Case No. 2301476/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr Hossein Khansari

Respondent: Platipus Anchors Limited

Heard at: London South (by video) **On:** 28 to 31 October 2024

Before: Employment Judge C H O'Rourke
Ms B Leverton
Mr P Adkin

Representation:

Claimant: In person
Respondent: Mr R Anderson - Counsel

RESERVED JUDGMENT

1. The Respondent unfairly dismissed the Claimant.

2. The Respondent subjected the Claimant to harassment related to his race.

3. The Claimant's claim of direct race discrimination fails and is dismissed.

4. A remedy hearing, with a time estimate of one day, will be listed on 2 December 2024, to be heard by CVP.

REASONS

1. The Claimant was an employee of the Respondent, in the role of Regional Sales Manager, from March 2019, until his summary dismissal on 4 January 2022. The Respondent company makes specialist anchors for use in construction and engineering projects which makes sure that structures are firmly attached to the ground. Mr Khansari has a PhD in engineering, but

he worked in a sales role, covering the north of England. As part of that role, he was also involved in some technical aspects of the sale, including testing the equipment before it was supplied.

2. He brings the following claims, as set out in the list of issues [separate document to the bundle] and as further agreed at the outset of the Hearing.

3. Unfair Dismissal. The Respondent concedes that the dismissal, on grounds of conduct, or in the alternative, capability was unfair, procedurally. It therefore relies solely on the following two issues:

    a. Did the Claimant contribute to the dismissal by his conduct? This requires the Respondent to prove, on the balance of probabilities, that he committed the alleged misconduct.

    b. If either reason for dismissal is established, and, as accepted, the procedure was at fault, making the dismissal unfair, what chance was there (assessed as a percentage) that a fair process would have led to a different outcome?

4. Time Limit. While it is not in dispute that the unfair dismissal claim was brought in time, it is disputed that at least some elements of the race discrimination claims are out of time. It is accepted by both parties that any acts or failures that took place before 31 December 2021 are potentially out of time. In that event, the Tribunal will need to decide whether:

    a. The discrimination was in fact conduct extending over a period of time and ending after the above date; or

    b. That it would be just and equitable to extend the time limit.

5. Direct Discrimination (s.13 of the Equality Act 2010) on grounds of race.

    a. The Claimant describes himself as British Iranian.

    b. It is not in dispute that the Respondent both suspended and dismissed the Claimant. The Claimant also relies on those matters set out below, within his claim of harassment, which are found not to be such.

    c. Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in

the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant says he was treated worse than a hypothetical comparator.

d. If so, was it because of race?

4. Harassment related to race (s.26 Equality Act 2010)

4.1 Did the Respondent do the following:

a. Projects within Mr Khansari's region were assigned to others without good reason, in particular:

• a contract for Scottish Power was given to Mr Alan Richardson on or about the 30 March 2021, and
• a contract in the Dane's River area was given to Mr Stewart McArthur in the first half of 2021.

b. He was given the formal written warning on 2 August 2021, which was copied to other members of staff.

c. He was given the formal written warning on 28 September 2021, which was copied to other members of staff.

d. He was given the formal written warning on 23 November 2021, which was copied to other members of staff.

e. At a Teams meeting on 8 December 2021:

• Both Mr Agg and Mr Mike Russell subjected him to abuse, with Mr Russell shouting the "F" word at him.
• Unfounded allegations were made about some creep tests he had carried out on anchors for the Leeds Flood Evaluation Scheme.

f. That project was then taken off him and given to Mr McArthur.

g. When he objected to this by email on 9 December 2021 he was suspended and then required to attend a disciplinary hearing arranged for 5 January 2022.

h. He was prevented by Mr Agg from submitting an effective defence in that:

• He had to return his work laptop which had the information on

it that he needed to defend himself,
• Mr Agg said that he would provide documents on request but failed to provide the sales figures he asked for.
• Mr Agg pressured him with various emails (on 26, 27, 28 and 31 December 2021, and 1, 4, 17 and 19 January 2022), making unfounded allegations of theft in relation to the retention of files and consequent threats of legal action, and

• his requests to postpone the hearing were refused.

i. Mr Agg also sent several other emails about him on 23 and 28 November, 8 and 9 December 2021, copying others in, and calling him a cheat, ridiculing his PhD Thesis and his technical competence, his written English, comparing him to a graduate engineer and accusing him of being a liability.

j. On 4 January 2022 Mr Khansari was dismissed because he had not supplied written submissions in advance of the hearing.

k. The dismissal was also based on an allegation not mentioned in the invitation letter, i.e. the design life issue.

i. His appeal against dismissal was rejected.

j. More generally, the Claimant also says that when he was in the office, on an almost daily basis (in particular on 3 August, 4 August, 23 November, 6 December and 7 December 2021) Mr Jeff Curnick and Mr Alan Richardson would:

a) make racial slurs against him
b) make fun of his accent,
c) speak in Afrikaans.

4.2 If so, was that unwanted conduct?

4.3 Did it relate to the Claimant's protected characteristic, namely race?

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

4.5 If not, did it have that effect? If so, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5. Preliminary Matters. The Claimant had made a written application on 20 October 2024 to adjourn this Hearing, for the following reasons:

    a. He considered that since July 2023 he had '*significant concerns about the handling of my case'*. He complained, in particular, of a strike-out warning made at a previous case management hearing.

    b. He further considered that the same judge had failed to '*address'* his concerns at a further preliminary hearing on 23 July 2024, alleging conflicting orders; unjustified expansion of the list of issues and the '*inclusion of an incomplete and biased bundle'*. Among his concerns was that requests both for the instruction of an expert witness and a witness order against a former colleague, were, respectively, rejected or not actioned.

    c. He complained of '*unexplained tribunal delays and lack of communication'*.

    d. That the Respondent '*consistently failed to disclose key documents'* in violation of previous case management orders.

    e. That Employment Judge Wright recuse herself from these proceedings due to his concerns relating to impartiality and fairness. (As this request is of no relevance to this final hearing, it is not considered further.)

6. Following discussion with the Claimant as to these concerns and their effect, if any, on the conduct of this Hearing, the matter boiled down to alleged non-disclosure of documents by the Respondent and the witness order. The other matters complained of relate to case management orders made by other judges, to whom any such concerns should be addressed. It is, I am afraid, a common experience for parties to suffer delays in receiving responses from the Tribunal, due to pressure of caseload on the Tribunal and not unique to the Claimant. Regardless, however, the case management orders that were made, had, after three such hearings and the adjournment of a previous substantive hearing, eventually managed to get this case before this Tribunal, with a 740-page bundle and statements for eight witnesses, ready to proceed.

7. Mr Anderson submitted that a huge amount of documentation had been disclosed by the Respondent and they had found it simpler to just agree to the Claimant's demands, rather that dispute them. However, in respect of this current demands of the Claimant, he has failed to specify the nature of the documents he seeks and their relevance to his case. The Respondent solicitors have corresponded with him seeking such information, but it has

not been forthcoming. The Respondent vigorously resisted the application to adjourn, particularly in view of the time lag now since the events in question (three years) and the time and expense spent on three case management hearings and the adjournment of the previous substantive hearing. A further adjournment will simply allow the Claimant to drag the matter out further, with further dispute as to disclosure or other matters. The case is ready to proceed to hearing. Any adjournment would delay the hearing until likely 2026. It would clearly not be in the interests of justice to do so and 'a line needs to be drawn'.

