Appeal Nos. UKEAT/0417/14/DXA
UKEAT/0029/15/DXA
UKEAT/0030/15/DXA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
On 14 & 15 July 2015
Judgment handed down on 7 August 2015

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR A BHAM — APPELLANT

2GETHER NHS FOUNDATION TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS NABILA MALLICK (of Counsel)
For the Respondent	MS REHANA AZIB (of Counsel) Instructed by: Bevan Brittan LLP Kings Orchard 1 Queen Street Bristol BS2 0HQ

SUMMARY

RACE DISCRIMINATION - Direct

RACE DISCRIMINATION - Inferring discrimination

HARASSMENT

VICTIMISATION DISCRIMINATION - Other forms of victimisation

The Appellant appealed against (1) a Substantive Decision of the Employment Tribunal ("ET") dismissing his claims for discrimination and victimisation on the grounds of race, and harassment on the grounds of religion and belief, (2) a Decision refusing to reconsider the Substantive Decision, and (3) a Decision ordering him to pay costs.

The appeals against the Substantive Decision and the Reconsideration Decision were dismissed. The Employment Appeal Tribunal held that the ET had correctly directed themselves in law on the substantive claims. It also rejected an argument that the ET had failed to make reasonable adjustments during the hearing for the Appellant.

It further held that, whether or not the ET had erred in refusing to reconsider its Substantive Decision, the appeal against that decision having been dismissed, it was not in the interests of justice for the ET to reconsider that decision.

The appeal against the Costs Decision was allowed, on the grounds that the ET had given inadequate reasons for ordering the Appellant to pay costs. The costs application was remitted to the ET for reconsideration.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. These are conjoined appeals against three Decisions of the Employment Tribunal. The Employment Tribunal consisted of Employment Judge Livesey, Mr H J Launder and Mrs E Burlow.

2. The first Decision followed a hearing on 27 February, 3 to 6, and 10 to 14 March 2014. In its Judgment and Reasons sent to the parties and entered on the register on 14 March 2014, the Employment Tribunal ("the ET") dismissed the Appellant's claims of discrimination on the ground of the protected characteristic of race, and of harassment on the grounds of religion or belief. The second Decision was a decision to refuse to reconsider the Decision of 14 March. The third Decision followed a hearing on 10 June 2014. The Reasons for the third Decision were sent to the parties and entered on the register on 15 July 2014. The ET by that Decision ordered the Appellant to pay a total of £1,366 in costs to the Respondent. That award was made on the basis of the Appellant's conduct in the run up to the hearing. I will refer to the first Decision as the Substantive Decision, to the second Decision as the Reconsideration Decision and to the third Decision as the Costs Decision.

The Appeals in this Case

3. Ms Mallick represented the Appellant at the Rule 3(10) Hearing in this Tribunal under the ELAAS scheme. I record my gratitude to her for that, and for her representing him at this hearing. She did this pro bono, as an extension of her ELAAS work. I am sure that by representing him she has ensured for him the best possible chance of success, and that she has

also helped me by refining the issues substantially. She pursued his interests with unflagging determination, and remained steadfast in the face of my questions. I also record my gratitude to Ms Azib, who has represented the Respondent, for her helpful and succinct submissions.

4. Ms Mallick relied on five broad grounds of appeal against the Decision of the ET on the substantive hearing. They were that the ET erred in law:

1. in its approach to the complaint of victimisation;

2. by failing to stand back and to look at the complaints cumulatively;

3. in failing to address the complaint of direct discrimination on grounds of religion or belief which had been wrongly characterised by the Respondent's counsel as a complaint of harassment;

4. in its approach to the 10 April 2010 appeal (making a perverse decision and giving inadequate reasons for it);

5. in failing to make reasonable adjustments for the Appellant by giving him breaks during the hearing which he needed on account of his disability, and because he was a litigant in person.

5. She did not pursue ground 4 at the hearing.

6. Her grounds of appeal against the ET's decision on the reconsideration application are that the ET should not have refused to entertain that application on the grounds that the Appellant had not copied it to the Respondent. She acknowledges that the Appellant had, in that respect, failed to comply with Rule 71, but submits that the ET should not have treated that failure as one which invalidated his application. Her ground of appeal against the ET's decision

on costs was that there was no sufficient basis for making an award of costs. She submitted that the Appellant was on benefits, and that the ET failed to consider the impact of the costs order on him. The ET did not explain why they considered that he had the means to pay.

The Substantive Decision

The ET's introduction to its Reasons

7. The ET recorded in its Reasons that the procedural background was complicated. The Appellant had already made one claim against the Respondent (issued in April 2010) in which he had claimed direct discrimination, victimisation, and harassment on the grounds of the protected characteristics of both race and sex.

8. Both claims focused on a meeting which had taken place on 4 November 2009, on the investigation which had followed that, and on grievances which had been raised by the Appellant in December 2009 and January and February 2010. Those claims had been heard in March 2011 and had been dismissed by an ET. The Appellant appealed then to this Tribunal. That appeal was dismissed in September 2013. At the time of the ET's Substantive Decision that matter was pending in the Court of Appeal.

9. The claim in this case was issued on 29 September 2011. There were various attempts to clarify the issues at case management hearings and the Appellant eventually produced a 15-page schedule of allegations. There were further hearings.

10. This claim was originally set down for hearing in October of 2012. There were further procedural issues, including an further appeal by the Appellant to this Tribunal. In the meantime

he had issued three further claims on the 24 July, 23 August and 12 December 2012. Those three further claims were initially listed to be heard with this case. This case was set down to be heard on its own in February 2013 as the Appellant had by then lodged a further appeal against various case management decisions. That appeal was still outstanding at the date of the ET hearing in this case.

11. As the ET recorded, the issues in this case fell into what it described as chronological window between those that were dealt with as part of the first case and those which were covered by the three claims issued in 2012. The 2012 claim related to the Appellant's dismissal and other issues occurring both before and after that dismissal.

12. The ET recorded at paragraph 4.2 of its Reasons that the Appellant described himself as an Asian Muslim. His complaints of the direct discrimination contrary to section 13 of the **Equality Act 2010** ("the 2010 Act") and of victimisation contrary to section 25 of the **2010 Act** were as follows:

> **"(1) Sending the Claimant home on the 11 January 2010;**
>
> **(2) Dismissing his grievance on 13 April 2010 and denying him the opportunity to appeal;**
>
> **(3) Proceeding with disciplinary hearing on 30 September 2010 in his absence [In fact the date as the ET recorded was incorrect. Both parties had agreed that the hearing took place on 21 October and 4 November];**
>
> **(4) On 20 June 2011 failing to allow him to return to work contrary to the Respondent's Grievance Policy which applied at the time when the Appellant raised his grievance on 11 January 2010 and which referred to a preservation of the status quo;**
>
> **(5) On 23 June 2011 unilaterally withdrawing the Appellant's grievance;**
>
> **(6) On 30 June 2011 commissioning an investigation not predicated under any Trust policy or procedure;**
>
> **(7) Failing to follow the Trust's own policies and procedures;**
>
> **(8) Failing to respond to the Appellant's request to pursue his grievance."**

13. The ET recorded that, in the relation to the first issue, it was necessary for it to decide whether that issue had effectively been determined in the proceedings which the Appellant had issued in 2010. If it had been, then it would not be appropriate for the ET to re-decide it. The ET recorded in relation to the seventh allegation that the Appellant had been asked to provide four examples of the way in which the Respondent had failed to follow its own policies and that the Appellant had done so under cover of an email dated 11 May 2012; in fact, more than four examples had been given. The ET recorded, in the relation to the eighth allegation, that two examples of the instances in which the Appellant had said that his grievance was not pursued by the Respondent had also been supplied under cover of the email dated 11 May 2012. The ET said that, in relation to the claim of victimisation, the protected act was said to have been the Appellant's grievance of 11 January 2010 and the first set of tribunal proceedings which had began on April 2010. The Respondent had conceded that those matters qualified as protected acts under the section 27 of the **2010 Act**. The ET then mentioned the discrete claim for harassment on the grounds of the protected characteristic of the Appellant's religion or belief. This, the ET said, concerned a remark made by Mrs Andrews in an interview. The Claimant became aware of that remark in October 2011.

14. A case management order made by Employment Judge ("EJ") Mulvaney on 3 May 2012 made it clear that the ET also had to decide jurisdictional time issues. The Respondent's argument was that the first of the three issues which the ET had listed were out of time and could not, in factual terms, have formed part of a series of connected acts. The Appellant argued that his complaints were part of a course of conduct, or of a series of connected acts and if that was wrong, it would be just and equitable for time to be extended.

15. The ET said this at paragraph 5.1 of its Reasons,

> **"These reasons would not be complete if they did not reflect the significant input required from the Tribunal to manage the hearing within the time estimate, which the parties had agreed at the outset was probably generous."**

16. The ET went on to say that it would serve no purpose to set out the full extent of that input and the problems that had to be overcome. They concerned the Appellant's reluctance to leave the factual issues alone which had been decided by the previous ET, and his repetitive and, at times, hectoring questioning of witnesses and his inability to take guidance from the Tribunal. The ET said that although the litigants in person frequently need help and guidance, it was rare, in their experience, for them to need as much guidance and, at times, insistence, as had been needed in this case. They did go on to say that the situation had improved once the Appellant had agreed to prepare his own time-table for cross-examination but even then he had strayed from this earlier on, and had needed further help to ensure that he focused on the relevant issues. The ET was left in little doubt that the case would have run for many days over the time estimate, if the Appellant had been given free rein.

17. However, in fairness to the Appellant, the ET also made clear that their comments would not have been balanced or complete if they did not also record the fact that the Appellant's conduct and focus improved during the course of the hearing. The ET thanked him for that.

The ET's findings of fact

18. The ET made a number of detailed factual findings in section 6 of its Reasons. I summarise them below.

19. As initial factual background, the ET referred to the Reserved Judgment and Reasons given the Appellant's 2010 claim. The Respondent is a mental and social care provider serving Gloucestershire. It employs around 2200 people. The Appellant was employed by the Respondent from June 2008 as a community development worker ("CDW"). The team in which the Appellant worked had the job of helping the hard-to-reach communities in Gloucestershire, including black and minority ethnic groups, to get access to mental health and social care form the Respondent. The Appellant accepted in his evidence that it was part of his role to be a positive advocate for the Respondent and that in order to be effective, the CDW team had to work as a team in order to meet its objectives.

20. The ET in this case then set out in paragraph 6.4 of its Reasons a summary of the matters which had been decided by the previous tribunal in the 2010 case. It recorded, in a paragraph 6.5 of its Reasons, that as a result of convoluted procedural background to this case, the events which were relevant to the claim happened rather a long time ago. Before setting out its full factual findings, the ET made some comments about the evidence which it heard.

