EMPLOYMENT TRIBUNALS

Claimant: **Mr C Morrison**

Respondent: **Leicester City Council**

Heard at: **Leicester**
On: **Friday 17 February 2017, Monday 20-24 February 2017, 27-28 February 2017 and 1-2 March 2017**

Before: **Employment Judge Ahmed**

Members: **Mrs B Tidd**
Mr R Gosai

Representatives

Claimant: **Mr T Dracass of Counsel**
Respondent: **Miss D Masters of Counsel**

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The complaints of direct race discrimination and victimisation are dismissed.

2. The Claimant was unfairly dismissed but contributed to his dismissal. The basic and compensatory awards shall be reduced by 75%.

3. The issue of remedy is adjourned to Thursday and Friday 17 and 18 August 2017. Directions in relation to remedy are issued separately.

REASONS

Background

1. In these proceedings Mr Clive Morrison (born 13 September 1965) brings various proceedings against his former employer, Leicester City Council. Mr Morrison began his employment with the Respondent local authority on 5 April 1987. He was dismissed for gross misconduct and the effective date of termination is agreed as 5 February 2016.

2. There are 3 claims in these proceedings. The first complaint (case number 2601240/2015) was presented on 31 October 2015. That was a complaint of direct race and an unlawful deduction of wages. The complaint of direct sex discrimination and unlawful deduction of wages were subsequently withdrawn and dismissed.

3. On the second claim (case number 2600505/2016) was presented on 22 January 2016. That was a complaint of victimisation only.

4. The third and final claim in these proceedings (case number 2600987/2016) was presented on 5 April 2016 and that was a complaint of unfair dismissal. At a Preliminary Hearing on 10 June 2016, Employment Judge Camp permitted the Claimant to add a victimisation complaint in relation to the dismissal. The Claimant's application to add a whistleblowing complaint was refused at an earlier Preliminary Hearing on 4 January 2016.

5. There is both a factual and procedural history to this case. So far as the procedural issues are concerned, it is unfortunate that the final hearing has taken place a little over a year after the Claimant's dismissal. After the Claimant's first ET1 was presented, this case was listed for a 3 day final hearing on 14-16 March 2016 (under the pilot scheme operating in this region of listing all discrimination cases for 3 days upon issue) and following a case management Preliminary Hearing on 4 January 2016, the case expected to proceed to a hearing. As a consequence of the fact that the hearing was relatively imminent, the Claimant's application for various alleged acts of victimisation to be included by way of an amendment were refused at a Preliminary Hearing on 4 January 2016. Unfortunately, that hearing had to be vacated due to the Claimant's ill health. No subsequent application to add any further victimisation complaint was made until 10 June 2016 Preliminary Hearing before Employment Judge Camp referred to above. The consequence is that this hearing was concerned with complaints of direct race discrimination, victimisation arising out of the dismissal process and unfair dismissal.

6. At an earlier stage, the Claimant, who has been represented by Mr Dracass of Counsel under the direct access scheme at various stages, and at least one of the Preliminary Hearings, helpfully produced a Scott Schedule of the allegations of race discrimination and victimisation to which we will refer in due course. It was also agreed at the Preliminary Hearing before Employment Judge Camp that the case would take much longer than the 3 days originally set and as a consequence a time estimate of 10 days was given with the earliest dates convenient to the parties and available to the Tribunal were in the final 2 weeks of February 2017 and early March 2017. One day was set aside for reading. Despite the fact that the Tribunal could not sit for half a day on 21 February, we are grateful to the parties' representatives for ensuring that the time scheduling has been adhered to with the result that the case was completed in time.

7. As will become apparent from the facts below, the Claimant now suffers from psychological ill health and as a result adjustments were necessary to accommodate his disability. At the June 2016 Preliminary Hearing it was agreed that longer breaks would be of assistance but the application for the Claimant to give evidence by video link was not pursued, nor was the application for the Respondent to cross examine the Claimant by putting questions to him in writing.

During the course of the hearing however, it became necessary to increase the frequency of the breaks to half an hour whilst the Claimant was giving evidence and also to adjust the seating arrangements and limit the number of people in the room to an absolute minimum. At one point agreement could not be reached as to what the minimum level should be but the Tribunal considered that those who were essential witnesses should nevertheless be present. The number of members of the public who could observe the hearing were limited whilst the Claimant was giving evidence.

8. Despite the fact that the parties have appropriately kept witness evidence to a minimum, there have nevertheless been a very large number of witnesses giving evidence in this case. The Claimant, in addition to giving evidence himself also called the following:-

8.1 Mrs Allison Morrison (the Claimant's spouse).

8.2 Ms Mary Baker (Athletics Coach at Saffron Athletic Club).

8.3 Dr Cherie D'silva (Chair of Leicester Athletics Development Group).

8.4 Mr Daniel Hewins (School Sport Development Manager for Leicester City School Sport and Physical Activity based at the Lancaster School, Leicester).

9. The Respondent's witnesses were as follows:-

9.1 Mr Roy Cole (Facility Manager).

9.2 Mr Edwin James (Area Sports Services Manager).

9.3 Ms Nicola Graham (HR Team Manager).

9.4 Mrs Hina Patel-Dhanji (Human Resources Advisor).

9.5 Mrs Simone Louis (HR Advisor).

9.6 Mrs Karen Demmer (HR Team Manager).

9.7 Mr Mukund Kumar-Narshi (Accounting Technician).

9.8 Ms Victoria Ball (Sports Regeneration Manager).

End of Side 1, Tape 1

Beginning of Side 2, Tape 1

9.9 Mr Andrew Beddow (Head of Sports).

9.10 Mrs Fiona Cook (HR Advisor).

9.11 Mr Cory Laywood (Service Manager at the Leicester City Council Business Service Centre).

10. In coming to our decision we have taken into account the evidence of all the witnesses set out in their witness statement and in their oral evidence, together with the documents in the main bundle produced by the Respondent and the supplementary bundle produced by the Claimant. We are also grateful to the helpful submissions by Counsel on both sides which were supplemented by detailed written submissions and a bundle of authorities. The reason for the supplementary bundle is that there was a disagreement as to who should prepare the bundle. At a telephone Preliminary Hearing 2 weeks before the final hearing itself, it was decided that the bundle to be used by the Tribunal would be that prepared by the Respondent. The Claimant alleged that some of the documentation which he had received had either been fabricated or that he had not received all of the documentation which was before the dismissing officer. With the exception of two pages that were missing from the documents that the Claimant should have received, this allegation was not pursued further.

11. During the course of the hearing, there was also an application to amend the ET3 ((response) to the first two claims) to correct a factual error which had been made in the first two ET3's. The error was that in both the responses to the first two claims, the Respondent had incorrectly stated that an internal report recommended that employees at the centre should be moved until an investigation could be completed and the proposal to move the Claimant to another centre was made accordingly. In actual fact it was only the Claimant who was to be moved to another site and the amendment was to accurately reflect that. Although the application to amend, made during the hearing itself, was opposed, we considered that applying the principles in **Selkent Bus Company Limited v Moore** [1996] IRLR 661, that the amendment should be granted. The amendment only reflected the reality of the position rather than affecting the nature of the claims before us.

THE FACTS

12. Mr Morrison began his employment with the Respondent on 5 April 1987 as a Centre Attendant. After 3 years he was promoted to Duty Officer working at the Leicester Leys Centre for approximately 10 years. He was then appointed Neighbourhood Centre Manager for 12 months before being seconded for 3 years to a Sports Project Officer, followed by an Athletics Development officer and then subsequently to the position of Duty Officer at the Saffron Lane Sports Centre (Saffron Lane) where he remained until the termination of his employment. Mr Morrison holds various qualifications in sports and leisure management and the evidence was that he was himself a talented amateur athlete. The Saffron Lane site where he spent the last 10 years of his employment is a 3,000 seater stadium with an athletics track, being a dry site (that is no swimming facilities) offering the full range of athletics facilities to schools and other bodies by the local authority. The majority of the bookings are in the summer months but it is open all year round. Mr Morrison's duties included the day to day running of the site, setting up events for users, maintenance, security, dealing with bookings, banking, monies received and dealing with the management of the car parking on the facility. Those users who booked the facilities, car parking was free but as a large car parking facility, it was often booked by organisations including the Leicestershire County Cricket Club and De Montfort University.

It was also available for parking by private customers on occasions when demand in the area was likely to be high. One such occasion which is relevant to these proceedings was the final home match of Leicester City Football Club in 2014 when they were promoted from the championship.

13. Mr Morrison was not the only employee at Saffron Lane. There were two other duty officers, Lynette Harrison (white female) and Lewis King (white male). [Mr Morrison describes his ethnicity as Black British.] Although Mr Morrison sets out his hours of work in his witness statement as 4 pm to 9.30 pm daily (with the exception of Tuesdays and Thursdays), the evidence we heard was that Mr Morrison was usually at work at 3.30 pm on his usual work days. Ms Morrison however worked only part time, 10 hours a week which was subsequently increased to 12 in 2016 and Mr King was also part time. Although not designated as such being the only full time officer, Mr Morrison was very much seen as the more senior person on site.

14. Mr Morrison's immediate Line Manager was Mr Roy Cole who has been employed by the Respondent since 1986 and has been Facility Manager since January 2004. He only became Facility Manager for Saffron Lane however in December 2013. Prior to that the Claimant's Line Manager was Mr Harnek Kandola. Mr Cole and Mr Morrison have been friends for a long time, the two of them having known each other since the Claimant began his employment in 1987. They have covered each other's shifts. Mr Cole is also of Jamaican descent and African Caribbean origin. His evidence, which we accept is that both of them belonging to a relatively small African Caribbean community in Leicester, have socialised together. Mr Cole has acted as a referee when Mr Morrison was undergoing the process of being a potential foster parent. Mr Cole has overall responsibility for various leisure centres in his role and the Duty Officers at Saffron Lane report to him. That includes Ms Harrison and Mr King.

15. The sports facilities are overseen by an Area Service Manager, who in this case was Mr Edwin James. Mr James also describes his ethnicity as Black British and has known the Claimant since 1988. Mr James has been promoted from various positions beginning his career with the Leicester City Council in 1984 as a Centre Attendant. Mr James is Mr Cole's Line Manager.

