EMPLOYMENT TRIBUNALS

Claimant: **Kami Houllier**

Respondent: Nissan Motor Manufacturing UK Ltd

Heard at: Newcastle Employment Tribunal

On: 9th – 12th January 2023 (deliberations: 12th January and 10th February 2023)

Before: Employment Judge Sweeney

Members: Jonathan Adams and Brenda Kirby

Representation:

For the Claimant: In person,
For the Respondent: Robert Dunn, counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. **The complaint of race discrimination is not well founded and is dismissed.**

2. **The complaint of harassment related to race is not well founded and is dismissed.**

REASONS

The Claimant's claims

1. By a Claim Form presented on **22 April 2022**, the Claimant brought a claim of race discrimination in which he complained of the following acts/failures to act:

   1.1 That, following a request for a pair of safety shoes made by him on or before **08 June 2021,** the new pair he was given by his supervisor, Andy Lambert on or before **10 July 2021,** were defective and caused him pain and

discomfort; that when he handed the shoes back after a few weeks he was told that a new pair would be ordered but in fact none were provided until a grievance meeting in **January 2022**.

1.2 That, during that period he was forced to work without safety shoes, putting himself at risk.

1.3 That, on **20 December 2021**, upon being called to a meeting, Andy Lambert and Gavin Kerr (both supervisors) attacked him on multiple levels. Firstly, they asked him why he was not using safety shoes and insisted he used them despite the Claimant saying that they cut into his feet. Secondly, they questioned the quality of his work and issued him with a caution for missing fixings on five cars that day, despite the Claimant reminding them that the reason he missed the fixings was due to malfunctioning equipment, something which he had reported to them many times before. The Claimant's claim is that, by comparison, his white colleagues do not get cautioned like he does. In the ET1 he refers to a date, **28 January 2022**, when he says his colleague, Mr Lidford, missed nine fixings yet was not cautioned – thus identifying Mr Lidford as a comparator.

1.4 That he was sent to HR regarding a 5-day period of sickness absence. The Claimant claims that his white colleague, Mr Lidford, on the other hand, stayed at home for longer than him (for about 3 weeks) without any medical certification and was never referred to HR.

2. That was the extent of the claim as set out in the ET1. A preliminary hearing was listed for **30 June 2022** the purpose of which was to identify the claims and issues and to make case management orders. In advance of that hearing, the Respondent wrote to the Claimant on **16 June 2022** seeking some further information of the claims. It was not a focussed request, seeking only in general terms identification of the legal claims being pursued as well as information '*such as event dates and names of those involved in the allegations*'. Given the limited basis on which the claim was put, a rather more focussed request for specific information of the matters set out in paragraph 1 above would have been more helpful.

3. The Claimant responded to the Respondent's request by sending two documents on **20 June 2022.** In the first document, located at **page 33 MB** ('Main Bundle' – see paragraph 13 below), the Claimant did not say much more than that which had already been stated in the ET1, save that he added: '*other employees white are allowed to make phone calls and texts while working, however, if I look at my phone to check the time I have been caution. On one morning briefing team leader James said please do not use your headphones and speakers during dayshift which demonstrates all that they are aware of others using their phone but they haven't been cautioned'*. He again referred to **28 January 2022**, upon which date he alleged he was cautioned for not completing a task, whereas his white colleague,

who did not complete several tasks, was never cautioned, an act of discrimination which he alleged had happened to him on many occasions.

4. In the second document sent by the Claimant on **20 June 2022** (**pages 34 – 35 MB**) headed '*detail of my legal grounds I intend to rely on'* (the 'legal grounds') he said that the date that the Respondent should most be interested in is **28 January 2022.** He referred to this as being the date on which direct racial discrimination and unfair treatment was committed against him, when he was cautioned by his team leader and supervisor for missing parts on cars, whereas his colleague, working on the same station, was not.

5. In his legal grounds, the Claimant also identified other dates, being:

   5.1 **On or before 08 June 2021** – the date he requested safety shoes,

   5.2 **On or before 10 July 2021** – the date he was provided with safety shoes,

   5.3 **20 December 2021** – HR meeting triggered by his supervisor was cancelled because they wanted to intimidate him before he reached HR.

6. Those three dates had already been identified by the Claimant in the ET1. In addition, however, the Claimant added that: '*there are many unfair treatment and direct discrimination examples I can list and I will do so when making a case in front of a judge, we must keep in mind that there are acts that were committed at the work places that I don't feel comfortable to deal with such as sexual misconduct however this is out of this tribunal remit and is better for the police to deal with. There's no statue [sic] of limitation*'. He then named 6 people as being 'those involved'.

7. The Respondent's solicitors responded on **23 June 2022** as follows:

   7.1 In relation to the allegation: '*there are many unfair treatment and direct discrimination examples I can list*…' the solicitors asked the Claimant to list what had happened, by whom and when.

   7.2 In relation to the 6 individuals, the Claimant was asked to elaborate on what they were alleged to have done.

8. The Claimant responded on **25 June 2022** (albeit the attached letter was given a date of **20 June 2022)** [**pages 36 – 39 MB**]. In this document, the Claimant gives further limited information about his complaints (some of which was new – in the sense that it had not been identified in the Claim Form or in his further information on **20 June 2022**). **Pages 36-38 MB** was headed 'unfair treatment' and **page 39 MB** as 'direct discrimination'. In paragraph (3) of **page 39 MB**, the Claimant said, among other things, that '***January March 2022*** *while working online Andy called me a nigger when passing by.*' We shall hereafter refer to this word by its initial '**N**'.

The Respondent never raised any objection to what was, clearly, an amendment to the claim.

Preliminary case management hearings

9. On **30 June 2022**, the preliminary hearing took place before Employment Judge Martin. She identified the claims as follows:

    1.1.1. a claim of direct discrimination: section 13 Equality Act 2010

    1.1.2. a claim of harassment related to race: section 26 Equality Act 2010

10. Judge Martin gave permission for the Respondent to serve an amended response which it duly did. She directed the parties to agree a list of the legal and factual issues by **28 July 2022**. However, she set out the key issues to be decided by the Tribunal in paragraph 39 of her case management summary at **pages 49-51 MB**. The parties' subsequent agreed list of issues was located at **pages 68 – 72 MB**.

11. There was a further telephone preliminary hearing before Employment Judge Arullendran on **16 November 2022**. She noted that the issues had been agreed. Judge Arullendran noted that: "*the Claimant said today that he was provided with size 12 safety boots by the Respondent when he began his employment, which was the correct size. However, when the boots needed to be replaced, the Respondent failed to do so for a period of seven months, during which time he wore his own footwear. The Claimant says that the Respondent stocks size 12 boots and that they are not required to be specially ordered and he also said today that he did not ask for or require size 13 boots to be provided, which the Respondent appears to argue in their response. After some discussion, it was agreed that this is evidence which needs to be dealt with in witness statements by both sides, but it is not necessary to include the size of the boot as a specific issue in the List of Issues*".

12. Judge Arullendran explained that the parties must ensure their witness statements cover the evidence relevant to all of the issues in the agreed list of issues.

The Final Hearing

13. The parties had prepared a main bundle of documents ('**MB**') consisting of 293 pages and a supplementary bundle ('**SB**') consisting of 102 pages. There was, in addition, a chronology and a cast list.

14. At the beginning of the Hearing, the Tribunal discussed the following matters with the parties.

    14.1 **Witness orders**: The Claimant had obtained witness orders in respect of three individuals. Two of those witnesses (Mr Holmes and Mr Faid) had logged into and were present at the beginning of the hearing. The third

witness, Mr Lidford, was not. The parties – and the Tribunal Judge – mistakenly understood that the order was for all three to attend on **09 January 2023**. In fact, as subsequently realised by the Judge, the order was for them to attend the following day, **10 January 2023**. Mr Lidford had provided a witness statement [**page 232 MB**]. There were no statements from the other two witnesses.

14.2 **Video footage**: The Claimant wished to refer to some video footage which he had taken on his mobile phone. This consisted of 3 short clips. The first video, we were told, showed the Claimant walking down the line of his workshop. The second showed the Claimant working on a battery, touching the battery terminal with a tool. The third showed two of the Claimant's colleagues looking at their mobile phones. Each video was said to be only a few seconds long. There was a dispute as to the relevance of these videos. The Claimant said that the first showed his workstation in 'trim and chassis 3' where there were heavy boxes; that the second showed that the battery had electricity and that he was working in unsafe conditions and the third, taken in about **July 2022**, showed colleagues on their phones.

14.3 **Legally privileged email**: Mr Dunn explained that there was an email of **30 March 2022** which, in correspondence between the parties only, the Claimant suggested should be included in the bundle. Mr Dunn explained this was an email exchange with a solicitor. Mr Dunn said that it had not been included in the bundle because the Respondent's solicitors wished the Claimant to fully understand the implications of placing a privileged document before the Tribunal. When asked about this, the Claimant said that he did not wish this email to be included in the bundle and it was left at that.

14.4 **The Claimant's name**: Mr Dunn also asked for some guidance on how to refer to the Claimant in these proceedings. This is because the Claimant refers to himself as Sir Kami Houllier. The Claimant confirmed that he has not been knighted, that he had paid to change his name officially to Sir Kami Houllier, which is the name that appears on his driving licence. He said it was irrelevant and that he could be addressed as Mr Houllier in these proceedings. Therefore, it was agreed that in these proceedings.

14.5 **The agreed list of issues**: On discussing the issues, the parties confirmed that they were agreed save that Mr Houllier asked for the words 'the right size 13' to be deleted from paragraph 1.1 of the list of issues [**page 68 MB**]. His case was that size 13 was not the 'right size'. That the size should not be included in the list of issues was in keeping with Judge Arullendran's case management summary (see paragraph 12 above). We have attached the agreed List of Issues as an Appendix at the end of these reasons.

15. The Tribunal then adjourned at 11.10am to complete its reading and the parties re-joined the hearing at 2pm. Upon resuming the hearing, we explained that we would

admit the video evidence in that it was very brief and we would not know the full extent of its relevance until we had watched it. Mr Dunn then played the videos by sharing them on the screen before receiving the Claimant's oral evidence. The three videos were, in total, about a minute in duration. Upon viewing them the Claimant suggested that the second video (about 7 seconds in length) may have been edited by someone because it did not show sparks coming from the battery as he touched the terminal. He said that it was very important that we see the sparks because it shows his life was in danger. It is right that the Tribunal had not noticed sparks, but it was not looking out for any sparks, not having been alerted to this. The Tribunal asked Mr Dunn to check with his instructing solicitor and for her to forward what she had been sent by the Claimant. Mr Dunn did so and Jade Martin, solicitor, emailed the Tribunal later that day at 18.17 confirming that the video that had been played to the Tribunal was the one that had been sent to the Respondent by the Claimant. Upon replaying the video, we noticed the sparks. The video had clearly not been edited or tampered with in any way. As it happened, the Claimant never referred to these videos during the hearing and they had no bearing on the issues in the case. However, as the case proceeded, this suggestion of manipulation by those associated with the Respondent became a common theme of the Claimant's.

16. The Claimant gave oral evidence on his own behalf and called:

    16.1.1 Philip Lidford

    16.1.2 Shaun Holmes

    16.1.3 Daniel Faid

17. The Respondent called the following witnesses:

    1.1.3. Andrew Lambert

    1.1.4. Leslie Greener

    1.1.5. Lee Watson

18. One additional document was added to the bundle on Wednesday **11 January 2023**, during the cross examination of Mr Lambert. This was a screenshot of the document properties of a letter at **page 121 MB**. The document properties had been requested by the Tribunal during the hearing. The properties showed on the face of things that the letter at **page 121 MB** had been created on **11 January 2022.** Mr Dunn asked for this to be added to the bundle, which it was, as **page 121A MB**.

19. Evidence and submissions were completed by 12.30pm on Thursday, **12 January 2023**. The Tribunal deliberated for the rest of that day and completed its deliberations on **10 February 2023**.

Findings of fact

20. The Claimant identifies himself as Black Caribbean. He has leave to remain and work in the UK under refugee status on a residence permit which is valid to **31 December 2024** [**page 80 MB**]. The Respondent is a car manufacturer and operates a large car plant in Sunderland, Tyne & Wear. The Claimant commenced employment with the Respondent on **12 October 2020** on a fixed term contract to expire, initially, on **01 January 2021**. This was subsequently extended on 3 or 4 occasions until he entered into a permanent contract in **August 2021**. The Claimant was and is employed in the capacity of Manufacturing Staff. At the time relevant to these proceedings, he was assigned to an area of the production line known as "Trim & Chassis" (specifically to a zone referred to as 'Trim & Chassis Line 1' ('TC1') although he has since moved to a different area, which we understand to be 'door-subs'. The Claimant was at the time the only black employee on his team and, as far as the Tribunal understood, within the wider area in which he worked. There was a mixture of white British and eastern European employees.

21. Andy Lambert is a supervisor. He is white British. He has worked for the Respondent since **February 2010**. He started as Manufacturing Staff but in due course was promoted to Team Leader and then Supervisor. Mr Lambert started as a supervisor in the area known as 'Inspection' in **December 2018**. He then moved to 'Chassis 3' on **01 October 2020** (which covered the Claimant's zone TC1) and then back to Inspection on **13 December 2021**. He is currently studying for a bachelor's degree in Business Leadership and Management Practice, which he commenced in 2020. As part of this, he attends Northumbria University on Tuesdays. Mr Lambert was the Claimant's supervisor from **October 2020** to **13 December 2021**. There was a short handover period while Gavin Kerr replaced him in Trim & Chassis on **20 December 2021**.

22. Philip Lidford is a former employee (Manufacturing Staff) of the Respondent. He is white British. Shaun Holmes and Daniel Faid, also white British, are current employees (also Manufacturing Staff). At various times, all three worked alongside the Claimant on the production line at Sunderland. Work on the production line is fast paced (at least, ordinarily, leaving aside spells during Covid when production was hugely reduced). Manufacturing staff work on 'stations' (at various sections of the vehicle) in close proximity to each other – no more than a metre or metre and a half apart for 8 hours a day. As Mr Faid put it, they see more of each other than they do of their partners. Life online is such that the workers regularly engage in jokey conversations and 'banter'-type chat. The 'banter' within the group which included Mr Faid, Mr Lidford, Mr Holmes and the Claimant was lively and good-natured. As Mr Faid said in his evidence, and we accept, it was a really good group. They got on well. There was no suggestion from the Claimant, or from anyone else,

that any 'banter' was racist in nature or that it operated so as to exclude the Claimant. On the contrary, everything pointed to the Claimant fitting in well and getting on with others and to others getting on well with him – and we find that to be the case.

Monitoring and appraisal of workers

23. The Respondent keeps a 'fact file' or, to give it its official name, a 'performance review record' for each worker. This is a document which records anything of note relating to the employee's work or performance and is retained by the supervisor. Extracts from the Claimant's fact file for **2021** and **2022** were included in the bundle at **pages 90-92 MB**.

24. There are ways of monitoring or examining quality and production issues within the Respondent's organisation both on a macro and a micro level, by which we meant at the level of the individual employee. One source of useful information is available from an examination of what is known as the 'Help Lamp' system. This is a data system whereby workers can flag up faults with tools and equipment (or other issues relating to production). If a worker needs support, for example because he is running out of time to complete an assignment or is struggling to complete a task due to any problem or quality concern, he activates what is called a 'lamp call'. This is then attended to by the team leader and the issue – be it a faulty piece of equipment, or whatever – is logged. Quality statistics are also retained for manufacturing staff, which enables the Respondent to assess whether workers are having any issues regarding the quality of their work.

25. Each employee is appraised annually by his supervisor. On **19 November 2021**, Mr Lambert completed the Claimant's appraisal for the period **01 October 2020** to **30 September 2021 [page 111 – 113 MB]**. His overall evaluation was that the Claimant met expected performance, that he had a good first year, having settled into the team well and that he was able to build a good quality vehicle. Mr Lambert thanked the Claimant for all his hard work and support. In terms of attendance and timekeeping, Mr Lambert noted that this was an area that the Claimant needed to improve. However, as regards the quality of his work, Mr Lambert reported that there were no major issues.

Rest areas and the use of Perspex dividers

26. The first national lockdown came into effect on **26 March 2020** and ended on **15 June 2020**. That was prior to the commencement of the Claimant's employment. During this period, most of the Respondent's workforce were on furlough, including Mr Lambert. The nature of the Respondent's business being the manufacture of motor vehicles, the work of most of the workers is performed on the production line (referred to by workers as 'online'). When not online, Manufacturing staff take their breaks in a rest area (often referred to as the 'bait area') within their zone. Up until Covid, there were established, or fixed, rest areas. For the purposes of these proceedings, two such rest areas were marked on a plan on **page 169 MB**: a rest

area known as ‘C3 Rest Area’ (marked on the plan by a red box) and a rest area referred to as ‘Inspection Rest Area’ (marked on the plan by a pink box). Employees also have meetings, briefings and ad hoc discussions with team leaders or supervisors in their rest area. The Respondent put social distancing measures in place when employees returned to work after the first lockdown. Part of this involved the creation of additional, temporary, rest areas - additional, that is, to the existing fixed rest areas such as C3.

27. To facilitate social distancing within each rest area (both fixed and temporary), ‘pods’ were created by fitting makeshift dividers onto the tables, thus creating an individual space for each employee where they could sit during breaks, separated from other workers by dividers. These dividers (or panels or partitions) were made from white Perspex, an excess of which had been purchased by the Respondent back in about 2014 when it was producing a model of car known as the ‘Infinity’ model. The Respondent had purchased 10,000 sheets of this white Perspex, not all of which had been used. A large quantity of it had been retained in the Respondent’s stores. Although not a photo of the Claimant’s rest area, we had an idea of what these pods looked like from a photograph on **page 175 MB**. A pod was created by fitting upright panels in a criss-cross fashion onto the tables. This produced an enclosed, triangular section of table (or ‘pod’) at which the employee could sit. Each employee was allocated his own individual pod, albeit he shared it with another worker – in that when one employee vacated his seat, the pod would be cleaned and made ready for the ‘sharing’ employee to use. There are, or were at the material time, some 900 employees in Trim & Chassis 1 and approximately 6,000 employees throughout the plant. All employees sat in pods while social distancing restrictions remained in place. We infer from this that there were hundreds, if not thousands, of these Perspex panels/dividers across the whole of the plant.