8. Conclusions. The application to adjourn the Hearing is refused, for the following reasons:

    a. As already stated, the Claimant's assertions about previous case management orders have either already been disposed of by the relevant judges, or are matters for them, not this Tribunal.

    b. In respect of documentation, the Claimant has failed to particularise what type of documents it is he seeks, or why they would be relevant to his claim. We note that there is, already, a 740-page bundle. Essentially, in relation to documentary evidence, in respect of the Claimant's claims, the issues are as follows:

        i. Discrimination – the Claimant is not asserting that there is any documentation that would support this part of his claim.

        ii. Unfair Dismissal – the only issues are whether Polkey and/or the contributory fault principles apply to reduce any award and the Claimant has not suggested any documentation that is missing that would be relevant to these matters.

        iii. In respect of the requested witness order, it does seem to be the case that the Tribunal did not action his application. The Claimant said that he had approached that witness, but that she had stated that she was unwilling to give evidence. When asked to explain the relevance of her potential evidence, he said that it was in relation to the '*creep'* issue. This matter was one of several concerns raised by the Respondent with the Claimant as to his performance and compliance with management instructions. Effectively, the parties disagree as to the technical relevance of the term (which relates to the effect on the movement of anchors due to the nature of the soil in which they are placed). The potential witness had been involved in commenting on this issue to the Respondent's managing director and effectively the Claimant sought to challenge her conclusions on this

point. We made it clear to the Claimant that it was no part of this Tribunal's decision-making process to conclude whether or not he was right or wrong on whether the term 'creep' should be used. The clear evidence from the time was that the Claimant believed that it should be, but the Respondent did not and directed him to stop using it. It is that direction and the Claimant's response to it (and in turn the Respondent's reaction to that response) that is relevant to us, nothing else. Accordingly, therefore we saw no relevance to the evidence to be provided by this potential witness. It was also pointed out to the Claimant that even if a witness order had been made, there was no requirement for that witness to provide a statement in advance of the hearing, so he would have no idea, in advance, as to what she was going to say. Also, the Claimant would not have been able to cross-examine the witness, unless she was treated as a hostile witness (which she would very likely be), in which case, applying **Pasha v DHSS EAT 556/80**, she should not be called.

c. It was pointed out to the Claimant that as the Hearing proceeded and if he considered, at any point, that the lack of any specific documentary evidence was hindering him in advancing his case, he should say so and such consideration would be dealt with there and then, with, if necessary, an order for immediate disclosure. (He did not, in fact, allege this at any point in the Hearing.)

d. The Respondent had also, at very much the last minute, applied to add eight additional documents to the bundle, to which the Claimant objected. That application was refused, with the same *caveat* that if during the Hearing, a document's relevance could be shown, it could be admitted. (Three such documents were referred to. While the Claimant objected, the documents were clearly relevant, relating to whether or not he or others had been in the office on certain days, when alleged acts of harassment took place; they were brief and easily digestible by the Claimant and therefore he suffered no prejudice by their introduction.)

e. While the Claimant was not given any option in the matter, he expressed his view, on being informed that his application was refused and that the hearing would proceed that he would continue '*under protest*'.

9. Claimant's Preparedness for this Hearing. The Claimant indicated, on several occasions during the Hearing that he felt unprepared to represent himself and also mentioned '*being up all-night preparing questions for the*

witnesses.' He stated that at least part of the reason for this unpreparedness was that he had assumed that his application to adjourn would be granted and that therefore preparation would be unnecessary. The following was pointed out to the Claimant:

a. He could have no reason to conclude that an adjournment would be granted and that therefore preparation was unnecessary, particularly in view of the indications given to him by Employment Judge Wright at the case management hearing of 23 July 2024, specifically in respect of such an eventuality [83], following a previously adjourned final hearing.

b. It was noted that even at that case management hearing, three months in advance of this Hearing, he was already asserting that he would have insufficient time to prepare.

c. He did not take the Tribunal's advice to attend another litigant-in-person's hearing, as a member of the public, in order to more fully understand what would be expected of him and which may have expedited the process of this Hearing and focused his preparation for it.

d. As an intelligent, well-educated professional, he is in a better position than many fellow litigants to present his case.

e. That while he had stated that English was his second language, he is well-spoken and has a good vocabulary in that language, being entirely capable of submitting lengthy well-expressed written submissions. His CV indicates that he has been working (and presumably living) in UK since 2007 [204]. He also stated in his witness statement that he moved to the UK for higher education, '*where I earned three degrees, including a PhD in Civil Engineering'*. The Tribunal had no concerns about his ability to understand what was being said in the Hearing.

f. Finally, towards the end of the Hearing, the Claimant indicated that he felt rushed, both in terms of his cross-examination of witnesses and in preparation of closing submissions. He referred to the fact that the parties had been told that the Hearing was listed for five days, whereas this Tribunal had been informed, when allocated to this case that it was a four-day listing. It appeared, on investigation that when this case was first automatically listed, by way of standard directions at its outset, it was allocated four days. However, at the March 2024 case management hearing that was amended to five days, but that instruction was missed, and the

original listing remained in force. In respect of the Claimant's concerns, the following was pointed out to him:

i. The timetable set out in the relevant case management order indicated that the Claimant would have a day and a half to cross-examine the Respondent witnesses, concluding at the end of the third day. He was permitted that same timeframe, all of the third day and the morning of the fourth day.

ii. He considered that he should have been permitted an overnight period to prepare closing submissions (the original timetable indicating the conclusion of the Respondent's evidence at the end of the third day and closing submissions the next morning). However, that planned timetable had to be pushed back, as due to the Claimant's application for adjournment and request for discussion time with the Respondent, at the outset of the Hearing, the hearing of his evidence was delayed, taking up all of the second day (with an early finish, at his request). It also took longer than perhaps estimated, due to the need for frequent repetition of questions put to him. The Claimant's cross-examination of the Respondent witnesses concluded at 13.00 on the fourth (and final) day. From that point, the Claimant had an hour and forty minutes, before Mr Anderson made his submissions, at 14.40, in order to commence preparation of his own. After Mr Anderson's submissions were delivered, at about 15.10, the Claimant was permitted another adjournment, until 16.00 (in fact extended to 16.35), at which point he provided a three-page written submission, to which he did not add any oral submissions. We consider therefore that the approximately three-hour period provided to the Claimant was ample time to prepare his submissions.

The Law

10. We reminded ourselves of the statutory tests (as set out above).

11. As to the burden of proof, we also reminded ourselves, as established in **Royal Mail Group Ltd v Efobi [2021] UKSC 33** that the burden of proof does not shift to the employer to explain the reasons for its treatment of the employee, unless the employee is able to prove, on the balance of probabilities, those matters which they wish the tribunal to find as facts, from which, in the absence of any other explanation, an unlawful act of discrimination can be inferred. The at least initial burden of proof is therefore on the Claimant.

12. We also noted the case of **Amnesty International v Ahmed [2009] UKEAT IRLR 884**, in which then President Underhill confirmed that when deciding whether a claimant has proven discriminatory conduct by the respondent, the Tribunal should consider what inferences, if any, can be drawn from the primary facts, the mental processes (conscious or unconscious), the surrounding circumstances and explanations provided by the respondent.

13. Mr Anderson referred us to the following authorities:

    a. **Madarassy v Nomura International plc [2007] ICR 867, CA**, which indicated that a difference in race and a difference in treatment were not, on their own, without more, sufficient to raise a prima facie case of discrimination.

    b. As to contributory conduct, misconduct need not be 'gross' in character to warrant a deduction (**Jagex Ltd v McCambridge [2020] IRLR 187 EAT**) – the correct test is to consider if the conduct was culpable, blameworthy, foolish or similar which includes conduct that falls short of gross misconduct and need not necessarily amount to a breach of conduct.

    c. The onus is on the employer to adduce evidence to show the dismissal would have occurred in any event (**Britool Ltd v Roberts [1993] IRLR 481 EAT**).

The Facts

14. We heard evidence from the Claimant. On behalf of the Respondent, we heard evidence from Mr Alan Richardson, a then fellow regional sales manager; Mr Max du Plessis, another regional sales manager; Mr Jeffrey Curnick, an export sales manager; Mr Elliot Harris, a principal geotechnical engineer; Mr John MacArthur, a special projects manager; Mr Michael Russell, a former director and Mr Charles Agg, the managing director.

15. Chronology. We set out the following brief chronology in this matter:

    a. March 2019: the Claimant's employment commenced.

    b. September 2020: Mr Agg conducted a review meeting with the Claimant [238].

    c. March 2021: The Claimant was given a pay rise [263].

d. 27 and 28 July 2021: There was a discussion and correspondence between the Claimant and Mr Agg regarding a holiday request and sales targets [279 & 291].

e. Early August 2021: The Claimant alleged that in this period, Mr Curnick, in referring to a cricket match, in which India was playing, stated '*the brown dogs are playing'*, '*the curry is getting hot'* and '*the curry is getting hotter'*.

f. 2 August 2021: Mr Agg emailed the Claimant about his sales performance [291-293]

g. 3 and 4 August 2021: the Claimant said that on those dates, Messrs Curnick and Richardson mocked his accent (by, as subsequently became clear, mimicking an 'Indian' accent).

h. 28 September 2021: a further exchange of emails between the Claimant and Mr Agg regarding sales figures [297-298].

i. 4 October 2021: Mr Agg requested a detailed business development plan ('BDP') '*asap'* from the Claimant [301-302].

j. 23 November 2021: Further exchange of correspondence between the Claimant and Mr Agg [385-387]. The Claimant alleged that on the same date his accent was again mocked, by the same colleagues.