16. Leicester City Council employs, as one might expect, a very large number of HR Officers. They include Ms Nicola Graham (white female), Mrs Hina Patel-Dhanji (of Asian ethnicity), Ms Simone Lewis (Black British), Mrs Demmer (white female) and Mrs Fiona Cook (white female). Mr Narshi, who was an Accounts Technician employed by the Council and who undertook an investigation as part of the Corporate Fraud Investigation is of Asian ethnicity. All others referred to in these proceedings are white British unless otherwise mentioned.

17. In summer 2014 an internal audit was undertaken at Saffron Lane. Mrs Margaret Mernagh, then Interim Head of Sports Services, raised concerns with the Respondent's Finance Department regarding the financial processes at Saffron Lane. Those concerns were that there appeared to be insufficient income being received from the centre and that service users did not appear to be charged for using facilities at the centre.

Mrs Mernagh instructed the Respondent's Internal Corporate Fraud Team to review processes. Following the audit, it appeared that there were financial irregularities in terms of record keeping, of the income received and banking. The consequence was that the Corporate Counter Fraud Team, led by Mr Kumar, produced 2 reports. The first related to financial processes at the Saffron Lane Centre and the second into an investigation concerning Mr Clive Morrison personally. We should pause there to say that whilst the reports were completed in December 2014, there had been a number of attempts by Mr Narshi

End of Side 2, Tape 1

Beginning of Side 1, Tape 2

Mr Narshi had made various efforts to speak to the Claimant as part of his investigation. His investigation began in February 2014 but the work began in earnest in August. Mr Narshi noted that there was a breakdown of financial processes which he attributed to the use of a manual diary than the Plus 2 system. The Plus 2 system is a computer software programme used by the Council at its various sports facilities. It is used to keep details of bookings and customers as well as processing payments and producing reports. Duty Officers are trained in using this system as well as in the Council's financial processes.

18. Mr Narshi detected that there was a disparity between what he felt should have been charged by way of parking on match days and what in fact was being taken and banked. He also noticed that there were a number of voided car parking receipts and incomplete financial records. He noticed that there were a total of 92 voided receipts for 3 May 2014. The immediate implication of this was that customers may have been charged but a lesser sum banked. The usual process is that where a ticket is voided for any reason (such as a customer may have changed their mind or they were entitled to park free of charge) the white top copy is stapled to the lower carbonised pink copy. A number of the top white copies could not be traced as part of the investigation. Mr Narshi requested a meeting with the Claimant and he arranged this for 8 October 2014. Mr Morrison did not turn up. A further meeting was organised for 22 October 2014 which Mr Morrison also failed to attend. There is then an exchange of e-mails about a meeting arranged on 29 October 2014 when, it appears to a misunderstanding as to what time the Claimant worked, the meeting did not take place. As a consequence, Mr Narshi ultimately prepared his report without input from Mr Morrison. His recommendation was that the Sports Service Manager should interview Mr Morrison to seek an explanation for the discrepancies that had been found and "consideration should be given to disciplinary action.

19. The reports were forwarded to Mrs Mernagh who decided that Mr Morrison (and not all of the employees at Saffron Lane as is now accepted) should be moved to another centre, namely Cossington Street Centre. It is this proposed move which appears to have been the origin of the subsequent issues, certainly so far as the Claimant was concerned.

20. It was left to Mr Cole to communicate the decision of the transfer to Mr Morrison, Mr Cole himself receiving instructions from Mr James. At this stage Mr Cole did not regard this as a disciplinary transfer, nor was he advised as such but he was aware of the Counter Fraud Investigations and we accept that he was less than transparent, for reasons which may have been beyond his control, in telling Mr Morrison that he was to be moved to Cossington Street Sports Centre from 1 December 2014. We accept Mr Cole's evidence however that at no stage was the Claimant told this was a secondment.

21. Mr Cole confirmed the discussion of 12 November 2014 in an e-mail to Mr Morrison. Mr Morrison replied back to say that he had some concerns although he did not specify what these were, it was agreed they would discuss these concerns face to face. Mr Morrison had a meeting with his union representative, Mr Steve Joyce and he subsequently asked Mr Cole for a meeting with his trade union representative. Mr Cole then arranged a meeting with his own Line Manager, Mr James, and Mr Joyce on 4 December 2014.

22. The meeting on 4 November is not documented except in e-mails but we are satisfied that it was confirmed that the Claimant's move would now be pushed back to 1 February 2015 that issues as to child care and annual leave were discussed and agreed with. Mr James' understanding and that of Mr Joyce appeared to be that the Claimant had accepted, albeit reluctantly, that the move would take place. It was therefore with some surprise and disappointment that Mr James received an e-mail subsequently to say that there was no agreement about the move. Mr Morrison sought advice from his trade union as to lodging a grievance and on 12 January 2015 Mr Morrison sent an e-mail to Mr James headed "official grievance" in which he said:

"Proposed move to Cossington Street Sports Centre

During this whole process I have been marginalised/victimised – and undervalued as a council employee – no other duty officer is being moved at this present time – as a precedent has been set for staff moves – duty officers and Managers – moves on mass."

23. In December 2014 the Counter Fraud Reports were completed and these highlighted the concerns as to Mr Morrison's part in the financial irregularities. Mr Cole discussed these with Mrs Patel-Dhanji and her advice was that in the light of the reports Mr Morrison's transfer should be under the disciplinary process. Mr Cole organised a meeting with the Claimant on 16 January 2015 at Saffron Lane at 3 pm to advise him that the transfer was now a disciplinary transfer.

24. Mr Morrison disputes that any such meeting was organised on 16 January. There is no contemporaneous note or e-mail but we are satisfied that Mr Cole's evidence on this is correct as there was otherwise no need for him to be at Saffron Lane with Mrs Patel-Dhanji on that day. At 3:05 when the Claimant had not arrived (he was usually very punctual) Mr Cole attempted to make contact with him. There was no answer on the telephone and shortly afterwards there was a telephone call from Mr Morrison to say that he was unwell and would not be attending the meeting.

25. Sixteenth January was a Friday and the Claimant would ordinarily be working that weekend. Mr Cole decided that he would cover the Claimant's role himself on Saturday 17 and Sunday 18 January 2015. Mr Morrison telephoned Mr Cole on the Sunday to say that he was well enough to return but Mr Cole replied that as he was already covering the shift, it would be best if Mr Morrison returned to work on Monday 19 January. However on Monday 19 January at 11:21 am Mr Morrison sent a text to say "Roy I will not be in today – still not feeling better".

26. The following day on 20 January 2015 Mr Cole wrote to the Claimant in the following terms:

"I am writing with regard to your current sickness absence from work.

As per the attendance management procedure, you are required to maintain contact with your employer. You have been sending text messages, however, the procedure does require you to speak with your manager.

I am therefore, requesting that you contact me to discuss the reasons for your absence, by Friday 23 January 2015.

I have requested that your keys and the events diary is returned to me as soon as possible and I have asked your union representative, Steve Joyce, to discuss this matter with you.

I hope that you feel better soon and I look forward to hearing from you."

27. Three days later, on Friday 23 January 2015, Mr Cole once again wrote to the Claimant in the following terms:

"I am writing further with regard to your current absence from work.

I had requested that you contact me by today to discuss the reasons for your absence. I have not heard from you.

You were required to attend a meeting with me on Friday 16 January 2015 at 3 pm, however you rang me at 3.10 pm, following a call from me, to advise that you were unwell and would not be in work. We then had a discussion on Saturday 17 January 2015 where you advised me that you would be returning to work on Sunday 18 January 2015, I advised you that your shifts had been covered and that you should come in on Monday 19 January 2015. You were seen later driving past the Stadium.

I then received a text message from you on Monday 19 January 2015 stating that you would not be in work as you were still not feeling better.

I have not heard from you following this last text message and my letter dated 20 January 2015. I am also unaware of the reasons for your absence and I have not received a fit note from your GP advising that you are unwell. At present you are absent without leave.

As you have not contacted me since Monday 19 January 2015, I must request that you contact me as a matter of urgency.

I do hope that your health is not preventing you from contacting me. If there is any support or assistance that I can offer then I am more than happy to facilitate this. May I remind you of the telephone number for the employee assistance programme provided by Amica, (Leicester City Council's confidential Counselling service), which can be accessed on 2544388 quoting employer reference number 0504. Alternatively if you feel that a referral to the Occupational Health Service would prove useful please contact me so I can make the necessary arrangements.

I must advise that this is the second time I have written to you advising you to contact me. If I do not hear from you by Monday 26 January 2015, I will have no alternative but to suspend your pay.

I have to advise you that should you fail to meet this target, and comply with the Attendance Management Procedure, further formal action may be taken."

28. Mr Cole wrote to the Claimant again on 2 February 2015 in a letter which was delivered by Ms Simone Lewis in which Mr Cole wrote:

"I had written to you asking for you to contact me as a matter of urgency by 26 January 2015, and I have not heard from you. You had submitted a fit note advising that you have been signed off sick, however, you have not contacted me to discuss your absence and to discuss the return of the centre keys and booking diary.

I have now not heard from you since 19 January 2015 and I would like to meet with you to discuss the reasons for your absence and for you to bring in the keys and booking diary. Therefore, I have arranged the meeting for Wednesday 4 February 2015 at 11 am at Braunstone Leisure Centre.

It is important that you do attend this meeting.

In addition, in my previous letter I had advised that if you do not contact me by 26 January 2015, I will have no option but to suspend your pay. As I have not heard from you, your pay will be suspended with effect from 1 February 2015."

29. On 4 February 2015 Ms Trisha Morrison, the Claimant's sister, contacted Mr Cole to say that her brother was on holiday in the United States. She confirmed this in writing in an e-mail of 5 February in which she writes:

"I am Clive's sister and have his express permission to correspond with you… I confirmed my brother was on holiday with our elderly parents and would be unable to make the meeting scheduled for 11 am on the 4th February. I also spoke to Roy Cole who confirmed annual leave had been requested by Clive and approved last year for the period of the holiday taken."