21. It said that the Appellant was undoubtedly an intelligent man. He was well respected in his community and held a number of elected positions. He had given his time to sit as a magistrate since 2005, but the ET said, he did not impress them as a witness. The ET was surprised by the extent and the nature of the matters which he disputed in his evidence. For example, he was not prepared to accept that the notes of grievance and disciplinary interviews were necessarily accurate. He seemed to find suspicion and doubt even in the most uncontroversial documents. He even objected to the accuracy of a Cast List which was produced by the Respondent's counsel for the purposes of a hearing, which was no more than a

simple list of the main personnel involved in the case and their job titles. The ET said that the Appellant's willingness to see bad faith and suspicion in so many documents and events did not assist in portraying his case with credibility. His habit of badgering witnesses, of talking over them and of failing to heed the ET's advice and direction gave credence to much of what the Respondent's witnesses had said about his behaviour in the workplace.

22. The ET recorded its surprise at the contents of the Appellant's witness statement. That statement dealt with historic issues extensively, in other words, matters which had been before the previous tribunal. It was only just over half way through the witness statement that the Appellant began to deal with matters that were relevant to the issues identified as being the issues in this case by EJ Mulvaney. Even so, many of the issues were not covered at all. He was asked why that was so. The ET recorded that they found his answer unsatisfactory. That was, that he was inexperienced and had been ill at the time. The ET felt that he had shown a good understanding of the procedure of tribunal and that as a magistrate he would have had an understanding of the need to cover relevant information in a witness statement. He did not give any detailed evidence about the nature and extent of his illness at the time the statement was written; but, the ET noted, whatever his illness had been, it did not apparently hinder his prosecution of current claim, of the three claims issued in 2012 and of the original 2010 claim.

23. The ET said that at the start of 2010, the Appellant was still part of the CDW team. That team also included Manisha Jani, Farooq Ismail and Zain Patel. The two last were also Asian Muslims. The team at that stage was line managed by Mr Davies, who had taken over from Mrs Andrews just before the end of December 2009. That had occurred because Mrs Andrews was focus of the Appellant's grievance.

24. There was an investigation into the Appellant's conduct on 4 November 2009. Those conducting the investigation interviewed the relevant witnesses in December. After the Appellant raised his grievance on 11 January 2010, many of the witnesses were re-interviewed, as part of a broadened investigation by the same team. Some of the contents of those interviews were put to the Appellant in cross-examination during the Tribunal hearing. He accepted that the statements provided at the second interview were substantially similar to the accounts which had initially been given in 2009. The ET recorded that in some respects, in their view, the statements were actually worse. Examples were Mr Patel's reference to the Appellant's grievance having been "*baseless*" and Mr Ismail's suggestion that it was "*completely frivolous*" and was "*wasting people's time*".

25. A Fact Finding Review was produced in respect of the allegations about the Appellant's conduct on 4 November 2009 and his grievance. The report concluded that there was no evidence to support the Appellant's allegations against Ms Hall or Mrs Andrews. The team found no evidence of institutional racism. The report made clear that its scope did not include any consideration of what was referred to as the 'Addendum' grievance submitted on 15 February 2010. That raised separate issues and the team felt that the commissioning manager should consider whether a separate investigation of that was needed. The report left it up to managers to decide what further action to take. On 13 April 2010 Mr Trewin met the Appellant and told him the result of the investigation that his grievance had been dismissed. That was confirmed in the letter of the same date.

26. The ET said, at the paragraph 6.15 of its Reasons, that it was noteworthy, that despite having been one of the issues clearly identified by EJ Mulvaney, the Appellant's witness

statements contained no criticism at all of the actual grievance outcome. In the light of the statements which had been gathered during the investigation, the Appellant accepted in cross-examination that the documentary evidence was unanimously against him and that the Respondent would have made its judgment based on that.

27. The 'Addendum' grievance, which was issued on 15 February 2010, concerned issues surrounding a comment made by Ms Jani in 2008. There was a gap of a year between the issues covered by the grievance and the 'Addendum' and the Appellant had made no complaint about the 2008 incident until February 2010. Mr Trewin thought that this was outside the scope of the grievance investigation and the letter of outcome expressed that view. Mr Trewin was prepared to commission a further investigation if the Appellant wanted him to do so. He repeated that offer on 28 June. The Appellant never took up that offer. His only response was to criticise Mr Trewin for failing to have considered the 'Addendum' in the conjunction with his other complaints.

28. The Respondent's Dignity at Work Policy under which the Appellant's grievance had been investigated contained a right to appeal, although the Appellant said that he was not aware of that. The Policy was available on the Respondent's Intranet, as the Appellant accepted. In his letter of 13 April, Mr Trewin had failed to tell the Appellant that he did have a right of appeal. Mr Trewin said in his statement that that was a "*simple oversight*" by him.

29. An examination of the Appellant's conduct on 4 November had been suspended once the Appellant had issued his own grievance. Once the grievance had been decided, the Respondent returned its attention to these issues, and Mr Trewin reached the conclusion that the

investigation had shown that there was a case for the Appellant to answer. The Appellant was first invited to a disciplinary hearing on 21 April. The allegation that he faced was "on Wednesday 4 November 2009 at Collingwood House, you demonstrated unacceptable behaviour in the form of verbal aggression toward another member of staff in breach of the Trust's Dignity at Work Policy".

30. The meeting was rearranged several times for various different reasons. The Appellant attended a postponed meeting on 23 June. He asked for it again to be postponed as he said that he had only had a 39-day mourning period instead of a 40-day mourning period following the death of his mother. Mr Trewin consulted with a Muslim member of the panel, Dr Uppal, who had never heard of such a mourning period. The ET said that during his evidence before them, the Appellant initially suggested that he had said no such thing, but then suggested that he might have done so, albeit mistakenly. A second reason for the application for the hearing to be postponed was also given by the Appellant. Given a combination of those factors Mr Trewin reluctantly agreed to postpone the meeting. His reasons for postponing the hearing were set out in a letter dated 28 June 2010. The ET said that this was a generous approach.

31. On 7 July, a further hearing date was arranged. On 15 July, the Appellant was signed off work with anxiety and the hearing was cancelled pending advice from Occupational Health. The Appellant stayed absent through illness until June 2011. In the meantime, he had issued his first ET claim on 1 April. On 1 September 2010, the Appellant wrote to Mrs Harrison and demanded that a Fact Finding Review should be withdrawn and that, if it was not, he might report Dr Buntwal, one of the members of the team, to her professional body. He said that the

report had been malicious, biased and a misrepresentation of the facts. The ET said that that seemed to have then to have been an intemperate letter.

32. By 22 September, the Appellant was judged by Occupational Health to be fit to go to a further disciplinary hearing. Dr Vivian (the Respondent's Occupational Health physician) was keen to see matters resolved so that the Appellant's health might recover so that he might then be able to return to work. The hearing was rearranged for 21 and 22 October. The letter about this told the Appellant that Mr Farooq and Mr Ismail would be attending the hearing to give evidence at his request but that Ms Jani and Mrs White had declined to do so, explaining that they thought that the experience would be "too intimidating and distressing".

33. There was then a further letter from the Appellant concerning his health. The Appellant's GP, Dr Lush, wrote to the Respondent about this but did not address the criteria in Dr Vivian's letter. Dr Lush said that while the Appellant might not have been fit to attend a disciplinary hearing, he might well have been fit to attend to represent himself at the forthcoming four-day Tribunal hearing. The Respondent did not see the GP's letter as a sufficient reason to overturn the view of its own Occupational Health physician that the Appellant was fit to attend a disciplinary hearing.

34. On 15 October the Appellant submitted another grievance, complaining about the treatment which he said he was suffering at the hands of Mr Trewin, and about the arrangements for a disciplinary hearing. The Appellant did not attend the hearing and Mr Trewin decided that it should continue in his absence because the up-to-date medical evidence suggested that he was fit to attend, and there have been several postponements already.

Witnesses, Ms Hall, Mrs Andrews, Mr Patel, and Mr Ismail were called to give evidence. The Appellant had asked seven witnesses to attend on his behalf. They had all been asked to do so, but five were not willing to, and the Respondent had no way of compelling them to. Mr Patel and Mr Farooq were prepared to give evidence. The panel decided that they should have their say in, the interest of fairness to the Appellant. The panel consisted of Mr Trewin, Dr Uppal and Mrs Harper. The panel found the allegation proved. A final written warning was issued, effective for two years from 4 November 2010. A very detailed letter of outcome dated 11 November 2010, which included a summary of the evidence that panel had heard, was sent to the Appellant.

35. On 30 November, the Appellant indicated that he wanted to appeal. The Respondent tried to get advice from Occupational Health about his fitness to attend an appeal hearing but the Appellant would not consent to the Respondent's seeing the result of that referral. That caused significant delay.

36. On 11 March 2011, the Appellant was sent a letter by the Deputy Director of HR, Ms Sparks, telling him that Mr Trewin's letter dismissing his grievance in April 2010 should have included a notification of his right of appeal. She added that any grievance appeal should be heard before his appeal against the disciplinary sanction. He was asked to file details of his appeal within 5 days of the hearing. A provisional date was set aside for that purpose, with the disciplinary appeal to follow. The Appellant did not submit any details of an appeal and so on 30 March, Ms Sparks again wrote to him suggesting that his letter of 30 November 2010 would be taken as grounds. The grievance then took precedence over the appeal on the disciplinary issue.

37. The Appellant's first ET claim was heard between 28 and 31 March 2011. Various members of the Respondent's staff gave evidence and they were all cross-examined by the Appellant, who represented himself. He called Mr Patel and Mrs White to give evidence for him.

38. On 7 April, the day of the hearing of the grievance appeal, the Appellant telephoned Ms Sparks and told her that he was not well, and would not be coming. The panel decided that it would be justified to postpone the hearing of a grievance appeal. This in turn led to a postponement of the hearing of the appeal on a disciplinary point. On 20 April, the Appellant wrote to the Respondent and asked for other new matters to be included in the appeal which had come to light as a result of recent ET hearing. The Respondent replied that the appeal would not be broadened to take into account those new matters. A further new date for the grievance appeal was provided.

39. Despite further chasing letters sent by the Respondent, the Appellant did not provide any grounds of an appeal. On 18 May, the Appellant's daughter telephoned the Respondent to say her father had been admitted to hospital. The grievance appeal was then postponed again and a third new date was provided. He was asked again to provide grounds for his appeal. Also on 18 May, the Reserved Judgment and Reasons in the first ET claim were sent to the parties. On 2 June, a further Occupational Health report repeated that the Appellant was fit to attend internal hearings. At this stage, the Appellant was working from home, which according to Mr Davies, was an arrangement with which he was content. On 5 June 2011, the Appellant wrote to the Respondent's Chief Executive, Mr Clee, and told him that he thought that the original disciplinary process had been flawed because the his grievance appeal had not been

decided. In the same letter, however, he also expressed concern that the grievance appeal would be nothing more than a pointless exercise and futile. The Respondent then asked him whether he was withdrawing his appeal. He did not reply directly to that question, but it was clear from his reply that he would not engage further until he had had a satisfactory response from Mr Clee.

40. During the course of the ET hearing, the Appellant tried to suggest that he had become confused about which appeal was which. However, as the ET recorded, his own letter of 5 June had made it clear that he was well aware of the distinction between the disciplinary and grievance appeals.