28. The team responsible for the creation of the temporary rest areas and the installation of the dividers in all rest areas (and other parts of the plant) was from a department known as ‘Kaizen’, which, apparently, is Japanese for ‘continuous development’. Kaizen workers, among other things, perform easy or quick fixes on anything associated with the operation of the plant, including equipment and machinery. Mr Faid, in his evidence, described the Kaizen team as ‘Nissan’s handymen’. They made ‘cut-offs’ from the white Perspex to create the makeshift pods. The bulk of this work had been done in 2020, before staff – including Mr Lambert and other supervisors and team leaders – returned from furlough.

The Claimant’s pod

29. One of the Claimant’s allegations is that upon starting work, he noticed that all the panels in these pods were white (like those shown on the photograph on **page 175 MB**) except for his, one of which he says was black. He alleges that his colleague asked Mr Lambert why the Claimant’s was different and that Mr Lambert just laughed and walked off – see the Claimant’s further information, para 8, **page 39 MB**. As set out above, the Claimant sent that document on **25 June 2022**. It was

the first time he had raised this as a complaint. In the List of Issues, at paragraph 7.2, under 'harassment', the complaint was put on the basis that the Respondent issued a black panel to the Claimant's workstation, whereas every other employee had a white panel [**page 70 MB**]. There was no evidence or suggestion from the Claimant that this black partition was in place for anything other than a short period of time. The Respondent disputes that the Claimant was given a black panel. We must determine this factual dispute.

30. As confirmed by Mr Faid in his evidence, the 'main dividers' had been set up by the time the Claimant joined in **October 2020**. By 'main dividers' we find that to be the dividers in the fixed rest areas and those additional rest areas created when Manufacturing Staff returned from furlough after the first national lockdown. In **October 2020**, the Respondent took on more Manufacturing Staff on temporary or rolling fixed term contracts. Three of these – including the Claimant – were to work in T&C. We find that further, extended, makeshift rest areas were created by Kaizen staff at this time to accommodate these additional workers. The best evidence of this came from Mr Faid. When the Claimant started, he was allocated a pod in one of these makeshift rest areas. The Claimant shared his pod with another worker, Rob Robson, who is white British.

31. The Respondent's senior managers initially believed that social distancing dividers would probably be necessary for a short period of time. However, they came to realise that the need to maintain social distancing was going to continue for some while, due to the longer-term Covid situation. Therefore, it decided to replace the opaque dividers with clear, transparent ones, so that people could at least see and communicate with each other as they sat in their separate pods. It is not in dispute that all the dividers were replaced with clear Perspex. What was unclear was when this happened. It was not possible from the evidence to determine the date with any certainty. In paragraph 10.4 of the Respondent's amended response, it asserts that all dividers were changed to clear Perspex in **October 2020**. Mr Greener gave evidence that the change to clear Perspex happened gradually. On **14 October 2020** a new three tier system of restrictions started in England. It is, we conclude, from this point that the Respondent realised that it would need to keep dividers in place for some time and that it set about procuring clear panels and replacing the existing ones. We infer that the process of changing to clear Perspex started in **October 2020** and was most likely completed by **early 2021**. The clear Perspex dividers remained in place throughout 2021 and well into 2022. All social distancing dividers in the plant were finally removed by summer of **2022**. The Claimant gave no evidence at all about the panel. He said nothing in his witness statement about it and, in light of that, was not cross-examined on the subject.

32. As already indicated, the Respondent disputed that the Claimant's pod consisted of a black divider. Its position was that all panels were white. By the time the Claimant had raised this as an issue (on **25 June 2022**), it had clearly not been possible to go and look at the Claimant's pod. The Respondent did have some photos from back in 2020. Although these were not of the Claimant's rest area, it

relied on these photos showing white Perspex pods and on the oral evidence of its witnesses in support of their belief and recollection that all the panels at the time had been white. After the issue was raised by the Claimant in **June 2022**, Mr Greener also spoke to Colin Chapman, Production Supervisor and Gary Marley, Kaizen Supervisor. They confirmed their understanding that all the plastic sheets originally used were white. Based on that information, the Respondent contended that the Claimant's pod, as all others, was made entirely of white Perspex – that is, until replaced – as were all others - with the clear Perspex.

33. We find that the Claimant's pod did, for a short period of time, contain a panel which was probably of a darker colour than the other panels which made up his and Mr Robson's pod. We arrived at our finding despite our significant, general, reservations about the unreliability of the Claimant as a witness overall – about which we shall say more later. We cannot say that the colour was in fact black. It is more likely, owing to the Claimant's propensity for exaggeration, that he has used black as a descriptor to associate it with him being black. It could quite as easily have been a shade of grey. Nevertheless, for the purposes of this judgment, we shall refer to this darker coloured panel as being 'black'. We arrived at this finding following an assessment of the evidence of Mr Faid. His was the only evidence on the matter which the Claimant could rely on – the Claimant himself having said nothing in his own evidence. It was Mr Faid's evidence that enabled us to arrive at our above finding that when new workers arrived in **October 2020**, further temporary rest areas and pods were created.

34. Mr Faid used the fixed C3 Rest Area (marked by the red box), whereas the Claimant took his breaks in a temporary rest area, which was quite a few metres away and which Mr Faid did not frequent. Mr Faid did not personally see the Claimant's pod. However, the Claimant had mentioned to him, shortly after joining in **October 2020** that one of his divider's was black. He did not mention it to Mr Faid as a serious issue or as an issue of concern. Rather, the Claimant laughed about it with Mr Faid and suggested to him that he had been given a black divider because he was black. Mr Faid joined in the joke and said to the Claimant why doesn't he ask.

35. We considered that the existence of a single, black divider is such an unlikely detail for anyone to invent. It was, we found, more likely than not that the Claimant's pod contained a divider which was not white but was dark or black in colour. That is not to say that we find that to have been the only pod in the plant to have contained a makeshift panel that was dark or black in colour. The Claimant does not and cannot know this. We concluded from Mr Faid's evidence that, in **October 2020**, the Kaizen team most likely used whatever materials that they could get their hands on, to get the job done. It is perfectly plausible that in **October 2020**, when Kaizen staff were applying their handymen skills to put in place further makeshift dividers, that they were short of some panels. It is equally plausible that a worker, using his initiative, would have used what he could lay his hands on to get the job done. We infer, from the fact that more makeshift rest areas had to be created in **October**

2020, that Kaizen were running low on stocks of white Perspex and that the Kaizen team used the White Perspex and whatever other material they could lay their hands on to create the pods in these extended areas. It is possible, and given the numbers involved, it is more likely than not that there were other makeshift pods in this vast plant that contained an odd panel of a different colour and material.

36. The Claimant made the point many times in this hearing that the reason he did not speak up about alleged racial insults was because of his feelings of insecurity arising out of the fact that he was on a rolling fixed term contract. We shall say more about that in due course. As a new employee, we accept that the Claimant tried to fit in with his new work colleagues. Part of that fitting in was to laugh and joke about many things. We recognise that, as a new starter and as the only black employee in the team and as an employee on a fixed term contract, he might instinctively be reluctant to raise any racial issues for fear of rocking the boat or upsetting the jokey atmosphere on the line. Upon assessing the evidence regarding the issue of the black panel, we considered the very real possibility that, when joking with Mr Faid about it, the Claimant might have been masking a genuinely held concern and hurt feelings through laughter and a willingness to fit in. However, whilst recognising that very real possibility, we find that, at the time, the Claimant did not in fact really believe that he had been allocated a pod containing a single black divider (erected by a person unknown) because he was black. We find that he was not in any way offended, hurt or humiliated by it. Rather he used it as a joke, as a way of fitting in with his new colleagues on the line, demonstrating to them that he could join in and initiate jokey conversations and 'banter'. Thus, he joked with Mr Faid about it along the lines of 'do you think it is because I am black'.

37. Although Mr Lambert has no recollection of it, we find that on one occasion Mr Faid, continuing what he and the Claimant regarded as a joke, said to Mr Lambert, who was passing by the line, that the Claimant wanted a word about his pod being black. It is of no surprise to us that Mr Lambert has no recollection of this. It was a passing moment of no significance to him. The Claimant and Mr Faid both laughed about it. As we have set out above, Manufacturing Staff are often engaging in 'banter' with each other. It is clear from Mr Faid's evidence, and we so find, that Mr Lambert was at the time confused by the comment and did not understand what they were laughing at. The existence of a black panel was never mentioned again to Mr Lambert by Mr Faid or anyone else, including the Claimant. In an environment where workers are regularly engaging in jokey conversations and banter, it is unsurprising to us that Mr Lambert would have no recollection of a passing singular comment made by Mr Faid back in **October 2020**. It is more understandable that Mr Faid would remember the joke. To the extent that the Claimant alleges that Mr Lambert 'laughed off' the fact that he had a black divider and walked away – with the implication that he was mocked and did not take the matter seriously, we reject this. Firstly, the Claimant gave no evidence about this whatsoever. Secondly, Mr Lambert did not know the Claimant had a black divider – he does not to this day agree that the Claimant had such a divider because he had never seen it and from

his memory, they were all made from white Perspex. All Mr Lambert had to go on is what was said at paragraph 8 on **page 39 MB**. Thirdly, contrary to the Claimant's submission to us, Mr Faid did not say that Mr Lambert laughed the matter off. It was Mr Faid and the Claimant who laughed the matter off – not Mr Lambert. It is more likely than not, and we so find, that Mr Lambert responded by laughing at their laughter, but without understanding what the joke was. Far from him not taking seriously a complaint from the Claimant, there was no complaint and nothing to take seriously.

38. Therefore, while it existed, we find that the existence of a black divider did not concern the Claimant at the time. Nor did he consider it to be an issue when he submitted his grievance. He had not raised any issue about the colour of the panel in his grievance or in his appeal. Nor was it raised in the Claim Form which he presented to the Tribunal on **22 April 2022**. As set out above, it was first raised on **25 June 2022** in the further information [**page 39 MB**, paragraph 8]. It had come to take on some new meaning for the Claimant after he had started litigating a complaint of race discrimination. We find that the Claimant has looked back over his employment and remembered the time when, for a short period, his pod consisted of a single black panel and that he had mentioned this to Mr Faid. He then came to advance this as an act of racial harassment/direct discrimination, omitting that at the time, in **October 2020**, it was of no concern to him.

39. We accept that the supervisors, looking back, genuinely believed all panels to be white. That is because the vast majority were white and because the white Perspex had been earmarked and used for the purpose of creating the pods. However, by the time, in late **June 2022**, when anyone was made aware of this as an issue, all panels had been removed (and all had been clear Perspex since early 2021) and to identify the person or persons who might have put the partitions together in any one area would be an impossible task. The best that those supervisors could do was to work on their understanding that the panels were white.

The Respondent's absence monitoring

40. The Respondent company operates a number of policies, one of which is a sickness absence policy. Under the policy, where an employee's absence exceeds 7 days the supervisor is required to ask the employee for medical confirmation explaining the absence, which would normally be a fit note. During the height of the pandemic, if any absence was in relation to Covid-19, the supervisor was required to ask for proof of a positive Covid test or an NHS app notification that the person had been in contact with someone with Covid and had been advised to self-isolate. That was the position certainly as of **December 2021**.

41. One of the Claimant's complaints in these proceedings is that he was asked for medical proof in respect of a short period of absence (up to 5 days), was cautioned and that he was instructed to attend a meeting with his supervisor and HR to discuss his attendance levels. The Respondent's position is that it has no record

of ever asking the Claimant for any medical proof. The Claimant gave no evidence about being asked for medical proof and there is absolutely no evidence that he ever was asked. We find that he was not, in fact, asked by Mr Lambert or by anyone else to provide such proof. No one period of sickness absence was 7 days or more. On **page 68 MB**, there is a record of absences on the following dates:

1.1.6. **27 February 2021**. This was a covid related absence and the Claimant had shown the NHS app verification.

1.1.7. **20 May 2021**. This was a single day absence when the Claimant fainted. He explained that he was fatigued because of some medication he had been taking as part of a trial and he did not want to disclose anything else. No-one asked him for proof or evidence of this.

1.1.8. **15 July 2021**. On this occasion, C was sent to the medical centre when he complained of wrist pain due to an old injury. He was not asked to provide any medical evidence.

1.1.9. **16 July 2021**. This was an absence because of his wrist pain. Again, no medical evidence was requested by anyone.

42. The Claimant agreed in cross examination that he had a total of 5 days absence over 3 occasions within a period of 12 months (**20 May, 15 July and 24 November:** 1, 2 and 2 days respectively). Under the Respondent's absence management policy, this triggers a process of review by HR. That is what happened in the Claimant's case. He accepted, in his oral evidence, that he met the trigger points. He was, therefore, invited to discuss his absence at a meeting on **20 December 2021**. He was also told that there would be a discussion about his lateness, in that there had been 5 occasions on which he had arrived at work late. Although part of the Claimant's claim was that he was issued with cautions because of his sickness absence, in cross examination he accepted that he had not been given any written caution in relation to absences. In any event, we are satisfied and so find that he was never issued with a written caution in respect of sickness absence. Nor was he, we find, given any verbal caution or warning in relation to his absences (in the sense of a disciplinary warning). He had been 'counselled' about not following company procedure on **12 July 2022** (**page 213 MB**) but that is after the events complained of in the Claim Form in any event.

43. The Claimant was asked to show proof in relation to a Covid absence. This was on **20 December 2021**, when he informed Gavin Kerr that his daughter had Covid. The Respondent's policy at the time was that, in such circumstances, the employee should come to work unless he had tested positive. Mr Kerr asked the Claimant to attend a walk-in test centre for a PCR test, as opposed to waiting for lateral flow testing kits to arrive in the post, as the Claimant had suggested. That was, we find, a perfectly ordinary and understandable discussion given the circumstances.

44. The attendance review meeting scheduled for **20 December 2021** did not go ahead – and has not to date been rearranged. It was cancelled because of high levels of absence on line C3 in the run up to the Christmas shutdown. We return to the events of **20 December 2021** below.

Safety shoes

45. Owing to the nature of the work undertaken by Manufacturing Staff, it is often necessary to wear PPE, including in certain instances, safety shoes, with steel toecaps. Safety shoes come in all sorts of styles and sizes. There was a notice board within Trim & Chassis 1 which shows the variety of footwear available [**page 188 MB**]. The Respondent keeps a stock of such shoes at the plant. However, it only stocks shoes in sizes 7 to 12.

46. The Claimant was issued with a pair of safety shoes when he commenced employment in **October 2020**. These shoes were in the style of 'trainers', like those shown in the top left-hand corner of **page 188 MB**. The Claimant liked his trainers very much. He can be seen wearing them in a photograph on **page 209 MB**. In his evidence he said they were so nice, you could 'get married in them' and they were very popular with the employees. It is right to say that they are popular and that the majority of those online wear safety shoes in the style of trainers. It is not easy simply from looking at the safety trainers to distinguish them from other, non-safety trainers which is, we infer, the most likely explanation for their popularity.

47. Sadly, on **05 June 2021** the Claimant's home was destroyed by fire. Among other things, he lost his safety trainers and workwear in the fire. He reported the fire to Mr Lambert on **07 June 2021**. Mr Lambert entered this in the Claimant's 'fact file' [**page 90 MB**]. Mr Lambert took immediate action and emailed Leanne Neve asking for his workwear to be replaced and saying that the Claimant had completed his probation and was entitled to a uniform [**page 95 MB**]. Leanne Neve emailed Mr Lambert back at 12.27pm the same day to say that she had 3 trousers, 3 polos and a sweatshirt and that the Claimant should call in and collect them [**page 94 MB**].

48. A large, inordinate, proportion of the cross examination (of both the Claimant and the Respondent witnesses) was taken up in questions about safety shoes. There was a dispute as to when replacement safety shoes had been ordered and delivered and what size was asked for, if at all. We now turn to our findings to determine this dispute. We began by looking at how the Claimant was putting things. His account of what happened varied and was, we find, inconsistent and unreliable.

49. As recorded in paragraph 1.1 above, in his Claim Form, the Claimant claimed that he requested a new pair of safety shoes from Andy Lambert and that '*on or before **10 July 2021***' he received the requested safety shoes; that they were uncomfortable and painful and that when he handed them to Jimmy Prior and Andy Lambert, they said they would order a new pair but that they never did. In the further

particulars of his claim [**page 33 MB**] the Claimant claimed (at paragraph 2) that when he asked for new shoes after the house fire, '*they took a couple of weeks to give me it*'. In a grievance submitted by the Claimant on **20 December 2021** [**page 118-119 MB**] he said that he asked for these many times after his house fire and that it took about 3 months for a new pair to arrive. The house fire being on **5 June 2021**, that means (on that basis) the shoes would have arrived on or around **05 September 2021**. In his evidence to the tribunal the Claimant said that he received the new shoes the day after he requested them. If correct, that would have meant he received them on **08 June 2021**. However, he then clarified this to say that he received them on **15 June 2021**, which was the day after he returned to work on **14 June 2021**.That was still arguably not consistent with what he had stated in his Claim Form. We say 'arguably' because, when challenged in cross examination, the Claimant said that **15 June** is 'on or before **10 July'**. Therefore, to say that there was confusion regarding the date on which the Claimant said he was given a new pair of safety shoes to replace those destroyed in the fire, is putting it mildly.

50. Furthermore, there was confusion regarding the size of shoes the Claimant says he was given. The first time there was a reference to any dispute surrounding shoe size was at the preliminary hearing before Judge Arullendran in **November 2022**. Up until then, the Respondent was unaware that the Claimant was asserting that he had been given an incorrect shoe size after his original safety trainers were lost in a fire. There had been no reference to the Respondent providing the Claimant with the wrong shoe size (13) in the Claim Form, in the further particulars or at the preliminary hearing before Judge Martin on **30 June 2022**. Indeed, the issue is recorded there, as in the Claim Form, that there had been a failure to provide the Claimant with safety shoes. In his evidence to the tribunal, the Claimant said the shoes he had been given on **15 June 2021** were size 12. The Respondent disputes that he was given any shoes on **15 June 2021**. It maintained that he was provided with a replacement pair on **06 July 2021** and that they were size 13 because that was the size he had stipulated. We now turn to set out our findings on the issue of safety boots.