30. In fact Mr Cole's evidence is that he had not approved any leave for this period and he contacted Mr Chris Kilby, Facility Manager at Cossington Street to see if any leave had been approved. Mr Kilby said that Mr Morrison had requested leave but there was some confusion regarding the dates.

31. On 4 February 2015 Mr Cole wrote to the Claimant once again in which he wrote:

"Following receipt of the letter, your sister, Trisha Morrison, has contacted HR and advised that you are currently in America on holiday and you had left the Country on Sunday 1 February 2015.

I have been notified that you have not requested this period of holiday as annual leave on Myview, as requested by Chris Kilby, Facility Manager, and therefore, you continue to be absent without leave.

Your sick note ran out on 3 February 2015 and I have not received a further note."

32. On 23 February Mr Cole received a letter from "*Mr and Mrs Morrison*", although it is now accepted that it was largely a letter written by the Claimant's wife, Mrs Alison Morrison, in which she said that it was "incomprehensible that you continue to correspond with my husband while you are fully aware of his sick leave due to work related stress". Mrs Morrison went on to say that a sick note had been posted to HR on 7 February and a further sick note would follow.

33. On 25 February 2015 Mr Cole wrote to the Claimant to say that he understood that the Claimant had now returned from the United States and whilst it was his intention to pay wages, he required clarity as to whether the absence for the period 1-17 February 2015 was sickness or holiday. He went on to say:

"In addition, I still do not have the keys or the booking diary for the Stadium and it is imperative that we now have this. Therefore, *someone* will come to your house to collect the keys and diary on Friday 27 February 2015. Unfortunately, I cannot confirm a time with you, however, if there is a specific time that you would like them to come, then please give me a call and we can arrange a specific time for that day. Please ensure these items are given to them. [Emphasis added.]"

34. On 27 February 2015 Mrs Morrison wrote to Mr Cole in which she complained of the Claimant's suspension of pay despite the fact that medical certificates had been submitted. She also complained of a visit to her house on that day by Mr James who had apparently been instructed to collect keys and the diary from Mr Morrison's house. Although it is accepted that Mr Cole's letter of 25 February which he had given advance warning that someone would be attending to collect the keys and diary on 27 February, he had not identified who that person was. Mr James gave evidence of this visit. Under cross examination he acknowledged riley under cross examination that to say the meeting had not gone well was an understatement. Mr James had been asked by Mr Cole to attend Mr Morrison's home on the basis that as Mr Cole might be investigating misconduct later he did not wish to have a conflict of interest. Mr James attended the house but unknown to him Mr Morrison had gone missing a few days earlier. Mrs Morrison opened the door. She was visibly distressed and explained that she had just filed a missing person report with the Police as she did not know of Mr Morrison's whereabouts.

It is Mr James' evidence that Mrs Morrison was very abusive towards him and despite his attempts to defuse the situation, which appear to have wholly failed, Mrs Morrison said that she did not know anything about the diary or the keys and so Mr James left without them. Mrs Morrison's subsequent letter of complaint said that she was left very upset and distressed by the visit and complained of a failure by the Council to discharge their duty of care to safeguard his wellbeing.

35. Mrs Morrison then contacted her sister, with whom she had apparently not been in contact for some time but as her sister was a qualified solicitor, she sought advice. That resulted in 2 letters in identical terms, written by Ms T Clark, solicitor on 19 and 20 March, one addressed to Ms Steph Holloway, Head of Human Resources at the Respondent and the other to HR Operations. The letters, which are curious in that they are not on headed note paper and to all intents and purposes would not give the impression that they are from any firm of solicitors or indeed a solicitor were it not for Ms Clark identifying herself as a solicitor, state that she acts on behalf of Mr Morrison "in relation to this employment matter". Ms Clark goes on to deal with complaints of harassment subjected to him by Mr Cole whilst he was on sick leave and a failure to pay sick pay whilst Mr Morrison was absent from work. She closes the letter by threatening to bring proceedings for harassment and discrimination.

36. On 25 March 2015 Mr Cole decided to refer the Claimant to occupational health and a meeting was arranged with an occupational health adviser on 9 April. On the day of the appointment Mr Cole was informed (via occupational health) that Mrs Morrison had telephoned to say that her husband was not well enough to attend the appointment. A further appointment was arranged for the Claimant on 26 May 2016 which the Claimant also failed to attend.

37. On 10 June 2015 Mr Cole invited the Claimant to meet with him to formally investigate a failure to maintain contact throughout the period of absence and "concerns relating to alleged financial irregularities". The investigation meeting was subsequently confirmed in a letter of the same day, also written by Mr Cole in which the Claimant was invited to an investigation meeting on 26 June 2015. The purpose of the investigation was to consider the following allegations:-

(i) Failure to maintain contact throughout the period of absence.

(ii) Financial irregularities of a potentially fraudulent nature.

(iii) Not following City Council and sports procedures.

38. On 21 June Mr Morrison wrote to Ms Holloway, a senior HR Officer to say that not only was he off sick for work related depression but that the notice of the meeting had "*exacerbated his fragile recovery*". Mr Morrison sought further details as to the nature of the allegations. He went on to say that he would not be able to attend the meeting on 26 June and asked for it to be postponed.

39. On 24 June Mrs Demmer agreed to postpone the meeting and in response to the request for details of the allegations wrote:

"The allegations you are querying relate to concerns over disparity of match day parking tickets pricing and day to day processes at the Centre not being followed. You will be given more detail at the investigatory meeting. I want to be clear that this meeting is part of an investigatory process and the aim of the investigation is to obtain, as far as possible, a fair and balanced picture through a written record to establish facts and determine if it is necessary to proceed to a formal disciplinary hearing."

40. The Claimant denies receiving this letter. It is his case that this letter has subsequently been fabricated.

41. On 18 July 2015 after a period of some 6 months absence, Mr Morrison wrote to Ms Demmer to say that he wished to have a further occupational health referral to "enable my rehabilitation and support in returning to work".

42. At this stage, although there is no direct documentary evidence, it appears that a decision was taken that Mr Cole would no longer be the investigating officer and that the responsibility would in fact be passed on to Ms Victoria Ball, Sports Regeneration Manager. The decision to change the investigation manager appears to have been that of Mrs Patel-Dhanji. Ms Ball knew the Claimant but did not directly work with him or have any previous dealings with him. Ms Ball made what can only be described as an inauspicious start. The letter inviting the Claimant to an investigation meeting which had largely been prepared earlier for 26 June meeting was printed again, altering the date of the meeting and the date of the signatory. The material information however had remained the same. Although we do not have the e-mail from Mrs Patel-Dhanji to Ms Ball, we assume it was around 24 July 2015 which was the date of the letter to Mr Morrison. It appears that Ms Ball printed off the letter on 27 July by which date 3 days had already gone by in a fairly tight time schedule. It was her intention to post the letter that morning. Unfortunately she found herself very busy at work and needed to attend to an emergency which lasted until 2 pm. By this point Ms Ball still had the letter on her person but was concerned that if it was not received in good time, the meeting on 31 July might need to be postponed again. Perhaps as a result of her being busy, she mistakenly read it to mean that the meeting was on 30 July which only served to reduce the timescale. In the circumstances Ms Ball decided that rather than post the letter she would deliver it personally to Mr Morrison as it was on her way. She arrived at Mr Morrison's house at approximately 2:50 pm and discovered Mr Morrison was doing some gardening in the front garden. It is her account that no one else was present except Mr Morrison. When she walked towards the garden wall Mr Morrison came over to join her

End of Side 2, Tape 2

Beginning of Side 1, Tape 3 (But you say tape 4)

Mr Beddow decided to consider the material lodged by Mr Morrison as written representations. He was unable to conclude the disciplinary hearing on 21 December and it was adjourned to 11 January 2016 and subsequently adjourned once again to 19 January 2016. Mr Beddow wrote to Mr Morrison on 22 December to say that he was adjourning the hearing and again on 14 January. In the course of his investigations he decided that it was appropriate to visit Saffron Lane and speak to Ms Lynette Harrison, which he did on 19 January 2016. He felt it was important to understand the management relationship between Mr Morrison as full time Duty Officer and Ms Harrison as the part time Duty Officer. In addition to the meeting with Ms Harrison Mr Beddow also received a number of additional documents between the reconvened hearings and he sent copies of those to Mr Morrison on 14 January. Mr Morrison objected to the additional documentation being taken into account. Mr Beddow invited the Claimant to submit any further evidence or comments by 4 February. Mr Morrison wrote on 26 January to say that he would not be providing any further comment on the documentation and asked as to when a final decision would be communicated. On 4 February Mr Beddow invited the Claimant to attend a meeting the following day to inform him of his decision. Mr Morrison did not attend.

43. On 5 February 2016 Mr Beddow sent a letter to the Claimant confirming the outcome of the disciplinary hearing. In a 10 page letter Mr Beddow set out his findings in relation to the 3 allegations. In relation to the first allegation he concluded that the process for match day parking had been clearly communicated to all staff. He accepted that the car parking charge on the day was £4 and not £5. He noted the practice of the Claimant and Mr King in pre-tearing off tickets prior to issue and was critical of the fact that the Claimant did not take into account that an accident on 3 May 2014 with subsequent road closures would have led to Claimant to conclude that the expected volume of cars would be less and therefore the practice of pre-tearing of tickets was unnecessary. He concluded that neither the Claimant nor Mr King had followed correct processes in relation to car parking. He concluded that there was no evidence that procedures were put into place to ensure that customers who were entitled to free parking received it. He found that none of the voided tickets were attached to the pink duplicate tickets in the receipt book as they should have been. This was a requirement in line with Council's procedures and a breach of those procedures. He noted that a number of tickets were located in the safe in the office and in addition a number of voided tickets were found in a took box in a locked cabinet to which the Claimant was the only key holder. He noted that the remaining voided tickets had still not been produced, located or presented to management or the Corporate Counter Fraud Team as requested. He found that the Claimant had failed to provide an explanation to meet up with the Corporate Counter Fraud Team on 3 occasions. As the senior person on shift he concluded that the Claimant was the responsible officer and that he had failed to appropriately manage match day car parking. However Mr Beddow was not satisfied that there was evidence of any significant loss of income to Leicester City Council and he therefore found the Claimant "partially blameworthy" of the allegation.

