leave until his retirement in December. HS also gave evidence about

a conversation he had with VS on 3 November 2020 where VS expressed his upset to HS about being "*forced to return to the office*". We accepted that these conversations took place broadly as alleged by C and HS. VS was subsequently off work from 26 November 2020 (see e mail at page 1807) and it does not appear that he returned to work passing away on 11 January 2021 (see page 1808). VS did not raise a complaint about this issue formally during his employment and we also accepted the evidence of CT that after his death, when visiting his family, they had not made any suggestion that he had been pressured into attending the office.

12.40 On 14 October 2020, C sent an e mail to CR asking for an update on the matter raised by e mail with him about the PJ 15 July 2020 incident (page 414). This e mail stated:

"I wanted to ask if you had any update on our conversation about what happened in the HR office, email chain below.

Last time we spoke during my HRD (10/08), you said you were going to raise this with [BP] as this was above your paygrade.

Do you know if this has been raised or anything has happened, I don't want this happening to someone else."

A response was shown to this e mail at page 413 from CR stating that CR would call him later that day to discuss. Once again and for the same reasons as set out above, we accepted that such e mails were genuinely sent and received despite CR's failure to recall sending or receiving them in evidence.

12.41 The claimant told us that when CR called him the next day and in a very brief conversation CR informed him that raising a grievance would not be simple as it was against the Managing Director and the highest seniority in the company and so the complaint could not go to the UK HR department. The claimant said that CR told him he was looking into who else to contact. Although CR had no recollection of such a conversation taking place, we again conclude that this did occur as C recounted it. We did not find CR's evidence on this matter reliable.

Decision to close Coventry office and relocate staff to Birmingham

12.42 On 2 October 2020, R held a call with its employees in Coventry where PJ announced the proposed closure of the Coventry office and a proposal that all staff relocate to its Birmingham office. This was followed up by a letter confirming the plans and asking for nominations for an employee representative from each of the three affected departments. The claimant was appointed as employee representative for the R&D department. There were collective consultation meetings with the employee representative group (which C attended) on 2 and

16 November 2020. There was then a period of individual consultation with affected employees. The claimant attended an individual consultation meeting conducted by BP with CT in support on 25 November 2020 (notes of that meeting taken by CT shown at page 472. MB attended to support C at this meeting and the notes he took were shown at page 477-8. The claimant presented a number of PowerPoint slides during this meeting (pages 535-7) which set out his objections to the proposal, largely based on the impact of the increased commute time on him given his family and caring commitments. The claimant proposed that he be based at home but attend the office in Birmingham one day a week.

12.43 On 8 December 2021, C sent a further e mail to CR chasing on an update on his e mail of 15 October 2021 (page 489) commenting that he would be finishing for Christmas soon. For the same reasons as set out above, we accept that this e mail was sent. The claimant said he then spoke with CR who informed him that his complaint about PJ would be passed to BP, but this would be done after Christmas. The claimant said he told CR he was not happy there had been no progress but that he knew he had no choice but to wait. Again, CR has no recollection of this discussion, but we conclude for similar reasons as set out above that it did take place.

12.44 The claimant gave evidence that he raised the matter again with CR in January 2021. The claimant said he called CR and was extremely upset that he had received no update on his complaint and became "*a bit tetchy*" with CR. He said he asked CR if he had any idea how it made him feel hearing PJ's comments to which CR responded that he never could never understand and he was sorry, but he would raise the matter with BP in their next management meeting. Again, CR could not recall such a conversation but again and for the same reasons we conclude this conversation did take place.

12.45 A further consultation meeting took place with C on 20 January 2021 (notes taken by CT at page 504 and notes taken by MB at pages 479-80). At this meeting BP proposed to C that he work at the Birmingham office 2 days a week with the other days worked at home. The claimant continued to put forward his objections to this. It was proposed to C during this meeting that R would reimburse the claimant's travel expenses for the days he attended the Birmingham office through its standard expenses policy. The claimant raised at this meeting that he did not think this was possible as this would essentially be employees claiming private mileage so could not be paid as a tax free sum via the expenses system. CT informed C that there were "*no issues*" with the proposal and this had been done on other occasions where there had been a change in permanent office location. The claimant said that he would be checking this with his tax accountant and an 'Employment Barrister'.

12.46 PJ subsequently sought advice on this issue from R 's tax advisers by e mail on 24 January 2021 (page 508). The advice received by e mail on 29 January 2021 (page 507) confirmed that payments made for expenses would need to be grossed up and then paid through the payroll as it was not possible to do this as a tax free payment via the standard expenses system. At a further consultation meeting held between the claimant, BP and CT that same day (29 January 2021) (notes taken by CT at 511-2 and taken by MB at pages 481-3), C provided detailed information about the proposal to reimburse his expenses and why he felt this was not correct. He referred to the 24 month rule being proposed to allow this to take place not being appropriate. CT agreed in cross examination that C was raising a serious and legitimate issue at this time concerning a potential breach of a legal obligation. The claimant said he had sought advice from his accountant and his cousin on this and the notes also record him saying:

"*HMRC have been notified by my accountant that the Company are making these recommendations to staff and might be avoiding tax in this area, as a duty of care to me."*

CT responded by saying that what C had said was "*standard stuff*" and that she already knew about this. She informed C that R was looking into this and that all mileage sums would be grossed up and that all tax and national insurance would be covered by the company. During this meeting C continued to assert that he could not commit to more than 1 day a week in Birmingham and suggestions were made about C reducing his hours or working flexibly to meet his caring commitments. The claimant then accused BP and CT of bullying, intimidating and pressuring staff into agreeing to the change.

12.47 The claimant said he again called CR in February 2021 (before 18 February 2021) where he said to CR that he had had enough, that he needed to know what had been done about his complaint and that if he did not, he would raise a grievance against PJ and CR himself for failing to take action. He said that CR admitted he had done nothing, that he was sorry it wasn't the news C wanted to hear but he wanted no involvement in the complaint. The claimant told us he was devastated by this response, and this brought back traumatic memories from his childhood of racist bullying being ignored by teachers at school. The claimant told us that he hung up on the call with CR and he was angry. CR again said that he had no recollection of this discussion, but we found again that it did take place. We note that C on a number of occasions in written correspondence after this refers to his manager not being prepared to raise it. For example, in his e mail to SL on 29 April 2021 (see paragraph 11.57 below) and in the form submitted as part of Grievance 1 on 6 May 2021 (paragraph 11.73 below).

12.48 When asked whether CR ever raised any of these matters with him, BP told the Tribunal that he could not recall if it was discussed and that he would have followed through with it if had been discussed. We accepted that CR did not in fact inform BP of the complaints he made as this was also consistent with what the claimant had been told had taken place.

12.49 On 16 February 2021, C sent an e mail to AJ following a conversation he had with him about Covid issues mentioning "*long term A/C, seating, heating, H& S etc*" (page 548). In that e mail he also stated:

"As the team rep, I get lots of questions that I am asked to put forward because employees are petrified of the senior mgt given certain experiences so they will not ask them".

AJ responded to that e mail stating that he expected questions and would try and resolve issues but commented that C should make people aware that there needed to be *"some give and take on all sides".* The claimant replied agreeing with that and further adding:

"But the Covid mgt also have to listen to the staff because currently the staff do not think this is the case, and if they fail to do this, and there is a H&S breach, I think they will just report the company to the authority" (page 548).

AJ forwarded this e mail exchange to PJ and during a management meeting that took place that day PJ told BP that C had raised some issues, including about health and safety. BP told us that he suggested a meeting to obtain further information. CT said she was also made aware of this and in her witness statement said she believed the claimant's allegations to be "*unfounded*". On 17 February 2021 PJ e mailed C with a meeting request for the following day, asking him a number of questions about what he meant by certain comments in the e mail. He asked what experiences made staff petrified; what the questions he had were; how he felt that the Covid management team were not listening and what specific H&S breach was being referred to (page 550). He admitted in cross examination that he recognised that potentially serious issues were being raised by C in his e mail.

12.50 The claimant participated in a teams meeting with PJ, CT, BP and AJ on 18 February 2021 where these matters were discussed. No formal minutes were taken of this meeting by R. The claimant told us that during this meeting that PJ's only focus had been to know the names of staff that would complain to the H&S Authority and that examples should be provided. The claimant said he tried to explain that because employees had lost trust in management that they did not want to speak up and that he could not provide names. He told us that PJ became angry at one point, put his head in his hands and muttered "*for fuck's sake*". PJ could not remember this but accepts that he was

trying to extract specific details from the claimant. BP agreed that PJ became frustrated with C failing to provide information but could not recall him using this phrase. CT could not recall this. We accept the claimant's evidence about this meeting and that PJ was frustrated at C failing to provide the names of those complaining or specific examples. This is supported by an e mail sent by PJ after the meeting on 19 February 2023 stating that C and his colleagues should report any Health and Safety issues to management as this was their "*moral and legal duty*". He also asked that people needed to come forward with examples of issues as without the information, R would not be able to address "*concerns or perceptions*". The claimant was asked in cross examination why he did not at this time make a complaint directly to PJ about the 'Indian Bill' comment being used and C said that "*no-one would go up to the MD and say that*".

12.51 There was a further consultation meeting on 18 February 2021 (notes taken by CT of this meeting at pages 516-517 and by MB at pages 484-5). At the end of this meeting, it was agreed that C would work 1 day a week in the office and 2 days where he could and that the position would be reviewed in 3 months. The claimant commented that he felt he was constantly having to fight and that he did not feel that management were considering staff impacts or feelings.

'Collective' grievance March/April 2021

12.52 The claimant sent an e mail to PJ, copying CT, BP and AJ on 22 February 2021 including his version of the meeting minutes of the 18 February 2021 meeting (page 551-4). The claimant set out his view that the main issue of concern was the lack of trust in management and that this was preventing him and others from coming forward with details and examples of what was wrong, suggesting that R had "*instilled fear*" into its employees. There was no mention in this e mail of PJ making any racist comments to the claimant. PJ then responded on 1 March 2021 (page 555) stating that he did not accept that these were minutes of the meeting and again asked C or his colleagues to provide details and examples of what was being complained about so that these matters could be investigated. He suggested that the complaints be treated as a formal grievance and investigated outside the legal entity. There were further e mails between PJ and C in early March 2021 and on 23 March 2021, C confirmed that wished to raise an "*official grievance for Germany to handle*". PJ confirmed that the grievance would be heard from someone outside the legal entity but in the UK who had familiarity with the UK issues (page 529).

12.53 R arranged for the grievance to be heard by Mr R Bayley ('RB') and Ms S Lawrence ('SL'), senior business and HR managers at the CES business (a group company) both of whom were based at the Burgess Hill site. At page 561 we saw a message exchanged between PJ and RB at 14.20 on 29 March 2021 asking him if he was free for a call as

he "*had a favour to ask*". The claimant was then notified of this at 16.40 on 29 March 2021 (page 547). A grievance hearing took place on 7 April 2023 attended by C (supported by MB), RB and SL and the minutes of that meeting were at pages 565-573. RB and SL had been provided with the various e mails between C and management (summarised at paragraphs 9.49 and 9.50 above in advance). The claimant went through the concerns he had during this meeting starting with issues that had arisen from March 2020, complaining that it had taken management a month to answer questions arising from Covid matters. He went on to make complaints about the air conditioning system not being Covid safe and then made a complaint about VS being put under pressure to return to the office. The claimant complained that the culture was toxic and that during his meeting with management on 18 February 2021, the focus of PJ was who was making complaints about R . The claimant also complained that anyone who complained (like him) then their "*card is marked*" and felt that he had already committed *"career suicide*" because he had "*stuck his neck out*".

12.54 The claimant was asked if he could give names of those who had complained, and SL confirmed after a break that there were would be a confidential discussion and action would only be taken with the permission of the individual concerned. He went on to raise concerns about how the consultation about the Coventry office move had been handled, in particular his own requests about home working. He also mentioned another employee who was informed that as their contract had a mobility clause in it, they had to move. When asked about what he meant by the reference to there being "*unorthodox rules*" in place in Birmingham he said it was that PJ turned off the heating and air conditioning to save money.

12.55 The claimant then went on to state that he "*had been subjected to racism*" during his time at the company which "*happened some time ago, but I was told to swallow it for the good of the company*." The claimant said that he had copies on e mail and would be complaining to the board about it. The claimant said that SL told him to think carefully before doing this as there would be no going back. The notes of R record that SL said "*That's very serious. My advice to you would be to follow the internal process first, but it is your decision and you don't need to make it today*" so we conclude that C was told to think carefully about raising the issue of racism. The claimant was asked at the conclusion of the meeting whether there was anything else he wanted to raise but said no. The claimant was sent an e mail with the minutes of the meeting on 12 April 2021 and sent his comments on 13 April 2021 (pages 574-5). The claimant made some corrections and stated:

"*Also, I would like to leave my personal Racism issues out of this, like I said these are being dealt with outside of this*."

The claimant also provided some names of people for RB and SL to interview. On 22 April 2021, they met with MB (the claimant attended in support) and on 26 April 2021 they interview J Cheng. The issues discussed in these meetings were the way the return to work post Covid was handled.

12.56 On 26 April 2021, RB and SL interviewed HS as part of their investigations. During this meeting HS raised a number of issues complaining about the way he was managed by PJ. He also said that he had been subject to racist comments by PJ recounting that he had used the phrase 'Indian Bill' at a recruitment meeting. HS described RB as being shocked and asking him to repeat what he had said. HS also complained about the AS carjacking incident; complained about the office roof leaking water onto IT equipment and that he felt VS had been forced to return to work during Covid. HS emailed RB and SL after the meeting with the notes he had prepared in advance which he told us he had read during the meeting, asking for these to remain confidential. RB replied to HS on 28 April 2021 (page 581) saying that having read the notes, whilst "*significant concerns*" had been raised that:

"these do not fit within the scope of the original Grievance raised by [claimant]. So our plan is not to take the points further in this investigation"

The e mail went on to state that the points should be raised and suggested that HS do this by raising with his immediate supervisor, to pick up health and safety concerns with AJ or to raise it with the Corporate helpline,

12.57 HS copied this response to C and asked for a meeting to discuss and C then e mailed RB and SL on the same day (page 579-80) expressing his disappointment and asking for a meeting. He suggested that the matters raised by HS were connected to the original grievance including health and safety, racism and bullying. He then made a request that the grievance procedure and investigation be put on hold. He suggested that RB and SL had "*opened Pandora's box*" and discovered a "*major problem*" in R and did not want to be involved and that this was a "*cover up exercise*." RB replied (page 579) stating that he had made the decision and that there was no basis to put the grievance on hold and asked him to confirm if it was being withdrawn. The claimant responded on 29 April 2021 attaching a statement confirming that the grievance had been withdrawn (page 579 and 582). The document stated that C and others were "*fearful*" of repercussions and of losing their jobs and that they felt "*let down*" by R . The claimant indicated that the matter would be taken forward"*with Germany*".

12.58 There was then an exchange between C and SL on 29 & 30 April 2021 (page 346-50) where the withdrawal of the grievance was acknowledged and SL informed C that if any individuals wished to raise a grievance individually themselves, they were free to do so. The claimant added a response to this statement in his reply by saying:

"[HeGo - The reason the grievance was raised was due to staff being fearful of speaking out on their own. My own manager, just like many managers do not want to approach Paul, so we are stuck. We cannot approach our HR due to Trust and Confidentiality issues, so we are stuck."

The claimant confirmed in this e mail that this "*concludes the UK side of things*" (page 546)

12.59 RB notified PJ by a chat message sent on 29 April 2021 (page 561)that C had withdrawn his grievance and suggested that a feedback session to PJ and CT was required. RB sent a further message to say he would let BP know of this too, so he was not "*under pressure*" and the exchange finished with PJ thanking RB and SL for their support.

Restructure/reorganisation plans

12.60 From early 2020, due to challenging market conditions, R's group of companies started a worldwide program to reduce or deploy between 20,000 and 30,000 jobs. By April 2020, R started to explore various cost saving options within its business. At page 1-3 R Supplementary Bundle we saw an e mail exchange involving senior management in Europe and BP about a possible plan for transforming the UK R&D business. We were referred to slides produced around this time at pages 4-11 of R Supplementary Bundle which referred to the development of a Centre of Competence ('CoC') relating to issues around Coverage & Diagnostics and Emissions, but that pure development work would be transferred to best cost sites outside the UK.

12.61 By June 2020 further work had been done on these plans and at pages 12-13 R Supplementary Bundle, we say an e mail exchange between Mr Bogdan-Calin, Director of R&D within the wider R group (and BP's line manager) and Mr F Rominger (Vice President R&D globally) ('FR') approving some initial steps being taken in relation to the transformation. This included reference to the closure of the Coventry site and transfer of the R&D employees there to a combination of home working and the Birmingham office. This was implemented in October 2020 as referred to at paragraph 11.42 above and BP confirmed that PJ was informed of the plans at a high level at this time as was responsible for the Coventry site. PJ knew from 29 June 2020 about plans for restructuring in R&D as he had been informed by FR. R&D at the time was a separate function outside PJ's direct reporting area.

BP reported to FR functionally but had a 'dotted line' reporting line to PJ as country head. That meant that BP attended monthly leadership meetings and was part of PJ's management team in the UK.

12.62 At this time analysis had been produced (page 19 R Supplementary Bundle) which anticipated a reduction in the number of engineers from 32 down to 22 by the end of Q3 2021 and 14 by the end of Q1 2022. At page 21 R Supplementary Bundle, the Tribunal was referred to what was known as the 'Ramp Down Plan' which listed all the employee within the UK R&D function together with information as to when their roles may no longer be required as part of the transformation plan. The claimant was listed on this along with all other colleagues in the UK R&D team and an 'X' had been marked against his name indicating that his role would not be required by Q1 2022. There were other colleagues identified as those where roles were not required including MB and N Gupta, with these roles having an 'X' beside them from Q3 2021. BP said he recalled this document and said this was a "*What if scenario*" which simply looked at the work being done and what was needed looking forward. He said that names had been added to make it easier for management to relate to the roles. He told us that at this time no formal decision had been made on the removal of any role, but this was an analysis document. We accepted this evidence.