41. There was a further postponement of the hearing on 7 June 2011. A further date was set. The Appellant was encouraged to take a more active part in the appeal and to provide proper grounds. He was asked to provide those by 14 June. He was warned that if he did not do that, his appeal would be treated as having been withdrawn. Despite a further reminder on 17 June, the Appellant sent in no grounds of appeal. He was then told on 23 June that his appeal was considered by the Respondent to have been withdrawn.

42. The 30 June was to have been the fourth date for the appeal hearing and, as the ET recorded, the Respondent had effectively led the appeal, first by bringing it to the Appellant's attention, and then by repeatedly asking him to provide grounds. In the light of those factors, the ET held that the Respondent's decision to treat the appeal as having been withdrawn was "perfectly understandable and reasonable" in the circumstances.

43. The Appellant had been away from work through illness throughout that period. On 10 June 2011 he wrote to his new line manager and said that he would be able to return to work on Monday 20 June. He asked how it was planned that he would be reintegrated into the team. Mr Trewin was given this letter and he wrote to the Appellant to say that he thought it was appropriate to have a meeting in order to consider how the Appellant's return to work would be managed. The meeting took place on 20 June. Mr Trewin said to the Appellant that because of the short notice of his proposed return to work, he, Mr Trewin, had not had time to consider its implications properly. Refresher training would normally be required given the length of the Appellant's absence. Mr Trewin needed to consider what support and training the Appellant might need and what support might be needed by others in the team. He was concerned that the Appellant failed to appreciate that the 2009 issues might have left other team members feeling apprehensive about the Appellant's return to work.

44. There was a suggestion that the Appellant should take some accrued annual leave. The Appellant initially said that he was unsure whether he wanted to take annual leave. He asked Mr Race to note that he believed that he was being stopped from coming back to work in a team. He also said that he did not want to be "victimised again", which, with some understatement, the ET said, "ran somewhat contrary to the Tribunal's previous findings". The Appellant then decided he did not want to take any annual leave but Mr Trewin was unwilling to have him back at work immediately, and put him on special leave. The Appellant then, after all, did want to take annual leave. He remained, nonetheless, on special leave. Mr Trewin then booked the Appellant onto the induction course on 4 July which would have enabled him to be trained to the extent necessary.

45. The Respondent then turned its attention to the Appellant's appeal against the final warning. He had issued that appeal in November 2010. It had been delayed because of the grievance appeal. The ET said that no evidence was led by the Respondent about that. The Chronology before the ET suggested that the appeal was ultimately dealt with on 6 October, in the Appellant's absence, but the Appellant did not agree that document. On the other hand, as the ET had recorded, those issues were not challenged by the Appellant and the ET said that they were not issues before it.

46. When Mr Davies found out that the Appellant was intending to return to work he told the CDW team about it. In the ET's words, "they expressed significant misgivings about the prospect". The upset caused back in 2009 had been relived and exacerbated during the Tribunal proceedings and the relationships were a long way from being repaired. In different ways, the members of the team expressed feelings of vulnerability and nervousness about a possible repeat of the Appellant's behaviour. Ms Jani said that she would be unable to continue in her employment if he returned. Mrs White said, "To ask his colleagues to forgive and forget is a step too far after what he has put us all through for the last 19 months-calling into question our credibility, capability and integrity; not to mention attempting to tarnish the Trust's reputation such that the community will not work with him. The greater needs of the Trust and of his team should take precedent."

47. On 30 June 2011, the Respondent started a formal investigation into whether the working relationships in the CDW team had irretrievably broken down. It was carried out by Mr McIlveen and Mrs Bubb-McGhee. Mr Thompson wrote to the Appellant about that and the Appellant was kept on special leave. Two members of the Respondent's staff were

commissioned to do the investigation. During the ET hearing the Appellant claimed not to know what the investigation was about although the letter had referred to "the working relationships between you and your colleagues" and the "people who would be working with you". The ET said that they found that his stated ignorance, given the particular history, to be inherently improbable. The Respondent did not have a policy which dealt with a situation involving an alleged breakdown of working relationships and so had to devise a special procedure to enable it to deal with this situation.

48. The interviewees were worried about the Appellant's effect on service delivery generally, his behaviour at work in the team, and that there might be a repeat of conduct like that of 4 November 2009. They also expressed concerns about the ET hearing in March 2011. Mr Ismail and Mr Patel were unhappy that the Appellant had apparently tried to set up a community meeting in which he had tried to persuade leaders (Imams, Muftis and Mr Patel's father) to put pressure on them to change their evidence. Ms Jani was unhappy that the Appellant had referred back to her comment in 2008 in the ET hearing. Dr Buntwal noted that Ms Hall had been upset by the Appellant's conduct at the ET hearing. Ms Hall echoed that. Other managers referred to the Tribunal proceedings in broader and much more generic terms. The ET said at paragraph 6.53 of its Reasons, "It was important to note that these were complaints about the Appellant's behaviour in connection with the Tribunal hearing. Their concerns were not about the nature or subject matter of the claim itself".

49. The ET noted that Mrs Andrews had been interviewed as part of the investigation on 8 August 2011. Her evidence was that the team had lost all trust in the Appellant and that the Appellant had also lost the faith of the community which he had served. She referred to the

difficulties that were caused for Mr Patel and Mr Ismail by the Appellant's attempt to contact staff outside of work to try and to gain their support. She referred to his approaches to senior family members and Imams in order to put pressure on them to support his version of events. She said that the Appellant had openly tried to gain support and improve his credibility by trying to discredit his colleagues. He had suggested that his colleagues lied on oath, which had caused further emotional distress to them, particularly from a religious prospective.

50. The Appellant attended for his own interview on 5 September. The interviewers, after a procedural discussion, asked him; *"Could you return to the current team and how do you feel about that?"* The Appellant made it clear to them that he would not answer the question unless he knew what procedure was being adopted. His behaviour, as the ET described it, paralysed the process. The interview finished without the Appellant having answered any of the questions. During his evidence, the Appellant said that he would not respond meaningfully to questions because he did not understand the "charges" that he faced. The ET said in paragraph 6.55 of their Reasons, "In our view, that was disingenuous". The Report was then finished without any further input from the Appellant and sent to Mr Race on 15 September.

51. On 27 September 2011, the Appellant issued a further grievance against Mr Thompson. He complained that the investigation had not been conducted under any recognised policy. He was unclear what allegations had been made against him. He made 21 complaints which reflected a continuing loss of faith in, and suspicion of, the Respondent. He made further allegations of discrimination. Mr Clee replied to the letter on 13 October and dealt with some of the concerns. He referred the others to the officer who commissioned the investigation, and those in turn were referred to the panel for them to consider, in addition to the other issues.

52. At that stage, the Appellant had seen the investigation report but did not know what the Respondent intended to do about it. Mr Clee told the Appellant that many of his 21 complaints might best be raised at any panel hearing that might have to be convened as a result of the report. The Appellant was asked to comment on the report, since he had not taken part in the interview.

53. On 5 October 2011, the Appellant was asked to go to a meeting to be held on 10 October to discuss the report. There was in fact a meeting with the Appellant a day later, on 11 October. The Appellant was given a copy of the report and was asked to respond to it. He did so on 23 October. This was a long and detailed critique of the evidence, as the ET described it, and of the procedures which had been used to produce it. As the ET said, "Nowhere within it was there any hint of an olive branch; no apology, remorse or contrition was ever expressed". The ET added that the Appellant's case was that that was because he had never been given an opportunity to do so.

54. On 15 November, the Appellant raised what looked like a further grievance, although in fact, on close reading, the letter was a request for a 27 September grievance to be "re-initiated and fully pursued". On 21 November, a panel met in order to consider what to do as a result of the contents of the report. The Appellant did not turn up. He had said in earlier letters that he had would not do so. Mr Quinn was not especially surprised. Nonetheless, the panel decided that it would give the Appellant one more chance to take part, and postponed the hearing. Once Mr Quinn had considered the evidence, he decided to ask further questions only from the CDW team members. He got replies to his questions. He raised similar questions of the Appellant

but the Appellant did not reply. Unfortunately, as the ET recorded, those three pieces of the additional evidence were not supplied to the Appellant before the hearing of 5 December.

55. There was a further hearing on 5 December. The Appellant was given a copy of the Respondent's Mediation Scheme in the hope that that would encourage him to use this method of repairing the relationships. The Respondent implored him to attend a meeting so that they could understand all of the possible ways in which bridges between him and the team could have been re-built. He did not take up that option and made it clear that he would not take the part. He said, "My attendance will only be a tokenistic gesture and I will be unable to assist the panel any further. I trust you will communicate my views to Mr Quinn and the panel".

56. The panel meeting went ahead on 5 December. The Appellant had sent a letter the day before setting out the conditions on which he would agree to attend. That letter also said that as far as he was concerned, there was no issue between him and the team. The ET said this about that, "That view clearly flew in the face of the evidence within the report which he had". Before the meeting started, Mr Quinn discussed his letter with the Appellant and the Appellant continued to profess ignorance about the panel's remit. Mr Quinn repeated what had been set out in the previous letters but it was clear that the Appellant would not engage, and he left without discussing any of the substantive issues.

57. On this occasion, the panel decided to continue in the absence of the Appellant. It heard the evidence. It examined the report and the additional letters at length. In the light of the size of the team, the strength of feeling in it, and its need to operate effectively as a team, the panel unanimously decided that the relationship between the Appellant and the team had irretrievably

broken down. That view was expressed in a detailed 11-page letter which explained the panel's decision. The letter said this:

> **"It is the panel's conclusion that the working relationship between you and your colleagues in the CDW team has irretrievably broken down. There was a very strong sentiment within what is a small team that the trust and respect between you and them has broken down and, at the very least, there would be a very severe strain on the working relationship should you return to the team. One member of the team has said that he would consider moving if you returned…In making this decision, the panel has balanced the views and rights of your colleagues, and the Trust's duty of care towards them and its patients, the fact that the team is a small one as well is taking into account your own rights. The panel also took into account your lack of engagement in all parts of this process and your lack of acknowledgement that there is a problem in the working relationship with your colleagues.**
>
> **On the same basis the panel have no confidence that you would make any efforts to repair relationships…it is the belief of the panel that if you returned to the CDW team there would be significant dysfunction which would impair both the quality and effectiveness of the service provided. In addition, there is a real risk that your return to the team may result in team members leaving the employment of the trust. This is clearly undesirable."**

58. The letter referred to the Appellant's previous ET proceedings, which had been mentioned in the report by way of background information. Mr Quinn clearly directed the panel that those were not relevant to the issues which the panel had to decide. He said this:

> **"As part of its deliberations the panel did not take into account any references to or opinions about the Employment Tribunal process. The panel were also clear that we were considering only your return to your current role and if we believed you could not return then what options existed."**

59. The panel considered mediation as a possible alternative. Its view, however, was that since the Appellant had not "displayed any understanding of his colleagues' views, perceptions or concerns", it was unlikely to have been effective, particularly since the Appellant had not co-operated with the process that had led to the panel hearing.