51. We find that when the Claimant stated in his Claim Form 'on or before **10 July 2021**' this was a reference to **06 July 2021**, which was, in fact, when his boots were delivered. Although it is logically correct to say (as the Claimant did in response to Mr Dunn) that **15 June** is '*on or before 10 July'* we regarded that as a glib response by him upon realising that his stated case did not appear consistent with what he had said in evidence. Although the Claimant should have been provided with safety shoes when he returned to work on **14 June 2021** he was not. Nor was he provided with any the following day (**15 June 2021**). Mr Lambert was not at work that day, it being a Tuesday. Mr Lambert did not immediately appreciate that the Claimant had lost his safety trainers in the fire. We infer this from our above finding that, on **07 June 2021**, he reacted quickly and positively to the Claimant's disturbing news about the fire by immediately contacting Leanne Neve to obtain replacement workwear. He was sympathetic to the Claimant's unfortunate situation. We find that he only came to realise the Claimant had no safety shoes

later, on **24 June 2021.** We will come on to what happened on **24 June 2021** in a moment. However, he also acted quickly on that date when he realised that the Claimant did not have any safety shoes. Mr Lambert has shown himself quick to react positively once the facts are known to him. Had he known, before **24 June 2021**, that the Claimant did not have safety shoes, it is more likely than not that he would have taken steps to replace the footwear at the same time he contacted Leanne Neve for the other items. There was no reason for Mr Lambert to knowingly deprive one of his team of safety shoes.

52. It is unsurprising to us that Mr Lambert had not initially appreciated that the Claimant had lost his safety shoes. The Respondent's policy was for safety shoes to be kept at work. However, as set out above, the Claimant liked his trainers very much and he took them home with him. Therefore, unbeknown to Mr Lambert, from **14 June 2021** to **24 June 2021**, the Claimant worked without wearing safety trainers. In this period, he worked only 9 shifts. This was because of the Respondent's "stand down" policy during the COVID-Pandemic, following a fluctuation in demand. At no time during this period did the Claimant mention to Mr Lambert that he did not have any safety shoes. Any discussion the Claimant had regarding safety shoes in that period was with Jimmy Prior, the Team Leader.

53. Unlike Mr Lambert, Mr Prior was aware, before **24 June 2021**, that the Claimant did not have safety shoes. The Claimant told him that he needed safety trainers. Mr Prior told the Claimant that he would arrange for this. That is why, we infer, Mr Prior contacted Ant Curry inquiring about safety trainers. Mr Curry replied by email on **17 June 2021** [**page 100 SB].** The Claimant took a photograph of the computer screen on which was displayed the email from Mr Curry. We infer that Ant Curry's email is a response to an email from Mr Prior. We get this from the fact that in the email subject line it says '*re: 13 safety shoe,'* connoting that it is a reply to an earlier email which had in the subject line *'13 safety shoe'*. We find that the reason Mr Prior was asking about size 13 was because the Claimant had asked him (or at the very least agreed for him) to order size 13 trainers. That is certainly the natural inference, given that it is unlikely that the Claimant's shoe size would be known to Mr Prior without having been told it by the Claimant.

54. We find that the Claimant had gone to Mr Prior, after he returned to work on **14 June 2021** to ask about replacement trainers. The Claimant says that he 'complained' about not having safety shoes. We find that what he refers to as 'complaining' is a reference to him prompting Jimmy Prior every now and then, asking when he was going to get his new trainers. Mr Prior, therefore, contacted Mr Curry, who explained to Mr Prior in the email that '*Only do up to size 12 in the ones we get. If you have a look on arco and find some u want send me the link and I will order*'.

55. That evidence points to the fact that Mr Prior believed the Claimant to be more than a size 12. The Claimant said in oral evidence that he was a size 12 (and that his original boots were size 12); he maintained that he did not ask for a size 13 but

that it was the Respondent who suggested this size – and only then because he had returned the size 12 boots complaining of pain and blisters. Although we do not think it ultimately matters who first raised the 'size' of shoe (whether Mr Prior or the Claimant) we find it more likely than not that the Clamant asked for size 13. He is, after all, happily wearing a size 13 safety shoe now. Whilst recognising that not all shoes fit in the same way (a person may well wear size 13 in one shoe and a size 12 in another, according to the manufacturer or style). However, the evidence points towards the Claimant requesting a size 13, and we find that is precisely what happened. We reject the Claimant's evidence that he was issued with a pair of size 12 boots on **15 June 2021** and that he complained to Mr Lambert that day. Had he been issued with boots on **15 June 2021**, we could see no good reason why Mr Prior would have been looking to order a size 13 pair on **17 June 2021,** so soon after the Claimant had been given a replacement pair on **15 June**. It was not because the Claimant had handed them back to Mr Prior – on the Claimant's claim form, he says he wore the boots for a few weeks after he received them, not a couple of days. Further, Mr Lambert was not at work on **15 June**, so he could not have complained to him that day. We find that the Claimant did not hand any safety boots back on **15 June** or at all. None had been ordered for him before **24 June 2021**.

56. Returning to the events of **17 June 2021**, Mr Curry enclosed a screen shot of a pair of '*Trojan Hyperion black S1P safety trainers'* from the website arco.co.uk. Arco is a company that specialises in workplace safety, providing, among other things specialist safety shoes. Mr Lambert was copied into this email. However, he did not act on it. The email was, after all, to Jimmy Prior who was to order the shoes, not Mr Lambert. The email also made no reference to the Claimant. It is the sort of routine email which a supervisor will from time to time receive and which does not require any action from him. We find that he simply overlooked this email not expecting that he had to do anything or that it related to the Claimant.

57. As set out above, the Respondent does not stock safety shoes above size 12. Anything above that size must be ordered, which inevitably means a delay in obtaining them. In our deliberations, we wondered why the Claimant had taken a photograph of Mr Prior's computer screen showing a pair of safety trainers. We concluded that he did so because, although he liked those trainers, he also wanted to see what other styles were available. That is also the most likely explanation for Mr Prior not ordering the trainers on **17 June 2021** – because the Claimant wished to do some research of his own. The Claimant did, in fact, carry out his own research. He came across a pair of safety trainers which he liked very much, at the cost of £107.52. Therefore, he took a screenshot of the web page to show to Mr Prior. That screenshot can be seen on **page 182 MB**. The Claimant was inconsistent as to the date on which this photograph of the webpage was taken. He insisted that it was taken on **07 July 2021.** The reason for his insistence was that **07 July 2021** was when he says he showed this photograph/screenshot to Mr Prior and Mr Lambert, at which point Mr Lambert was alleged to have uttered the racially offensive phrase '*not for that N*. When the date on **page 183 MB** (**18 June**

2021) was drawn to his attention, the Claimant said that the photograph he sent to the Respondent during disclosure showed a date of **07 July 2021** – the implication being that the date had been doctored. The Tribunal Judge, therefore, asked Mr Dunn to check with his solicitors what document had been sent to them by the Claimant. It was subsequently confirmed by the Respondent's solicitor that the documents on **pages 182 and 183 MB** were as provided to her by the Claimant, showing the date of **18 June 2021** on **page 183 MB**. This was an example of the Claimant's propensity to assert mischief or manipulation when a date or fact did not suit his narrative.

58. The Claimant insisted that the photo on **page 182 MB** was taken on **07 July 2021**. However, he could not explain to our satisfaction the date which appeared on **page 183 MB**. That page shows the same photograph as appears on **page 182 MB** in miniature with the date **18 June 2021**. The natural inference – and the one we draw - is that, following discussion with Jimmy Prior on **17 June 2021** about the trainers shown on **page 100 SB**, the Claimant researched other trainers available on the Arco online catalogue as he wanted a nice pair, in a style to his liking. On **18 June 2021,** he saw a pair of safety trainers which appealed to him and took a screenshot of it on his phone for the purposes of showing it to Jimmy Prior. Those are the trainers on **page 182 MB**.

59. Mr Prior had certain autonomy as a team leader, which included the authority to order safety shoes and other items of PPE. Although there was no imposed upper price limit on a pair of safety shoes, the team leader was expected to stay within the overall budget for the zone on PPE and tooling which was in the region of £450 a month. As a team leader, he was not required to seek approval from a supervisor to order a pair of safety trainers. However, as with all budget holders, he would be subject to challenge if any spend authorised by him took the zone over budget. We infer from this and from the cost of other available safety shoes (for example the Claimant's current pair [**page 93 SB**]), that Mr Prior considered the pair on page **182 MB** as much too expensive and for this reason he did not order them. We can easily understand why a team leader would not order a pair of safety shoes costing in excess of £100 when a pair could be purchased for around £40. This discussion regarding safety shoes was going on between the Claimant and Mr Prior, who in turn was liaising with Mr Curry. As for the date of **18 June 2021**, we reject the Claimant's evidence that he took the photograph on **07 July 2021** and reject his evidence that he showed this photograph to Mr Prior and Mr Lambert on **07 July 2021**. Even on that point, the Claimant was inconsistent, saying on the one hand that Mr Prior showed Mr Lambert the photograph the Claimant had taken (that is, the one on page **182 MB** – which is a screenshot of a webpage) and on the other hand putting to Mr Lambert that, on **07 July 2021**, Mr Prior showed Mr Lambert a photograph of the trainers in a physical, hard copy catalogue – referred to as 'the big book'. We deal specifically with the events of **07 July 2021** below.

60. Summarising the position at this stage in the chronology then: the Claimant was without any safety shoes following his return to work on **14 June 2021**. He was not

given, as he alleges, any safety shoes on **15 June 2021**. He worked in his normal trainers. We find that during that time he said to his colleagues that he did not have any safety trainers, having lost them in the fire and on occasion he asked his team leader, Jimmy Prior what was happening about safety shoes. This led to Mr Prior contacting Mr Curry, showing the Claimant what could be ordered and to the Claimant undertaking his own research for alternative an trainer style. However, Mr Lambert was unaware of this.

61. It was on **24 June 2021** that Mr Lambert noticed that the Claimant was not wearing safety shoes. The Claimant told him he did not have any, that they had been lost in the fire. Mr Lambert then took immediate steps to rectify this and placed an order for replacement shoes. He could not remember how he came to order size 13, whether it was the Claimant who told him the size or whether it was his team leader, Mr Prior. It is more likely than not that it was Mr Prior; that upon seeing the Claimant without safety shoes, he spoke to Mr Prior who explained that he had been in the process of ordering a size 13 safety shoe. In any event, Mr Lambert believed that the Claimant required a size 13 however he came to understand this – otherwise, he would have sent the Claimant to the store to collect a pair of size 12 shoes. Mr Lambert took action himself to remedy the situation. On **24 June 2021,** at 13.36, he emailed Gary Marley asking: '*can you order me some size 13 safety boots please'* [**page 96 MB**]. Mr Marley responded the same day at 14.35 saying '*ordered*'. As stated above, we find that Mr Lambert ordered size 13 because that is the size he believed the Claimant required and for no other reason. However, the order he placed was for safety 'boots' – not 'trainers.' It took a couple of weeks for these to arrive – they were delivered on **06 July 2021**, as confirmed by Mr Marley [**page 97 MB**].

62. The Claimant's role in trim & chassis 3 line 1 was such that he was <u>required</u> to wear steel top cap safety shoes. Indeed, that is why Mr Lambert acted immediately to order them as soon as he realised the Claimant was wearing ordinary trainers. From **24 June 2021**, Mr Lambert put the Claimant on duties referred to as '*Shoki*' duties. This is another Japanese term used by the Respondent to describe the 'final quality check'. It involves a visual inspection of the vehicle only, without any need to lift, handle or operate any tools, parts or equipment. Mr Lambert decided that it was an acceptable risk to allow the Claimant to undertake this work without safety boots pending delivery of the new boots, even though the shoki work is carried out on or near the line.

63. Although the Claimant contended that no boots were delivered or given to him in **July 2021**, and that emails suggesting otherwise were manufactured for the purposes of these proceedings, we have found that the boots ordered by Mr Lambert were delivered on **06 July 2021**. We also find that the Claimant received them, wore them and found two things: one he did not like them because they were not 'trainers' and not the style he was expecting to receive (following his discussion with Mr Prior) or that he preferred to wear. Secondly, he found that they were uncomfortable and hurt his feet. On **07 July 2021** he spoke to Mr Lambert and said

the boots hurt. He said nothing about the shoes being the wrong size. Mr Lambert explained that it was not unusual for new safety shoes to hurt. He advised him to wear them for a couple more days and if the pain did not go away to come back and see him. He also advised the Claimant to try pads or double socks in the meantime to see if that helped. The Claimant was, we find, frustrated by Mr Lambert's reply and he walked away.

64. We are satisfied, and we find, that Mr Lambert did not say anything derogatory (racially or otherwise) either to the Claimant directly or to Mr Prior. We infer from what happened on **07 July 2021** and from our earlier findings regarding the Claimant's stylistic preference for trainers (rather than boots) and from the fact that he conducted his own research into expensive stylish trainers, that the Claimant's dissatisfaction, disappointment and frustration was more to do with the fact that the style of safety shoe ordered by Mr Lambert was not to his liking. He expected they would simply be replaced upon saying that they hurt; but here he was, being advised to wear them in. Although we are satisfied that the new boots did hurt to a degree, this was not the Claimant's primary concern. New boots or shoes are often uncomfortable or painful when first worn, and it is likely that heavy, steel toe-cap shoes are particularly so. While it would be unreasonable for an employer to expect a worker to wear ill-fitting boots that hurt and which could not be made better by inserting pads, nevertheless new boots or shoes can take some time to wear in. Some take longer than others. We can understand the advice to add pads or wear two pairs of socks until they softened up and it is not unreasonable advice to give new shoes a few days. However, that is not what the Claimant wanted to hear. We find that the Claimant wanted trainers and, moreover, trainers that he could wear at work and outside work – which is why, we infer, he took his original trainers home with him. He did not want to 'wear' these boots in.

65. The Claimant maintained that he complained daily about how his shoes hurt, and how they cut his feet, caused blisters and were unwearable. Mr Holmes had no recollection of the Claimant complaining about not being issued with safety shoes. Mr Faid, in his evidence, said he could not remember the Claimant complaining about shoes. He could recall only that, now and again, when a team leader would pull him up about wearing his normal trainers, the Claimant would say that his safety shoes hurt. Mr Lidford said nothing in his witness statement about the Claimant complaining to him that his safety shoes hurt, merely that the Claimant was not given any. However, he did say in oral evidence that the Claimant complained to him about his shoes hurting. We do not accept Mr Lidford's evidence in his written witness statement that he witnessed the Claimant asking Mr Lambert or a team leader on many occasions for safety boots. Mr Lidford's statement was written by the Claimant. Mr Lidford accepted this but added that the Claimant had read it to him before he signed it and that he agreed with it. However, Mr Lidford's evidence overall was unreliable. In cross examination he accepted that he was not party to any discussions and only heard from the Claimant after the event. He later said that he had witnessed the conversations. He then changed this again to say that any information he had was given to him by the Claimant.

66. We do not accept the Claimant's evidence that he complained to Mr Lambert. We find that he did not complain at all to Mr Lambert, other than on the one occasion on **07 July 2021**, which we have referred to above. Neither was Mr Lambert made aware of any complaint about the replacement shoes by his team leader or by anyone else. Having found how quickly Mr Lambert reacted to the Claimant's situation (firstly, on being told of the fire and secondly on subsequently realising he did not have safety boots) it is most unlikely that he would have received regular complaints from the Claimant – or via others - about blisters and cut feet, yet not act upon them – especially having told the Claimant to come back to him if the shoes were still hurting. We could discern no possible reason for Mr Lambert to have ignored any such pleas. It would not be in the interests of anyone, that is, the Claimant, Mr Lambert or Nissan for a supervisor to knowingly permit an employee to work in pain, to work without appropriate safety shoes, or to refuse to replace shoes that he knew to be causing such pain. Of course, we appreciate that the Claimant accuses Mr Lambert of being a racist and of covering up his racist tendencies and behaviours and that this is would be a reason for failing to provide appropriate shoes and failing to act on his pleas. We will say at this juncture that we carefully considered the allegation that Mr Lambert was racist and was covering up such tendencies and that he, therefore, was knowingly depriving the Claimant of shoes, but we rejected the allegation entirely. It is, we find, a wholly unfounded allegation.

Summary of findings in relation to the safety shoes

67. It is clear, therefore and we so find, that a new pair of work boots were ordered for the Claimant on **24 June 2021**. The boots were then delivered on **06 July 2021** and the Claimant collected them and wore them. The Claimant, disliking the style, then said to Mr Lambert that they were uncomfortable and hurt him on **07 July 2021** but made no further complaint to him after that date.

68. From **07 July 2021** the Claimant on occasion complained to one or two of his colleagues when working on-line about his replacement safety boots being uncomfortable. However, as he has exaggerated wildly to this tribunal about various matters, we find that he more likely than not exaggerated the degree of pain and discomfort caused by the replacement boots. Moreover, the Claimant was unhappy with the style of boot he had been given. He was, therefore, unwilling to wear the boots in, as suggested by Mr Lambert. Therefore, he chose to wear his normal trainers in preference, and to explain to his colleagues why this was so, he overplayed the description of pain that the boots caused him.

69. We infer that the Claimant wore the boots on the very odd occasion after **07 July 2021** but, feeling them still uncomfortable (because he had not worn them in), preferred to wear his normal trainers. The Claimant largely wore his own trainers. From time to time, he complained to his colleagues that he did not have safety boots and that the ones that had been provided cut his feet. This was more likely

than not after a team leader had pulled him up about the lack of footwear. Therefore, it was not that the Claimant the Respondent had failed to provide the Claimant with safety shoes. It had. He had chosen not to wear them and did not allow sufficient time or take steps to wear them in.

