



EMPLOYMENT TRIBUNALS

Claimant: Mr H Fullah

Respondent: (1) Medical Research Council
(2) Dr Russell Thompson

HEARD AT: CAMBRIDGE **ON:** 20th, 21st, 22nd, 23rd, 24th &
25th February 2017.

BEFORE: Employment Judge Warren

MEMBERS: Mr C Davie
Mr A Schooler

REPRESENTATION

For the Claimant: Ms Belgrave (Counsel)

For the Respondents: Mr French-Williams (Solicitor)

WRITTEN REASONS

Background

1. Mr Fullah, who still remains in the employment of the Respondent, brings claims of direct race discrimination, discrimination arising from disability and victimisation.

The Issues

2. The issues in the case were identified at a Preliminary Hearing before Regional Employment Judge Byrne on the 5th August 2016. I checked with the parties at the outset of the case and they confirmed that we could rely on that list of issues. I set out the list of issues, replicating the numbering taken from the written record of REJ Byrne's Preliminary Hearing, replicating the numbering therein as follows:

4. Disability

- 4.1 Does the Claimant have a physical or mental impairment, namely:
- 4.1.1 Depression
 - 4.1.2 Symptoms of epilepsy following his contracting meningitis in 2014.
- 4.2 If so, do the impairments have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
- 4.3 If so, is that effect long term? In particular :has the impairment lasted for at least 12 months?
- 4.4 The Claimant's case is that he has suffered from depression from April 2009 and that depression is ongoing and that he has suffered symptoms of epilepsy following contracting meningitis since December 2014.
- 4.5 Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
- 4.6 The relevant time for assessing whether the Claimant has a disability (namely, when the discrimination is alleged to have occurred) is from May 2015 to date.

5. Section 13 Direct discrimination because of race

- 5.1 Then Claimant relies on being Black British and of Black African origin (Section 98(1)(a) and (c) of the Equality Act 2010).
- 5.2 Has the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act, namely:
- 5.2.1 Is the Claimant being sidelined by Dr Thompson and Professor Gathercole at work by being encouraged/assigned to work on the helpdesk and doing only low level work, not allowing him to attend meetings, as detailed at paragraphs 10 (May 2015), 14 (8 July 2015), 15 (20 July 2015), 16 (30 September 2015), 18 (25 November 2015) and 19 (6 January 2016).
 - 5.2.2 The comments made by Dr Thompson in an email to the Claimant commenting on his 2015/2016 performance appraisal (PER) dated 19 January 2016 (paragraph 20 of the claim form).
 - 5.2.3 Dr Thompson's retort to the Claimant on 25 January 2016 that "black people always think they are being racially

discriminated against” when the Claimant expressed the opinion that he was the victim of racial discrimination (paragraph 21 of the claim form).

5.2.4 The failure of Professor Susan Gathercole to take any meaningful steps to assist the Claimant in investigating the Claimant’s concerns properly and a failure to investigate his grievance following the Claimant’s email to Professor Gathercole in August 2015 raising his concerns and following him submitting a complaint alleging discrimination and victimisation to Professor Gathercole on 29 January 2016 (paragraphs 23 and 24).

5.3 Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on Howard Gyton who is white and/or hypothetical comparators.

5.4 If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

5.5 If so, what is the Respondent’s explanation? Does it prove a non-discriminatory reason for any proven treatment.

6. Section 15 Discrimination arising from disability

6.1 The allegation of unfavourable treatment as “something arising in consequence of the Claimant’s disability” falling within Section 39 Equality Act is those matters set out in paragraphs 5.2.1, 5.2.2, 5.2.3 and 5.2.4 above. No comparator is needed.

6.2 Does the Claimant prove that the Respondent treated the Claimant as set out in paragraph 6.1 above?

6.3 Did the Respondent treat the Claimant as aforesaid because of the “something arising” in consequence of the disability?

6.3.1 Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

6.4 Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

7. Victimisation

7.1 Has the Claimant carried out a protected act? The Claimant relies upon the following:

7.1.1 In 2010 he brought a claim for race discrimination against his employer which was dismissed by an Employment Tribunal by judgment in 2012.

- 7.1.2 The Claimant at present relies on the letter sent by him in or around May 2015 to the first Respondent complaining about being overlooked for an IT manager position whilst on sick leave.
- 7.1.3 The Claimant relies on emails sent in August 2015 to Professor Gathercole.
- 7.1.4 The Respondent does not presently concede that any of the three matters relied on above amount to protected acts within the meaning of the legislation.

7.2 If there was a protected act, has the Respondent carried out any of the treatment set out below] because the Claimant had done a protected act?

- 7.2.1 The matters set out in 5.2.1, 5.2.2, 5.2.3 and 5.2.4 above.
- 7.2.2 Dr Russell Thompson accessing the Claimant's work computer secretly on 13 May 2015 out of office hours without telling the Claimant when there was no need to do so.
- 7.2.3 Dr Thompson accessing the Claimant's work computer secretly out of office hours on 8 July 2015 without telling the Claimant.

8. Time/limitation issues

- 8.1 The claim form was presented on 4 May 2016. Accordingly, and bearing in mind the effects of ACAS early conciliation, any act or omission which took place before more than three months before the date of the last act relied on is potentially out of time, so that the tribunal may not have jurisdiction.
 - 8.2 Does the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
 - 8.3 Was any complaint presented within such other period as the Employment Tribunal considers just and equitable?
3. We were told at the outset that the reference to a letter of May 2015 as a protected act was no longer relied upon. We were also told that the Respondent accepts that the Claimant was disabled by reason of epileptic seizures following his ill health in 2014. It does not accept that he was a disabled person by reason of depression during the relevant period.

Evidence

4. We had before us from Mr Fullah, a Witness Statement and a Disability Impact Statement. For the Respondent, we had Witness Statements from Professor Gathercole, Dr Thompson, Mr Gyton and Mr Pelham.
5. We had before us three bundles; the first paginated and indexed runs to page number 461, the second bundle, a tad confusingly, starts from page number 1 again, paginated and indexed to page number 212. As for the third bundle, at no point in the proceedings were we required to refer to it.
6. During an adjournment at the outset of the case, we read the Witness Statements and we read or looked at in our discretion, the documents referred to in the Witness Statements. We made it clear to the representatives that if there were relevant passages in the documents, then they must make sure they take us to them during evidence, they must not assume that we have read and taken on board everything.

Disability

7. I will deal first of all with the issue between the parties as to whether or not Mr Fullah was a disabled person by reason of depression at the relevant time, which was between May 2015 and the date of the Preliminary Hearing, which I think was May 2016.

Law on Disability

8. I explained to the parties that I will set out in any written reasons I am required to produce, a full exposition of the relevant law which I have already prepared for today's purposes. I gave a layman's explanation of the relevant law as set out in the paragraph below.
9. A person is disabled if they have a mental impairment that has a substantial and long term adverse effect on their ability to do normal day to day activities. An impairment is long term if it has lasted for at least 12 months or is likely to last for more than 12 months. If such an impairment ceases to have a substantial adverse effect on a person's ability to carry out their day to day activities, that can be treated as continuing to have that effect and therefore be a disability, if it is likely to recur in the future.
10. My lawyer's explanation of the law on whether a person is defined as disabled is as follows.
11. For the purposes of the Equality Act 2010 (EqA) a person is said, at section 6, to have a disability if they meet the following definition:

"A person (P) has a disability if –

- (a) *P has a physical or mental impairment, and*
 - (b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
- 12. The burden of proof lies with the Claimant to prove that he is a disabled person in accordance with that definition.
- 13. The expression 'substantial' is defined at Section 212 as, '*more than minor or trivial*'.
- 14. Further assistance is provided at Schedule 1, which explains at paragraph 2:
 - "(1) The effect of an impairment is long-term if –*
 - (a) it has lasted for at least 12 months,*
 - (b) it is likely to last for least 12 months, or*
 - (c) it is likely to last for the rest of the life of the person affected.*
 - (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur".*
- 15. As to the effect of medical treatment, paragraph 5 provides:
 - "(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –*
 - (a) measures are being taken to treat or correct it, and*
 - (b) but for that, it would be likely to have that effect.*
 - (2) 'Measures' includes, in particular medical treatment ..."*
- 16. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled, 'Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability'.
- 17. As Sections A3 through to A6 of that guide make clear, in assessing whether a particular condition is an "impairment" one does not have to establish that the impairment is as a result of an illness, one must look at the effect that impairment has on a person's ability to carry out normal day-to-day activities. A disability can arise from impairments which include mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, unshared perceptions, eating disorders, bipolar affective disorders, obsessive compulsive disorders,

personality disorders, post traumatic stress disorder, (see A5) and can also include mental illnesses such as depression. It is not necessary and will often not be possible to categorise a condition as a particular physical or mental impairment.

18. As to the meaning of 'substantial adverse effects', paragraph B1 assists as follows:

"The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect".

19. Paragraph B12 explains that where the impairment is subject to treatment, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or the correction, the impairment is likely to have this effect and the word 'likely' should be interpreted as meaning, 'could well happen'. In other words, one looks at the effect of the impairment if there was no treatment.
20. A substantial effect is treated as continuing, if it is likely to recur, this is explained at paragraph C5 by cross reference to Schedule 1, paragraph 2(2) referred to above.
21. Amongst the examples given at C6 are certain types of depression.
22. A useful example is given at C6:

"A woman has two discreet episodes of depression within a ten month period. In month 1 she loses her job and has a period of depression lasting six weeks. In month 9 she experiences bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than twelve months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the twelve month period.