12.63 CR was aware of the cost savings being required from around Q3 2020 but in December 2020, BP started to have discussions with CR about changes in the UK R&D structure (which would result in job losses) and that he would be involved in the restructuring. On 18 January 2021 the restructuring was discussed between CR and BP at a management meeting and at page 502 we saw a handwritten note prepared by CR about the discussions. We accepted that this note was in connection with the planned restructuring despite C suggesting that this was a doctored note which had been produced to try and mislead the Tribunal. There was a clear reference to transformation plan and notes about some of the issues to be considered and the timeline is consistent with other evidence and contemporaneous documents about the transformation plan.

12.64 As part of CR's performance review meeting with BP in February 2021, the transformation plan was again discussed and it was agreed between BP and CR that CR's role would effectively be 'safe' in the new structure and would manage the PTI, Systems and Architecture part of the transformation team, with R Sculfor, ('RS') heading the Coverage team and BP leading the team. Both BP and CR told us that when carrying out and planning the restructuring process they were aware of and made reference to the Redundancy Policy with BP telling us this was the "*guiding framework*" to go through the process. We did not accept this evidence. None of R 's witnesses who were involved in this process made any reference to the Redundancy Policy in their

witness statements and none of the contemporaneous documents about the planning for or the implementation of the restructuring process make any reference to it.

12.65 On 23 April 2021, BP arranged a meeting with CT to discuss the changes (see meeting invite page 577). CT told us that it was on this date (and not later as had originally been stated in her witness statement) that she was informed by BP of the plans for the UK R&D transformation and asked to assist. On 23 April 2021 CT sent an e mail to BP (page 607) attaching a document entitled Redundancy Selection Matrix which was the document shown at page 1357. This was a form which left spaces for scores to be given to individuals based on 8 criteria: Skills; Relevant Qualifications; Job Performance; Experience; Versatility; Timekeeping; Disciplinary Record and Absence. It allowed for a score to be given and a weighting for a number of matters listed under each criterion from 1 to 4, In relation to skills, it provided a range from an individual not having the relevant technical and practical skills at 1 up to 4 having all the relevant skills. Similar scaled scoring was then provided for the other criteria.

12.66 There was then a further meeting arranged attended by CT, BP and CR on 14 May 2021 (page 591). In advance of this meeting that BP shared with CR and RS the Redundancy Selection Matrix he had received from CT on 23 April 2021 (see page 169) and in that e mail made the following comment:

"..this is the matrix that [CT] had sent me. The main difference being here is that she said that we do the selection after we identify the 'pool' affected rather than doing it beforehand. Lets discuss in our meeting with her"

There was then a later meeting on 7 July 2021 attended by CT, BP and CR (see meeting invite at page 652).

12.67 During these meetings BP created a spreadsheet which he used as a 'living' document through the process between April and July 2021 to record issues that arose, the discussions and how they were resolved. The Tribunal were referred to the printed extracts from this spreadsheet through the hearing which was shown at pages 1399 to 1305. The way this was printed and added to the pdf bundle to be used by the Tribunal made it difficult to follow but CT said she recognised this document and one used by BP to record discussions and that this document was shared over screens during the various meetings and updated by BP as they went along.

12.68 At page 1400 this spreadsheet noted that a number of matters were discussed around pooling and selection of candidates for redundancy. CT told us that she advised the transformation team that pooling roles and then selecting down from such roles was an option and that if this

was done then similar roles would need to be pooled together and this could be either the same role or interchangeable roles. She agreed with the advice that had been recorded on the spreadsheet that any groupings or poolings had to be based on the work done and the role the individual had, reflecting what an individual "*mainly*" did and that that individuals should not be able to "*see themselves being in another group*". She also agreed as recorded in the spreadsheet that the skills individuals had was a relevant factor and the reference to 70% on the spreadsheet was that if an individual had a minimum of 70% fit of skills for the role being considered, they could do that role. CT agreed in cross examination that she would give the same advice now but perhaps had been mistaken in not informing the managers that they should document how they had grouped individuals. She did not accept that the grouping had been carried out incorrectly but that the managers had gone wrong by not documenting the rationale for grouping.

12.69 BP was asked about other spreadsheets and documents at pages 1360 to 1370. These documents were equally difficult for the Tribunal to follow, and it was not entirely clear what they were or what information was said to be contained within them (none of the witnesses having given any evidence in their witness statements referring to any such documents) which was unhelpful. BP believed that the document at page 361 was an earlier document produced after the closure of the Devizes office to assess skills remaining and that it "*might have*" been used during the restructuring discussions. When asked about a later document shown at pages 1362 of the Bundle where different employees were shown as being rated with a number 0 to 3, BP agreed that he had produced this, but he did not know when and he did not know whether it was used as part of the assessment process. We were unable to place any weight on the contents of these documents as it was simply unclear what they showed.

Decision to allocate C to the Web/Client Dev grouping/pool

12.70 Following the meetings with CT on 23 April and 14 May 2021, BP and CR (together with RS) carried out the assessment of roles and skills that had been discussed with CT. This took place between May and July 2021 and finalised on approximately 7 July 2021. CR told us that the first step was to decide what skills, knowledge and experience would be required for the CoC and then match this with the skills and experience within R&D. A document was created by BP, CR and RS (shown at page 740 with a similar document at page 1383-4) where individuals currently working within UK R&D were put into 15 separate groups "*according to the technology areas they supported*" and what roles were required within that group in the new structure. The claimant was put into group 6 in this document which was labelled as Web/Client Dev alongside NG (a Senior Software Engineer who

reported to the claimant). The claimant's 'main activity' was identified as 'Web clients' and the technology used was identified as 'Web'. He was shown as having been identified as 'At Risk' as Group 6 was shown as having 2 current positions but with no positions required in the new structure. CR told us that he was put in this group "*as the claimant's role was primarily working on on-line applications and internet based technologies, it did not naturally fit into the CoC technology areas*" and that as the claimant's "*primary role was a software engineer performing software engineering activities*" and that these activities were being moved to the 'best cost' locations that his role was identified as being at risk. CR said that as C was working on online applications and other software engineers were working on diagnostic data, that their skills were a better match for the CoC. CR acknowledged that C had skills outside the current activities he happened to be performing but his view was that he was not an "*expert*" in these. CR told us that the analysis of the software disciplines needed in the future together with their own knowledge about what staff were working on was the form of assessment they carried out, although this was not documented. BP accepted that just because an individual was working on a particular project did not mean that their skills were limited to that project.

12.71 The Redundancy Selection Matrix that had been sent by CT to BP was not used at all in allocating C to this group. BP and CR agreed in cross examination that when allocating C to this group that no documented assessment or rating was carried out of the claimant's skills as according to BP *"we knew his skills"* on the basis of the projects he had worked on over 8 years. BP agreed that once this had been done, that the groupings were "*set in stone*" and CR agreed that because of this grouping there was effectively no possibility that C would not be made redundant. However, he disagreed that C could have been placed in another grouping stating that he did not have the skill set and had been correctly identified. There seemed to be some acknowledgement of difficulties with this approach by BP in his spreadsheet when it was queried "don't we have to open the group to the pooling?) (page 1404).

12.72 When it was put to CR that the claimant's job title was 'Software Development Team Lead', CR said he was unaware of this job title and as far as he was concerned C was a Senior Software Engineer. CR accepted though that C and M Coles ('MC') and N Baker ('NB') were all team leads who reported to him. CR accepted that the claimant's appraisals had all been positive and that in his 2021 appraisal which took place before the restructuring, that he had rated C as "*one level above*" his current position. He agreed when questioned that C was capable of carrying out the same level role as CR himself with some mentoring and support.

12.73 We were not satisfied that CR and BP (or RS) carried out any genuine assessment of the claimant's skills but decided to place him into the Web/Client Dev grouping following a very cursory consideration of tasks C was at that time carrying out. CR, BP (and RS) were in effect selecting C for redundancy at this grouping stage without any consideration of the selection matrix that had been developed or carrying out any objective assessment of his skills. The explanations of CR and BP as to why C had been put into that grouping were unclear and inconsistent, jumping between a decision based solely on activities and then suggesting that it was the claimant's skills (which they alleged were assessed based on their knowledge) that were relevant. The claimant's job title and reporting lines seemed to have played no part in this process. It was put to BP and CR that C had been deliberately grouped this way to ensure that he would be selected for redundancy; that this was because C had raised complaints and that either he or CR had wanted to ensure that the process ended up with C being made redundant. This was denied. When it was put to BP that the grouping exercise was just CR and BP picking who they wanted for the new roles, he accepted that the process had "*identified people who would naturally fit into those roles, but we could not confirm who was in those roles until the whole redundancy process had been completed*". We find that there was a deliberate decision to group C into this pool where there were no roles available which would ensure that C was automatically selected for redundancy, rather than being assessed objectively using the selection matrix. This approach also appears to have been 'signed off' by CT (page 1404). We address the reason for that grouping decision in our conclusions below.

12.74 PJ told us he first became aware that a grouping and pooling exercise was taking place in around July 2021. He said he was also aware that the focus of the new CoC would be on BTI and Content (and that job losses were likely) and that as C did not work in those areas, he might be affected but could not recall whether he had been told this or had worked it out from his own assumptions. BP denied that any of the discussions around selection had involved PJ although admitted that PJ was aware of the restructure in terms of its status. We find that PJ was aware of the detail around this selection and grouping exercise that was taking place in early July 2021 because of conversations between himself and BP/CT. We find that whilst PJ was not actively involved in the discussions around which pool C was placed into, he had sufficient knowledge of the proposed restructuring and how it affected employees in the R&D team. He admitted in cross examination that he believed that the claimant did not fit into the roles required in the new CoC and that the claimant was not an expert in PTI which we find suggests he did have knowledge and input into the process either via discussions with CT or through management team

meetings held attended by BP. PJ acknowledged that R&D was a small team and that he knew who was being affected.

Grievance 1

12.75 During the period when this selection and grouping exercise was taking place, on 6 May 2021 C submitted a grievance by attaching a letter (shown at page 592-3) to an e mail and sending this to CF(page 598-9). This letter stated that the grievance was raised against PJ and CT and other managers were involved. It said it covered many topics giving examples of "*Fear/Bullying/Intimidation/Discrimination/Racism*" and "*Health and Safety*". It briefly recounted events since C e mailed AJ on 18 February 2021. It made serious allegations on such matters which C said had been going on for "*many years*" although no detail of incidents was provided. In this document it also stated:

"We are all fearful of our jobs, fearful of repercussions or reprisals that may come out of this".

The letter further stated:

"*We cannot raise this with our management as they will not approach [PJ], and they do not want to be involved. We cannot raise this with UK HR, the Head of HR [CT] is part of this grievance, since there is no confidentiality or trust."*

12.76 This grievance was acknowledged by CF on 10 May 2021 (page 597-8) and on 12 May 2021, CF sent a letter to C asking him to complete a grievance form setting out details of the complaints including the dates when incidents were said to have happened and who was involved (page 596-7). This e mail also confirmed that the matter would remain confidential, and C should not discuss the matter with anyone else at this time. It informed C that LT and WM would be involved in assisting with the matter and copied them to this correspondence. WM then contacted C on 13 May 2021(page 595) and again advised him not to speak to other members of staff until the first meeting and that C should provide the evidence/account of what had happened from his perspective only.

12.77 On 19 May 2021 C sent an e mail to CF, LT and WM (page 594) attaching his grievance form (page 608-610). This complained about a number of matters. These can be summarised as follows:

12.77.1 An allegation of *"3 Counts of Racism"* against JG and PJ between 2014 and 2020.

12.77.2 Alleging "*multiple* "counts of bullying, intimidation and pressuring against PJ, CT and BP specifically about the office relocation and return to the office after Covid.

12.77.3 Issues around the handling of his USA/UK work relocation.

12.77.4 "Tax Avoidance" in relation to relocation expenses.

12.77.5 Miscalculations in furlough payments alleging there was "incorrectly illegally withholding salary".

12.77.6 Lack of support and trust and no confidentiality against CT which also included an allegation about "*laughing at racist jokes*".

12.77.7 Health and Safety specially referencing:

(a) The handling of the Covid pandemic and the treatment of vulnerable staff (mentioning VS and MB) against PJ, CT and BP.

(b) That he had received an "*electric shock from toilet hand dryer which took 2 years to replace"*

(c) H&S issues C had "*heard about from other employees*" including: a roof leaking over a server, inadequate safety equipment for engineers carrying out repairs; R asking staff to paint offices during work hours, "*causing inhalation of paint fumes by employees*" and "*personal liability*" issues.

The claimant did not make a specific or detailed allegation against PJ making racist comments to him in this document. The claimant also raised that he and others were *"fearful of our jobs and fearful of the repercussions that will follow this from [PJ]. I know that [PJ], [BP] and [CT] will try to make it difficult for me after this."* CF acknowledged in cross examination that the issues raised by C in this document he saw were detailed and that the issues around inadequate health and safety and tax/mileage were issues that potentially affected a wider group of people than just the claimant.

12.78 CF appointed LT to investigate the claimant's grievance and said that he was confident that LT would investigate the matter impartially with the support of WM who was appointed to assist from a UK perspective. On the advice of WM, LT wrote to C on 27 May 2021 advising him that he had been appointed to investigate and invited him to a meeting on 2 June 2021 (page 614-5). During cross examination LT was referred to a teams message exchange between himself at page 611 which showed that on this same day, 27 May 2021, he had messaged PJ and then had a call with him. LT was further referred to a teams chat he had that same day with WM at page 1723 where he informed WM that he had had his "*call with [PJ] where I informed him about our grievance topic*" and then went on to recount being told be PJ that C had already raised a grievance earlier this year which had been withdrawn and that PJ had said that "*if it was the same grievance, now,*

that we must not to an official hearing". LT suggested to WM that his view was that a grievance meeting should still take place and WM confirmed she agreed with this. When asked why LT had informed PJ of the grievance, given that C had written in his grievance that he was fearful of repercussions from PJ for raising a grievance, LT said he felt that as managing director of R , he had a right to know of a grievance that was running in his legal entity. LT said he did not inform PJ of any details of the grievance. WM accepted that in hindsight although she had advised LT to let PJ know of the grievance for awareness purpose, it was perhaps "*wrong*" to do this and not good practice, as C had raised a specific concern about fearing repercussions from PJ. When CF was asked about whether this was correct of LT, he said he did not know but that he thought that he "*would not do it*". We find that it was ill advised of LT to have contacted PJ in this manner given that the grievance was against PJ directly and that C had expressed his concern about reprisals from PJ and others because of raising this grievance.

12.79 The claimant told us that on 1 June 2021, he took part in a teams call with CR (see invite at page 619). He said that MB was also present at his house when this meeting took place. He told us that during this meeting he went through the grievance with CR and that CR told C that "*going higher would be the only way as he wouldn't support me*". The claimant said CR said he understood what C was saying but that "*if the business wanted you out, they would just find another way*" and mentioned making someone redundant or making you reapply for your job and not getting it. The claimant also said that CR jokingly said to him "*It was nice working with you, H, good luck with your job search*". MB told us that he also recalled that meeting and that CR did make a comment about the business finding a way to get someone out if they wanted to. CR told the Tribunal that he did not recall this meeting taking place and said he could not remember what the meeting was about. He also said he could not recall making the comments alleged at the meeting but also told us that he did make such comments in an entirely different context talking about something that had arisen at his partner's work. We accepted the evidence of C and MB that this call did take place and what was discussed in it. The meeting invite supports that such a meeting was scheduled; both C and MB give a similar account of the meeting and we found CR's evidence on this matter lacking credibility and inconsistent having said he simply did not recall the meeting or what was said and then going on to explain the context of comments allegedly made.

12.80 On 2 June 2021, C attended a meeting to discuss his grievance with LT and WM. The minutes taken by LT's assistant were at pages 648-651 (with the claimant's suggested amendments to those minutes sent to him on 30 June 2021 (see page 645) at pages 655-662). Many issues were discussed during this two hour meeting, but we have

confined our fact finding to the issues we needed to determine in this complaint.

12.81 The allegation of racism was raised, and C detailed his complaints referring first to the incident with JG in 2014. The claimant then complained about 3 incidents involving PJ. The first incident was when PJ used the phrase 'Indian Bill' during a conversation on an occasion when it was just him and PJ. The second complaint related to PJ using this phrase during a meeting with HS when CT was there and that both laughed at the phrase. The third complaint related to the conversation in the HR office when PJ again used the phrase 'Indian Bill' and then had a conversation about the impact of Covid 19 on the BAME community stating that it was because they were living together so its spreading mentioning diet and ignorance. When asked how it made him feel, C stated "*sick in the mouth*" but that he did not say anything as he was shocked. The claimant then went on to mention the car jacking incident and PJ stating that the assailants must have been Black or Indian.

12.82 The claimant later raised his allegation regarding forcing employees into office attendance during the pandemic, with C mentioning MB having his concerns about his own health and living with vulnerable parents ignored and VS being pressured to return despite being clinically extremely vulnerable.

12.83 Another topic discussed was recorded with the heading "Tax Avoidance" with C setting out how he had raised the issue of the suggestion of paying relocation expenses via the expenses policy not being permissible. C suggested he was told R had done this before and that the policy was only changed because he had raised it and that this would have impacted all staff and the company itself.

12.84 C also raised that R had calculated his furlough pay incorrectly and when it was raised with CT it took months to resolve the problem.