70. When Mr Kerr subsequently pulled the Claimant up on **20 December 2021** for a number of matters, including not wearing safety shoes, the Claimant regarded that as unfair and made it a subject of grievance (see below).

Award for Mr Lambert

71. As far as Mr Lambert was concerned, he genuinely believed that he enjoyed a good working relationship with the Claimant. The Claimant, in terms of his interaction with Mr Lambert, did or said nothing to him, or to anyone else, that gave, or might have given, the impression that the two did not have a good working relationship or that the Claimant had any concerns about Mr Lambert. That was the case during the whole of the time that Mr Lambert was the Claimant's supervisor. The first hint of any dissatisfaction with Mr Lambert came on **20 December 2021**, the day on which the Claimant submitted his grievance. Up until then, any observer of day-to-day life in Mr Lambert's team would get the impression that the Claimant – and his colleagues - liked and respected Mr Lambert. That was certainly the impression of Mr Faid. Indeed, consistent with how it appeared, we find – oddly, in light of the allegations in this case – that the Claimant genuinely got on with Mr Lambert and that he genuinely liked and respected him as a supervisor.

72. So much so that, in about **October 2021**, the Claimant, on his initiative, suggested to his colleagues that the team provide Mr Lambert with an 'award', as a symbol of his and their regard for him as a supervisor. They agreed. The Claimant carried out his own research and purchased a small 'trophy', with the intention of being reimbursed by his colleagues. A photograph of the trophy purchased by the Claimant is at **page 110 MB**. It is engraved with the words '*Nissan Best Supervisor Andy Lambert Sept 2020 – Sept 2021*'. Those words were chosen by the Claimant. The Claimant and his colleagues briefly discussed who should present the trophy to Mr Lambert, but no-one wished to do so for fear of being the butt of jokes, something along the lines of being mocked as the "teacher's pet". Therefore, the Claimant gave it to a Team Leader, Jason Gibson, for him to present it to Mr Lambert. Mr Gibson simply placed it on Mr Lambert's desk. Mr Lambert, who had taken some annual leave in late October saw the trophy on his desk when he returned on **01 November 2021**. When he asked Mr Gibson about it, Mr Gibson explained that the Claimant had arranged it.

Attendance monitoring and absence review meeting

73. The Respondent operates an Absence Management Procedure which consists of a number of stages. Certain action is taken under the policy according to which stage the employee has reached. The Respondent's practice was and is to hold a formal meeting where an employee accumulates 5 days' absence on two or more

occasions over a 12 month rolling period. Where this happens, the supervisor is required to invite the employee to a formal HR meeting at which attendance targets will be set. From 2020 up until at least the end of 2021, Covid-19 absences were excluded from this calculation.

74. On **16 August 2021**, Mr Lambert emailed Sarah Woodland, an HR Controller, regarding Philip Lidford. In the email, [**page 81 SB]**, Mr Lambert asked Ms Woodland to arrange a meeting regarding Mr Lidford's attendance as Mr Lambert believed him to have hit the trigger in the last 12 months. Ms Woodland replied the same day to say that Mr Lidford '*was only at 4 days over 2 occasions, so needs at least another 2 days sickness absence before triggering an attendance counselling*'. She had corrected Mr Lambert in that COVID absences were excluded and a number of days had been discounted for bereavement and dealing with family issues. Mr Lidford subsequently went on long-term sick leave. His employment was terminated around the end of **June or early July 2022** by reason of long-term absence. The Claimant complains that he was treated less favourably than Mr Lidford regarding sickness absence. Mr Lidford gave no evidence about his sickness absence.

75. On **24 November 2021**, the Claimant telephoned Mr Lambert to say that he would not be turning in to work that day, as he had twisted his knee. He was also absent the following day, **25 November 2021**. Mr Lambert advised him to get some medical attention and to call him with an update the next day. His shift on **25 November 2021** started at 7am. The Claimant did not call as he had been asked to. However, he sent a WhatsApp message at 1.36pm saying '*Hi hope all well I feeling better today I can confirm I attended work tomorrow*' [**page 114 MB**]. Although the phone number is for a phone shared by the chassis 3 supervisors, Mr Lambert did not see the message, as he does not use the WhatsApp facility.

76. This period of absence meant that the Claimant had hit the 'trigger' at which the supervisor is required to contact HR to arrange a meeting. This appeared not to be in dispute, that is, until the Claimant began to cross examine Mr Lambert. Therefore, to the extent that there was a factual dispute here, we must determine it.

77. In his oral evidence, the Claimant agreed that he was absent on sick leave for one day on **20 May 2021**, for two days from **15 July 2021** and two days from **24 November 2021**. He agreed that this meant he had hit the Respondent's trigger for inviting him to an HR meeting. Later, when cross-examining Mr Lambert, the Claimant suggested that he was not, in fact, absent for two days in **July 2021** and that he had been on light duties from **15 July to 09 August 2021**. This was contrary to the Claimant's oral evidence. He relied on the absence of any reference to an absence on **page 90 MB** of the fact file. That the Claimant had never in fact hit the triggers had never been raised before. His case had always been that other white colleagues, who also hit the triggers, were not invited to HR meetings and were therefore treated more favourably. Upon reading the fact file entries on **page 90**

MB, it is right to say that there is no reference to two days' absence in that period. It certainly looked like the Claimant had a point here – on the face of the fact file entries at least. However, absences are also recorded, for payment and other HR purposes, on a part of the Respondent's HR system called 'workday'. Mr Lambert had calculated the 5 absences from the information available on the system. That information was not included in the bundle as it had never before been asserted by the Claimant that he had not hit the trigger.

78. Despite the arguable apparent ambiguity of the entries on rows 9, 10 and 11 of the fact file [**page 90 MB**] we find that the Claimant had been absent for 5 days over two or more occasions in a period of 12 months, as he initially agreed in evidence and as confirmed by Mr Lambert in his evidence, which we accept. In any event, we are satisfied, and so find, that Mr Lambert genuinely believed the Claimant to be absent on those occasions and to have hit the relevant trigger – just as he believed Mr Lidford to have hit the relevant trigger back in **August 2021**. In the case of Mr Lidford, HR had drawn to Mr Lambert's attention that he had not in fact hit the trigger at that point in time. That was not the case with the Claimant.

79. On **03 December 2021**, Sarah Woodland, HR Controller, wrote to the Claimant advising him that he was required to attend an attendance counselling meeting on Monday **20 December 2021** at 08.30am. The letter explained that the purpose of the meeting was to discuss concerns regarding his attendance record, that Mr Lambert would chair the meeting and that she would be present to provide personnel support and advice [**page 115 MB**]. She provided her number and advised that, if the Claimant had any queries as a result of the letter, he should contact her on that number. He did not do so.

80. On **06 December 2021**, the Claimant was seen to be using a radar jig incorrectly and overstocking the sub bench with radars and brackets. This had the potential to bend the angle of the radar once fitted to the vehicle. Mr Prior recorded an entry in the fact file [**pages 90-91 MB**]. It records the Claimant as having agreed that it was bad practice. Mr Prior made a further entry the following day on the same subject matter, which records a discussion with the Claimant on that occasion and a direction that he cannot do more than 2 radar subs at one time. When asked about this in cross-examination, the Claimant said that Mr Prior was right that he had seen him using 5 brackets. However, he maintained that the change of procedure from 5 to 3 came about only two days earlier and that he, the Claimant, had just forgot. He accepted that he was not doing the task in the way he was supposed to and forgot that it had changed. The Claimant insisted that he received a written caution for forgetting this procedure. We are satisfied and so find that he did not receive a written caution. Mr Prior simply spoke to him and recorded the entry in the fact file. To the extent that he had been spoken to or counselled about quality concerns, that was not unusual. It was part of the everyday interaction between supervisors/team leaders and manufacturing staff. Other employees were also spoken to when there were quality concerns. Indeed, the tribunal would expect that to happen as a matter of good practice.

Mr Lambert moves to Inspection

81. On **13 December 2021**, Mr Lambert was replaced as Trim & Chassis supervisor by another supervisor, Gavin Kerr. That was because Mr Lambert, in accordance with the Respondent's rotational system, was moving, or rotating, to the role of Inspection supervisor. Therefore, from **13 December 2021**, Mr Kerr became the Claimant's supervisor, albeit there was a short handover period of about a week. During that handover period, Mr Lambert updated Mr Kerr on relevant matters, one of which was that the Claimant had a scheduled absence review meeting for **20 December 2021**, which he would have to conduct.

82. From **December 2021**, Mr Lambert worked in Inspection and, following advice from HR, he had purposely avoided contact with the Claimant after submission of the Claimant's grievance (which we address below). The Inspection department is at the end of the line. In order to access it, Mr Lambert does not pass through any of the Trim and Chassis zones, where the Claimant worked. There is a blue pedestrian path specifically to enable people to walk through the plant. All operators and supervisors use this path, which is about 10 metres from the production line and the Claimant's workstation. That is not to say that Mr Lambert, after he moved to Inspection, was not and would never have cause to be in the part of the line where the Claimant worked. An Inspection Supervisor might, if requested, go to TC1 to inspect a specific fault, to feed some information back to the zone or if he was attending the area with other supervisors and managers, for example, where a new model was making its way along the line, or where some significant changes to production were being introduced. After **13 December 2021**, however, any time spent in the general area where the Claimant worked was brief and only very occasional. If at all, Mr Lambert would only have been in the general vicinity of the Claimant's workstation.

20 December 2020 - Discussion in the rest area with Gavin Kerr, supervisor

83. The absence review meeting which the Claimant had been informed of by Sarah Woodland did not go ahead on **20 December 2021**. This was because of a shortage of manpower on the day, due to a high level of covid absences. Mr Kerr had decided to postpone the meeting and to reschedule it. The Claimant when cross-examining Mr Lambert suggested that it was a lie that the meeting had to be cancelled due to manpower issues. He suggested that it was cancelled because Mr Lambert wanted to stop him from speaking to HR about the injustices of the warning letters he had received. He further suggested to Mr Lambert that it was cancelled to further soften him up. There was no evidence of this and nothing from which we could infer that to be the case. Further – and we come on to this later - the Claimant had received no warning letters, the injustices of which he would be able to raise with HR. We find that the sickness absence review meeting was cancelled by Mr Kerr simply due to manpower issues and that the Claimant had understood this. In fact, the Claimant himself mentioned this subsequently in his grievance meeting on **19 January 2022 [page 125 MB]**.

84. Later that same day, in the C3 rest area, Mr Kerr spoke to the Claimant about 3 matters – none of which involved sickness absence. Mr Lambert happened to be present in the rest area at the time but he was not involved in the discussion. These were now matters for Mr Kerr. To the extent that the Claimant suggested to Mr Lambert that he summoned him to a meeting with two supervisors, we reject this as further exaggeration. The Claimant was not summoned and it was not Mr Lambert who asked to speak to him. It was simply that his new supervisor, Mr Kerr, said he wanted to speak to him in the rest area. That is and was a perfectly normal occurrence. The three matters Mr Kerr wanted to speak to him about were as follows:

    84.1 That the Claimant had reported to a team leader that his daughter had tested positive for covid. Mr Kerr wanted to be sure about this. He advised the Claimant to book a walk or drive through PCR test.

    84.2 That the Claimant had missed 5 fixings which would need to be rectified. In the fact file, on **page 92 MB**, he noted that he had informally counselled the Claimant on this.

    84.3 That the Claimant was not wearing safety boots. Mr Kerr had noticed this that day and asked the Claimant why this was. The Claimant explained that they had burned in his house fire.

85. Mr Kerr's record on the fact file records the Claimant saying, in relation to the PCR test suggestion, that he would '*stop off sick tomorrow'*. When asked why, the note records the Claimant saying that he was unwell, that his back hurt a bit. He went on to record that this would be a premeditated absence. As regards the safety boots, Mr Kerr made the following entry: "*I asked him why he wasn't wearing the boots that had been issued to him he said that they were hurting his feet, I asked him if he had any issues with his feet to which he replied no, I asked if they were too small as he said that they were hurting his toes so I said I would order him the next size up to see if that would rectify the issue."*

86. It became apparent during the hearing that it was not in dispute that Mr Kerr told the Claimant on this day that he would order him size 14 safety boots. However, there was a dispute about the context of the discussion. When cross examining Mr Lambert, the Claimant suggested that Mr Kerr said he would order size 14, in order to frustrate him. He suggested that he (the Claimant) told Mr Kerr and Mr Lambert that the size 12 boots were in the cupboard and that they hurt him; that Mr Kerr threatened him that if he did not wear those boots he could not work on the line and that he (the Claimant) asked for this in writing. Mr Lambert overheard the discussion about safety shoes. He did not accept that Mr Kerr had threatened the Claimant or that the Claimant had returned boots or that he said they were in the cupboard and could not recollect the Claimant requesting anything in writing.

87. We find that, on **20 December 2021**, Mr Kerr noticed the Claimant was wearing his normal (non-safety) trainers and simply asked him why that was. The Claimant told him he lost them in the fire and that the replacement pair hurt his feet. If, as the Claimant contended at the hearing, the Respondent believed that he took a size 12, it seems very odd that Mr Kerr would suggest jumping two sizes from 12 to 14. We infer from the fact that Mr Kerr said he would order a size 14 that he asked the Claimant what size he wore, and that the Claimant replied size 13 – something which until the preliminary hearing before Judge Arullendran, never seemed to be in dispute. We find it more likely than not that Mr Kerr said that the Claimant would have to use the shoes that he was given (either the size 13 which had already been provided or the size 14 which he was going to order following their conversation) or if not, he could pay for his own safety shoes. When the Claimant says he handed the boots back, we find that he had not done this (see paragraph 55 above). It is more likely than not that he kept them in a cupboard or locker (unlike his previous pair, he did not take them home) and that by pointing out to Mr Kerr that the boots were in the cupboard, he has subsequently equated this with him 'handing them back'.

88. What was unclear was whether Mr Kerr got round to ordering a pair of size 14 boots. Although Mr Greener, in paragraph 19 of his witness statement, said that when he investigated the Claimant's grievance, he had noted that size 14 boots were ordered on **21 December 2021** and delivered on **27 January 2022**, we saw no contemporaneous record of the order or delivery (as we had in the case of the size 13 boot). There is an entry on **page 77 SB** which shows which 'consumables' were ordered for each employee in the financial year 2021. There are two entries against the Claimant's name under the subject 'boots': **07/07/2021** and **31/01/2022**. The first is a reference to the size 13 boots ordered by Mr Lambert. We were unsure whether the second reference was to the size 14 boots or to the 'bolster honey boots' which the Claimant subsequently obtained from Screwfix – see below, paragraph 101. We were unable to arrive at any finding on this, but in any event, this was academic as the discussion with Mr Kerr was overtaken by the submission of the grievance which resulted in the Claimant obtaining a new pair of boots on **20 January 2022,** and which he still wears to this day.

89. The Claimant regarded it as unfair that, on **20 December 2021,** he had been pulled up on missing 5 fixings on vehicles, for which he blamed faulty equipment. In cross examination, the Claimant accepted that Mr Kerr simply spoke to him about it. He did not assert in evidence that Mr Kerr gave him a warning. He also felt it unfair to be told that, should he not attend work the following day for a bad back, it would be seen as a premeditated absence. He was also unhappy that Mr Kerr had said he would have to wear what safety shoes the company provided or buy his own. He was also particularly unhappy that Mr Lambert, who was present in the rest area during the discussion, did not back him up when Mr Kerr was saying these things. He felt aggrieved at Mr Kerr's comments and he felt let down by Mr Lambert. In this regard, we found the evidence of Mr Faid, who was called as a witness by the Claimant, to be telling. He had no recollection of the Claimant having any

concerns about Mr Lambert until the time when 'Gav' (Mr Kerr) pulled him into the 'bait room'. That was on **20 December 2020**. The Claimant told Mr Faid that he had been cautioned by Mr Kerr about missing cars and that he had been pulled up about the safety shoes and that 'Andy' (Mr Lambert) had not stood up for him. That was the first time Mr Faid felt that the Claimant had any problem with Mr Lambert. We found Mr Faid's evidence to be compelling and consistent with that part of the note of the grievance hearing on **page 125 MB**, where it records the Claimant as saying *'…Gav grilling me saying I can't go out to work until I get my shoes. Shocked my sup. Never say anything*.' That is, we find, a reference to Mr Lambert not saying anything or speaking up. It is also consistent with Mr Lambert's evidence, and our finding, that he was not actually involved in the discussion on **20 December 2021**, but that he was present and heard part of the discussion.

90. Mr Faid had only become aware of the allegation of racial harassment against Mr Lambert during these proceedings – from the Tribunal bundle. He was unaware of it before then and he was shocked to hear of the allegation. The Tribunal Judge asked Mr Faid about the racial mix in the area and whether race was raised. As regards the safety boots, the Claimant told Mr Faid that he had hounded managers for boots, but Mr Faid had not witnessed this. The Tribunal judge asked whether the Claimant mentioned anything about his race in connection with the boots. Mr Faid said: '*not initially, the longer it went on, he said do you think it is about me being black?*'

91. We find that the Claimant felt a sense of injustice regarding what he considered to be the unsatisfactory situation with his safety shoes. He wanted to wear safety trainers which the majority wore but was given safety boots. The boots were not to his liking and they were uncomfortable. He saw others in safety trainers and felt he was being treated differently. He was not willing to wear the boots in. Therefore, he wore his own trainers. On occasion he would say to his team leader things like, 'am I getting new safety shoes'? but this was not actioned. He felt he was being treated unfairly and began to wonder whether it because he is black. When he was spoken to by Mr Kerr, his sense of injustice was heightened further. Not only was he being spoken to about not wearing safety shoes but he felt he was being reprimanded for missing fixings on cars and felt that he was having to prove himself on a covid test. He began to associate this with race, and at this point mentioned to Mr Faid that maybe it had to do with his colour. Thus, when he came to draft his grievance, he headed his grievance as 'discrimination'.