However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond a twelve month period, she would satisfy the long term requirement".

23. As for what amounts to normal day-to-day activities, the guidance explains that these are the sort of things that people do on a regular or daily basis including, for example, things like shopping, reading, writing, holding conversations, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out

household tasks, walking and travelling by various forms of transport, taking part in social activities, (paragraph D3). Whilst specialised activities either to do with one's work or otherwise, are unlikely to be normal day-to-day activities, (paragraphs D8 and 9) some work related activities can be regarded as normal day-to-day activities such as sitting down, standing up, walking, running, verbal interaction, writing, driving, using computer keyboards or mobile phones, lifting and carrying (paragraph D10).

24. As to what amounts to a 'substantial effect', the guidance is careful not to give prescriptive examples but sets out in the Appendix a list of examples that might be regarded as a substantial effect on day-to-day activities as compared to what might not be regarded as such. For example, *'difficulty going out of doors unaccompanied...'* or *"difficulty waiting or queuing, for example, because of a lack of understanding of the concept..."* or *"difficulty entering or staying in environments that the person perceives as strange or frightening, because the person has a phobia..."* which would be regarded as substantial effects, as compared to, *'inability to speak in front of an audience simply as a result of nervousness;'* or *"some shyness and timidity..."* which would not be so regarded.
25. In Goodwin v Patent Office [1999] ICR 302 the EAT identified that there were four questions to ask in determining whether a person was disabled:
 - 25.1. Did the Claimant have a mental and/or physical impairment?
 - 25.2. Did the impairment effect the Claimant's ability to carry out normal day-to-day activities?
 - 25.3. Was the adverse condition substantial? And
 - 25.4. Was the adverse condition long term?
26. In J v DLA Piper UK LLP [2010] IRLR 936 Mr Justice Underhill, President of the EAT at time, observed that it is good practice to state conclusions separately on the one hand on questions of impairment and adverse effect and on the other hand on findings on substantiality and long term effect. However, Tribunals should not feel compelled to proceed by rigid consecutive stages; in cases where the existence of an impairment is disputed, it makes sense to start by making findings about whether the Claimant's ability to carry out normal day-to-day activities is adversely effected on a long term basis and then consider the question of impairment in light of those findings. It is not always essential for a Tribunal to identify a specific 'impairment' if the existence of one can be established from the evidence of an adverse effect on the Claimant's abilities. That is not to say that impairments should be ignored, the question of impairment can be considered in light of findings on day-to-day activities.

27. There is one further aspect to the case J v DLA Piper UK LLP and that is the passage at paragraph 42, which emphasises the importance of distinguishing between a reaction to adverse circumstances at work (which does not amount to a disability) and a 'mental illness' or 'mental condition' which is sufficient to amount to a disability. The difficulty with this distinction can, as the EAT recognise, be exacerbated by the "looseness with which some medical professionals and most lay people, use such terms as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'". Mr Justice Underhill continues:

"Fortunately, however, we would not expect those difficulties often to create a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at paragraphs 40(2) above, a Tribunal starts by considering the adverse effect issue and finds that the Claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long lived".

28. On the question of recurrence, a point which concerns us in this case, Mr Justice Underhill recited some illustrative examples rather similar to that which I have quoted from the Guidance above. He compared a person who had suffered depressive illness in her early twenties which lasted for over a year and had a serious impact on her ability to carry out normal day-to-day activities. However, she made a complete recovery and was symptom free for thirty years, after which time she suffered a second period of depressive illness. Statistically, the fact that she had an earlier illness meant that she was more likely than a person without such a history, to suffer a further episode of depression. It does not, however, follow that for that reason alone she could be said during the intervening thirty years to have been suffering from a mental impairment characterised perhaps as 'vulnerability to depression' but rather as a model of someone who has suffered two distinct illnesses, or impairments, at different points in her life. The second example he gave was of a person who over a five year period suffered several short episodes of depression which had a substantial adverse impact on that person's ability to carry out normal day-to-day activities, but between episodes was symptom free and did not require treatment. He suggested that in such a case it may be appropriate, subject to medical evidence, to regard that person as suffering from a mental impairment throughout the period in question, including in between episodes and not as a model of a number of discreet illnesses, but of a single condition producing recurrent symptomatic episodes. He said:

"In the former case, the issue of whether the second illness amounted to a disability would fall to be answered simply by

reference to the degree and duration of the adverse effects of that illness but in the latter, the woman could, if the medical evidence supported the diagnosis of a condition producing recurrent symptomatic episodes, properly claim to be disabled throughout the period: even if such individual episode were too short for its adverse effects (including 'deduced effects') to be regarded as 'long term'. She could invoke paragraph (2) of Schedule (1) provided that she could show that the effects were 'likely' to recur".

Discussion on the Question of Whether Mr Fullah met the Definition of a Disabled Person by Reason of Depression at the Relevant Time

29. We were taken to a couple of occupational health reports from 2012, the first is dated 11th May 2012 in which the Occupational Health Adviser Dr Sandy Marshall, advised that Mr Fullah had been absent from work since August 2010 with work related stress and depression. In her report, she spoke of moderately severe depression, of his need for medication and that he was having some specialist counselling. In a later report of July 2012, Dr Marshall wrote that Mr Fullah had not yet fully recovered from his depressive illness.

30. We have before us a joint expert report prepared by a Dr Hindler, Consultant Psychiatrist. The report was prepared on 12th December 2016, arising out of an assessment conducted on the 5th December 2016. Dr Hindler carried out a review of the Claimant's medical history, which he set out in his report and which we have read. Mr Fullah had no previous history of mental ill health. The records show him encountering problems at work, giving rise to stress. On his analysis, Dr Hindler explains, his diagnosis is not in fact of depression, but adjustment disorder. He explains what that is at page 152 of bundle 2, paragraph 1.2 of the report: adjustment disorder is defined as a condition in which a person responds to a stressful event with extreme emotions and actions, which causes problems at work and at home. He says that these symptoms remit after new levels of adaption are obtained or stressors have been removed. At paragraph 1.3 he suggests that should be within 6 months. He says that in Mr Fullah's case, the adjustment disorder would be specified as chronic with mixed anxiety and depressed mood. He explains at paragraph 1.20 "*the GP regularly refers to symptoms of anxiety and low mood. I note that the term depression in the context of an adjustment disorder refers to a low mood rather than depression.*" He observes at paragraph 1.23 that a potential confounding issue in relation to Mr Fullah's case and his mood, relates to the *strongyloides* parasitic infection, (that is a reference to Mr Fullah's illness in 2015). Dr Hindler goes on to comment at paragraph 2.5 that over the period 18th February to 25th August 2016, despite a GP comment, "stress at work" in August 2015, there were no reported concerns about mood or anxiety. At paragraph 2.6, he concludes that Mr Fullah's mood was for the time frame, essentially within the normal range.

31. Dr Hindler had the benefit of reading Mr Fullah's impact statement dated 1st September 2016 as had we. At paragraphs 4.1 to 4.3 he explains how he does not find Mr Fullah's description of his symptoms as credible. He makes the following observations at paragraph 4.4:

"During our meeting on the 5.12.2016, Mr Fullah claimed that his appetite had not improved. This is contradicted by the Adenbrookes discharge summary (12.2.2015) – 'now eating well, beginning to gain weight' and GP entry 19.12.2015, 'making good recovery with weight gain - despite having lost most of his teeth.'"

32. At paragraph 4.6, Dr Hindler refers to Mr Fullah's fear of having another seizure as being an important factor adversely affecting his sleep, bathing, cooking, swimming, travelling on public transport and attending social events. At paragraph 4.7, he says that although Mr Fullah had reported to him in their meeting on the 5th December that he was feeling worthless and hopeless, that seemed to be contradicted by his assertion that he retained a will to survive and remained determined to pursue the Employment Tribunal case, investing in a Barrister in order to improve his chances of success. At paragraph 4.9 he refers to Mr Fullah reporting to him feeling isolated and withdrawn from socialising with friends, which he suggests seems to be due to Mr Fullah's putting work first and social activities second in his list of priorities. He quotes Mr Fullah as having said to him on more than one occasion, that he would take home work at weekends and he comments, *"this does not reflect on a very depressed individual with impaired concentration, marked sleep deprivation, significantly reduced motivation and energy level"*.
33. Dr Hindler concludes at paragraph 5.1 that Mr Fullah's ability to carry out normal day to day activities is not adversely effected to a substantial degree and at 5.3, that his symptoms are not especially significant, although of course ultimately these are matters for us to determine.

Conclusions on the Question of Disability

34. Mr Fullah suffered a re-active disorder from 2010, known as an adjustment disorder. The symptoms of such a condition are expected to remit, there is no reference to any evidence of a likelihood of reoccurrence.
35. The impact of adjustment disorder in 2010 to 2012, on his day to day activities, keeping him away from work, was such that he was likely to have met the definition of disability at that time. However, since 2012, those symptoms have abated, evidenced for example by the medical history set out in Mr Hindler's report at page 140 of bundle 2, where we see that he went to his doctor on the 5th February 2013 when things were recorded as stable and did not go to see his doctor for another 9 months, until the 26th November 2013, when nothing significant

appears to be recorded. He then does not see his doctor again for another year, until in December 2014, he consulted with regard to symptoms which ultimately are seen to relate to his physical ill health.

36. We concur with Dr Hindler's observations as to the credibility of Mr Fullah's described symptoms.
37. Latterly and for the relevant period February 2015 to August 2016, such symptoms of mental ill health that Mr Fullah has, do not have a substantial and long term adverse affect on his ability to carry out day to day activities.
38. For these reasons, we find that he was not disabled by reason of his mental ill health as defined in the Equality Act 2010.

The Law on the Substantive Claims

39. I explained the law in layman's terms to the parties as set out in the paragraph's below.
40. Direct discrimination is where somebody says that they have been treated in a way that is worse than another person of a different ethnic origin has been or would have been treated in the same circumstances.
41. Disability related discrimination is where someone is treated badly because of an effect of that disability.
42. Victimisation is where someone is treated badly because they made a complaint about being discriminated against.
43. The Law requires that a Claimant who says he has been discriminated against must prove facts from which the Tribunal could conclude that the employer has discriminated against him. If the Claimant proves those facts, we then look to the employer to prove to us that the discrimination played no part in what is complained about.
44. My lawyer's explanation of the relevant law is set out in the paragraphs below.

Race Discrimination

45. The relevant law is set out in the Equality Act 2010.
46. Section 39 provides that it is unlawful to discriminate against a person by subjecting him to a detriment
47. Race and disability are two of a number of protected characteristics identified at s.4.

48. Race is defined at Section 9 and includes colour, nationality, ethnic and national origins.

Direct Discrimination

49. Mr Fullah says that he was directly discriminated against because of his race. Direct discrimination is defined at s.13(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”.

50. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the claimant, but not having his protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that he has been treated less favourably than that real or hypothetical comparator.

51. How does one determine whether any particular less favourable treatment was, “because of” a protected characteristic? Under the previous legislation, the term used to proscribe direct discrimination was, “on the ground of” the particular protected characteristic. It was not the intention of Parliament to change the legal meaning of direct discrimination, as explained in the Explanatory Notes published with the Act at the time. In Amnesty International v Ahmed 2009 ICR 1450 in the EAT, Underhill P, (as he then was) referring to the Race Relations Act, suggested that, “because of” could be used as a synonym for “on the grounds of”. Later in the Court of Appeal, Lord Justice Underhill confirmed in Onu v Akwivu and Taiwo v Olaiqbe [2014] IRLR 448 at paragraph 40 that there was no difference in meaning between, “because of” and “on the grounds of”.

52. As Lord Justice Underhill explained when he was President of the EAT in Amnesty International and again more recently in the Court of Appeal in Onu v Akwivu and Taiwo v Olaiqbe, what constitutes the grounds or reason for treatment will vary depending on the type of case. He referred to the paradigm case in which a rule or criterion that is inherently based on the protected characteristic is applied. There are other cases, not involving the application of discriminatory criterion, where the protected characteristic has operated in the discriminator's mind in leading him to act in the manner complained of. The leading authority on the latter is Nagarajan v London Regional Transport [1999] IRLR 572 and in particular, the speech of Lord Nicholls of Birkenhead, (I quote from paragraphs 13 and 17):

“...in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question.

Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator...

I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn."

53. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

54. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 - the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

Disability Related Discrimination

55. Disability Related discrimination is defined at section 15 as follows:

- (1) *A person (A) discriminates against a disabled person (B) if—*
- (a) *A treats B unfavourably because of something arising in consequence of B's disability, and*
- (b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
- (2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

56. The difference between Direct Discrimination on the grounds of disability and Disability Related Discrimination is often neatly explained in these terms: direct discrimination is by reason of the fact of the disability, whereas disability related discrimination is because of the effect of the disability.
57. In General Dynamics v Carranza UKEAT 0107/14/1010 HHJ Richardson explained that disability related discrimination is about making allowances for that persons disability, (as compared to making a reasonable adjustment, which is about preventing the disadvantage).
58. There are 2 separate causative steps: firstly, the disability has the consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular something, see Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN.
59. If there has been such treatment, we should then go on to ask, as set out at Section 15(2), whether the unfavourable treatment can be justified. This requires us to determine:
- 59.1. Whether there was a legitimate aim, unrelated to discrimination;
- 59.2. Whether the treatment was capable of achieving that aim, and
- 59.3. Whether the treatment was a proportionate means of achieving that aim, having regard to the relevant facts and taking into account the possibility of other means of achieving that aim.
60. The test of whether there is a proportionate means of achieving a legitimate aim, (often referred to as the justification test) mirrors similar provisions in other strands of discrimination, such as in respect of indirect discrimination under s19 of the Equality Act, the origins of which lie in European Law.
61. There is guidance in the Equality and Human Rights Commission's Code of Practice on Employment, which reflects case law on objective justification in other strands of discrimination and which can be relied on in the context of disability related discrimination.

62. Thus, in Hensam v Ministry of Defence UKEAT/10067/14/DM the EAT applied the justification test as described in Hardys & Hansons Plc v Lax [2005] EWCA Civ 846. The test is objective. In assessing proportionality, the tribunal uses its own judgment, which must be based on a fair and detailed analysis of the working practices and business considerations involved, particularly the business needs of the employer. It is not a question of whether the view taken by the employer was one a reasonable employer would have taken. The obligation is on the employer to show that the treatment complained of is a proportionate means of achieving a legitimate aim. The employer must establish that it was pursuing a legitimate aim and that the measures it was taking were appropriate and legitimate. To demonstrate proportionality, the employer is not required to show that there was no alternative course of action, but that the measures taken were reasonably necessary.
63. The tribunal has to objectively balance the discriminatory effect of the treatment and the reasonable needs of the employer.
64. “Legitimate aim” and “proportionate means” are 2 separate issues and should not be conflated.
65. The tribunal must weigh out quantitative and qualitative assessment of the discriminatory effect of the treatment, (University of Manchester v Jones [1993] ICR 474).
66. The tribunal should scrutinise the justification put forward by the Respondent , (per Sedley LJ in Allonby v Accrington & Rosedale College [2001] ICR 189).

Victimisation

67. Section 27 defines victimisation as follows:
- (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.*
 - (3) *Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

(4) *This section applies only where the person subjected to a detriment is an individual.*

(5) *The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.*

68. The meaning of, “detriment” is explained above.
69. Whether a particular act amounts to victimisation should be judged primarily from the point of view of the alleged victim, whether or not they suffered a “detriment”, rather than from the point of view of the alleged discriminator. Whether or not a claimant has been disadvantaged is to be viewed subjectively; see St Helens Metropolitan Borough Council v Derbyshire [2007] IRLR 540 HL. That said, an unjustified sense of grievance could not amount to a detriment.
70. To be an act of victimisation, the act complained of must be, “because of” the protected act or the employer’s belief. Previous legislation had referred to, “by reason that” but this is unlikely to represent any significant change in the test of causation, for reasons referred to above in the context of, “because of” and the remarks of Mr Justice Underhill in Amnesty International v Ahmed. The protected act does not have to be the sole cause of the detriment, provided that it has a significant influence, (see Lord Nicholls in Nagarajan v London Regional Transport [1999] ICR 877). “Significant influence” does not mean that it has to be of great importance, but an influence that is more than trivial, (see Lord Justice Gibson in Igen v Wong cited below).
71. Section 109(1) provides that an employer is liable for acts of discrimination, harassment and victimisation carried out by its employees in the course of employment.

Burden of Proof

72. Section 136 deals with the burden of proof:
- “(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.*
73. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was set out in Igen Limited v Wong and others [2005] IRLR 258. That case sets out a series of steps which we have carefully observed in the consideration of this case and we will set them out:

- 73.1. It is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation that the Respondent has committed an act of discrimination against the Claimant.
- 73.2. If the Claimant does not prove such facts, he will fail.
- 73.3. It is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit discrimination even to themselves.
- 73.4. The outcome, at this stage, of the analysis by the Tribunal will, therefore, depend upon what inferences it is proper to draw from the primary facts found by the Tribunal.
- 73.5. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead to the conclusion that there was an unlawful act of discrimination. At this stage the Tribunal is looking at the primary facts proved by the Claimant to see what inferences of secondary fact could be drawn from them.
- 73.6. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.
- 73.7. These inferences can include, in appropriate cases, any inferences that are just and equitable to draw from evasive or equivocal replies to questionnaires.
- 73.8. Likewise, the Tribunal must decide whether any provision of any relevant Code of Practice is relevant and if so to take it into account. This means that inferences may also be drawn from any failure to follow a Code of Practice.
- 73.9. Where the Claimant has proved facts from which conclusions could be drawn, that the Respondent has treated the Claimant less favourably on the prohibited grounds, then the burden of proof moves to the Respondent.
- 73.10. It is then for the Respondent to prove that it has not committed the act.
- 73.11. To discharge that burden of proof it is necessary for the Respondent to prove, on the balance of probabilities, that the prohibited ground in no sense whatsoever influenced the treatment of the Claimant, (remembering that the test now is whether the conduct in question was, "because of" the prohibited ground – see Ahmed v MOJ UKEAT/0390/14).