12.85 The minutes further recorded that the issue of the toilet hand dryer was not mentioned (with C clarifying in his corrections that it was mentioned very briefly but that details were in his original grievance document). It also recorded that C said that in relation to roof leaks that a bucket was required to catch water and prevent it touching electrical equipment. The allegation about engineers "*having to buy their own tools*" was recorded and it was noted that C would provide dates. The allegation that staff members were asked to paint the office without training and safety equipment was also raised.

12.86 The claimant e mailed LT and WM after the meeting on 3 June 2021 (page 629-30) thanking them for their time and to state that he felt that he was raising the grievance on behalf of him and others giving 8 names including MB, JC and HS. CF replied on 9 June 2021 with a list

of documents/details that C said he would provide. The claimant replied on 11 June 2021 (page 628) attaching a zip file attaching 10 further documents which were those identified together with a pdf titled 'More Examples'. It was suggested by C that this document was the one shown at pages 1285-1299, and we accepted that this was the case. On 15 June 2021, LT e mailed WM with his comments on the documents C had sent. LT set out his initial view on the documents attached in many cases suggesting that he had not seen anything of concern. The issues he had identified as needing further investigation were the 'Indian Bill' topic; the issue around tax avoidance and lack of HR support. In relation to the 'More Examples' document LT sets out what C said where he accused PJ of being "*a bully, a racist and a vindictive man who lies, cheats, and abuses his position of powe*r" and suggested that PJ must "*leave the business*". LT stated that he felt these were "*hard words*" and that C "*must be very careful with wordings like these*" and that if this was shown to PJ that he would "*fight against it*" which he would "*understand*".

12.87 On 9 July 2021, we saw an exchange of messages between LT and PJ about the claimant's grievance (page 611). The chat started with some general comments about the football match that previous weekend (when an England team had played Germany). The chat went on with LT mentioning the claimant's grievance and that LT and WM were meeting with CT on Monday and that after that a meeting would be held with PJ. He then added:

"To be honest; This topic drives me sometimes a little bit crazy…But all good, we will make it"

When asked what he meant by this in cross examination, LT stated that he has a heavy workload and that investigating this grievance (all in his second language) had to be conducted on top of this. He said he was also sending a 'message' to PJ that the wider Continental organisation was 'looking at' his entity and he was responsible for it. He said that normally matters were handled within the country so perhaps challenging PJ as to what was going on in his entity that a grievance had to be handled out of the UK at corporate level. When asked whether in hindsight, LT agreed that it was not good practice for him to have contacted PJ (who was the subject of the grievance) in this manner, he disagreed.

PJ responded to this message as follows:

"*Yes I spoke to [CT] yesterday and as a British person I am saddened that one of our employees has felt the need to put this on your table as you have many more important issues to be spending your time on"*

PJ denied that this was an inappropriate phrase to have used in the context of allegations of racism but was making the point that he would have preferred if such issues could be resolved locally. We found this exchange to be concerning given the context of a serious complaint having been made against PJ which LT was investigating.

12.88 CT told us that she had been made aware of the fact that C had raised a grievance on 8 July 2021 as she had been contacted by LT and it is clear from the message exchange above that this is correct and that she had contacted PJ about this which she also acknowledged, although denied she had discussed any details about the grievance at this time. We find it is highly unlikely that no information about the grievance was discussed between CT and PJ at this time, given their acknowledged close working relationship. CT told us that herself and PJ had many detailed debates behind closed doors and that she often challenged him on decisions rather than simply doing as he instructed.

12.89 LT and WM then started their investigations and interviewed CT on 12 July 2021 (minutes at page 675-674). This was a lengthy meeting where all issues raised by C in so far as they involved CT were discussed. CT was asked many questions and set out her response to the issues raised around bullying and intimidation about the closure of the Coventry office; the tax treatment of mileage expenses; furlough calculations; lack of HR support; the handling of Covid 19; employees painting the office and the claimant's previous grievance. LT admitted in cross examination that CT was not asked any questions about whether she had witnessed PJ making racist comments (to C and HS) of whether she had laughed at PJ using the term 'Indian Bill'). PJ was also invited to an investigation meeting and in advance of this on 14 July 2021 he received an e mail from LT (page 711) with a summary of what would be discussed for his preparation.

Announcement of reorganisation in R & D

12.90 On 16 July 2021, a meeting was held in person and by teams where the UK R&D Transformation was announced by BP. The list of attendees at that meeting (in person and virtually) was at page 718 and this included the claimant, MB, NG and CR. The claimant, BP and CR were referred to pages 719-725 and 726-731 which appeared to be two similar but slightly different versions of a presentation that R contends was presented to employee that day. Neither BP nor CR could confirm which version was presented to employees on that day. We accepted the claimant's evidence that the slides at pages 719-725 that were shared with employees with the presentation at pages 726-731 being created later. It was not clear why an updated version of this slide deck had been produced and no explanation could be given by R for this. Later that day PJ sent an e mail to all staff informing them of the announcement (page 738). This e mail said that the reorganisation would have an effect on roles in the UK and that some

roles would not longer be needed and would be at risk of redundancy. On 20 July 2021, CT sent an e mail to the R&D team with some FAQ's (page 755 & 757-760). This set out the basis for the restructuring and explained what the CoC was. It included the following information:

"13. What is a redundancy pool?

A redundancy pool is a grouping of employees from which 'at risk' staff will be selected. A redundancy pool is not relevant where only one employee performing a unique role is being made redundant or the proposal is for all employees in a particular area to be redundant. Each pool typically includes employees who currently perform the same or similar roles or will do so after the redundancy exercise, if not made redundant.

14. What will the selection criteria be?
Where selection criteria are required, criteria typically include standard of work, skills, qualifications or experience, attendance record and disciplinary record. These would however be discussed with the impacted employees."

12.91 During the hearing we were referred to several organisational charts at pages 647, 1824 and 1864. These showed the current structure with names of individuals in the R&D structure in boxes which were coloured green with a legend showing those names to be 'At Risk' including the claimants. CR was asked about and he suggested that he had put these documents together in September 2021, but them seemed to suggest they had been done in July 2021. We found the explanations as to what these documents were and when produced very unsatisfactory. R confirmed that these structure charts were not shared with C at the time of the announcement in July 2021.

<u>Investigation meeting with PJ</u>

12.92 PJ attended an investigation meeting with LT on 19 July 2021 and the minutes of that meeting were shown at pages 745-753. This was also a lengthy meeting where all the issues raised by C were discussed and PJ was able to give his responses to them. On matters relevant to the issues before this Tribunal we note the following:

12.92.1 PJ set out in detail how R addressed the Covid 19 pandemic explaining that there was a core team of him, CT and AJ and told LT what steps were taken at each point. When PJ asked LT whether he had answered the question he confirmed that on the issue of PJ pressuring people to come into the office, having listened to PJ, he could not see that. He was asked about VS but said although he knew there were health issues and that he had passed away, he did not know the circumstances about his return to the office and that this was dealt with by NG.

12.92.2 LG asked PJ whether he was aware of any incidents in the past 2 or years where there had been a failure by anyone to act in accordance with the code of conduct. PJ responded "*generally no*" but then went on to mention an employee in Production who referred to himself as 'Polish Pete' which PJ felt was unacceptable stating that there should be "*no reference to someone's nationality when referring to hem. We are a multicultural group of people and we've moved on a lot and I don't see any terms of racism and if I saw it would be dealt with, its not acceptable*". At this point WM asked PJ about whether he had had a conversation with anyone at work where he had referred to someone as 'Indian Bill'. PJ went on to say that there was someone who lived in his village and that people did refer to him as 'Indian Bill'. He then stated:

"I may have had a conversation with someone about this, but it is wrong and you don't refer to someone as that. It is possible I had a conversation with someone, I must of done for you to know about it, about someone in the village to be called Indian Bill and being referred to it and how wrong it is and how they shouldn't be called this, I call him Bill"

WM suggested to PJ that he must have used that phrase and that the issue was that in relaying a conversation and referring to 'Indian Bill' that some people were offended as that was labelling that person by nationality or cultural background. PJ replied that he did not remember the conversation but that if he did use the phrase, it was in the context of an example of what was unacceptable. When PJ was informed that it was a conversation with C when this was alleged to have been said, PJ said that he would not have referred to someone in that way if talking to someone with an Indian background and that it was in the context of saying that these phrases were used but were wrong.

12.92.3 When asked about the conversation with C regarding Covid and the impact on the BAME community, PJ said that he did not specifically remember having this conversation but that this matter was a topic that had been discussed and debated in the press stating:

"There had been discussions in spread more. Leicester is a hot spot, has been right from the start. People were trying to understanding why they had a higher level of Covid cases, in the Indian culture there is maybe more multicultural families together and young people bringing Covid into the household and passing it to older generations."

12.92.4 When asked about the previous 'collective' grievance and how this grievance had arisen, PJ said that AJ told him that C seemed *"so angry"* and was *"telling everyone how horrible the company was".*

He went on to state he was disappointed to hear that other employees felt they were unable to raise matters as he felt he had an open management style. He added:

"I would question if they have gone to [C] or if he's gone searching out for people and he's encouraging people to complain about things? I don't know?"

12.92.5 LT did not ask PJ about his involvement in dealing with C'scomplaint about racism from 2015 (in particular the suggestion that JS had discussed the claimant's complaint with PJ and then suggested that C drop it (see paragraph 11.8 above and page 265).

12.92.6 At the end of the meeting PJ informed LT and WM that there was a restructuring in the R&D department and although he did not know who was in scope, he believed C would be a part of the restructure.

Further investigation meetings

12.93 LT carried out further investigations having meetings on 21 July 2021 with S Gregory ('SG) (notes pages 762-765); with RB and SL (notes at 767-770) and HS (notes at 771-776). Again, these were lengthy meetings and notes, but our key findings relevant to the issues were that:

12.93.1 RB stated that the main points in the original 'collective grievance were about the handing of Covid 19 and the move from Coventry to Birmingham and that C was clear he did not want to raise issues of racism and Health and Safety. SL told LT that C had made a request to pause the original 'collective' grievance process as a result of SL and RB telling him that they did not need to interview HS further or speak to any more witnesses.

12.93.2 During his interview, HS recounted his recollection of the September 2019 meeting with PJ and CT and the 'Indian Bill' comments. HS told them he was offended, and he did not laugh along with PJ or CT as he did not find it funny. He confirmed he did not raise anything at the time or make a complaint after the meeting. He mentioned that PJ had a reputation for saying offensive things (mentioning the Tramp comment in 2017) and that he did not think anything could be achieved by complaining with the Head of HR sitting in the room too. He gave an account of his conversation with VS and described the carjacking incident. HS alleged that at the outset of his investigatory meeting that he was informed that the meeting would be recorded and that he would receive a copy of the recording. Neither LT nor WM could recall that being stated. The minutes of the meeting do not show any

reference to this being discussed. We find that HS was given an indication that the meeting was recorded and that he could have a copy, because HS recounts this in the first communication he has with LT after the meeting (see paragraph 11.108 below).

12.94 On 21 July 2021, C e mailed LT for an update (page 781) and to ask for support as he felt he was "*getting no support*". He said that he had raised issues "*highlighting a pattern of historical discrimination and abuse*" and "*many breaches to UK Laws, and Health and Safety breaches*" and had told he would be "*protected*". He informed LT about the announcement of the restructuring and that senior management had stopped interacting with him. He went on to state:

"Due to the treatment I have been subjected to, I know I will be targeted as part of this restructure" and further

The restructure consultation team is the same mgt team who I raised the grievance against so there is a clear link to their motive".

Further investigatory meetings were subsequently held with AJ on 9 August 2021 (notes at page 862-3) and with BP on 10 August 2021 (notes at page 864-866). BP told us that it was on this date that he found out that C had raised Grievance 1, and we accepted this evidence as it is supported by the minutes of the meeting where BP asks LT who had raised the grievance.

12.95 Having carried out his investigation, LT told us that he drafted a report with the support of WM which made recommendations which were put to CF in order that he could make his decision. This report was contained at pages 1136-1143, and it contained a number of embedded documents. The report set out the conclusions of the investigations on the matters raised. The key findings we make about this report relevant to the issues in dispute are:

12.95.1 In relation to the allegation of racism from 2014/15 LT concluded that "*as all parties concerned have left the Company*" that no further investigation be carried out.

12.95.2 In relation to PJ saying 'Indian Bill' he recounted what C and PJ said about the allegation and then stated:

"Clear announcement to [PJ] about that topic and to advise/teach him that he should never use wordings like these. In addition training related to racism would be recommended for [PJ] in response to this point."

When asked further about this LT stated he had concluded that PJ had used the phrase but accepted PJ's explanation for its use. He explained that he made the recommendation for training as he felt

PJ should be cautious about using such words in the context he did.

12.95.3 LT did not reach a conclusion as to whether PJ made comments to the effect that people from BAME communities 'deserved' Covid. WM agreed that this was an "*omission*".

First individual consultation meeting

12.96 On 22 July 2021 was sent a letter confirming that his role was one of those at risk of redundancy and inviting him to participate in a consultation process (page 819-20).On 28 July 2021 C attended an individual consultation meeting conducted by CR with CT in attendance (notes taken by CT at 824-3 with the notes taken by MB at 824-6). In advance of that meeting CR and RS shared some teams messages about the upcoming consultation meetings where CR said that he was "*not looking forward to the one with H*" and that this would be "*awkward*". When asked in cross examination what made him think this would be a difficult meeting, CR stated that at times C "*could ask awkward questions*". When probed further on his answer, CR was unable to really explain what he meant but said it related to some of the interactions he had with C on work matters where he would challenge suggestions made by others. We found this was an insightful comment as to how C was viewed by CR and other managers, and this also shed light on the interaction between him and C about issues raised about PJ. CR was told by CT before this consultation meeting that C had raised a grievance against BP and that it was a grievance about discrimination and race. CT also told us she did not at this stage think of stepping back from assisting with the claimant's consultation process given that a grievance had been raised against her.

12.97 We were also referred to some teams chat messages between CR and CT which appeared to have been those sent during the consultation meeting itself (page 815-818). The claimant makes a number of allegations about what took place during this consultation meeting contending that these are acts of victimisation and whistleblowing detriment. Our findings of fact of each on turn are as follows:

CR being hostile to the claimant

12.98 The first allegation relates to CR being hostile to him during this meeting which was further clarified as an allegation that he was unwilling to engage or listen to mitigation; repeatedly told C "*we need to move on*"; refused to carry out an assessment on C despite C he had more skills and experience than others and that CR had been overheard saying to CT that he was not looking forward to the meeting.

In his witness statement CR denied that he had been hostile and alleged he was empathetic throughout.

12.99 During this meeting, C asked CR about organisational alignment and what people would be doing in reorganised roles and was told that nothing had been finalised. CR also informed C that if he was unable to come back with ideas on mitigation that he would be made redundant. The claimant made some suggestions about why he should not be selected. The claimant also asked that as he was not pooled that no assessment would be done on him, and CR confirmed that it was correct. When asked during cross examination about challenges made by C as to why he was not being retained as a PTI expert, CR said he disputed the contention that C was a PTI expert and that R "*had an expert already who had far more experience and knowledge about legislation*." CR agreed in cross examination that he did not tell C during this meeting that he was in a pool of 2 with NG. We find that although C was not provided with very much tangible information in this first consultation meeting and was given information that was confusing and unclear, we were not able to find that CR was hostile to the claimant in this meeting.

<u>CR telling C 3 times that he was already redundant</u>

12.100 CR in his witness statement denied that he told C that he was already redundant. During cross examination CR acknowledged that he had made "*a slip of the tongue*" at the start of the first redundancy consultation meeting and said that C was redundant, explaining that this was the first time he had conducted a redundancy process. This was also reflected in the claimant's notes of the meeting (but not those taken by CR). We were satisfied that CR did make this statement once in this first consultation meeting, albeit mistakenly. He also later stated in response to the claimant's question that if C was unable to show mitigation that he would be made redundant. We could not find that this statement was made three times, but it was said on two occasions first expressly and then impliedly.

<u>CR telling C that his skills and experience were irrelevant and that he did "web applications and nothing else".</u>

12.101 We were unable to find that this statement was made by CR during the first consultation meeting as there was no reference to it in either the minutes produced by C or those produced by CT.

12.102 On 2 August 2021, C provided by e mail to LT and WM a statement from AS re the carjacking incident and a statement from an engineer of R , T Homer who had recently retired (pages 831-833). The statement from T Homer contained a comment that he felt that the engineers did not have proper training on the equipment they were using and that they were denied proper tools.

12.103 On 6 August there was a message exchange between CT and PJ (page 843-4)where CT informed PJ that AJ had been invited to attend an investigatory meeting with LT and WM to which PJ responded. "*FFS when will this end*". He also mentioned that he thought C had been in touch with JS about a job to which CT responded:

"careful giving a reference to Julian! You'll get accused of blocking"

It was put to PJ in cross examination that at this time there were ongoing discussions between PJ and CT about the claimant's grievance and that PJ was also in discussion about the claimant's redundancy which he denied. We find it improbable that PJ and CT were able to keep their discussions around what was taking place in relation to the claimant's grievance and his selection for redundancy entirely separate during this period and that PJ was not only aware but involved indirectly via CT in the discussions around the claimant's redundancy. PJ acknowledged in cross examination that given that by this stage the claimant had raised a grievance with his superiors in Germany that the claimant would have been someone 'on his radar' and that he was aware and more sensitive to whether the claimant was being made redundant.