44. In respect of the second allegation, he noted that there was a paper diary system in place at Saffron Lane, notwithstanding the Claimant had been given instructions by his Line Manager to use the computerised Plus 2 system. He found that Mr Morrison had been told that the practice of using a paper diary should stop but nevertheless continued despite e-mails from Mr Cole to the Claimant. He also went on to list how as a result of failing to use the proper system there had been a loss of income to Leicester City Council. He gave examples from several schools. He also noted that De Montfort University had been charged £20 an hour for parking whilst Leicestershire County Cricket Club were charged £20 per day. However Mr Beddow went on to conclude he accepted the Claimant had not fraudulently taken income but he nevertheless found the Claimant blameworthy of failing to appropriately manage bookings for the Council's sports facilities resulting in a significant loss of income.

45. In relation to the third allegation Mr Beddow found that the Claimant's failure to maintain and share booking information with the staff resulted in double bookings and had caused "considerable operational problems and reputational damage". Mr Beddow also went on to say that the Claimant had caused damage to the Council's reputation by communicating with an external customer about his dissatisfaction with the Council in an e-mail and had spoken to Dr D'Silva about his case. Mr Beddow went on to conclude that having considered the matter carefully he considered that the allegations constituted gross misconduct and warranted summary dismissal.

46. The Claimant appealed against the decision but subsequently withdrew the appeal. On 5 April 2016 he presented his third and final claim in these proceedings which included a complaint of unfair dismissal.

THE LAW

Equality Act 2010:-

Section 9, subsection 1(a) to (c)

(1) Race includes—

(a) colour;

(b) nationality;

(c) ethnic or national origins.

Section 13, subsection 1

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

Section 23, subsection 1

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

Section 24, subsection 1

(1) For the purpose of establishing a contravention of this Act by virtue of section 13(1), it does not matter whether A has the protected characteristic.

Section 27, subsections 1 and 2

(1) A person (A) victimises another person (B) if A subjects B to a detriment because:-

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act:-

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

Section 39, subsection 2

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

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

(c) by dismissing B;

(d) by subjecting B to any other detriment.

Section 123 and here we need to do pretty much all of it I think, subsection 1, subsection 2 (a) to (b), subsection 3 and subsection 4

1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of:-

(a) The period of 3 months starting with the date of the act to which the complaint relates, or

(b) Such other period as the Employment Tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of:-

(a) The period of 6 months starting with the date of the act to which the proceedings relate, or

(b) Such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section:-

(a) Conduct extending over a period is to be treated as done at the end of the period;

(b) Failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something:-

(a) When P does an act inconsistent with doing it, or

(b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 136

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to:-

(a) an employment tribunal;

(b) the Asylum and Immigration Tribunal;

(c) the Special Immigration Appeals Commission;

(d) the First-tier Tribunal;

(e) the Special Educational Needs Tribunal for Wales;

(f) an Additional Support Needs Tribunal for Scotland.

Employment Rights Act

Section 98 subsection 1(a) to (b)

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

Section 98(2)(b)

(2) A reason falls within this subsection if it:-

(b) relates to the conduct of the employee,

Section 98(4)(a)

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.

47. In the course of submissions we were referred to the following authorities **Hadjioannou v Coral Casinos Limited** [1981] IRLR 352, **Burrett v West Birmingham Health Authority** [1994] IRLR 87, A v B [2003] IRLR page 405, **Robinson v Bexley Community Centre trading as Leisure Link** [2003] IRLR 434, **J Sainsbury Plc v Hitt** [2003] ICR 111, **Strouthos v London Underground** [2004] IRLR 636, **Associated Society of Locomotive Engineers and Firemen v Brady** [2006] IRLR 576, **Lyfar v Breeton and Sussex University Hospitals Trust** [2006] EWCA civ 1548, **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854, **Ramphal v Department of Transport** [2015] UK EAT/0352/14, **Reynolds v CLFIS (UK) Limited** [2015] ICR and **Adesokan v Sainsburys Supermarkets Limited** [2017] EWCA civ 22.

48. In coming to our decision we have also taken into consideration the guidance in the following cases, HSBC Bank Plc v Madden [2000] ICR 1283, **London Ambulance Service NHS Trust v Small** [2009] EWCA civ 220, **British Home Stores v Burchell** [1980] ICR 308, **Laws v London Chronicle** [1959] IWLR 698 and **Sandwell v West Birmingham Hospitals NHS Trust** [2009] UK EAT 0032/09/1712 and **McCormack v Hamilton Academical Football Club Limited** [2012] IRLR 108.

THE ALLEGATIONS **End of Tape 3, Side 1**

Beginning of Tape 3, Side 2

Allegation 1

49. That Mr Cole insisted verbally and by e-mail that the Claimant must apply for his Pool Bronze even though he knew that the Claimant had been diagnosed with high blood pressure.

Allegation 2

50. That Mr Cole left the Claimant to run the Athletics stadium on numerous occasions on his own.

Allegation 3

51. That Mr Cole failed to provide alternative staffing cover when Ms Harrison and Mr King were absent. In addition he ignored the Claimant's request for additional staffing.

Allegation 4

52. That Mr Cole granted paternity leave for Mr King and annual leave for Ms Harrison without arranging cover knowing that it would leave the Claimant working alone.

Allegation 5

53. That the Claimant was told he would be seconded [to Cossington Street] without adequate notice or information.

Allegation 6

54. That Mr Edwin James did not respond to the Claimant's grievance submitted on 12 January 2015 or investigate it.

Allegation 7

55. That Mr Cole sent a letter to the Claimant in which he was asked to contact him as a matter of urgency otherwise his pay would be suspended.

Allegation 8

56. That Mr Cole sent a letter to the Claimant threatening to suspend his pay.

Allegation 9

57. That Mr Cole sent a letter to the Claimant inviting him to a meeting to discuss his sickness absence and stating that his pay would be suspended.

Allegation 10

58. The decision to hand deliver the Respondent's letter of 2 February 2015 and to discuss it with the Claimant's daughter.

Allegation 11

59. That Mr Cole stated in a letter that he was not in receipt of the Claimant's sick note despite Mr Cole having in his possession the Claimant's sick note.

Allegation 12

60. That Mr Cole stated in a letter that he did not know whether the Claimant was on sick leave.

Allegation 13

61. That Mr Cole failed to provide details of which employee would be visiting the Claimant and when.

Allegation 14

62. An allegation that Mr James attended the Claimant's premises uninvited on 27 February 2015.

Allegation 15

63. That Mr Cole refused to communicate directly with the Claimant's wife following her correspondence.

Allegation 16

64. That Mr Cole invited the Claimant to a disciplinary hearing by letter of 10 June 2015.

Allegation 17

65. The Respondent in refusing to provide the Claimant with additional information concerning the allegations against him was guilty of direct race discrimination.

Allegation 18

66. That Ms Ball discussed the allegations against the Claimant with him outside his home and within earshot of his neighbours.

Allegation 19

67. That the Respondent caused letters to be hand delivered to the Claimant's home address and declined to confirm that no letters would be so delivered going forward.

Allegation 20

68. The decision to refer the Claimant to occupational health before his return to work despite already having adequate information.

Allegation 21

69. The decision to transfer the Claimant to Town hall under the disciplinary procedure.

Allegation 23

70. Asking the Claimant to pay back monies he had received in error and failing to apologise or offer any explanation.

Allegation 25

71. That the Claimant was invited to a disciplinary hearing on 10 December 2015 which contained more allegations and of a more serious nature.

Allegation 26

72. That the Claimant was subjected to an oppressive disciplinary process.

Allegation 27

73. That the Claimant was victimised in relation to the decision to dismiss.

74. In respect of all of the allegations the Claimant relies upon Mr Lewis King, Ms Lynette Harrison, or a hypothetical white comparator.

75. Allegations 1-4 are of direct race discrimination and against Mr Roy Cole only.

76. Allegation 5 is against both Mr Cole and Mr James.

77. Allegation 6 is against Mr James only.

78. Allegations 7-9 are of direct race discrimination against Mr Cole. The Claimant does not know who was the perpetrator in relation to allegation 10.

79. Allegations 11-13 are against Mr Cole only.

80. Allegation 14 is against both Mr Cole and Ms James.

81. Allegations 15-16 are against Mr Cole only.

82. Allegation 17 is against Ms Holloway and Ms Demmer.

83. Allegation 18 is against Ms Ball.

84. Allegation 19 is against Mrs Patel-Dhanji, Sir Peter Soulsby and Ms Holloway.

85. Allegations 20-21 are against Mrs Patel-Dhanji only.

86. The Claimant does not know who was the perpetrator of Allegation 23.

87. Due to a numbering error there is no allegation 24.

88. Allegations 25-27 are of victimisation.

89. Allegation 25 is against Mr Roy Cole only.

90. Allegation 26 is against Ms Bull, Mrs Patel-Dhanji, Ms Demmer, Mr Cole, Mr Beddow and Ms Fiona Cook.

91. Allegation 27 is against Mr Beddow only.

92. The broad issues were as follows:-

92.1 Whether the Claimant was directly discriminated against by reason of his race?

92.2 Whether complaints of race discrimination have been presented out of time and if so whether it is just and equitable to extend time?

92.3 Whether the Claimant was victimised by reason of having presented his first claim form on 30 October 2015?

92.4 Whether the Claimant was unfairly dismissed?

92.5 If the Claimant was unfairly dismissed for purely procedural reasons, what adjustment if any should be made to the compensatory award to reflect the possibility that the Claimant would have been dismissed even if a fair and reasonable process had been followed (Polkey v AE Dayton Services)?

92.6 Whether there should be a reduction or increase in compensation for breach of the ACAS code of practice?

92.7 Whether there should be any reduction of compensation by reason of the Claimant's contribution to dismissal?

CONCLUSIONS

93. The Claimant identifies himself as 'black British' and as such there is no dispute that he falls within the protection of Section 9(1) EA 2010. The complaint of direct race discrimination requires the Tribunal to consider less favourable treatment because of that protected characteristic of race.