The Claimant's grievance

92. After he finished work on **20 December 2021**, the Claimant returned home and later that night compiled a written letter of grievance [**page 118-119 MB**]. The Claimant said in evidence that he was 'dying' when he wrote the grievance. The Tribunal asked what he meant by this – regarding it as perhaps a misplaced or intemperate phrase to describe that he wasn't well and that he was not really dying. The Claimant said that he was dying, as was his daughter. We find this unfortunate

tendency to exaggerate to be a general trait of the Claimant's. Even when given the opportunity to rail in his exaggerations he does not take it. Clearly, he was not dying. Other than this exaggerated statement the evidence was that the Claimant had a sore throat and achy joints – not uncommon Covid symptoms. We find that the Claimant exaggerated the effects of Covid on **20 December 2021** as a direct response to Mr Dunn challenging him on what appeared to be an inconsistency between his claim and the grievance letter, in which he said it took about three months after he requested them before he received safety boots. There is, plainly, an inconsistency between what is said in the grievance letter and what is said in the Claim Form on this issue. The grievance which the Claimant drafted was headed 'discrimination/unequal treatment'. In it, he highlighted 5 points:

92.1 Sick leave
92.2 Safety shoes
92.3 Unsafe equipment
92.4 Caution or warning letters
92.5 harassment

93. As regards 'harassment', the Claimant wrote '*I don't want to say anything about this not yet*'. In his evidence to the tribunal, he said that was a reference to sexual harassment, which he did not want to speak about and which formed no part in these proceedings. The Tribunal wondered whether this was an oblique reference to the alleged racially offensive remark from Mr Lambert on **07 July 2021**. However, it was not. The Claimant told the tribunal that he had not referred to the alleged racial slur by Mr Lambert in his letter of grievance because he did not want to concentrate on that. Rather, he wanted to focus on unfair treatment concerning shoes, unsafe equipment sickness and warning letters.

94. As regards the issue of safety shoes, in his grievance [**page 118-119 MB**] the Clamant said that he asked for these many times after his house fire and that it took about 3 months for a new pair to arrive. He said that, on **20 December 2021**, he was instructed to use the shoes that had been provided or to buy his own. As regards tools and equipment, the Claimant referred to being cautioned on **20 December 2021** due to not completing his job on the cars. This was a reference to missing about 5 cars, which he put down to malfunctioning equipment. As regards 'cautions and warning letters', the Claimant said that he had agreed to these in the past to '*keep under the radar'*, while others get away with murder. He said that if he looks at his phone, he gets a caution while others have on ear pods and make phone calls. As regards 'unfair treatment', the Claimant said that when others stay at home more than 5 days a year (by implication, on sick leave) they are not sent to HR – unlike him.

95. We find that it was the discussion with Mr Kerr on **20 December 2021** that led the Claimant to submit this grievance and – with one exception - not because the Claimant had any genuine concerns regarding Mr Lambert's actions or failings during his time as his supervisor. The exception was that the Claimant was

personally disappointed that Mr Lambert did not come to his support during the discussion with Mr Kerr, which he perceived as unfair criticism of him by Mr Kerr.

96. The Respondent's plant shut down for Christmas on or around **23 December 2021** and reopened on or around **06 January 2022**. The Claimant was invited to attend a grievance meeting to be held on **19 January 2022** at 2pm to be chaired by Les Greener, Senior Supervisor. A copy of the letter inviting him to the meeting is at **page 121 MB**. There is no dispute that the Claimant received a letter in identical terms to that on **page 121 MB** and no dispute that he attended the meeting on **19 January 2022**. However, during the hearing, he maintained that the letter on **page 121 MB** was a fabrication. As it turned out, this assertion was made by the Claimant solely because the date given on the copy of the letter in the bundle was **08 September 2022**. As that was after the date of the meeting in **January 2022**, this demonstrated, said the Claimant, that it was a fabrication. Further, it was this letter (and specifically the incorrect date) and only this letter on which the Claimant relied in support of his assertion that other emails (in particular, those on **pages 96 and 97 MB**) were fabricated. Often in litigation, individuals use intemperate language in expressing themselves, or often they use the wrong words to describe something less serious than their actual words might suggest. For example, many litigants in person say that a statement in a document if a fabrication when they simply mean they do not agree with the statement. Conscious of this, the Tribunal asked the Claimant whether the date might simply be an error, which is what it looked like, especially when he had received the identical letter at the time and attended the meeting. The Claimant said he could not accept this. Therefore, the Tribunal directed the Respondent to disclose the document properties to see if this would assist the Claimant and shed light on the discrepancy. Further to the Tribunal's direction, the Respondent subsequently disclosed the document properties showing that the letter had been created on **11 January 2022**.

97. The Tribunal asked the Claimant, now that he had seen the document properties, and given that he had received an identical copy at the time, whether he accepted that the date of **08 September 2022** was simply an error. However, he maintained that it was not, that it and the document properties page were fabricated and fraudulent. Again, conscious that the Claimant might simply be getting carried away, using heightened, emotional language to convey nothing other than mere disagreement, the Tribunal Judge explained that sometimes people use the words 'fraudulent' or 'fabrication' when really all they mean is that the document is wrong or that they disagree with the content and that they do not use it to mean 'dishonestly manipulated'. The judge asked whether, by referring to fabrication and fraud, the Claimant meant simply that he did not agree that the date on the letter at **page 121 MB** was correct and that he simply did not agree with what was said in the other emails at **pages 96 and 97 MB** or whether he was really alleging that the documents were dishonestly manipulated for these proceedings. After some reflection, the Claimant said it was the latter.

98. Therefore, we must make a finding on this. We have no doubt whatsoever that there was no fraudulent or dishonest manipulation of these or any documents by the Respondent or by its solicitors. We find that the explanation for the date of **08 September 2022** is simple and it is the one ventured by Mr Lambert when he heard the Claimant's assertion during the proceedings: that is, the date was automatically inserted when the letter was opened, on the balance of probabilities by the Respondent's solicitors, when it was obtained from the Respondent's HR department for the purposes of disclosure. We note that the date **08 September 2022** was the date given by the Tribunal in paragraph 10 of the orders of **30 June 2022** [**page 46 MB**]. We are satisfied that the document was created on **11 January 2022**. We are also satisfied that Mr Lambert sent the email on **page 96 MB** on **24 June 2021** at 13:36 and that he received the response on that page from Mr Marley on the same date at 14:35. He also received the email from Mr Marley on **06 July 2021** at 17:56 on **page 97 MB**.

99. On **19 January 2022**, the Claimant, accompanied by a Company Council representative, Paul Murray, attended a grievance meeting with Les Greener. We accept Mr Greener's evidence that the notes at pages **124 – 127 MB**, taken by Ms Woodland, contain an accurate account of the discussion. They are not and were not intended to be verbatim but they accurately and adequately capture what was discussed with no material omissions.

100. Among other things, the Claimant told Mr Greener that he lost his safety shoes in his house fire and that after two to three months of persistence by him, he eventually received the shoes but that they were not the same as the previous pair. The reference to them not being 'the same' is, we find, a reference to the 'style' not the size – consistent with our earlier finding that the Claimant's main concern about the safety shoes was that they were not in the style of a trainer. Rather, they were boots. He also told Mr Greener that Gav (that is, Gavin Kerr) gave him a 'grilling' on **20 December 2021** and added '*shocked my sup. Never say anything'*. As we have found above, that is a reference to the Claimant's disappointment that Mr Lambert had not stepped in to back him up, consistent with Mr Faid's witness evidence. The Claimant told Mr Greener that he wore size 13. As regards the **20 December 2021** absence review meeting, the Claimant told Mr Greener that this had been cancelled due to manpower. He was upset because Mr Kerr still had time to call him in regarding the 5 missed cars. The Claimant said that he wanted to put on record that he thinks Andy Lambert is a good supervisor. He mentioned that the team had given him an award [**page 127 MB**]. There was no reference at the grievance meeting to having been given a black divider in the rest area or to any racial comment.

101. Mr Greener's first priority was to ensure that the Claimant had a pair of safety boots. Mr Greener later collected the Claimant from the rest area and took him to a car where another worker drove him to a shop, Screwfix, to buy some shoes. At the store, the Claimant tried on various pairs and settled on a pair of DeWalt

Booster 'Honey' colour safety boots, size 13 at a cost of £39.99 [**page 93 SB** and **page 206 MB**].

102. Mr Greener investigated the grievance. He spoke to Mr Kerr and to Mr Lambert. Further, although the Claimant had said in the grievance meeting that the issues regarding the tools was now resolved, he conducted a safety audit on the tools used by the Claimant and others in the area to see what if any concerns had been flagged and if there was any particular issue relating to the Claimant. Having satisfied himself that there was no current concern regarding tools, he looked at historical information from the 'Help Lamp' system [**pages 176-181 MB**]. From **October 2020** to **December 2021**, the Claimant had raised 8 tooling concerns. He also had 88 'untagged' faults – that is, 88 vehicles on which faults not raised by the Claimant had been identified. Given that approximately 35,000 vehicles had passed the Claimant in that period, this was a number which did not concern Mr Lambert or any other team leader or supervisor. The Help Lamp data also showed that the number of quality concerns on the Claimant's line was of no concern. Manufacturing staff do not have their own allocated tools. The tools are allocated to the work station and zone and naturally will vary from task to task. Therefore, any tools used by the Claimant are also used by others. Further, given the sheer volume of manufacturing, tools experience wear and tear and mechanical or other problems. This is a common occurrence throughout the plant. The Kaizen team is there to provide any quick fixes if necessary (if the supervisor or team leader are unable to do so) and if the issue cannot be fixed, the tool is replaced.

103. Mr Greener wrote to the Claimant on **03 February 2022** with the outcome to the grievance [**page 130 – 134 MB**]. He concluded that Mr Lambert applied equal triggers regarding sickness absence across the team and that he had requested attendance meetings for other team members. Mr Greener stressed that it was the number, not the validity, of absences that was to be addressed at the meeting. As regards safety shoes, Mr Greener acknowledged that there had been an initial delay in ordering the new shoes in **July 2021**, that there was a need to order shoes in because the Respondent did not retain any size 13 safety shoes in stock, which was the Claimant's size. He concluded that Mr Lambert was unaware the Claimant had been wearing his own trainers since the replacement pair arrived. He concluded that there was no 'malice' in the delay but that it was unacceptable that the Claimant had been permitted to work online without the appropriate footwear. He intended to liaise with the Respondent's safety footwear provider to ensure a wider range of sizes are stocked in future to avoid delays. As regards tools and equipment, he concluded that there was no evidence that any problems were exclusive to the Claimant. He encouraged the Claimant to report any concerns regarding harassment to his supervisor or team leader at the earliest opportunity or to speak to HR or a Company Council Representative. Therefore, the Claimant had been encouraged by Mr Greener to speak out if he had been subjected to any harassment. In cross examination, the Claimant was asked why he did not mention to Mr Greener that Mr Lambert had used a racially offensive term about him. The Claimant initially said that he could not remember raising this at that meeting, then

changed his evidence to say that he thinks he did raise it. When asked why he had not challenged the accuracy of the notes, the Claimant said that in his witness statement he refers to the Respondent '*changing the narrative'* and that this can be taken as him not accepting the accuracy of the notes; that if he were to go through everything it would take him a month and that he was not aware he was supposed to do this. The Claimant was quite animated in his evidence at this point. We find that he did not raise the allegation of racial slur because it had not happened.

Appeal against grievance outcome

104. On **07 February 2022**, the Claimant appealed the grievance decision [**page 135 – 137 MB**]. By the time he came to draft his letter of appeal, the Claimant had become very critical of Mr Lambert. He ended the appeal letter by saying: '*…it's important where people have done wrongdoing they are held accountable because to walk away from this is to condone wrongdoing. When will it stop*?' However, he made no reference in this to Mr Lambert being a racist or using racist language towards or about him.

105. On **page 136 MB**, the Claimant said: '*The Nissan Team Leader showed me a catalogue to order my shoe. When he ask Mr Lambert for approval he said no I was sitting right there*.' The reference to the Nissan Team Leader is to Jimmy Prior. In his oral evidence, the Claimant said that Mr Prior showed Mr Lambert a book – a physical, hard copy catalogue. He relied on a photograph of Arco's webpage as proof that such a physical hard copy existed. **Page 101 SB** does indeed show a picture of a physical book: '*the Arco Big Book'* with the year 2012/13 on the cover. Mr Lambert's evidence was that Mr Prior did not show him any picture, did not ask him for approval and, in any event, that the Respondent did not have any hard copy catalogue – whether there is such a book or not.

106. We accept Mr Lambert's evidence. There may be a 'big book' but the Respondent (and certainly Mr Lambert) did not have this. We find the reference on page **136 MB** (the letter of appeal) to a 'catalogue' to be a reference to the webpage shown on the computer screen on **page 100 SB**. That is the screen shot of the online catalogue which Mr Prior showed the Claimant on **18 June 2021** and of which the Clamant took a photograph. If he had been shown a picture of shoes from a book, it seems odd that he did not take a photograph of that. He took a photograph of the computer screen because that it is what he was shown. Although the Claimant was insistent that Mr Prior showed Mr Lambert a physical book on **07 July 2021**, we are satisfied that he did not. The only time Mr Prior showed the Claimant a picture of safety trainers was on **18 June 2021** and that was from the online catalogue.

107. We are satisfied then that the Respondent did not have a physical copy of this 'big book' (or any other hard copy version of that book). Consequently, we find that Mr Prior did not show any such book to Mr Lambert. We are also satisfied that Mr

Prior did not show the item on **page 100 SB** (or any other webpage) to Mr Lambert or that he asked for Mr Lambert's approval to purchase shoes on **07 July 2021** or on any other date.

108. The Claimant's appeal against Mr Greener's decision was heard by Lee Watson, Shop Manager, on **28 February 2022**. The Claimant was again accompanied by Mr Murray, the Council Representative. Mr Watson understood the main concerns being expressed by the Claimant to be that Mr Lambert had lied about not knowing he had a concern with his safety shoes; that some of the tools he used malfunctioned and that he was being treated unfairly regarding sickness and covid absences. The Claimant made no reference to Mr Lambert using an inherently racist slur.

109. Mr Watson carried out his own inquiries into the matters raised by the Claimant. Although the Claimant had said that the issues he had with tooling were resolved, Mr Watson checked every tool on the station. The Claimant used a Bosch Exact gun, in respect of which Mr Watson found no faults. On **29 March 2022**, he wrote to the Claimant with the outcome of the grievance appeal [**pages 142-143 MB**]. Mr Watson did not uphold the appeal.

110. A review of the Respondent's data shows that the Claimant raised tooling concerns on average twice a month from **October 2020** to **December 2021.** This is within a normal range and was not exclusive to the Claimant. Tool malfunctioning is to be expected in the industry and the Respondent's data produced to the Tribunal did not reveal that the Claimant had suffered malfunctions any more than his colleagues or comparators.

The complaint of racial harassment by using an offensive racial slur

111. The Claimant alleges that on two occasions, Mr Lambert called him by the racially offensive term '***N'.*** The first such occasion was, he said, on **07 July 2021,** the events of which we have set out in our findings in paragraphs 63-64 above. The second occasion was approximately 8 months later, sometime in **late February or early March 2022**. Both were denied by Mr Lambert. As regards the second occasion, the Claimant could not recall an exact date but said he could only give an approximate month and year. Although in his further particulars he referred to a timeframe of January to March 2022, he settled on **late February/early March 2022**. Under cross examination he said that the comment was made at a time when there was a new car, or a new event at which all supervisors were present but that he could not recall the details.

112. On **07 March 2022**, the Claimant commenced a period of sick leave. He was absent until **12 July 2022**, on which day he returned to work on a 'rehabilitation plan' starting on half shifts in accordance with physiotherapy advice.

113. By the time Mr Lambert came to give evidence, he had a very limited understanding of the circumstances in which he was said to have racially insulted the Claimant for a second time. There was the reference on **page 39 MB**, paragraph 3; "*January March 2022 while working online Andy called me a **N** when passing by*". The only other reference was in the Claimant's witness statement, paragraph 8 where he said: *"…the first time… was in July 2021….. 2nd time was when I was working online.*"

114. Mr Dunn put to the Claimant in cross-examination that Mr Lambert had never called him the offensive word, and that had Mr Lambert done this when he was working online as alleged, others, such as Mr Faid or whoever had been working there, might be expected to have heard it if he had said it. The Claimant insisted that Mr Lambert did call him **N**. However, when later cross-examining Mr Lambert, the Claimant put to Mr Lambert that, in fact, he 'mouthed' the word silently as he walked by; that although he did not say it aloud the Claimant could see his lips move. The Claimant had not mentioned this in his witness statement or in his own evidence when being cross-examined. This was the first time it had been suggested that Mr Lambert silently mouthed the offensive word. The Claimant put to Mr Lambert that he did this at the moment he had been passing by the Claimant's workstation, when he was walking past on the other side of the car on which the Claimant was working; that just at that moment the Claimant happened to straighten up, looked across the car and saw Mr Lambert. It was in this moment, he suggested, he saw Mr Lambert mouth the offensive word. Mr Lambert denied this.

115. Although we have set out above our findings of fact as to what happened on **07 July 2021,** we make it clear at this juncture that we accept Mr Lambert's evidence that he did not, in **July 2021** or at any other time, say to Mr Prior '*not for that **N**'* and that he did not at any time utter the offensive word to Mr Prior or to the Claimant. Nor did he say or mouth the word upon passing by the Claimant's workstation in **February** or **March 2022** or at any other time. The tribunal was surprised to hear that the second allegation changed from one of calling the Claimant the N word to 'mouthing' it. Again, we wondered as a tribunal whether the Claimant might always have been asserting this and whether he had simply not expressed himself sufficiently clearly when making the allegation. However, we do not consider this to be due to any misunderstanding or lack of clarity on the part of the Claimant. This is not a case where the Claimant had always maintained that he had 'mouthed' the word. We considered whether there had been a misunderstanding on the part of the previous Employment Judges at case management stage. However, we were satisfied that in this respect he was not misunderstood by the Employment Judges (Judge Martin and Judge Arullendran) at the case management preliminary hearings, concluding it to be unlikely that two judges and a third full tribunal, would have misunderstood this. Nor did we misunderstand the Claimant's evidence, when in answering Mr Dunn's questions, he said that Mr Lambert had called him the offensive word. The Claimant only made the distinction about 'mouthing' the word after it was apparent from a study of the

photographs on **page 90 SB** that the location where Mr Lambert was alleged to have used the racial term and that other workers were working nearby at the time, raising the possibility that they would have heard, had the word been used.

Caution for not completing tasks

116. The Respondent undertakes monthly safety audits. In the period **June 2021 to December 2021**, there were no documented concerns raised by the Claimant regarding faulty equipment.

117. The Claimant alleged that on **20 December 2021** he was issued with a caution because he missed five fixings on cars. He does not dispute that he 'missed five cars' but says that this was due to malfunctioning equipment, of which he had previously made his supervisor aware. Therefore, he says it was not only unfair to caution him in these circumstances but discriminatory, in that a white colleague who had missed tasks and who had explained that this was due to malfunctioning equipment would not have been cautioned. In his Claim Form, [**page 8 MB**] he compared his treatment with that of Mr Lidford on **28 January 2022**, alleging that Mr Lidford missed 9 fixings that day, yet was never cautioned. The Claimant also compares his treatment with that of Sean Holmes [**page 50 MB**, paragraph 1.2.3]. However the Claimant gave no evidence about Mr Lidford or Mr Holmes missing fixings or not completing work and nor did Mr Lidford or Mr Holmes. When Mr Dunn asked the Claimant whether he was alleging that he (the Claimant) received a caution on **28 January 2022** he said he could not remember and asked Mr Dunn whether it was in the notes. When Mr Dunn pointed out that it was in the issues, the Claimant said that he was alleging it then. He said that he believed it would have been Gavin Kerr who did this, for missing cars. When asked by Mr Dunn whether there was any evidence of him giving any caution on that day, the Claimant said no but insisted he had been. We do not accept that.

118. The Respondent accepts that neither Mr Lidford nor Mr Holmes were issued with cautions for missing cars (or for poor performance). However, it also denied that it issued the Claimant with any cautions, for anything, be it faulty work or missed parts or sickness absence. There is no record of any 'caution' or 'warning' on the Claimant's file. Not only is there no caution recorded on the Claimant's personnel file there is no record elsewhere of any significant quality concern regarding the Claimant's work. In responding to this complaint, the Respondent interrogated its records.

119. As set out above, quality statistics are retained for manufacturing staff. In the Claimant's case, they reveal 74 quality concerns in **September 2021** over 22 shifts. That worked out as an average of 3.4 faults per shift. In the Respondent's heavily monitored working environment, such a record equates to what is termed an 'OK vehicle ratio' of 98.8%. That reflects a standard of performance by the Claimant that would not warrant any investigation or caution.

120. Faced with the rather odd situation whereby the Respondent had no record of any caution against the Claimant and where the records did not reveal any concern – as did the appraisal – the Tribunal wondered whether the Claimant, by referring to a 'caution' was referring to the informal discussions regarding performance that a supervisor would have with a worker, and which was entered on the fact file – such as that on **page 91 MB** (entries 18 and 19) and **page 92 MB** (entry 1). We wondered whether the Claimant might have misunderstood a discussion with his supervisor as amounting to a 'caution'. The entry on **page 92 MB** in particular is a reference to **20 December 2021**. It is an entry by Gavin Kerr saying: '*I spoke to Kami about his poor quality during the shift and the missed important 5 fixings and that this needs to be rectified as it is a going concern over a few months. I informally counselled Kami for these missed operations*.' The Claimant was asked whether that is what he meant by a 'caution'.

121. However, the Claimant was insistent that he given a formal written caution, by which he said, it was a formal disciplinary 'warning'; that he signed it and that a record was kept by his supervisor although he was not given a copy. The Claimant said that the document he signed was something similar to the document on **page 213 MB** (which is a return to work interview form) only that instead of the words 'Return to Work Interview Form' it said something like 'caution' or 'warning'. He said it then went on to make recommendations and what future action would be taken against him if he repeated this. He maintained that these cautions (of which he had received many from Mr Lambert and the one from Mr Kerr on **20 December 2021**) were being deliberately hidden by the Respondent from the Tribunal. The Respondent witnesses rejected this, saying that there is no such document; that they do not have a standard caution letter and no written warning or caution would ever be issued without first going through HR and in the presence of an HR officer. Mr Lambert said that he had never issued such a caution or warning to the Claimant and Mr Greener and Mr Watson had no knowledge of any such practice.

122. We accept the evidence of the Respondents' witnesses. We find that the Claimant was never issued with any written caution or warning. We can conceive of no advantage to Mr Lambert or any other supervisor in issuing a written warning and then keeping this from HR. It is more likely than not, and we so find, that by 'caution' the Claimant is in fact referring to the sort of discussion that he had with Mr Kerr on **20 December 2021** and which is recorded in the fact file entry as informal counselling. This was an ordinary exchange between supervisor and line worker of the sort which happens to many of the workers, online.

123. We are satisfied that when a supervisor, such as Mr Lambert or Mr Kerr had occasion to talk to the Claimant about performance or quality, that he regarded this as a 'caution' in his own mind. When he was counselled by Mr Kerr on **20 December 2021**, we find that he reported to his colleagues, Mr Holmes and Mr Faid afterwards that he had been given a 'caution'. But that was, we find, a reference to the counselling by Mr Kerr. His colleagues were not to know that. After all, they were not present. It was what he perceived to be a 'caution' that formed

part of his sense of grievance and which led him to prepare his written grievance later that night after work. We have no doubt that he regarded this as a caution – and in a sense it is. We find that he has convinced himself that this documented informal counselling was more serious than it was and, we fear his propensity to exaggerate matters (even to himself) has led him to convey these 'cautions' as formal written warnings when they were, in fact, not. We also conclude that he has come, sadly, to believe his own narrative that he had been asked to sign a document that looked like that on **page 213 MB**, when in fact, that was the only sort of document he had been asked to sign.

Mobile phones

124. Mobile phones are not allowed on the shop floor, something which all manufacturing staff, including the Claimant are made aware, through induction and team briefings. The Respondent has a mobile phone policy [**page 189a MB**]. Exceptional circumstances may permit an operator to have their phone with them, for example if they are awaiting a call for a family emergency. The Respondent's practice is that anyone seen using their phone on the shop floor (other than in the rest area) will be stopped and challenged and asked to put it away. We find that this happened to the Claimant on occasion. Mr Lambert caught the Claimant on his phone on a few occasions. On those occasions, he reminded the Claimant of the no phone policy and told him to put the phone away. He also did this with others whom he had seen using their phones. However, the Claimant was never issued with any formal caution or warning despite Mr Lambert believing the Claimant to be one of the worst for using his phone. The Claimant has regarded this ordinary management interaction, incorrectly, as a caution. We have no doubt that some will have got away with occasional mobile phone usage (it being hard to police) but equally the Claimant will also have got away with it. He accepts that he did use his phone. His point was that others who used theirs (or earphones) were not issued with written cautions whereas he was. We reject this.

125. We accept Mr Faid's evidence (and that of the Respondent witnesses) and find that it was commonplace for supervisors or team leaders to 'pull people up' for mobile phone use. Indeed, Mr Faid had been spoken to by supervisors regarding the use of mobile phones, just as the Claimant had. We accept the evidence of Mr Greener that staff were and are constantly reminded that they are not to use mobile phones. Neither the Claimant nor his comparators have ever been issued with a formal or written caution or warning regarding mobile phone usage. That was the case despite Mr Lambert believing that the Claimant was one of the worst in the team for using his phone.

126. Those then are our key findings of fact. We now turn to set out the relevant legal principles before coming to our conclusions.

Relevant law

127. Section 39(2) Equality Act 2010 provides that an employer ('A') **must not discriminate** against an employee of A's ('B')

127.1.1 as to B's terms of employment,

127.1.2 in the way A affords B access, or by not affording access to, opportunities for promotion, transfer or training or for receiving any other benefit, facility or service,

127.1.3 by dismissing B,

127.1.4 by subjecting B to any other detriment.

128. When considering whether an employee has been subjected to a 'detriment' Tribunals should take their steer from the judgement of the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R. 337, where it was held that a detriment exists *'if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment*'.

129. Section 40(1)(a) EqA 2010 provides that an employer 'A' **must not, in relation to employment by 'A' harass a person**, 'B' who is an employee of A's.

130. These concepts of discrimination and harassment are then defined in other provisions, namely section 13 (direct discrimination) and section 26 (harassment).

Direct discrimination – section 13 Equality Act 2010

131. **Section 13** provides that:

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

132. Person 'B' in section 13 is often referred to as 'the statutory comparator'. It follows from the wording of the section that the statutory comparator must not share the claimant's protected characteristic. In these proceedings, therefore, the comparator must be an individual who is not black or black Caribbean.

133. In addition to this, **section 23(1) Equality Act 2010** provides that:

(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

134. This means that the comparator must be someone in the same position in all material respects as the claimant, save only that he is not a member of the protected class: **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R. 337 HL. This does not mean that the circumstances of the claimant and the comparator must be identical in all respects. Only those circumstances that are 'relevant' to the treatment of the claimant must be the same or nearly the same for the claimant and the comparator (see also paragraph 3.23 of the EHRC Code of Practice on Employment 2011).

135. In **Shamoon**, Lord Rodger said:

> ***"….the 'circumstances' relevant for a comparison include those that the alleged discriminator takes into account when deciding to treat the claimant as it did".***

136. A circumstance may be relevant if an employer attached some weight to it, when treating the person as it did. In **Macdonald v Ministry of Defence v Governing Body of Mayfield Secondar School** [2003] I.C.R. 937, HL, Lord Hope held that:

> ***"All characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator".***

137. This principle applies whether the comparator is an actual or hypothetical comparator: **Shomer v B and R Residential Lettings Ltd** [1992] IRLR 317, CA. Where there is no actual comparator, it is incumbent upon the Tribunal to consider how a hypothetical comparator would have been treated: **Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting** [2002] I.C.R. 646, CA.

138. Where a complainant relies on a hypothetical comparator, the 'circumstances' of the comparator must be constructed. When considering whether the employer would have treated the comparator any differently from the claimant, it may draw inferences from (among other things) the treatment of a person whose circumstances are not sufficiently similar to warrant them being treated as an actual comparator. Although not actual comparators, their circumstances may be sufficiently similar, and their treatment such, as to justify an inference that the Respondent would have treated a hypothetical comparator in similar circumstances to the claimant, more favourably.

139. In **Stockton on Tees Borough Council v Aylott** [2010] I.C.R. 1278, CA, Mummery LJ stated:

> ***"I think that the decision whether the claimant was treated less favourably than a hypothetical employee of the council is intertwined with identifying the ground on which the claimant was dismissed. If it was on the ground of disability, then it is likely that he was treated less favourably than the hypothetical comparator not having the particular disability would have been treated in the same relevant circumstances. The finding of the reason for his dismissal supplies the answer to the question whether he received less favourable treatment."***

140. Therefore, in cases where the identify of the comparator is in issue, a tribunal may find it helpful to consider postponing the question of less favourable treatment until after it has decided why the treatment was afforded to the claimant. If it is shown that the protected characteristic had a causative effect on the treatment of the claimant, it is almost certain that the treatment will have been less favourable

than that which an appropriate comparator would have received. Similarly, if it is shown that the characteristic played no part in the decision making, then the complainant cannot succeed and there is no need to construct a comparator: see **Law Society and others v Bahl** [2003] IRLR 640, EAT (Elias J, as he then was).

141. An employer can be liable for discriminatory treatment in circumstances where the decision maker in relation to the claimant is different to that in the comparator's case. The mere difference in identity of decision makers is unlikely to constitute a material difference for the purpose of section 23 EqA: **Olalekan v Serco Ltd** [2019] IRLR 314, EAT.

Harassment – section 26 Equality Act 2010

142. Section 26 provides:

> (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.

143. The unwanted conduct must be related to the protected characteristic (in this case, race, which includes colour). The intention of those engaged in the unwanted conduct is not a determinative factor although it may be part of the overall objective assessment which a tribunal must undertake. It is not enough that the alleged perpetrator has acted or failed to act in the way complained of. There must be something in the conduct of the perpetrator that is related to race. This is wider than the phrase '*because of*' which is used elsewhere in the legislation and requires a broader inquiry. However, the necessary relationship between the conduct complained of and the protected characteristic is not established simply by the fact that the Claimant is of a particular race and that the conduct has the proscribed effect.

144. Unwanted conduct is just that: conduct which is not wanted or 'welcomed' or 'invited' by the complainant (see ECHR Code of Practice on Employment, paragraph 7.8). This does not mean that express objection must be made to the conduct before it can be said to be unwanted. The Tribunal must be alive to the very real possibility that a person's circumstances may be such that they feel constrained by certain pressures whether in their personal life or in work which explains a failure to object to (expressly or impliedly) or to mention nearer the time what they now say, in the course of litigation, was objectionable and unwanted conduct. Clearly, conduct by A which is by any standards, or self-evidently, offensive will almost automatically be regarded as unwanted.

145. In **Grant v HM Land Registry** [2011] IRLR 848, CA, it was held by Elias LJ (para 47) that the words 'intimidating, hostile, degrading, humiliating or offensive environment' should not be cheapened as they are an important control to prevent trivial acts causing upset being caught by the concept of harassment.

Burden of proof

146. Proving discrimination can be very difficult. As Lord Rodger of Earlsferry said in **Shamoon** (@para 143):

> ***"Discrimination is rarely open and may not even be conscious. It will usually be proved only as a matter of inference: Nagarajan v London Regional Transport [1999] I.C.R. 877 e – h, per Lord Nicholls. The important point is that there are no restrictions on the types of evidence on which a tribunal can be asked to find the facts from which to draw the necessary inference. In Chief Constable of West Yorkshire Police v Vento [2001] IRLR 124 the Employment Appeal Tribunal discussed some of the kinds of evidence that are used and how they should be approached. In particular, Lindsay J pointed out, at p.125, para 7, that one permissible way of judging how an employer would have treated a male employee in cases which, while not identical, were also now wholly dissimilar. Despite the differences, the tribunal may be able to use that evidence as a sound basis for inferring how the employer would have treated a male employee in the same circumstances as the applicant. Of course, a tribunal cannot draw inferences from thin air, but it can draw them by using its good sense to evaluate the evidence, including the comparisons offered: p.126, para 12."***

147. To assist complainants in establishing discrimination, the Equality Act 2010 provides for a reversal of the burden of proof in certain circumstances.

148. **Section 136** Equality Act 2010 provides that:

> *(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*

149. This section, otherwise known as the burden of proof provision, lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision: **Hewage v Grampian Health Board** [2012] I.C.R. 1054.

150. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had failed to make reasonable adjustments or harassed B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: **Madarassy v Nomura International pl**c [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA.

151. For there to be direct discrimination, the treatment needs to be because of a protected characteristic. In considering this, motive is irrelevant. Where the reason for the treatment is not immediately apparent – or inherently discriminatory - it is necessary to explore the mental processes, conscious or unconscious of the alleged discriminator to discover the facts that operated on his or her mind: **Amnesty International v Ahmed** [2009] I.C.R. 1450, EAT. However, the protected characteristic need not be the only reason or even the main reason for the treatment for it to be said to be 'on grounds of' or 'because of'. It is enough that the protected characteristic is an effective cause.

152. The concept of a shifting burden of proof recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race: **Laing v Manchester City Council** [2006] I.C.R 1519, para 71, per Elias P. However, first and foremost, in any complaint of discrimination or harassment, a claimant must prove, on the balance of probabilities, that the words relied on were uttered or that the conduct relied on did actually take place. If a claimant does not prove the things he claims happened, the claim will fail.

153. If he does prove the facts on which he relies for drawing inferences of discrimination, the burden does not shift automatically. More than a difference in treatment and a difference in the protected characteristic is needed to shift the

burden. If the burden does shift, the Respondent must show a non-discriminatory reason for the treatment in question. It is not required to show that it acted reasonably or fairly, although unreasonable and unfair treatment is not irrelevant.

Section 123 Equality Act 2010

154. This section provides as follows:

> *(1) Subject to section 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.*
>
> *(2) …*
>
> *(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.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*
> *(a) When P does an act inconsistent with doing it, or*
> *(b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

155. The three month time limit section 123(1)(a) is not absolute. An employment tribunal has discretion to extend the time limit for presenting a complaint where it thinks it just and equitable to do so. Although this is a broader discretion than is the case in unfair dismissal claims, it is not without limits. In **Roberson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 (@ para 25), the Court of Appeal stated:

> *"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."*

There is no requirement for exceptional circumstances to exist before time may be extended, simply that it must be just and equitable to do so. In exercising the discretion, tribunals may have regard to the checklist in section 33 of the Limitation Act 1980, as modified by the EAT in **British Coal Corporation v Keeble and**

others [1997] IRLR 335. This requires the tribunal to consider the prejudice to each party and to have regard to all the circumstances, including the length of and reason for the delay, the extent to which the cogency of evidence is likely to be affected by the delay. There are other factors in addition to these and their relevance depends on the facts of each individual case. A tribunal need not consider all the factors in every case: **Department of Constitutional Affairs v Jones** [2008] IRLR 128, CA. However, it must not leave a significant factor out of account. The balance of prejudice and the potential merits or demerits of the claim are relevant considerations which must be weighed in the balance before reaching a conclusion on whether to extend time: **Rathakrishnan v Pizza Express(Restaurants) Ltd** [2016] I.C.R. 283, EAT

Discussion and conclusions

Race Discrimination: section 13 EqA

156. We start with the complaint of direct race discrimination. As set out in the relevant law section above, any claimant bringing a complaint of discrimination or harassment must prove that the things he claims happened, in fact happened. He must do so on the balance of probabilities.

157. Therefore, we started by considering what it was that the Claimant alleged the Respondent had done and the essential things he was required to prove. Those were:

157.1 That Mr Lambert had not provided the Claimant with safety shoes when he requested them in **June 2021** and that the Respondent only provided these in **January 2022**

157.2 That the Claimant was formally cautioned in writing for sickness absence on **25 November 2021** and on **20 December 2021**

157.3 That the Claimant was formally cautioned in writing for not completing tasks due to malfunctioning equipment on **20 December 2021** and **28 January 2022**.

157.4 That the Claimant was formally cautioned in writing for using his mobile phone in the workplace in **November 2021** and **December 2021**.

157.5 That someone from the Respondent installed a black panel/partition in his pod in **October 2020**.

157.6 That, on **07 July 2021**, Andy Lambert called the Claimant **N.**

157.7 That in **late February/March 2022**, Andy Lambert mouthed the word **N** at him.

158. We take these in turn:

That Mr Lambert had not provided the Claimant with safety shoes when he requested them in **June 2021**

159. It is clear from our findings of fact that the Claimant has failed to establish that he asked Mr Lambert for safety shoes and that he did not provide any when requested. The actual complaint, however, as pleaded in the Claim Form, was that the Claimant received a new pair Mr Lambert on or before **10 July 2021** but the shoes were defective and caused him pain and discomfort; that and was told that a new pair would be ordered but a new pair was not provided until he raised the matter in a grievance meeting in **January 2022**.

160. As is apparent from our findings of fact in paragraph 51 Mr Lambert did not immediately appreciate that the Claimant had lost his safety trainers in the fire, otherwise, we found, he would have made arrangements for them to be replaced as he did with regards to other items of clothing.

161. We also found that the Claimant did not hand any shoes back (see paragraphs 55 and 87 above) as he alleged in his evidence. The Claimant's evidence as to when he asked for safety shoes, when he was given them, how long he wore them, whether and when he handed them back was inconsistent and, in keeping with much of his evidence, wholly unreliable (see paragraphs 49-50 above). As soon as Mr Lambert realised the Claimant was without safety shoes, he ordered some. Any delay in providing the Claimant with boots after the fire in his home was not deliberate but was due to a number of different factors at various points in time, including: that Mr Lambert did not realise the Claimant was without safety shoes; that when Mr Curry identified shoes on **17 June 2021**, the Claimant looked for other types on line; that the Claimant took size 13 shoes which had to be ordered in because they were not stocked by the Respondent. Further, shoes were ordered by Mr Lambert and delivered to the Claimant on **06 July 2021** and the Claimant wore them. He did not complain to Mr Lambert about these shoes after **07 July 2021** and Mr Lambert did not appreciate that the Claimant thereafter largely wore his own trainers. It was not until **20 December 2021** that Mr Kerr, upon noticing the Claimant without safety shoes, raised the matter. There was nothing from any of this which could lead us properly to draw any inference that Mr Lambert, or anyone else, was motivated consciously or unconsciously by race. Therefore, the Clamant has failed to establish that he handed the shoes back after a few weeks and was told a new pair would be ordered.

162. Even though the Claimant has failed to establish the essential facts on which this part of his claim rests, we went further and considered whether Mr Lambert had knowingly permitted the Claimant to work from July 2021 to December 2021 without appropriate footwear and whether that might properly give rise to an inference of discrimination. However, we concluded that he did not knowingly

permit this. He was unaware of the fact that the Claimant largely wore his own trainers. As we have set out in our findings, most of the manufacturing staff wear safety 'trainers'. At a glance, these are hard to distinguish from normal (non-safety) trainers. Whether Mr Lambert should have been aware is another matter, but we accepted his evidence that he genuinely was not aware. When he realised on **24 June 2021** that the Claimant had no shoes, he ordered some immediately. That is inconsistent with him being the sort of supervisor who would knowingly allow the Claimant to work without safety shoes. As far as he was concerned, the Claimant had collected his safety shoes and the last word on it from Mr Lambert on the subject, when the Claimant said they were uncomfortable, was to wear them in. That was on **07 July 2021**. Therefore, the explanation for him doing nothing about the fact that from July to December 2021, the Claimant was not, by and large, wearing safety shoes is that he did not realise that. That is a non-discriminatory explanation.

That the Claimant was cautioned for sickness absence on **25 November 2021** and on **20 December 2021**

163. The Claimant has not established that he was cautioned for sickness absence on those dates or at all. During the hearing, he was at pains to say that by 'caution' he meant a written warning, which he signed for and a copy of which was retained by Mr Lambert but not given to him to retain. In cross examination, the Claimant conceded that he had not, in fact, been issued with any written caution in relation to sickness absence. We refer to our findings in paragraph 42. Therefore, to that extent, this part of the complaint must fail as he has not established the essential facts. It is, we conclude, the Claimant's tendency towards exaggeration that has resulted in him referring to normal manager/worker interactions as being formal warnings. We conclude that when the Claimant speaks of 'caution' he is in reality referring to the fact that his supervisor had, from time to time, spoken to him about things such as not following procedures, or for using his phone, or for missing a fixing etc… and that from time to time, a note would be entered (either on a return to work form, such as that on **page 213 MB**) or on his fact file, such as those on **page 90-91 MB** (entries 7, 16, 18 and 19). In a way, these are 'cautions'. The Tribunal explored with the Claimant whether that was really what he was saying. However, he insisted that he received formal, written warnings. That was his case and the basis on which he alleged he was treated less favourably.

164. Although there is a complaint regarding **25 November 2021,** there was no evidence of anything happening to the Claimant at all on that date. We conclude that this date simply emerged from the Claimant having seen entry 15 on **page 91 MB**. However, that was merely Mr Lambert's entry noting the number of absences, which was factual. As for **20 December 2021**, we refer to our findings in paragraphs 42-44 and 83 - 87 above. The Claimant was not cautioned in relation to sickness absence on this day – or on any other day. The sickness absence review meeting had been cancelled and no one even discussed absence triggers that day.

165. There was also no evidence that the Claimant had ever been asked to provide proof of any cause of (non-covid) sickness absence and we conclude that he was not asked to do this. To the extent that the Claimant's complaint also encompassed covid related absences, he was asked to show proof of a Covid absence by Mr Kerr. This was standard practice. There was no evidence that any other manufacturing staff who had contracted covid or who had been in close contact with a family member who had contracted covid was told that they need not provide proof. There was no evidence that the Claimant had been treated less favourably than any other employee in this regard. Mr Lidford was named as an actual comparator on this issue. Given that he was dismissed by reason of the length of his sickness absence, we considered him an odd choice of comparator. In any event, Mr Lidford gave no evidence as to what had happened to him in relation to earlier periods of absence – that is, what happened to him when he had hit the trigger points. However, insofar as Mr Lambert (the alleged discriminator) was concerned, it is clear from our findings that he treated Mr Lidford and the Claimant in the same way, in that, believing them both to have hit the relevant triggers he contacted HR to arrange a counselling meeting (see paragraph 74 above). Mr Lambert, therefore, did not treat the Claimant less favourably than he treated Mr Lidford.

That the Claimant was cautioned for not completing tasks due to malfunctioning equipment on **20 December 2021** and **28 January 2022**.

166. Although only two dates were identified in the list of issues prepared by Judge Martin, the parties had identified a third date in their agreed list of issues, the other date being **06 December 2021** (**page 68 MB**, paragraph 1.3). The date of **28 January 2022** is referred to in the Claim Form, not as a date on which the Claimant was issued with a caution or warning but as a date on which Mr Lidford was said to have missed 9 fixings but was not cautioned. Thus, in the Claim Form at least, the Claimant referred to that date, merely to draw the comparison of less favourable treatment with Mr Lidford, his comparator on this issue. Later, in the further information provided on **page 33 MB**, however, the Claimant said that he had in fact been cautioned on that day, the same day that his colleague (Mr Lidford) allegedly missed fixings but received no caution. The Claimant referred to this date again on **page 34 MB** as being the date that should most interest the Respondent, being the day on which direct racial discrimination was committed against him when he was cautioned by his team leader and supervisor for missing parts on cars. However, the Claimant gave no evidence whatsoever as to what happened on **06 December 2021** and unreliable, vague evidence as to what happened on **28 January 2022** which we rejected (see paragraph 117 above). There wasn't any evidence either as to whether Mr Lidford missed any fixings on **28 January 2022** or on any other day and what did or did not happen as a result.

167. As regards **06 December 2021**, we have set out our findings in paragraphs 79-80 above. That was a day on which the Claimant was seen to be using a radar jig

incorrectly and overloaded the sub bench with radars and brackets [**pages 90-91 MB**]. He accepted in evidence that he had been in the wrong but maintained that he had forgotten that the procedure had changed. In any event, he did not receive any formal caution or warning. We have set out our findings on **20 December 2021** in paragraphs 83-87 above. The Claimant accepted that Mr Kerr had simply spoken to him about the mixed fixings on this date as recorded in the fact file.

168. The Claimant has, therefore, failed to establish the facts on which he relies in relation to this part of his claim. We are entirely satisfied that he was never issued with any written caution or warning. To the extent that he had been informally counselled about quality concerns, that is not the Claimant's case. In any event, we found that is not unusual and he had not been treated any differently or more harshly than others. Other employees were also cautioned when there were quality concerns. However, the Claimant's quality overall was acceptable – as recognised by Mr Lambert in the appraisal and as borne out by the quality data held for employees.

That the Claimant was cautioned for using his mobile phone in the workplace in **November 2021** and **December 2021**

169. It was the Claimant's case that he was issued with cautions regarding the use of his mobile phone – again he insisted that these were formal, written warnings issued by Mr Lambert for improper mobile phone use, making recommendations for going forward and spelling out action that will be taken if he uses his phone again. Although he said this happened many times, two dates were identified by the Claimant in the list of issues as being dates on which these warnings were issued. When questioned on those dates by Mr Dunn, the Claimant said that he did not have a date for the warnings. The Claimant submitted that these written warnings were signed by him, that he was never given copies, that they exist and are being deliberately withheld as part of a conspiracy to cover things up. We are satisfied that is not the case. The Respondent has no copy of any such document because there is none. As with the Claimant's claims about cautions generally, we found that he was not issued with any formal written caution or warning for using a mobile phone in the workplace. We refer to our findings in paragraphs 122-123 and 125 above. He has failed to establish the essential facts on which he relies.

170. Although he failed to establish those essential facts, we went further (as with all the complaints) to consider– rather than formal written warnings - whether the Claimant had received any formal verbal warnings for using his mobile phone – as opposed to simply being instructed to put his phone away after he had been caught using it. However, we concluded that he had not been given any verbal warnings. The most that happened was that he had been told to put his phone away. This was a commonplace instruction issued to all manufacturing staff when caught on their phone, as confirmed by Mr Faid. We would have understood if the Claimant had said to the Tribunal that, when he said 'caution' he meant being pulled up for using his phone and told to put it away. Although that was emphatically not his

case, we considered whether there was evidence that the Claimant had been treated differently as regards his phone usage.

171. It is likely to be the case that some team leaders are more relaxed about these things than others. However, other than a bare assertion by the Claimant, there was no evidence that any particular individual had been seen using his phone by Mr Lambert (or anyone else for that matter) without the supervisor/team leader having words with that person. Workers are likely to be 'wise' to supervisors being on the lookout for mobile phone usage and therefore to hide their phones when a supervisor or team leader is about. The Claimant's photographs which he took of colleagues using their phones, and which he submitted in evidence as proof of other, white workers, getting away with it, is not proof or evidence that they were permitted to do so or that Mr Lambert, or any other supervisor turned a blind eye to their use.

172. We were satisfied that the Claimant was treated no differently to anyone else and, if anything, in light of Mr Lambert's belief that he used his phone a lot, was treated leniently in this respect.

That the Claimant's pod contained a black panel/partition in **October 2020**

173. We refer to our findings in paragraphs 27 – 39 above, and to paragraph 33, in particular, where we find on the balance of probabilities, that the Claimant's pod did contain a black divider. We address this further when we come on to consider whether this claim has been brought in time and whether the Claimant had been subjected to unwanted conduct related to race and whether (in the alternative) he had been subjected to any detriment and treated less favourably because of race.

That, on **07 July 2021** and in late **February/early March 2022** Andy Lambert called the Claimant N or mouthed the word to the Claimant

174. We think it plainly obvious that this is a very serious allegation of racial harassment on two separate occasions. The uttering – or mouthing – of the **N** word by a white supervisor to a black worker is inherently racist and offensive. As with all the complaints brought by the Claimant, we gave this careful consideration. As a Tribunal we were acutely conscious of and on the lookout for the possibility that the Claimant was right and that Mr Lambert might be pulling the wool over our eyes, holding himself out to be the sort of person who is appalled at the use of such a word, whilst beneath it, harbouring a racist trait. That, after all, is really what the Claimant is saying. We considered this but rejected it. We were satisfied in fact that Mr Lambert did not say this offensive word – or mouth it – to the Claimant or to anyone else. Therefore, the Claimant has failed to establish the facts on which he relies.

175. In arriving at our conclusion on this and other matters, we had regard to our overall assessment of the witnesses, the quality of the evidence they gave, whether there was any surrounding evidence that would support or undermine the

allegation, or any other evidence from which we might legitimately draw an inference that Mr Lambert had done as alleged. Mr Lambert was consistent and measured in his evidence. Mr Faid was shocked to hear of the allegation. The Claimant was inconsistent and unreliable as a witness and prone to serious exaggeration. There was no evidence of racist 'banter' or exclusionary behaviour towards the Claimant. One major concern for us was the Claimant's tendency to exaggerate. We concluded that the Claimant has – after the event - come to believe his own exaggerated narrative and had convinced himself, that Mr Lambert was and is a racist.

176. We refer to our findings that the Claimant, of his own volition, arranged for Mr Lambert to be given a trophy for being the best supervisor in Nissan. We regarded as compelling evidence that, on his initiative, the Claimant suggested that the team provide Mr Lambert with an 'award', as a symbol of their regard for him as a supervisor. This sat incongruously with the suggestion that Mr Lambert in the Claimant's presence refused approval for the purchase of trainers, saying '*not for tha**t N'*** and then continued to ignore the Claimant's daily or regular pleas that the safety boots he had been provided with hurt and cut his feet and that he needed replacements. Even allowing for the real possibility that a person's circumstances may be such that they feel constrained by certain pressures whether in their personal life or in work which explains a failure to object to (expressly or impliedly) or to mention nearer the time what they now say, in the course of litigation, was objectionable and unwanted conduct (paragraph 144 above), we regarded, as implausible that the Claimant would on his own initiative arrange for a trophy to be given to Mr Lambert if he had behaved as alleged. We also had regard to the evidence of Mr Faid that, as far as he understood, the Claimant had no problems with Mr Lambert until **20 December 2021**, when the Claimant considered that Mr Lambert failed to back him up.

177. When challenged by Mr Dunn regarding this apparently contradictory and implausible state of affairs, the Claimant said that he bought the trophy because Mr Lambert <u>was</u> the best supervisor in Nissan but added 'only if you are white' and that he was just recognising this for others. We reject this as another glib response and fairly typical of the Claimant to deflect from the reality of the situation. We have no doubt that the reality, at the time, was that he did regard Mr Lambert as a good supervisor, as did Mr Faid and the others who worked under him. If the Claimant saw him as a good supervisor only for white employees, that would not explain why he, as a black employee subjected to discrimination, harassment and unfair treatment, would take it upon himself to obtain such an award. That glib response was, we concluded, not credible.

178. We also reminded ourselves of our findings that the Claimant did not mention any racial harassment in his grievance. Nor did he mention it in his appeal – which was at a point when he had become very critical of Mr Lambert and, in his own words speaking about standing up to or not condoning wrongdoing (see paragraph 103 above). The Claimant also gave inconsistent explanations for not referring to

this in his grievance. At one point he said he could not remember if he had raised it. He then said that it was because he was not a permanent employee. However, he was made permanent in **August 2021** and he raised his grievance in **December 2021**. He then said that it was because he did not understand until Judge Martin explained in **June 2022** what discrimination and harassment meant, that she had explained that 'unfair treatment' was not enough. He said that it was only then that he understood he should mention the allegation that he had been racially abused by Mr Lambert. Such inconsistency was fairly typical of the Claimant's evidence.

179. We observed that, when asked straightforward questions which either threw into doubt what he was alleging or cast a different light on them, the Claimant had a tendency to become agitated and to give exaggerated responses and to accuse the Respondent of fabricating or hiding documents and the truth.

180. We also considered the description eventually given by the Claimant of the second occasion on which Mr Lambert was alleged to have used the **N** word as inherently implausible. Aside from noting that the allegation was now that he 'mouthed' the word silently (never before put in this way), we considered it highly unlikely that the Claimant just happened to look up at the very moment Mr Lambert passed by and that he was instantly able to lip read the utterance of the **N** word, a word with no consonants which involves contact of the lips.

181. Further, we considered that the Claimant is intelligent. He understood what is right and what is wrong. He understands that to refer use the deeply offensive racial slur which he alleges was used is a serious matter of wrongdoing. Yet, he did not once refer to his. On the contrary, he organised an award for Mr Lambert reflecting what, at the time, he genuinely thought of him.

182. By the time he came to present this complaint to the Tribunal on **22 April 2022**, Mr Lambert had, on his account, racially insulted him a second time, as recently as **March 2022**. Yet it did not feature in his complaint of race discrimination. We did not accept as a genuine explanation for not raising Mr Lambert's use of the **N** word that it was not until Judge Martin spoke about direct discrimination and racial harassment that he realised he could raise this.

183. Having regard to all these things, we satisfied that Mr Lambert was not pulling the wool over our eyes and the claimant was not constrained from raising the complaint. Mr Lambert simply did not do what the Claimant alleged he had done. It is not for this Tribunal to explore what might explain the Claimant's tendency to exaggerate or to have made allegations which we have concluded to be wholly unfounded. There may be some deeper explanation for this but it is our function to determine the facts from evidence and decide the claims on the merits.

184. In light of the above conclusions that the Claimant has failed to establish the essential underlying facts, the only complaint which has any prospect of amounting to harassment related to race or to an act of direct discrimination because of race

is in relation to the use of a black panel in **October 2020** (paragraph 173 above). We say that because he has, just about, established that his pod did contain such a panel. We say 'just about' because the Claimant gave no evidence about the pod at all. It was only the evidence of Mr Faid that enabled us to conclude that one of the panels was black (in the way we have set out in our findings). We now turn to this complaint considering, first of all, the merits of the claim. We will then go on to consider, whether the complaint was presented in time and if not, whether it is just and equitable to extend time.