Second consultation meeting

12.104 The claimant attended a second consultation meeting with CR (CT in attendance) also accompanied by MB on 9 August 2021 (CT notes of meeting at pages 856-7 and MB notes of meeting 858-9. During this meeting C made several challenges about his selection for redundancy. He queried why other software engineers were being told that software would continue to be done in the UK, but he was told it was moving offshore. He also suggested that CR did not understand his capabilities as he was not assessed. CR stated that high level software would be done in the UK, but online development would be done offshore. The claimant suggested that he had not been asked about his experience to which CR said, "*What does this have to do with this?"*. When C asked about what skills were required for the PTI, Systems and Architecture roles in the new CoC structure CR said that these had already been filled and then said, *"can we move on*". The claimant also asked why he had not been pooled with the other team leaders and then assessed has he felt that there were overlapping skills, experience and responsibilities to which CR stated, "*it's the role that's gone".* We find that during this consultation meeting CR did behave in a hostile and defensive manner and did not answer or address the claimant's questions. After this meeting CT suggested to CR that he check the position on the claimant's grouping with BP and RS. This did not appear to have happened or if it did no feedback was subsequently provided to the claimant.

12.105 On 12 August 2021, C having received no response to his earlier e mail sent a further e mail to LT (page 780) asking for an update on his grievance and complaining that LT has not during the process asked after his welfare and said that since the investigation had started that he had, "*continued to suffer discrimination and detriment at the hands of these directors and managers*". He complained about the serious impacts that the stress and anxiety were having on him and his family. He complained about the two redundancy consultations that had taken place being a "*total disaster*" with CR refusing to listen to mitigations and that he would not assess him. The claimant complained specifically about being selected for redundancy over the other two team leaders and that he was the only Indian. He alleged that he was being discriminated against and forcefully removed from the business.

12.106 On 25 August 2021 CR e mailed to the R&D team a document said to provide an overview and proposed structure of the planned UK CoC (page 879-883).At page 882 a structure chart of the proposed CoC was shown with the proposed roles in the 3 areas to be focused on; Diagnostic Coverage (headed by RS); PTI/Emissions (headed by CR) and Systems/Architecture (also headed by CR). CR agreed that this showed the new roles that would be required for the CoC. CR was asked why he did not mention these roles to C at the previous consultation meeting where he said that all roles "*had been filled*" he explained that management had identified who could be put into the roles, but these would not be filled until consultation was over. He denied that any of the roles would have been suitable for the claimant.

Third consultation meeting

12.107 The claimant's third consultation meeting with CR and CT took place on 14 September 2021. At the start of the meeting and whilst the participants were joining, CR said to CT "*This is one meeting neither of us are looking forward to*" which was noted in a teams chat between C and MB (page 900). At this meeting C was informed that his role was redundant, and this would be the final consultation meeting. The claimant objected strongly and alleged that he has he had been discriminated against. During discussions about the steps taken to mitigate, CR told C that his current work is primarily web applications and when he challenged this to say that he was a Software Engineer and Team Leader, CR said, "*But your current work is web applications, nothing else*" and said that this would not be required in the CoC. When C asked why he had not been assessed he was told by CR that it was not about him it was about his role. On 15 September 2021, C was issued with notice of redundancy (page 904). On this day CT also e mailed LT to notify him that C had been made redundant (page 899).

12.108 CR was asked about a document shown at page 1553 which was a document which recorded the discussions had with other managers on appraisals carried out. It was dated 22 September 2021. This

document records some comments about C which were critical of him stating that he did not like to share constructive feedback, that he kept work "*close to his chest*" and that he did not communicate well across the project. It also addressed the fact that C had been rated 1 level above suggesting this was due to lack of work. CR could not recall why this document was so different in tone to the claimant's earlier appraisals which had been positive but disagreed that this had been done to bolster the decision that had already been made to make C redundant. We find that this document was there to try and roll back from some of the more positive comments on earlier appraisals and support the decision that had at this stage been made to make C redundant.

Appeal against redundancy

12.109 The claimant submitted an appeal against redundancy on 20 September 2021 (page 915). This raised an appeal on a number of grounds challenging the basis for his selection for redundancy; complaining that he was not considered for any new roles created in the CoC structure; that any mitigation he presented was not taken seriously; that the company had preselected those they wanted to keep; that he was not considered for alternative employment and was given no support. The claimant also complained that he had been discriminated against due to his race and caring responsibilities and that every Indian colleague who was 'at risk' had been made redundant. The claimant did not allege in this letter that he had been dismissed because he had made protected disclosures.

12.110 The appeal was heard by CA on 1 October 2021 and at page 1027-1040 were the notes of that appeal. CA had been sent all the notes of the consultation meetings (and letters sent to the claimant); the R&D announcement slides presented to, and FAQ issued to staff in July 2021; the CoC overview and UK structure chart and the appeal letter which she said she read. CA did not have a copy of a redundancy policy to hand during the appeal and did not know there was such a policy. During the meeting she went through each of the items raised in the appeal letter. The claimant agreed that he had a reasonably free hand during that meeting to raise the things he wanted to do and was not stopped from raising any issues. CA told us that having heard what C said that she then took some time to consider the matter and concluded that "*the claimant had been fairly selected for redundancy and that the consultation process had been fairly carried out*". CA admitted that she had not seen any documentation to explain how C came to be selected for redundancy. She said that having discussed this with CT during a telephone call on 30 September 2021 (message at page 953) she understood the rationalisation of the pooling and selection. She disagreed with the question put to her that C had no idea how he had been selected. She also concluded that there was no

evidence to suggest that the claimant's race played a part in his selection for redundancy. CA prepared an outcome letter and asked CT and CR to "*fact check*" this although said this was not seeking their approval. That outcome letter (page 1055) was sent to C on 7 October 2021. It briefly responded to each of the points raised dismissing each point entirely. We noted that in respect of the claimant's complaint regarding all Indian colleagues at risk being confirmed as redundant, she stated "*I am satisfied that race was not a factor in the decision-making process*" but did not provide any further detail. It was put to CA in cross examination that she viewed the appeal through a narrow remit and did not probe deeply but took at face value what CT told her about pooling and did not scrutinise this. CA disagreed and said that her remit was to check whether a fair process was followed. CA did not recall speaking to CR as part of her investigations. We found that this appeal whilst addressing each issue raised, was a brief and cursory review of what had taken place and did not really explore or investigate any of the points made in detail, in particular as to how C came to be pooled with NK and thus ultimately selected for redundancy.

Issue raised by HS re the recording of investigation interview of 22 July 2021

12.111 On 18 October 2021, HS sent an e mail to LT stating that he had not had any response following the investigation interview that he attended and asked for a copy of the recording that was taken of the meeting so that he could compile his own minutes (page 1114). LT responded the same day apologising for the delay and said that the minutes would be sent by his assistant the following day to which HS responded that he would still like a copy of the recording of the meeting (page 1113). HS was sent a copy of the minutes but continued to ask for the recording and was informed that the audio file had been deleted. On 20 October 2021 he again wrote to LT expressing his concern about this and asked what method was used to delete the recording. HS continued to challenge why this had been deleted and at page 1111-2 he again wrote to HS (this time copying the claimant) and asked further questions about this. On 2 November 2021, LT responded (page 1110) and informed C that the intention of the recording of the meeting was to "*support the typed record of the meeting*" and that it was deleted once the notes had been typed up. He apologised for any distress caused. HS was of the view that the recording had been deliberately deleted as it showed that WM had behaved in an aggressive manner towards him. We do not find that there was a deliberate destruction of the recording for this or any other reason but accept the evidence of LT that the recording was used solely to allow minutes to be made and was then deleted.

Grievance 2

12.112 On 21 October 2021 C submitted a further grievance (page 1078-1080). This is relied upon in respect of the claimant's victimisation complaint, but not his whistleblowing detriment and unfair dismissal complaint so we have considered only those aspects of this grievance relevant to that matter in our fact finding. We note that in that document C made complaints of "*acts of race and sex discrimination*" and further stated that management had "*discriminated against many employees including myself with acts of discrimination on race, sex, disability, pregnancy and maternity, harassment and victimisation*". This was sent by e mail to N Seltzer, Chief Executive of R 's wider group ('NS') on 26 October 2021 (page 1118) and NS was one of the recipients on copy. This was acknowledged by e mail on 3 November 2021 (page 1130) and C was informed that an appropriate local representative would be appointed.

12.113 On 9 November 2021, C e mailed LT sending a lengthy e mail complaining about not receiving a response to Grievance 1 (page 1106-1110. In this e mail he also complained about sending e mails to LT about the difficulties he was experiencing which were not responded to. In this e mail C also referred to the issue that HS had raised about the deletion of the recording of the investigation meeting with him on 22 July 2021. It went on to complaint about institutional discrimination. He further made allegations about the way that R had been dealing with requests for flexible working alleging that 2 Indian colleagues had had their requests declined as opposed to 2 white colleagues whose requests were approved. It further made accusations of cover ups and the destruction of evidence.

Grievance 1 Outcome

12.114 On 12 November 2021 C was sent an e mail from CF attaching a letter with the outcome of his grievance (page 1132-1135). These were the only documents submitted to C on this day. This letter stated that the grievance had not been upheld and set out findings on 6 items raised as part of the grievance. In relation to the allegations of racism from 2014/15 it concluded that it was not possible to progress this grievance as it was from 6-7 years ago and many of the individuals concerned no longer worked for the company. In relation to the claimant's allegations against PJ, the letter provided:

"Whilst there was no recollection of a specific conversation in the office; [PJ] confirmed that there is someone in the village where he lives who is known as "Indian Bill"; for this to be raised within the work environment there must have been a conversation because there is actually someone know in the village where he lives by that name. The reference was to his known title; However, there was no recollection of a subsequent conversation where those words were used again; nor were any references made to

people of Indian heritage in relation to covid. Paul said he did not think there was a race discrimination issue at the location.

Whilst I have found nothing to substantiate that racism has occurred I am aware of the sensitivities relating to racism and it is for this reason that I will recommend to HR that training is implemented at the site to promote the need for awareness specifically when using terminology."

12.115 When asked about this in cross examination CF agreed that he had reached the conclusion that PJ had used the term 'Indian Bill' but "*not in an offensive way*". It was suggested that the grievance should have been at least partially upheld based on this conclusion, but CF stated that he did not agree as the grievance was about racism and he concluded that the use of 'Indian Bill' was "*inappropriate but it was not racist"*. WM admitted in cross examination that to make a statement that someone' nationality is a title is inherently racist and that if senior leaders were saying this, then this "*did not sound inclusive*". When asked why training was recommended if the grievance had not been upheld CF said he recommended training for everyone in the location to make people aware of the sensitivities of language and that this kind of language should not be used as it make cause "*irritation*". CF was then asked what his conclusion was on the other allegation made by C around Covid 19 and BAME communities deserving it, CF said his conclusion was that this was not said. The letter stated that CF felt he had taken an "*objective and balanced view of any information that came to light*" and also informed C that he could appeal the decision within 7 days.

12.116 CF was asked in cross examination why given that the last person interviewed as part of the investigation was on 10 August 2021, that it took until 12 November 2021 for the outcome letter to be sent. CF stated that he felt that it was partly due to vacations during August, and it took some time for the report to be compiled given the number of matters to be addressed. Legal advice was sought on its contents (WM agreed that she had been involved in this legal advice). At page 1236 we saw a note taken by DS during the grievance appeal where he looked at this issue which suggested that legal advice had been taken after October. It had been suggested that there was a deliberate delay in providing the outcome of the claimant's grievance until after his redundancy appeal had been completed. We accepted that CF was unaware of the claimant's redundancy or redundancy appeal taking place around this time (stating that he only knew about the claimant's dismissal after he had left). We were not satisfied that this was the reason for any delay.

12.117 PJ confirmed that no training had been carried out with him individually or on a group basis since this recommendation was made in November 2021.

Appeal against Grievance 1 Outcome

12.118 On 24 November 2021, C submitted an appeal against the grievance outcome (page 1189-1200). This was a lengthy document raising multiple points of challenge and asking questions. We have confined fact finding to those issues relating to the matters we must consider for the purposes of this claim. The appeal letter included the following statement related to the appeal outcome provided on 12 November 2021:

"Based on your response, it is my belief, within Continental's senior hierarchy, 'Indian Bill' may be nothing but a title. However, being labelled Indian is a constant reminder of being seen differently and that we will always be judged by the colour of our skin. This is a direct breach of statutory rights in accordance with EqA 2010."

Additional roles in R& D structure

12.119 We were referred during the hearing to e mail correspondence involving PJ, CT and R 's recruitment team from early November 2021. At page 466-467, we saw an e mail from PJ to the recruitment team on 18 November 2021 requesting approval for external hiring which included 3 positions for the R&D CoC being requested (including a Senior Software Engineer). He was asked in response by the recruitment team why this needed to be done by way of external hiring suggesting that this might be because "*Internal Hiring Process has not been successful. No Internal Applications*" and PJ responded to her to confirmed he had added this to the request. At page 1230 we saw an updated requested with this wording included. PJ was challenged as to why this was requested given that C who had worked as a Senior Software Engineer was working his notice and PJ stated that he was unaware at this time he was under notice. We found this highly implausible evidence given PJ's involvement in all the matters surrounding the investigation of the claimant's grievance.

12.120 We were then referred to further e mails about approval having been given (via R 's electronic personnel requisition (EPR) system for R to recruit 6 new roles externally to BP's R& D team. These roles were to be based in Birmingham or Birmingham/Bridgwater and included a Senior Software Engineer (page 1225-6). It was put to BP that this approval process for new roles was taking place while C was serving his notice of termination, and that C should have been considered for such roles. BP told us that these roles were not available at the time and that he did not think C could perform those roles. He accepted that C was not informed that these roles were being considered stating that there had been an issue with the EPR approval which meant that after this point, it had to be redone and was not finally in place until February 2022. CR clarified that these roles were replacement roles for people

who had resigned during the restructuring and alleged that these were not finally approved and advertised until February 2022. He accepted that at the time that C was on notice the company was going through a process to recruit new people externally on the basis that no-one was available to fill the role internally. He admitted that the Software Engineer role that was advertised could have been a role C could have applied for.

Grievance 2 meeting

12.121 On 2 December 2021 C attended a meeting with NH who had been appointed to investigate Grievance 2. This was a lengthy meeting lasting 2-3 hours and C acknowledged he was given every opportunity to air his grievance and explain his points by NH. The notes taken by MB who attended with C were shown at page 1212-6 and the notes taken by R 's note taker, M Udale (MU) were shown at pages 1217-1224. A number of issues were discussed at this meeting, but we have confined our fact finding largely to the substance of the allegation in these proceedings to which it relates which is whether during this meeting NH accepted that terms such as 'Indian Bill', 'Jamaican Bob' 'Chinese Jiang', 'Pakistani Mo' were acceptable. At the start of the meeting C asked what training NH and MU had received and then directly asked them if they were racist to which they answered that they were not. The claimant recounted incidents of racism he has experienced during his life and then also said that he felt that LT "*did not care because I mean nothing to him*". He also stated to NH:

"The Company admitted PJ said racist comments but did nothing. Even with witness statements. What's even worse, the company is saying 'Indian Bill' is just a title. Completely rejecting everything I went through subjecting me to further discrimination"

NH told C that he felt for him when he heard of his past experiences, and he was sorry that C had to experience racism. He told the Tribunal that he was showing empathy to C who had become very emotional when describing the experiences he had.

12.122 The claimant went on to ask NH whether he agreed that if C used the terms 'Jamaican Bob' or 'Pakistani Mo' that it would be unacceptable and a disciplinary matter to which NH responded that he would need to understand the context of the comments to view it objectively. The claimant then said he suggested to NH that if someone was being defined by their ethnicity then that was racism and there was no context to which NH replied that he would need to understand who was involved. He said the conversation continued and other matters were discussed. NH told us that his recollection of the exchange was that he did not say it was acceptable to use the phrase 'Indian Bill' but that he could not accept what C was saying that it was never acceptable for the two words to be used together in any circumstances

as in NH's view that the circumstances would need to be investigated and the context of the two words being used together examined. NH said he could not give an answer to what C was asking and that he needed to carry out his investigation into the claimant's grievance first to see whether in the context the words used were acceptable.

12.123 The minutes taken by MU did not really record this exchange. The notes taken by MB recorded the exchange as follows:

"HeGo: In the previous Grievance I said if I called someone Jamaican Bob or Pakistani Mo. Would that be a disciplinary offence. What is your understanding?

NeHe: We would need context to view it objectively.

HeGo: If you define someone by their ethnicity then that is racism.

NeHe: I need to understand who was involved."

We did not find that this amounts to an acceptance by NH that terms such as 'Indian Bill', 'Jamaican Bob' 'Chinese Jiang', and 'Pakistani Mo' were acceptable. NH did not say that the terms were acceptable but answered briefly questions put to him by C about the use of the terms. He did not say that the terms were acceptable or unacceptable and stated that context and an understanding of who was involved would be needed. We find that this is different from stating that the use of such terms is acceptable.

12.124 The claimant also told NH during this meeting that PJ had used the phrase 'Indian Bill' on multiple occasions mentioning an earlier occasion when he had heard him say it (page 1213).

Grievance 1 Appeal meeting with DS

12.125 On 8 December 2021 C attended a meeting to discuss the appeal against his grievance which was conducted by DS (minutes at 1234-5). This was a very brief meeting lasting less than 20 minutes and again at the outset C asked DS whether he was racist to which DS responded that he was not and that he took exception to the question as he had never had that accusation levelled against him. The claimant then went on to ask a similar question to DS about whether he felt that the use of terms such as Pakistani Mo and Chinese Jiang were acceptable as C felt they were not as they were racial slurs. DS replied that he was not able to pass comment. DS admitted that being asked these questions by C had "*got his heckles up*". The claimant denied that he was being antagonistic to DS but that he felt it was reasonable to ask such questions as he wanted to ensure he got a fair hearing. Again, we found that DS did not during this meeting state that the use of the terms was acceptable and not answering the claimant's question

may have concerned C, but it did not amount to an acceptance of the term itself being acceptable.