60. As a consequence of this, the Appellant was identified as being at being *"at risk"* and the Respondent's Management of Change Procedure was then applied to him. The Appellant was promised training to update his skills, and the vacancy bulletins, and protected applications, for roles for which he met the minimum job specifications. The benefits associated with this

status under the Procedure lasted for 12 weeks. After that the Appellant was warned that his future employment would have to be reconsidered. Mr Telford was allocated to him as his new operational line manager. The Appellant was told of his right of appeal against this decision. The ET said that it was worth noting that the decision to try retain the Appellant in some role in the Respondent was contrary to the views expressed by both Dr Buntwal and Mr Trewin in the investigation by Mr McIlveen and Mrs Bubb-McGhee.

61. The ET noted that those matters in the Appellant's 27 September grievance, which directly concerned that investigation, had been considered at the hearing on 5 December and the letter contained responses to the issues which had been left outstanding. On 29 December, the Appellant wrote to Mr Clee asking to be reinstated in the CDW team "immediately". Mr Clee did not accede to that request.

62. Mr Merker, the Respondent's Chief Operating Officer, chaired an appeal against the 5 December decision on 10 April 2012. As the ET recorded, the events leading up to that hearing were as convoluted as others in the history. A number of hearing dates was set and then postponed. The ET also noted that throughout that process, the Appellant had repeatedly been asked for his grounds of appeal, which had never materialised.

63. On 10 April 2012 he had been due to attend a telephone Case Management Discussion in respect of the current ET claim. The Respondent's representative had not been notified of that hearing. The Appellant had alleged that the Respondent had deliberately arranged the appeal on that day when it was known that he would not be present. The ET recorded, "We have no reason to suspect that the Trust had rigged this as a trap". The Appellant did not go to

the appeal hearing because he chose to attend the telephone ET hearing instead, nor did he give the Respondent any indication that there was a clash, or that he was not going to attend. The Appellant tried to suggest in his cross-examination of Mr Merker that one of his reasons for not attending the hearing on 10 April was because he had been confused by a mistaken reference in Mrs Harrison's letter to 10 May. The ET's view, on the evidence, was that his stated confusion was "illusory". The further reason that the Appellant gave for not attending on 10 April was a suggestion that he had been ill. Mr Merker looked into that suggestion and decided that there was no evidence on which he could conclude that the Appellant was in fact medically unfit to attend the hearing. The ET also noted that the Appellant had been given a chance to attend the appeal by a conference call, and that he had not taken that option, despite having chosen to attend the ET Case Management hearing the same day by telephone.

64. So on 10 April the panel was faced with an absent Appellant. The panel's view, in the light of the facts that the Appellant had not attended, and had not supplied any grounds of appeal, and because of the lack of evidence that he was ill, and the intransigent approach of his earlier letters, was that he had again refused to engage in the process. The panel therefore decided to go ahead in the absence of the Appellant. The appeal was dismissed.

65. The ET made findings in respect of a further feature of the appeal. Mr Race had originally been due to be present as the HR representative, but because he was on annual leave, the Appellant was then told, in a letter dated 30 March, that Mrs Harrison would take that role. On 4 April, the Appellant had written to the Respondent to ask that seven people should attend the hearing as his witnesses, including Mr Race. Mrs Harrison had replied that he had been told before that it was his responsibility to ask his witnesses whether they would be prepared to

come to the hearing on his behalf. As far as the ET were aware, the Appellant had never asked any of the seven whether they would attend. He merely reiterated his request that they do so to the Respondent on 8 April.

66. Finally, the ET recorded that what may or may not have happened after that hearing was very much part of the subsequent 2012 proceedings. The ET did not need to go any further into those issues.

The ET's legal directions

67. The ET set out the legal framework in section 7 of its Reasons. It noted that the claims were brought under sections 13, 26 and 27 of the **2010 Act**. They were therefore all claims of detriment in the employment context within the meaning of section 39(2)(d). The ET noted that the claim of direct discrimination was brought under section 13 of the **2010 Act**. It set out the definition in that provision accurately. The protected characteristic relied on in that case was race. The Appellant was Asian (section 9(1)(c)). The ET said that the Appellant had asked that the ET to compare his situation with that of hypothetical comparator who was not Asian. The comparison that the ET had to make under section 13 was that set out in section 23 (1) of the **2010 Act**. That is "On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case." The ET then said that they had approached the case by applying the test in **Igen v Wong** [2005] EWCA Civ 142 to the provisions of the **2010 Act** about the burden of proof (sections 136 (2) and (3)). They set those out accurately.

68. The ET said that test encouraged them to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. They were permitted to take into account the Respondent's factual evidence at the first stage, but they needed to ignore explanations or evidence about motive in that evidence. The ET said that they had reminded themselves that unreasonable treatment of itself is generally not relevant in considering the test. What is relevant is whether there is evidence from which they could see, either directly, or by reasonable inference, that the Appellant had been treated less favourably than others not of his race because of his race. The ET said that they had also considered whether the matters complained of were enough to constitute less favourable treatment within the meaning of the section. The test for what amounted to less favourable treatment was an objective one and it was the treatment itself rather than its consequences that the ET had to focus on.

69. The test of causation under section 27 was similar to that under section 13. They were required to consider whether the Appellant had been victimised "because" he had done a protected act, but they had not applied the "but for" test. They directed themselves that the act had to have been an effective cause of the detriment but did not have to be its principal cause. What, however, had to have been the cause was the act itself, and not the issues around it. In that connection, the ET referred to the decision in **Martin v Devonshire Solicitors** [2011] ICR 352. In that case, a claim of victimisation failed because the motivation for the unfavourable treatment had been not the fact of the Appellant's complaints but the way in which they had been made. The Appellant in that case had been dismissed as a result of an irretrievable breakdown in the working relationship between her and her employers. The ET dismissed her claims, holding that there were several things about the Appellant's behaviour in relation to her grievances (their frequency, repetitive nature and untruthfulness) which had affected the

employer's view, and which had nothing to the fact that the grievances had raised allegations of sex and disability discrimination. The ET noted that the then President of this Tribunal, Underhill J (as he then was), had encouraged ETs to concentrate on the statutory language on causation in the context of that case, and the word "because". He referred to Lord Nicholls' approach in **Nagarajan v London Regional Transport** [1999] ICR 877; "whether the prescribed ground or protected act 'had a significant influence on the outcome' ".

70. The ET said that the Appellant had referred them to **Woodhouse v West North West Homes Leeds Ltd** [2013] UKEAT/0007/12 in which this Tribunal had warned against using the decision in **Martin** as "a template into which to fit the factual aspects of a case in which victimisation was alleged". They also said that the circumstances in that case had been exceptional and tribunals needed to be cautious about seeing features, such as a multiplicity of grievances, and obsessive over-reaction by an employee, as exceptional. This Tribunal referred to paragraph 23 of the decision in **Martin**. In paragraph 98 of its own decision this Tribunal then clearly accepted, according to the ET, that an employee's conduct or behaviour might be a reason to separate or stand between the conduct complained of and the protected act.

71. The ET added that in order to succeed under section 27, the Appellant needed to show two things. Firstly, that he was subjected to a detriment and secondly, that that was because of the protected acts. The ET said that they had applied the "shifting" burden of proof in section 136 to that test as well.

72. The ET also noted that there was a complaint of harassment under section 26 on the grounds of the Appellant's protected characteristic of religion or belief (section 26 (5)). They

then quoted section 26 (1) and (5) accurately. The ET reminded themselves of the test in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336. The test they had to apply was essentially objective but with a subjective element. If the objective bystander was likely to have seen the behaviour as satisfying the test in section 26, the claim would succeed but the bystander was entitled to take into account a particular Appellant's perception before concluding whether the test had been met. Intention might be relevant but was rarely determinative.

73. The ET then considered time issues. The Respondent had argued that the first three issues in the ET's initial list were out of time. The first question was whether the claims had been brought within the period of three months starting with the date of the act to which the complaint related. If not, the next question was whether taken together they were "conduct extending over a period" within the meaning of section 123 (3)(a). The Appellant argued that they were, and in addition that if any of the claims were out of time, time should be extended because it was just and equitable for the ET to do that.

The ET's conclusions

74. The ET set out their conclusions in section 8 of their Reasons. The ET started by making a general point about the way in which the Appellant's case had been put. The ET noted that he had put his case on victimisation to the relevant witnesses properly (if not excessively) but that they could not remember any time when he had suggested that any particular thing had been done to him because he was Asian. The ET said that in closing submissions, the Appellant seem to accept that failing but asked the ET to accept that because he was an inexperienced litigant in person, he should not be penalised as a result. The ET then

set out the Respondent's response to that argument which was that the Appellant was a magistrate and a previous litigant in the ET. He was reasonably familiar with the need to put his case to witnesses in cross-examination and his approach to cross-examination had been consistent with his own statement, which also made no reference to direct discrimination on the grounds of the Appellant's Asian ethnicity. The ET recorded the Respondent's argument that there was also an inherent improbability in his claim of discrimination since all 3 other members of the CDW team were Asian and no member of the team had complained of any poor treatment at the hands of those whom the Appellant criticised.

75. The first issue which the ET dealt with was the time issue. The ET held that there was no doubt that the first three issues were substantially out of time. They also held that the incidents relied on were "a succession of unconnected or isolated specific acts". Nonetheless, the ET were satisfied that it was just and equitable to extend time in the circumstances of the case. If they did not do so, the Appellant would suffer the obvious prejudice of not being able to pursue serious allegations of discrimination. The Respondent had accepted that any prejudice to the Respondent was limited as the witnesses evidence was not obviously affected by the passage of time. In that situation, the ET considered that the balance of prejudice lay in the Appellant's favour and extended time.

Issue 1

76. The ET then dealt with the Issue 1, which was sending the Appellant home on 11 January 2010. The ET repeated that it was surprising that the Appellant in his witness statement did not deal with this allegation. They nevertheless went on to consider whether the findings in relation to the Appellant's grievance had been reached for reasons relating to his

race, or to any protected acts he had carried out. Their conclusion was that that was not the case. The ET decided that the Appellant's grievance had been rejected because the evidence did not support his account, but rather supported an opposing view of events. Even before the Appellant had done the protected acts, the Respondent had interviewed witnesses relevant to the events of 4 November who gave a clear and vivid picture of the Appellant's conduct. Once he had filed his grievance, their story did not change materially. The ET held that the grievance was rejected because the Appellant's account of the 4 November meeting had not been accepted by the Respondent. The ET noted that the previous ET findings about the Appellant's behaviour on 4 November supported the account which was given by those who were interviewed both before and after the protected acts were done. That led the ET to find that the reasons for the rejection of the Appellant's grievance had had nothing to do with his race or the protected acts which he had done. Rather it was because the Respondent had reasonably preferred the evidence of the other witnesses, and because the Appellant had asked "Questions of Ms Hall aggressively, such that she became upset" and would not stop despite being asked by Mrs Andrews to do so; see paragraph 4.11 of the earlier ET's Reasons.

