



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr W Lewis

v

Lyreco UK Limited

Heard at: Watford

On: 2 & 3 May 2018
4 May 2018 (in chambers)

Before: Employment Judge R Lewis
Mrs G Binks MBE
Mr W Dykes

Appearances

For the Claimant: Mr N Pourghazi, Counsel
For the Respondent: Mr T Gosling, Counsel

RESERVED JUDGMENT

1. The claimant's claim of wrongful dismissal (breach of contract in notice pay) is dismissed on withdrawal.
2. The claimant's claims of victimisation under s.27 Equality Act 2010 are dismissed on withdrawal.
3. The claimant's claim of direct discrimination in alleging that he had taken drugs is dismissed on withdrawal.
4. The claimant's claims of direct racial discrimination which form issues 2.1, 2.3 and 2.4 in the appended list of issues succeed and are upheld.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The remedy to which the claimant is entitled will be determined at a hearing at the Watford Employment Tribunal on **Friday 3 August 2018** starting at 10am, and which is listed for one day.
2. The parties are reminded of their continuing disclosure obligations insofar as they relate to the matters which remain before the tribunal.
3. The claimant is at liberty, if so advised, to serve an amended statement on remedy provided that such statement is served on the respondent no later than **4pm on Friday 20 July** and if he fails to do so, he may rely only on the remedy portion of the witness statement already before the tribunal.
4. The respondent, if so advised, may rely on witness evidence on remedy provided it serves on the claimant any statement on which it relies no later than **4pm on Friday 27 July 2018**.
5. The parties are responsible in accordance with the case management order of Employment Judge Skehan for ensuring that any further documentation is available to the tribunal on 3 August in agreed paginated bundle form.
6. Each party is responsible for bringing to the tribunal at least five additional copies of any witness statement upon which it relies at the remedy hearing.

REASONS

Matters of procedure

1. This was the hearing of the claim presented by the claimant on 1 August 2017, in which he raised a number of complaints arising out of his dismissal on 20 February 2017. Day A was 19 May and Day B was 3 July.
2. The respondent defended the claims, denying racial discrimination and asserting that the claimant had been dismissed by reason of gross misconduct.
3. A case management hearing took place by telephone on 20 October 2017 (Judge Skehan) and her order was sent on 2 November (38).
4. Judge Skehan's list of issues, which was agreed, identified three broad heads of claim: direct race discrimination, victimisation, and wrongful dismissal in failure to pay notice. At the start of this hearing, counsel withdrew all claims of victimisation and of wrongful dismissal. At the start of

his closing submission, and for the reason set out at paragraph 91 below, counsel withdrew issue 2.2 of direct race discrimination (the allegation of drug taking). The appendix to these reasons is a relevant extract from the list of issues.

5. The tribunal had an agreed bundle of about 220 pages. Overnight and in response to a request from the tribunal, the respondent prepared a brief additional bundle of documents which were plainly material and disclosable. There were two helpful chronologies.
6. It was agreed that the claimant's case would be heard first, and that the tribunal would proceed in stages, dealing with liability first, and going on to remedy either on the third listed day or at a separate hearing. In the event, closing submissions were concluded by the end of the second working day, and the tribunal decided to reserve judgment and provisionally list a remedy hearing, which is now confirmed and is subject to the orders set out above. The delay in sending out this judgment has been in consequence of the judge having been unwell.
7. The claimant was the only oral witness on his own behalf. He had served a signed statement from Mr Richard Allsop, previously employed by the respondent as Field Sales Executive. Mr Gosling had no questions on Mr Allsop's statement, which therefore was agreed to be taken as read.
8. The respondent called six witnesses. All witnesses adopted statements on oath and were cross-examined. The respondent's witnesses were:
 - Ms Helen Moran, Category Manager, employed by the respondent for over 21 years, and a primary complainant against the claimant;
 - Ms Emma Hodgkiss, HR Manager;
 - Ms Louise Hoffman, Marcoms Manager, and also a primary complainant against the claimant;
 - Mr Gavin Hodges, at the time employed as Senior Area Sales Manager, who had investigated the allegations against the claimant and prepared an investigation report;
 - Mr Sam Irvine, employed by the respondent for 17 years, previously Regional Sales Director, and the claimant's line manager, who dismissed the claimant; and
 - Mr Nick Dacey, Logistics Director, who heard the claimant's appeal against dismissal, which he part allowed, and who confirmed the decision to dismiss.
9. At the conclusion of the oral evidence, it was agreed that there would be a short adjournment, after which we heard closing submissions. We record our gratitude to counsel for the high degree of professionalism shown on both sides.

Executive summary

10. As this case involved a number of entangled issues, we think it useful to set out a summary of our approach and conclusions, which we hope will make the remainder easier to follow.
 - 10.1 The claimant, who at the relevant time was aged 49, and is of mixed white British and Caribbean heritage, was employed by the respondent in a sales capacity. He was a successful salesman and a well-liked colleague. His claims were of racial discrimination only.
 - 10.2 He was the subject of three allegations after the respondent's annual sales convention in January 2017.
 - 10.3 The first allegation originated from Ms Moran. We find that it arose from a trivial office event. We find that it was expressed in language which indicated and adopted racial stereotyping. We find that the disciplinary investigation carried out by Mr Hodges was tainted by his adoption of the same stereotyping. We find that Mr Hodges' investigation was so poor in quality as to give rise to an inference of racial discrimination, which has not been explained by the respondent. We uphold the complaints of racial discrimination based on Ms Moran's complaint, and on Mr Hodges' investigation of it, and the outcome. We find that Mr Irvine adopted and endorsed the stereotyping in his decision to dismiss the claimant, in part for the Moran allegation. We uphold the complaint of racial discrimination based on his decision to dismiss the claimant.
 - 10.4 The second allegation originated from Ms Ross and Mr Bentham. We find that although it was expressed in language which indicated racial stereotyping, and despite our findings about Mr Hodges' investigation, the stereotype was not adopted by the respondent, and did not form part of the decision to dismiss on that allegation. We reject the complaints of racial discrimination by the respondent which are based on the Ross and Bentham allegations.
 - 10.5 The third allegation was that of Ms Hoffman. We reject the claimant's assertion that it was tainted by a racial stereotype, and all claims based on that allegation fail.
 - 10.6 The claimant was dismissed for all three allegations. We find that as Mr Irvine's decision to dismiss was to a material degree tainted by a racial stereotype, the decision to dismiss was an act of racial discrimination.
 - 10.7 Mr Dacey heard the claimant's appeal. He upheld the appeal against dismissal for the Moran and Ross allegations, but confirmed the claimant's dismissal for the Hoffman allegation. We find that the procedure which he followed, and the decision which he reached, were wholly untainted by any issue of race whatsoever. The claims of discrimination based on the appeal fail.