Grievance 1 Appeal outcome

12.126 On or around 17 February 2022 C was sent an outcome letter for his appeal against Grievance 1 from DS (page 1334-1352). This was a lengthy document which went through the matters raised by C providing the response of DS. The claimant's appeal was not upheld.

Grievance 2 outcome

12.127 On 18 February 2022 C received a letter from NH with the outcome of Grievance 1 (page 1669-1672) which was not upheld.

Relevant Law

13. The relevant sections of the ERA applicable to this claim are as follows:

43B Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

43C Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—

(a) to his employer,

44 Health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

…

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those

means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

47B. Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

48. Complaints to employment tribunals

(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section …44 (1).

…

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection (1) …. (1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a)before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

94. The right

(1) An employee has the right not to be unfairly dismissed by his employer.

95. Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

98 General

(1) 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.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……

(4) 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.

103A Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.]

14. The relevant sections of the EQA applicable to this claim are as follows:

4 The protected characteristics
The following characteristics are protected characteristics: …
..race;"

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

23 Comparison by reference to circumstances
(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."

26 Harassment
(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."

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(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."

123 Time limits

(1) [Subject to [sections 140A and 140B],] proceedings on a complaint within section 120 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
(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

136 Burden of proof

(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.

212 General interpretation

(1) In this Act-
…
"detriment" does not, subject to subsection (5), include conduct which amounts to harassment"

15. The relevant authorities which we have considered in relation to the claims for PID detriment and automatic unfair dismissal were as follows:

Williams v Michelle Brown AM/UKEAT/0044/19/00 where HHJ Auerbach considered the questions that arose in deciding whether a qualifying disclosure had been made

"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

Cavendish Munro Professional Risks Management Ltd v Geduld UKEAT [2010] ICR 325, [2010] IRLR 38 made it clear that to be a disclosure there must be a disclosure of information, not an allegation.

Fincham v HM Prison Service EAT/0925/01 confirmed that the disclosure of information must identify, albeit not in strict legal language, the breach of the legal obligation that C is relying on.

Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436 - paragraphs 31 and 32 on the irrelevance of the distinction between 'allegation' and 'information' in whistleblowing complaints as this is essentially a question of fact depending on the particular context in which the disclosure is made.

Chesterton Global Ltd v Nurmohamed [2017] ICR 731 CA The following guidelines were suggested as to determining whether the worker genuinely believed the disclosure was in the public interest and whether it was reasonable for him to have done so:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e., staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest, though this should not be taken too far.

Korashi v Abertawe Local Health Board [2012] IRLR 4 EAT, para.62 & 64 the reasonable belief of the person making the disclosure takes into account the characteristics of the claimant, i.e., what a person in C's position would reasonably believe to be wrong doing. In the case of multiple disclosures, it is not enough that C believes that the gist of the multiple disclosures are true, there must be a reasonable belief in respect of the particular disclosure relied upon.

Eiger Securities v Korshunova [2017] IRLR 115 EAT) - The ET must identify the breach of legal obligation (if that is relied upon). Conduct which is immoral, undesirable or in breach of guidance is not enough without also being in breach of a legal obligation

Blackbay Ventures Ltd v Gahir [2014] IRLR 416 EAT) - When considering a claim of detriment for multiple disclosures the ET should be precise as to the detriments and disclosures in question and should not just roll them all up together

Fecitt v NHS Manchester [2011] EWCA Civ 1190, [2012] IRLR 64 [2012] ICR **372** – "*section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower".*

International Petroleum Ltd & Ors v Osipov & Ors [2017] the EAT determined that "*the words "on the ground that" were expressly equated with the phrase "by reason that in Nagarajan v. London Regional Transport 1999 ICR 877. So the question for a tribunal is whether the protected disclosure was consciously or unconsciously a more than trivial reason or ground in the mind of the putative victimiser for the impugned treatment. Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done". In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference*."

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL - for a disadvantage is to qualify as a "detriment" , Tribunals should take the broad and ordinary meaning of detriment from its context and from the other words with which it is associated. It confirmed De Souza v Automobile Association [1986] ICR 514, 522G, that the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

Jesudason v Alder Hey Childrens NHS Trust [2020] IRLR - Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and C genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective. The causal connection of "on the ground that" is satisfied if the protected disclosure materially influences (in the sense of being something more than trivial) the employer's treatment of the whistleblower. It is more aptly described as a "reason why" test, it is not a "but for test.

Kuzel v Roche Products Ltd [2008] EWCA Civ 380 (CA) - the Court of Appeal approved the approach to the burden of proof in protected disclosure dismissal cases set out by the EAT as being as follows:-

"1*. Has C shown that there is a real issue as to whether the reason put forward by the Respondent, some other substantial reason, was not the true reason?*

2. If so, has the employer proved his reason for dismissal?

3. If not, has the employer disproved the Section 103A reason advanced by the Claimant?

4. If not, dismissal is for the Section 103A reason."

It *further* noted at para 59

"*The ET must then decide what was the reason or principal reason for the dismissal of C on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so."*

Secure Care UK Ltd v Mott: EA-2019-000977-AT (previously UKEAT/0122/20/AT), the EAT found that the 'materially influences' test applicable to section 47B claims for detriment by reason of making a protected disclosure (see Fecitt v NHS Manchester [2012] ICR 372), was the incorrect test and the Tribunal should apply the sole / principal reason test required by the terms of section 103A.

In Eiger Securities LLP v Korshunova: UKEAT/0149/16/DM the EAT found that whether the making of a protected disclosure was "a matter which was in the employer's mind at the time of dismissal" is not the correct test and Tribunals should apply the test as to whether disclosure was the reason or the principal reason for dismissal.

16. The relevant authorities which we have considered on the direct discrimination and victimisation claims are as follows:

Burrett v West Birmingham Health Authority 1994 IRLR 7, EAT is an example of the proposition that it is for the tribunal to decide as a matter of fact what is less favourable treatment and the test posed by the legislation is an objective one. The fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment, although the claimant's perception of the effect of treatment is likely to be relevant as to whether, objectively, that treatment was less favourable.

Anya v University of Oxford & Another [2001] IRLR 377 **-** it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Igen v Wong and Others [2005] IRLR 258 and Madarassy v Nomura International PLC [2007] IRLR 246.
The employment tribunal should go through a two-stage process, the first stage of which requires C to prove facts which could establish that R has committed an

act of discrimination, after which, and only if C has proved such facts, R is required to establish on the
balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether C had established a prima facie case, the tribunal is to examine all the evidence provided by R and the claimant.

Madarrassy v Nomura International Ltd 2007 ICR 867 - the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that R " committed an act of unlawful discrimination". There must be "something more".

Nagarajan v London Regional Transport [1999] IRLR 572, HL,-The crucial question in every case was, *'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?*'

Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for …'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: *'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.*'

Bahl v Law Society [2003] IRLR 640 – "*where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups.*"

17. In relation to harassment the following authorities were relevant:

Richmond Pharmacology V Miss A Dhalliwell [2009] ICR 724. There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that R may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so. A R should not be held liable merely because his conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created. Therefore, it must be objectively decided whether or not a reasonable person would have felt,

as C felt, about the treatment in question, and C must, additionally, subjectively feel that their dignity has been violated, etc.

Grant v HM Land Registry & EHRC [2011] IRLR 748 CA emphasised the importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created: "*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."*

Pemberton v Inwood [2018] EWCA Civ 564. Underhill J *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).*

Conclusion

18. The issues between the parties which fell to be determined by the Tribunal were set out in the List of Issues above. We have approached these in a different order but set out our conclusions on each numbered paragraph of the List of Issues below:

Harassment- Section 26 EQA - Paragraph 2

19. We started by considering the claimant's complaints for race related harassment. As well as the substantive complaints, we also had to determine whether the allegations were presented within the time limits set out in 123(1)(a) & (b) of the EQA and if not whether time should be extended on a "just and equitable" basis. We have considered first the substance, before returning to the issue of time limits and whether we have jurisdiction.

20. To decide the harassment complaints, we firstly had to determine whether R engaged in the conduct relied upon. We then had to consider whether any such conduct that did occur was unwanted. The next step is to decide whether the conduct related to a relevant protected characteristic (race). Following the Pemberton decision above, to decide whether any conduct falling within section 26(1)(a) has either of the proscribed effects under section 26(1)(b), a tribunal must consider both (by reason of section 26(4)(a)) whether the putative victim perceives themselves to have suffered the effect (the subjective question) and (by reason of section 26(4)(c)) whether it was reasonable for the conduct to be regarded as having had that effect (the objective question). It must also consider all the other circumstances under section 26(4)(b). The relevance of the subjective question is that if C does not perceive their

dignity to have been violated etc the conduct should not be found to have had that effect. The objective question is then relevant and if it was not reasonable for the conduct to be regarded as violating C's dignity etc, then it should not be found to have done so.

21. We considered each of the allegations in turn and our conclusions on each are as follows:

Paragraph 2.1 - In R's Birmingham HR office, on July 15th 2020, PJ used the expression 'Indian Bill' to describe an Indian man in his village.

22. Our findings of fact on what took place on 15 July 2020 are set out at paragraphs 11.24-11.31 above. We determined that this conduct did occur so went on to consider whether the conduct was unwanted, and we conclude that it was. The use of the phrase 'Indian Bill' clearly and self evidently falls into the unwanted category in respect of the claimant. We next had to consider whether it was related to race. It is quite clear that this was a comment related to race and the claimant's protected characteristic, British Asian, in particular.

23. We went on to consider whether the use of the comment 'Indian Bill' by PJ on this day had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. We thought carefully about whether we should conclude that the use of Indian Bill by PJ was in fact conduct which had the purpose of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Our concern here was that PJ appears to have used this phrase four times on each occasion in the presence of someone who was British Asian or of Indian heritage (see also paragraph 11.12 to 11.17). We found this troubling and wondered what purpose could possibly be served by using this phrase at all, even if the context that PJ says it was used is accepted. PJ seemed to at one point acknowledge the inherent difficulty in using this phrase at all when in conversation with someone of Indian heritage (paragraph 11.92.2). Both C and HS felt that the comments were directly racist and directed towards them. However, on balance, we concluded that PJ using the phrase 'Indian Bill' did not have this purpose. PJ has consistently said that his use of the phrase was repeating how others identified an individual he knew. Whilst we did not accept this excused the use of the phrase (which we conclude was inherently racist) it did perhaps demonstrate it was not used deliberately to cause offence. PJ has on occasions in the past caused offence to individuals by his unfortunate, clumsy (and on occasion discriminatory) choice of words (see paragraphs 11.9 and 11.10) and it appeared that this was another instance of this, albeit this had a significant and understandable detrimental impact on the claimant.

24. We then went on to consider whether this comment had the effect on C of violating dignity or creating an intimidating, hostile, degrading,

humiliating or offensive environment. We had no hesitation in concluding that it did considering as we are required to do the perception of the claimant, the other circumstances of the case and whether it was reasonable for the conduct to have that effect. A comment of this nature is in our view in any context inherently racist as it is labelling someone in relation to their race, nationality or cultural background. We agreed with the conclusions of both C and HS (see paragraph 11.16 and 11.30) that this was how they perceived this comment and indeed WM of R acknowledged this during the investigations (see paragraph 11.92.2) and during cross examination (paragraph 11.115). We accepted the evidence of C about the affect this comment had on him (see paragraphs 11.25, 11.81 and 11.118) and conclude given what we have said above that it was reasonable to have that effect. This allegation of race related harassment is made out.

Paragraph 2.2 - In R's Birmingham HR office PJ on July 15th 2020 explained to C why he thought 'BAME society deserved COVID due to their inability to follow simple instructions'.

25. We again refer to our findings at paragraphs 11.24-11.31 above. We determined that this conduct did occur broadly as alleged so went on to consider whether the conduct was unwanted, and we conclude that it was. Whilst C engaged with PJ in a conversation about the spread of Covid within 'BAME' communities, PJ then went on to make unacceptable comments about such communities being to blame for the spread and either expressly or impliedly suggesting that this was 'deserved'. This took what could have been a general conversation about an item of topical interest into an entirely different direction. It was only at the hearing itself that we heard for the first time the suggestion by PJ that it was C who had taken the conversation in that way by suggesting that Britian was a racist country. We could not accept that evidence as being credible. We were satisfied that the comments found to have occurred were unwanted by the claimant.

26. We next had to consider whether it was related to race. It is quite clear that this was a comment related to race as it was specifically about the spread of Covid in 'BAME' communities. We went on to consider whether this had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. For similar reasons to those set out above, we on balance concluded that this conduct did not have the purpose in that we did not conclude that PJ made such comments deliberately to offend the claimant. Rather we felt that as was put to PJ in cross examination that in a moment of stress and frustration, PJ said something highly inappropriate about his views on why the pandemic was continuing. We did not accept as suggested that PJ saw C as a weaker target due to earlier complaints in 2014/15. On that basis we conclude that it did not have the purpose required.

27. Nonetheless for the same reasons as above, it is abundantly clear that that the conduct had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The claimant gave affecting evidence about how this made him feel (see paragraph 11.25) and we accepted that C was shocked and offended (see paragraph 11.30). The circumstances of these comments being made were also relevant. In July 2020 the Covid 19 pandemic was still in its relatively early days, and it was being reported regularly about how Covid 19 had a disproportionately more serious affect on those from one of the 'BAME' communities. It was a worrying time in general but perhaps even more so for people from those communities. We also take note of the reaction of the other person present during that discussion as recorded in the contemporaneous emails (see paragraph 11.27) describing it as "*awkward*" and "*not good*". This complaint of race related harassment is made out.

Paragraph 2.3 - when on 12th November 2021 C read as part of the grievance proceedings that PJ explained that he had used the term 'Indian Bill' in conversations and stated that, 'Indian' is just a title'.

28. We refer to our findings of fact at paragraphs 11.114 to 11.115. We determined that this conduct did occur broadly as alleged so went on to consider whether the conduct was unwanted, and we conclude that it clearly was as this was a written notification of a grievance outcome provided to the claimant. We next had to consider whether it was related to race. It is quite clear that this was a comment related to race as it was specifically about the phrase 'Indian Bill' an explicit reference to race/nationality. We went on to consider whether this had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. We conclude that this was not the case. We found that CF was providing his view of the meaning of the phrase used by PJ which he found to have occurred. He had concluded that the phrase was used but not in an offensive way and was communicating that outcome to the claimant. It was an inappropriate turn of phrase to have used to state that 'Indian Bill' was a "*known title*" but we also accept there may have been some difficulties caused by the fact that both LT and CF who were investigating and deciding the grievance were operating in their second language and some of the nuances of meaning may not have come across.

29. However, notwithstanding any differences in linguistics, we were clear that conduct had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. We considered the perception of the claimant, the other circumstances of the case and whether it was reasonable for the conduct to have that effect. We concluded (and indeed WM for R acknowledged) that a statement that someone's nationality is a title was inherently racist and for someone at a senior level in an organisation to do this was in her

words "*not inclusive*". The claimant was also clearly upset and affected by managers at R not only effectively condoning the use of a racist phrase (by not upholding his grievance) but then going on to repeat a similar comment. In his appeal against the grievance outcome C made his feelings on this matter clear that he now believed that "*within Continental's senior hierarchy, 'Indian Bill' may be nothing but a title*" going on to say that being labelled was a "*constant reminder of being seen differently*" and being judged by the colour of his skin (see paragraph 11.118). During his grievance appeal meeting he also stated to NH that making this statement in his appeal outcome was "*even worse*" than rejecting his grievance in the first place and that this was further discrimination (see paragraph 11.121). This complaint of race related harassment is therefore made out.

Paragraph 2.4 - During the C's grievance appeal hearing, on 2nd December 2021 another managing director fully accepted the use of 'Indian Bill' and comments such as 'Jamaican Bob', Chinese Jiang', 'Pakistani Mo', are acceptable.

30. We refer to our findings of fact at paragraphs 11.121 to 11.123. This allegation is not made out on the facts as the conduct alleged did not occur as C alleged. This allegation is therefore dismissed.

Paragraph 20 – were the complaints made within the time limit in s123 EQA?

31. Having determined the substance of the complaints, a crucial issue relied upon by R is whether all the complaints of harassment were presented within the time limits set out in sections 123(1)(a) & (b) of the EQA? Dealing with this issue involved considering whether there was an act and/or conduct extending over a period, and/or whether time should be extended on a "just and equitable" basis. It had already been identified that given the date the claim form was presented (17 December 2021) and the dates of early conciliation (2 to 6 December 2021), any complaint about something that happened before 3 September 2021 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

32. We have found that three incidents amounted to harassment contrary to s 26 EQA. The first two acts (paragraphs 2.1 and 2.2) took place on 15 July 2020 and the last such act took place on 12 November 2021 (paragraph 2.4). Therefore, on their face at least the first two incidents were presented out of time. The last incident found to be an act of harassment was presented in time and so succeeds.

33. We had to consider whether there was conduct extending over a period ending with an act of harassment that was brought in time (Paragraph 20.2 and 20.3). Section 123(3) EQA provides that conduct extending over a period is to be treated as done at the end of the period. We take note of the case of the case of Hendricks v Metropolitan Police Commissioner and that is whether an employer is responsible for an

"*ongoing situation or a continuing state of affairs*" in which the acts of discrimination occurred. We also considered and were persuaded by the comments of HHJ Eady in Robinson v Royal Surrey County Hospital NHS Foundation Trust.

34. We conclude these three acts of harassment did amount to conduct extending over a period as the final in time act relates to and connects directly back to the same incident which took place on 15 July 2020. The comments made by PJ on 15 July 2020 were the subject of the grievance which was started in May 2021 and concluded with the outcome that was communicated on 12 November 2021. We concluded that the original acts of harassment were compounded by the way complaints about those acts were treated and the conclusion that was reached by CF about the term 'Indian Bill'. When managers at R not only effective condoned the use of a racist phrase (by not upholding his grievance) but then repeated a similar comment, this made the original act 'worse' in the claimant's view (which we share). We conclude that by effectively restating the comment made earlier and minimising its impact, the last act reactivated and linked back to the earlier acts, leaving us in no doubt that there was conduct extending over a period.