94. Section 23 EA 2010 requires the Tribunal to ensure that in determining whether there has been less favourable treatment requires a comparison whereby there must be no material difference between the circumstances relating to each case. The fact that Mr Cole and Mr James (and for that matter also Ms Lewis) also share the same protected characteristic as the Claimant does not prevent race discrimination as a matter of law from occurring – see Section 24 EA 2010.

95. The complaint of victimisation is founded on the protected act of the first ET1. It is important to note that it is agreed between the parties that the Claimant's grievance of 12 January 2015 does not constitute a protected act.

96. Unlawful direct race discrimination is prohibited by Section 39(2) EA 2010. This is subject to the provisions however of time limits which are set out in Section 123 EA 2010. In this case there is a dispute as to which allegations are out of time and whether or not time should be extended under the principles set out in that Section.

97. Section 136 EA 2010 deals with the burden of proof. There is no dispute in law as to the burden of proof provisions in this case. It is now well established following Madarassy v Nomura International Plc (2007) ICR 867 – a case decided before the provisions of EA 2010 but a case which is entirely consistent with the statutory scheme that in deciding whether there is race discrimination, it is for the Claimant to establish a prima facie case of discrimination (the first stage) and for the Respondent then to discharge the burden of proof in proving the absence of discrimination (stage 2). That is of course one approach. The alternative approach, which is to consider the reason why the discriminatory acted as they did for reasons set out below, it does not matter in this case whichever approach one takes.

98. In relation to the complaint of unfair dismissal, and in applying Section 98(4) ERA 1996, we have borne in mind the guidance in HSBC Bank v Madden, namely that:-

"(1) The starting point should always be the words [Section 98(4) ERA 1996] themselves.

(2) In applying the above section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute its decision as to what was the right cause to adopt.

(4) In many cases there is a band of reasonable responses to the employees conduct with which one employer might reasonably take one view and another employer quite reasonably take another.

(5) The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band it is unfair."

99. The Court of Appeal in **London Ambulance Service NHS Trust v Small** reminded Tribunals of the importance of not substituting their views for that of the employer. We have been conscious of the importance of not doing so, particularly in this case where the Claimant, not having attended the disciplinary hearing, has sought to put in evidence matters which would otherwise have been argued at a disciplinary hearing.

100. It is now well established that the band of reasonable responses test applies equally to the investigation as it does to the decision to dismiss (**Sainsburys Supermarket Limited v Hitt**).

101. In **British Home Stores v Burchell**, the Court of Appeal identified the criteria the Tribunal should apply generally in cases of dismissal by reason of alleged misconduct. Firstly, the Tribunal should decide whether the employer had an honest and genuine belief the employee was guilty of the dishonesty in question. Secondly, the Tribunal must consider whether the employer had reasonable grounds on which to sustain that belief. Thirdly, at the stage at which the employer formed its belief,

End of tape 3, side 2

Beginning of tape 4 (you say tape 5), Side 1

whether it had carried out as much investigation as was reasonable. Although Burchell was decided before changes were made to the burden of proof, the three step process is still very helpful in determining cases involving dismissals from gross misconduct.

102. The classic test as to what constitutes gross misconduct justifying an employee's summary dismissal was set out in **Laws v London Chronicle**, where it was held that the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract.

103. This principle has subsequently been explained in two cases, one of the EAT and one of the Inner House of the Court of Succession in Scotland. In the former, **Sandwell v West Birmingham Hospitals NHS Trust**, his Honour Judge Hand QC said (at paragraph 111) "gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee: See **Wilson v Racher** [1974] ICR 428 CA per Edmond Davis LJ at page 432….." so the conduct must be a deliberate and wilful contradiction of the contractual terms. The second of those two cases, **McCormack v Hamilton Academic Football Club Limited**, Lord Emslie explained the relevant test as to gross misconduct (at paragraph 8) as follows:

"Summary dismissal has to be regarded as an exceptional remedy calling for substantial justification. It will not be readily sustained for misconduct which only peripherally affects the performance of core duties under the relevant employment contract. To bring summary dismissal into play, repudiatory conduct must be so serious as to strike at the foundation of the employer/employee relationship, and for practicable purposes make its continuance impossible. It is, furthermore, a remedy which must normally be exercised as soon as a sufficiently episode or course of misconduct comes to the employer's attention. Delay and inaction at that point carry with them an obvious risk that the employer would be held to a past from his option to accept the repudiation and, conditionally or otherwise, to have affirmed the contract instead."

RACE DISCRIMINATION

The Out of Time Point

104. The first claim was presented on 31 October 2015 when the Claimant was still employed. It is the Respondent's position that having regard to the early conciliation provisions, any allegations prior to 10 August 2015 are out of time. That particular proposition does not appear to be disputed save that it is the Claimant's case that all of the allegations are in time and if not in time that it is just and equitable under the provisions of Section 123(2)(b) to extend time.

105. Allegations 1-18 predate 10 August 2015 and are thus potentially out of time. In relation to the issue of whether they are an act extending over a period, we agree with Ms Masters on behalf of the Respondents that they are not a single act extending over a period (the old "continuing act"). They relate to different people in most cases, there are different incidences and the subject matter is different. There is nothing that links all of these allegations together, nor is there any common thread between them. There are frequent breaks between some of the acts. It cannot be said that there was an ongoing situation or a state of affairs between allegations 1-4 and allegation 6 and 10 for example. We are therefore satisfied that there is no basis for alleging a continuing act and Mr Dracass in fairness does not push the point very far in that direction.

106. The next question therefore is whether it is just and equitable to extend time. We begin firstly with the often cited passage in **Robertson v Bexley Community Center** (at paragraph 25) that time limits should be exercised strictly and time should not be extended unless there is a reason to do so. In this case Mr Morrison has not advanced any reason to extend time. On the contrary, it is clear that he was receiving advice from a solicitor (T Clark) in March 2015 where Ms Clark writes to say that she acts on behalf of Mr Morrison "in relation to this employment matter".

In his evidence Mr Morrison rather disingenuously said he did not know who Ms Clark was (in response to a question that it was unusual to instruct a solicitor in London) but his wife's evidence clarified that Ms Clark is in fact her solicitor. We find it difficult to accept that Mr Morrison did not know that Ms Clark who was writing letters on his behalf – primarily to reinstate his pay – was in fact his sister-in-law. In any event, he was in receipt of legal advice as at March 2015 and given that Ms Clark had threatened to bring proceedings, he must have been aware of the fact that he could bring a claim, yet he chose not to do so. Mr Morrison has also been a member of Unison throughout and has received advice throughout. It is clear from the e-mails he has disclosed that he was seeking advice as to how to present his grievance in January 2015 and if he had felt that he had been racially discriminated against there is no doubt that he would have sought advice as to what remedies were open to him.

107. In conclusion, we are satisfied that allegations 1-18 are out of time and should be dismissed as being out of time. In the event that we are wrong on that point, we have nevertheless gone on to consider the allegations in their substance along with the remainder of them. Our conclusions are set out below.

108. The first allegation relates to a requirement that the Claimant was told he must apply for his Pool Bronze qualification despite the fact that he had made it clear to Mr Cole that he had been diagnosed with high blood pressure.

109. Although on the face of it that might amount to an allegation of disability discrimination rather than race discrimination, we do not find any less favourable treatment. It was common ground that the actual qualification (a national Pool Lifeguard qualification) which involved lifesaving skills primarily but not necessarily limited to centres where there was a swimming pool, the Claimant was asked to complete the course on several occasions. However, there was no less favourable treatment because it was an essential element of his role as a Duty Officer and it was part of his job description. Mr Morrison had previously held a qualification but it had simply lapsed by December 2014. Whilst it is correct that Saffron Lane did not have a swimming pool, it is also correct that Duty Officers might be required to transfer to other leisure sites and as such the qualification would be essential. The medical evidence that the Claimant proffers is very vague. It refers to the Claimant being "a bit tired" which on the face of it hardly warrants medical grounds. The Claimant was to all intents and purposes at this stage still participating in athletics competitions. In any event there was no less favourable treatment because Mr King the comparator was also required to do the course.

110. Allegations 2-4 all deal with the Claimant's allegation that he was required to undertake work without adequate assistance, cover or resource. His case however is factually deficient in support of the allegation. We accept the Respondent's position, supported by the documentary evidence, that Mr Oliver Charlesworth (a Casual Centre Attendant) was available to provide assistance if necessary and that where the Claimant was left without assistance, that was because he failed to ask for assistance. It is not factually correct that Mr Cole ignored the Claimant's request.

The allegation as to Mr King going on paternity leave in May 2014 means that the mount of time that the Claimant may have been without Mr King's assistance was very short. We do not find there to be any substance in the suggestion that the Claimant was left without appropriate cover. It is also difficult to see how this was an act of race discrimination.

111. Allegation 5 relates to the entire chain of events which is central to this case, namely that the Claimant was told that he was to be transferred to Cossington Street Sports Centre. Firstly the Claimant has misunderstood or mislabelled it as a secondment. The Respondent has never at any point labelled it as a secondment. The Claimant is also mistaken in his allegation that the perpetrator or the decision maker was Mr Cole when in fact it was Mrs Margaret Mernagh. The Claimant must have recognised that the decision to transfer him would be made higher up than Mr Cole and so his allegation that Mr Cole is the perpetrator of the act of discrimination smacks of retaliation rather than a genuine belief that Mr Cole would have made the decision. Whilst it is accepted that Mr Morrison was not initially told that it was a disciplinary transfer, there is no reason to believe that this information was not provided because of his race. Mr Cole was merely passing on the message and whilst we accept that he was less than transparent in giving the reasons, that was not motivated by race. Mr Cole had also transferred a white employee in similar circumstances. There is thus no evidence of less favourable treatment.

112. In relation to allegation 6 whilst Mr James did not respond to the grievance it is incorrect factually to say that it was ignored. Mr James passed it on to Mrs Patel-Dhanji.

End of Tape 4, Side 1

Beginning of Tape 4 Side 2

We will deal with allegations 7, 8, 9, 11, 12 and 13 together as they all appear to relate to the circumstances of the Claimant's absence. The conduct of Mr Cole has been severely criticised by Mr Dracass as "unnecessary, unjustified and heavy handed". What the Claimant is essentially complaining of here is that despite having a good attendance record in the past, Mr Cole wrote to the Claimant only a few days into his sick leave, in a manner which was harsh and heavy handed.