The legal framework

11. The claim presented as a claim of direct discrimination on grounds of race or colour only. It was therefore brought under the provisions of s.13 and s. 39 of the Equality Act 2010. S.13 provides that, “A person discriminates against another if because of a protected characteristic, A treats B less favourably than A treats or would treat others.” The protected characteristic of race is (s.9) defined to include colour; nationality; and ethnic or national origins. The forms of discrimination are set out so far as material at s.39, of which the material portions were s.39(2)(c) and (d) which provide so far as material: “An employer must not discriminate against an employee... by dismissing B ... by subjecting B to any other detriment.”
12. Although counsel did not address us specifically on the point, they referred to the burden of proof provision which is set out in s.136(2), and provides, “If there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred.”
13. We noted also that s.23 provides that when comparing a claimant with an actual or hypothetical comparator, “There must be no material difference between the circumstances relating to each case.”
14. In the present case, where the only comparator was hypothetical, we were asked to consider a hypothetical white male in the claimant’s material circumstances.
15. Counsel jointly referred to only one authority, Islington London Borough Council v Ladele [2009] ICR 387, in particular paragraphs 39 and 40. While it would be invidious to paraphrase what is said there, we understand the material points for the present discussion to be that we should bear in mind the possibility at least that there are cases in which identification of a comparator is of no or limited value; and that, in the words of Elias P at paragraph 39,

“It is now well established that there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for the act or decision. It follows that there will inevitably be circumstances where an employee has a claim for unlawful discrimination even though he would have been subject to precisely the same treatment even if there had been no discrimination, because the prohibited ground merely reinforces a decision that would have been taken for lawful reasons. In these circumstances the statutory comparator would have been treated in the same way as the claimant was treated. Therefore, if the tribunal seeks to determine whether there is liability by asking whether the claimant was less favourably treated than the statutory comparator would have been, that will give the wrong answer.”
16. The EAT there set out basic propositions on direct discrimination. We bear in mind that the first is that it is the duty of the tribunal to determine “the reason why the claimant was treated as he was.” The second states that, “If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the

only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial”.

17. Where the burden of proof shifts, “The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the claimant unreasonably...quite irrespective of the race etc of the employee ... Of course in the circumstances of a particular case unreasonable treatment may be evidence of discrimination.”
18. The discussion concludes by quoting and adopting the observation of Lord Nicholls in Shamoon v Chief Constable of the RUC 2003 ICR 337:

“Employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was.”

Stereotyping

19. There was considerable discussion at this hearing about stereotyping. The word was used freely in evidence and submission without definition, discussion, or reference to any authority. The claimant’s evidence on the point was brief (WS43). He described his reaction on first seeing the written allegations against him:

“This made me think more about the nature of the complaints and that they were actually related to my race and were racially stereotyping me by accusing me of taking drugs. And, like most black men, I speak loudly with a deep tone and this was taken as being rude.”

20. Mr Pourghazi asked the respondent’s four main witnesses whether they accepted the presence in society of the three stereotypes in this case (see below). All four accepted the existence of the stereotype of drugs use. Ms Moran and Mr Hodges accepted in general terms the existence of a racial stereotype about an ‘attitude;’ Mr Irvine and Mr Dacey did not. None of the four accepted the existence of the sexual stereotype. In light in particular of our finding at paragraph 26 below we do not criticise either party for not adducing any wider evidence on the existence of a stereotype, even if such evidence were available from the social sciences.
21. We understand that stereotyping in this context means attributing characteristics or behaviour to a racial group; and therefore attributing those characteristics or that behaviour to an individual who is or is perceived to be a member of that group. Mere adherence to a stereotypical belief does not alone constitute unlawful discrimination. Discrimination occurs when an individual is treated less favourably in consequence of the stereotype attributed to the group. We noted, but were not referred to, one authority: R v Immigration Officer at Prague Airport 2004 UKHL 55, from which we respectfully adopt two uncontroversial observations, those of Baroness Hale at paragraph 74, and of Lord Carswell at paragraph 113:

‘The individual should not be assumed to hold the characteristics which the [respondent] associates with the group, a process sometimes referred to as stereotyping’ (paragraph 74); and

‘’What may be true of a group may not be true of a significant number of individuals within that group’’ (paragraph 113).

22. We ask first whether the three stereotypes about which we heard are reflected in our understanding, as matters of general experience of society, and in particular of the world of work. We draw in particular on the knowledge and experience of the non-legal members in doing so. We accept, as Mr Pourghazi asked us to, that stereotypes may not be conscious, and need not, in discrimination law, be the sole or main reason for the treatment complained of.
23. We accept that there is in society in general a stereotype which associates black men, and mainly but not exclusively young black men, with responses to authority which run from scepticism through resentment to hostility and resistance, and which are often summarised in the single overarching word “attitude”.
24. We accept that there is in society in general a stereotype which associates black men, and mainly but not exclusively young black men, with the use of drugs.
25. Thirdly, it was put to us on behalf of the claimant that there exists in society a stereotype that black men are sexually predatory or “forward” (the word used in questioning by Mr Pourghazi). We do not agree that there is such a stereotype about black men, as a racial group, as distinct from men in general.
26. Notwithstanding the above, our approach is that we need not go so far as to reach broad conclusions about whether a particular stereotype in fact exists as a social phenomenon. It is sufficient if, following Baroness Hale’s words, we find that an individual has been subjected to detriment because of assumptions associated with the racial group of which he is (or is thought to be) a member. The use of stereotyping language is evidence that a generalised assumption has been made, and we rely upon such language in a number of respects. We find that it is differential treatment in itself, as well as being evidence of differences in treatment in the relevant contexts.

Background findings of fact

27. The identification of the issues before us, and their reduction during the hearing, has left the tribunal with some difficulty in how to present our findings in a way which will most clearly illuminate our reasoning and be easiest to follow. We have found it most useful to set out first a broad chronological summary of the process. We then set out an analysis of issue 2.1, and how it developed and affected issue 2.4. We then deal with the remainder of the issues posed by issue 2.4 and we finally deal with issue 2.3.