73.12. The above point requires the Tribunal to assess not merely whether the Respondent has provided an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the prohibited ground was not a ground for the treatment in question.

73.13. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, the Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

74. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation. That case also confirms that a mere difference in treatment is not enough.

Findings of Fact

75. The Respondent is a non-departmental government funded organisation operating under royal charter to promote and support research into human health. The part of the Respondent in which Mr Fullah works is the IT Unit within the Cognition and Brain Sciences Unit (CBU) based in Cambridge.

76. The Respondent has a grievance policy which starts at page 88. At page 93 there is a procedure to follow for raising grievances which talks, as one would expect, about putting a complaint in writing, clearly setting out the nature of the grievance and the outcome sought, marking a grievance as, "formal grievance" and so on.

77. The Respondent also has an equal opportunities policy which is at page 66 and appears to be appropriate.

78. Mr Fullah is Black British. He is a qualified teacher, has an accountancy qualification and a degree in Computer Science. His employment with the Respondent commenced on the 22nd May 2001 as a Computer Officer.

79. The Respondent has 120 staff at the location where Mr Fullah works. He was one of only two Black people in their employment at that location at the time.

80. The Respondent overall had, at the relevant time, about 3,000 employees and a dedicated Human Resources Department.

81. The Director of the unit at which Mr Fullah works is Professor Gathercole. Her expertise is as a psychologist specialising in memory and related disorders. She used to Line Manage Mr Fullah's Line Manager, but in 2014 that function passed to a Dr Norris, who has a greater knowledge of computing. Her role as Director is the unit's scientific and strategic direction. She was for a time, a member of the Respondents Equality and Diversity Committee.
82. In 2009, Mr Gyton was appointed as a Computer Officer.
83. In 2010, Mr Fullah brought an Employment Tribunal complaint of race discrimination against the Respondent which failed in 2012 and failed on appeal to the Employment Appeal Tribunal in 2013.
84. During the period 2010 to May 2012, Mr Fullah was absent from work due to ill health. His GP variously described his illness as work related stress, later adding the word depression to his fit notes. As we have seen, the Respondent's Occupational Health Advisors referred to the illness as depression and we have set out evidence that we have seen from Dr Hindler and his recent diagnosis of adjustment disorder.
85. In 2011, Dr Thompson was appointed to the department as a Computer Officer, having previously been a graduate science student with the Respondent, to whom Mr Fullah had provided support since 2002. As well as his science expertise, Dr Thompson also had 15 years experience in coding and 10 years experience of using the software the CBU used.
86. On the 28th December 2014, Mr Fullah was taken very seriously ill. He was in intensive care for several weeks. He has continued since to suffer from epileptic seizures. He was discharged from Hospital on the 17th February 2015 and then remained at home convalescing until May 2015. Because of the terms of his contract with regards to sick pay, (6 months full pay, 6 months half pay in any rolling period of 4 years) Mr Fullah received no sick pay for this period of absence.
87. On the 26th February 2015, Professor Gathercole wrote to Mr Fullah and informed him that his manager was leaving and that she would in due course let him know about the recruitment process, her letter is at page 188. She said:

"We are currently seeking approval for a replacement post and hope to be in position to advertise this before too long, the post will be open to both internal and external applicants, if you've not returned to work before it is advertised I will make sure that you know about it"
88. Mr Fullah noted this in a response of the 2nd March, page 189 where he says:

“Thank you for telling me about the replacement post and about making sure that I know when it is advertised”.

89. Professor Gathercole in fact never did inform Mr Fullah of the recruitment process, she forgot. The Claimant relies upon this by way of background. It is not an issue in this case; it does not appear in the list of issues as an act of discrimination, nor is it pleaded as an act of discrimination, although it is referred to in the pleaded case as a fact.
90. On the 28th April 2015, Dr Thompson was offered and accepted the managerial position. On the 29th April, he wrote to Mr Fullah and explained that he had applied for and obtained the position and said that he just wanted to let him know before Professor Gathercole announced it publicly.
91. It is appropriate to mention at this point that Dr Thompson and Mr Fullah had hitherto been on good terms. As we have mentioned above, they had known each other since 2002 when Dr Thompson was a graduate student working in the unit and Mr Fullah provided him with IT support on occasion. Dr Thompson had joined the unit as an employed IT Officer in 2011, whilst Mr Fullah was absent due to ill health between 2011 and 2012. During Mr Fullah’s more recent period of absence, Dr Thompson had visited Mr Fullah in hospital and at home whilst ill. On the occasion of the home visit, Dr Thompson had driven Mr Fullah to a hospital appointment.
92. Mr Fullah returned to work on the 4th May 2015.
93. The list of issues refers to Mr Fullah not being permitted to attend a meeting in May 2015. It cross refers to paragraph 10 of the claim form, which makes no reference to a meeting in May 2015. No reference to such a meeting appears to have been made in the evidence. We assume this is an error. Mr Fullah was not prevented from attending any meetings in May 2015.
94. On the 13th May 2015, Dr Thompson accessed Mr Fullah’s computer out of hours. Mr Gyton’s evidence was that this was something that happened all the time; sometimes the access is mentioned to the individual whose machine is accessed and sometimes it is not. There was no attempt by Dr Thompson to conceal that he had logged in, he did so openly using his own log-in, so that Mr Fullah could see that he had done so. Dr Thompson was unable to recall this particular incident, but acknowledged that he had logged-in to Mr Fullah’s system or computer, a number of times. Mr Fullah at this stage had only been back at work for 9 days and there is no evident deterioration in their relationship at this point, not that Dr Thompson was aware of any way. There may have been inward tension on Mr Fullah’s part, finding himself working under someone he saw previously as his junior. We

accept that accessing Mr Fullah's computer here was entirely innocent and not something for which Dr Thompson can be criticised.

95. On the 25th June 2015, Professor Gathercole met Mr Fullah at his request. He complained that he would like sick pay for his latest period of absence through illness. The argument that he put was that the Employment Tribunal had only ruled against his claim of racism, not harassment and that this had led to a prolonged illness, which may have contributed to his recent medical condition, which had led to his not being paid during his last period of absence. Professor Gathercole indicated that she was prepared to explore whether it was possible for him to be paid something for his latest period of absence, given the severity of the illness, provided there was no attempt by him to link his request to the Employment Tribunal case. She asked him to email her with the key points to be made and that she would support his request. As we understand it, there is some provision in the Sick Pay Policy for the exercise of discretion in exceptional circumstances.
96. Mr Fullah says at paragraph 25 of his statement, that he also complained about not being considered for the IT Managers post, he says that he told Professor Gathercole that he was thinking about bringing disability discrimination and race discrimination claims. Professor Gathercole denies this. She is supported by her diary note at page 212, which makes no reference to this. If Mr Fullah had said that he was thinking of bringing such claims, Professor Gathercole would we think certainly have noted it. We find he made no such complaint during this meeting. Professor Gathercole heard nothing further on this from Mr Fullah for seven weeks, until the 19th August, as we shall see shortly.
97. On the 8th July 2015, Dr Thompson accessed Mr Fullah's computer out of hours. We have noted the comments at the grievance meeting at pages 405-406, where Dr Thompson refers to accessing to see if Mr Fullah was getting on with a decommissioning project, not mentioning this to Mr Fullah personally, because things were getting tense between them. We find that he was not referring to this instance; there were other instances of Dr Thompson accessing Mr Fullah's computer which are not referred to in the list of issues. We find that this occasion too, was an innocent and routine occurrence.
98. The list of issues refers to Mr Fullah not being permitted to attend a meeting on 8th July 2015. It cross refers to paragraph 14 of the claim, but no such meeting is referred to therein. Mr Fullah does not appear to refer to a meeting on this occasion in his witness statement either. We find that there was no such meeting.
99. The list of issues refers to Mr Fullah not being permitted to attend a meeting on the 20th July 2015 and cross refers to paragraph 15 of the claim, which again, does not refer to any such meeting. The Claimant's

Witness Statement makes no reference to any such meeting either. We find that there was no such meeting.

100. On the 17th July and again on the 24th July 2015, Dr Thompson and Mr Fullah had conversations relating to whether or not Mr Fullah had given consent for the release of an Occupational Health Report. The background to this was that Mr Fullah had attended an Occupational Health appointment on the 8th June, he had then signed a consent to release of the report to the employer. On the 11th June, (bundle 2, page 88) Occupational Health wrote to Mr Fullah to say that they appreciated he had signed a consent form, but as they had discussed matters relating to his history of seizures and had made recommendations accordingly, not something that they had discussed during their consultation, they needed him to sign another one. At the same time, they sent him a draft of their report for him to approve. It is clear that it is a draft that has been sent to him to approve. Mr Fullah knows what is going on. We note that in the draft report, which the Respondent did not see during the relevant period in question in this case, (it appears at bundle 2, page 93) the Occupational Health Advisor, (a Dr Bennett) commented that although ultimately it is a legal question, her opinion was that Mr Fullah would be likely to be considered a disabled person. The Respondent did not see this because Mr Fullah never gave his consent to the release of the report. It is therefore disingenuous of Mr Fullah to seek to argue, as he has, that the Respondent denied receiving this report so as to avoid acknowledging that it had received that advice about him being a disabled person. It was also disingenuous of Mr Fullah to attempt to argue that the last paragraph at page 94, where the draft report says *"please note that Henry has agreed to the release of this report and a copy has been sent to him"* was evidence that the Respondents were not telling the truth when Dr Thompson was suggesting to him that he had not given his consent. The letter is clearly a draft, it is clear that the comment is there because it will be appropriate, once Mr Fullah has given his consent.
101. All of the above is all the more clear because Occupational Health wrote again on the 7th July, (page 103). The letter was addressed to the Respondent stating that Mr Fullah had not yet confirmed that he had read the draft report and he has not given his consent to the report being issued to them. The letter is noted as having been copied to Mr Fullah.
102. Against that background, we accept that Mr Fullah was obdurate and difficult with Dr Thompson in their discussions about the Respondents need for him to provide consent so that they could access the Occupational Health report. That Mr Fullah was inclined to be difficult is corroborated by some of the comments of Dr Bennett that we see at pages 95-96. At page 95 she referred to Mr Fullah as being a vague historian and at page 96 she noted that Mr Fullah had refused to give

her his consent to request a report regarding gastroenterology, neurology and infectious diseases care.

103. After this, Dr Thompson found Mr Fullah to be uncommunicative for several weeks.
104. On the 19th August 2015, Mr Fullah wrote to Professor Gathercole making reference to their last meeting, (page 249). He said he had been thinking seriously about what he would like by way of settling matters with the MRC and he set out 3 points that he would like Professor Gathercole to pursue. They were as follows:-

- “(1) The MRC to pay me all income I have lost as a result of the problems between me and the MRC.*
- (2) Compensate me for the effect of my illness, disability and/or disability discrimination and/or race discrimination and/or victimisation.*
- (3) Continue to put in place and enforce policies that prevent and/or eradicate all forms of discrimination and maltreatment of any employee.”*

It is clear to us that here Mr Fullah is referring to his 2010 discrimination case. He was not accepting it as an outcome. He was seeking from the Respondent compensation for that and he was blaming his illness on that.

105. Professor Gathercole responded on the 21st August, (top of page 249). She said that she would be prepared to explore with the MRC whether they could look again at Mr Fullah’s sick pay during his recent period of illness, but that would only be on the grounds of exceptional circumstances and the severity of his illness, she would not support any of his other requests for compensation as set out in his email.
106. Mr Fullah then wrote on the 22nd August, (page 252) to say that he was going to start the process of bringing race and disability discrimination claims on the 28th August. Mr Fullah refers us to Human Resources’ reaction to that, we see it at page 251. Professor Gathercole had written to Human Resources saying that it would be helpful if they could meet to discuss this. Human Resources, (Ms Barthelemy) replied to say that they should wait until they received legal paperwork and then they would need to instruct Lawyers. Professor Gathercole replied that she agreed there was no point in rushing it.
107. Mr Fullah suggests that this indicates that there is an unwillingness to deal with him properly. I am afraid we do not agree. It is a proper response, although not the only possible proper response, from the Respondent’s Human Resources. Mr Fullah says that he is about to

issue a claim and they are saying that until they know what is being alleged, there is not much they can do.

108. Mr Fullah wrote again to Professor Gathercole on the 29th August, to say that he had not yet started the process and he was giving the Respondents a few more days to respond. Professor Gathercole replied on the 1st September, (page 256) to say that she very much regrets that he has decided to proceed with these claims, but as she has explained, the position remains as outlined in her email of 21st August. She encouraged him to take independent advice.
109. During September and early October, there were communications through ACAS as part of the early conciliation process. In cross examination, Mr Fullah agreed that he did not give details of what his complaints were, that he had only referred to his claims at what he called a, "high level" by which he meant that he merely indicated that he would be claiming race discrimination and disability discrimination for his unpaid sick leave and complaining that he'd not been offered the Mangers job.
110. On the 28th September, Dr Thompson nominated Mr Fullah for a reward. It was a reward that is designed to be made to employees who have gone beyond their role. In his nomination, he referred to Mr Fullah as, since his return to work, having shown great dedication and had picked up more helpdesk calls than any other member of the team.
111. On the 29th September, Dr Thompson met with Mr Fullah to discuss goals going forward. In this discussion, Dr Thompson asked Mr Fullah if there were any projects that he would like to do and Mr Fullah replied, *"it's up to you I'll do what you ask me"*. Dr Thompson subsequently sent emails to seek Mr Fullah's agreement to the goals that they had discussed. He did not get a reply until 21st October, (page 282) when he said *"as I said at our meeting I will do whatever you want me to do, I've always been willing to do whatever is asked of me"*.
112. Mr Fullah complains that he was not permitted to attend a meeting with Aruba/Vanix on 30th September 2015. They supply a wireless facility. Mr Fullah said this placed him at a disadvantage; those attending he said, had a head start on understanding the technology and were able to establish relationships with the supplier which gives them an advantage in seeking technical support. Dr Thompson says that this was a discussion in very general terms with an Account Manager. Mr Gyton did attend that meeting. Mr Fullah was on Annual Leave that day.
113. On the 3rd October 2015, Mr Fullah wrote an email to Professor Gathercole to say that he now had the early conciliation certificates and asked whether it was the Respondents intention to fight the case. He said he was going to issue proceedings on the 7th October. She replied, (page 274) to say, *"as we haven't received*

any information concerning the nature of your case against me it isn't possible to judge what position MRC will take".

114. Mr Fullah wrote back on the 15th October, but still gave no more detail, just saying that he was going to claim race discrimination, disability discrimination, victimisation and harassment. He did not explain on what basis and he did not set out any specific allegations.
115. In his Witness Statement at paragraph 74, Mr Fullah says that he was excluded from meetings with Aerohive on the 27th October 2015. This is not in the list of issues, but it is in the Claim Form at paragraph 16. Mr Gyton did attend. It was a meeting with a Sales Representative to discuss in very general terms, wireless network products. Mr Fullah was on Annual Leave.
116. Mr Fullah says at paragraph 75 of his statement that Dr Thompson accessed his PC on 6th November 2015. This is not in the list of issues but it is in the Claim Form at paragraph 17.
117. On the 16th November 2015, Dr Thompson wrote an email to Mr Fullah and Mr Gyton, setting out some tasks for both of them to do, (pages 299-300). Mr Fullah complains that he was given lower calibre work. We accept Mr Gyton's evidence that these tasks to which he was referred, were matters he had already been working on for some time and whether they could be referred to as more demanding, depended upon the individual's particular skills.
118. Mr Fullah says that on the 25th November 2015, he was not permitted to attend a meeting about a transfer of the unit to the Cambridge University. Mr Gyton did attend. Dr Thompson says an explanation was given to the attendees at this meeting, in very general terms, about the process of transfer, which was then passed onto the other members of the group. Mr Fullah was on Annual Leave that day. This is the 3rd instance where Mr Fullah has made an allegation that he has not been permitted to attend a meeting when in fact he was on Annual Leave. This undermines his credibility generally. It suggests that he is prepared to cast about for anything he can think of to put forward as an allegation of discrimination, regardless of its lack of merit.
119. Mr Fullah complains that he was not permitted to attend a meeting on the 6th January 2016. This was with Vanix Airwave. Mr Gyton attended with Dr Thompson. The Account Manager gave a demonstration of a product which as it happens, the Respondent has not purchased. Mr Gyton's evidence was that the opportunity to attend this meeting was offered to the team and he took up the invitation because he had some experience of the product.
120. On the 15th January 2016, Mr Fullah sent his Performance Development Review (PDR) Form to Dr Thompson. We note that he said on the third page of that form, (page 310) in the bundle:

"I love my job and show great dedication and commitment to helping all staff, students, collaborators and visitors. I have strong work ethic with great enthusiasm and I enjoy helping those who require assistance."

And on the next page, he makes the following remark:

"It has been another good year in terms of updating and developing my professional skills and some of the latest developments in IT by taking private training on areas that are useful to the unit".

121. Between pages 309-310, we see that there are a lot of projects listed in which Mr Fullah has been involved; clearly he has been doing more than just working on the Helpdesk and building computers.
122. On the 19th January 2016, Dr Thompson added his comments to the PDR, (page 319). We note that the pleaded case at paragraph 20 and the list of issues, refer to an email of the 19th January in which Dr Thompson makes adverse comments. It is clear that really, Mr Fuller is referring to the comments added by Dr Thompson to the PDR here. We see that there are a lot of positive comments. He speaks of Mr Fullah's great dedication after returning to work from such a serious illness, talks of his handling an increased proportion of user support cases, resolving them more quickly and as being recommended for the award. He says that the whole unit appreciates Mr Fullah's efforts, he encourages Mr Fullah to continue developing his skills and his knowledge.
123. That said, there are negative comments too:
 - 123.1. There is a reference to certain goals being partially met or not met;
 - 123.2. There is reference to his having a tendency to forget;
 - 123.3. He was said to having spent too much time downloading older versions of software;
 - 123.4. He was said to have a tendency to make small mistakes;
 - 123.5. There is reference to his installing the wrong version of something called Mat Lab;
 - 123.6. He was said to be finding it difficult to keep track of longer term goals.
 - 123.7. Dr Thompson said that he sometimes had to repeat requests to him, and

- 123.8. Finally, Dr Thompson said that Mr Fullah sometimes made him feel uncomfortable and had a tendency to become agitated and verbally aggressive.
124. There are 3 areas of potential improvement identified by Dr Thompson in the PDR:
- 124.1. Memory strategies;
- 124.2. Planning and problem solving - suggesting Mr Fullah draw up a detailed structured plan, and
- 124.3. Reference to organisational skills and keeping track of long term goals, suggesting that he put together a to-do-list.
125. We note the reference at the bottom of page 321 to events outside of work. Dr Thompson wrote there, *"I appreciate that events outside work have made the past 18 months very stressful"*. Mr Fullah suggests that he is there referring to things that Dr Thompson has learnt by snooping on his computer.
126. We ought to compare that PDR to Mr Fullah's main comparator, Mr Gyton, whose PDR is at page 343E. There we see references to Mr Gyton demonstrating a consistently high level of performance and demonstrating an ability to communicate successfully at different levels. What Dr Thompson wrote here is all very positive. There is no apparent criticism.
127. We see that there is a passage in the PDR form where, for want of a better expression, the service users give feedback. Somebody called Mr Bell referred to Mr Gyton as an indispensable resource. A Mr Duncan wrote that he loved asking Mr Gyton questions, a Ms Lloyd that Mr Gyton had always been attentive with a quick response time and a Ms Pearce saying that he worked really hard for them, (I am para-phrasing). We note that the opportunity to seek comments from service users was offered to Mr Fullah and he declined to take up that suggestion. The feedback from the service users on Mr Gyton's form are all very positive and corroborate the remarks about his performance made by Dr Thompson.
128. We also contrast that Dr Thompson recommended Mr Gyton for moving up a pay grade but did not make any such recommendation for Mr Fullah.
129. On the 25th January 2016, Mr Fullah and Dr Thompson met to discuss the PDR. Mr Fullah told Dr Thompson that he considered the PDR to be race discrimination. Dr Thompson says that Mr Fullah commented to him that, *"white people always think black people are playing the race card"*. Mr Fullah denies that, Mr Fullah says that Dr Thompson made a comment, *"black people always think they're being*

discriminated against". Dr Thompson denies that; he says that he may have repeated back to Mr Fullah his comments to him, but no more than that.

130. How do we resolve this conflict of evidence? The first thing to say is that Dr Thompson does not strike us as the sort of person who would be likely to make such an outrageous remark as he is alleged to have made. However, demeanour is no basis upon which to make an important judgment such as this. We do however think that if Dr Thompson had made such a comment, Mr Fullah would most likely have ended the meeting and immediately protested to Professor Gathercole and to Human Resources about what had just been said. He did not. We appreciate that it would not be wise just to dismiss someone's allegation because they had not raised a grievance; there are many reasons why someone might not raise a grievance about an act of discrimination inflicted upon them. However, in the context of this case, Mr Fullah has already brought an employment tribunal claim against the Respondent alleging race discrimination. He has more recently intimated that he is going to bring another such claim. There seems to be no impediment to, and every good reason to, immediately raise this and he did not do so. This is a factor.

131. During cross examination, Mr Fullah told us that he made a written note of the remark at the time during the meeting and he referred us to page 332. What is there is unclear, but the words Mr Fullah wanted to refer to are clear and he confirmed in cross examination that they read, "*black people always think they are being discriminated*". That is corroborative evidence in favour of Mr Fullah. However, it is not clear from the notes who said what and in what context. It is not clear if this is a quote of something said by Dr Thompson or a reference to something the Claimant may have said, or may have been thinking. One would have thought that for such a critical piece of evidence, steps would have been taken to make sure that it was clearly presented to us.

132. As we will see in a moment, subsequently, a final amended version of the PDR was produced, on which is appended appraiser comments. In that respect, Mr Fullah wrote, (page 342):

"I told Russell that some of his comments and review of my work are discriminatory and/or a form of victimisation and/or harassment and did not reflect my contribution in the team. I told Russell that some of his comments are to dampen what I had achieved during the reporting year..."

And turning the page,

"I am afraid I feel that this assessment, my review, and treatment has been characterised by implied criticisms, racial discrimination and/or racial prejudice and/or disability discrimination and/or

victimisation and/or harassment and/or less favourable treatment, in some cases in a covert manner or more subtle form. I note that Russell in some occasions tries to discredit me through my work.”

133. We find it quite incredible that Mr Fullah would feel able to make such comments, but not to make a clear reference and quotation of an outrageous racist remark.
134. We look at this conflict of evidence in light of some of the analysis that we have already had to make about Mr Fullah's evidence. We have seen above, instances of unreliable evidence such as for example with regard to the withholding of consent for the release of the Occupational Health Report and the complaint about not being permitted to attend meetings on the days when he was on Annual Leave.
135. The analysis we have to make is on the balance of probabilities, what is more likely than not. Our assessment is that it is more likely than not that Dr Thompson did not make the remark attributed to him by Mr Fullah. We put it no higher than that. This is not an exact science. It is a case of considering the evidence and deciding which is more likely.
136. On the 26th January 2016, Dr Thompson emailed Mr Fullah the amended PDR on which Mr Fullah added the remarks at page 342 that we have just quoted. Professor Gathercole saw this on the 18th February 2016. She counter-signed the PDR that day and she decided to meet Mr Fullah to discuss his remarks.
137. On the 16th March, someone on Professor Gathercole's behalf wrote to the Claimant and asked him to meet her to discuss the PDR. Professor Gathercole and Mr Fullah met on 29th March and she wrote the next day to confirm what had been discussed, (page 363-364). She refers to having been concerned by the comments in the PDR and she explained that she had invited him to explain the basis of these allegations. She also recorded that she had asked him for information regarding his disability, reciting that they had of course arranged for an Occupational Health Assessment the previous year but they had not been able to access the report or its recommendations because Mr Fullah had not signed the Employer Release Form. As a consequence, she and the Respondents did not know what accusations of disability discrimination was being levelled against them. She had asked for this information to be supplied and he had declined to do so. She recalled Mr Fullah explaining that as he had prepared a case which included specific incidents against the Respondent, which would now be part of the legal process, he was not prepared to provide specific accounts of incidents that he believed would warrant action. She recalled that the only incident that Mr Fullah had given details of, mentioned that day for the first time, was the alleged racist statement by Dr Thompson. She offered to resolve the matter either informally by way of a meeting with Dr Thompson, or if that was not possible, formally.

138. On the 7th April 2016, Professor Gathercole met Dr Thompson and told him about the allegation against him. This is the first he knew of it.
139. On the 8th April 2016, Mr Fullah emailed Professor Gathercole. He said that it was his intention to issue his claim if the matter was not resolved within 7 days. In her reply, Professor Gathercole reminds him that she had given him two options, which was either to deal with the matter informally in a meeting between herself, Mr Fullah and Dr Thompson, or formally by way of a formal investigation and grievance process. She said that she would instigate a formal investigation if she had not heard from him by the 13th April. She did not hear from him by that date.
140. Early conciliation certificates were issued by ACAS on the 9th April 2016.
141. On the 18th April 2016, Professor Gathercole wrote to Mr Fullah to say that she would be instigating a formal investigation under the Respondent's Grievance Procedure. He replied simply to say that the contents were noted.
142. Proceedings were then issued by Mr Fullah on the 4th May 2016. There has been no application to amend the claim to bring into issue anything that may have happened after that.
143. There are a couple of findings of fact to make that fall outside the framework of the chronology.
144. The IT Department in which Mr Fullah works supports 150 users, 300 desktops, 60-80 servers and very many items of remote hardware such as iPads and iPhones. If a user has a problem they email the Helpdesk, which generates a ticket, which then sits in a queue. The tickets are not allocated to anyone in particular; individuals must choose to pick up a ticket, which then disappears from the queue and appears in the individual's to-do-list. Members of the team can see each other's to-do-list.
145. Statistics for the Helpdesk, unchallenged, were in the bundle at page 390. The statistics for 2015 show that Mr Fullah picked up 198 tickets compared to Mr Gyton's 149. That is a lot, bearing in mind that Mr Fullah did not come back to work until May of that year, but we also see that Dr Thompson picked up 262. We can also see that in terms of cases per day in 2015, Mr Fullah picked up 1.14, Mr Gyton 0.86 but Dr Thompson 1.51. Thus it can be seen that Dr Thompson had the highest volume of Helpdesk tickets picked up and Mr Fullah picked up more than Mr Gyton.
146. The nature of the work that Mr Fullah has done has not changed in 5 years since 2011, when Dr Thompson started working in the Department.

Conclusions

147. We approach our conclusions by reference to the list of issues. Where we refer to paragraph numbers, we are referring to the paragraph numbers in the list of issues as summarised by REJ Byrne in the Preliminary Hearing.

Direct Discrimination

Allegation that the Claimant was sidelined by Professor Gathercole in the work that was assigned to him or not allowing him to attend meetings, (paragraph 5.2.1).

148. Professor Gathercole had no involvement in the work that was assigned to Mr Fullah, the allegation is not upheld.

Allegation that the Claimant was sidelined by Dr Thompson in the work that was assigned to him, (paragraph 5.2.1).

149. The work that Mr Fullah was doing was no different from the work that he had been doing for the last 5 years.

150. We do not accept the notion suggested by Mr Fullah that work on the Helpdesk was low level, we accept the evidence of Dr Thompson and Mr Gyton that it was varied, from the very simple to the very complex. In any event, the evidence was that the Claimant and his colleagues choose what to pick up in the way of tickets from the Helpdesk queue. Work from the Helpdesk was important work and encouraging Mr Fullah to do it was not sidelining him. The fact that Dr Thompson did more than anyone else belies this suggestion.

151. We do not accept the assertion that other work assigned to Mr Fullah was low level work either, nor that this amounted to his being sidelined. Mr Fullah had the opportunity to put himself forward for projects which he chose not to do, because he was happy to remain in his own comfort zone, (the work within which, for the avoidance of doubt, was not low level). The comments by Mr Fullah in his PDR at the bottom of page 310 and top of page 311 noted above, are not the comments of one who is unhappy and feels that he is being sidelined, not being allowed to develop, or only being given low level work and not being allowed to progress.

152. This allegation not upheld.

Allegation that the Claimant was sidelined by Dr Thompson in not allowing him to attend meetings, (paragraph 5.2.1).

153. Firstly, we should say that we heard no evidence to suggest that Mr Fullah was ever not allowed to attend meetings. In other words,

there were no instances of Mr Fullah expressing a wish to attend a meeting and not being permitted to do so. The following are the instances of meetings that Mr Fuller relies on:-

May 2015 – there was no such meeting.

8th July 2015 – no such meeting was referred to, either in the Claim Form or the Claimant's Witness Statement.

20th July 2015 – no such meeting was referred to, either in the Claim Form or the Claimant's Witness Statement.

30th September 2015 – The Claimant was on Annual Leave.

27th October 2015 – not in the list of issues but is referred to in the Claim Form and the Claimant's Witness Statement. Mr Fuller was on Annual Leave.

25th November 2015 – Mr Fullah was on Annual Leave.

6th January 2016 – We accept the evidence of Mr Gyton that Mr Fullah had the chance to attend this meeting, it was open to everybody. Mr Gyton had volunteered to attend because he had experience of the product. Mr Fullah was not, "not allowed" to attend, he chose not to, he had the opportunity to attend.

154. With regard to the 3 instances when Mr Fullah was on Annual Leave, he cannot complain about not being permitted to attend meetings when in fact he was not at work to attend the meetings. In each instance, he accepted in cross examination he had been on Annual Leave and offered no explanation at any point as to how it was a detriment not to have had the opportunity to attend a meeting on a day when he was on Annual Leave.

155. Mr Fullah's comments in his PDR at the bottom of page 310 are not those of someone frustrated by being excluded from meetings.

156. This allegation is not made out.

157. None of the matters referred to at 5.2.1 in the list of issues amounted to a detriment.

The allegation relating to the comments by Dr Thompson in the PDR, (paragraph 5.2.2).

158. Here the list of issues cross refers us to paragraph 20 of the particulars of claim and they number i to x. We deal with each of them in turn.

Allegation i) That Dr Thompson's description of the Claimant's role ignored his considerable experience and confined him to manning the Helpdesk and other tasks, which are unlikely to assist his career progression.

159. The description of the Claimant's role was accurate and the negative reference to the Helpdesk gives the wrong impression of the importance and value of that work. If Mr Fullah had felt that the work he was given was not such that would afford him the chance of career progression, he had the opportunity to do something about that by picking up other projects or indeed complaining in the PDR. In fact, this allegation appears to be contradicted by a quotation lifted from the same document, below as part of the Allegation iv), where Dr Thompson is quoted as being pleased that the Claimant is taking on a wider range of cases and encourages him to do more.

160. This allegation is not upheld.

Allegation ii) The tasks were always shared between the team but Dr Thompson seemed intent on establishing the Claimant as the junior member of the team.

161. We do not recognise Mr Fullah's suggestion that the PDR seeks to portray him as a junior member of the team. This allegation is not made out.

Allegation iii) Dr Thompson erroneously stated that the Claimant had picked up 32% of cases and spent on average of 82 hours per case.

162. This is a suggestion that Mr Fullah spent more than 2 weeks working on each query received by the Helpdesk, which is physically impossible. This is not something that was pursued in cross examination. The figures in terms of percentage taken up seemed to be broadly borne out by the unchallenged statistics of page 390. This allegation is not made out.

Allegation iv) The Appraisal reads as though the Claimant has recently arrived in the Department and is patronising in tone and content:

163. Mr Fullah points to the following aspects of the PDR in support of this contention:

163.1. Dr Thompson states that he is pleased that Mr Fullah has started to deal with a wide range of cases and he would encourage him to continue developing the skills and knowledge necessary to extend the range of cases he handles even further.

163.2. He says that Dr Thompson suggests falsely that he needs to organise his work better as he is forgetful and spends a long time downloading out of date software.

- 163.3. Mr Fullah points to Dr Thompson's suggestion that he should keep a to-do-list; he says that this might be appropriate for a new employee, but is hardly necessary for a senior member of staff who has worked successfully in the office for a number of years prior to the arrival of Dr Thompson.
- 163.4. Dr Thompson's suggestion that Mr Fullah has failed to understand instructions or communicate that he has understood them.
- 163.5. The criticism that Mr Fullah gives vague and unhelpful answers when the level of detail that he provides to a user is obviously dependent on the nature of the query.
- 163.6. Dr Thompson suggested that Mr Fullah had handled Mat Lab incorrectly,
164. Mr Fullah says that these allegations are baseless and designed to belittle him.
165. We do not agree with Mr Fullah's perception of the PDRs tone and content. Dr Thompson's comments seem to us to be helpful and constructive, made in the light of failings he has pointed out in the report. Done, we find, with genuine motives. The allegations therein were not, we find, designed to belittle and were probably based on foundations of some merit. The advice given was not a detriment, the criticisms made were meant to be constructive. In so far as the criticisms might not have been constructive, (and we think they were) they were made with genuine motives on the part of Dr Thompson, from genuine concern.
166. This allegation is not made out.

Allegation v) Dr Thompson concluded that the Claimant had not met his targets or partially met his targets.

167. This is not a point pursued in cross examination. It was probably a fair statement, for example the reference at the fifth bullet point on page 319 to identifying training needs, (referred to as "Goal 5" and said not to have been met). There was no evidence that we were taken to that Mr Fullah had identified training needs and one would expect this to be something Mr Fullah would have pursued if he was to prove his point and the evidence was there. Dr Thompson's conclusions about the Claimant's targets were not a detriment.
168. This allegation is not made out.

Allegation vi) Dr Thompson described the Claimant as antagonistic and aggressive, deliberately suggesting that the Claimant's behaviour was unprofessional and inappropriate.

169. Actually, from what we have heard and seen about the Occupational Health Report on the issue of consent, this is probably a fair comment by Dr Thompson. It is a detriment to have been subjected to this criticism, but we find that the criticism was made with good cause and we accept the explanation of Dr Thompson. It was not because of Mr Fullah's race or his illness.

170. This allegation is not made out.

Allegation vii) Dr Thompson sought to assign meaningless tasks to the Claimant such as to classify existing tickets and managing user desktop and laptop computers.

171. This is a reference to what is written at page 322 where Dr Thompson wrote, "I would like him to take on a project to classify existing Helpdesk tickets" and in the next paragraph, "provided he feels happy with the role I would like Henry to take on a greater responsibility for managing User Desktop and Laptop computers". Those are not meaningless descriptions, this is not a detriment. The allegation is not made out.

Allegation viii) Dr Thompson falsely suggested that the Claimant has a problem dealing with licensing of software for the network; while the Claimant was handling a particular query, Dr Thompson intervened and said that he, Dr Thompson, had downloaded the relevant license, creating the impression that the Claimant was unable to do this himself. When this issue was discussed at the subsequent meeting on 25th January 2016 about the Appraisal, Dr Thompson could not substantiate his claim.

172. This is not something that was pursued or raised in evidence. Mr Fullah did not establish that the allegation was false. We find that Dr Thompson was not making a false allegation, in that he was raising something that he genuinely thought was an issue. The criticism is not a detriment in that genuine concerns are raised by Dr Thompson. In so far as it might be said to be a detriment, we accept that he was raising genuine concerns and not inflicting a detriment on Mr Fullah either because of his race or his illness.

173. This allegation is not made out.

Allegation ix) Dr Thompson also suggested that the Claimant had gone beyond his instructions without discussing his actions with Dr Thompson. This allegation is false. The work that the Claimant did in deleting the security group reached decommissioned machine was a necessary and essential part of process and the Claimant was surprised that he had to explain this to Dr Thompson.

174. Again, this is not something that was explored in evidence. Mr Fullah did not establish that the allegation was false. We find that Dr Thompson was not making a false allegation, in that he was raising something that he genuinely thought was an issue. The criticism is not a detriment, in that genuine concerns were raised by Dr Thompson. In so far as it might have been said to be a detriment, we accept that he was raising genuine concerns and not inflicting a detriment on Mr Fullah either because of his race or illness.