k. 2 to 5 December 2021: A further exchange of emails, relating to the Leeds Flood Alleviation Scheme (LFAS) and the term '*creep'* [409-411].

l. 6 and 7 December 2021: Further allegations of accent mocking.

m. 8 December 2021: A Teams meeting to discuss the Claimant's PowerPoint presentation on LFAS [497-498 presentation 555-572].

n. 9 December 2021: correspondence between the Claimant and Mr Agg in respect of that presentation, with Mr Agg removing him from the LFAS project [497-504]. On the same day, the Claimant was suspended [505].

o. 13 December 2021: Mr Agg invited the Claimant to a disciplinary hearing on 4 or 5 January 2022 [543].

p. 31 December 2021: The Claimant requested that that hearing be postponed to on or after 10 January 2022, which request is refused [576-577].

q. 4 January 2022: Mr Agg summarily dismissed the Claimant [602-605].
r. 5 January 2022: The Claimant appealed against that dismissal and brought a grievance [608-611, 612-674].
s. 13 January 2022: The Claimant was invited to appeal and grievance meetings [681], but which appeal and grievance, at the Claimant's then solicitor's request, were instead dealt with 'on paper'.

t. 19 January 2022: Appeal outcome, from Mr Russell and grievance outcome, from Mr Agg [696-705].

u. 30 March 2022: The Claimant commenced ACAS Early Conciliation.

v. 3 May 2022: Early Conciliation certificate issued.

w. 4 May 2022: The Claimant presented his ET1.

x. 16 May 2022: The Claimant commenced new employment.

16. Claimant's Evidence. The Claimant's evidence (focussing on the List of Issues) is summarised as follows:

a. During his employment, he '*excelled in my role, often exceeding sales targets …'*.

b. On appointment, he took over the Northern sales region, which he considered '*dormant'* at that point.

c. He passed his probation in September 2019 and was praised on his performance [226].

d. His 2020 sales figures exceeded target (£426k, against £310k). He secured new clients and pursued major projects, to include LFAS and the Scottish Power Project.

e. He secured a further pay rise in March 2021 and was praised for his hard work [263].

f. Throughout his employment (he said, in cross-examination, from about September 2020 onwards) he '*faced a hostile work*

environment characterised by racial discrimination and isolation. As the only non-white employee in a predominantly South African office, I was subjected to regular racist remarks (to include mocking of Indian accents and as set out in the Chronology). (Several of his former colleagues, including Messrs Curnick and Richardson, are white South Africans.) He said that this situation escalated after Mr Curnick's promotion to senior management, in June 2021.

g. In July 2021, the Claimant experienced marital difficulties, which he disclosed to the Respondent [292]. He considered that Mr Agg issuing him a disciplinary warning on 2 August was '*an attempt to exploit his vulnerable state and discredit my otherwise strong performance'* and the commencement of '*a crafted plan to dismiss me'*. He denied that his sales performance was poor and compared unfavourably to others. He said that sales records had been '*manipulated'* and '*fabricated'*. He also denied the allegation that he had poor relationships with colleagues, or that he was '*arrogant'* and said that any issues raised by others had been '*manipulated*'. He denied any mishandling by him of a holiday request, stating that it was, in fact, a request to work from home.

h. He stated that his emailed responses to this and other correspondence at the time, where he apparently accepted the criticism and undertook to improve and expressed gratitude for the support he'd been provided were '*forced confessions'*, caused by his '*vulnerable emotional state and personal issues'* and '*a desperate attempt to retain my job'*. What he said did not reflect his true views and '*this confession was extracted under duress, illustrating* (Mr Agg's) *deliberate manipulation.'*

i. Mr Agg's request that the Claimant provide him with a detailed BDP was '*an unnecessary imposition'* and was '*meant to overwhelm and distract me from progressing with major projects like Leeds'*.

j. Mr Agg's criticism of the Claimant's LFAS presentation (which he stated was, in any event, a draft) was '*superficial'* and his dismissal of the Claimant's use of the '*well-established term'* of '*creep … revealed a misunderstanding of fundamental technical concepts in the field …'*. He considered that Mr Agg's resistance to the term was to avoid '*acknowledging … failures* (which) *would severely undermine the credibility of the Respondent's assertions regarding anchor performance.'*

k. He considered Mr Agg's response on this point, referring to input he had requested from a colleague, a 24-year-old graduate engineer

and comparing the Claimant's advice unfavourably to it was '*unwarranted and insulting'*.

l. The Claimant said that Mr Agg's tone became increasingly hostile, and he considered that Mr Agg, in referring to the presentation, stating that '*your grammar stinks'* was racially harassing him, as English is his second language. The Claimant also felt demeaned in front of colleagues, by the comments made on the presentation, to include '*bollocks .. yuk .. oh dear … more bollocks'*. He considered this behaviour was designed to provoke his resignation and said that Mr Agg asked him '*are you resigning?'*

m. He decided he had no option but to raise a grievance, which resulted in his suspension and subsequent invite to a disciplinary hearing.

n. He denied the disciplinary allegations made against him (more of which below). He also denied that, on being suspended, he had taken files from the office.

o. He considered the Respondent's refusal to delay the disciplinary hearing unreasonable.

p. The subsequent decision to summarily dismiss him was '*filled with distortions and manipulations'*.

q. The appeal and grievance outcomes were '*pre-determined and biased'*.

17. Claimant's evidence in Cross-Examination. A summary of that evidence is as follows:

a. One of the criticisms levelled against the Claimant was that he failed to routinely record his work, all transactions and contacts on the Respondent's database ('ACT'). The purpose of doing so was to ensure secure storage of that information and access to it, across the Company. He accepted that this requirement was spelt out in his job description and that he had received training in how to do so [219] but challenged the degree of any such failure and said that he '*couldn't comment'* on the importance of doing so.

b. He was referred, generally, to his contract and handbook, accepting that he had signed and acknowledged both receipt of and reading of those documents, but said that in fact he '*hadn't read anything'*, considering such documents to be routine of their type. When challenged in respect of the section in the handbook as to equal

opportunities and the importance of raising concerns about any acts of racial discrimination (which he had not mentioned until raised in his appeal), he said that '*this handbook was not on the server and I couldn't find my copy … and in any event I wouldn't have dared raise such concerns'*.

c. He was also referred to the disciplinary policy in the handbook which referred to 'theft' as being gross misconduct. He acknowledged that there was a dispute between him and the Respondent as to whether he had taken files from the office and not returned them and denied that he had done so. He understood that the Respondent stated that he was not telling the truth in this respect. He agreed, hypothetically that if the allegation were true, that would be theft.

d. On the subject of his use of the work '*creep'*, he agreed that as early as August 2020, it had been identified by the Respondent, following a 'webinar' to clients that '*Creep is a negative term, and we do not want to use* (it)(sic) *in our answer, even if it is raised in a question …'* [235]. He said however that this was '*not an instruction'* not to use the term.

e. He was referred to his employment review with Mr Agg, in September 2020 and asked about Mr Agg's reference in an email [238] to '*simply we need to be as active as possible and I am concerned that 7 four-day weeks with long weekends is not the sort of focus that I want, we are lucky that we have a good business, in your case we need to improve your overall strike rate and activity'* (sic). He was asked to confirm that at that point he had put in a holiday request, asking for seven four-day weeks and he said that he '*couldn't remember'*. He accepted that '*allegedly*' there were concerns about his performance as far back as September 2020, but that the concerns were not true, as his sales were '*fine'*. He was asked if he was alleging that Mr Agg was making false statements in this respect and he said he was and that there was '*no question as to my performance'*.

f. The Claimant denied that during an independent 'ISO' inspection of the Respondent, in September 2020, in which his work was to be audited, he had purposely left the office, to avoid it.

g. Moving forward to April 2021, the Claimant was referred to a chain of emails with a colleague, Mr Jones [265], the operations manager, which he had asserted were '*aggressive'* towards him and which he also said were '*not very friendly'*. He agreed that Mr

Jones sounded like he was frustrated or annoyed with the Claimant (‘*this is a waste of my time…’*).