28. The respondent is a major supplier of workplace equipment. It employs approximately 1400 people in the UK, based in Telford.
29. The claimant, who was born in 1967, joined the respondent in May 2016 as a home-based Field Sales Executive. He is of mixed British and Caribbean heritage. In the course of the respondent's investigation, and again in evidence in the tribunal, the claimant said that he does not speak 'Queen's English' and that his tone and volume of speech may sound Caribbean. We disregarded that evidence in its entirety, as it seemed to us misplaced, and irrelevant to these events, and to our task. The claimant's speech sounded no different to us from that of any member of the public.
30. The claimant worked in a team under the leadership of Ms Cawdell, who had very long service with the respondent. His area of work was sales and targets driven, and attributed high esteem to the achievement of targets. The respondent's evidence in this case was that he was a "great salesman" and a well-liked colleague.
31. We were concerned solely with the events of Friday 13 January 2017 when the respondent held its annual Sales Convention in Liverpool. We were left uncertain of the exact numbers attending, save that it was several hundred. We were shown the information sheet given to delegates (151). It indicated a working conference day, followed by a Gala dinner and awards ceremony.
32. The sheet set out basic rules of conduct. It included a dress code, which seems, from the photograph which we saw of the claimant's team (150), not to have been strictly enforced, but that is a minor point. The sheet also stated that,

"The normal rules concerning conduct and behaviour apply. This means that any occurrence of disorderly conduct including, fighting, harassment or abusive behaviour will be dealt with under the Company's disciplinary procedure. Conduct which is unreasonable or offensive will not be excused on the grounds that it took place at a social event."
33. That is followed on the sheet by a seven-line section dealing exclusively with alcohol, including a provision for random searches.
34. Our overarching finding is that the standards of conduct set out in the information sheet existed largely on paper. The disregard of the dress code was just a minor example. The investigation report and witness statements which we saw contained many references to unrestrained drinking and drunkenness. The small group of people about whom we heard included one who passed out, and one who had no memory of the evening's events as a result of the amount she had drunk. There was no evidence of any other delegate being disciplined over his or her conduct at the convention.
35. In the course of the evening, Ms Cawdell's team, including the claimant, received the annual award for the best performing team in the country.

36. The convention events took place in an exhibition centre, and delegates were provided with adjacent hotel accommodation. The functions of staging, lighting, convention arranging and such like were supplied through a contractor, Mammoth Productions Ltd.
37. The precise sequence of events, and the relationship between the allegations which followed and how they were made was not totally clear to us, in part due to gaps in the respondent's evidence caused, we were told, by the unavailability of certain emails. For ease of reference in this judgment we refer to three allegations which were made against the claimant. We call the first the Moran allegation. That was an allegation made by Ms Helen Moran that the claimant had been rude. The second we call the Ross allegation. That was an allegation by Ms Jayne Ross of Mammoth Productions that while on the dance floor the claimant had twice touched her breasts, and her related allegation, supported by Mr Bentham of Mammoth Productions, that the claimant had been under the influence of drugs. The third was the Hoffman allegation. That was an allegation by Ms Louise Hoffman that on the dance floor the claimant had pinched, or grabbed, her bottom.
38. The convention took place on Friday 13 January 2017. The Gala dinner took place that evening. We were told that dancing continued into the small hours. A common theme of the witness accounts was that the dinner and disco were high spirited events, and that a great deal of alcohol was consumed. Delegates left the venue the following morning, Saturday 14 January.
39. The following Thursday, 19 January, Mr George Thompson of Mammoth Productions sent an email to Ms Hannah James, the respondent's Marketing Manager. According to Ms Moran, Mr Thompson emailed a photograph of the claimant and asked that the respondent identify the person.
40. This email came to Ms Moran's attention. Ms Moran had worked with Mr Thompson for many years and wanted to know the reason for his query. Mr Thompson replied that there had been an incident involving the person in the photograph and Ms Ross.
41. Ms Moran recognised the photograph as showing the claimant, whom she recognised from what we call the Moran allegation, which is described separately.
42. Ms Moran emailed the Regional Sales Managers to ask if anyone could name the person in the photograph. She also emailed Ms Hoffman, who she understood to have an HR presence, to ask if she could identify him.
43. At 17:02 on 19 January Ms Hoffman replied, "He was a PAIN at the convention," to which Ms Moran replied a moment later: "What did he do – we have him on some inappropriate behaviour with George's team!!" Neither of those emails suggested behaviour of any great seriousness.

44. Over the weekend of 21 and 22 January, staff at Mammoth Productions wrote accounts of what they said had taken place. Ms Ross sent an email to Mr Thompson on the afternoon of 21 January (73). Although these documents should be read in full, the material portion states (both emphases added),

“I was standing with Mr Bentham...when a man approached us.. he was very animated and appeared drunk or high. He was very hyperactive and ranting on... Not much of what he was saying made any sense. While he was ranting on he was standing uncomfortably close to me and his hands were waving about a lot. At one point he briefly touched my right breast, which I was slightly irritated by but let it go without comment as I wasn't completely sure if it was accidental or not ... He carried on making ... comments...then when he touched my breast the second time I stopped him in his tracks, and said “right that's enough, you have done that twice now and it is not acceptable” – at which point he sort of put both hands in the air, started going on about how he ‘loved his mother’ and how he ‘meant no offence’ and eventually disappeared off...”

45. Mr Thompson forwarded the email to Mr Bentham for his comments, who replied,

“Yes that's an accurate record.
He was overtly touching Jayne inappropriately and she did tell him to stop...
The man was self absorbed, offensive and quite obviously high. I'd consider his behaviour as assault if I was Jayne.” (72).

46. Those emails were forwarded to the respondent by the morning of Monday 23 January. That morning the question of any follow-up was placed in the hands of Sarah Renton of HR. Ms Renton was not a witness, and there was no statement from her. It appears that she may have been the first person to adopt the view that the three issues – Moran, Ross and Hoffman – were properly to be approached as one, under the umbrella of unprofessional behaviour. That became the view of everyone else who dealt with the matter, until and except Mr Dacey.

47. Ms Hoffman had a conversation with Ms Renton and told Ms Renton the factual basis of her comment that the claimant had been ‘a pain’. That morning Ms Hoffman emailed to Ms Renton. Her email said in its entirety:

“Hi Sarah As I mentioned, Wayne Lewis' behaviour at the Gala dinner at the Sales Conference on 13/01 was inappropriate and made me feel very uncomfortable. Despite me asking him to stop on multiple occasions he continued to pinch women's bottoms including mine and made people feel uncomfortable.” (71).

48. Ms Renton asked Ms Moran to write about her interaction with the claimant. A few minutes later Ms Moran emailed Ms Renton (70) as follows:

“During the exhibition ... I was stood on the main course talking to Steve Tighe and Greg Fry. I witnessed a rep speaking to a member of the venue staff in a way that I didn't find appropriate, he was very rude and had what I would describe as a disrespectful “attitude” to the gentleman he was speaking to. I excused myself from the conversation with Steve and Greg and approached Wayne and asked him if I could help him.