175. The allegation is not made out.

Allegation x) Dr Thompson alluded to the fact that the Claimant's performance may have been affected by problems outside of work. The Claimant believes that Dr Thompson has gained information about his personal life by secretly and inappropriately accessing his computer. He says that this is an invasion of privacy and a gross breach of trust as Dr Thompson should appreciate.

176. It seemed to us to be perfectly obvious that Dr Thompson was referring to Mr Fullah's health issues, not to something that he gleaned from having had access to Mr Fullah's computer. It is also clearly and obviously right that he should make reference to those problems and offer his support, as he does. It was not a detriment. The allegation is not made out.

177. We return now to the allegations in the list of issues.

At paragraph 5.2.3: Dr Thompson's alleged remark that black people always think they are being racially abused.

178. We have found that this remark was not said and so the allegation is not made out.

That Professor Gathercole is alleged to have failed to take any meaningful steps with regard to Mr Fullah's concerns, failed to investigate his grievance following his email in August 2015 and his complaint of 29th January 2015, (paragraph 5.2.4 of the list of issues).

179. Mr Fullah never submitted a formal grievance in accordance with the Respondents Grievance Policy; he was perfectly capable of doing so.

180. In respect of the August 2015 communications from Mr Fullah, Professor Gathercole responded very reasonably. Initially in the 19th August communication, Mr Fullah gives the impression he is seeking to revive his 2010 complaints. Professor Gathercole is entitled to make it clear that she is not prepared to contemplate discussions about that. On 22nd August, he says that he is going to issue proceedings on 28th August. At this point he has mentioned disability discrimination, so his complaint is clearly going to be about something new. Professor Gathercole sought HR advice, the advice she received

was to wait for the legal papers to see what the claim is. Some Human Resources advisors might have advised to respond immediately, asking for details of what he was proposing to claim, but it is not unreasonable, it is not a detriment, given the history and his stated intention to issue proceedings in six days time, to wait and see what the detail is in the claim. The decision maker on that was the Human Resources Advisor, Ms Barthelemy. The accusation here is made against Professor Gathercole. She has given evidence because Mr Fullah named her as the discriminator. Race played no part in Professor Gathercole's decision making.

181. After the August exchange of emails, ACAS were then involved in early conciliation. Mr Fullah gave no details of his complaint. There was an exchange of communications in October in which Professor Gathercole made it clear that it was not possible to respond to Mr Fullah unless he gave details of what his complaint was. Given that Mr Fullah had not provided any detail of what his complaint was, had ample opportunity to do so and that he had chosen to not take the matter further forward, it was not unreasonable of Professor Gathercole not to press the matter forward herself. Her motivation for doing so was not Mr Fullah's race, nor for that matter his illness, nor that he had made a complaint in the first case.
182. In respect to the comments made in the PDR, Professor Gathercole did follow this up appropriately; she spoke to Mr Fullah about his allegations, she set out the options of dealing with the matter formally or informally, she invited him to let her know his preference and he did not respond. It ill behoves him now to complain of Professor Gathercole's inaction, when he did not respond to her communications.

The Respondent treated the Claimant less favourably than it treated or would have treated either the actual comparator, (Mr Gyton) or a hypothetical comparator, (paragraph 5.3 of the list of issues).

183. We consider comparisons with Mr Gyton first of all. Mr Fullah complained about the nature of the work allocated to the two of them. Mr Fullah's work had been the same for the previous five years. He had been given the opportunity to take on other projects and had chosen not to do so. His attitude to Dr Thompson was, 'I will do what you tell me to do'. Such difference as there was between them in the nature of their work was of Mr Fullah's own making and not as a result of a difference in treatment.
184. There were clear differences between their respective PDRs. Mr Gyton's did not contain negative comments. The service users comments about Mr Gyton corroborate that there may be good reason for the exclusively positive comments that he received. We accept Dr Thompson's explanation that their respective PDRs reflect genuine differences between the two of them.

185. The same reasoning and conclusion applies to the fact that Dr Thompson recommended Mr Gyton be put on a higher pay band called 'Sustained Excellence' and did not make the same recommendation for Mr Fullah.
186. Mr Fullah complains that Mr Gyton was invited to meetings and he was not. Three of the four meetings he has complained about were on days that he was on Annual Leave. As to the fourth meeting, Mr Gyton gave a credible explanation, (which we accept) as to why he attended and Mr Fullah did not.
187. With regards to Mr Fullah's comparison between himself and Mr Gyton, there are no facts from which we could conclude that race was the reason for the difference in treatment, nor has Mr Fullah proven facts from which we could conclude that a hypothetical comparator, a white person doing his job in the same way, behaving in the same way, with the same history of failed litigation against the Respondent, would have been treated more favourably in respect of any of the above allegations. The burden of proof does not shift to the Respondent.
188. The complaint of direct race discrimination fails.

Disability Related Discrimination

189. Mr Fullah was a disabled person by reason of his epileptic seizures. The following reasons may be taken to equally apply had we decided that in fact, Mr Fullah was disabled by reason of mental ill health, (whether the label be depression, adjustment disorder or any other label) during the relevant period.
190. At 6.1 of the list of issues, Mr Fullah relies on the same allegations he relies on in his claim of direct race discrimination considered above:
- 190.1. We have found that he was not sidelined and he was not give low level work.
- 190.2. In respect of the one meeting referred to that he was not on Annual Leave for, there was good reason for Mr Gyton to have attended that meeting, which Mr Fullah himself had the opportunity to attend. There was no unfavourable treatment. There was no link, no, "something" linking his ill health and his none attendance at that, or any other, meeting. His non-attendance had nothing to do with his ill health.
- 190.3. With regards to the PDR comments, in so far as there was unfavourable treatment in the criticisms made of him, there was good reason for those comments, or they were made by Dr Thompson believing there was good reason for them. We accept his explanation. There was no evidence before us that the few matters for which Mr Fullah was criticised, arose

because of something relating to his ill health. If they had been related to disability, the comments would have been objectively justified; the legitimate aim of a PDR is assist an employee in their personal development, improve their performance and improve the performance of the employer organisation. To be effective, a PDR should be frank and honest, but also measured and courteous. The criticisms made appear to be all of those. Conveying these matters in a PDR is proportionate, it is part of what a PDR is for, to discuss openly perceived shortfalls and ways of improvement, as well as to give praise and explore development.

190.4. The racist comment was not made.

190.5. The manner in which Professor Gathercole dealt with Mr Fullah's complaints was not unfavourable, it was appropriate. Her conduct in relation to the complaints was not in any way related to, it did not arise from something relating to, Mr Fullah's ill health.

191. The claim of disability related discrimination fails.

Victimisation

192. The protected acts relied on are:

192.1. At 7.1.1 in the list of issues - the 2010 discrimination claim, which the Respondent rightly concedes, was a protected act.

192.2. At 7.1.2 – Mr Fullah no longer seeks to rely on the letter from him dated May 2015.

192.3. Thirdly at 7.1.3 – Mr Fullah relies on his emails to Professor Gathercole in August 2015. Item 2 from the email of 19 August, page 250, which reads, "*Compensate me for the effect of my illness, disability and/or disability discrimination, and/or race discrimination, and/or victimisation.*". From that, the Respondent must surely believe that Mr Fullah may make an allegation that there has been a contravention of the Equality Act or may issue proceedings under the Act. It seems to us that is plainly a protected act.

193. Turning to consider the detriments relied upon as a consequence of the protected acts, once again Mr Fullah relies on the four categories of detriment that he relied on in respect of his direct race and his disability related discrimination claims. Our reasoning and conclusions are the same:

193.1. Mr Fullah was not side-lined.

193.2. He had the opportunity of attending the one meeting complained of that he was not on Annual Leave for.

193.3. The contents of the PDR were either not a detriment or there was good reason for them, or Dr Thompson made the comments believing he had good reason to make them. His reason for making them was not because of the 2010 Employment Tribunal Claim, in fact there's no good reason why it would be, it affected him in no way at all. It was not because of the August complaint.

193.4. The racist comment was not made,

193.5. The allegation against Professor Gathercole that she did not properly deal with Mr Fullah's complaints is without foundation.

194. At paragraphs 7.2.2 and 7.2.3 of the list of issues, Mr Fullah relies on the additional detriments of Dr Thompson accessing his computer on the 13th May and the 8th July 2015. Dr Thompson did not work for the Respondent when the Claimant issued his 2010 Employment Tribunal Claim, he was not implicated in it in any way, indeed he was personally supportive of Mr Fullah, he had no reason at all to access Mr Fullah's computers because of that. The dates of alleged access pre-date the August complaint and so could not have been because of that protected act.

195. For these reasons, the complaint of victimisation also fails.

Overall

196. We have stood back and have looked at the facts of this case overall. We have asked ourselves whether with this overview, we think there has been discrimination here and we have concluded that there has not been.

197. For these reasons, Mr Fullah's claims fail.

Employment Judge Warren, Cambridge.

JUDGMENT SENT TO THE PARTIES ON
12 June 2017

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FOR THE SECRETARY TO THE TRIBUNALS