h. He was asked about an email from Mr Agg, of 27 July 2021, in which he complained to the Claimant, stating ‘*your holiday request thrust into my hands this morning upstairs caught me off guard*’ [279]. When it was suggested to the Claimant that Mr Agg would have no reason to make up the ‘*thrust in my hands’* comment, he said that ‘*there is’* and that he didn’t accept that he had done so. He agreed that the rest of the email, referring to thirty days’ notice for holiday requests normally being required, not a week, was accurate and fair to say. He also agreed that it was fair of Mr Agg to ask that before he agree the leave, he wished to ‘*review both your current success against forecast and also next month’s forecasts as well asap’*. He agreed that he didn’t reply to that request, or provide the forecasts ‘asap’, but agreed with Mr Agg, orally, that they could be dealt with within the routine monthly meetings. When challenged that he’d never referred to this discussion previously, despite referring to Mr Agg’s email in his statement (5.2.4), he said that he’d not been asked about it before. He denied that he was not telling the truth about this conversation. When it was put to him that Mr Agg’s subsequent reference, in an email of 2 August 2021 [292], to the Claimant that ‘*my requests to review your current sales (July) and August prospects was not replied to …’* further undermined his assertion as to this conversation, he said that Mr Agg was ‘*not telling the truth’* and agreed that he ‘*was making it up’*. He said that he did not respond to that fabrication by Mr Agg, referencing their conversation because he was ‘*being compliant*’ and was ‘*intimidated by the email’*, fearing for his job.

i. On 28 July 2021, Mr Jones wrote to the Claimant concerning the collection of goods that were on hire to a client [280-282] and the Claimant agreed that Mr Jones explained why he was unhappy with the Claimant’s handling of the matter but considered that the email could be seen as ‘*aggressive … depending how it’s read’*.

j. On 2 August 2021, Mr Agg wrote to the Claimant, acknowledging that the Claimant had told him about his marital difficulties, but, while sympathetic, nonetheless had concerns about the Claimant’s performance [291]. He referred to an ‘*erosion of relationships with your colleagues and additionally the battles your* (sic) *having with everybody*’. He referred again to the holiday request and the Claimant’s failure to provide his sales forecasts. He also referred to the exchange of emails with Mr Jones, ‘*further erod*(ing) *that relationship and quite frankly these basic business practises can be*

forgiven a new employee, certainly not one as intelligent as your self and mature in our own processes … I am deeply concerned as to your sales and motivation and lack of pro activity … I must say there seems to be an arrogance about you that we are all not worthy of you, so much so that I am writing this with some concern over your employment with us … you need to re gain the respect of your colleagues.' He was asked to consider this email as a first written warning and told that his performance would be kept under review. The Claimant agreed that these would be valid concerns for Mr Agg, '*if they were true'* and *'there was evidence'* to support them. He disagreed that Mr Agg would have '*no reason to make them up*'.

k. He was challenged that his email response indicated that he accepted the criticisms as valid '*I am much saddened for being viewed as having an arrogant attitude and I would like to extend my sincere apologies to any of my colleagues who has been affected, which may have been in part due to my personal circumstances. I have learnt a great deal from yourself and Mike for which I am grateful and would continue to concentrate and benefit from your advice moving forward in line with your proposal details below*' [291]. He said that this was a 'forced confession' as he was afraid of losing his job. He disagreed that his response was, at the time, genuine.

l. The Claimant was challenged as to his claim concerning the alleged racist comments by Mr Curnick, it being put to him that they had never been made and he said they had. He was shown Mr Curnick's diary for August 2021, which indicated that he was not in the office on the 3rd and 4th, and he challenged the authenticity of that document, pointing out that it was one of the documents very recently disclosed by the Respondent. He agreed that he'd never raised these allegations in any form, while employed, but referred again to his concerns about keeping his job (despite some of these comments being made prior to Mr Agg's emails) and he '*wouldn't have dared*' to do so and also '*hoped that things would improve'*. He was further challenged about having asserted that this racist behaviour commenced in or about September 2019, but despite this 'brushing it off' and carrying on with his job and he said that at the time, he'd '*not seen it as a big issue'*.

m. On 28 September 2021, Mr Agg wrote again to the Claimant, replying to an email of his, stating that he '*remained deeply concerned about your performance, sales for the month are £2858.62, this is way off your forecast by a mile …* (sic).' The Claimant agreed that in replying to the Claimant's email (which had

copied in several others), Mr Agg had simply replicated those recipients. The Claimant stated that he disagreed with Mr Agg's assessment of his sales, but in his email in response wrote in similar terms to his previous 'forced confession' email, for, he stated, the same reasons.

n. On the question of privacy, he agreed that he had copied others into his emails, including telling them of his marital difficulties and had never asked for a private meeting with Mr Agg.

o. On 4 October 2021, Mr Agg wrote again, reiterating his previous concerns and stating that '*you need to prepare a very detailed BDP for the next three months asap to give you utter focus on pulling back the poor performance to make sure we stop the drift, I see no reason for it at all.'* (sic) [301]. It was suggested to the Claimant that this indicated that Mr Agg did not consider the situation hopeless and that he was proposing a way to address it and, on this question being put to him twice, he agreed. When it was suggested, reference the BDP that Mr Agg was being very clear that he wanted it 'asap', the Claimant said that no date was given and that he intended to do it as soon as he had time, allowing for other work commitments. When it was further suggested that if that was the case, it would have been reasonable for him to have updated his boss, he agreed, but said that he was '*expecting him to tell me when he wanted it. At the time, I thought he meant January.'* When it was then suggested to him that as Mr Agg had specified, on 4 October, '*the next three months'* that that could not mean January, he said that that was '*how it appeared at the time'*. He denied that he was '*making this up'*. When it was suggested that he was now saying this for the first time, and that if it was true he would have mentioned it in his witness statement, he said that he '*didn't think of it at the time'*.

p. Mr Agg wrote again on 23 November 2021, in respect of a '*three-month performance review'* [386]. He listed several concerns, to include ACT; poor sales forecasting; low sales (£15k in November); a further request for the detailed BDP and the alleged avoidance by the Claimant of the ISO audit. The Claimant said that the ACT complaint was too broad and unevidenced and that other colleagues failed in this respect also; that the sales concerns were '*not true'* and that the BDP request was not a '*failure to follow a reasonable management instruction',* but was simply a '*requirement*'. He eventually agreed however that it was a reasonable management instruction, which he had failed to comply with, but he had reasons for doing so. He was referred to his response to that email, which stated '*I agree that I have not been*

able to be focused, and I am sorry for this let down. I'll endeavour to get re-focused to the best of my ability and correct matters going forward. Of course, if the situation does not improve by the February deadline I will be responsible for any resulting outcome.' He asked for a deadline of 9 December for the BDP. Again, the Claimant asserted that this was a 'forced confession', as he was '*weak*'. When pressed on this point, that his email was genuine and his answer now was untrue, he agreed. When it was reiterated, therefore that it was not a 'false confession' he said '*partly, I sought clarification on the BDP. If I'd been myself, I'd have exploited every point'.*

q. On 3 December 2021, the Claimant provided a document to Mr Agg about the LFAS project [412]. Mr Agg commented on it, generally favourably, but stating '*I don't like the use of the 'creep' word, it describes the aspect of anchor behaviour badly or negatively, it may be technically accurate with all the standards, can't remember what we decided, think it was consolidation or similar* (sic). *We are the market leaders by a mile, so let's set the standards.'* When it was suggested to the Claimant that this was a clear message to him not to use the term, he referred to Mr Agg's use of the word 'like'. The Claimant responded stating '*just one point that the term 'creep' is well recognised and established in Geotechnical Engineering field, it is discussed in EC7 and numerous publications as well as my PhD and distinct from consolidation, so I'm afraid in a 'creepy' way that we'll have to stick with 'creep'.'* The Claimant said that this was a '*light-hearted comment'* but agreed that stating '*stick with 'creep'* was a definitive statement. He agreed that Mr Agg's response [410], '*don't be 'afraid', 'creep' won't stay in, you can argue all day … the document* ***will be*** *amended, you've never pulled your PhD badge out before, so quite surprised, so your* (sic) *instructed to write a very short sentence explaining why we don't use creep … If you can't I will write one.'* was a clear and unambiguous instruction. He responded by stating '*With 40 years of experience in design and manufacture of PDEA, our anchors have demonstrated being least influenced by creep.'* to which Mr Agg responded that he was '*stunned*'. He said that it was a mistake to rely on the word 'creep' and agreed that he'd failed Mr Agg's reasonable management instruction. He denied, on questioning by the Tribunal that this exchange could be considered as an example of arrogance on his part.

r. Subsequently, Mr Agg asked the 24-year-old graduate to provide a rationale for not using 'creep' which she did and which Mr Agg forwarded to the Claimant, on 8 December 2021, expressing his '*grave concern over the 'professional' advice you gave me after I*

questioned you over the use of 'creep', unfavourably comparing it to that that provided by the 24-year-old [490]. When it was put to the Claimant, he continued to assert that this comparison by Mr Agg was related to his race.