35. Mr Holland made many references to a problem with the 'poor culture' at R in terms of complaints of racism and other issues not being addressed or taken seriously. He suggested that this showed a 'pattern of discrimination'. We were also concerned about the way complaints made by C on various occasions were handled. Although not part of this claim, the events of 2014/15 and the response to this by managers at the time were troubling. When C raised a complaint informally to CR, he delayed in dealing with this and ultimately informed C he wanted no involvement in it (paragraph 11.47). We accept that CR may have felty concerned as to how to deal with this serious complaint against a senior manager (perhaps being concerned about any impact on him) but this was a failure of management responsibility. When C intimated that he wanted to bring complaints about racism during his first 'collective' grievance, he was told to think carefully about raising it (see paragraph 11.54). It is perhaps unsurprising that there was a delay on the claimant's part in taking formal internal action to pursue his complaints. Equally concerning to the Tribunal was learning that even where recommendations had been made because of complaints made against PJ, the suggested action did not take place. See paragraphs 11.9 and 11.114. We were entirely satisfied that the three acts of race related harassment amounted to a course of conduct.

36. The last act of race related harassment having taken place on 12 November 2021, being the last act in a course of conduct extending over a period is to be treated as done at the end of the period. We find that the three complaints of harassment set out at paragraphs 2.1. 2.2 and 2.3 were brought in time. On this basis it was not necessary for us to further

decide whether to exercise our discretion to extend time based on justice and equity (Paragraphs 20.4 to 20.6). We do conclude that it is highly likely that the Tribunal would have determined that it was just and equitable for the claimant's complaints to have been brought had they not been part of conduct extending over a period. The claimant did in fact complain informally about the incident on 15 July 2020 to his line manager and then continuously chased for an outcome to this (see findings of fact at paragraphs 11.33-11.35, 11.40-11.41,11.43-11.44 and 11.47). He was unable to resolve this and then pursued a 'collective grievance' on other but in some ways related matters in February 2021 (see paragraphs 11.52-11.59), ultimately pursuing the matter internally by a grievance started in May 2021 (see paragraph 11.75). This outcome was not received until November 2021. We also conclude that the way in which the claimant's complaints had been handled in the past affected the way he raised such complaints on this occasion (see paragraph 11.8). The claimant expressed concern on several occasions about reprisals (see for example paragraphs 11.52-11.53, 11.75 and 11.77). Given the reasons for the delay, the seriousness of the allegations made and the fact that R was able to call evidence to deal with such allegations (and was not therefore prejudiced) we would have exercised our discretion to extend time in any event. Therefore, these three acts of race related harassment were presented in time and succeed.

Direct discrimination- Section 13 Equality Act 2010 ('EQA') - Issue 1

37. In order to decide the complaints of direct disability discrimination, we had to determine whether R subjected C to the treatment complained of (which was set out at paragraphs 1.1 to 1.5 of the List of Issues above and then go on to decide whether any of this was "less favourable treatment", (i.e. did R treat C as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances). We had to decide whether any such less favourable treatment was because of the claimant's race (British Indian).

Paragraph 1.1 - In R's Birmingham HR office, on July 15th 2020, PJ used the expression 'Indian Bill' to describe an Indian man in his village.

Paragraph 1.2 - In R's Birmingham HR office PJ on July 15th 2020 explained to C why he thought 'BAME society deserved COVID due to their inability to follow simple instructions'.

Paragraph 1.3 - when on 12th November 2021 C read as part of the grievance proceedings that PJ explained that he had used the term 'Indian Bill' in conversations and stated that, 'Indian' is just a title'.

38. As we have found all such acts to amount to race related harassment, then pursuant to section 212 (1) EQA, such acts cannot also be acts of detriment for the purposes of a complain of direct discrimination pursuant to section 39(2) EQA. Those complaints are accordingly dismissed

Paragraph 1.4 - During the C's grievance appeal hearing, on 2nd December 2021 another managing director fully accepted the use of 'Indian Bill' and comments such as 'Jamaican Bob', Chinese Jiang', 'Pakistani Mo', are acceptable.

39. This allegation was not made out on the facts and so is also dismissed as a complaint of direct race discrimination

Paragraph 1.5 - C was dismissed.

40. The claimant alleges that his dismissal was an act of less favourable treatment and it was because of his race. We applied the two-stage burden of proof referred to above. We first considered whether C had proved facts from which, if unexplained, we could conclude that the dismissal was because of race. The next stage was to consider whether R had proved that the treatment was in no sense whatsoever because of race.

41. The claimant points out that of the three Software Team Leaders, C was the only Indian and he was selected for redundancy, the other two team leaders were White and were not. In the alternative, C relies on a hypothetical white comparator for his direct discrimination claim who had the same level of experience and CV as the Claimant. It is striking that having heard considerable evidence and submission on the race related harassment allegations made and the allegation that C was dismissed for having carried out protected acts and having made protected disclosures, C did not focus as heavily on the allegation that he was dismissed because he was British Indian. The claimant clearly feels very strongly and genuinely that he was subject to racism whilst he was employed at R both historically and in relation to comments he was subjected to. It is perhaps understandable why he believes his dismissal was also racially motivated. However, for the Tribunal to reach the conclusion that C was also dismissed because of his race, there must be evidence, although it is possible that evidence could be inferences drawn from relevant circumstances. A belief, that there has been unlawful discrimination, however strongly held is not enough.

42. Ultimately, we have concluded that the claimant's race was not the reason why consciously or subconsciously he was selected for redundancy and dismissed. As we go on to address in our conclusions in respect of this complaint made as an allegation of victimisation and in relation to protected disclosures, we have concluded that it was because C made complaints (about racism and other matters) that was the reason for dismissal, not his race of itself. C himself acknowledged on a number of occasions that it was the fact of him making the complaints that he was concerned would lead to reprisals (see paragraph 35 above). In relation to the allegation of direct race discrimination we conclude that it was the complaints that were the 'reason why' C was ultimately dismissed. The

claimant's race was not the reason for the treatment. In relation to the allegations of direct race discrimination he has been unable to show us the "something more" required by the Madarassy case for us to conclude that the dismissal was because of race. This complaint is dismissed.

Victimisation- Section 27 EQA

43. The claimant relies on three separate matters which were said to be protected acts ('PAs') and it did not appear that R conceded that any such acts were PAs within the meaning of section 27 (2) EQA (Paragraph 3). We firstly set out our conclusions on each of the matters relied upon said to be a PA:

Grievance One (date submitted May 19th, 2021) (Paragraph 3.1)('PA1')

44. Our findings of fact on this issue are at paragraph 11.75–11.77. This clearly refers to allegations of racism and laughing at racist jokes. The document also complains about possible *"repercussions*" because of complaining. Whilst the specific detail of the allegations was not included, we were satisfied that C had a genuine belief at this time that discrimination (and victimisation) was taking place which was articulated in the claimant's e mail. Therefore, this qualifies as a PA under section 27 (2) EQA.

Grievance Two was sent via email directly to the CEO (Nikolai Setzer) on Oct 26th 2021 (Issue 3.2) (Paragraph 3.2)('PA 2')

45. Our findings of fact on this issue are at paragraph 11.112. This grievance made complaints of race and sex discrimination and made specific complaints about discrimination, harassment and victimisation. For the same reasons we conclude that the document set out the claimant's genuine belief that discrimination was taking place and therefore this too qualifies as a PA under EQA s 27 (2).

Emails with the C's manager CR about race discrimination (in relation to same incidents as above) (Paragraph 3.3)('PA3')

46. Our findings of fact on this issue are at paragraphs 11.33 to 11.36; 11.40 to 11.41; 11.43-44 and 11,47. We conclude that in these e mails and related conversations with CR, C made clear complaints about suffering race discrimination during the incident involving PJ on 15 July 2020. These were genuine complaints and therefore these e mails (and related conversations) with CR between 5 August 2020 and a date in February, before 18 February 2021, qualify collectively as a PA under section 27 (2) EQA.

Issue 4 - Were the detriments found suffered by C because he did a protected act?

47. There are nine remaining allegations of detrimental treatment which he says took place because he did PA1, PA2 and/or PA3. For each

detriment relied upon we had to determine whether R subjected C to the detriment complained of (which is set out at paragraphs 4.1 to 4.10 of the List of Issues) and then go on to decide whether any of this was because of the protected act. The provisions on the two-stage burden of proof set out at Section 136 EQA apply in victimisation cases. Once a claimant establishes a prima facie case of victimisation, the burden of proof shifts to R to show that the contravention did not occur. To discharge the burden of proof, there must be cogent evidence that the treatment was in 'no sense whatsoever' because of the protected act. We set out below our conclusions with reference to each paragraph number whether the allegation is listed before we go on to consider the reason.

48. As a number of related allegations are made about the actions of CR during the consultation meeting, we set out below our conclusions about whether the conduct took place as alleged with respect to each allegation and then have gone to consider whether collectively whether such conduct was because of a protected act.

Paragraph 4.1 - C was treated in a hostile manner as part of a redundancy consultation (July 28th, 2021) (by CR)

49. We found at paragraphs 11.99 and 11.104 that CR was not hostile to C at the first consultation meeting on 22 July 2021 but that he did behave in a hostile and defensive manner with C in the second consultation meeting on 9 August 2021. This allegation is therefore made out in part on the facts.

Throughout all consultations, CR the consultation manager, was unwilling to engage and/or listen to any mitigating reasons given by claimant.

50. We found at paragraph 11.104 that during the consultation meeting on 9 August 2021 that CR did not answer or address the claimant's questions and that no feedback was subsequently provided to issues raised so this allegation is made out in part on the facts.

CR repeatedly interrupted C when he was trying to explain his skills, experience, knowledge, expertise, etc.

51. This allegation was not put to CR during the hearing. This is not made out on the facts and this part of the allegation is dismissed.

CR repeatedly told C 'we need to move on' during consultations.

52. We found at paragraph 11.104 that CR said to C on 9 August 2021 "can we move on" when C was asking about the pooling and skills, so this allegation is in part made out on the facts. Whilst not said 'repeatedly', it was said.

Claimant asked questions surrounding his pooling, why other team leaders, software engineers, etc were not even 'at risk', claimant was told he was pooled as one/unpooled.

53. We found at paragraph 11.99 that C was informed during the consultation meeting on 22 July 2021 that he was not pooled and in response to questions about pooling with other team leaders that it was his role that had gone. Therefore, we find this allegation to be made out in part on the facts.

CR repeatedly refused to assess C even after claimant stated he had more skills, experience and knowledge to offer, more years in the business.

54. At paragraph 11.99 we found that CR informed C at the first consultation meeting on 22 July 2021 that he would not be assessed and at 11.104 than when the issue of being assessed was raised again it was refused so this allegation is made out at least in part on the facts.

The Claimant overheard CR tell CT (Head of HR) he was not looking forward to this call.

55. We refer to paragraph 11.104. This allegation is made out on the facts as at the final consultation on 14 September 2021 CR did say to CT that he was not looking forward to the consultation with the claimant.

Throughout consultations, Callum repeatedly sighed when C was talking.

56. This allegation was not put to CR during the hearing. This is not made out on the facts and this part of the allegation is dismissed.

Callum confirmed new roles in the restructure, but C was denied opportunity to apply for these roles. The Claimant was not provided any job descriptions in relation to these roles.

57. At paragraph 11.104 we found as a fact that when C raised a question about the new roles in the CoC structure that he was told they had been filled. The claimant was not given the opportunity to apply for these roles or shown a job description for them, so this allegation is made out on the facts.

Claimant was told only his work was moving offshore, especially given when restructure announcement (July 16th, 2021) stated all development would be best cost location. Claimants was later pooled as two.

58. This allegation does not appear to have been put to CR. This is not made out on the facts and this part of the allegation is dismissed.

Paragraph 4.2 - C was told 3 times in 1st consultation (July 28th, 2021) (by CR) that he was already redundant.

59. We refer to our findings of fact at paragraph 11.97 above. This allegation is made out partly on the facts in that the claimant was told twice he was already redundant.

Paragraph 4.3 - C as part of the consultation was insultingly told (by CR) that his skills and experience were irrelevant and that he did 'web applications and nothing else'.

60. We refer to our findings of fact at paragraphs 11.104 and 11.107. This allegation is made out in that C was informed by CR at the second consultation meeting on 9 August 2021 that his experience was not relevant and at the third consultation meeting on 14 September 2021 that his current work was web applications and nothing else.

Issues 4.1 to 4.3 – Were the detriments re CR actions during consultation because of a protected act?

61. The factual allegations made at paragraphs 4.1, 4.2 and 4.3 were made out at least partly on the facts in that (1) on 22 July 2021 CR told C twice he was already redundant, said he was unpooled and that C would not be assessed; (2) on 9 August 2021 was hostile, unwilling to engage and listen; told C on one occasion "*we need to move on*" and that he could not apply for new roles in the structure; and (3) on 4 September 2021 told CT he was not looking forward to the meeting with C and told C that he did web applications and nothing else. The key question is whether any of those actions were taken as a result of any of the protected acts. PA2 cannot have been a reason for any of this treatment as this took place on 26 October 2021 after the consultation meetings were completed. We have gone on to consider whether either PA1 or PA3 was the reason for the treatment. We have applied the two-stage burden of proof and conclude firstly that C has shown a prima facie case that these two protected acts influenced the manner in which CR conducted the consultations (which is essentially what this complaint is about).

62. CR was aware of PA1 (as C informed him of this in his meeting on 1 June 2021 (see paragraph 11.79) and CT then told him about it in advance of the first consultation meeting (see paragraph 11.96)) and PA2 (as this was a protected act involving and made directly to him). The claimant submits that the reason CR behaved in the manner he did during the consultations was because he already knew that C was destined to be made redundant. We accept that CR had by this stage concluded that the claimant's redundancy was inevitable. It was acknowledged by BP that once the grouping process had been done that it was highly likely that C would be dismissed as the groupings were effectively 'set in stone' (paragraph 11.71). As both CR and BP had already decided that the claimant would be made redundant, CT he did

not engage properly with C in seeking to avoid redundancy. Even though we accepted that telling C he was already redundant was a slip of the tongue and CR meant to say, 'at risk', (paragraph 11.100) it was in fact an accurate statement as the decision about C exiting R had already been made some time earlier. The claimant was not, and we conclude never going to be assessed objectively against the selection criteria that had been developed irrespective of any issues or challenged raised by him. By complaining about discrimination to CR from August 2020 until February 2021 (PA2) , C placed CR in position he felt uncomfortable with. It is clear to us from our finding of fact at paragraphs 11.35 that CR found the complaint raised by C with him in August 2020 difficult to deal with. In October 2020 when C chased him for some action, he again expressed how difficult it was to address given it involved R 's Managing Director (paragraph 11.41). When further pressed by C in January and February 2021 CR ultimately admitted he had not progressed the claimant's complaint and wanted no involvement in it (paragraph 11.47). In June 2021, when C himself informed CR of Grievance 1, CR made a comment implying that this could lead to C being pushed out of the business. When C then in fact raised the matter formally (PA1), no doubt the difficulties for CR in dealing with the matter only increased, as the grievance specifically stated that the claimant's management would not approach PJ and "*did not want to be involved*" (see paragraph 11.79). All of this supports the claimant's contention that CR behaved as he did because of the earlier protected acts.

63. We then went on to consider whether R has established on the balance of probabilities that PA1 or PA3 was not the reason for the treatment, and we conclude that it has not. R largely submitted that the actions in question either did not occur or must have been withdrawn by C as they were not put to CR in cross examination. We were not satisfied that this was the case. In most cases, the allegations were put at least in general terms to CR. Where such allegations were clearly not put, they were not found to have taken place (see above). The explanation largely adduced by R is that CR made errors in the way he expressed matters and that he was generally uncomfortable with dealing with the consultation process, not just for the claimant. Whilst it may be the case that CR found such tasks difficult, the claimant's consultation was one that he was particularly apprehensive about (see paragraph 11.96). He acknowledged that C was someone who asked, "*awkward questions*" and we concluded that this was a direct (if unintentional) reference to the matters C had been raising with CR for some time. For these reasons, R has not shown that PA1 and PA3 was in no sense whatsoever the reason for the treatment. We were satisfied that the protected acts were the reason for this treatment by CR and the complaint of victimisation succeeds.

<u>Paragraph 4.4 - C's grievance panel (November 12th, 2021) failed to make findings that another worker was harassed when he heard the comment 'Indian Bill' said by PJ.</u>

64. We refer to our findings at paragraphs 11.95 and paragraphs 11.114. The investigation report made some reference to the use of 'Indian Bill' to HS but did not conclude whether it took place and the outcome letter sent to C on 12 November 2021 did not contain any findings as to whether HS was subject to harassment. This allegation is made out on the facts. However, we conclude that C has not shown that this failure was because of either PA1, PA2 or PA3. The Claimant has not met the first stage of showing a prima facie case that the failure to make the finding about the comments made by PJ was because of him having raised a protected act. Even if burden had shifted it, R would have discharged that burden as we accepted LT's evidence that his conclusion was that the term was not racist. Even if we disagree, that was clearly what he concluded and what led to his finding. What C is really complaining about the correctness of the decision made and not that this treatment was because of any of the protected disclosures themselves. We remind ourselves that the test is one of 'the reason why' not a 'but for' test. Clearly had C not raised PID1 in Grievance 1, there would not have been any findings including the one C complains of. However, that is not what we must decide. There is no evidence that this finding was made because of the protected act as somehow an act of retribution for complaining. This allegation of victimisation is dismissed.