The complaint of harassment related to race: section 26 Equality Act 2010

185. This is the complaint identified at the Preliminary Hearing by Judge Martin in paragraph 2.2.2 (**page 50 MB**). This has been treated and identified as a complaint of harassment (section 26). We have also looked at facts to see whether, in the alternative (for it cannot be both) it gives rise to a complaint of less favourable treatment (section 13 direct discrimination).

The conduct complained of

186. The factual complaint is that the installation of a black partition in **October 2020** was unwanted conduct related to the Claimant's race (colour) which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. As we found, the pod had been created before the Claimant started his employment on **12 October 2020.** Other than identifying that it was the Kaizen team who erected all partitions, nobody could say which individual or individuals made the pods. Nor was anyone able to say how any individual worker came to sit at any given pod during breaks. The inability to identify these things is due to the fact that no complaint was ever raised about the pods until after all pods in the entire factory had been removed which was about 18 months after the original dividers in the Claimant's pod had been replaced.

187. Ordinarily, in a complaint of harassment, a tribunal will look to identify the perpetrator of the alleged conduct which forms the basis of the complaint. That has not been possible in this case. The Claimant could not be expected to know this as the pods had been created before his arrival – although arguably, had he raised the complaint shortly after he started it might have been possible to find out. Therefore, we have taken a broad approach to what can be regarded as 'conduct' in this respect. The conduct was, on our findings, not a deliberate act, but a 'state of affairs' – the existence of a black divider/panel.

Was the conduct unwanted?

188. We refer to our findings in paragraph 30 above. There were three new starters in the relevant area in **October 2020**, for whom new pods were created. One out of the three was black, that being the Claimant. The other two were white, one of whom was Mr Robson. We do not know how it was that the Claimant came to use

one pod as opposed to another. What we do know is that he shared it with a white employee. He was not singled out by being given his own pod. However, to the extent that the Claimant did not ask for a pod which consisted of a panel of different colour, and even though he shared it with a white employee, we accept that, as a black employee, the existence of a black panel which was different to the others in that area (although not necessarily in other areas) can legitimately be categorised as 'unwanted' conduct even though the person who installed it did not do so to make a point about race or colour.

Was the conduct related to race?

189. We were not satisfied that it was. In our judgement, the conduct of fitting a black panel was not related to race. There is nothing to suggest that anyone deliberately selected one panel in the knowledge that the Claimant, a black employee, would be sitting at that pod. There is nothing from the fact that the panel was black that would lead us fairly and sensibly to infer that this was installed to make the Claimant feel uncomfortable or to make a statement of any kind. Why stop at one panel in that case? Why not make the whole pod out of black panels? There was no evidence that the Claimant's colleagues or supervisors engaged in racially offensive behaviour or made him feel uncomfortable or singled him out in any way (save in respect of the allegations against Mr Lambert, which we have rejected). There is no suggestion from the Claimant that anyone else displayed any racist tendencies. Therefore, there is nothing, other than the existence of the panel and the fact that the Claimant is black that would support any inference that its installation or existence related to race. Those two states of affairs are mutually exclusive of each other. They only cease to be mutually exclusive if were to have found that the panel was installed so as to make some kind of connection with or statement about the Claimant's colour; or if some identifiable person allocated the pod to the Claimant to make some kind of connection with or statement about the Claimant's colour. There was no basis for such a finding.

190. We acknowledge that the conduct of the alleged perpetrator, in a harassment claim, need not be 'because of' race. The test of 'related to' is broader. Therefore, while an examination of the alleged perpetrator's motivations may be of assistance, it is not determinative. But as set out above, in this case, the Claimant is not able to say who installed the petition. It is not alleged that Mr Lambert had any hand in it – and we have found that he did not. The Claimant suggested that when Mr Faid raised the fact that there was a black panel with Mr Lambert, he (Mr Lambert) laughed it off. However, we rejected that. Mr Faid's evidence was not that Mr Lambert laughed it off, but that he (Mr Faid) and the Claimant laughed it off. (see our finding in paragraph 37 above).

191. We conclude that the fact that there was a single black panel in a pod shared by two employees, one black and one white, was coincidence and arose out of the fact that Kaizen staff used what they could lay their hands on to construct makeshift pods in October 2021. That conduct, even if the Claimant regards it as unwanted,

is not conduct related to race and we concluded that we could not properly infer that it was. The only person who ever suggested that it was related to race was the Claimant, when he initiated the joke about it.

Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

192. The Claimant never said that the existence of the panel had either the proscribed purpose or effect. As observed above, he says nothing at all about this in his short witness statement. As to 'purpose' we were satisfied that the purpose of using whatever material was available was to ensure that a makeshift pod was in place for use by workers to maintain social distancing. The Claimant did not say anything about the effect that this panel had on him in his oral evidence. By virtue of section 26(4)(a) Equality Act 2010, the perception of a claimant is a mandatory part of considering whether any conduct had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. The Claimant is a litigant in person. He may not have appreciated that his perception of the effect is a relevant consideration – even though it was spelled out in the issues by Judge Martin. Therefore, we considered whether it did in fact have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

193. We were satisfied that the Claimant himself did not perceive the existence of a single black panel to create for him an intimidating, hostile, degrading, humiliating or offensive environment. We refer to our findings in paragraph 36 above. In fact, the Claimant made a joke about it. He was not offended. Far from regarding it as creating a hostile or degrading or humiliating environment, he used it as a means of fitting in with his new colleagues. In our judgement it was almost a statement from him to his colleagues to the effect that he could be seen to joke about race. It was more likely than not his way of breaking down barriers, he being the only black employee among his white colleagues. Again, we are not blind to the very real possibility that by joking with Mr Faid about the panel, the Claimant might have been hiding his true feelings of humiliation. He was at this stage a new employee on a temporary contract and unlikely to want to rock the boat. However, we do not believe that to be the case here. Had it been so, we would have expected the Claimant to have raised the matter as a complaint in his grievance about discrimination (by which time he was a permanent employee), or in his appeal, or in the Claim Form. However, he made no reference to it until **June 2022**, shortly before the first preliminary hearing.

194. Even if we are wrong that the Claimant did not personally believe the panel to have the effect in section 26 Equality Act 2010, we must still consider whether, in all the circumstances of the case it is reasonable for the conduct to have that effect. In our judgement it is not. The circumstances were that this was a temporary, makeshift pod put in place before the Claimant started, something which he was

aware of. It was short-lived and the pod was altered (with all others) to have clear Perspex panels. The Claimant shared the pod with a white employee and was not singled out. Looked at objectively and considering **Grant v HM Land Registry**, we consider this to be a trivial matter – indeed, consistent with how the Claimant himself saw it.

195. Although the claim was pursued as a complaint of harassment related to race, we considered whether, in the alternative, the Claimant had made out a claim of direct discrimination in respect of the installation of the black divider in **October 2020**. The first question we had to consider was whether the Claimant was subjected to a detriment – in contravention of section 39(2) Equality Act 2010. We concluded that he was not. We repeat our conclusions above that he personally made a joke of this and did not regard it as having any detrimental impact on him. We remind ourselves of the direction of the House of Lords in **Shamoon** (paragraph 128 above) as to 'detriment'. Given all the circumstances, no reasonable worker would consider this to be a detriment. It might be otherwise if the Claimant had genuinely and reasonably believed that someone had installed the panel to single him out as being black. However, we have found that not to be the case here. Further, even if a detriment to the Claimant, it is not enough simply to point to a difference in treatment (the existence of a black panel) and a difference in race to shift the burden to the Respondent to prove a non-discriminatory explanation. There must be something more (**Madarassy**). There were no facts from which, in our judgement, we could legitimately infer that the panel was fitted, or the pod given to the Claimant, because of race.

Is this complaint of harassment, alternatively direct discrimination out of time and if so is it just and equitable to extend time?

196. The complaint is that upon starting employment on **12 October 2020**, the Claimant had been given a pod which contained a black divider. Even if one takes the complaint as being that Mr Lambert failed to do anything about this when it was raised by Mr Faid and the Claimant, this happened – according to the Claimant in **October 2020**. The act complained of was, therefore, at the latest **31 October 2020**. The primary time limit for a complaint of direct discrimination expired on **30 January 2021**. Proceedings were commenced on **22 April 2022**. No complaint about this issue was raised until **25 June 2022**. The pod in question had been dismantled and replaced by at the latest early **2021**.

197. Therefore, the complaint having been 'presented' on **25 June 2022** - that date being taken as an unopposed date of amendment (see paragraph 8 above), it was approximately 17 months out of time.

198. In such circumstances, a tribunal has a discretion, under section 123 Equality Act, to extend time if it considers it just and equitable to do so. As stated in **Roberson v Bexley Community Centre**, although this is a broader discretion than is the case in unfair dismissal claims, it is not without limits. The tribunal is required

to consider the prejudice to each party and to have regard to all the circumstances, including the length of and reason for the delay and to the extent to which the cogency of evidence is likely to be affected by the delay. The Claimant did not advance any explanation for his failure to present the claim in time or say why it would be just and equitable for the Tribunal to consider it. Nevertheless, it was possible to discern from the Claimant's evidence and submissions overall that one reason was that he was a temporary worker and did not want to risk not being taken on permanently. He referred to this as a reason for not mentioning the racial slur in his grievance. However, we do not accept that as a genuine explanation – he was made permanent in **August 2021**, some 4 months or so before he raised his grievance. We conclude that the real reason he did not raise the complaint earlier was that he did not regard it as something which was detrimental to him nor did he believe that he had been given a black panel to single him out. It was only in **June 2022**, realising that he would have to give particulars of things that were racially motivated that he raised it, remembering that the panel existed but omitting to say that he had joked about it.

199. We have been most concerned by the effect of the delay in relation to this complaint. The delay created a real forensic difficulty for the Respondent which was amply demonstrated. None of those who gave evidence on behalf of the Respondent knew that the Claimant's pod contained a black divider back in **October 2020**. Their inquiries did not reveal that there was any such panel. The only evidence that there was such a panel emerged in the oral evidence of Mr Faid during the hearing. Prior to that there was the bare assertion on **page 39 MB**. Even then, Mr Faid had never seen this panel and had only been told about it by the Claimant. We inferred from the fact that it would be an unusual thing to invent and from Mr Faid's evidence that he and the claimant had laughed and joked about it, that there was indeed such a panel. However, by the time the matter was raised in **June 2022** it was extremely difficult, if not impossible, for the Respondent to ascertain if there was such a panel or the circumstances in which it came to be installed. As far as their inquiries were concerned, all the panels were white Perspex. Their ability to defend a complaint of racial harassment/direct discrimination on such a discrete issue was severely hampered. We weighed that against the prejudice to the Claimant should we refuse to extend time. This was a case where he advanced no reason for not complaining of this earlier and the only one we discerned was, we concluded, not a genuine explanation as by the time he raised a grievance in December 2021, he had been a permanent employee for some four months. Further, the claim was never something of significance to the Claimant, it never having featured in his grievance of discrimination and unfair treatment. He did not regard it as creating a humiliating etc..environment or subjecting him to any detriment and in our objective assessment the existence of a single panel did not have either of these effects. To that extent, we have also had regard to the merits of the claim in considering the time point. Taking all these things together, the balance of prejudice favoured the Respondent. We concluded that it would not be just and equitable to extend time.

Summary of conclusions

200. The Claimant has failed to establish that:

200.1 He was not issued with safety shoes or that there was any deliberate failure to do so,

200.2 He was cautioned for sickness absence on the dates alleged or at all or that he was treated less favourably than others by being invited to a sickness review meeting,

200.3 He was cautioned for not completing tasks in time/missing parts on cars despite using malfunctioning equipment on the dates alleged or at all,

200.4 He was cautioned for mobile phone use on the dates alleged or at all,

200.5 He was called the N word by Mr Lambert or that Mr Lambert mouthed this word to him on the dates alleged or at all,

201. Although the Claimant has established that his rest area pod, in October 2020, contained a black panel and that this was unwanted conduct, it was not related to race and the Claimant did not perceive the conduct to have the purpose or effect in section 26(1) Equality Act 2010

202. The Claimant has was not subjected to any detriment by the installation of the black panel.

203. The panel was not installed, nor was the Clamant allocated to the pod containing the black panel, because of race.

204. The complaint of harassment/direct discrimination relating to the pod/panel is out of time and it is not just and equitable to extend time.

205. Therefore, the complaints of direct race discrimination and harassment related to race are dismissed.

Employment Judge Sweeney

Date:13 February 2023

APPENDIX

LIST OF ISSUES

Direct discrimination: Equality Act 2010 s13

1. The Claimant alleges that the Respondent did the following things which constituted direct race discrimination:

    1.1 Not issuing the Claimant with safety shoes when originally requested in June 2021 until January 2022;

    1.2 Cautioned the Claimant for sickness absence on 25 November 2021 and 20 December 2021, triggering an absence meeting with HR on 20 December 2021 (but which was later cancelled) but then the Claimant had a discussion with Mr Lambert and Mr Kerr where he claims a third caution was issued;

    1.3 Cautioned the Claimant for not completing tasks in time due to malfunctioning equipment on 6 December 2021, 20 December 2021 and 28 January 2022; and

    1.4 Cautioned the Claimant for using his mobile phone in the workplace in November 2021 and December 2021.

2. **Whether claim(s) in time**

    2.1 Has the Claimant brought his claim within the time limit set by Section 123(1) of the Equality Act 2010? This gives rise to the following sub-issues:

        2.1.1 What was the date of the act to which the complaint relates?

        2.1.2 Was the act to which the complaint relates an element of conduct extending over a period? If so, when did that period end?

        2.1.3 Insofar as the complaint relates to a failure to do something, when did the Respondent decide on it?

    2.2 Is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010?

3. **Whether Claimant subjected to a relevant detriment**

    3.1 Did Andy Lambert/ the Respondent not issue the Claimant with the correct work boots when requested on 7 June 2021? When did he issue the new work boots to the Claimant? If this took longer than others would wait, why was this the case?

3.2 Did Andy Lambert/ the Respondent caution the Claimant for his sickness absence on 20 December 2021?

3.3 Did Andy Lambert/ the Respondent caution the Claimant for not completing tasks due to malfunctioning equipment on 20 December 2021 and 28 January 2022?

3.4 Did Andy Lambert/ the Respondent caution the Claimant when using his mobile phone in the workplace in November 2021 and December 2021?

4. **Whether Respondent vicariously liable under s109 Equality Act 2010**

4.1 Was Andy Lambert employed by the Respondent under a contract of service or a contract personally to do work?

4.1.1 If so, were the acts complained of done by Andy Lambert in the course of his employment?

4.1.2 If so, did the Respondent take all reasonable steps to prevent Andy Lambert from carrying out those acts or from doing acts of that description?

5. **Whether treatment was less favourable**

5.1 In doing the acts complained of, did the Respondent treat the Claimant less favourably than it treated others, specifically:

5.1.1 In relation to his first allegation, the Claimant intends to compare himself to Mr Philip Lidford, Shaun Holmes and Daniel Faid?

5.1.2 In relation to his second allegation, the Claimant intends to compare himself to Mr Philip Lidford

5.1.3 In relation to his third allegation, the Claimant intends to compare himself to Mr Shaun Holmes and Mr Philip Lidford

5.1.4 In relation to his fourth allegation, the Claimant intends to compare himself to Mr Shaun Holmes, Mr Philip Lidford, Mr Dan Faid and Mr Ryan McClusky.

5.1.5 If so, was there any material difference between the circumstances relating to the Claimant and Philip Lidford, Shaun Holmes and Dan Faid and Ryan McClusky?

5.2 In doing the act complained of, did the Respondent treat the Claimant less favourably than it would have treated others in comparable circumstances?

6. **Reason for less favourable treatment**

6.1 If the Respondent treated the Claimant less favourably, was this because of the Claimant's colour, nationality or ethnic or national origins or any other aspect of race as defined by section 9(1) of the Equality Act 2010?

Harassment: Equality Act 2010 s26

The Claimant alleges that the Respondent engaged in the following conduct which constituted harassment related to race:

7. **Whether incidents/events complained of occurred**

7.1 Did Andy Lambert/the Respondent call the Claimant N on 7 July 2021 and again in early March 2022?

7.2 Did the Respondent issue a black partition to the Claimant's work station and every other employee a white partition in October 2020?

8. **Whether Respondent vicariously liable under s109 Equality Act 2010**

8.1 Was Andy Lambert employed by the Respondent under a contract of service or a contract personally to do work?

8.1.1 If so, were the acts complained of done by Any Lambert in the course of his employment?

8.1.2 If so, did the Respondent take all reasonable steps to prevent Andy Lambert from carrying out those acts or from doing acts of that description?

9. **Whether claim(s) in time**

9.1 Has the Claimant brought his claim within the time limit set by Section 123(1) of the Equality Act 2010? This gives rise to the following sub-issues:

9.1.1 What was the date of the act to which the complaint relates?

9.1.2 Was the act to which the complaint relates an element of conduct extending over a period? If so, when did that period end?

9.1.3 Insofar as the complaint relates to a failure to do something, when did the Respondent decide on it?

9.2 Is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010?

10. **Whether conduct related to race**

10.1 Was the conduct in question related to the Claimant's colour, nationality or ethnic or national origins or any other aspect of race as defined by section 9(1) of the Equality Act 2010?

11. **Whether conduct unwanted**

11.1 Was the conduct in question unwanted?

12. **Purpose/effect of conduct**

12.1 Did the conduct in question have the purpose of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

12.2 Did the conduct in question have the effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account: the Claimant's perception, the circumstances of the case, and whether it was reasonable for the conduct in question to have that effect?

13. **Remedy**

13.1 Is it just and equitable to award compensation?

13.2 What about of compensation would put the Claimant in the position he would have been in but for the contravention of the Equality Act 2010?

13.3 Should the Tribunal recommend that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

13.4 What amount of compensation would put the Claimant in the position he would have been in but for the breach?

13.5 What financial losses has the discrimination cause the Claimant?

13.6 For what period of loss should the Claimant be compensated?

13.7 What injury to feelings has the discrimination caused the claimant how much compensation should be awarded?