Issue 2

77. The ET then dealt with the allegation that the Appellant had been denied an opportunity to appeal. The ET held that the Appellant had not been denied an opportunity to appeal. It accepted that there was a delay until March 2011, when, as she reviewed the paperwork, Ms Sparks had realised that Mr Trewin's letter had failed to tell the Appellant about his right of appeal. The ET was not satisfied that this delay amounted to less favourable treatment, or a detriment, in the same way that a denial of the right to appeal might have done, since in any event, once notified of his right to appeal, the Appellant simply failed to engage in the appeal

process. The ET accepted Mr Trewin's evidence that his failure to mention the right of appeal in his April 2010 letter had been a simple oversight and had not been done for reasons related to the Appellant's race and/ or because the Appellant had done a protected act.

Issue 3

78. The ET then dealt with a third complaint which concerned the Respondent's carrying on with the disciplinary hearing on 30 September 2010 in the Appellant's absence. As the ET observed, the correct dates for that hearing were 21 October and 4 November. The ET recorded that there had been five previous attempts to convene this hearing. They accepted that some of the postponements had been for reasons which had nothing to do with the Appellant, but the ET held that the postponement of the hearing on 23 June seemed to have been particularly generous. That hearing had been postponed for two reasons; the Appellant's insistence on a 40-day mourning period, which he accepted for the ET had been a mistake, and the fact that he had not been given 5 clear working days' notice of the hearing, despite the fact that he had had all the documents, and had known what the issues were, since April. The ET held that on 21 October, it was reasonable for the Respondent to conclude that the Appellant's failure to attend entitled the panel to continue in his absence. There was advice from Occupation Health which indicated that there was no medical reason for the Appellant not to be at the hearing. The Respondent was justified, in the view of the ET, in treating his continued complaints about the process as "a deliberate attempt to simply thwart them". The ET also said that the Appellant had been given a clear notice that the panel could proceed in his absence if he failed to engage and attend. In that situation, the decision to do so was not taken for any reason relating to his race or because of a fact that he had done any protected acts.

Issue 4

79. The ET then dealt with the fourth issue, which was the failure to allow the Appellant to return to work on 20 June 2011. The Appellant argued that this was contrary to the Respondent's Grievance Policy of May 2009, which referred to preserving the status quo. This had been in force at the time the Appellant raised his grievance on 11 January 2010. The ET found that the reason why the Appellant was not allowed back to work immediately on 20 June was because he had not had mandatory training that was required under the Respondent's policies. In addition, the Respondent needed to consider whether the Appellant needed support on his return from an extended period of sickness such as by way of a phased return and/or whether his team might have needed any support. The ET found that it was clear from the evidence that the Respondent intended to have the Appellant back to work. That was why the Respondent had held a return to work meeting, why the Appellant was scheduled to have refresher training in July, and it was what his team had been told.

80. The ET referred to the Respondent's Grievance Policy. This in term refers to the maintenance of the status quo in the event that an employee raises a grievance. The ET pointed out that the Appellant had not raised a grievance at the time in question. His last grievance had been issued on 15 October 2010. He had not worked in his team since late 2009. What the Respondent did on 20 June was to maintain the status quo, at least in the short term, in the sense that the Appellant was kept on special leave, away from the team. The ET found that the Respondent's motives for what was done on 20 June had nothing to do with the Appellant's race or was a fact that he had done any protected acts.

Issue 5

81. The fifth issue was what was described by the Appellant as the unilateral withdrawal of the Appellant's grievance on 23 June 2011. The ET held that the Appellant's grievance appeal was treated as having been withdrawn by him because he did not engage in the appeal process. The ET noted that the process had effectively been started and led by the Respondent once it had realised that the original letter of 13 April 2010 had failed to tell the Appellant that he had a right of appeal. The ET recorded that once the Respondent had spotted this, it brought that to the Appellant's attention, and set up an appeal hearing date, on the assumption that the Appellant would have wanted to pursue that opportunity. In that situation, it was understandable for the Respondent to have asked for the grounds on which the Appellant wished to pursue any appeal to be provided. Despite the request that he provide grounds of appeal, the Appellant never did so. The Appellant was eventually told that if he did not provide grounds of appeal by 23 June, his lack of engagement in the process would result in the appeal being treated as withdrawn. The ET recorded that this was "yet another occasion when the Respondent was faced with prevarication and intransigence". The ET found that the letter of 9 June, which contained the deadline of the 23 June, was an entirely reasonable and understandable attempt to force the Appellant's hand and to get him to take part in a process which was supposed to be for his benefit.

82. The ET held that the reason for the withdrawal had nothing to do with the Appellant's race or with his protected acts. The appeal was withdrawn because the Respondent simply could not get the Appellant to engage with the process.

Issue 6

83. The sixth complaint was that on 30 June 2011 the Respondent had commissioned an investigation which was not provided for under any of its policies or procedures. The ET observed that the Respondent had always accepted that the investigation was not covered by any of its existing procedures or policies. The ET said that the Respondent therefore had to construct a procedure. In the view of the ET, the Respondent had done its best to fashion a procedure which was analogous to its other processes, and which was both fair and transparent. An employer should not be paralysed from acting simply because it has failed to devise policies to cover every conceivable situation which can arise in the work place. There simply was no policy which covered a situation where there was a possibility that there had been an irretrievable breakdown in working relationships. The ET said that it would have been ludicrous if the Respondent was prevented from considering such a situation simply because no policy existed. The ET found therefore, there were no grounds for concluding that the commissioning of the investigation was, in itself, a direct discrimination and/or victimisation.

Issue 7

84. The seventh complaint was that the Respondent had failed to follow its own policies and procedures in the ways summarised in the Appellant's further particulars. Before turning to consider the specific particulars provided by the Appellant, the ET expressed its firm belief that the "extraordinarily convoluted chronology" in the case was the result of the Appellant's attempts to "tie the Respondent in procedural knots and its insufficiently robust attempts to prevent that from happening". The ET said that that in itself was not something from which inferences of discrimination or victimisation could be drawn. The ET then considered in great detail the specific complaints about procedures that had been raised by the Appellant in his

further and better particulars. That consideration started at the paragraph 8.30 and continued to paragraph 8.56.

85. I do not need to consider those complaints in detail.

86. In summary the way in which the ET dealt with them was to make clear findings that none of the matters complained of had happened because the Appellant was Asian or because he had committed a protected act.

87. I should, however, say something about the final elements of complaint 7(3), which the ET dealt with at paragraphs 8.45 to 8.52 of its Reasons. As the ET observed, this complaint was not a procedural or process complaint but a complaint of substance.

88. The complaint concerned the decision to put the Appellant on the 'at risk' register. The ET made clear findings that the decision to place the Appellant on the 'at risk' register had nothing to do with the fact that he was Asian. Had the report been about an employee who was not Asian, the ET's view was that the panel would have made the same decision about that employee on 5 December.

89. The ET said, however, that they had had more difficulty in dealing with the claim of victimisation. The ET held that it was undoubtedly the case that the negative views about the Appellant, which had been expressed by interviewees during the investigation, were partly influenced by the earlier ET proceedings. They had expressed concern about the events of 4 November 2009, about the expected effects on past and future service delivery by the team,

about the way in which the Appellant had gathered evidence for the ET hearing and about his subsequent conduct at that hearing.

90. The ET referred again to the two decisions of this Tribunal which it considered in section 7 of its Reasons.

91. The ET in **Woodhouse** had found that the employer was concerned that the employee's past habit of issuing grievances and tribunal claims indicated a likelihood that he would do so in the future. As the ET observed, that was a different case from the case with which the ET was dealing. The Respondent here was not concerned about the Appellant's grievances or his earlier proceedings when it took the decision to take him away from the CDW team and put him on the 'at risk' register. The panel's sole concern was with the Appellant's past and present behaviour. Just because some of that behaviour had been shown leading up to and during the ET proceedings did not mean, in the ET's view, that the decision to remove him from the team was because he had done a protected act. In the view of the ET, the reason why the interviewees thought that the Appellant would not be able to be reintegrated into the team was simply because of his behaviour. The ET also referred to the Judgment of this Tribunal in the **Woodhouse** case, and in particular to paragraphs 96 to 98 of that decision, in which it was recognised that the behaviour "might be one type of separable feature" which could enable an employer to successfully to argue that the reason for a detrimental decision was not one which had actually been caused by a protected act. In simple terms, the ET said, they were satisfied that, "as a matter of common sense and common justice", the reason for the detriment here was not the fact that the Appellant had brought grievances and/or ET proceedings but was partly because of the way in which those proceedings had been pursued, irrespective of their content.

The ET said that although it was similar, the case they were dealing with was not factually the same as either **Martin** or **Woodhouse**. They said that they have been very careful not to use **Martin** as a template for their conclusions.

92. The ET went on to say that, nevertheless, the Appellant did not obtain "an impenetrable cloak of protection as a result of the protected acts" that he had done, as long as his employers did not act because he had done them. In this case the ET held they did not. They took him out of the team because of the strength of views held by his colleagues, which had themselves been caused by a number of factors, including the Appellant's behaviour before, and at, the ET hearing. For those reasons, the ET held the Appellant's claim of victimisation under this head also failed.

Issue 8

93. Issue 8 was failing to respond to the Appellant's request to pursue his grievance. The first sub-issue related to a formal grievance on 27 September 2011 against Mr Thompson, the Respondent's Chief Operating Officer. The Appellant alleged that Mr Clee in his reply of 13 October 2011 had not complied with the Grievance Policy and had failed to deal with specific concerns of victimisation that had been raised by the Appellant.

94. The ET recorded that there were some failures by the Respondent to comply with the letter of its policy. The ET were also conscious that Mr Clee had not given evidence before them or explained the reasons behind his decisions to deal with the grievances the way he did on 13 October. But they considered the letter carefully and could see nothing in it, or in the

surrounding circumstances, that should lead them to infer that discrimination and/or victimisation was any reason for the decision.

95. With specific reference to one of the allegations, allegation 14, the ET said that the allegation was difficult to unravel and it was unsurprising that the panel were unable to take that matter any further forward. The ET held that although the way in which this batch of grievance allegations had been dealt with was not within the suggested process in the Grievance Policy, the reason why that had happened had nothing to do with the Appellant's race and/ or with the fact that he had done a protected act. The reasons were clearly set out in Mr Clee's original letter, and in the later letter dated 4 January 2012. The reasons related to overwork in the HR team and on the part of other managers, to the Appellant's previous failure to engage in the processes, and to the fact that the substance of those allegations concerned the investigation which was at the heart of the meeting on 5 December. The ET finished this section of their decision by observing that this part of the Appellant's case was not that his grievances were not dealt with but rather that they had not been dealt with in the way in which he wanted them to be deal with.

96. The ET then dealt with issue 8 (2) which related to alleged failings by Mr Clee in letters dated 7 November 2011 and 4 January 2012. The ET said that it was difficult to see that either of those letters was dealing with a grievance, and that the allegations were difficult to understand as part of an umbrella complaint that the Appellant's grievances were not pursued. Nevertheless, in paragraph 8.64 of their Reasons, the ET examined each of the sub-complaints and dismissed them. In paragraph 8.65 they said that taken together, the allegations typified the

circular and convoluted form in which the Appellant's arguments had been put, both to the Respondent and to the ET.

97. The ET rejected the suggestion that the processes of the Respondent, or the way in which the Respondent dealt with Appellant's conduct, with his grievances, or with the breakdown in his working relationships with the team had anything to do with his race and/ or with the fact that he had done protected acts. They said that there was nothing in sub-complaint 8 (2) which seemed to take the Appellant's case any further.

The harassment claim

98. The ET then considered the Appellant's harassment claim. The ET recorded that in his closing submissions, the Appellant had repeated the comments from Mrs Andrews which had caused him offence. That, the ET said, had been expected as a result of EJ Mulvaney's Order of 3 May 2012. The comments in question were taken from Mrs Andrews' interview to the investigation, which had been released to the Appellant in October 2011. He had also included the phrase "he constantly talks over people – especially women", which was taken from Mrs Andrews' interview to the earlier investigation in 2009 (which had been done by Dr Buntwal and Mr Grubb). Those words had never previously been part of the Appellant's case. The ET said that they could see nothing in that comment which could, objectively, be seen to be related to the Appellant's religion or belief. The ET went on to say that the Appellant had not given any evidence about it or its subjective effect on him. The ET therefore rejected the allegation that this was an act of harassment. The ET then turned to comment taken from Mrs Andrews' interview to the second investigation. The ET said it was clear to them that, during the course of his evidence, the Appellant was particularly offended by the use of the phase "Muslim

community" in that interview. The ET also referred to paragraph 88 of the Appellant's statement. The Appellant felt that it "ghettoised" those of his faith within the wider community in Gloucester.

99. The ET held that there was no doubt that what Mrs Andrews had said to the investigation was an honest and faithful account of what she had been told by Zain Patel and Farooq Ismail. Her comments reflected their comments. The ET went on to say, however, that although the substance of the text was therefore a report which Mrs Andrews had received from others, that did not prevent it from having been harassment. However, the ET said, the Appellant seemed more concerned with the words that Mrs Andrews had chosen. The ET said in relation to those words, that they had to confess to not really understanding what the Appellant was concerned about. The ET had sought to clarify this from the Appellant, both in his evidence and in his closing submissions. The ET noted that the Appellant had himself used the expression in his own letter of 15 February 2010 and the ET could not understand the difference between his use of that expression and Mrs Andrews' use of that expression. The ET also recorded that the Appellant's own witnesses, Mr Patel and Mr Gangat, referred to a "community" defined on the grounds of faith in their own written evidence. The ET considered the entirety of the text relied on by the Appellant and concluded that they did not believe that it could be said that the contents of the document violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him, when they were looked at objectively. The ET recorded that, as Mrs Andrews had said, the Appellant had a certain standing within the Muslim community as a leader and her use of the expression to define the group was accurate and not offensive. Further, the ET could not accept, because they could not

understand, how or why the Appellant himself saw the words used to have been harassment within the statutory definition. The ET therefore dismissed that part of the Appellant's claim.

The Reconsideration Decision

100. In an email dated 28 March 2014, the Appellant applied for a reconsideration of the ET's decision pursuant to Rule 33. He attached a longish document to that email explaining the basis of that application. By a written Decision dated 15 April 2014, the ET dismissed that application.

101. The reasons for the decision reported that the application had been referred to the EJ. The author of the letter had been directed to tell the Appellant that the application had been refused. The letter said that the Appellant had not indicated whether the application had been copied to the other parties and that it was not in the interest of justice for that requirement to be dispensed with. The letter also said that the Appellant referred to Rule 33 in his application and said that it was possible that the Appellant had referred to the old Rules. The letter directed the Appellant to Rules 70 to 30 of the **2013 Rules**.

The Costs Decision

102. The ET sent this decision to the parties on 17 June 2014 after a costs hearing held on 10 June 2014. The ET considered whether any of the tests under Rule 76 were made out and if so, whether they should exercise their discretion in the Respondent's favour by making an order for costs. They had then to consider the amount of any award, and Rule 84, in relation to the Appellant's means, before deciding whether to make any award and if so, what amount of costs to make. At paragraph 4 of the Reasons, the ET recorded that basis of the application was set

out in the letter from the Respondent dated 18 March 2014. The ET decided that there were three main areas of argument in relation to the application. For reasons which I do not need to go into, the ET concluded that it would only be right for them to deal with the third aspect of that argument (that is, the Appellant's conduct in the run up to the hearing), and to postpone the first and the second aspects of that argument.

103. The ET set out Rules 76 (1)(a) and 84.

> **"76 (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –**
>
> > **(a) a party (or that party's representative) has acted vexatiously, abusively, or disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted…"**
>
> **"Rule 84 Ability to pay**
>
> **In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."**

104. In paragraph 8 of their Reasons, the ET said that there did not need to be a direct link between the particular item of cost and any behaviour complained of but any award of costs was nevertheless broadly required to reflect any conduct complained of. Paragraph 9, the ET referred to Rule 84 which provides that a Tribunal may have regard to a party's ability to pay. The ET observed that there were two points where that could be applied; firstly, at the point of considering whether to make any award, and secondly, at the point where the level of the award was being assessed. The ET rightly said that it was not however necessarily constrained only to make an award if a party was able to pay. That is a correct reflection of the case law on the interpretation of Rule 84.

105. The ET then considered the application. The ET recorded that the Appellant had brought a previous claim and an appeal against the Respondent. They referred to paragraph 3 of their Reasons sent to the parties on 14 March. They recorded the Respondent's submission that that was relevant because it showed that the Appellant had some experience of litigation. The Respondent also referred to the fact that the Appellant was a magistrate who should, it was said, have had a better understanding of what was expected of him in the preparation for a hearing than many other litigants. The ET set out the background and in paragraph 12 referred to Mr Smith's letter of 18 March 2014. He said that the Appellant's behaviour was the most unreasonable that he, an experienced solicitor, had ever experienced. That point was repeated in paragraph 4 of Mr Smith's statement.

106. A number of examples of that behaviour was given, ranging from rudeness in correspondence, including an unsubstantiated allegations of dishonesty, lateness to hearings and the failures to co-operate over the preparation of a bundle and of other documents for the hearing. The ET recorded that the application concentrated on four main areas: the extent to which pre-trial case management hearing became necessary, the Appellant's failure to supply a schedule of loss, issues relating to the disclosure, and issues relating to the preparation of the hearing bundle. The ET considered those four elements of the Appellant's conduct in detail. They decided, in short, that his conduct had been unreasonable in all four respects.

107. Their conclusion was that they had no doubt that the Appellant's style had been abrasive and argumentative throughout the proceedings which had served to increase cost generally and to raise the temperature of the litigation. That of itself was not a reason to make a costs award against him. What they had tried to do instead was to identify those elements of his conduct

which the ET felt had clearly given right to the additional cost. The ET then dealt with the Appellant's means at paragraph 32 of their Reasons. They heard submissions about those which they recorded.

108. The Appellant told them that he was receiving benefits only and had not worked since May 2012. He lived in a family home which was apparently owned by his daughters who nevertheless paid him to live there. There was no mortgage on the property but the Appellant had a dependent father who lived with him and who, because he had come from India, was not eligible for any benefits. The Appellant said he owned his own car, but had no other assets. His wife did not work.

109. At paragraph 33, the ET said that having heard those submissions and having considered the Appellant's means within the first limb of Rule 84, they "nevertheless believed it was appropriate to order but he should pay something toward the Respondent's costs". They decided that he should pay £1,022 to the Respondent in respect of the need for the two further case management hearings on 19 April and 3 May 2012; that he should pay £238 in respect of the Respondent chasing him for a schedule of loss, and that he should pay £28 in respect of his failure to make disclosure between 3 July and 14 September 2012. They ordered that the Appellant should pay £78 to the Respondent in relation to the bundle. The ET said that the Appellant could not and did not dispute that the Respondent's schedule of costs contained actual times incurred in the work described by their solicitors. The ET said that though the Appellant might have doubted the credibility and veracity of the Respondent's schedule, the ET found no reason to do so. The ET finally observed that in fairness to Mr Smith and to the Respondent, they had appeared to have erred very much on the side of caution in making the

calculations in the schedule. For those reasons, the ET awarded the total sum of costs to the Respondent of £1,366.

Discussion

(1) The Substantive Decision

Ground 1: did the ET err in its approach to victimisation?

110. Ground 1 embraced issues 1, 2, 7(1)-(3) and 8(1)-(2). Ms Mallick argued that the ET erred in finding that issue 1 had, in effect, already been the subject of a decision in the first tribunal claim. The ET described the earlier claim in paragraphs 3.2 and 3.3 of its Reasons. In paragraph 4.3 the ET recorded that the earlier Tribunal had covered the factual ground of the complaint described in paragraph 4.2.1 of the ET's Reasons (sending the Appellant home on 11 January 2010). The ET went on to say that the issue for it was whether "the issue had been effectively determined in those proceedings as part of the general allegations concerning the restrictions which had been put on the Appellant's duties". If so, the ET should not have re-opened it.

111. In her oral submissions in reply, Ms Mallick submitted that the evidence before the ET suggested that the Appellant had been sent on special leave, not sent home to work. In my judgment, this argument does not undermine the safety of the ET's Reasons. First, they rightly held that they were bound by the first ET's factual findings about this (which were not, I am told, challenged in the Appellant's appeal to this Tribunal against that decision). Second, they do refer to his having been on special leave elsewhere in their decision. Third, the argument they were facing from the Appellant was that he had been sent home from work (rather than sent home to work at home). The first ET had found that he had been sent home, to work at

home. The ET in this case did not record that the Appellant placed any particular stress on the fact that he had been given special leave. She nonetheless argued that the ET's failure to make a finding that the Appellant was on special leave undermined their findings about the sequence of events, a point to which I now turn.

112. In my judgment, the ET gave sound reasons why, having analysed this complaint and the earlier ET decision, this complaint had been decided by the earlier ET. But in any event, they also made further obiter findings, dismissing this complaint on its merits. The reference to Mr Davies's witness statement is a reference to his evidence that the Appellant had been told to work at home because he had not done the training necessary to enable him to work in the Montpellier ward, and that the Appellant had handed the grievance to Mr Davies in an envelope *after* this. As a matter of logic, a claim of victimisation based on a protected act done after the alleged detriment was imposed cannot succeed. The ET expressly accepted this evidence. The Appellant's witness statement about this did not in terms contradict that evidence. His witness statement was not clear on this point. In that situation, the ET cannot be criticised for accepting Mr Davies' evidence. That evidence, once accepted, was fatal to this part of the victimisation claim.

113. I turn to issue 2. I reject Ms Mallick's attempt to argue that the Appellant did not know that his grievance had been dismissed. Among other things, as Ms Azib pointed out, the premise of issue 2 in the list of issues was that the Appellant's grievance had been dismissed on 13 April 2010. As the ET pointed out, the Appellant's witness statement did not deal at all with this issue. He advanced no positive case about it. The ET accepted the evidence of Mr Trewin that he had made a mistake when he did not tell the Appellant that he had a right of appeal

against the decision on his grievance. There was no denial of a right of appeal, as once the Respondent realised the omission, the Appellant was told about it, and given every encouragement and opportunity to take part in the appeal process. He simply refused to engage with it. I can see no possible criticism of the ET's approach to issue 2.