s. When challenged that LFAS was not 'the Claimant's project' as the Respondent had been working on it since 2018, prior to his arrival, he disagreed. He agreed, however, that it was a 'big deal' for the Respondent, so important to get right. The Claimant had provided his PowerPoint presentation, to be delivered in due course to the client, to senior management and which was the subject of considerable criticism by Mr Agg, in his email of 9 December 2021 [497]. Mr Agg said that '*God forbid what they would have thought about the document had it left our offices on Friday.',* referring to it being '*technically horribly inaccurate'* and to the misuse of 'creep'. He considered it potentially damaging to the Company's reputation. As a consequence, he decided to take the Claimant off the Project. The Claimant disagreed that this decision was nothing to do with his race. Mr Agg wrote '*this latest episode is another example where we seem to be at loggerheads, we have spent days emailing and arguing about Creep, errors on your basic day to day functions continue, all of which suck up every one's management time, I just don't get it, you're a very experienced, highly intelligent, qualified individual'*. He concluded by reminding the Claimant that, on his own schedule, the BDP was due that day. The Claimant agreed that he had failed to meet his own deadline, but that it was '*impossible in my circumstances.'*

t. The Claimant said that by this point the relationship had broken down, one-sidedly by the Respondent, but that he was trying to mend it.

u. He denied that a reference in an email from a potential client to a colleague, Mr Glover, who had taken over his role, after his suspension, to '*the last guy I dealt with was not anywhere near as helpful as you have been'* was referring to him [513]. He said that he had '*chased up Mr Duff* (the sender of the email) *and he told me it was not me. I asked him to confirm this, but he didn't provide me with anything.'*

v. He was also asked about an audit carried out on his saving of documents to ACT [520-522], which it was suggested indicated that the vast majority of his work had not been saved and he said that that was not the case and he suspected the validity of the document listing the gaps, as it had been manually annotated, rather than being a straight print out from ACT, which, he said,

should have been entirely possible. Nor did he agree that a screenshot showing non-synchronisation with ACT for 18 days, referred to him, as he was not named on it [525]. He also stated that in any event, even if did relate to him, he had not been in the office for much of this 18-day period, as he'd been suspended.

w. The Claimant was asked about the missing files and was asked whether the Respondent was making this matter up and he said, '*of course they have'*. He said that the statements the Respondent obtained at the time from other members of staff, stating that they saw him carry a heavy bag out on his last day and that files which were normally on his desk were no longer there and on a search in the relevant cupboard, others were found to be missing, did not justify a genuine belief that he had taken them, or justified his dismissal. He pointed out that these statements were obtained post his dismissal.

x. He was asked about his delay in bringing this Tribunal claim and whether there was any reason he could not have brought it earlier. He said that if the Respondent had responded sooner to ACAS Early Conciliation, he would have done so.

18. Respondent's Evidence. We summarise the Respondent's witnesses' evidence as follows:

a. In his statement, Mr Richardson said that he '*did not make any racial slurs towards Hossein … nor did I ever hear anyone make fun of Hossein's accent. There was no mocking of anyone's accent in the Platipus office that I was aware of.'* He has never before heard or used the term '*the curry is getting hot'.*

b. He denied that it was unfair that the Scottish Power project had been allocated to him, rather than the Claimant, as this took place in Spring 2019, when the Claimant had only been in the Company for about a month. Also, because he was the sales manager for the South-West region (which also covered Ireland), he developed experience of dealing with utilities companies (such as the Electricity Supply Board in Ireland) and thus was best suited to deal with Scottish Power, another utility, with whom he secured the order. No other region did so. He made his targets for the South-West without Scottish Power being included.

c. The following was put to him in cross-examination:

i. On 13 January 2022, he had provided a witness statement, commenting on the Claimant's laptop bag looking full and

heavy on his last day, at the point of suspension, despite the Claimant leaving his work laptop in the office. He was unable to locate several relevant files thereafter. He denied that he was speculating and said that he simply recorded what he saw.

ii. He couldn't recall if he'd seen any files on the Claimant's desk, but confirmed that afterwards he did look for files, but couldn't find them. He didn't accept that that number of files (about twenty) could have simply been misplaced.

iii. He was asked if he'd seen the list of missing files before [726] and said that he thought he had, at the time. When challenged that this was not the original list, but was created three months ago, he said it was similar to the list he saw.

iv. He was asked about discussions in the office re cricket, in August 2021 and he said he was not sure what matches would have been on at the time, but he and Mr Curnick would have discussed any that were. He didn't know if any of the matches they discussed involved India. He was asked if he recalled '*mocking an Indian accent'* and he said, no, never, but when asked whether he'd ever imitated such an accent, he said he had, sometimes and that in his view, there was a clear distinction between the two. It would only be mocking '*if it was done in a negative or critical way'*. He agreed that both he and Mr Curnick did this. When asked why he would wish to imitate the accent, he said that his (South African) accent was imitated by others, but which he did not consider mocking or to be '*automatically negative'.* He said that he grew up in a multicultural country and therefore understood such sensitivities. He said that he was unaware that the Claimant might have been offended by this and said that he '*wished he'd said something'*.

d. Mr du Plessis, in his statement, denied any '*racist slurs in the office'*, or that Messrs Curnick and Richardson would make fun of the Claimant's accent. He said that if he had heard anything of that nature, he would have spoken up about it. He also provided a statement about the missing files [677].

e. The following was put to him in cross-examination:

i. He was asked as to how many files he would routinely see on the Claimant's desk, and he said, as in his statement, 5 to 7, or around that figure.

ii. He said, when challenged that it was not his position to accuse the Claimant of stealing the files (which he hadn't), but simply to recount what he'd seen.

iii. He agreed that it was possible that some files may have gone missing, but he doubted it, having checked the archive. It had never happened before.

iv. He was asked if he was aware of accents being imitated in the office and he said, once or twice, to include French and German accents (they had clients of those nationalities), but '*not in a derogatory way'*, or to ridicule.

f. Mr Curnick denied, in his statement that he had ever used the 'curry' or 'brown dogs' comments or made fun of an Indian accent. He also had no idea why the Claimant would consider that he wanted him out of the Company. He was aware as to performance concerns around the Claimant. He was requested by Mr Agg, while the Claimant was suspended, to audit the Claimant's use of ACT, which he did, finding many gaps in the information [520]. In supplementary questions and in cross-examination, he said the following:

i. He confirmed, from his electronic diary that on some of the days that the Claimant alleged racist comments had been made by him, he was not in the office (3 and 4 August).

ii. When questioned as to his audit of the Claimant's activity on ACT, he said that the information he provided was easily searchable and was correct. He said that synchronisation should be done every day.

iii. He was asked about the issue of 'design life' (i.e. how long the Respondent's product could be expected to safely last). The Claimant had been criticised for describing the length of that life as '*60+ years'* rather than '*up to'* a maximum of 60 years. He denied that this was '*flagged up as a major issue'* and that he was simply '*looking for anomalies'*.

iv. He agreed that on rare occasions, accents were imitated, including by himself. He denied that it had become a habit, to the extent that he was unaware he was doing it. He said, having grown up in a different culture (South Africa) '*things were taken differently'* there. He denied making any adverse comments about any Indian cricket team, other than on their

performance. He said that mimicking of accents was triggered by sport or by customers.

g. Mr Harris, in his statement, said while he had his own office (rather than the shared office the others used), he usually kept his door open and could therefore generally hear what was being said. He said that he never heard anything of the nature the Claimant alleged as to racist slurs or the mimicking of his accent. If he had, he would have raised the matter. In respect of his relationship with the Claimant, he felt that there was a tension, due he thought to the Claimant resenting his authority over design decisions, '*possibly due to differences in age and his perception of my qualifications on paper.'* This working relationship became more difficult over time, as the Claimant '*refused to consider the perspectives of others and insisted on being in the right*'. Mr Harris considered that the Claimant did not have the technical expertise to fully understand the relevant principles, due to either his training being too specialised or to being out of practice. He therefore kept such discussions to a minimum. He entirely supported the Respondent's/Mr Agg's view on the use of the term 'creep'. In cross-examination, he said the following:

    i. He was questioned at length on the technical points raised in his statement, in particular in relation to 'creep'. (We reiterated our view that it mattered not to us who was correct in this technical argument and that we would be making no such finding.)

    ii. He stated that the Respondent moved away from the term, due to the understanding of terminology and of the English language varying so much between countries.