He adopted the same manner with me to start off with, I asked him what he needed help with and he said well I don't know where I am meant to be. I said let me have a look at your badge and see if we can't get you to the right place. I told him where he needed to go to which he walked off – with no thank you etc.

Overall my opinion of him was that he had a very poor attitude and I didn't feel he was respectful towards either myself or the Venue staff. There was no need to behave in the manner he did for what could have been a simple direction request. I was equally surprised that he would behave in that manner in front of [Mr] Tighe and Fry”.

49. Later that morning Mr Hodges was asked to conduct a potentially disciplinary investigation. Mr Hodges had joined the company about two months previously. He told us that the last occasion on which he had conducted a disciplinary investigation had been in 2003, in a previous employment. Like Ms Moran, Mr Irvine and Mr Dacey, he had not had, or could not recall, training in issues of diversity and equality. At 12.20pm Ms Ashley-Ruff, HR Manager, who was tasked with supporting Mr Hodges, emailed the claimant to tell him that Mr Hodges wished to speak to him at 5.00pm. Her email said, “You will not to (*sic*) prepare anything in advance of this.” (80).
50. Mr Hodges had a telephone call of 50 minutes with the claimant that afternoon. He and Ms Ashley-Ruff listened on speaker phone and Ms Ashley-Ruff typed notes (92-95), headed, “Investigation meeting.” There was no meeting, there was a telephone call. The claimant was asked about the emailed complaints against him, which he had not at that point seen. He denied the allegations put to him of improper behaviour at the gala event, and suggested six colleagues who would verify his denial. Ms Ashley-Ruff's notes were not sent to the claimant for comment or correction.
51. On the following day, 24 January, Mr Hodges had a face to face meeting with Ms Cawdell, in the presence of Ms Ashley-Ruff (96). That was the only part of the investigation in which Mr Hodges interviewed a potential witness in person. Ms Cawdell expressed shock and surprise at the allegation. She robustly rejected the allegations against the claimant, asserting both that she had seen nothing untoward, and that she would not have tolerated any form of sexualised misbehaviour.
52. In the course of the same day Mr Hodges conducted telephone interviews (with Ms Ashley-Ruff listening in) with four other members of the claimant's team who had been present at the convention, Mr Chohan (97); Mr Shapiro (99); Mr Mohammed (101) and Mr Chana (103). All the notes of the meetings were prepared in the way described above, and all were headed 'Meeting' notes. None was sent to any interviewee to check or for comment. None of the interviewees confirmed having seen the claimant conduct himself inappropriately. All confirmed that drink was a major factor throughout the event. In reply to being asked if he had seen 'anything of concern,' Mr Chana answered (104), “If my partner was there I wouldn't be worried, there was no groping or anything sordid, I got groped a couple of times but put it down to people enjoying themselves and having a good

time.” The claimant had suggested a sixth person, Ms Gordon, who was not spoken to; in his evidence Mr Hodges was unable to explain why not.

53. Mr Hodges did not meet, interview or seek clarification from any of the complainants. That concluded Mr Hodges’ investigation and he subsequently wrote a report (106) which found that there was a case to answer at a disciplinary hearing. Although Mr Hodges told the tribunal that he had the support of the HR Manager, there was no evidence of any specific point on which he asked for support, or on which she advised.
54. On 13 February Mr Irvine wrote to the claimant and asked him to attend a disciplinary hearing on 20 February (112). He sent the claimant Mr Hodges’ report and appendices. That was the first the claimant saw of the primary complaints against him, or of the notes of any of the interviews, including his own.
55. In reply, (114) the claimant submitted a document in which he set out his response, and stated repeatedly, and for the first time, that he considered that he had been discriminated against on grounds of his race, and victimised.
56. The claimant attended the disciplinary meeting on 20 February. Mr Chana joined him as his companion. The meeting lasted in excess of two hours. Mr Irvine was supported by Ms Robinson of HR (117). Mr Irvine had very long service with the respondent, and told us that he had conducted about 100 dismissal interviews, most of them related to performance targets. There was some discussion of the claimant’s complaint that he had been discriminated against. At the end of the meeting Mr Irvine informed the claimant that he was dismissed and gave his reasons (127).
57. He was told that his employment ended that day and that he would not be paid notice. His employment ended on 20 February 2017, which was the effective date of termination of employment. Mr Irvine confirmed the outcome in a dismissal letter of 22 February (130) which confirmed the claimant’s immediate dismissal for gross misconduct. The letter was brief to the point of curtness. It did not confirm in writing the detailed outcome which had been given to the claimant at the meeting. It failed to set out the precise allegations, the course of investigation, the reasoning process, and the choice of dismissal as sanction. It gave no reply to the claimant’s allegations of discrimination.
58. The claimant exercised his right to appeal and was invited to attend an appeal meeting on 15 March 2017, which was conducted by Mr Dacey, supported by Ms Hodgkiss (136). The claimant was not accompanied at the meeting, and following the meeting Mr Dacey undertook some further enquiry.
59. On 20 March, he interviewed Ms Hoffman, one of the original complainants (144). Neither of his predecessors, or their HR support, had done this. Ms Hoffman confirmed that she had been ‘grabbed’ twice by the claimant, and

that the second time, she told him to go away, and he went away (144). Mr Dacey asked Ms Hoffman if she could identify anyone else whom the claimant had touched. This question had not previously been asked. He asked Ms Hodgkiss to contact Ms Powell, who was named by Ms Hoffman as another person touched by the claimant. Ms Powell had by then left the respondent's employment and Ms Hodgkiss communicated with her by email. Ms Powell (87) was asked, "Do you recall anything happening to you whilst you were on the dance floor at the Sales Convention?" to which she replied, "Nothing happened to me directly in regards to Wayne."