114. I turn to the decision to put the Appellant on the 'at risk' register. In answer to question from me, and in her reply, Ms Mallick summarised her submission on this part of the case by saying that the ET erred in law by not adding a sentence to their reasons which said, "The protected acts (the grievance of 11 January 2010 and the first ET claim: see paragraph 4.6 of the ET's Reasons) were not a significant influence on the Respondent's decision to decide that the Appellant's job was at risk". She referred me to **O'Donoghue v Redcar and Cleveland Borough Council** [2011] EWCA Civ 701 in support of that submission. That was a very different case, in which an ET had found, on the facts, that a discriminatory reason was significant to an employer's decision. She submitted that it is not difficult for a Claimant to show victimisation: all he has to show is a causal link between a detriment and a protected act. The victimiser's reasons for acting can be conscious or unconscious. The causal link is established if the protected act is a significant influence, that is, one which is more than trivial.

115. She referred to the decision of this Tribunal in **Martin v Devonshires Solicitors**, which, as I have explained, the ET considered carefully. Underhill P (as he then was) said that there will be cases where an employer has subjected an employee to a detriment in response to a protected act, but where "he can as a matter of common sense and common justice, say that the reason for the [detriment] was not the [protected act] as such but some feature of it which can properly be treated as separable. The most straightforward example is the manner of the

complaint...". He said that it would be extraordinary if the victimisation provisions gave absolute immunity in the context of a protected act. He added that tribunals could be expected to be slow to recognise such a distinction save in clear cases.

116. She also referred to **Woodhouse v North West Homes Leeds Limited** and to this Tribunal's warning against treating **Martin** as "a template into which the facts of alleged victimisation cases can be fitted". The ET in this case, as their reasons show, were aware of, and expressly heeded this warning. In **Woodhouse** this Tribunal said that cases where the reasoning in **Martin** could apply would be exceptional. Simply because there were many grievances, or they were irrational, would not mean that they ceased to fall within the victimisation provisions.

117. In oral argument, Ms Mallick also submitted that there was evidence in the statements taken during the Respondent's investigations from which the ET was bound to find that a significant influence on the decision that the Appellant's job was at risk was the fact that he had done protected acts. I reject that submission. What she showed me were glancing references to the ET proceedings, mostly factual or historical. They were not an adequate platform for this submission. As Ms Azib pointed out in her submissions, the decision was not, in any event, made by those witnesses, but by a panel which had been specifically directed not to take the protected acts into account.

118. As Ms Azib also pointed out, the ET directed itself carefully and accurately about the law relating to causation (in section 7 of its Reasons) and made clear findings, in the context of reasoning which adverted again to the two relevant decided cases, that the Respondent "was not

concerned about the [Appellant's] grievances or his earlier proceedings when they took the decision to remove him from the CDW team and put him in the 'at risk register'. The panel was only concerned with the [Appellant's] past and present behaviour ...". The rest of paragraph 8.49 of the ET's Reasons is also important in this context. In paragraph 8.51 of its Reasons, the ET made clear findings that the Respondent did not act because the Appellant had done protected acts, and that the views of his colleagues had been caused by a number of factors, including his behaviour before and at the ET hearing. In my judgment, the ET was entitled to conclude (a finding for which there was cogent evidence) that the Appellant was put on this register because of his longstanding and thoroughly uncollegiate behaviour, and not because of his protected acts. Those were no more than a background factor, on the ET's reasoning.

119. In my judgment the extra sentence for which Ms Mallick contends is redundant, on this analysis. The ET's decision is well reasoned and I can detect no error of law in it. I reject the submission that the ET erred in law by not spelling this out. The ET reminded itself carefully of the two relevant authorities. Whether this case was one of the exceptional types of case which Underhill P referred to in **Martin** was a question of fact for the ET. Their decision that it was such a case was open to them on the evidence. As I have already said, the ET made an express finding that the Respondent was not concerned about the Appellant's earlier proceedings or his grievance; the Respondent was concerned with his present and past behaviour, and that was why the Respondent decided he could not be reintegrated into the team. Paragraphs 8.50 and 8.51 of the ET's Reasons, in particular, are a careful self-direction and a meticulous analysis of the facts in the light of that approach to the law. I also bear in mind their correct self-direction about causation in section 7 of their Reasons.

120. The remainder of issues 7 and 8 concerned particular examples of the Respondent's alleged failures to follow its policies and procedures. The ET dealt thoroughly with all the examples relied on. I can see no error in any part of the ET's approach to those issues. On this area of the appeal, Ms Mallick criticised the ET's reference to "the extraordinary and convoluted chronology" in this case, and its causes, as "less than impartial". That criticism is unfounded. The ET were quite justified in making this comment on the basis of the evidence they had read and heard. It was not evidence of any partiality. In context, it was an observation not about the ET procedure, but about the Appellant's use of the Respondent's internal procedures.

Ground 2

121. Ms Mallick argued that the ET erred in failing to stand back from the factual detail and ask themselves whether, in the light of all their primary findings of fact, including the Respondent's explanations, it was legitimate to infer that the acts of the Respondent which were the subject of complaint in the ET1 were on racial grounds. She referred me to some authorities, which I say more about below. I say immediately that I find it hard to see how, if an ET considers each of a series of allegations of discrimination and victimisation, and, directing itself properly in law, finds that none of the alleged detriments was on racial grounds or amounted to victimisation, it can err in law by failing to say, in a sentence, that the picture as a whole does not disclose any action taken on grounds of race, either. As a matter of logic, it seems to me that if none of the parts is done on grounds of race, then the whole cannot be, either. It may be that in some cases, "the cumulative primary facts" might have some "eloquence...on the issue of racial discrimination" which each fact taken on its own does not have. But this is not such a case, as the careful findings of the ET show.

122. The Respondent submitted to the ET that three of the Appellant's colleagues in the CDW team were from the same ethnic group as he was. They made no complaints of racial discrimination. That submission was referred to by the ET, and it was part of the uncontested factual background. Moreover, as the ET recorded, in section 8 of its Reasons, they could not recall any time in his cross examination of the Respondent's witnesses, when the Appellant had suggested that a particular thing had been done to him because he was Asian. In any event, it is clear from many findings in the ET's decision as a whole that the Appellant had a difficult personality, and that the Respondent was doing its best to apply its internal procedures to his case, and to preserve the functioning of the CDW team, over a long period.

123. The cases to which Ms Mallick referred me were cases of two kinds. The first kind of case, of which **Fearon v Chief Constable of Derbyshire** [2004] UKEAT 0045 is an example, is a case in which a Claimant makes an overarching complaint (in his case, that he had never, in all the history of his employment, made any advance in his career), and that that was a consequence of discriminatory regime. In such cases the Claimant will often rely on the whole history of his employment to make that good the overarching complaint. In such a case, an ET needs first, to find the primary facts in relation to each incident which is relied on, and then, standing back from the whole history, decide whether it can draw an inference that the reason for the lack of career advancement over the whole period is race discrimination.

124. The second type of case is a case like **X v Y** [2013] UKEAT 0322 - 12 0406. In that case an ET found a number of serious breaches of contract by an employer, with the consequence that the employee had been constructively and unfairly dismissed, but rejected her discrimination claim. The employee was the only Black African in her work group. At

paragraph 60 of its Decision, this Tribunal held that in that case, the ET should have said explicitly that it was taking a holistic view of all the facts, and should expressly have explained why, in circumstances where there had been a significant number of substantial breaches of contract, the employee's race was not the reason for that treatment. In my judgment, this case is completely different. Apart from the fully explained and unsinister failure to tell the Appellant that he had a right of appeal from the April 2010 decision, which was later put right, and of which the Appellant did not take advantage, Ms Mallick did not rely on any other significant mistake or breach of duty by the Respondent.

125. My conclusion is that this was not a case in which the ET was required to spell out expressly that it had taken a holistic approach, and why it was rejecting the race claims overall. The authorities to which Ms Mallick referred are well known, and although I was told by Ms Azib that the ET were not referred to them, I am not persuaded that the ET can have been unaware of the principles they illustrate. I have considered, nevertheless, whether there is any material which should have given the ET pause. Other mistakes by the Respondent were referred to in the Reasons (see, for example issue 8(1)). These were explained, and the ET accepted those explanations. In the context of the whole claim by the Appellant (which consisted of a series of detailed complaints, to none of which he expressly ascribed a racial motive in cross-examination), and the way in which the ET carefully analysed all its aspects, I have no doubt that this was a case in which the ET's approach of considering each allegation separately, and not asking themselves a global question, was correct.

126. Second, and in case that is wrong, I should say something about remittal. Ms Mallick did not suggest that if she were to succeed on this ground, the case should be remitted to the ET

for a full re-hearing. She submitted that it should simply be remitted for the ET to ask themselves the global question. I have no doubt that there would be no point in remitting this aspect of the case to the ET. For an ET to draw an inference that the Appellant had been discriminated against on grounds of race, on the facts found by the ET here, would be nothing short of perverse.

Ground 3: did the ET err in law in its approach to the harassment claim?

127. In her skeleton argument, Ms Mallick concentrated on a point which I will come to shortly. In her oral submissions, she stressed two further points. They concerned the remarks alluded to in EJ Mulvaney's order. She argued that the ET reached the wrong conclusion about each, as each, on its proper construction, amounted to harassment or race discrimination. One set of remarks was made by Mrs Andrews to the investigation team on 11 December 2009. The other comments were made by her at an investigation meeting on 11 August 2008. These were both disclosed to the Appellant in 2011.

128. In my judgment there are two separate questions for an ET when it considers such a claim. First, what do the alleged words mean? The correct construction of any comments said to amount to harassment is a question of law. Next, do the words meet the statutory test for harassment? Whether they meet the statutory test of harassment is a mixed question of fact and law for the ET. Ms Mallick's submissions tended to elide these two separate questions. For the reasons I give below, I consider that the ET correctly construed the comments, and were entitled to reach the view that the comments did not meet the statutory test for harassment.

129. First, Ms Mallick submitted that "They all lived in the Muslim community in

Gloucester" was both discrimination and harassment. Like the ET, which is more expert than I am, I had difficulty understanding what was objectionable about this comment. The ET accurately recorded the Appellant's objection to it, which was that, as Ms Mallick submitted, the remark "ghettoised" him. She submitted, in answer to a question from me, that a comment that "They all in live in Gloucester and are part of the Muslim community" would not have been objectionable. This is an extremely subtle, if not invisible, distinction and I would be dismayed if a person could be guilty of discrimination or harassment because they used the first, rather than the second, formula.