113. The Respondent's relevant policy states at paragraph # :

"Employees must telephone their Manager or nominated person in their division by 10 am… on the first day of sickness absence, stating the reason for absence and expected date of return. If unable to return to work when indicated, the employee must *contact* their Manager again to ensure they are aware of the expected duration of the absence and to enable continued provision of services.

When an employee does not report in as specified above, and has no good reason for not doing so, then pay for the whole day and for subsequent day's absence not notified will be stopped." (Emphasis added)

114. Mr Dracass argues that the word contact does not necessarily require a personal telephone call and can legitimately be undertaken by text. Whilst that is arguable, it was not how Mr Cole or Mrs Patel-Dhanji interpreted the policy. It is perfectly possible for both interpretations to be correct and on Mr Cole and Mrs Patel-Dhanji's understanding the Claimant's failure to speak to Mr Cole was a breach of the policy. Given that the earlier part of the same paragraph refers to telephoning the Manager, if anything, the policy appears to suggest that the Claimant must continue contact by telephone. We accept Mr Cole's evidence that he did not regard text message contact as appropriate and neither did Mrs Patel-Dhanji. In those circumstances Mr Cole's motivation for his actions was that the Claimant had failed to comply with the policy rather than in relation to Mr Morrison's race. Mr Morrison had gone off sick on 16 January 2015 shortly after he had lodged a grievance about being transferred to a site where he did not wish to go. He had failed to attend a meeting arranged on 16 January and whilst he had indicated that he was willing to return on Sunday 18 January 2015 (and told that his shift had already been covered) he was expected back at work on Monday 19 January. On that day he had sent a text to say that he was too sick to come into work but had given no details or information. Mr Cole is required to put information into the Council's Myview system which governs pay. At the point of the first letter being sent on 20 January, Mr Morrison had sent only one text with no explanation. Mr Cole could have waited a few days longer and in hindsight he probably wishes that he had, but there was no breach of the attendance policy in writing on 20 January as he did. At this stage Mr Morrison had not made any direct contact with Mr Cole to explain his absence.

115. By 23 January, Mr Morrison had still not made any contact despite the fact that notwithstanding the two days when the Claimant would have rest days there had still been no communication and no explanation for the reasons for absence. In writing to the Claimant in the terms that he did Mr Cole was simply following policy. We do not accept the suggestion that the letter was unsympathetic (even if it was, that is not necessarily race discrimination) as Mr Cole specifically says "if there is any support or assistance that I can offer you then I am more than happy to facilitate this" and "I hope that you are feeling better very soon".

116. As a general proposition, we would find it difficult to accept that where the Respondent has applied its policy and procedures, that there is less favourable treatment unless there is any evidence of the application of the policy being any different to the Claimant than it was to others. There is in fact no evidence that what Mr Cole was doing, supported and advised by HR, was any different in this case to any other employee.

117. In relation to allegations 9 and 10, which centre on the letter from Mr Cole of 2 February 2015, it is both factually correct that the Claimant had not been in contact with him to discuss sickness absence and that the Claimant had by this point still not returned the Centre keys and booking diary which he had inexplicably taken with him prior to commencing sick leave on 16 January. As we will see later, the absence of both of these items caused considerable difficulties to the Respondent.

118. Leaving aside any allegations of discrimination, which are difficult to follow in relation to allegation 9, it is also hard to see what the complaint is about, unless it is the interpretation of the Respondent's attendance policy. If that is so, the interpretation which Mr Dracass now places upon the aforementioned word contact, was not at any point the interpretation put on it by Mr Morrison. It is difficult to see why an employee should complain, when he has been absent without any communication and without any sick note until a fitnote which appears to have been provided at its earliest on 2 February (although we note that the first sick note is dated 4 February with an assessment by the Claimant's General Practitioner on that day) and where the sick note had not come to Mr Cole's attention at the time that he writes the first two letters of 20 and 23 January. The letter of 2 February 2015 is not only factually correct but in terms of procedure entirely proper because the Claimant had (a) failed to advise of the reason for absence and (b) failed to contact Mr Cole to discuss absence and (c) failed to return or to discuss the return of the Centre keys and booking diary.

119. In relation to allegation 10, Ms Lewis gave evidence that the letter of 2 February 2015 was delivered personally by her to the Claimant's home. Her evidence was that a man answered the door (not Mr Morrison) wearing only a bath towel around his waist. When Ms Lewis asked the man if he was Clive Morrison, he said that he was not. She told the man that she had a letter for Mr Morrison and asked whether he would be back at some point later that day. The man said that he thought Mr Morrison would be back later that day and Ms Lewis explained that the letter was from Mr Morrison's employer, that it was urgent and handed over the letter.

120. We now know that the man who answered the door was Mr Morrison's daughter's boyfriend but it is not clear why handing a letter to a man who is his daughter's boyfriend (as opposed to his daughter as the Claimant alleges) would constitute an act of race discrimination or indeed why it would constitute an act of race discrimination at all.

121. In the circumstances we make the following findings:-

121.1 That Mr Cole did not know until at least his letter of 2 February 2015 why the Claimant was absent or when he would be returning to work.

121.2 That Mr Cole believed he was following the attendance management policy.

121.3 That by 26 January 2015 Mr Morrison had been absent for 9 working days and was still in possession of the Centre keys and booking diary.

121.4 That by 26 January 2015 (the date by which the Claimant was to contact Mr Cole and provide an explanation) the Claimant had met the trigger to have a meeting under the attendance policy.

121.5 That there was nothing inappropriate about Ms Lewis hand delivering a letter to the Claimant's home as she had no reason to believe that Mr Morrison would not be present and her actions in handing over the letter and explaining that it was urgent was the act of a reasonable employer.

122. The letter from the Claimant and his wife of 23 February 2015 is the first response to previous letters of absence, no doubt as a response to the suspension of pay and the response of Mr Cole of 25 February is the basis of allegations 12 and 13. Before dealing with that however, there is one aspect of the case which was not sufficiently explained. On 5 February 2015 the Claimant's sister sent an e-mail to Mr Cole to say that she had express permission to correspond with Mr Cole from her brother and confirmed that her brother was on holiday with their elderly parents. Mr Morrison says in his witness statement that that was an error on the part of his sister but it is difficult to see how the error could have come about. Either he authorised his sister to make that remark (Ms Tricia Morrison specifically stating that she had express permission from her brother to correspond with Mr Cole) but neither Ms Morrison gives any evidence nor does Mr Morrison explain in any satisfactory detail as to how this assurance came about. Indeed Mr Cole confirms that discussion in an e-mail of 17 February to Ms Tricia Morrison but despite Mr and Mrs Morrison writing on 23 February about other matters, they failed to address that issue altogether. In any event we do not find that there was any less favourable treatment by reason of Mr Cole sending the letter of 25 February 2015. Any other employee would have been treated in exactly the same way under the same circumstances.

123. Allegation 14 is somewhat bizarre. It arises out of the letter from Mr Cole of 25 February where he states that **Tape 4, Side 2 ends**

Beginning of Tape 5, Side 1

Allegation 14 is odd in the sense that it does not involve the Claimant at all. It is alleged that Mr James' visit to his house in order to deliver the letter personally constituted race discrimination. The basis of that appears to be Mr Cole's letter of 25 February 2015 in which he said "*someone* will come to your house to collect the keys". He did not specify who that would be and although Mr James did not have advance permission to attend, Mr Morrison was not at home on the day that he did and as such there can be no basis of any less favourable treatment against the Claimant. In any event we accept that the Claimant and Mr James have known each other for a long time and were friends and as such Mr James was not motivated by racial considerations in delivering the letter personally.

124. We find no substance in allegation 15. We note that Mrs Morrison has on a number of occasions written directly to the Respondent, occasionally in fairly aggressive terms, and if there was a reason why the Respondent refused to correspond with her, quite apart from issues of confidentiality, it was no doubt because they did not wish to exacerbate the situation. In any event Mr Cole did write to the Claimant on 3 March 2015 to say that he could not correspond with the Claimant's wife when she had initiated correspondence by sending an e-mail to Mr Cole, copied to Mr James. **Tape ends because of interference on tape**

Beginning of Tape 6, Side 1

125. In relation to allegation 16 it is difficult to see how inviting the Claimant to an investigation meeting can amount to less favourable treatment. We are satisfied that anyone else in the same circumstances who was under suspicion of financial irregularities would also have been invited to an investigation in the same way.

126. Allegation 17 relates to a refusal to provide the Claimant with additional information and in turn leads to some bizarre suggestions.

127. On 21 June 2015 Mr Morrison had written to the Respondent asking for further information in relation to the allegations against him. The letter was addressed to Ms Holloway. Ms Holloway replied on 24 June and in one of the paragraphs gives more information as to the allegations. Mr Morrison did not receive Ms Denner's letter of 24 June. There was subsequent correspondence but they appear to have been at cross purposes with each other, not realising that Mr Morrison had not received the 21st letter despite references which could only have related to correspondence that Mr Morrison had not previously seen. The simple explanation is that the letter was not received but from that Mr Morrison extracts an allegation that Ms Demmer has fabricated the letter of 24 June in order to disguise her initial failure to respond.

128. We find that allegation wholly unsubstantiated. We preferred Ms Denner's evidence that the letter was sent and that her references in subsequent correspondence was to the information she had given. Ms Demmer, an HR Officer, had never met Mr Morrison nor had any dealings with him and had absolutely no reason to take the drastic action of subsequently fabricating a letter. Somewhat puzzlingly the Claimant also alleges that this act of discrimination involved Ms Holloway which we assume is an error as Ms Holloway is involved in allegation 19. The simple explanation is that the relevant letter was lost in the post and there was thus no less favourable treatment.

129. In relation to allegation 18 we accept the evidence of Ms Ball that there was no attempt to discuss the allegations with the Claimant within earshot of his neighbours. It was the Claimant who had initiated the discussion as to what the contents of the letter were that Ms Ball had intended to deliver. Although Ms Ball's record of the events in the bundle does not entirely appear to be contemporaneous, there is no written record made by the Claimant at the same time and we accept that the note is substantially in accordance with what occurred.