<u>Paragraph 4.5 - Senior Management destroyed a recording of a grievance meeting held on July 21st, 2021, which could have assisted the C's grievance and case, in which another employee, HS, made allegations of hearing the term 'Indian Bill' which could have assisted the C's grievance.</u>

65. We refer to our findings at paragraph 11.111. R did destroy a recording of an investigation interview held on 22 July 2021. We were not able to make any conclusion about the extent to which it would have assisted the claimant. This allegation though is made out on the facts. Again, we could not conclude in relation to this allegation that C had shown that the destruction of the recording of HS's interview notes was done because he had raised a protected act. We refer again to our conclusions above, and it is the fact that the recording was destroyed, and that C felt this could have assisted him, which is really the complaint here, not genuinely that this was done because C complained in the first place. This was not even suggested by C and his real complaint here was that he felt that the recording would have shown that WM was behaving in an aggressive manner towards HS. This is an entirely different allegation. Moreover, we accepted the explanation of R about the reasons for destroying the recording (see paragraph 11.111). It was perhaps not ideal for this to have been done (especially as HS was told a copy of the recording would be provided to him as per our findings at paragraph 11.93.2) but we do not find that the reason for this was because of C raising a protected act. This allegation of victimisation is dismissed.

Paragraph 4.6 - C was unfairly pooled and ultimately selected for redundancy and dismissed on December 10th, 2021. The Claimant should also have been pooled with the other two Software Team Leaders (NB and MC). NB, MC and C all reported to CR. The Claimant should have in the alternative, been pooled alongside Senior Software Engineers and/or Software Engineers.

66. Our findings of fact on the decision to pool C which ultimately led to his dismissal were at paragraphs 11.70 to 11.74. The facts behind the allegation are made out as C was grouped and effectively selected for redundancy between May and early July 2021. Whether or not this was 'unfair' is not the issue here, but the crucial question is whether this was because C had done a protected act. PA2 cannot have been a reason for this treatment as this took place on 26 October 2021 after the grouping and selection had taken place. We have gone on to consider whether either PA1 or PA3 was the reason for the treatment. The first matter to decide was who was the effective decision maker. We concluded that this was a joint management decision between BP, CR, RS and CT but that PJ was also part of and hugely influenced that decision making process. We refer to our findings of fact at paragraph 11.74 and at paragraph 11.2 and conclude that PJ had significant managerial and decision making influence on the matters in question. He was the controlling mind of the respondent and we concluded that he influenced and controlled the key decisions we had to consider, either consciously or subconsciously. The operational decision makers, BP, CR and RS together with the HR decision maker, CT operated as a team (and put into operation a decision also effectively made by PJ) that the claimant should exit the business as part of the R&D restructuring process.

67. We have applied the two stage burden of proof and conclude firstly that C has shown a prima facie case that these two protected acts played a part in the operational decision making of CR (PA1 and PA3), CT (PA1) who we conclude were jointly involved in the decisions about pooling alongside BP and RS. We also conclude that these decision makers (in particular CT) were also heavily influenced by PJ in making this decision, again consciously or unconsciously. We conclude this for the following reasons:

    67.1 CR had on a number of occasions informed C that he was finding it difficult to take forward his complaints about PJ (PA3) and ultimately chose not to deal with the matter at all (see paragraphs 11.35; 11.41 and 11.47). When a formal grievance was then raised, this must have been concerning for CR as the claimant's line manager. In June 2021 (at the same time the selection and grouping were taking place), when C told CR about Grievance 1 (PA1), CR made a comment implying that this could lead to C being pushed out of the business (paragraph 11.79). There is a clear evidential link as well as a link in timing between PA1 and PA3 and the decisions around grouping that took place.

67.2 BP had carried out the difficult consultation meetings with C over the Coventry closure (see paragraphs 11.42; 11.45 & 11.51). BP had also been involved in the meeting held on 18 February 2021 (see paragraph 11.50) which led to the first 'collective' grievance raised by the claimant. BP's actions in conducting the consultation over the Coventry closure (and his handling of Covid matters) had been included as part of Grievance 1. Although there was not an allegation of a racist motive to his actions, he did allege that BP would make life difficult for him because of raising the grievance. BP was not aware of PA1 or PA2 at the time the grouping exercise was carried out, but we do conclude was influenced more generally by these earlier complaints and difficulties he had interacting with the claimant. Whilst PA1 and PA3 may not have influenced his actions, the decisions he made on grouping were connected to the earlier complains

67.3 CT had been involved in the restructuring plans from their inception and had advised CR and BP about this. Discussions around grouping and pooling had occurred with CT advising to use the method which ultimately led to the claimant's grouping and selection which was finalised on or around 7 July 2021 (see paragraph 11.66). We conclude that the advice around selection and grouping, although generic, did contribute to the way the claimant's grouping was carried out and anticipated the precise issue C complained about that individuals should not be able to "*see themselves in another group*". CT was aware of PA1 from 8 July 2021, the precise time that the grouping/selection approach was being finalised. CT had also had a number of what might be seen as problematic interactions with C in the past including the claimant's raising of furlough issues in June 2020 (see paragraphs 11.19-11.23); the failure of management to respond to Covid questions (see paragraph 11.36) and the consultations around the closure of the Coventry office (paragraphs 11.42; 11.45 & 11.50) in particular around the tax treatment of expenses. CT was a close management colleague of PJ, and we conclude was heavily involved in advising PJ and implementing his decision making as a member of his senior management team (see paragraphs 11.89 and 11.103).

67.4 PJ had been informed by LT about Grievance 1 on 27 May 2021(see paragraph 11.78) and during that discussion PJ had suggested to LT that he "*must not*" hold an official hearing about it, given C had raised a similar grievance earlier in the year. Whilst ultimately LT did go on to do this, PJ was already at this stage making attempts to influence the outcome of the grievance and how it was handled. It was clear from the exchange of messages between PJ and LT on 9 July 2021, that PJ was irritated that C had taken his complaints to senior management in Germany and was of the view that C was effectively wasting their time (see paragraph 11.87). PJ's further expression of frustration to CT on 6 August 2021 (see paragraph 11.103) also showed to us how

PJ viewed Grievance 1 and highlighted his increasing annoyance that C had complained about him. Whilst PJ may not have been directly involved in the discussions around grouping, we conclude that he significantly influenced the decisions and actions taken by BP, CR, RS and CT to ensure that the claimant was grouped in the way he was.

67.5 CR and CT were at the very time they became aware of PA1 in particular, were actively involved (with RS and BP) in and formulating R 's restructuring plans and we find it highly improbable that they were able to separate the fact that C had made PA3 and PA1 (in CR's case) and PA1 (in the case of CT) and keep this entirely out of mind when making decisions about selection. We conclude that BP whilst unaware of PA1 or PA3 must also have been influenced by earlier complaints and difficult interactions with the claimant. Neither CR or BP were able to satisfactorily explain how C came to be grouped as he was and their explanations about how the claimant's primary role was assessed were flawed and confused (see findings at paragraphs 11.70 to 11.74). We conclude that C had been selected already and these explanations were attempts to retrospectively explain and justify his selection, rather than a genuine assessment of activities and skills being matched to requirements in the new structure. Whilst we accept that C had been provisionally identified as possibly a role than may not be required as early as June 2020 before any of the protected acts (see paragraph 11.61) we accepted BP's explanation that these were simply what if scenarios and at this stage no decision had been taken.

67.6 PA1 itself included the claimant's statements that he was "*fearful of repercussions or reprisals*"; that his managers "*do not want to be involved*" and that he felt unable to raised with UK HR as the grievance also concerned CT(see paragraph 11.75). This was before he was aware of any potential restructuring or redundancy exercise.

68. We are conscious that we must look beyond the acts in question to any background evidence to consider whether prohibited factors have played a part in the judgment of decision makers. These many background factors lead us to conclude that key decision makers CR and CT (and P who ultimately was responsible for the decisions) were significantly influenced by the fact that C had done protected acts when making their decisions on grouping and selection. We conclude that whilst the restructuring itself was genuine and unconnected to the protected acts (see paragraphs 11.60-11.63), it was a convenient and timely opportunity for the decision makers to ensure that C was selected for redundancy and ultimately dismissed. We conclude that R 's decision makers deliberately chose to group C in the way that they did so that he would ultimately leave the business by way of redundancy. The claimant was known as an 'awkward' individual who asked 'awkward questions' (see paragraph 11.96). He had been causing the UK management team difficulties for some time and which included making two protected acts

and we concluded that these two protected acts (PA1 and PA3) contributed to the decisions made by CR, CT and PJ to group him as had been done. For those reasons we conclude that R has not shown that the decision to group and select him as they did was in no sense whatsoever because of PA1 and PA3 and accordingly this complaint of victimisation succeeds.

Paragraph 4.7 - R failed to provide prompt redress in answer to C's 'Grievance No1' which was submitted on May 19th, 2021. The outcome was given on November 12th, 2021.

69. Our findings of fact about how Grievance 1 was handled and the delay in providing the grievance outcome were at paragraphs 11.78; 11.80-11.86; 11.89; 11.92-11.95 & 11.114-11.115 above. This allegation is made out on the facts in that it took almost 7 months for the claimant's grievance to be investigated which is not in our view prompt redress to a grievance and was a detriment to the claimant. However, C has not been able to make out a prima facie case that this was because of him having done a protected act. It was not even the main argument posed by C who in fact suggested that the outcome was delayed to allow his redundancy appeal to be concluded (see paragraph 11.116). There is no evidence at all that any of the protected acts of themselves were the reason for delay in the completion of the investigation and the issuing of the outcome. Whilst LT and CF were aware of PA1 as that was the subject they were addressing and PA2 had taken place at this time (and CF at least was aware of it), we accepted his evidence about why the outcome was delayed (paragraph 11.116). Even if burden had shifted it, R would have discharged that burden. The delay was caused by holiday absences, the seeking of legal advice and the substantial number of allegations that had to be addressed. This treatment was not because of the protected act. This allegation of victimisation is dismissed.

Paragraph 4.8 - ~~R failed to answer C's appeal submitted on November 24th, 2021.~~

70. This allegation was withdrawn and so this allegation of victimisation is dismissed.

Paragraph 4.9 - Grievance One Appeal Meeting took place December 8th, 2021. Hearing Manager - David Smith (Managing Director, Continental Tyre Group Ltd, Country Head UK & Ireland). Grievance One Appeal Outcome delivered by post February 25th, 2022

71. It is not entirely clear what this allegation is, but we assume this is an allegation about the delay in providing the outcome of the appeal against Grievance 1 which we accept occurred and was detrimental treatment in that there was indeed a delay of 2 months between the meeting (paragraph 11.125) and the outcome (paragraph 11.126). There was no evidence that any delays in DS providing an outcome to the claimant's appeal against

Grievance 1 were because of a protected act in any event for similar reasons to those set out above. Whilst DS was certainly aware of PA 1 as this was the appeal in respect of it, there is nothing to suggest that this caused any delay in responding to the appeal. DS's appeal outcome, whilst not to the claimant's liking was a lengthy document and we conclude that the meeting having taken place in December 2021, that it was a reasonable timeframe for an outcome to have been provided in just over 2 months, given that this period included the festive season and given the large number of matters that needed to be addressed. This allegation of victimisation fails and is dismissed as C has been unable to show that the delay was because of any protected act.

Paragraph 4.10 - C was dismissed.

72. It is not disputed that C was dismissed and this was a detriment so the facts behind the allegation are made out. We have already determined that the decision to pool/group C that was taken between April and early July 2021 was an act of victimisation. The decision to group C ultimately and inevitably led to C being dismissed on 15 September 2021 (paragraph 11.107) which took effect after a period of notice on 10 December 2021. Therefore, for the same reasons as set out above, we conclude that the claimant's dismissal was also an act of victimisation. In addition, we also conclude that once this decision had been taken, CR retrospectively tried to justify the decision by being much less positive about the claimant's performance in an appraisal on 20 September 2021 (para 11.108). BP, CT and PJ were all fully aware of the details of the claimant's grievance by the time C was actually dismissed and had been interviewed about the complaints made against them by LT by this time (see paragraphs 11.92; 11.93 and 11.95). Serious allegations had been made against them by C and we feel that this ultimately influenced the way in which they approached the consultation process. We accepted the submission of Mr Holland that there was simply 'no way' R would have changed its mind on the claimant's selection for redundancy at this time and that this was directly connected to the fact that C had raised protected acts. Furthermore, our conclusion is supported by the fact that before the claimant's employment ended and whilst he was still working his notice, R's management team became aware of and started to take the steps to seek approval to recruit a Software Engineer (see paragraphs 11.119-11.120), the very role C had been carrying out. This was a role that C could have been considered for and yet absolutely nothing was done to inform C of the possibility of this vacancy. R 's managers closed their minds to the possibility of avoiding C being made redundant and we conclude that this was because C had done protected acts. This allegation of victimisation succeeds.

Paragraph 20 – were the complaints made within the time limit in s123 EQA?

73. Having decided that the above complaints were substantially made out, we again had to consider whether these complaints of victimisation were presented within the time limits set out in sections 123(1)(a) & (b) of the EQA? As set out above, any complaint about something that happened before 3 September 2021 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

74. We have found that the following incidents in substance amounted to victimisation contrary to s 27 EQA:

    74.1 On 22 July 2021 CR told C twice he was already redundant, said he was unpooled and that C would not be assessed;

    74.2 On 9 August 2021 CR was hostile, unwilling to engage and listen; told C "we need to move on" and that he could not apply for new roles in the structure; and

    74.3 On 4 September 2021 told CT he was not looking forward to the meeting with C and told C that he did web applications and nothing else.

    74.4 C was unfairly pooled and ultimately selected for redundancy and dismissed on December 10th, 2021.

    74.5 C was dismissed

75. On their face the first two incidents were presented out of time. The remaining allegations of victimisation were presented in time. We again considered whether there was conduct extending over a period ending with an act of victimisation that was brought in time (Issue 20.2 and 20.3). Section 123(3) WQA provides that conduct extending over a period is to be treated as done at the end of the period. For similar reasons to those set out at paragraph 32 above, we conclude that these five acts of victimisation did amount to conduct extending over a period as all the allegations arose out of and related to the claimant's selection for redundancy culminating in his dismissal. Once R had carried out the grouping exercise in the way that they did (which we concluded was because C had raised a protected act), then this led to the consultation taking place and being carried out as it was and ultimately culminated in dismissal. There was a close and clear connection between all the acts as they all involved CR and other managers at R involved in this decision, The last act of victimisation having taken place on 12 November 2021, being the last act in a course of conduct extending over a period is to be treated as done at the end of the period. All five complaints of victimisation that have succeeded were brought in time. On this basis it was not necessary for us to further decide whether to exercise our discretion to extend time based on justice and equity (issues 20.4 to 20.6).

<u>Whistleblowing</u>

76. The claimant relies on 9 acts each of which are said to be a protected disclosure ('PD') (one earlier act relied upon at paragraph 5.2 having been withdrawn). The parties agree the alleged disclosures were made to the employer under s43C (1) (a) ERA and this if they are found to be qualifying disclosures, then they would be protected disclosures. However no further concessions were made by R about each alleged PD. Therefore, in relation to each disclosure relied upon we had to determine:

    76.1 Was the disclosure was made as alleged?

    76.2 Did this amount to a disclosure of information?

    76.3 Did C believe it tended to show a person had failed, was failing or was likely to fail to comply with any legal obligation (S43B(1)(b) ERA 1996)?

    76.4 Did he believe the disclosure of information was made in the public interest?

    76.5 In both cases, was that belief reasonable?

Paragraph 5.1 - Grievance 1 submitted May 19th , 2021 via email to Carlos Freymann ('PD1')

77. Our findings of fact about this grievance were at paragraph 11.77. The disclosure was made, and it was a disclosure of information. We were not addressed on which legal obligations C says he believed this disclosure tended to show. We note from the guidance in Fincham and Korshunova above that in reaching our conclusions the Tribunal must be able to identify what the breach of legal obligation is, albeit it is not required to be done in strict legal language. We conclude that C genuinely believed that R had failed to comply with its obligations to comply with certain provisions of the Equality Act 2010 (as he make allegations of race discrimination and victimisation). He also makes allegations of tax avoidance which we were content is specific enough to amount to an allegation of a breach of a legal obligation. We also conclude that the claimant's belief in respect of those matters was reasonable, particularly in respect of the concerns being raised about discrimination. We were also satisfied that C believed that the disclosures of information made were in the public interest considering the guidance in Chesterton above. The complaints made in relation to discrimination were serious allegations affecting an important interest to wider society. We conclude that PD1 was a qualifying disclosure on the above basis and therefore a protected disclosure.

78. The grievance document also makes general allegations of health and safety breaches in respect of a number of matters. It does not identify which specific legal obligation he relies upon. Ultimately, we were not satisfied that anything contained in Grievance 1 was specific enough to be

an allegation of a breach of a legal obligation in relation to health and safety at work. In relation to the allegations around Covid, we were again not satisfied that C had identified any breach of a legal obligation but makes non specific complaints about R 's handling of Covid. We were also not satisfied that C had identified the breach of a legal obligation alleged in relation to the other matters complained of including allegations about his USA relocation and miscalculations in furlough.