h. Mr MacArthur, in his statement, said that he had never witnessed any racial slurs, or making fun of the Claimant's accent. He denied that any projects were given to him that should have been given to the Claimant. He said that the River Dane project resulted from a personal contact of his, but in any event did not go ahead, due to cost. If it had, it would have been passed to the Claimant to manage, and he then would have got commission on it. In respect of LFAS, he had had long involvement in that project, from 2018 and therefore when Mr Agg decided to take the Claimant off it, he was the obvious person to take it on. He also, as with Mr Harris, queried the Claimant's technical understanding and his inability to explain why he disagreed with others on such matters. Finally, he had also provided a witness statement in relation to the allegedly

missing files [682]. In supplementary questions/cross-examination, he said the following:

i. He said that '*nothing much was happening'* with LFAS in 2021 and the Respondent was simply keeping a 'watching brief' on the project.
ii. He said that on 7 December 2021 (one of the days on which the Claimant alleged racist comments), he knew that the Claimant wasn't in the office, as he was forwarded queries meant for the Claimant. He couldn't recall if he'd been absent all day, but he certainly was in the afternoon.

iii. He was asked about the list of missing files, which he had collated (as referred to in his statement of 14 January 2022 [682]) and said that he'd done this some time prior to that date. He said that he'd typed the statement and attached the list and left it on Mr Agg's desk. He said that subsequently the original list was lost, and he recreated it [726], a couple of months ago, although he couldn't be sure, after this time lag, which list was the original, but thought that the one in the bundle was the recreated one.

i. Mr Russell, in his statement, said that he had had concerns as to the Claimant's work, both in terms of the reliability of his sales forecasts and his accurate completion of Internal Process Orders (IPOs) and he referred to some examples. He said that while the Claimant was not alone in making mistakes with his paperwork, he made '*significantly more errors than others'*. He concurred with Mr Agg that the Claimant's presentation on the LFAS project '*would have shown the company in a very poor light.'* He agreed that he may have sworn in the Teams meeting at which this presentation was discussed but denied that he had done so at the Claimant. He and Mr Agg jointly decided that the Claimant should be suspended '*as his behaviour was becoming very disruptive in the office'*. As Mr Agg had dismissed the Claimant, when the Claimant brought an appeal, Mr Russell said that he was the only person (as the only other director) who could deal with it. He did so, on paper, as requested by the Claimant [696-700], rejecting it. He referred to the Claimant's failure to previously raise any allegations of racism and said that had he done so, they would have been dealt with and that the Company had previously dismissed employees for such behaviour. As to the Claimant, generally, he said that he '*found him to be the most difficult and challenging employee that we had ever hired. He was not a team player* (giving the non-synchronisation to ACT as an example) … *would not take instruction without an argument and persisted in making basic*

administration errors time and again, resulting in additional work for other members of staff.' In supplementary questions/cross examination, he said the following:

i. He confirmed Mr MacArthur's evidence as to the Claimant's minimal activity in relation to LFAS, in 2021, as little was happening with the project.

ii. When questioned about the incident involving goods on hire to a customer and whether that was a 'big issue', he said that the Claimant's errors caused '*a lot of work and huge embarrassment for the Company, as we were continuing to charge the customer* (for goods they had asked to be taken off hire) *and we spent time on raising and chasing unnecessary invoices and engaging in pointless communication.'*

iii. He was challenged if he could have been unbiased in dealing with the Claimant's appeal and said he could. However, on being referred to his email of 8 December 2021, relating to an alleged error by the Claimant, in which he said '*Another nail!'*, he agreed '*that that doesn't look unbiased'*.

j. Finally, Mr Agg said the following in his statement:

i. He was unaware of any racist behaviour against the Claimant (until such general allegations were raised in his appeal and further specified in his further and better particulars).

ii. He confirmed the evidence contained in his various emails to the Claimant as to their discussions about the Claimant's performance.

iii. He considered that the Claimant received a lot of support from colleagues and guidance from him.

iv. While he did award the Claimant a pay rise in March 2021, it was by way of encouragement, in the hope that his performance would improve.

v. He reiterated the concerns raised in his emails about his perception of the Claimant's '*arrogance'* and poor relationships with colleagues.

vi. He accepted, generally that the Company's handling of disciplinary/capability matters was '*not what it should have been'* and that for example, simply labelling emails as being '*first written warning'* was inappropriate, without some procedure to back it up.

vii. He commented on the Claimant's sales performance by reference to a summary from the Company's accounting software [401], for the period September to December 2021, which showed the Claimant's sales to be between three to four times less than his colleagues in the other regions. His forecasted figures were also wildly out (£926k to actual sales of £381k). He said that the figures provided by the Claimant [733] were '*not an accurate reflection of sales performance'*. Firstly, they were one month out, as based on the Claimant's pay slips, with commission being paid in arrears. Secondly, he sought to rely on '*won projects'* which is not a measure of performance used by the Company – sales performance is based on actual sales that have been invoiced and paid. Those figures show, for a 16-month period that the Claimant's performance was well below that of his peers and well below his forecasted sales [732].

viii. His view of the Claimant's presentation on LFAS was that, if released, '*we would have become a laughingstock in the industry'*. As a consequence, he decided to remove him from the Project.

ix. Concerned generally about the Claimant's attitude, performance and errors, he and Mr Russell decided that '*it was best for everyone for Hossein to be suspended to allow us time to properly consider the situation.'*

x. In the Claimant's absence, his failure to synchronise to ACT was detailed and files were found to be missing.

xi. Mr Agg said that he was wrongly under the impression that having invited an employee to a disciplinary hearing that employee (in this case, the Claimant) was obliged to make written submissions in advance of that hearing. He was also concerned that despite the Claimant threatening to bring a grievance, he had not done so. Therefore, he was '*concerned that things were dragging on which was not in the interests of either party. It was clear that the relationship between Hossain and the company had irretrievably broken down. I decided that in the circumstances it was best for*

Hossain's employment with Platipus to be terminated and I wrote to him to this effect on 4 January 2022 [602-605]. The reasons he gave for that decision were as follows:

1. The ACT failures;
2. Errors in relation to IPOs and other documents;
3. Misleading a customer about 'design life';
4. Inaccurate sales forecasts;
5. Failure to comply in a timely manner with his instructions in respect of the BDP;
6. Failure to return the files he had taken;
7. Ignoring instructions from directors;
8. Alienating colleagues;
9. Poor sales.

xii. The next day, 5 January 2022, the Claimant submitted a grievance and appeal. Mr Agg responded to the grievance [701-705].

xiii. He categorically denied that these decisions were in any way motivated by the Claimant's race.

k. In supplementary questions/cross examination, he said the following:

i. He was in no doubt that the '*last guy*' reference was to the Claimant.

ii. He agreed with the Claimant that while he had started well, his performance tailed off over time.

iii. He maintained his position that he considered that the Claimant had deliberately avoided the ISO audit.

iv. He was questioned about the figures provided by the Claimant as to his sales [733] and did not agree that they showed his performance as better than thought, commenting that they and the Company's figures were '*chalk and cheese'*. He pointed out that the Claimant's figures only went up to August 2021 and were based (wrongly) on '*won projects'*, not actual invoiced and paid sales.

v. He was entirely confident that had other colleagues been similarly underperforming that they would have been dealt with in the same manner.

vi. He did not agree that because the LFAS presentation had not yet been sent to the client that any errors in it were any less consequential, as '*it should have been checked*'.

vii. He disagreed that his email of 9 December 2021 indicated that the Claimant would be dismissed [497].

viii. He agreed that the Claimant's email of the same date highlighted his concerns about the treatment he was receiving [499].

ix. He denied that his use of the phrase '*your grammar stinks'* was '*racially connected*'.

x. When asked if there was '*toxicity on both sides'*, he agreed that '*my words on the document* (the LFAS presentation) *were not very eloquent and didn't help and probably increased the toxicity'*.

19. Closing Submissions. As stated, written submissions were received from both parties (as well as some oral submissions from Mr Anderson) and which we will consider (as thought relevant) in our conclusions below.