130. I cannot detect any error the way the ET approached this aspect of the claim. Ms Mallick submitted that the ET misunderstood the Appellant's objection to these words. But the ET made it clear that they had considered the whole text referred to. The ET used the words, "...these words and in particular…". I am not persuaded, given those words, that the ET erred by not considering the text as a whole. Indeed, as this part of their decision records, they asked the Appellant expressly about this. Ms Azib submits, in any event, that the language of the ET's Reasons and the ET's reference to the Appellant's letter suggest that the complaint which was made in the ET was an objection to the phrase "Muslim community" as opposed to the phrase "living in the Muslim community". She represented the Respondent at the ET but was scrupulous not to give evidence about this. I do not need to resolve this issue, as it seems to me that whatever the precise nature of this complaint, the ET's reasons for dismissing it were adequate. I bear in mind that their self direction about the law which applied was correct.

131. Second, Ms Mallick submitted that Mrs Andrews discriminated against the Appellant on the grounds of faith or belief, and harassed him on that ground, by saying "I think it is a gender

thing, perhaps maybe with other members of the team not being seen as so important in the community. All the team have issues with his manner and tone". She submitted that this was a coded reference to Islam. I do not accept that submission. The comment is about what "perhaps maybe a cultural issue", not a religious issue. It was not discriminatory for Mrs Andrews to speculate in that way, nor was it harassment. Ms Mallick also submitted that what Mrs Andrews was saying was that the Appellant was "culturally Muslim". The difficulty with that submission is that there is no reference in the comments to Islam or to the fact that the Appellant is a Muslim. I can see no error in the way that the ET dealt with this issue in paragraph 8.68 of its Reasons.

132. In my judgment there is a more fundamental problem with these two submissions, although it did not form part of the ET's Reasons. This is that none of the remarks to which the Appellant objected was made in his presence, or directed at him. They were made during the course of internal investigations, when he was not present, and he only found out about them much later, when the documents recording them were disclosed to him as part of the Respondent's internal procedures. It is difficult to see how such comments could meet the test in section 26(1)(b) of the **2010 Act**. Moreover, the Appellant's "perception" was only engaged many months after the comments were made (see section 26(4)(a)). It is difficult to see how any ET, taking into account the matters referred to in section 26(4) could conclude that these remarks were harassment within the statutory definition.

133. Be that as it may, as Ms Azib reminded me, the ET had the statutory definition of harassment well in mind. So they did not misdirect themselves. I cannot, on an appeal, absent perversity, substitute my view for their judgment whether these remarks met that statutory

definition. There are no grounds for concluding that their approach was perverse.

134. Ms Mallick's other point on the harassment claim was that the ET erred in law in dealing with this part of the claim only as harassment, without considering whether it was direct discrimination on grounds of religion or belief. It is true that EJ Mulvaney's somewhat vague case management order referred, when alluding to these remarks, only to discrimination on grounds of religion and belief, and not to harassment.

135. However, I can see no sign in the ET1 (which does not mention the comments), or in the Appellant's long witness statement that, before the ET, he was making a distinct claim of discrimination on grounds of religion or belief arising from the comments of Mrs Andrews. Paragraphs 21 and 88 of his witness statement are the Appellant's evidence about the comments. Paragraph 21 does not assign a cause of action to the comments which are mentioned there. Paragraph 88 appears to pick up paragraph 21, as it says, "Clearly once again CA [that is, Mrs Andrews] was typecasting my Faith and religious beliefs were being brought up in a manner that violates dignity, causes me offence and constitutes ongoing harassment". This is as clear an allegation of harassment from a litigant in person as one could find. The Appellant also referred to the same two claims of harassment, identifying them as such, in his application for reconsideration.

136. All of this suggests that the ET had correctly understood the nature of the complaint he wished to make about these comments. In that situation, the ET did not act unlawfully in considering these as claims of harassment and not as claims of direct discrimination. On the contrary, the ET is to be congratulated for doing an excellent job in distilling, from the

documents, what the essential issues in this complex case were. I should record, for completeness, that I cannot see how, if the ET had dealt with such complaint specifically as a complaint of direct discrimination, they could conceivably have come to any different conclusion. This ground of appeal fails.

Ground 5: the ET's procedure

137. Ms Mallick criticised the way in which the ET dealt with the Appellant's requests for breaks. She submitted that this was a procedural irregularity which affected the fairness of the hearing, and might well have coloured the ET's views about the Appellant's behaviour. She accepted that there was no medical evidence before the ET. The Appellant did submit some medical evidence, but only as part of the later ET claims. It was not submitted in the course of this hearing. On this part of the appeal, I considered the Appellant's affidavit, the comments of the EJ, and the affidavit of Mr Smith, the Respondent's solicitor.

138. There is a difference of recollection about whether the Appellant asked for an adjournment on the second day of the hearing. I prefer the recollection of the EJ and of Mr Smith about this. Both are professional lawyers and, it is clear from the material they produced, both kept detailed contemporaneous notes of the hearing. The Appellant did not suggest that he had kept any notes.

139. Ms Mallick made three complaints. First, the Appellant had said he was not well on 5 March, and had asked for an adjournment. There had then been a discussion between him and the EJ. He had accepted that he had no medical evidence. Again, to the extent that the recollections of the Appellant, and of the EJ and Mr Smith differ, I prefer those of the EJ and of

Mr Smith, for the reasons I have just given. Their recollection is that the EJ left the choice of whether to adjourn or not to the Appellant, and he had decided to continue. The EJ indicated that if there were to be further adjournment, medical evidence should be provided. In my judgment, the way in which the ET dealt with this was sensitive and appropriate. At the end of the discussion, the Appellant indicated that he would continue, and did so. The EJ noted that his performance in cross examination improved after this exchange. Ms Mallick submitted that if a litigant in person says he is too unwell to continue, the ET should adjourn without further investigation. I reject that submission. For example, if the ET is not entitled to probe such claims, there is a risk that litigants in person will manipulate the ET's procedure by making claims which are not true, and there will be occasions where tactful probing will reveal that a short break may suffice. It follows that the EJ here was entitled to indicate that he would require medical evidence in support of any further application to adjourn.

140. Ms Mallick's second complaint was based on the Appellant's witness statement. That said that the Appellant had broken down during the hearing on three or four times and could not remember being offered breaks when that happened. The recollection of the ET chair and of Mr Smith was that the Appellant was given regular breaks during each morning and afternoon session, and told to let the ET know if he needed more breaks. There is nothing in this complaint, either. There is nothing wrong in the ET putting the onus on a litigant in person to ask for a break if he needs one, especially where, as here the litigant in person is articulate and intelligent, and has some experience, as the ET knew, of court procedures in two different jurisdictions.

141. Finally, Ms Mallick submitted that if the Appellant had been given the breaks he should

have had, it would have made a difference to the view which the ET took of him. I reject that submission also. The ET took careful steps to timetable the hearing so as not to impose too great a strain on the Appellant, by increasing the number of days for which it was listed. The EJ also adopted a pattern of regular breaks each morning and afternoon session, asked the Appellant how long he wanted for those breaks, and said that he was to indicate if he needed another break. Those steps were considerate, and reasonable. The recollection of the EJ and of Mr Smith does not suggest that the Appellant gave any overt signs that he needed more breaks. The EJ did say that the Appellant became agitated at times and hostile and loud in his questions to witnesses, and had to be told to calm down at times, but that is all. I reject this complaint also.

The reconsideration appeal

142. I heard argument from both sides about whether the ET erred in refusing the application for reconsideration, and/or gave insufficient reasons for that decision. I do not need to resolve that question, although I incline to the view that that decision was correct.

143. I asked Ms Mallick whether she suggested that, if the ET reconsideration had been wrong in any respect, and her appeal against the Substantive Decision succeeded, she would ask for the Reconsideration Decision to be remitted to the ET. She accepted that if the substantive appeal were to succeed, such a remission would be futile. But she submitted that if the substantive appeal were to fail, and I considered that the ET had erred in any respect in the Reconsideration Decision, I should remit the application for reconsideration to the ET, as it was for the ET, and not for me, to decide whether it was in the interests of justice for the case to be reconsidered by the ET. I reject that submission. With one irrelevant exception, the grounds

for reconsideration and the grounds of appeal are very similar. I have decided to uphold the ET's Substantive Decision. It is inconceivable that the ET could, in that situation, find any aspect of its decision which it could be in the interests of justice for it to reconsider. Indeed, I doubt (though I have heard no submissions about this) whether it would have power to. I dismiss this appeal.

The costs appeal

144. Ms Mallick submitted that if the ET exercised its discretion under Rule 84 to take the Appellant's means into account (as it appears, at least, that it might have), it was bound to make findings about the Appellant's means and, thus, about his ability to pay any costs award; and if the ET had decided, despite his not having the means to pay, that it would nonetheless make an award, it had to explain why. She relied on the decision of this Tribunal in **Jilley v Birmingham and Solilull Mental Health Trust** UKEAT/0584/05. I accept that submission. In my judgment the ET did not make adequate findings about what the Appellant's means were, whether and if so what award he could afford to pay, and why (if he could not afford to pay the award) they were, nonetheless, deciding to make an award. It is true that the **Rules** do not oblige an ET to take means into account. But because they give an ET power to do so, an ET should, when an application for costs is made, expressly consider whether to exercise this power, and then explain their decision to exercise, or not to exercise it.

145. I should make it clear that I have some sympathy with the ET. I am inclined to infer, from the language of paragraphs 32 and 33 of the Costs Decision, that the Appellant did not produce any documents about his means, or give the ET any detailed evidence about them (they refer to his "submissions", not to his "evidence"). They may well have been in a position

where they had no detailed or apparently reliable evidence from the Appellant about his means, and no supporting documents. In that situation, they might have felt, on the basis of the limited information that they did have, that the Appellant probably could afford to pay the relatively modest amount they awarded. However, their use of the word "nonetheless" suggests that they made an award despite thinking he could not afford to pay it. In the circumstances, Ms Azib very fairly did not invite me to draw any inferences that this was the ET's line of reasoning. I simply do not know from their Reasons what information the ET did or did not have, or what they made of that.

146. I remit the costs application to the ET for it to reconsider. I should also make clear that it is for the Appellant to satisfy the ET that his means are such that he cannot afford to pay the costs awarded. If he does not attend the remitted hearing with detailed evidence about his means, he should not be surprised if, on the basis of the very limited information which the ET were given at the first hearing, they make exactly the same award. The ET may well have been puzzled by the apparently contradictory assertions they record that the Appellant lived in a house owned by his daughters, but that they paid him to live in it. If the ET are not given detailed enough evidence and are not able to make findings because the information they are given is incomplete, or they do not believe the information they are given, they would be entitled to draw any inference they consider appropriate, provided that they explain their chain of reasoning. Rule 84 also makes clear that the ET is not obliged to take means into account. So if even if the Appellant satisfied them that he could not afford to pay the award, they could decide, despite that, to make an award, so long, again, as they explain why they are doing that.

Conclusion

147. For these reasons, I dismiss the appeals against the Substantive and Reconsideration Decisions. I allow the appeal against the Costs Decision and remit the Respondent's application for costs to the ET for it to reconsider in accordance with the preceding three paragraphs of this Judgment.