60. Ms Hoffman mentioned a third person as potentially a victim of touching by the claimant. The respondent's grounds of resistance stated that that person "was asked informally during the investigation stage whether she could recall anything of the events. She replied that she could not due to the amount of alcohol she had consumed." (34). Although Mr Pourghazi asked, no witness was able to give any evidence about this portion of the respondent's pleading, which was not supported by any evidence from Mr Hodges, and of which there was no documentary record.
61. By letter of 3 April (147) Mr Dacey upheld the claimant's appeals on two of the allegations on which he had been dismissed. The letter should be read in full, but, briefly, Mr Dacey found that the Moran allegation could not on its face constitute gross misconduct, and that the Ross interaction had not been shown to be intentional. As Mr Dacey found that neither of those allegations was of gross misconduct, he agreed that the claimant should not have been dismissed for either of them.
62. Mr Dacey rejected the claimant's appeal on the allegation of pinching Ms Hoffman on the bottom. He upheld the finding that the claimant had committed an act of gross misconduct in relation to Ms Hoffman, which he defined as "you did pinch the bottom of Louise Hoffman, twice on the night of the Gala" (149). He found that this was gross misconduct, and confirmed the claimant's dismissal for that matter alone.
63. Mr Dacey also set out his considerations and conclusions on the claimant's complaints of discrimination, and other points of appeal. He agreed with some of the claimant's criticisms of Mr Hodges' investigation and report. He did not agree that there had been discrimination. We find that he was the only person on behalf of the respondent who took the discrimination allegations seriously, thought about them, and set out a measured view in writing.
64. We now consider each matter separately and we turn first to the Moran allegation.

The Moran allegation

65. The allegation is set out in its totality in Ms Moran's email of Monday 23 January 2017 (70), set out at paragraph 48 above. That was written ten days after the event. In her witness statement, Ms Moran gave no instance or detail of the conduct which she criticised in the claimant. She was

pressed to in oral evidence, but could not. She was asked to answer hypothetical possibilities of what might amount to rude or disrespectful behaviour, such as a raised voice, aggressive language, swearing or such like. She agreed that none of those was the case. She was unable to say what the claimant had said or done wrong which led her to complain, and at times seemed not to understand the question or its potential importance.

66. We find that the incident lasted no more than a couple of minutes. It occurred at a convention attended by several hundred people, including the claimant who was then relatively new to the respondent, and had not attended an annual convention before. The claimant could not find his way to the meeting which he was to attend. He was late, and was flustered. He asked support staff for directions. Ms Moran was distracted from her conversation, went over to the claimant, and gave him directions. She had been in conversation with two senior Directors, and was displeased to have been interrupted. The claimant rushed off to his meeting. Ms Moran said in evidence that he may not have given her a salutation, and the claimant (during his telephone interview) accepted that he rushed off without saying thank you.
67. At worst, the claimant failed to say good morning at the start of his interface with Ms Moran, and thank you and goodbye at the end of it. It was a banal workplace moment. Its triviality is shown by the fact that Ms Moran got over her irritation and carried on working for another ten days without giving it any thought. She wrote her complaint about it when prompted to do so by Ms Renton, and as a make weight, added in consequence of what she and Ms Renton understood to be two other complaints against the claimant.
68. In writing her complaint, Ms Moran referred twice to a lack of respect and twice to the claimant's attitude, using that word, on the first occasion, in inverted commas. She gave no clarification at any stage of what she meant by 'attitude'.
69. We find that the language used by Ms Moran indicates that she brought to her complaint against the claimant a racial stereotype of black men as people lacking respect for the authority of others (notably in this case, her own authority), thereby displaying the 'attitude' which we have sought to define at paragraph 23 above. We reach this conclusion because of Ms Moran's inability, at any time, to identify the factual basis on which she wrote her report; and because of the extreme disproportionality between the language of her report and the triviality of the incident which triggered it.
70. We attach further weight, as evidence of stereotyping, to Ms Moran's conviction, later shared by Mr Hodges and Mr Irvine, that the three events formed a pattern. We can see no pattern which could reasonably relate a hurried failure to say thank you with sexual misconduct. We agree with Mr Pourghazi that the only pattern was the involvement of the claimant.
71. We do not find that Ms Moran's stereotyping was necessarily conscious, nor do we find that the claimant's race was the only reason why she wrote her report: we accept that she did so at the request of HR, and we accept that

her choice of language may have been driven in part by her irritation that a conversation of three senior figures had been interrupted.

72. We find that by writing a formal complaint against the claimant on 23 January 2017, Ms Moran subjected him to a detriment. We then ask whether that was an act of discrimination. We find that it was. We find strictly that the detriment in question had two limbs, which were the making of the complaint, and the manner of its expression. Our finding on the first limb is that to a material degree, Ms Moran made the complaint on racial grounds, of which her use of stereotypical language is evidence. Our finding on the second limb is that the use of stereotypical language is of itself a second, separate detriment.
73. We heard no submission on the characteristics of a hypothetical comparator; and it may well follow logically from our findings on stereotyping that none need be considered. For avoidance of doubt we add our finding that if Ms Moran had had the same interaction with a white sales person on 13 January, she would not have subsequently complained, or complained of his 'attitude.' We heard scant submission on the burden of proof. Our finding, in light of the above, is that the respondent has not given an explanation of Ms Moran's report or language which stands free of race.
74. In the course of his telephone interview of the claimant, Mr Hodges asked him about the incident: "It was said that you were rude and disrespectful. ... It is alleged that you had a very poor attitude at this time" (92-93) to which the claimant could only reply, in the absence of any further information, and without having read Ms Moran's email, "I am shocked to hear that I had a poor attitude I wasn't rude" (93). Later he said that he remembered asking for directions; he introduced an issue about the quality of his spoken English, and stated, "I forgot to say goodbye and thank you." (94).
75. As stated above, the issue of the claimant's spoken English seemed to us a distraction. The claimant spoke fluent mother tongue English which was perfectly clear to understand, and did not to this tribunal appear to differ from the speech of the average Londoner. In any event, there was no evidence on behalf of the respondent which addressed this issue.
76. In his report about this incident, Mr Hodges wrote that the complaint was that the claimant had been 'disrespectful in attitude and very rude in his tonality to both a venue employee and Lyreco Employee (107).' There was no evidential basis for the words 'in his tonality.' Ms Moran had not made that complaint, and Mr Hodges had not interviewed her. Although Ms Moran had written the words 'very rude' she was never asked before this hearing what exactly had been said or done that was very rude.
77. Mr Hodges' conclusions on the allegation were, "To some extent at the end of the investigation meeting (*sic*) with Wayne, he admitted that his conduct may not have been professional in the daytime when he stated that he was in a rush and doesn't speak the Queen's English" (111). It would have been more accurate had the word "meeting" not been used to describe a telephone call. The claimant had not admitted that he had been

unprofessional; he admitted not saying thank you. We find that Mr Hodges' paraphrase is something of a misrepresentation. It conveys an acceptance of unprofessional conduct on the part of the claimant, which we do not find the claimant to have given.