Conclusions

20. Harassment related to Race. Dealing with the allegations as set out in the List of Issues, we find as follows:

a. The assignment of projects within the Claimant's region to others, without good reason (Dane's River and Scottish Power): we had no reason to doubt Mr Richardson's evidence that Scottish Power was allocated to him due to his utilities experience and Mr MacArthur's evidence that as the Dane's River project did not go ahead there was nothing to assign. Neither witness was effectively challenged on this evidence. There is no evidence (the 'something more' in **Madarassy**) that either matter was related to the Claimant's race.

b. That the Claimant was given three written warnings (2 August [291], 28 September [297] and 23 November 2021 [385]), which were copied to other members of staff. The sending of and contents of those emails are not in dispute, less that only the first one was labelled as a '*written warning'*. That email was copied only to Mr Russell, who, as a co-director would, we consider, be an appropriate person to include in such correspondence. The second email was a reply by Mr Agg to an email from the Claimant in which he had copied in a large number of recipients, and which were

therefore included in Mr Agg's reply. In turn, the Claimant's reply to that email, in which he discloses his '*difficult personal circumstances'* is also copied to those recipients. We don't consider, therefore that the Claimant can have been genuinely offended by the inclusion of those recipients, as otherwise he would have excluded them, or asked for a private discussion with Mr Agg. Further, it is clear from the evidence that individual sales performance was openly discussed, at least monthly, in group sales meetings and therefore not something which the Claimant can have expected to be kept private. The third email was copied to Mr Russell (as before), as well as Mr Curnick and a Mr Cavedaschi (the Respondent's Sales and Marketing Director and the Claimant's original line manager). Mr Agg was not questioned by the Claimant on this issue at all, indicating perhaps the relative seriousness he placed in it. Again, the Claimant, in his reply, copied in the same recipients and made no request for private discussion. It may well be, in respect of this third email, which is severely critical of the Claimant that it would have been better for Mr Agg to have written privately to the Claimant (perhaps cc'ing Mr Russell, as a co-director), but there is no indication that the Claimant felt aggrieved by the choice of recipients at the time. Overall, therefore, while the Claimant was no doubt concerned for his job and his ability to improve his performance, and that while he may have felt intimidated or was facing hostility, there is no evidence that any such criticisms related to his race.

c. That at the Teams meeting on 8 December 2021, he was sworn at and that unfounded allegations were made about some creep tests he had carried out on anchors for LFAS:

    i. There is no dispute that the meeting was heated and it's quite possible that swear words were used. There is no evidence however that any such use of swear words was directed at the Claimant or was related to his race.
    ii. The issue of 'creep' and related tests was an entirely technically related difference of opinion that had nothing to do with the Claimant's race.

d. There is no dispute that the LFAS project was taken off the Claimant and given to Mr MacArthur. However, we accept the Respondent's rationale for doing so, based on their concerns as to the Claimant's related presentation and in respect of which there is no evidence of any relationship to his race.

e. There is no dispute that the Claimant was suspended, but we had no reason to doubt the Respondent's stated reasons for doing so and again there was no evidence that they were related to his race.

f. The Claimant was not permitted to take his work laptop home with him, while suspended, which would be an entirely routine measure in such circumstances and again, there is no evidence that that decision was related to his race.

g. The Claimant alleged that he was not provided with documents by the Respondent as to his sales figures. He did not raise this allegation with any of the Respondent witnesses and which is denied by the Respondent and therefore is not upheld.

h. That Mr Agg made unfounded allegations, in a series of emails, as to the Claimant having committed '*theft*' of files: the word 'theft' is the Claimant's own and was not used by Mr Agg in the various emails referred to – he simply complains of missing files that he wishes the Claimant to return. In any event, however, we don't consider these allegations to be 'unfounded', but on the balance of probabilities to be true i.e. that the Claimant did take a number of files home with him, which he then denied taking and failed to return. Such a complaint, therefore, cannot found a claim of racial harassment by the Claimant, having nothing to do with race, but instead the Respondent's entirely legitimate wish to have their property returned. We find that the Claimant did take the files, for the following reasons:

    i. He had obvious motivation for doing so, either to disadvantage the Respondent, or to cover any errors of his, or to potentially provide information to support his case.

    ii. The evidence of his colleagues as to him having a noticeably heavy laptop bag, on his final departure from the office, when his laptop was left behind.

    iii. We did not find the Claimant to be, generally, an entirely credible witness. We reach that conclusion for the following reasons:

        1. He was frequently evasive in his answers in cross-examination, frequently having to have questions put to him several times, before answering.

        2. On a couple of occasions, he was clearly 'thinking on his feet' and gave answers of which we doubt the

truth, having not raised such matters previously, despite the voluminous paperwork generated in this case. His answers in respect of his '*detailed BDP'* being required '*asap'* are an example of this.

3. He was clearly not telling the truth about his alleged discussion with Mr Agg in July 21 as to Mr Agg agreeing that he could provide his forecast at the next scheduled sales meeting (as opposed to 'asap').

4. His entirely implausible attempted reliance, now, on the assertion that his emails in response to Mr Agg were 'false confessions', when it is entirely clear to us that they were his genuine sentiments at the time.

i. That his request to postpone the disciplinary hearing was refused. It is correct that that request was refused, the Respondent stating that they considered that the Claimant had had sufficient time, but, in any event, there is no evidence that such decision was related to his race.

j. That Mr Agg's various emails, '*calling him a cheat'*, ridiculing his PhD thesis, his technical competence, his written English and unfavourable comparison to a younger engineer were acts of racial harassment. There is no evidence of Mr Agg calling the Claimant a '*cheat'*. We do agree that Mr Agg's correspondence was, at times, intemperate and ill-judged, particularly from a managing director and that the Claimant's expertise and grammar was disparaged and that he was unfavourably compared to a much less-experienced, much younger, engineer, which can only have been humiliating for a man of his age and experience. However, as with so many of the Claimant's allegations, he has failed, utterly, to show any link between them and his race. All the evidence indicates, to the contrary, that Mr Agg's comments were motivated by his concerns about the Claimant's performance, his perception of him being 'arrogant' and the Claimant's outright refusal to comply with instructions (such as with the issue of 'creep' and the provision of a '*detailed BDP asap'*).

k. That the Claimant was dismissed on 4 January 2022 because he had not provided written submissions in advance of the planned hearing. As previously agreed by Mr Agg, he was mistaken to expect such a requirement, but, in any event, whether or not such requirement was legitimate, there is no evidence that it was related to the Claimant's race.

l. That an additional allegation (in relation to 'design life') was relied upon as part of the reason for dismissal, when not included in the invitation letter. This was an entirely unnecessary addition by the Respondent to an already long list of 'charges' and while smacking of a 'belt and braces' approach by them to 'ensuring' the Claimant's dismissal, there is no evidence that its addition was related to his race.

m. That his appeal was rejected; this is the case. Again, however, there is no evidence that that decision was related to his race, but instead with the Respondent's decision, for the reasons they have stated, to terminate his employment.

n. That on 3 and 4 August, 23 November and 6 and 7 December 2021, Messrs Curnick and Richardson, in the office, made 'racial slurs against him'; made 'fun of his accent' and spoke in Afrikaans. We deal firstly and briefly with the Afrikaans allegation. It was the evidence of some of the Respondent's witnesses that Afrikaans was, on occasions, spoken in the office. However, we fail to see how the occasional use by a native speaker of their mother tongue could constitute harassment of another. The Claimant did not dispute that he himself occasionally spoke his native language on the phone. In any event, however, it was undisputed evidence that there were several other non-Afrikaans speakers, who were not Iranians, in the shared office, as well as the Claimant and therefore it cannot have been reasonable, in all the circumstances, for the occasional use of that language to have had the purpose or effect of violating the Claimant's dignity, or creating a hostile etc. environment for him, or to being related to his race.

o. The 'racial slurs' refer to the alleged 'brown dogs' and 'hot curry' comments. Beyond the Claimant's belated assertion of these comments (not in his appeal or claim), there was no evidence these phrases had been used. We note Messrs Curnick and Richardson's evidence on this point; their puzzlement and unfamiliarity as to the nature or meaning of such seemingly bizarre phrases (as opposed to their frank admission as to mimicking accents) and combined with our concerns as to the Claimant's credibility, we find, therefore, on balance, that they were not used.

p. Finally, it is the case, as admitted by Messrs Curnick and Richardson that they did, on occasion, mimic accents, to include an Indian accent. The Claimant is not, of course, Indian, but it is not unreasonable for him to find this '*uncomfortable'*, as the '*only non-white with an Asian background'* in the office [22]. Messrs Curnick and Richardson were, we found, genuinely non-plussed that such

behaviour could be potentially considered as racial harassment, referring to their '*multicultural'* upbringing in South Africa. When it was put to Mr Curnick, however that it was not for them to judge whether such behaviour was insulting, or worse, he concurred. We are satisfied that this was conduct unwanted by the Claimant and that it did relate to his race. We are not satisfied, however, based on the witnesses' evidence that their behaviour had the 'purpose' of harassing the Claimant, but was instead a private 'joke' between them, which they genuinely, but wrongly, did not consider, perhaps based on their lack of understanding of modern British views on such matters, to be potentially offensive to the Claimant. In considering whether, nonetheless, such behaviour had the harassing 'effect' on the Claimant, we find it reasonable that it did, for the following reasons:

i. The context of him having the lone '*non-white with an Asian background'* status in the office, leading him rightly or wrongly to perceive that the behaviour was directed at him;
ii. The repeated nature of the act;
iii. His mention of it in his appeal letter. While he did not raise it earlier than this, we take into account that it is not unusual for employees to be reluctant to raise such matters, perhaps not wishing to be perceived as 'rocking the boat'.

q. We do conclude therefore that on those occasions that Messrs Curnick and Richardson mimicked an Indian accent they racially harassed the Claimant.