130. Allegation 19 concerns a refusal by the Respondent to confirm that letters would not be hand delivered in the future. On the face of it that appears to be an allegation that the Respondent did not provide more favourable treatment in refusing to confirm that letters would not be hand delivered. Clearly there would be situations where it was necessary to ensure firstly that there was proof of receipt and secondly to ensure the Claimant had the longest period of time to absorb the content. Accordingly there is no less favourable treatment.

131. The Claimant's suggestion that Peter Soulsby the City Mayor, did not reply personally is without substance. We accept Ms Denner's evidence that the City Mayor is precluded from dealing with individual employment matters personally and that the letter was responded to by Ms Holloway on his behalf. Indeed the Claimant himself admitted that he would not expect a direct response.

132. In relation to allegation 20, it is accepted that the Claimant was referred back to occupational health but that was after he had indicated that he was ready to return, although we suspect because at that point the Claimant's sick pay had run out. It is rather off that immediately prior to the termination of sick pay and after the Respondent had suggested a plan for the Claimant to return to work (at the Town Hall) that the Claimant felt he was unable to return to work. A mere decision to refer the Claimant to occupational health was not in the circumstances less favourable treatment nor, for these purposes (in respect of allegation 21) was the decision to transfer the Claimant to the Town Hall under the disciplinary procedure. We accept Mrs Patel-Dhanji's evidence that a white employee has also been transferred to Town Hall due to a disciplinary investigation.

133. As a result of miss numbering, there is no allegation 22 or 24.

134. In relation to allegation 23 the Claimant was indeed over paid but the specific allegation is firstly that the Respondent failed to apologise and secondly failed to provide an explanation. Both of these are factually correct. The Claimant received an apology in a letter of 28 September 2015 from the Business Service Centre and he also received an explanation from Mrs Margaret Mernagh on 5 November 2015.

135. The remaining allegations (25, 26 and 27), all relate to victimisation and we will deal with these together. We accept the evidence of the Respondent's witnesses that whilst the fact of the Claimant's ET1 had been circulated in an e-mail by Mrs Patel-Dhanji upon receipt, the details of the claim were not at that stage known. The explanation, which we accept, is that once a claim was issued (and in line with the pilot programme operating in this region) the Tribunal also at the same time issued a notice of hearing of the case for 3 days in March 2016. The reason for Mrs Patel-Dhanji informing others was therefore to ensure that the hearing dates were convenient. We accept that Ms Cook and Mr Beddow were not familiar with the finer details of the claim form and that it did not influence the way in which they dealt with him.

136. In any event, we find no causal link between the protected act of the first claim which had been lodged on 31 October 2015, and the dismissal which ultimately occurred on 5 February 2016. Mr Cole and Mr James who were the principle targets of the first claim form were not involved in the decision to dismiss other than as witnesses but not in any decision making capacity. In relation specifically to the allegation against Mr Cole (that the decision to invite him to a disciplinary hearing on 10 December 2015 was an act of victimisation) there is no evidence that this decision was that of Mr Cole. Indeed Ms Ball had taken over the conduct of the investigation in late July 2015 and thus by November 2015 Mr Cole had no further dealings with it. The letter which was sent to the Claimant inviting him to a disciplinary hearing on 10 December was quite properly a decision of Ms Ball in line with discussions with HR Officers.

137. We do not find that the disciplinary process was "oppressive" as alleged. The Claimant did not attend any of the disciplinary hearings and it is difficult to see how that term can be applied or how it was affected by the existence of the first claim particularly as it is our evidence that the details of the first claim were unknown to Mr Beddow and Ms Cook and the allegations had been framed largely as a result of the counter fraud report which had existed prior to the claim being presented. The complaint of victimisation is therefore dismissed.

Unfair Dismissal

138. The reason given for the dismissal is conduct which is a potentially fair reason for dismissal under Section 98(2)(b) Employment Rights Act 1996. We are satisfied that the Respondent has discharged its burden in showing that the reason for the dismissal was conduct.

139. We have gone on to consider the issue of reasonableness under Section 98(4) Employment Rights Act 1996. In doing so we have been careful not to substitute our views for that of the Respondent. We have considered the

End of Tape 6, Side 1

Beginning of Side 2, Tape 6

guidelines and the three fold test in **Burchell v British Home Stores**.

140. Before dealing with the issue of conduct, we remind ourselves, and in doing so remind the parties, of what constitutes gross misconduct. The relevant principles are set out above. We have asked ourselves whether the Claimant's behaviour manifested a deliberate intention to disregard the essential requirements of the contract or a deliberate and wilful contradiction of the contractual terms. We conclude that on a fair analysis it did not. The three allegations levelled against the Claimant all concerned a failure to manage. These failings went back some considerable time and were systemic failures to use the plus two system instead of a paper diary. They were not new allegations in the sense that the Claimant had suddenly stopped using one system in place of another.

141. In an exchange of e-mails in October 2014, Mr Cole sent an e-mail to all 3 Duty Officers at Saffron Lane reminding them of the procedures to be followed in relation to car parking. His e-mail simply said:

"See below reminder of what needs to happen, failure will result in formal action."

142. It appears at some point between then and November 2014 the system as to car parking had changed so that it was no longer necessary for the registration number of the vehicle to be entered onto the white slip. However, neither the Claimant's failure to comply with procedural requirements before the change nor afterwards were the subject of any warning or disciplinary action. Indeed when Mr Morrison sends an e-mail on 21 November 2014 within the same chain of e-mails as to car parking requirements and asks what else must be adhered to, there is no reply.

143. Mr Morrison had been using the same procedures that he had adopted for many years in 2014 as he had done a long time before then. It is clear from the statement of Mr Kandola in the investigation and disciplinary process that the Claimant's failure to observe the required processes was nothing new. Despite that however he had not been issued with any disciplinary process and although Mr Kandola had threatened to do so at one stage, nothing materialised. Whilst that does not of course excuse the Claimant's behaviour the issue surrounding the Claimant's self adopted procedures was a historical one that had never been tackled head on.

144. All 3 of the allegations in this case are, as we say, concerned with a failure to manage which on the face of it are essentially performance issues. Of course a failure to perform which is sufficiently serious can still amount to gross misconduct but on these facts, we do not consider that it would be within the range of reasonable responses to do so. Indeed in reality there are only 2 allegations with no material difference between the second and third allegation, the wording being such that it is only the consequences that are different rather than the conduct.

145. We accept Mr Dracass' submission that there is a significant miss match or disconnect between the statement of case which sets out the evidence in support of the allegations and the allegations themselves. In particular we note the following comments in relation to the allegations:-

- With banking discrepancies found by the CFT (Counter Fraud Team) during 2014 and the significant difference income taking during match day car parking under Clive management it is believed that Clive has *deceived* the Council of a loss of income, thus *constituting fraud* and this is believed to be gross misconduct

- There is also evidence that Clive took cash for bookings without banking the income

- Sports services management claim that the (sic) Clive has fraudulently taken this income for his personal benefit

- Clive's actions have led to a loss of income to the Centre and does constitute *defrauding* the Council of income

- In addition there are also examples of inappropriate management of the Centre, which has led to a loss of income, therefore constituting *defrauding* the Council of income

- Since 2013 when Clive was a Duty Officer at Saffron Lane Sports Centre, a complete breakdown in trust is experienced with Clive, particularly in relation to his *honesty, integrity* and ability to perform his role effectively (Emphasis added throughout)

146. We were referred to the case of Strouthos v London Underground Limited in which Peel LJ said (at paragraph 12):

"It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge."

147. We do not find that in this case the evidence matches the charges. The initial impression given upon a reading of the statement of case at first blush would suggest that Mr Morrison has been guilty of fraud, whereas the allegations do not reflect that. Indeed in the earlier notice of the investigation meeting, one of the allegations was "financial irregularities of a potential fraudulent nature". That allegation was withdrawn yet the statement of case, trenchant as it is in its allegations of fraud, does not at any point resile from the very serious nature of the allegations.

148. It is not clear to what extent Mr Beddow was initially influenced by the reading of the statement of case and whilst he specifically states that he does not find fraud, he does not at any point absolve the Claimant from the very serious allegations in the statement of case. Moreover, and perhaps more importantly, he fails to explain in his dismissal letter why having regard to the evidence that was before him, he roundly rejected the suggestion of fraudulent behaviour.

149. If the function of the Employment Tribunal is to view the matter through the eyes of the dismissing officer, it is very difficult to understand Mr Beddow's thought process in coming to his decision to dismiss. The entirety of Mr Beddow's reasoning process in the witness statement is paragraph 24 where he simply says this:

"Having considered very carefully all of the evidence, I concluded that Clive Morrison had failed to appropriately manage the match day parking, bookings resulting in significant loss of income and relationships with users at Saffron Lane which resulted in damage to Council's reputation. I considered these failings to be sufficiently serious to constitute gross misconduct and that Clive Morrison should therefore be dismissed with immediate effect."

150. As an explanation of Mr Beddow's thought process, that is wholly inadequate and unsatisfactory. That paragraph, which is the only paragraph that deals with the rationale behind the decision, simply sets out the allegations and the decision but not the thought process behind it. In order to understand the reasoning, it is necessary to go to the contents of the letter of dismissal. If therefore we have concentrated upon that letter rather than the evidence, it is entirely due to the way in which there has been a whole sale failure to go through the reasoning and to determine whether it was a decision that falls within the band of reasonable responses.

151. We begin with the rather obvious comment that Mr Morrison had over 27 years' continuous service with the Respondent. It is a fair comment to say that at the time of dismissal when he was almost 50 years' of age that he had spent practically most of his working life with the Respondent. We would therefore expect to see that reflected in the dismissal letter in terms of length of service. Whilst there is a paragraph which deals with the Claimant's length of service (erroneously giving the impression that the Claimant had 17 years' service, not 27) there is no reference as to **End of Tape 6, Side 2**

Beginning of Tape 7, Side 1

There is no reference to Mr Beddow taking into consideration the Claimant's length of service. There is no suggestion in Ms Cook's statement that she, as the HR Officer advising Mr Beddow, that this matter was flagged up for his attention. Whilst Mr Beddow in cross examination said that he took length of service into consideration, there is no evidence that he did so at the time. We conclude that the Claimant's very long service was not given due weight.