78. We find that Mr Hodges adopted, without inquiry, Ms Moran's complaint about the claimant's 'attitude'. Having done so, he wrote a report which was adverse to the claimant, and recommended that the case against him should proceed. We find that by doing so, he subjected the claimant to a detriment on grounds of race, and accordingly discriminated against him on the respondent's behalf. We accept that the racial grounds which we have found were not conscious, and were not the sole or main grounds for the claimant's treatment, but they were material.
79. The same matter was discussed at the disciplinary hearing, when the claimant introduced another distraction, namely the volume of his speech, whether he spoke in what he called "a hard deep tone" and whether his speech was characteristically Caribbean. Mr Irvine again raised the issue of professional conduct.
80. When he came to dismiss the claimant, Mr Irvine did so on the basis that all three allegations were of equal gravity (128). The dismissal letter (130) described the Moran matter as "the first allegation of unprofessional conduct." Mr Irvine confirmed in his witness statement (WS23 and 28) that the claimant had been dismissed in consequence of Ms Moran's allegation. We find that Mr Irvine subjected the claimant to the detriment of dismissal. We find that he did so to a material degree because he adopted Ms Moran's complaint about the claimant's attitude, which he then categorised with the other complaints against the claimant, as forming part of the reason to dismiss. We find that on that basis alone, the respondent discriminated against the claimant through Mr Irvine's decision to dismiss.
81. At the dismissal meeting, Mr Irvine had before him the claimant's complaint that he had been discriminated against. The discussion was noted by an HR Advisor, Ms Robinson. The notes contained the following exchange:
 - "WL Things like that making me feel discriminated against,
 - SI Word discrimination keeps coming up, why
 - WL Just do, feel like that, nothing specific
 - SI Anything specifically from allegations and statements" (124).
82. Later in the same meeting Mr Irvine gave his conclusions, and said,
 - "I have taken all three as equal 3 bad things, in our business. We are a professional business, one of our value professionalism. Helen's – it's how she was made to feel, Louise – how she was made to feel, and thirdly someone out of our business – made to feel uncomfortable" (128).
83. We have considered those two passages in light of Mr Pourghazi's repeated cross-examination of Mr Irvine, in which he replied that the claimant's allegations of discrimination were not looked into, because there was no evidence to support them, other than how they made the claimant feel.

84. We interpret the above as showing first that Mr Irvine declined to consider or inquire into the allegations of discrimination. He did so because he required evidence of the factual basis of the claimant's feeling or perception. Later in the same meeting, he said that he had based his conclusions against the claimant on how the primary complainants said they had been made to feel (although only one, Ms Hoffman, had said so in terms).
85. We find that this disparity in approach, taken with the failure to inquire into the claimant's grievance, lead us to reject Mr Irvine's contention that he conducted this proceeding in reliance on professional HR expertise. We do not accept that an HR professional could have advised that he proceed as he did.
86. We conclude that Mr Irvine's dismissal of the claimant was to a material degree brought about by Mr Irvine's adoption and endorsement of the allegation made against the claimant by Ms Moran, which was itself driven by a racial stereotype. It follows that we find that a stereotype about the claimant's race was a material factor in his dismissal. We accept in so finding that the attitude stereotype was not a conscious stereotype in the mind of Mr Irvine, and if it is suggested that Mr Irvine discriminated against the claimant on grounds of race or colour otherwise than by applying to him that stereotype, we reject that contention.
87. When the Moran allegation came before Mr Dacey, his conclusion was a rare breath of common sense: "Even if you were disrespectful, and you used a rude "tone" (and there is dispute about whether you did), I don't find that either of these could be considered gross misconduct and, therefore, uphold your appeal for this part of the disciplinary action" (149). We add only that the claimant's tone of voice was not part of Ms Moran's complaint; it formed part of the claimant's defence.
88. We accept therefore that the stereotyping which we have found in the actions of Ms Moran, Mr Hodges and Mr Irvine did not affect Mr Dacey or his consideration of the matter, or the outcome of the appeal.

The Ross allegation

89. We have set out at paragraphs 44 and 45 above the totality of the Ross allegation, and of the material emails from Ms Ross and Mr Bentham in support of it. In reaching our findings of fact, we must bear in mind that although it was alleged, until the end of the evidence, that each had discriminated against the claimant, neither was called, and there was no witness statement from either. They may not have had the opportunity to answer the claimant's allegations against them. Indeed, as they do not work for the respondent, they may not even have been told about them.
90. Neither of them had met the claimant before the gala, so neither could have any view about how he usually spoke or behaved. Their interaction with him lasted no more than a few moments, on a busy dance floor. It took place in a setting which we have found (paragraph 34 above) included widespread

uninhibited drunkenness. We find that in that setting, and in light of all the evidence about behaviour at the gala, neither Ms Ross nor Mr Bentham can have had any reasonable basis for forming the view that the claimant was under the influence of drugs. We find that each applied to him a stereotype about the association of drug use and black men, which each then expressed in a written complaint to the respondent. That was the factual basis of issue 2.2 in the list of issues.

91. In submission, Mr Pourghazi said that the claim against the respondent about their reports was withdrawn, because in light of evidence that Ms Ross and Mr Bentham were employees of Mammoth, the claimant accepted that he could not make out the existence of a relationship between them and the respondent to which s.109(2) would apply. (That sub-section provides that, "Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.") The claimant did not withdraw any factual allegation about the drugs complaint, or against the respondent for its response to the allegation.
92. Although Mr Hodges asked the claimant about the drugs allegation, there was no evidence that he pursued it any further. The claimant denied the allegation vigorously. We have found that the drugs allegation, and therefore the relevant racial stereotype, were in the event not pursued on behalf of the respondent. They were not referred to in the conclusions to Mr Hodges' report, or the invitation to the disciplinary meeting, or Mr Irvine's dismissal letter. We do not find that any part of the drugs allegation played any part in Mr Hodges' outcomes, or in Mr Irvine's decision to dismiss the claimant.

The Hoffman allegation

93. We have not found that the sexual stereotype alleged exists. That finding does not determine the question before us, because we must separately consider whether any part of the process before us was tainted by a stereotypical view of the sexual behaviour of black men, and whether the claimant was treated on the basis of such a view.
94. We find that a racial stereotype played no part whatsoever in any stage of this process. That finding applies equally to Ms Hoffman's complaint, Mr Hodges' investigation and the outcomes of the Hoffman complaint, Mr Irvine's decision to dismiss on the basis of the Hoffman complaint, and Mr Dacey's confirmation of that decision.

Conclusions on the above findings

95. Issues 2.1 and 2.4 in the appended list succeed.
96. There was brief reference at this hearing to what consequences might logically follow if we reached the conclusion which we have in fact reached, namely that the discrimination which we find in relation to the actions of Ms Moran, Mr Hodges, and Mr Irvine, including dismissal, did not extend to Mr

Dacey. We record that any consequence may be dealt with at the remedy hearing.

The disciplinary investigation

97. We now turn to issue 2.3 which was that the claimant was treated less favourably because of his race by the respondent “failing to carry out a proper disciplinary investigation.” This allegation rested on the actions of Mr Hodges. It was advanced on two grounds. One was that Mr Hodges adopted the stereotypes found in the reports which he received, and we have upheld that claim in part. We now turn to the second, which was that he discriminated directly against the claimant in the poor quality of the investigation which he conducted.

98. We find as follows:

98.1 Mr Hodges was inexperienced in conducting any form of disciplinary investigation. This was the first one that he had undertaken for some 14 years. He had had no training in diversity issues.

98.2 He was new in post, making new relationships with new colleagues, and to that extent may well have found himself in a process which had been triggered by a senior colleague, and which would be concluded by another senior colleague.

98.3 He said that he had the support of the acting HR Manager (Ms Ashley-Ruff). We refer to our wider finding at paragraph 109 below about evidence of HR input.

98.4 Mr Hodges did not interview any of the primary complainants, two of whom were employed by the respondent. The gaps in Ms Moran’s written complaint were clear: apart from a complaint that the claimant failed to say thank you, Mr Hodges could not have read from her complaint what it was that the claimant was supposed to have done wrong.

98.5 Likewise, his failure to interview Ms Hoffman meant that there was no opportunity to test points which were clear from the material before him, eg (a) that she had asked the claimant to desist “on multiple occasions” (which was not her evidence to us); (b) that he had assaulted others (which was not corroborated by any other alleged victim); (c) that she was made to feel uncomfortable (she was not asked why her first report was made ten days after the event, and in response to a request from Ms Renton); or (d) why, when first asked about the event, she said only that the claimant had been ‘a PAIN’ (capitals in original, paragraph 43 above).

98.6 We do not accept Mr Pourghazi’s criticism that Mr Hodges failed to show the claimant the written complaints before the investigatory phone call. Our experience is that first investigations are almost

always undertaken by ambush, precisely so that the spontaneous reaction of the employee can be assessed.

- 98.7 There were nevertheless three problems with conducting the interview by telephone: first, Mr Hodges could not assess the claimant's reaction if he could not see him; secondly, he did not, after the call, give the claimant the written allegations to comment on; and thirdly the claimant was reliant on Mr Hodges' paraphrasing of the complaints over the phone.
- 98.8 We repeat our concern that the respondent relied upon documents entitled meeting notes, which were not notes of meetings, but notes of telephone conversations, and that none of the notes was verified by the interviewee.
- 98.9 The claimant nominated six potential witnesses to be interviewed on his behalf; Mr Hodges could not explain why he had only interviewed five, and only one in person.
- 98.10 Mr Hodges' interaction with Ms Cawdell was troubling. She was the most senior person closely involved with the claimant. Mr Hodges interviewed her in person on 24 January (96). Mr Hodges recorded her as saying,

“All night we were together and maybe I have made a mistake but I haven't seen anything. I am a feminist person so you can't cross the line with me, is (*sic*) someone is rude or crosses the line I will not accept this but nothing happened like that. Sometimes I can be too cool, but with this type of thing I am not ... I am shocked and surprised at any allegation.” (96).

- 98.11 When he came to write his report, Mr Hodges wrote that Ms Cawdell,

“[W]ent on to say that she was a feminist and that people could not cross the line with her. This concerned me that Marie may have known more of the allegations made against Wayne than what she should do, I have been very clear to Wayne that the matter was to be kept confidential.”

- 98.12 Ms Cawdell had been in post many years. She had just received an award for her leadership of the sales team of the year. Her commitment and experience to the respondent business could not be in question. If Mr Hodges thought that she had been tipped off by the claimant, and had therefore tailored her answers, he was free to ask her, or the claimant, but he did not. Mr Dacey later wrote, correctly, that, “There didn't appear to be any basis for this [conclusion]” (148).
- 98.13 Mr Hodges' evidence to us was, “Her approach seemed unnatural [*sic*], she said she was a feminist, she wouldn't allow that, I don't know why she said that.”
- 98.14 Ms Cawdell's observations seem to us plain as day. She told Mr Hodges that she is a woman who cares about the rights of women,

and has zero tolerance of abuse of the rights of women. We can see nothing unnatural about that response. Mr Hodges described her in evidence as “biased”. He appeared to respond with inexplicable hostility to a woman bringing a woman’s perspective to an allegation of sexual harassment. It was troubling, in that context, to note that the claimant had asked that two women colleagues be interviewed. One woman was not spoken to at all; and the response of the other was dismissed out of hand.

- 98.15 We are concerned by the quality of Mr Hodges’ report. A major part of the report consists of paraphrases. We make a general finding that the paraphrases in the investigation report do not appear to be a fair representation or summary of the primary source, repeatedly to the effect of worsening the case against the claimant. We note the following non-exhaustive matters, quoting from the report, and then giving our finding or comment.
- 98.16 *“Three different complaints were received by the company”* (107). Our finding is that the receipt of the Ross complaint led Ms Renton to invite the complaints of Ms Moran and Ms Hoffman. It is not correct to imply, as the report does, that three unconnected cases arose spontaneously from three mutually independent sources.
- 98.17 *“Stating that he was disrespectful in attitude and very rude in his tonality”* (107). Our finding is that there was no reference to tonality in Ms Moran’s email (70).
- 98.18 *“On multiple occasions pinched women”* (107). Our finding is that the allegation of plurality was not made out.
- 98.19 *It’s not acceptable.”* Our finding is that while that phrase is a quotation from Ms Ross’ complaint, it seems to us misleading to fail to quote the next sentence, set out in full at paragraph 44 above, and which was consistent with the lack of intention found by Mr Dacey.
- 98.20 *“He couldn’t remember anything specific and that his recollection of the evening was vague”,* (108). Our finding is that this phrase is not a fair summary, particularly when written about a drink-fuelled event. The claimant was first asked a completely open question, “Is there anything you would like to tell me about anything that happened,” to which the claimant replied, “I had a good time but there is nothing that I remember. I vaguely remember that something happened when we got back to the hotel” (92).
- 98.21 Mr Hodges interviewed Mr Chohan by telephone (97). Mr Chohan told Mr Hodges that he was “sober throughout the evening.” He also commented on four occasions that he was watching or looking out for colleagues (not just the claimant) to make sure that they were alright. He gave some account of his interactions with a number of colleagues, and of the behaviour of each. When expressly asked

about 'people getting overly touchy' Mr Chohan replied, "[The claimant] was going from one dance floor to the other, and we were watching to ensure there was no trouble" (98). He concluded, "If something amongst our team had happened we would have discussed it and there hasn't been anything mentioned" (98). Mr Hodges reported (109) that Mr Chohan said, "*He did not witness anything out of character and "looks" out for people.*" That is not a fair representation of what Mr Chohan said.

98.22 "*There are discrepancies with account [sic] of the evenings events.*" (110) Mr Hodges did not identify any discrepancies in the report, and he could not do so in evidence. We do not agree that there were discrepancies beyond those which are reasonably to be expected when ten days after it happened five people are asked separately to describe an event which lasted several hours.

99. At the end of his report, Mr Hodges wrote, "Based on facts gathered from the conversations had... it does not provide any evidence to contradict the allegations against Wayne".
100. We have considerable sympathy with Mr Pourghazi's submission that that phrase indicated that in Mr Hodges' mind the onus was on the claimant to disprove the allegations, and that that was inherently impossible for him to do. It was inherently impossible for the claimant to prove what he had done throughout every moment of the evening, particularly on crowded dance floors.
101. Mr Hodges gave no consideration to the genesis of the complaints, and no independent consideration to the triviality of Ms Moran's complaint. He took the three complaints as forming a pattern. We do not agree that he had a reasonable basis to do so. We find that there was no reasonable basis on which the Moran matter was generically alike or probative of the other two complaints, or vice versa.
102. In considering this issue, we have a number of cautions well in mind. First, this was not a case of unfair dismissal. Considerations of section 98(4) of the Employment Rights Act do not arise, including the range of reasonable responses. The question for the tribunal is not whether Mr Hodges treated the claimant fairly. The question is whether he was treated less favourably on grounds of race, in which formula we include less favourably by application of the racial stereotype described above. Mr Pourghazi's submission that the extreme unfairness meted out to the claimant was evidence of racial discrimination summarised our problem, which is that while counsel may have been correct, the tribunal must not conflate unfairness with discrimination.
103. We must base our conclusions on the evidence. We must take care not to over emphasise the view which we form of a witness' fluency or demeanour at the witness table. We accept that giving evidence in a tribunal may be a stressful and artificial experience. We must be cautious with what inferences we draw from the evidence of a witness who appears

unconvincing. Mr Hodges was a poor witness, for reasons summarised at paragraph 107 below. We accept, not without misgivings, that our findings may reflect Mr Hodges' inadequate preparation for the process of giving evidence (which was one of a number of points of contrast with the impressive evidence given by Mr Dacey).

104. In a compelling submission, Mr Pourghazi submitted that there were cumulatively remarkable shortcomings in Mr Hodges' investigation: he did not interview the complainants, he did not investigate the email allegation trails, he gave the claimant no information in advance of the conversation with him, he did not identify to the claimant who were the sources of the complaints, he sought no corroboration from the complainants of their complaints, he disregarded the evidence supporting the claimant, he discredited Ms Cawdell for reasons which were at best unclear, he failed to interview the sixth person suggested by the claimant, he offered no interviewee the opportunity to check interview notes, he did not show the claimant the complaints against him before completing his report, he wrote an outcome which was not an accurate reflection of his investigation, he merged the three allegations into one.
105. Counsel submitted further that Mr Hodges' answers in evidence were "confusing and evasive" and that he was for example unable to explain why he had attached so little weight to Ms Cawdell's evidence; whether he knew at the start of the matter that the claimant was black; and why he attached weight to the multiplicity of allegations and the mere fact that they had been placed in writing.
106. Mr Pourghazi summarised his submissions in a single brief point: that there was in the investigation "such a remarkable degree of unfairness, and so little by way of investigation, as to shift the burden of proof."
107. When asked about these shortcomings in cross examination, Mr Hodges was repeatedly unable to answer, and answered many questions by saying that he had done the best he could, dealing honestly with the material he had at the time, and without the hindsight available to a tribunal. We do not accept the last of these points. Apart from the steps taken by Mr Dacey (which Mr Hodges could have taken), the claimant's analysis, and our findings, are based on material which was reasonably available to Mr Hodges at the time.

Conclusions on issue 2.3

108. We have found that Mr Hodges' investigation and outcome were tainted by his adoption of Ms Moran's racial stereotype about the claimant. We conclude in addition that the investigation conducted by Mr Hodges was, taken cumulatively, so conspicuously inadequate in so many respects as to cause the burden of proof to shift. We find that the respondent has failed to discharge the burden of demonstrating to the tribunal that there was an explanation for the claimant's treatment which stands free of race. We uphold the complaint at issue 2.3, and find that the respondent discriminated against the claimant as alleged.

HR involvement

109. We heard during this case the names of a number of members of the respondent's HR function, who, we were told, were involved in supporting Ms Moran and Ms Hoffman, and then each of Mr Hodges, Mr Irvine and Mr Dacey. The only one who gave evidence was Ms Hodgkiss. There was evidence of HR staff being occasionally tasked with writing emails, and taking notes of meetings. There was no evidence that any HR professional at any stage was asked by any manager for her opinion or guidance, and no evidence of such guidance ever having been offered. We do not accept that any of the managers from whom we heard, with the exception of Mr Dacey, understood the need for HR guidance, or asked for it, or was given or followed it. We reach this stark conclusion because the tribunal cannot accept that the process which we have here described was undertaken with the benefit of professional expertise. While the previous sentence, like the rest of this Judgment, represents our unanimous conclusion, it is particularly the finding of the non-legal members, based on their substantial professional experience of workplace investigations.

Further

110. The parties are reminded that it remains open to them to settle their differences before the remedy hearing. They are also reminded that if they consider that further case management by the tribunal would be of assistance before the remedy hearing, they should contact the tribunal without delay.

Appendix

"The issues

Race discrimination: direct and victimisation

2. Did the Respondent treat the Claimant less favourably than they treated or would treat others, because of his race as alleged in the ET1? In particular by:
 - 2.1 Alleging he was loud and rude to venue staff on 13 January 2017, or perceiving his manner of communication as such
 - 2.2 Alleging he had taken drugs
 - 2.3 Failing to carry out a proper disciplinary investigation
 - 2.4 Dismissing him
3. Who are the appropriate comparators? – actual or solely hypothetical as pleaded in the ET1, in particular, white males?"

Employment Judge R Lewis

Date: 21 June 2018

Sent to the parties on:

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For the Tribunal Office