21. Direct Race Discrimination. We deal with this claim very briefly. As should be clear from the vast bulk of our findings in respect of the claims of racial harassment, the Claimant has utterly failed to link such allegations to his race. We see no need, therefore, to rehearse those allegations as ones also of potential acts of direct discrimination, the Claimant having established no *prima facie* case, applying **Efobi** that such acts as we have either found to have occurred, or are admitted by the Respondent, to be because of his race. Even, however, were that to be the case, the Respondent has, we are satisfied, provided valid, non-discriminatory reasons for such treatment. The Claimant's discrete claims of direct race discrimination relate to his suspension and dismissal and which, for the same reasons, we find were not less favourable treatment because of his race, but because of the reasons advanced by the Respondent: principally his sales underperformance; his refusal to accept instruction and his difficult relationship with colleagues. This claim therefore fails and is dismissed.

22. Limitation in respect of Harassment. Having found that there was an act or acts of harassment by the Respondent, in Messrs Curnick and Richardson's mimicking of an Indian accent, we consider whether such acts are out of time and if so, whether the Tribunal should exercise its discretion to extend time. The following factors apply:

    a. It was not in dispute that any act occurring before 31 December 2021 was *prima facie* out of time.

    b. The Claimant was suspended on 9 December 2021 and therefore there can have been no repetition of any such harassment thereafter.

    c. The Claimant provided some dates for such incidents and while we accept the Respondent's evidence that on some of those dates either one or other of Messrs Curnick and Richardson, or the Claimant were not in the office, at the same time, no evidence was adduced in respect of the Claimant's claimed dates of 23 November and 6 December 2021 and we conclude therefore that the latter was the last possible date of such behaviour.

    d. Having found that the Claimant's dismissal and the events occurring between 31 December 2021 and the outcome of his appeal were not acts of discrimination or harassment there can be no 'continuing act' that brings earlier claims within time.

    e. Therefore, the only factor for us to consider is as to whether it would be 'just and equitable' to extend time to include the 'accent mimicking' act(s) of harassment. In doing so, we consider the following:

        i. Why was the primary time limit not met (**Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13**)? In this respect, the only explanation provided by the Claimant was that he was awaiting involvement in Early Conciliation by the Respondent. This is not, in our view, a valid reason for delay. At no point did he indicate any lack of knowledge of time limits and indeed his claim of unfair dismissal was brought (just) within time and therefore he can be taken to understand this issue. He can have had no legitimate expectation that the Respondent would wish to engage at all, or, if they did, to his satisfaction, in Early Conciliation and any delay imposed by that expectation is his fault and nobody else's. It was his choice to wait, until the last moment, to bring his claim. However,

there is no strict requirement that a claimant provide a 'good' reason for such delay.

ii. The 'just and equitable' discretion is a wide one. The Court of Appeal made it clear in **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA**, that when tribunals consider exercising the discretion under s.123(1)(b) EqA, '*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 the discretion is the exception rather than the rule*.' The onus is therefore on the Claimant to convince the Tribunal that it is just and equitable to extend the time limit.

iii. What is the balance of prejudice to the parties if time is not extended? We are clear, in this respect that the balance falls firmly in the Claimant's favour. If time is extended, the Respondent will suffer only the prejudice of having to face a claim that would otherwise have been struck out by a time limitation defence. There is no 'forensic' prejudice to the Respondent in respect of delay in gathering evidence, or the effect of time on memory, as firstly, the allegations are admitted and secondly the relevant facts are all in the same timeframe as the unfair dismissal claim. The first type of prejudice will, of course, arise in every such case and therefore if that was decisive no time limit would ever be extended. In contrast, The prejudice to the Claimant is that he would be debarred from receiving a judgment that he was subject to racial harassment and from receiving the appropriate injury to feelings award.

iv. The length of delay is twenty-five days.

23. Conclusion on Limitation. We consider that it would be just and equitable to extend time in respect of the acts of harassment found against the Respondent, for the following reasons:

a. The length of delay is not great, and the Claimant has provided a reason for it.

b. The balance of prejudice falls in his favour.

c. The claim, is, as we have determined, well-founded.

24. Unfair Dismissal. The Respondent having conceded unfair dismissal, on procedural grounds, we need only consider the application of *Polkey*, contributory fault and ACAS uplift. We do so as follows:

    a. *Polkey*. We consider, rather than applying a percentage chance of the Claimant's eventual fair dismissal that instead we should consider what may have occurred had the Respondent, in early December 2021, have decided to embark on a fair and correct capability procedure. We consider that such a procedure, allowing for appropriate meetings, issue of formal warnings, guidance as to what was required of the Claimant in respect of his performance and if necessary, assistance in how to achieve it and if appropriate, allowing for any appeal procedure, would have taken three months, plus notice or pay in lieu of notice (two weeks, by that point, in early March 2022, in the Claimant's case). We consider, in view of our findings already (and as set out below in respect of contributory fault) that his fair dismissal would have been inevitable at that point, due principally to his poor sales and his general attitude. In that event, therefore, his loss of earnings is limited to three months and two weeks' pay (fifteen weeks in total).

    b. Contributory Fault. We find that the Claimant contributed to his dismissal, to the extent of 50%, for the following reasons:

        i. He took the Respondent's files, denied doing so and did not return them.

        ii. He wilfully and foolishly (**Jagex**) declined to follow reasonable management instructions, firstly, in respect of providing a BDP '*asap'*, seeming to consider Mr Agg's instruction either not such, or a distraction and secondly, his behaviour in respect of the 'creep' issue, somewhat justifying Mr Agg's accusation of being arrogant.

        iii. Contributing to a 'toxic' atmosphere with colleagues (albeit one for which he was not solely responsible, Mr Agg accepting that he had not handled the matter well).

    c. ACAS uplift. As conceded by Mr Anderson, the Respondent clearly failed to follow the ACAS Code in this case, except perhaps in their handling of the Claimant's grievance and appeal. We consider that the appropriate uplift is 20%, (applicable to both loss of earnings and an award for injury to feelings) for the following reasons:

i. The crucial element of the Code that was ignored in this case was the following of any valid disciplinary procedure, from the outset, to include letters in advance of disciplinary meetings (it was the Respondent's choice to frame its concerns as 'disciplinary'), setting out the Respondent's concerns, followed by minuted meetings, at which the Claimant could be accompanied, then followed by staged warnings, setting out what was required of the Claimant. Thereafter, failed repetition of such procedure at each warning stage, leading to dismissal, if appropriate.

ii. The imposition of the fallacious requirement on the Claimant that he provide a written submission in response to the disciplinary charges, without which no disciplinary hearing would be held.

iii. The tone and nature of the correspondence from Mr Agg which appeared on occasion to be hectoring and unprofessional, rendering it difficult for him to have dealt with the matter as impartially as possible (as required by the Code).

iv. The Respondent is not a small employer and could therefore have had access, if they wished, to appropriate HR or legal advice. In any event, their own disciplinary procedure broadly sets out what is required, but which they failed to adhere to [102].

25. Remedy. As stated at the conclusion of the Hearing, a remedy hearing, to be heard by CVP, is listed for 2 December 2024, with a time estimate of one day. Bearing in mind our findings as to the assessment of loss of earnings in the preceding paragraph, the parties should, it is hoped, be capable of agreeing the appropriate calculation of the award in respect of the unfair dismissal claim. In that event that would leave only the assessment of an award for injury to feelings, in respect of the sole successful claim of harassment related to race.

Judgment

26. The Respondent harassed the Claimant on grounds of race.

27. The Claimant's claim of direct discrimination fails and is dismissed.

28. The Respondent unfairly dismissed the Claimant.

29. A remedy hearing will be listed, remotely, with a time estimate of one day, on 2 December 2024.

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Employment Judge O'Rourke

Dated: 13 November 2024