Paragraph 5.2 - ~~Grievance 2 submitted October 26th, 2021 via email to the CEO (Nikolai Setzer)~~

79. No longer pleaded as a protected disclosure.

Paragraph 5.3. - Emails with C's manager CR about race discrimination (in relation to same incidents as above.). C emailed CR (7th August 2020) to discuss 'Indian Bill' incident. CR and C spoke via Telco. CR told C, 'he would speak to senior management, but he had to be careful. You don't bring easy things to me do you'. C emailed CR several times for updates (between Oct 2020 – Feb 2021) ('PD2')

80. Our findings of fact about these e mails were at paragraph 11.33 to 11.36; 11.40 to 11.41; 11.43-44 and 11,47. In these e mails and subsequent conversations with CR referred to in them, C made clear complaints about suffering race discrimination during the incident involving PJ on 15 July 2020. The disclosure was made, and it was a disclosure of information. In relation to the breach of legal obligation we conclude that C genuinely believed that R had failed to comply with its obligations under the Equality Act 2010 (as he makes clear allegations of race discrimination). We also conclude that the claimant's belief in respect of those matters was reasonable. We were also satisfied that C reasonably believed that the disclosures of information made were in the public interest. Complaints about race discrimination at work are serious allegations affecting an important interest to wider society. We conclude that PD2 was a qualifying disclosure on the above basis and therefore a protected disclosure.

Paragraph 5.4 - When C complained in his grievance (June 2nd 2021) that engineers had no health and safety training and safety equipment ('PD3')

81. Our findings of fact about the claimant's grievance meeting held on 2 June 2021 and in particular this allegation was at paragraph 11.85. The claimant informed LT and WM that "*engineers had to buy their own tools*" and that dates would be provided. Whilst this was a disclosure of information of sorts. We were not satisfied that C himself had a genuine and reasonable belief that the matter being complained of identified sufficient any breach of a legal obligation in providing this information. We note from our findings at paragraph 11.75.7, that the complaint about this matter relates to something C had been told about from other employees, rather than something within his direct knowledge. The claimant has also not shown that he believed that disclosing this information was in the public interest.

PD 3 was therefore not a qualifying disclosure and thus not a protected disclosure.

Paragraph 5.5 - When C complained in his grievance (June 2nd 2021) that there was a leak in the Birmingham Office roof above the server room, water falling onto electrical equipment ('PD4')

82. Our findings of fact about C making this allegation are at paragraph 11.85. For the same reason as set above in relation to PD3, PD4 was therefore not a qualifying disclosure and thus not a protected disclosure

Paragraph 5.6 - When C complained on 19th May 2021 and in his grievance (June 2nd 2021) that 'Production Staff were painting offices during work hours without H&S training and without safety equipment ('PD5')

83. We refer to paragraphs 11.77.7 and paragraphs 11.83. For the same reason as above in relation to PD3, PD 5 was therefore not a qualifying disclosure and thus not a protected disclosure.

Paragraph 5.7 - When C complained on 19th May 2021 and in his grievance (June 2nd 2021) that C was left burnt by a faulty hand dryer which R failed to repair ('PD6')

84. Our findings of fact about this matter are at paragraphs 11.75.7 and paragraph 11.85. This issue was not discussed at the grievance meeting itself but was included in the written grievance submitted on 19 May 2021. We were satisfied that this was a disclosure of information and that C reasonably believed that it disclosed a breach of a legal obligation (presumably in relation to his safety at work). However, we did not accept that C reasonably believed that this disclosure was made in the public interest. This was a specific matter in relation to an injury C says he suffered at work and whilst he does attribute this to failure to repair equipment, considering the guidance in Chesterton, we cannot conclude that it meets the test about this issue being raised in the public interest. PD6 was therefore not a qualifying disclosure.

Paragraph 5.8 - When C complained to Head of HR and Head of R & D about tax fraud in relation to personal mileage on January 20th, 2021 and January 29th, 2021 and in Grievance 1 ('PD7')

85. Our findings of fact about the alleged disclosures relied upon in January 2021 are at paragraphs 11.45 and 11.46 and in relation to this issue being raised in Grievance 1 at paragraphs 11.77.4 and 11.83. This was a disclosure of information and we were satisfied that C genuinely and reasonably believed when disclosing this information in January and again in May and June 2021 that this tended to show that at the time R was failing to comply with a legal obligation, namely its obligation to accurately deduct and account for the correct tax on sums paid to employees. The fact that by June 2021 the issue (in so far as it related to the claimant) had been corrected did not affect the genuineness of his belief that what was

being proposed (and indeed what he was informed had been done in the past) amounted to a breach of the relevant tax laws.

86. We have gone on to consider whether C genuinely and reasonably believed that disclosing this information was in the public interest and on this point, we also accept that this matter was being raised in the public interest. The payment of the correct tax by corporate organisations is a matter of public interest. Whilst in relation to the proposal to pay such sums through the expense system for the Coventry relocation was a specific issue relevant to C and a small group of employees, C was highlighting that this had been done on a previous occasion. Even if the issue around the Coventry relocation had been resolved by the time C raised the matter in Grievance 1, it was still a valid matter to raise. For these reasons we conclude that PD7 was therefore a qualifying disclosure and thus a protected disclosure.

Paragraph 5.9 - When, in June 2020, C disclosed to Charlotte Head of HR via email that furlough calculations were incorrect impacting all furloughed staff. C provided calculation, many months to resolve salary issue. This again was raised in Grievance 1 ('PD8')

87. Our findings of fact on C raising the issue of furlough payments being incorrect in June 2020 were at paragraphs 11.19 to 11.22 and in relation to it being raised in Grievance 1 are at 11.77.5 and 11.42. There was a disclosure of information (in detail) when this matter was raised in June 2020 and again in May/June 2021. Although the precise legal obligation that C alleges R was in breach of was not identified, the correct calculation of furlough pay (under the relevant legislation in place at the time) and pay more generally is something that could be considered to reasonably be a legal obligation. The claimant by alleging that this had not been calculated correctly was identifying a potential breach.

88. However, we were not satisfied that that C genuinely and reasonably believed that raising this matter was in the public interest. When this was raised in June 2020, C was perfectly understandably pursuing his own interests in ensuring he was paid correctly. He refers to his own pay and pension issues and only fleetingly mentions that others may be affected. He acknowledged at the time that the issue was complicated. As it turned out this matter appeared to only affect 3 out of the many R employees at the time. Applying the guidance in Chesterton, we were not satisfied that this was a matter (ultimately relating to mistakes in calculation of furlough payments rathe than anything deliberate) that could reasonably be said to have been in the public interest. PD8 was therefore not a qualifying or a protected disclosure.

Paragraph 5.10 - C complained in Grievance 1 that a vulnerable worker was being compelled to return to the office too early in Sept/Oct 2020 during COVID, when he should have been isolating ('PD9')

89. Our findings of fact about the issues raised by C re this matter are at paragraph 11.77.7 and 11.82 and about the broader issue of VS was earlier at paragraph 11.39. We found that C was clearly disclosing information here which was his view about he felt that VS had been pressured to return to work. We conclude that C genuinely felt upset and aggrieved about this especially given that VS has since died. We also conclude that C genuinely felt that it was in the public interest to raise this matter. However, what we cannot conclude is that C had a reasonable belief that this disclosed a breach of a legal obligation. There is no identification anywhere in the claimant's pleadings, witness statement or submissions made on his behalf as to what legal obligation is said to have been breached by the respondent in this regard. Therefore, we are unable to conclude that PD9 was a qualifying disclosure, and it is therefore not a protected disclosure.

Issue 7 & 8 - Was C subjected to detriment(s) (set out above as detriments under victimisation) and was any detrimental treatment on the ground that he had made a protected disclosure(s)?

90. Having concluded that C made protected disclosures in relation to PD1 made on 19 May 2021; PD2 made between 7 August 2020 and February 2021 and PD7 made on 20 and 29 January 2021 and in Grievance 1 on 19 May 2021, we needed to determine whether C was firstly subject to the detriments he alleged and secondly whether he was subject to any such detriment on the grounds of having made any of the protected disclosures. We remind ourselves again that the test in respect of protected disclosure detriment is one of deciding "the reason why" the treatment took place not a "but for" test. What we must consider is whether any of the pleaded disclosures were the reason why the decision maker acted in this manner. We take guidance from Osipov and Jesudason above and have asked ourselves whether any of the protected disclosures, were consciously or unconsciously a more than trivial reason or ground in the decision maker's mind. We conclude in relation to each alleged detriment as follows:

Issues 4.1 to 4.3 - Detriments re CR actions during consultation

91. As we have already concluded, the allegations made at paragraphs 4.1, 4.2 and 4.3 were made out at least partly on the facts in that (1) on 22 July 2021 CR told C twice he was already redundant, said he was unpooled and that C would not be assessed; (2) on 9 August 2021 was hostile, unwilling to engage and listen; told C "*we need to move on*" and that he could not apply for new roles in the structure on; and (3) on 4 September 2021 told CT he was not looking forward to the meeting with C and told C that he did web applications and nothing else. We also concluded that these were because of PA1 and PA3. For the same reasons as set out above, we also conclude that PD1 and PD2 (the same incidents which also formed the basis of PA1 and PA3) in particular were more than a trivial influence on the way that CR conducted the

consultation with the claimant. The complaint of detrimental treatment on the grounds of having made a protected disclosure is therefore successful.

Paragraph 4.4 - C's grievance panel (November 12th, 2021) failed to make findings that another worker was harassed when he heard the comment 'Indian Bill' said by PJ.

92. We refer to our findings at paragraphs 11.95 and paragraphs 11.114. The investigation report made some reference to the use of 'Indian Bill' to HS but did not conclude whether it took place and the outcome letter sent to C on 12 November 2021 did not contain any findings as to whether HS was subject to harassment. This allegation is made out on the facts but for the same reasons as set out in paragraph 63 above, we conclude that this was not a deliberate act of detrimental treatment on the grounds of PD1, PD2 of PD7. The claimant disagreed with the conclusion reached but we are not able to find any connection with or evidence to support the contention that this was because of any protected disclosures made. This allegation is dismissed.

Paragraph 4.5 - Senior Management destroyed a recording of a grievance meeting held on July 21st, 2021, which could have assisted the C's grievance and case, in which another employee, Harmesh Sehmar, made allegations of hearing the term 'Indian Bill' which could have assisted the C's grievance.

93. We refer to our findings at paragraph 11.111. R did destroy a recording of an investigation interview held on 22 July 2021. We were not able to make any conclusion about the extent to which it would have assisted the claimant. This allegation is made out on the facts. However, for the same reasons as set out at paragraph 64 above, this allegation fails because it was not on the grounds of C having made a protected disclosure. This allegation is also dismissed.

Paragraph 4.6 - C was unfairly pooled and ultimately selected for redundancy and dismissed on December 10th, 2021. The Claimant should also have been pooled with the other two Software Team Leaders (NB and NC). NB, MC and C all reported to CR. The Claimant should have in the alternative, been pooled alongside Senior Software Engineers and/or Software Engineers.

94. For the same reasons as set out at paragraph 65-67 above, we conclude that the fact that C had made protected disclosures PD1, PD2 and PD7 was consciously or unconsciously a more than trivial reason or ground in the mind of CR and CT (influenced by PJ) at the time they made the decision to group and pool C as they did. In addition, PD7 was one which was made directly to CT in respect of the January dates pleaded and this was repeated in Grievance 1 ('PD1'), which led to CT being investigated about this and other matters. We concluded that the suggestion that CR, CT and PJ kept the fact that C had made protected disclosures entirely separate and out of their minds when they were conducting the

redundancy selection exercise was unrealistic and the evidence recounted above suggests otherwise. This allegation of detrimental treatment on the ground of having made a protected disclosure is made out.

Paragraph 4.7 - R failed to provide prompt redress in answer to the C's 'Grievance No1' which was submitted on May 19th, 2021. The outcome was given on November 12th, 2021.

95. For the same reasons as set out at paragraph 68 above, we conclude that this treatment was not because of PD1, PD2 or PD7. This allegation of protected disclosure detriment is dismissed.

Paragraph 4.8 - ~~R failed to answer C's appeal submitted on November 24th, 2021.~~

96. This allegation was withdrawn and so this allegation of protected disclosure detriment is also dismissed.

Paragraph 4.9 - Grievance One Appeal Meeting took place December 8th 2021. Hearing Manager - David Smith (Managing Director, Continental Tyre Group Ltd, Country Head UK & Ireland). Grievance One Appeal Outcome delivered by post February 25th, 2022

97. For the same reasons as set out at paragraph 70 above, we conclude that any delays in providing the outcome to Grievance 1 were not because of PD1, PD2 or PD7. This allegation of protected disclosure detriment fails.

Were the protected disclosure detriment complaints in time?

98. We have concluded that the following complaints for detrimental treatment on the grounds of having a protected disclosure as set out above were made out substantively:

98.1 On 22 July 2021 CR told C twice he was already redundant, said he was unpooled and that C would not be assessed;

98.2 On 9 August 2021 CR was hostile, unwilling to engage and listen; told C "we need to move on" and that he could not apply for new roles in the structure; and

98.3 On 4 September 2021 told CT he was not looking forward to the meeting with C and told C that he did web applications and nothing else.

98.4 C was unfairly pooled and ultimately selected for redundancy and dismissed on December 10th, 2021.

99. We then had to consider whether these were made within the time limit in s48 ERA. On their face the first two incidents were presented out of time as they were made to the Tribunal more than three months (plus early

conciliation extension) of the act complained of. The remaining two complaints were presented in time. We had to consider whether there were a series of similar acts or failures with the last of such acts being presented in time (Issue 21.2). Section 48(3) ERA provides that were an act is part of a series of similar acts or failures, the act is in time if the last such act is presented in time. For similar reasons to those set out at paragraph 98 above, we conclude that these four acts of protected disclosure detriment did amount to a series of similar acts or failures as all the allegations arose out of and related to the claimant's selection for redundancy culminating in his dismissal. Once R had carried out the grouping exercise in the way that they did (which we concluded was because C had made protected disclosures), then this led to the consultation taking place and being carried out as it was and ultimately culminated in dismissal. There was a close and clear connection between all the acts as they all involved CR and other managers at R involved in this decision, The last act of protected disclosure detriment having taken place on 12 November 2021, being the last act in a series of similar acts means all such acts are in time. On this basis it was not necessary for us to further determine whether it reasonably practicable for the claim to be made to the Tribunal within the time limit and if not, was it made within a reasonable period (issues 21.3 and 21.4).

Paragraph 9 - Was the making of any proven protected disclosure the principal reason for C's dismissal i.e., automatic unfair dismissal contrary to s.103A ERA 1996?

100. We have already concluded that the claimant's dismissal was because of the protected acts for the purposes of the claimant's victimisation complaints (see paragraph 71 above). The protected acts we found to have been the reason why the claimant was dismissed (PA1 and PA3) are the same matters that we have also found to be protected disclosures (at least in respect of PD1 and PD2). We have taken note that the test for determining whether the dismissal was because of the protected disclosure is a different one and we must consider whether any of the protected disclosures were the 'reason or principal reason' for dismissal. We take note of the guidance in Kuzel, Mott and Korshunova above that this is more than a 'materially influences' test and it is not just determining whether the protected disclosure was in the mind of the decision makers at the time of dismissal. We have applied the guidance on the burden of proof as set out in Kuzel and firstly conclude that the claimant has shown that there is a real issue as to the reason but forward by the respondent was not the true reason. We refer to our reasons set out at paragraphs 66 and 91 above which led us to this conclusion. We next consider whether the respondent has proved its purported reason for dismissal i.e., redundancy and for the same reasons we set out at paragraph 71above, we conclude that it has not. The respondent has therefore not been able to disprove the claimant's contention that the protected disclosures were the reason for dismissal, and we conclude that PD1, PD2 and PD5 were

in fact the reason or principal reason for dismissal. The claim for automatic unfair dismissal pursuant to section 103A succeeds.

Unfair Dismissal

101. As we have concluded that claimant was dismissed for having carried out a protected disclosure then pursuant to section 103A his complaint for unfair dismissal succeeds. It is not necessary to consider the remaining issues set out at paragraphs 10-16 of the List of Issues. We also concluded that the claimant's dismissal was because of C having done a protected act and accordingly this was not a fair reason under section 98 ERA. As per our findings of fact at paragraph 11.73 above, we would have, if this had been required, been likely to conclude that R 's decision on selection and grouping for outside the range of reasonable response. Given our findings of fact at paragraphs 11.99-11.100; 11.104 and 11.107 above, it is also likely that we would have concluded that the consultation process carried out by R was unreasonable. We also would have concluded that R failed to genuinely consider whether there were any other suitable alternative roles to offer C (considering our findings at paragraph 11.119 to 11.120 above).

Unfair dismissal under s100(1) (c) ERA

102. Although this was not a matter ultimately pursued with vigour by the claimant, he did confirm that his complaint under section 100(c) ERA that the reason for dismissal (or, if more than one, the principal reason) for the dismissal that being an employee at a place where there was no such representative or safety committee, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety was still made. We conclude that this complaint is not made out on the facts on the basis that the protected acts and protected disclosures we have found to have taken place were those related largely to the claimant's allegations of discrimination and those about potential tax matters, not the various complaints he made related to health and safety. We heard no tangible evidence about whether there was a health and safety representative or safety committee in place. The complaint made under section 100(1) (c) fails and is dismissed.

Remedy

103. The Tribunal did not hear sufficient evidence or submissions on matters of remedy so a Remedy Hearing will now be listed to determine those issues listed at paragraph 18 of the List of Issues together with the following issues related to the claimant's successful complaints of race related harassment, victimisation and protected disclosure detriment:

103.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect of any discrimination/victimisation on the claimant? What should it recommend?

103.2 What injury to feelings has the discrimination/victimisation/detrimental treatment caused the claimant and how much compensation should be awarded for that?

103.3 Has the discrimination/victimisation/detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

103.4 Is it just and equitable to award the claimant other compensation?

103.5 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

103.6 Did the respondent or the claimant unreasonably fail to comply with it?

103.7 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

103.8 Did the claimant cause or contribute to the discrimination/victimisation/detrimental treatment by their own actions and if so, would it be just and equitable to reduce the claimant's compensation? By what proportion?

103.9 Was the protected disclosure made in good faith?

103.10 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

103.11 Should interest be awarded? How much?

Employment Judge Flood

Date: 29 December 2023