152. We have already commented on the fact that we do not see any material difference between allegations 2 and 3 and indeed if one considers the first half of each of the allegation, it is practically identical with the second half dealing with the consequence rather than the misconduct. Whilst there were therefore only 2 allegations, Mr Beddow only found the Claimant partially blameworthy on the first.

153. Mr Beddow also took into consideration issues relating to Leicestershire County Cricket Club which had been specifically withdrawn by Ms Ball at the commencement of one of the disciplinary hearings. We do not accept Ms Cook's attempted correction that this was merely background information. The letter of dismissal does not refer to it as background but in the same way as all of the other allegations which are said to be examples of gross misconduct. If the allegation was not a factor, we fail to see why it was mentioned at all without there being any caveat or condition.

154. There is also a failure to consider the issue as one of performance rather than gross misconduct.

155. There is a failure to apply the correct legal standard of what constitutes gross misconduct having regard to the legal position we have set out above.

156. There is no evidence, nor does Mr Beddow actually quantify any loss which the Respondent is said to have suffered. Given that the reason for the dismissal was that the Claimant's actions had resulted in a "significant loss of income", it was incumbent upon Mr Beddow to identify in broad terms what he meant by significant. Apart from the fact that there have been 3 double bookings, there is no evidence of significant loss. In that respect Mr Beddow's belief was not based upon reasonable grounds.

157. There is no evidence of any reputational damage as Mr Beddow suggests. Ms Masters suggests that there would never be an e-mail in those terms to suggest that reputational damage has occurred but of course it would be very straightforward for any of the users to write a letter of complaint and whilst there were difficulties in relation to the diary and the absence of the paper diary, there is a whole sale absence of written complaints from users which would be consistent with reputational damage.

158. In terms of reputational damage Mr Beddow seeks to rely upon an e-mail that the Claimant sent to Lynn Orbell on 6 December 2014. In the e-mail, at a time when the Claimant was experiencing difficulties, he said that he was having a "torrid time" with the Respondent. It is scarcely credible to classify such behaviour as gross misconduct on the basis that this damages the Council's reputation.

159. Mr Beddow also relies upon the fact that Mr Morrison has shared his details of dismissal with an external customer, Dr D'silva. Quite apart from the fact that the allegation did not appear in the management statement of case, Dr D'Silva was a potential witness and indeed has been a witness at this hearing. We find that it cannot be the act of a reasonable employer to dismiss an employee for discussing the matter with someone who may be a potential witness in a subsequent case.

160. Looking at the matter in the round, and despite the fact that the dismissal letter is almost 10 pages in length, at the end of the day this was a decision that no reasonable employer could have arrived at. In our judgment it falls outside the band of reasonable responses. Whilst we accept that Mr Beddow had held an honest and genuine belief, his belief was not based upon reasonable grounds. The Respondent's statement of case created a great deal of smoke without any fire. It repeatedly referred to matters of fraud and of a fraudulent nature yet this case was essentially about failing to manage processes but it was also about a failure to manage an employee.

161. On the subject of the investigation there are several flaws. Firstly as we have already referred to, there is a disconnect between the allegations and the substance of the report. Secondly, Ms Ball as the investigating officer draws a number of unwarranted conclusions rather than simply identifying facts. Indeed the investigation report (statement of case) is very short on fact and even less is it reliant upon documentary evidence. The counter fraud report was based upon discussions which did not involve the Claimant. There are repeated references to fraud, yet there is no evidence of fraud found by the dismissing officer.

162. In the course of the investigation Mr Kandola of whom one would expect to have an unfavourable opinion of the Claimant given that Mr Kandola was the subject of a bullying complaint, goes so far as to say that the Claimant was incompetent but not dishonest. We do not find that the investigation was fair and even handed within the meaning identified by the EAT in **A v B**.

Contribution

163. We do however find that the Claimant has substantially caused or contributed to his dismissal. We do so for the following reasons:-

163.1 The Claimant had received e-mails in March 2014 and October 2014 from his Line Managers urging him to follow the correct procedures but he failed to do so.

163.2 The Claimant failed to return the diary and the keys. He subsequently said that the diary was in the office but he did not specify where. We accept that he caused considerable confusion and inconvenience to the Respondent which was as a result of him taking the diary home and failing to return it.

163.3 There was no valid reason why the Claimant kept a number of voided tickets in the safe or in a locked box, thus only inviting suspicion upon himself.

163.4 The Claimant failed to attend 3 investigatory meetings with Mr Narshi where he could have given his explanations. We appreciate that there may have been a genuine misunderstanding for the fact that the third meeting did not take place but there is no satisfactory explanation for the Claimant's failure to attend the other 2 meetings with the Counter Fraud Team.

163.5 We are satisfied that the Claimant chose not to attend the investigation meetings at a time whilst he was absent on sick leave, there was no medical evidence that the Claimant was sufficiently unwell to attend an investigation meeting. The consequence is that the Claimant has never attended any face to face meeting either before or after his sickness absence where he has given an account of his actions. He was clearly well enough to return to work around September 2015 yet still failed to attend a disciplinary investigation or to give his explanation. This has not however prevented the Claimant from writing very long letters and statements which clearly affected the ability to understand what had gone out at Saffron Lane.

163.6 Despite the fact that the Claimant had submitted sick notes, there was nothing to prevent him from calling Mr Cole and giving a brief explanation of his reasons for absence. It is unfortunate that he chose to deal with the matter almost entirely by e-mail and correspondence rather than attending meetings and hearings.

164. In those circumstances we consider that there needs to be a substantial and significant reduction of any compensation for contribution. We assess that at 75%. Whilst we recognise that there are slightly different considerations that apply to the reduction of basic awards as opposed to compensatory awards, what ultimately leads to the Claimant's dismissal is a chain of events which results in his dismissal and accordingly it is appropriate to make the same reduction in respect of both awards.

Polkey

165. As the dismissal was so called substantively and not procedurally unfair, it is not appropriate to make any Polkey reduction and indeed no basis for a Polkey reduction is identified in any of the submissions, written or oral.

Mr Ahmed says the rest of the tape appears to be faulty from this point on so I will go on to another tape instead of side B End of Tape 7

Tape 8, Side 1

Reduction/Increase or Breach of the ACAS Code of Practice

166. We make no reduction for a breach of the code. It is accepted that it was not unreasonable for the Claimant not to attend the disciplinary hearings. The appeal was withdrawn but we would not consider it appropriate to make any reduction on that basis alone.

167. We make no increase for the Respondent's failure to deal with the Claimant's grievance of 12 January 2015. That can only be a basis of the race discrimination complaint (as the code does not create any freestanding right) and as the discrimination complaint has been dismissed there is nothing on which any uplift can attach. We therefore do not make any increase in the award for failure to deal with the grievance.

Remedy

168. There was insufficient time to deal with the issue of remedy which is adjourned. Directions and orders are set out separately. We have also decided not to deal with an issue which was identified earlier namely the question of whether the Claimant would have been dismissed subsequently in any event by reason of ill health/capability.

[The misconduct for which the Claimant was dismissed was broadly the same on the facts when the Respondent received the counter fraud report in November 2014. At that stage the Respondent considered that the appropriate sanction was a disciplinary transfer not a potential suspension for gross misconduct.]

[Mr Beddow fails to deal head on with the fraud issues which feature so prominently in the statement of case.]

[It is not credible that the Claimant has been racially discriminated against by 9 different people, at least two of whom share the same racial or ethnic origin. We find the allegation of direct race discrimination to be without merit.]

[On occasions the Claimant, quite apart from a failure to establish the factual basis of the allegations, has identified the wrong perpetrator. In other words, the act complained of has been done by someone other than the person whom the person committed it. That is significant only in the sense that the Claimant did not necessarily need to identify who the perpetrator of the act was (in respect of allegations 10 and 23 for example), the Claimant says he does not know which would have been acceptable, but that he specifically identifies Mr Cole behind the allegations when it ought to have been reasonably apparent that Mr Cole would have written letters with advice and assistance from an HR Officer.]

[The Claimant's allegation that parts of the documentation relied upon by the dismissing officer was not sent to him and that this was deliberate, was not pursued at this hearing. In the end the Claimant accepts that what is missing are 2-3 pages of documents. We are satisfied that there was no deliberate intention

to hide these documents from the Claimant as they are pages of a longer document and if the Respondent had intended not to disclose them, the Claimant would not have received any part of the document. The simple explanation is that there have been photocopying errors as a result of which a very small portion of the very large set of papers in this case have inadvertently not been sent to the Claimant. Quite apart from the obvious point that the Claimant could have asked for them, his reaction in then making an allegation of fabrication (which was the reason why he wanted to produce the final bundle instead of relying upon the Respondent's bundle) now seems wholly inappropriate and disproportionate.]

[In considering the motives for the actions of Mr Cole, we note that both he and Mr Cole were friends for some considerable time and it was only in the recent past that the two of them were in conflict. In considering what was in the mind of the alleged discriminator, had we not found that Mr Cole believed he was following policy, the only other possible logical explanation is that Mr Cole acted in the way that he did because Mr Morrison had lodged a complaint of bullying against him. Of course that does not assist the Claimant because the bullying complaint was not a protected act. Our primary finding is that Mr Cole did not treat the Claimant in the manner that he did because of his race but rather because he felt he was following proper procedure but if we are wrong on that, the only other logical conclusion is that Mr Cole was affronted by a complaint of bullying. In that respect given that Mr Morrison had a history of complaining of bullying (he had complained against his previous Line Manager of bullying also) it is conceivable that Mr Cole did not attach too much weight to it. We are satisfied that if Mr Cole was acting outside policy then Mrs Patel-Dhanji against whom no allegation arises until August 2015, would have taken action to prevent any improper treatment. The letters that Mr Cole sent were largely drafted by Mrs Patel-Dhanji, albeit amended and approved by Mr Cole as appropriate.]

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Employment Judge Ahmed

Date 28 April 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE