Case No: 2200396/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr J Merghani

Respondents: London Borough of Camden

Heard at: London Central **On:** 8-11, 15-17 May 2017
19 & 20 May (in chambers)

Before: Employment Judge H Grewal
Mr D Eggmore and Mr T Robinson

Representation

Claimant: In person

Respondent: Mr S Sudra, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of unfair dismissal is not well-founded;

2 The complaint of direct race discrimination in respect of the meeting of 21 October 2015 is not well-founded;

3 The complaints of victimisation in respect of the failure to deal with the grievance of May 2015 and the meeting of 21 October 2015 are not well-founded; and

4 The Tribunal does not have jurisdiction to consider any of the other complaints of direct race discrimination and victimisation.

REASONS

1 In a claim form presented on 15 March 2016 the Claimant complained of unfair dismissal and race and disability discrimination. Early Conciliation notification was given on 19 January 2016 and the certificate was granted on 16 February 2016. All complaints of disability discrimination, harassment and indirect race discrimination were dismissed upon withdrawal at a preliminary hearing on 7 December 2016. The only complaints going forward were those of constructive unfair dismissal, direct race discrimination and victimisation.

The Issues

2 It was agreed at the outset of the hearing that the issues that we had to determine were as follows.

Constructive unfair dismissal

2.1 Whether the following acts occurred as alleged by the Claimant:

(a) Between September 2014 and February 2015 the Respondent subjected the Claimant to a flawed Sickness Absence Management Procedure;

(b) On 29 January 2015 the Respondent issued the Claimant with a formal notification of concern which was to remain on his file for 9 months;

(c) In May 2015 the Claimant's appraisal and moderation was conducted by a lower management team, including an administrative officer who was junior to the Claimant, instead of by the Senior Management Team;

(d) The Respondent failed to deal with the Claimant's grievance dated 20 May 2015, as expanded on 26 August 2015, adequately or at all;

(e) From August 2015 the Respondent intimated and initiated unjustified disciplinary proceedings against the Claimant when he was not guilty of any conduct warranting disciplinary action;

(f) The Respondent required the Claimant to attend and exposed him to a threatening meeting on 21 October 2015 at which Ms Wheat told him that (1) she would only provide a reference if he dropped his grievances (2) she would ensure that the Respondent's solicitors would pursue him constantly and (3) she would hunt him down and make sure that he never worked again. (The Claimant's case was that this was the last straw).

2.2 If they did, whether they, individually or cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence;

2.3 If there was such a breach, whether the Claimant resigned in response to that breach;

2.4 If there was a constructive dismissal, what was the reason for the dismissal;

2.5 Whether the dismissal was fair.

Victimisation

2.6 Whether any of the following amounted to a protected act:

(a) The grievance of 6 February 2014;

(b) Bringing and pursuing previous claims before the Tribunal (case numbers 2200814.14 and 2201975/17);

(c) Pursuing an appeal in the EAT on 6 June 2015;

(d) The grievance of 20 May 2015 as expanded on 26 August 2015;

2.7 If so, whether the Respondent did any of the acts set out at paragraph 2.1 (a)-(f) (above) because he had done one or more protected acts.

Direct race discrimination

2.8 The Claimant describes himself as black of African and/or Sudanese origin. Whether the Respondent because of race treated the Claimant less favourably than it treated, or would have treated, actual or hypothetical comparators by doing any of the following:

(a) In September 2014 requiring him to attend a Stage 1 Sickness Absence Management review and issuing him with a notification of concern which was valid for 9 months on 29 January 2015. The comparators are Mohan Seyan (Asian) and Jessica Gibbons (white);

(b) Conducting his appraisal and moderation in May 2015 by a lower management team, including an administrative officer who was junior to the Claimant, instead of by the Senior Management Team. The comparator is Albert Grant (who is white);

(c) Giving him an appraisal grading which was too low and not a reflection of his work and commitment to the Respondent;

(d) Ms Wheat's conduct at the meeting on 21 October 2015 (as set out at paragraph 2.1(f) (above).

Jurisdiction

2.9 Whether the Tribunal has jurisdiction to consider any complaints about acts that occurred before 20 October 2015.

Res Judicata

2.10 Whether any part of the claim has already been determined in case number s2200814/2014 and 2201975/2014.

The Law

3 Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed if the employee terminates his contract of employment in circumstances in which he is entitled to do so without notice because of the employer's conduct. The basic propositions of law to be derived from the case law are as follows. An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of contract (**Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27**.

4 It is an implied term of any contract of an employment that an employer shall not without reasonable or proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. A breach of the implied term only arises if the conduct of the employer objectively viewed is such that it is likely to cause damage to the employer/employee relationship (**Malik v BCCI [1997] IRLR 462**. The breach of the implied term of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term although each individual incident may not do so. The "final straw" need not itself be a breach of contract but must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term.

5 Section 13 provides that a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. On a comparison of cases for the purposes of this section, there must be no material difference between the circumstances relating to each case (section 23). Section 14, which deals with discrimination because of a combination of two relevant protected characteristics, has not yet come into force.

6 Section 27 provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act. "A protected act" includes making an allegation that (whether or not express) that A or another person has contravened the Equality Act 2010.

7 If there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred unless A shows that A did not contravene the provision (section 136). Proceedings on a complaint under the Equality Act 2010 may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable (section 123(1)). Conduct extending over a period is to be treated as done at the end of the period (section 123(3)(a)).

8 We had regard to the guidance given in **Igen Ltd v Wong [2005] IRLR 258** and **Madarassy v Nomura International plc [2007] IRLR 246** as to the application of the reversal of the burden of proof.

10 In **Martin v Devonshires Solicitors EAT 0086/2010** Underhill P said at paragraph 22,

> "*In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable."*

11 The doctrine of "res judicata" applies where an issue has already come before a court or tribunal and has been decided, or an issue could have been brought before a court or tribunal in previous proceedings but was not and raising the issue later amounts to an abuse of process. A party who seeks to reopen or raise an issue will be barred, or "estopped" from doing it is res judicata applies.

The Evidence

12 The Claimant have evidence in support of his claim. The following witnesses gave evidence on behalf of the Respondent – Naran Pindoria (Technical Manager, Building Control Services), Nasser Rad (Head of Building Control), Frances Wheat (Acting Assistant Director, Regeneration and Planning), Karen Galey (Head of Placeshaping and Economic Development), Jessica Gibbons (Director of Community Services) and Susan Greening (HR Business Advisor). Having considered all the oral and documentary evidence the Tribunal made the following findings of fact.

Findings of fact

13 The Claimant describes himself as black and of African origin.

14 The Claimant commenced employment with the Respondent on 27 September 1999 working as a part-time reception security officer. On 15 January 2001 he commenced full-time employment with the Respondent in its Culture and Environment Department.

15 On 1 July 2008 the Claimant was appointed acting Principal Building Control Officer for a period of three months. He remained acting in that capacity for nearly six years, his temporary appointment being renewed every three months. Nasser Rad was appointed acting Head of Building Control in about June 2009. The Claimant requested on a number of occasions that his appointment to that role should be made permanent but it did not happen.

16 In February 2014 the Claimant raised a formal grievance that Nasser Rad had racially discriminated against him by not appointing him on a permanent basis to the role which he had been carrying out for nearly six years and not making other acting roles available to him. He said that as a result of the way in which he had been treated he was suffering from stress, anxiety and depression.

17 In February 2014 the Claimant requested that he be allowed to work two days a week from home between August 2014 and January 2015 (so that he could spend time with his family in Wales as his wife was going to be working there at that time). That request was granted by Nasser Rad.

18 On 30 March 2014 the Claimant brought a case in the Employment Tribunal against the Respondent and Mr Rad (case number 2200814/2014) in which he complained, among other things, of discrimination because of race and religion.

19 The Claimant had attended Building Control Management Team ("BCMT") meetings until the end of March 2014. Following a discussion at the meeting on 25 March about who should attend BCMT meetings and an exchange of emails with Mr Rad the Claimant stopped attending BCMT meetings.

20 As a result of what the Claimant had said about his health in his grievance, he was referred to the Occupational Health Service. In a report dated 14 April 2014 the OH doctor said that the unresolved grievance issues were causing the Claimant a considerable amount of anxiety and he had advised him to take the next two weeks off as sick leave. He said that at the end of that two week period the Claimant could return to work and that he thought that he would be helped by having regular one-to-one meetings with an appropriate and different line manager to help plan and prioritise his workload and by having his workload reduced by about 25% while the grievance was ongoing.

21 On 17 April 2014 the Claimant was appointed to the role of Principal Building Control officer on a permanent basis.

22 The Claimant was absent sick from 24 April to 8 May 2014. His medical certificate said that he was unfit to work because of anxiety and depression.

23 On 2 May 2014 HR advised Mr Pindoria of the recommendations made by the OH doctor and asked him to supervise the Claimant on his return to work and to meet with him fortnightly until his grievance had been concluded and to reduce his workload by 25%.

24 Mr Pindoria met with the Claimant when he returned to work on 9 May. At the meeting the Claimant gave Mr Pindoria a copy of the OH report. Mr Pindoria tried to reduce the Claimant's workload but did not do so in a very effective manner. He took over from the Claimant the additional duties that he had as a Principal Building Officer and asked him to focus on just the BCO work. This upset the Claimant because he had fought for so long to be confirmed in the PBCO post. He also put a number of inactive jobs in abeyance. That did not reduce the Claimant's workload because there was nothing happening on the inactive jobs. He accidentally also put some of the active jobs into abeyance which created more problems for the Claimant because the Claimant was not able to enter anything onto the system in respect of those.

25 The Claimant complained in writing to Mr Pindoria that he had not reduced his workload in accordance with the OH recommendation.

26 The one-to-one meetings with Mr Pindoria did not take place every fortnight because the Claimant felt that was excessive and not necessary. The next meeting took place on 24 June 2014. At that meeting Mr Pindoria decided that the simplest way to reduce the Claimant's workload was to remove from him one of the three patches that he covered and allocate responsibility for that to others. That was done within the next few weeks.

27 The grievance investigation concluded in September 2014. Kevin Churchill, who had investigated the grievance, concluded that there had been no evidence to support the Claimant's allegations of racial discrimination, harassment, blocking progress, intimidation and humiliation and those allegations were unfounded. He considered however, that continuing the Claimant's acting up arrangements for a period of six years was unacceptable and should have been rectified sooner. However, that had not been unique; he noted that the use of prolonged acting up roles in Building Control was common practice. He found evidence to show that Nasser Rad had shown concern, support and flexibility for the Claimant throughout since 2009. One of his recommendations was that both parties should consider a course of mediation to rebuild their working relationship.

28 Although the OH recommendations had been made for the period pending the conclusion of the grievance, they continued after the grievance had been concluded.

29 The Claimant was absent sick on 23 September 2014. The Claimant had until May 2014 been the leader of sub-technical group. Mr Pindoria had taken over that responsibility when he reduced the Claimant's workload in May 2014. At a meeting of the BCMT on 23 September 2014 it was decided that Albert Grant, the other Principal Building Control Officer, should take over as leader of the sub-technical group. Mr Pindoria called the Claimant at home on 23 September 2014 and left a message to inform him of the fact.

30 The Claimant remained off sick on 24 and 25 September 2014. On 25 September Mr Pindoria sent the Claimant a link in order to complete a stress risk assessment. The Claimant submitted a medical certificate dated 26 September 2014 which certified that he was unfit to work from 26 September to 10 October because of stress, anxiety and depression. There was some confusion as to whether the Claimant had in fact worked from home on 26 September.

31 The Respondent's Absence Management Procedure sets out trigger points to prompt managers to review an employee's sickness absence. Two of these are when absence exceeds ten days in total over a rolling 12 month period and when absence occurs on five or more occasions over a rolling 12 month period. The procedure makes it clear, however, that the trigger points are for guidance and to prompt a review of the situation but do not automatically lead to action being taken. Paragraph 6.1 of the Procedure provides that employees will be required to attend a Stage 1 Formal Absence Review meeting where,

> "*the circumstances of the sickness absence require formal action at an early stage; or*
> *Following earlier discussion, there has been a recurrence of unsatisfactory attendance previously addressed through the informal process; or*
> *Following earlier discussions of an informal nature the required attendance levels have not been attained; and/or*
> *The sickness is having an ongoing adverse impact on service delivery and/or colleagues."*

32 On 1 October Sophia Bhaimia in HR informed Mr Sudra, the Respondent's in-house counsel, that the Claimant had hit the trigger points and sought his advice as to whether they could start to manage his absence under the procedure. In light of the fact that the Claimant had an ongoing Tribunal case it is not surprising that she

sought advice before embarking on that course. She then sent an email to that effect to Susan Greening, who was taking over her role, and to Nasser Rad.

33 On 7 October 2014 the Claimant sent Ms Greening an email to complain about "*the apparent continuing vindictive, difficult and hostile actions"* of HR and Naran Pindoria. He said that he had not been paid the salary for the Principal BCO role for the past three months, Mr Pindoria had called him while he was on sick leave on 23 September to tell him that they had given his lead job in the technical team to Albert Grant and that Mr PIndoria had not reduced his workload as recommended in the OH report in May 2014 until July 2014.

34 Ms Greening consulted with payroll about the Claimant's pay and informed him on 9 October that there had been a genuine error with his pay for the last three months and that she had arranged for him to be paid what he was owed. She said that as far as his issues with Mr Pindoria were concerned, he should initially discuss them with Mr Pindoria to resolve them informally or alternatively they could try and resolve them by mediation.

35 On 9 October Susan Greening met with Mr Pindoria to discuss the Claimant's sickness absence and went through the Sickness Absence Management Procedure with him. According to the information that she had from HR records and Mr Pindoria, the Claimant had had 35 days' sickness absence over six occurrences in the previous twelve months, which was considerably higher than the suggested trigger points in the Respondent's procedure. She advised him that given the level of the Claimant's sickness absence and the impact that it had on service delivery, it would be appropriate to convene a Stage 1 Formal Absence Review meeting. She also advised him to refer to the Claimant to Occupational Health for further advice.

36 On 17 October Mr Pindoria referred the Claimant to Occupational Health and sent him again the link to the stress risk assessment form.

37 Sophia Bhaimia tried to set up mediation, in accordance with the recommendation of the grievance outcome. The Claimant's response was that he would only participate in mediation if it was "*a final settlement taking everything into account, the head of Service accepting responsibility, an apology, stopping hostility and importantly Camden financially compensating me for the detriments I have suffered to my health, dignity, feelings and confidence."* He concluded that as the Respondent was not offering him that he had no alternative but to seek justice in the courts.

38 On 23 October 2014 the Claimant presented a second claim form to the Employment Tribunal.

39 On 5 November 2014 Ms Greening met with Messrs Rad and Pindoria to discuss the management of the Claimant's sickness absence. Ms Greening's advice was that they should proceed to a Stage 1 formal meeting. The managers accepted that advice. Mr Rad helped Mr Pindoria to draft the letter inviting the Claimant to that meeting. Mr Pindoria had no experience of managing sickness absence under the Respondent's procedure.

40 On 6 November Mr Pindoria informed the Claimant that he would be holding a Stage 1 formal sickness absence meeting on a date to be notified to him.

41 On 10 November the Claimant wrote to Mr Pindoria that it was not necessary to escalate the matter to a Stage 1 hearing given that he knew that his sickness and absence had been caused by work related stress but that he was taking medication and was well enough to work.

42 In a report dated 11 November 2014 the OH Physician advised that the Claimant was fit for work and to attend meetings with his managers. It was, however, unlikely that he would be symptom free until the entire grievance process (the doctor referred to the "disciplinary" process but the Claimant was not being subjected to any disciplinary process) including the appeal and the Tribunal case had concluded. She said that his ill health was related to the concerns that he had about his treatment at work.

43 Mr Pindoria had a one to one meeting with the Claimant on 11 November 2014. They discussed the possible outcomes of the Stage 1 hearing. The Claimant accused Mr Pindoria of being hostile to him and threatened to put in a grievance against him and to seek a change of line manager.

44 On 1 December the third patch that had been taken away from the Claimant to reduce his workload was returned to him.

45 On 2 December 2014 Mr Pindoria invited the Claimant to a Stage 1 absence review meeting on 10 December. He said that since April 2014 the Respondent had provided the Claimant with support in order to improve his attendance but despite that his attendance had not improved to satisfactory levels. Since 1 December 2013 he had had been absent on six occasions for a total of 36 days. He was sent a summary of his sickness absence and a copy of the latest report from the Occupational Health Service. He was advised of his right to be accompanied and warned that a possible outcome could be the issue of a notification of concern which would be placed on his file for nine months.

46 The Claimant responded that he had found Mr Pindoria's letter to be "*very threatening, hostile, unnecessary"* and that it caused him distress. He said that Mr Pindoria was aware that his sickness had been caused by work-related issues and continued "*I was racially and religiously discriminated against Camden and since 1 April I have been victimised by you and HR and I regard your actions as continued victimisation,"* He said that he had had 35 days' sickness absence, and not 36 days as alleged by the Respondent. He said that as he had already raised a grievance involving Mr Pindoria, had made a complaint to Ms Greening about his vindictive behavior, had lodged a tribunal claim about his actions and against him and since Mr Pindoria continued to be threatening and hostile to him, he should not be the person conducting the Stage 1 meeting. He said that he intended to put in another grievance about Mr Pindoria's "*threatening inappropriate unwelcoming behavior and conduct"* and that if it was not addressed he would have no option but to bring another Tribunal claim.

47 On 9 December Ms Greening informed the Claimant that the Stage 1 meeting the following days was going ahead as planned and that Mr Pindoria would chair the meeting and she would be advising him.

48 On the morning of 10 December the Claimant complained to Mr Pindoria and Ms Greening that the letter inviting him to the hearing had been sent to the wrong address (151 Hillside instead of 151A Hillside). He said,

> "*Which one of you is careless, negligent and reckless in handling my personal sensitive data? Which one of you is responsible for this serious incident that has left me stunned at sheer incompetence? … Is it that this is now just a deliberate act or is it a continuation of victimisation or/and discrimination."*

49 The Stage 1 hearing took place on 10 December. The Claimant said that his sickness had been work-related but that he was now fit and had not had any sickness absence since 10 October. He had in fact worked on 26 September. He was about to complete the Stress Risk Assessment form and to start counselling. An informal process should have been followed rather than holding a formal stage 1 meeting.

50 On the following day the Claimant sent Ms Greening an email in which he said,

> "*I am submitting a grievance against you for abuse of power, bullying, harassment, non-following of Council procedure, unlawfully breaching my rights, sending sensitive, confidential and very private information about me to my neighbor, victimisation and very possible race discrimination."*

He asked her who her line manager was so that he could send the grievance to her line manager.

51 Ms Greening sent the Claimant an email that it was unacceptable to make allegations regarding bullying, harassment and victimisation without foundation. She said that it he wished to pursue a formal grievance, he should complete and submit the formal grievance template to Julie Foy.

52 On 16 December Mr Pindoria sent Ms Greening an email that he did not have cause for concern in respect of the Claimant's illness and a draft letter that he had based on one of the templates attached to the procedure. In the draft letter he said that as the Claimant had been at work since 10 October and the OH Physician had advised that he was fit for work, his opinion was that the Claimant's attendance had improved and he, therefore, did not need to progress the matter to the next stage of the procedure. It is clear that Mr Pindoria did not understand the process. The issue at that stage was not whether to progress to the next stage but whether the Claimant had alleviated the concerns that had been raised by his levels of sickness absence in the preceding twelve months. It is difficult to see how two months without any sickness absence could have alleviated those concerns especially bearing in mind what the OH doctor had said about the sickness being linked to work-related issues.

53 On 16 December Mr Pindoria apologised to the Claimant for sending the letter to the wrong address.

54 On 17 December Mr Rad issued a notification of concern to another employee in the Department following a Stage 1 absence review meeting. This was one of two such notices that he has issued in the past three years. One of the employees was white and the other was of mixed race. The second one was issued a year later on 16 November 2015. Mohan Seyan, a Structural Specialist of Sikh ethnic origin,

sustained a foot and back injury in November 2014 as a result of which he was unable to work for two months. During that period he was in constant communication with Mr Rad and updated him on his progress. He started a phased return to work on 13 January 2015 and shortly thereafter returned to full-time working except that he was not able to deal with dangerous structures call out. He worked two days a week from the office and three days a week from home. As his absence was fully managed and predictable, Mr Rad did not feel it necessary to use the Respondent's absence management process.

55 Between 19 and 22 December Ms Greening had discussions with Mr Pindoria about his draft response. She advised him that the template that he had used was normally used when attendance levels had improved to an acceptable standard following the issuing of a Notification of Concern or as a result of the informal process. She drew his attention to the correct template to use to convey the outcome of a stage 1 meeting. She also advised him of the factors which the procedure indicated that he should take into account and that the Procedure provided (at paragraph 10.1) that a Notification of Concern would be appropriate where absence issues previously addressed informally have not been resolved or absence issues have arisen whether or not they have been addressed informally previously.

56 On 24 December the Claimant complained in an email to Mr Pindoria and Ms Greening about the delay in the outcome of the stage 1 meeting being communicated to him. He repeated his complaints about the letter being sent to the wrong address and the stage 1 meeting being held. He said that he felt that what had happened to him had involved "*unlawful harassment, victimisation and discrimination".* He made it clear that when he received the outcome he would appeal against it and submit a grievance.

57 On 31 December the Claimant sent Mr Pindoria the completed Stress Risk Assessment form. In his email he said that he did not accept Mr Pindoria's apology for sending the letter to the wrong address. He described it as "*a severe incident"* which had caused him panic attacks. Unfortunately, Mr Pindoria missed this email on his return to work in January and, therefore, did not take any action on the Claimant's stress risk assessment.

58 On 29 January 2015 Mr Pindoria sent the Claimant the outcome of the Stage 1 meeting. Having taken Ms Greening's advice his decision was to issue a formal notification of concern over the Claimant's ongoing absence levels which would remain on the Claimant's personal file for nine months. If he was not satisfied with the Claimant's attendance during the nine month period, he could progress the matter to a stage 2 meeting. He advised him of right of appeal. Attached to that letter was a document setting out all the matters that Mr Pindoria had taken into account and why he had come to the decision that he had.

59 On 12 February 2015 the Claimant appealed against the outcome of the Stage 1 meeting. His grounds of appeal ran into seven pages and made numerous allegations of misconduct against Mr Pindoria and Ms Greening. He said that he considered all their actions to be "*actions of harassment, bullying and racial harassment and discriminatory"* to him and asked for them to be disciplined under the Respondent's Code of Conduct and Dignity at Work policies. He said that they had affected his right to life and had breached his human rights.

60 The Claimant's two claims before the Employment Tribunal were heard between 23 and 26 February 2015 and all his complaints were dismissed at the end of that hearing. The Tribunal noted in its decision that at two preliminary hearings and in the course of the four day hearing it had been explained to the Claimant in considerable detail what constituted discrimination. It had been explained to him that discrimination was not just adverse treatment; it was treatment that arose because of someone's race or religion. In the second claim the Claimant had made complaints of race discrimination in respect of certain actions carried out by Mr Pindoria. One of his complaints was about Mr Pindoria not reducing his workload sufficiently following the recommendations of Occupational Health in April 2014. The Tribunal concluded that Mr Pindoria had started making adjustments in May and that these had been concluded to the Claimant's satisfaction by early July. The Claimant made it clear at the hearing that he was not alleging any discriminatory motive on the part of Mr Pindoria. The Tribunal concluded that he was not under the control of Mr Rad in relation to his management decisions. The Tribunal concluded that in those circumstances the complaints of discrimination against Mr Pindoria could not succeed.

61 On 2 March the Claimant bumped into Mr Rad and asked to speak to him. He apologised for having brought the Tribunal claim and said that he wanted to put it behind him and was not planning to appeal the Tribunal's decision. They had a discussion about the Claimant's welfare and well-being. The Claimant said that he was concerned about the stage 1 outcome and was considering putting in a grievance against Mr Pindoria. Mr Rad suggested that he might wish to wait for the appeal process to be concluded as that might clarify for him why Mr Pindoria had taken the action that he had.

62 Karen Galey, Head of Economic Development, was asked to hear the appeal. On 26 March 2015 she invited the Claimant to an appeal hearing on 20 April 2015. She told him that she would not hear the case again but would review the evidence presented at the original hearing and would consider the facts found at that hearing unless the Claimant could prove that they were not correct. The Claimant was advised of his right to be accompanied.

63 On 14 April 2015 the Claimant sent Ms Galey an email setting out eleven points that he wished to raise at the appeal and asked her to let him know before the hearing whether she would consider each of them. The eleven points include allegations that the hostile, inappropriate, harassing and bullying conduct of Mr Pindoria had led to the illness which led to his absence at the end of September and beginning of October, that in September 1914 he was experiencing lots of anxiety and distress caused by Messrs Rad and Pindoria making false and malicious claims to Mr Churchill, Mr Pindoria and Ms Greening harassing and bullying him by delaying the outcome of the stage 1 meeting, Ms Greening not investigating his complaints against Mr Pindoria and insisting that he conducted the stage 1 meeting and Mr Pindoria sending sensitive information to his neighbor.

64 Ms Galey responded that at the appeal hearing she would consider the absence that was discussed at the stage 1 meeting, the reasons for it and whether, in light of that, the decision to issue a notification of concern was appropriate. She said that the Claimant had raised a number of serious allegations and if he had concerns that they fell outside the scope of the appeal hearing as she had defined it, he could raise them informally or formally through the grievance procedure.

65 The appeal hearing took place on 20 April 2015. The Claimant put forward all the points that he wanted. In summary they were that the procedure had not been followed (no informal action had been taken, there had been a delay in convening the meeting and in sending out the outcome), account had not been taken of the fact that his sickness was work-related, he had been contacted during sick leave with matters which had aggravated his illness, Occupational Health recommendations about regular one-to-one meetings and reduction of workload had not been followed and Mr Pindoria had conducted the meeting although he had objected to him. Mr Pindoria responded that he had decided to take formal action having taken into account the levels of sickness absence and the impact on the service. He also took into account that steps had been put into place to support the Claimant in the workplace (flexibility on trigger points, Occupational Health referrals, there had been some one-to-one meetings (four in six months), the Claimant's workload had been reduced. He said that even if the sickness was work-related it still needed to be managed and the purpose of the stage 1 meeting was to discuss the absence and the support in place and if that could be improved. He accepted that there had been a delay in sending out the outcome.

66 Having considered all the evidence Ms Galey concluded that Mr Pindoria's decision to issue the Claimant with a notification of concern was reasonable and should stand. She sent the outcome of the appeal to the Claimant on 29 April 2015. She explained that she had rejected his appeal because Mr Pindoria had shown management discretion in managing the case informally when he could have convened a stage 1 meeting much earlier long before the Claimant's sickness absence had reached 35 days, he had made a fair and reasonable decision in the circumstances of the case as steps had been taken to support the Claimant to remain in the workplace and the length of absence was having an impact on service delivery.

67 On 27 April 2015 Mr Pindoria met with the Claimant to discuss his appraisal for 2014-2015. At the meeting Mr Pindoria explained to the Claimant the factors that would have an impact on his rating. He told him that a factor that would weigh against him was that the Claimant has refused to carry out EPC/SAP assessments (they relate to assessing the loss of heat through the fabric of buildings). The Respondent had paid for the Claimant and a Building Control Officer called Shefa Warreich to be trained in carrying out these assessments. The intention had been that they could provide these services to clients and thus generate revenue for Building Control. However, the Claimant and Ms Warreich had refused to carry them out on the basis that it was not part of their job to do so and that they should be paid extra if they were expected to do it. As they were not prepared to do it, the Respondent had not acquired the software that would have been required to provide the service. In November 2014 the Claimant had asked Mr Pindoria whether he could carry out these EPC/SAP assessments in his personal capacity for clients in his own time in order for his qualification not to lapse. Mr Pindoria had said that he had no objection to it provided that it was within the Camden Code of Conduct and that he considered his health as well.

68 Each employee in the Building Control Team was appraised by his or her line manager and the appraisals were moderated by the appropriate management team. The appraisals of the officers who were part of the Building Control Management Team ("BCMT") were moderated by the Senior Management Team. The appraisals

of the rest of the team were moderated by BCMT officers who had people management responsibilities, namely Mr Rad, Mr Pindoria and Judith Pineda (Principle Administration Officer, grade PO2). As the Claimant had ceased to be a member of the BCMT in April 2014, Mr Pindoria informed him that he would be moderated by himself, Mr Rad and Ms Pineda. The other members of the BCMT in April 2014 were Albert Grant (Principal BCO, PO5), Philip O'Connor (Business Development Officer) and Michelle Horn (Access/Service Development Officer).

69 On 28 April the Claimant sent Mr Pindoria an email about the meeting the previous day. He said that he had felt "*intimidated, threatened and harassed"* with Mr Pindoria's attitude during the appraisal meeting and, in particular, with him saying that the Claimant had refused to carry out SAP/EPC assessments. He said that it was not in his contract of employment and he had put forward proposals two years before that to him and Mr Rad for doing the work and they had rejected them. He also complained that his appraisal was not going to be moderated by the Senior Management Team (as it had been in the past) but by Messrs Rad, Pindoria and Judith Pineda. He accused Messrs Rad and Pindoria of having "*been witch-hunting"* him for the past six years. He also said that Mr Pindoria and Ms Greening had injured his health and breached his duty of care and that he was going to submit a grievance against both of them.

70 On 29 April the Claimant sent Karen Galey an email which he copied to Frances Wheat, Acting Assistant Director of Regeneration and Planning. He said that she had re-written his appeal in her own comfortable words to suit her decision, had watered down the issues, ignored facts and had not considered breaches of Camden procedures by Mr Pindoria and Ms Greening. He said that she was condoning and supporting a breach of his rights, duty of care, human rights and health and safety and that it was clear that she did not think that he had any rights and did not take him seriously. He did not believe that she would have done that to a comparable white employee and he, therefore, believed that it was inherently about race discrimination, harassment and victimisation.

71 On 11 May Mr Pindoria informed the Claimant that he would receive a rating of "2", which denoted "needs to improve" for his appraisal and that the main reason for that was the Claimant's refusal to carry out SAP/EPC assessments. That was the first time that the Claimant had received a rating of "2". Ms Warreich was also given a rating of "2" for the same reason.

72 The Claimant's managers were very concerned that any management action in relation to him led to a large number of wide ranging and unsubstantiated allegations of race discrimination, harassment and victimisation in emails sent to his managers and HR. Mr Rad raised these matters with the Claimant on 20 May 2015. He told him that he was very concerned that the Claimant appeared unwilling to accept management decisions and outcomes and to move forward and work in a collaborative manner in line with Camden's way of working. He reminded him that he had previously been advised by Ms Greening that it was unacceptable to make allegations of bullying, harassment and victimisation without foundation and more recently that harassing staff with offensive and unfounded allegations would not be tolerated and could lead to disciplinary action. He advised the Claimant that if he had legitimate grounds to raise a grievance he could submit a formal grievance but reminded him the Council took the matters of making unfounded and offensive

allegations and/or submitting frivolous grievances very seriously and that it could lead to the disciplinary process being invoked.

73 On 21 May 2015 the Claimant sent Frances Wheat a grievance (dated 20 May) against Naran Pindoria and Susan Greening. He said in his email to Ms Wheat that he had meant no offence to Karen Galey and had explained that to her in person. The grievance comprised fourteen closely typewritten pages. The Claimant complained that between 2 May 2014 and 20 May 2015 Mr Pindoria and Ms Greening had injured his mental and physical health as well as his feelings. He set out a large number of physical and mental ailments which he claimed they had caused him through actions that he considered to be "*victimisation, bullying, harassment, discrimination, affecting my right to life, breaching my human rights and the duty of care Camden confirmed is owing to me."* He claimed that they had done so by doing 45 specific acts which he set out in detail numbered from A to SS. The Claimant complained that the Respondent had harassed and bullied him in reach of the Protection from Harassment Act 1977, Camden's policies and procedures (including its equal opportunities policy) his contractual agreements, Camden's Code of Conduct, Health and Safety Welfare, the Equalities Act. The only reference to any protected characteristic was towards the end of the grievance when he said that he found the actions to be discriminatory and less favourable treatment to do with his race, ethnicity and religion.

74 Ms Wheat acknowledged receipt of his grievance and noted that he was going to be away on holiday until 3 June 2015.

75 Frances Wheat liaised with HR in connection with the Claimant's grievance. It appeared to them that some of the matters raised by the Claimant might already have been addressed in his Tribunal claims or under the sickness absence process. Ann Cobhan, an Interim HR Manager, asked Sophia Bhaimia, Kate Mulliss and Sue Greening (who had all had some involvement with the Claimant in the preceding year) to review his grievance and to prepare a list of issues that they felt had previously been dealt with. They attempted to do this in the latter half of June.

76 On 19 June Ms Wheat wrote to the Claimant and apologised for the delay in dealing with his grievance. She said that they took it very seriously and she would shortly write to inform him of the manager who would be dealing with his grievance.

77 On 9 July 2015 Ms Wheat wrote to the Claimant that having reviewed the content of his grievance it appeared that some of the matters raised by him had been the subject of an earlier grievance and/or had been considered as part of the absence management procedure, and as such would not be considered again. However, it had been difficult to identify precisely which of his complaints fell into that category and which were new complaints. She asked him to submit an amended grievance dealing only with the new issues, ie those that had not been addressed before. She said that she would allocate an officer to consider his grievance once there was clarity about his complaints.

78 The Claimant responded that none of the matters raised in his grievance had been the subject matter of his previous grievance raised in February 2014 or had been dealt with as part of his appeal against the stage 1 meeting under the sickness absence management procedure. Therefore, the entirety of his grievance should be investigated. He also complained about the fact that it had taken her 49 days to send

that response to his grievance and that she had not yet allocated anyone to consider his grievance.

79 Ms Wheat informed the Claimant that she and her colleagues did not agree that his grievance raised matters that had not been addressed previously. She repeated that they would only investigate the new issues raised in his grievance. She warned him that if any part of his grievance was found to vexatious or frivolous, she might need to invoke further procedures. She asked him to confirm, bearing that in mind, whether he wanted his whole grievance investigated.

80 The Claimant responded on 16 July that he had found her email to "*threatening and intimidating"* and her to be *"unfair and inconsistent with this threat"* of invoking further proceedings. He continued,

> "*I believe you have taken matters personally and are no longer neutral in my case and I believe anyone that answers to you in this matter is unlikely to be neutral too."*

He said that the only reason that his grievance was not being taken seriously was,

> "*If the involvement extends beyond these two officers and/or there is a culture of a strong management close-up ranking in the organisations and/or it's because of my protected characteristics."*

80 On 14 July Ms Wheat asked Jessica Gibbons to investigate the Claimant's grievance and on 15 July she informed the Claimant that Ms Gibbons would be investigating his grievance.

81 On 21 July 2015 Ms Wheat wrote to the Claimant that she took exception to the allegations that he had made against her in his email of 16 July and as he had previously been warned about vexatious and frivolous accusations she would be referring his conduct to his manager for consideration under the Council's procedures.

82 On 24 July Ms Wheat sent Messrs Rad and Pindoria a copy of the grievance and met with them and Cynthia Maxwell from HR to discuss whether the whole of the Claimant's grievance should be investigated or only new issues being raised for the first time. She favoured the latter approach. Mr Rad's view was that although some of the matters in the grievance repeated accusations that had been made previously in a grievance, the Tribunal claims and as part of the sickness absence management process, the grievance manager should investigate the whole grievance and make a judgment about whether some of the matters raised by him had been previously raised and dealt with. If she could see the whole picture that would enable her to come to a conclusion as to whether the Claimant was making frivolous and vexatious complaints. That view was shared by Mr Pindoria. Their view was that the whole situation had been going on for nearly two years and it had to be resolved once and for all by someone deciding whether there was substance to the Claimant's complaints or he was making frivolous and vexatious complaints. In that context Mr Pindoria said that the Respondent needed to "draw a line under" what had been happening for two years.

83 On 27 July 2015 Ms Gibbons invited the Claimant to a meeting on 5 August to clarify which parts of his grievance needed to be investigated. She said that following that meeting, she would write to him to confirm the scope of her investigation. The Claimant was advised of his right to be accompanied.

84 On 27 July the Claimant sent Ms Wheat another email in which he complained about her conduct and accused her of causing him to feel threatened, humiliated and intimidated.

85 On 28 July the Claimant sent the whole of the BCMT (Building Control Management Team) an email that he would be attending BCMT meetings, starting with the next scheduled meeting, as he was a member of the BCMT in his capacity as the person who deputised for Mr Pindoria. Mr Rad responded, to the whole of BCMT, that it would be better if they discussed the Claimant re-joining the BCMT before he did so.

86 On 30 July Ms Gibbons informed the Claimant that she had been advised to refer him to Occupational Health in advance of the meeting with her to seek advice on what measures she could take to reduce any impact that the meeting might have on the stress and anxiety to which he had referred in his grievance. She made the referral on the same day and sought advice on that issue.

87 On 3 August the Claimant asked for the meeting on 5 August to be postponed as he had not been able to find someone to accompany him to the meeting on that date.

88 On 6 August Mr Gibbons sent the Claimant a document (comprising 13 pages) in which she had set out in a table each of the complaints which he had made and whether it had or could have previously been addressed. It was a detailed document and she had clearly put a lot of time going through all the material available to her to compile it. She made it clear, however, that the document was not conclusive but was to be used as a reference point for their discussions at the clarification meeting. Her provisional view was that a large number of the complaints had been, or could have been, addressed either at the stage 1 sickness absence meeting in December 2014 or at the appeal hearing in April 2015. Her view was that one matter had been addressed at the Tribunal hearing.

89 The Claimant asked for the clarification meeting to take place after he had been seen by Occupational Health. Ms Gibbons acceded to that request and the meeting was re-scheduled for 26 August 2015.

90 In a report dated 14 August 2015 the Occupational Health Physician advised that the Claimant had told him that he continued to suffer from anxiety and depression and that he (the Doctor) considered that work based issues lay behind that. He advised that his condition was likely to fall under the Equality Act 2010, he was able to undertake his role and to attend at the workplace any meetings related to his grievance and that no adjustments were required. He concluded that it was in everyone's interests for the grievance hearings to be held as soon as reasonably possible.

91 On 20 August 2015 the Claimant sent an email to the whole BCMT in response to Mr Rad's email of 30 July to him about re-joining the BCMT. In the email he said that he was a member of the BCMT by virtue of his job description and status, and had

been so for seven years. Hence, he had been shocked to have been told recently that he was not a member and would need to re-join. He said that the fact that his appraisal moderation had been dome at BCMT level, while that of Albert Grant, who was at the same level as him but a member of the BCMT, was being done at SMT level appeared to "*breach equal opportunity and equality"*, was unfair to him and could amount to race discrimination. He said that Mr Rad's actions led to "*an unbalance", "a rift or tensions"* between him and Judith Pineda and that he found Mr Rad's actions "*humiliating, intimidation, singling out, deliberately planned and distressing"* to him.

92 Mr Rad responded that he would consider the matters raised by him and reminded him to address any issues that he had with him to him alone and not to the whole BCMT.

93 On 21 August 2015 Mr Pindoria sent the Claimant his 2014-2015 appraisal. There was no explanation of why it had taken so long to send the document to the Claimant. The objectives set were general and appeared to have been lifted straight from the job description, other than the objective related to providing SAP/EPC assessments. Those objectives had not been agreed with, or communicated to, the Claimant at the beginning of the year. There was a reference to the overall KPI falling short of the target but no clear indication of what the targets had been and how they had fallen short. It was clearly set out on the appraisal that the Claimant had failed to do the SAP/EPC assessment unless he was paid for it, even though he had been offered time in lieu. The section dealing with behaviours had not been completed.

94 The clarification meeting took place on 26 August 2015. Ms Gibbons was assisted by Cynthia Maxwell from HR and the Claimant was accompanied by Dennis McNulty from GMB. At the outset of the meeting the Claimant handed Ms Gibbons a document setting out additional grievances he wished to raise against Nasser Rad, Karen Galey and Frances Wheat. These included allegations of race discrimination, bullying, harassment, victimisation, negligence and breach of duty of care. The allegation against Mr Rad related to the moderation of the Claimant's appraisal at BCMT level. The allegation against Ms Galey was that she had not taken into account a number of matters when making her decision. The allegations against Ms Wheat were that she had delayed in investigating the grievance, had shared the grievance with others and had expressed pre-conceived views about it to others. Ms Gibbons said that she would consider how to deal with it and asked the Claimant to submit the grievance on the Respondent's grievance forms. At the meeting, Ms Gibbons went through each of the complaints as set out in her table and sought clarification from the Claimant as to whether they had been raised and considered previously and his basis for making the allegations that he was making.

95 Ms Gibbons sent the document raising the additional grievance to Ms Wheat, who was her line manager and the person who had asked her to conduct the grievance.

96 On 27 August Ms Wheat met with the Claimant to discuss his email to the whole BCMT on 20 August. She asked him why he had sent it to everyone in the BCMT. She wanted to hear his explanation before deciding whether the matter needed to progress to a disciplinary hearing. The Claimant's explanation was that as Mr Rad had undermined him in the BCMT by sending his email to everyone in the BCMT, it was necessary for him to send his response, re-affirming his role and position, to everyone in the BCMT as well. What he had done was no different from what Mr Rad

had done. It was clear from his response that he had not sent it to everyone by mistake by accidentally pressing "reply to all" but had deliberately done so.

97 On 28 August 2015 the Claimant sent Mr Pindoria an email appealing against his 2014-2015 appraisal. He did so on the grounds that he had never seen the objectives and that they had never been agreed with him, it was not part of his contract of employment to provide SAP/EPC assessments, it was factually inaccurate, Mr Pindoria had not filled in the section dealing with behaviours, the Claimant had not been given an opportunity to comment on the content of it and that he disagreed with the rating of "2".

98 The Respondent's procedure for reviewing the appraisal rating has two stages. The first stage is for the employee to raise the concerns with his line manager and for the manager to meet with him to discuss his concerns. After the meeting the manager can confirm the original rating or vary it. If the employee is not satisfied, he can then move to the second stage, which is to request an independent review. Mr Pindoria was unaware that it was his responsibility to deal with the review and he believed that if the Claimant was unhappy about his decision he should appeal to someone at a higher level than him. Hence, he never dealt with the Claimant's appeal against his rating of 2.

99 On 3 September 2015 Ms Gibbons wrote to the Claimant. She sent him a formal grievance form and asked him to complete that if he wanted his additional grievances to be investigated formally. She advised him that she would consider the grievance against Mr Rad and Ms Galey, but that the grievance against Ms Wheat would be investigated separately by someone more senior to her. She also set out the scope of her investigation. Her investigation would consider:

- The fairness and consistency of how he had been managed and the processes followed during the period raised in his grievance (May 2014-May 2015);
- The sickness absence and sickness absence appeal process as undertaken in 2014 and subsequent actions undertaken;
- The process and procedures followed for his performance appraisal during 2015 and the moderation process during the same period;
- Issuss that he raised relating to the allocation of his work and its appropriateness to his role;
- OH advice received and how it had been considered and/or actioned including actions taken to ensure his protection under the Equality Action 2010.

Her investigation would not consider:

- Matters of racial discrimination or any other issues covered by the Employment Tribunal in 2015;
- Issues concerning management contact with him during his sickness absence; one-to-one meetings; and changes to workload as these had been resolved during the sickness absence appeal hearing in April 2015.

She informed him that she was going to be on annual leave from 4 to 14 September.

100 On 4 September 2015 Ms Wheat informed the Claimant that an officer would be appointed to carry out a disciplinary investigation into the following three matters – an allegation that his email to Mr Rad on 20 August had breached the Respondent's Code of Conduct, the allegations made in his additional grievances and his email of 2 September to Nasser Rad. On 11 September Ms Wheat informed the Claimant that an allegation that he had made frivolous and vexatious complaints in respect of the

matters that Ms Gibbons was not going to investigate would be added to the disciplinary investigation.

101 Nicolina Cooper, who was from a different directorate and had had no previous involvement with the Claimant, was appointed to conduct the disciplinary investigation. The Claimant was informed of that on 11 September 2015.

102 On 16 September the Claimant spoke to Mr Rad. He said that his health was being affected very badly and that he was working under protest and was looking for another job. He asked Mr Rad to speak to Frances Wheat about a settlement for him to leave Camden. He said that he would be looking to be paid two years' salary. Mr Rad informed Ms Wheat of that discussion.

103 Ms Gibbons was absent sick from work from 21 September to 16 October 2015. The Claimant was advised of that. The reason for the sickness absence was that she had suffered a late miscarriage. She also took some compassionate leave following the death of her father on 31 October.

104 Towards the end of September the Claimant applied to Capita for a Senior Surveyor role at Barnet Council. The role was similar to his role at the Respondent. He told Mr Rad about his application and asked him if he would provide him with a reference. Mr Rad said that he would. Mr Rad informed Ms Wheat that the Claimant was looking for work elsewhere and had requested a reference. At about the same time the Claimant also made inquiries of HR about the provision of references. He was interviewed for that role at the beginning of October.

105 The Claimant was on annual leave from 28 September to 10 October.

106 On 14 October Capita offered the Claimant the position of Senior Surveyor. The offer of employment was subject to references covering the last there years of employment.

107 On 14 October the Claimant sought Mr Pindoria's permission to include a paragraph setting out what his duties had entailed in a "to whom it may concern" letter setting out details of his employment with the Respondent which he had requested from HR. Mr Pindoria consented to that paragraph being added.

108 On the same day Ms Wheat wrote to the Claimant to ask him whether he was interested in having a "without prejudice" discussion to find a way of resolving his ongoing employment issues and his request for a reference. The Claimant responded that he would be happy to meet with her and the meeting was fixed for 21 October.

109 On 15 October Mr Rad met the Head of Service for Barnet Building Control at their monthly London-wide meeting. He informed Mr Rad that the Claimant was joining them in ten days' time.

110 In an email dated 16 October to Mr Pindoria the Claimant complained about a number of things and concluded by saying that he would be resigning the following week whether or not he had secured another job.

111 The Claimant had the "without prejudice" meeting with Ms Wheat at about 3.45 pm on Wednesday, 21 October 2015. He had decided to resign prior to that meeting and had started drafting the 12 page typed (single spacing) resignation letter that he sent to Ms Maxwell later that evening. He attended the meeting to see whether the Respondent would offer him any money as part of the settlement package.

112 Both parties gave evidence about the meeting on 21 October and neither side argued that it was not admissible. There was a dispute between the parties as to what was said. We accepted that the notes made by Ms Wheat shortly after the meeting are an accurate record of the meeting. The Claimant said that he had already told Mr Pindoria that he intended to leave. He was not happy and was on medication. He said that he had been offered a job at Barnett and was looking for a settlement and to leave. He said that he was due to start the following Monday. Ms Wheat reminded the Claimant that he was contractually obliged to give 12 weeks' notice. She proposed the following as a settlement agreement – The Respondent would forgo the notice period, would not pursue the disciplinary investigation or the grievance and would give the Claimant a factual reference (with no reference to the disciplinary investigation) if the Claimant would agree to withdraw any existing claims against the Respondent and would not bring any new claims and would sign a settlement agreement to that effect. The Claimant said that he needed to think about it but he was not prepared to drop all his cases.

113 At 9.36 that evening the Claimant sent Ms Wheat an email resigning with immediate effect after the "*distressing, humiliating meeting*" with her. He said that he had been ready to leave the previous week but had welcomed the meeting with her in the hope and anticipation that he might not need to leave after all. However, he had been shocked by her "*raw threats"* to his career, her threats to *"blacklist"* him and to *"pursue"* him in all his jobs in the future in any London borough.

114 At the same time he sent by email his resignation letter to Ms Maxwell. There were two very brief references in that letter to the meeting of 21 October – one sentence near the beginning and one sentence near the end. He said that his decision to resign had "*come about following the recent outrageous colluding conducts and behaviours of a number of senior managers towards me and the final decisions by Frances Wheat in pre-conceiving grievance outcomes without a grievance hearing or an investigation and in denying me a grievance hearing to the core aspects of my grievance."* He then set out in detail his complaints about what had happened since he had raised his grievance on 20 May 2015.

115 Ms Wheat responded to the Claimant's email to her the following morning. At the time that she did so, she was unaware of his resignation letter. She challenged his account of their meeting and asked him to reconsider his decision to resign. She saw his resignation later that day and wrote to the Claimant on 23 October to accept his resignation.

116 On 26 October 2015 the Claimant commenced employment at the London Borough of Barnet.

117 On 13 November Ms Wheat wrote to the Claimant that as he had resigned without notice the Respondent had not been able to conclude the disciplinary investigation prior to his sudden departure. She advised him that any future references supplied by the Respondent would include information relating to the fact

that there was an outstanding disciplinary matter being investigated when he resigned. The letter was drafted by Kate Mullis in HR who advised Ms Wheat that that was what they did when someone resigned when there was a disciplinary investigation pending.

118 On 14 December 2015 Ms Gibbons informed the Claimant that his formal grievance complaints were to be dealt with as a confidential internal management matter. As part of that she would investigate the fairness and consistency of his manager and the processes and procedures followed in the three months preceding the submission of his grievance and the OH advice received during that period and how it was considered or actioned. She would not investigate any matters that had been dealt with at the Employment Tribunal in February 2015 and at the sickness absence appeal hearing in April 2015 and any matter relating to his performance appraisal and rating. She asked him to let her know whether he wished to be informed of the outcome of her investigation. The Claimant never responded and the outcome was, therefore, not shared with him.

119 The investigation was concluded in March 2015.

Conclusions

Direct race discrimination

120 The Claimant has complained of direct race discrimination in respect of being invited to a Stage 1 sickness absence review (November 2014) and being issued with a notification of concern (29 January 2015), his appraisal rating and moderation by the BCMT and Ms Pineda (in May 2015) and Ms Wheat's conduct at the meeting of 21 October 2015. The only one of those complaints that was presented in time is the one relating to the meeting on 21 October 2015. If that complaint is not well-founded, the other complaints of direct race discrimination will not have been presented in time and the Tribunal will only have jurisdiction to consider them if it considers it just and equitable to do so. We considered the complaint relating to 21 October 2015 first but did not consider it in isolation but in light of our findings of fact and conclusion on all the issues.

121 We have not found that Ms Wheat said what the Claimant alleged she said at the meeting on 21 October 2015. She did not say that she would ensure that the Respondent's solicitors would pursue him constantly or that she would hunt him down and make sure that he never worked again. She did not say that she would only provide a reference if he dropped his grievances. She discussed the terms of a settlement agreement with him and informed him that one of the benefits for him would be that, contrary to the Respondent's normal position, he would get a reference that that did not mention that there was a disciplinary investigation pending when he resigned. She did not threaten him. We concluded that Ms Wheat did not subject the Claimant to a detriment by discussing the reference in the terms that she did. Furthermore, there was no evidence from which we could infer that she said what she did because of his black, African or Sudanese origin. She had those discussions with him in an attempt to resolve the ongoing disputes between the Claimant and the Respondent. The Claimant has not proved a prima facie case of direct race discrimination in respect of Ms Wheat's conduct at the meeting of 21 October.

122 We then considered whether it would be just and equitable to consider the Claimant's other claims of direct race discrimination notwithstanding that they had not been presented in time. The claims were presented five to nine months late. The Claimant had brought two previous claims to the Employment Tribunal (in April and October 2014) and was aware of the time limit for bringing claims. He was a member of GMB and had access to advice and assistance from his trade union. The only explanation put forward by the Claimant for not presenting those claims in time was that he was confused because the rules had changed in order to facilitate Early Conciliation. Those changes came into effect in April 2014, before he presented his first two claims. If the Claimant had any doubts about the impact of those changes on time limit, all he had to do was to look at the Employment Tribunals website. Having taken into account all those circumstances, we did not consider it just and equitable to consider those claims.

123 In case we are wrong in that conclusion and as we heard the evidence in respect of those matters we set out briefly what our conclusions would have been in respect of those claims. The Claimant's case in respect of sickness absence management was that he was treated less favourably than Mr Seyan and Ms Gibbons because, although their absence had exceeded ten days in a 12 month period, they were not invited to a Stage 1 formal review meeting. As the procedure makes clear the hitting of the trigger point does not automatically lead to action being taken. It is a prompt to review the situation to decide whether any action needs to be taken. There were material differences between the Claimant's position and those of Ms Gibbons and Mr Seyan. They had both had a single period of sickness absence that that had been precipitated by a particular injury or incident. In each case, it was by its very nature a one-off occurrence and not something that was likely to recur. The Claimant had had two periods of sickness absence for stress and anxiety separated by a period of less than five months. In the intervening period the Respondent had taken some steps to try to alleviate his stress and anxiety. There were genuine concerns as to whether these would recur. In considering whether race had played any part in the decision to hold a stage 1 review in the Claimant's case, we also took into account that Mr Rad had taken the same action in respect of two other employees in the department, one of whom was white and the other of mixed race. Having considered all the evidence we would have concluded that there was no evidence that race had played any part in the decision to invite the Claimant to a stage 1 absence review meeting and to issue him with a formal notification of concern.

124 We then considered the complaints in respect of the appraisal rating and moderation. As far as moderation is concerned it was not in dispute that the Claimant and Albert Grant (who is white) were both PBCOs at grade PO5 and the Claimant's appraisal was moderated by the BCMT and that of Mr Grant by the SMT. We were not convinced that moderation by the BCMT rather than by the SMT could be said to be a detriment. More importantly, that claim would have failed because the reason for the difference in treatment was that the Mr Grant was a member of the BCMT and the Claimant was not. All members of the BCMT, regardless of race, were moderated by the SMT. All the others in the department, regardless of race, were moderated at BCMT level. When the Claimant had been a member of the BCMT he had been moderated at SMT level. There was no evidence that race played any part in the moderation of the Claimant's appraisal in May 2015.

125 We had some concerns about the appraisal process in general. The objectives were not agreed with the Claimant at the start of the appraisal year, they were vague and generalised, some parts of the appraisal had not been completed, the written appraisal was not sent to the Claimant until 21 August 2015 and Mr Pindoria failed to deal with the Claimant's challenge of his rating. Those failures in our view stemmed from Mr Pindoria's deficiencies and lack of experience as a manager and would have applied equally in the cases of other whom he managed. The Claimant's complaint of race discrimination was in respect of his rating of 2. We would have concluded that the primary reason for that rating was the Claimant's refusal to carry out SAP/EAC assessments. Shefa Warreich (who is not black) was given a rating of 2 for the same reason. We would have concluded that the Claimant's race played no part in the decision to give him a rating of 2.

Victimisation

126 We accepted that the in Claimant's previous two claims to the Tribunal (in April and October 2014) and his grievances of February 2014, May 2015 and August 2015 he made complaints of race discrimination and that they, therefore amount to protected acts. We note only that the grievances made wide-ranging complaints and were not limited to specific allegations of race discrimination.

127 The only complaints of victimisation that were presented in time were of failure to deal with his grievance (paragraph 2(1)(e)) and about the meeting of 21 October 2015. If those complaints are not well-founded, the remaining complaints will have not been presented in time. For the reasons given above (paragraph 22), we would not consider it just and equitable to consider them.

128 The Claimant's case was that the application of sickness absence procedure to him had been flawed because the Respondent had failed to follow the recommendations of OH made on 14 April 2014, he had been treated differently from Mr Seyan and Ms Gibbons, Ms Greening had improperly advised Mr Pindoria to change his mind about the outcome after the Stage 1 review and the Respondent had decided on 29 January 2015 to issue him with a notification of concern. We have already concluded that he was treated differently from Mr Seyan and Ms Gibbons because their circumstances were different from his (see paragraph 123).

129 We did not accept that res judicata applied to the issue of whether the Respondent had followed OH recommendations. The previous Tribunal had considered an allegation of race discrimination in respect of Mr Pindoria's failure to reduce the Claimant's workload as recommended by OH in April 2014. We are considering whether the sickness absence management process that was followed was flawed because of the Respondent's failure to follow OH recommendations and, if it was, whether the Respondent followed a flawed process because the Claimant had done a protected act. We are considering a different issue although there is an overlap of some of the factual issues.

130 We have found that Mr Pindoria made some reduction to the Claimant's work on 9 May 2015, albeit not in a sensitive way, by removing from him the additional duties of a PBCO. His other attempts at reducing the Claimant's work were not a great success either. However, by early July, when he removed one of the Claimant's three patches from him, he had followed the OH recommendation in respect of them. He did not have one-to-one meetings fortnightly with the Claimant as had been

recommended by OH. That was partly because the Claimant felt that it was not necessary. However, that was no reason for Mr Pindoria to hold the meetings as infrequently as he did. There was no OH recommendation, contrary to what the Claimant believed, that Mr Rad was thereafter to have no involvement in managing any issues relating to him. The OH recommendation in respect of reduction of work was followed (albeit with some delay) and the recommendation in respect of regular one-to-one meetings was partly followed. Those factors did not make the sickness absence procedure flawed or unfair or improper.

131 It was not in dispute that as a result of advice from Ms Greening in HR Mr Pindoria changed his mind as to the outcome of the stage I review hearing. We did not accept that there was anything improper in Ms Greening giving Mr Pindoria the advice that she did. He had no previous experience of managing sickness absence under the Respondent's procedure, it was clear from his draft outcome letter that he had misunderstood the procedure and used the wrong template and it is the role of HR to advise in such situations. We did not accept, as the Claimant suggested at the hearing, that it was Ms Greening who made the decision. Mr Pindoria made the decision on her advice.

132 The was nothing wrong in issuing of the notification of concern. There was a delay in inviting the Claimant to the stage 1 review and in notifying him of its outcome. It was unfortunate but did not make the process unfair.

133 Having considered all the above, we did not accept that the Claimant had been subjected to a flawed sickness absence procedure. The Respondent was entitled to take the action that it did. There were some delays in following the OH recommendations and in the sickness absence management process. They arose from Mr Pindoria's lack of experience and management skills in managing such issues. There was no evidence that any of those delays were deliberate or because of the protected acts.

134 Our conclusions in respect of the appraisal and moderation (set out at paragraphs 124-125 above) apply equally to the victimisation claims. There was no evidence from which we could infer any causal link between the Claimant's protected acts and his appraisal rating or the moderation at BCMT level.

135 We then considered the Claimant's complaint about the failure to deal with his grievance adequately or at all. It was not in dispute that by the time the Claimant resigned on 21 October 2015 the Respondent had not investigated his grievance sent to the Respondent on 21 May 2015. There was a considerable delay in dealing with the grievance and there were a number of reasons that explained part of that delay. The grievance covered a year and made wide-ranging allegations about forty-five separate acts. The period covered by the grievance was May 2014 to May 2015. In the course of that period the Claimant had submitted a second claim to the Employment Tribunal (in October 2014) which had been adjudicated upon in February 2015 and had been subjected to the stage 1 absence review hearing and been issued with a notification of concern which had been considered at an appeal at the end of April 2015. There were, therefore, legitimate concerns that some of the issues being raised by the Claimant might already have been dealt with. The exercise of identifying which matters had been previously determined was not made easier by the fact that different HR personnel had been involved at different stages and the lack of conciseness and clarity in the drafting of the Claimant's grievance.

When HR had failed in the exercise Ms Wheat tried to get the Claimant to carry out the exercise and when that failed she appointed Ms Gibbons to investigate the grievance and she carried out the task by setting out her preliminary views in a document and then discussing them with the Claimant. With hindsight, it is easy to say that Ms Gibbons should have been appointed as soon as the grievance was received and given that task and thus avoided two months being wasted. However, Ms Wheat, understandably, took the view that she needed to know the scope of the grievance in order to find a person who had sufficient time to investigate it.

136 The clarification meeting with Ms Gibbons was delayed because of the referral to OH and the unavailability of the Claimant's companion. The Claimant raised additional grievances at the clarification meeting of 26 August 2015 and advice had to be sought how best to deal with them, especially as one of them was against Ms Wheat who was senior to Ms Gibbons. Ms Gibbons was absent sick from 21 September to 16 October 2015. It is also important to bear in mind that managers who investigate grievances do it in addition to their normal full-time job. The more convoluted and meandering the grievance, the longer it is going to take them to do it. It had taken the Respondent seven months to conclude the Claimant's grievance of February 2014.

137 None of the above is intended to excuse or condone the delay in investigating the grievances. It is simply to illustrate that there are understandable reasons to explain the delay. The Respondent did not willfully or deliberately delay the investigation of the grievance and there was no evidence from which we could infer that the Respondent failed to investigate the grievance because the Claimant had complained of race discrimination in the grievance or because of his earlier complaints of race discrimination to the Respondent and the Tribunal.

138 Following the Claimant's resignation, there was no need to investigate the grievance as there was no aggrieved employee looking for a solution. The Respondent nevertheless investigated elements of it to see whether there any management issues that needed to be addressed. It was reasonable for the Respondent to take that approach.

139 The Claimant's complaint of victimisation in respect of that is not made out.

140 We then considered the complaint of victimisation in respect of the disciplinary investigation that was initiated in September 2015. The allegations that were the subject matter of the disciplinary investigation fell into two categories – the two emails sent to Mr Rad and the making of the allegations in the grievance of 21 May 2015 which Ms Gibbons had decided that she would not investigate because they had already been dealt with and the additional allegations made at the clarification meeting. There was no evidence that initiating the disciplinary investigation in respect of the emails to Mr Rad had anything to do with the Claimant's protected acts. The disciplinary process was initiated because the Claimant had made serious allegations against the Head of Service in an email to the whole BCMT. They were damaging to Mr Rad's reputation and sought to undermine him. The proper forum to raise them, if the Claimant had any concerns about Mr Rad's conduct, was to raise a formal grievance through the appropriate channels. Ms Wheat did not immediately initiate the disciplinary process but sought an explanation from the Claimant. Had the Claimant said that he had pressed "reply to all" by mistake Ms Wheat might not have taken it any further. The Claimant not only made it clear that he had done it

deliberately but claimed that he was justified in doing so. We were satisfied that Ms Wheat took that action because she felt that the Claimant's conduct had been unacceptable and he did not think that he had done anything wrong. It was not because he had done any of the protected acts.

141 We then considered whether Ms Wheat commenced the disciplinary process in respect of some of the allegations in the Claimant's latest grievance because he had made allegations of race discrimination in that grievance and/or in any of his earlier protected acts. We thought it significant that Ms Wheat did not initiate the disciplinary process in respect of the whole of the grievance but only in respect of a part of it which she considered to be frivolous and vexatious. That fell into two parts. The first related to matters which Ms Gibbons had decided that she would not investigate because they had already been dealt with. These were all the issues (including those of race discrimination) which had been determined at the Employment Tribunal and matters relating to his sickness absence which had been covered at the sickness absence appeal hearing. She had previously warned the Claimant that only new matters would be investigated and that repeatedly pursuing matters that had already been resolved amounted to improper conduct that could lead to the disciplinary process being invoked. The reason that she commenced the disciplinary process against him in respect of those matters was not because he was pursuing or had pursued complaints of race discrimination but because he was repeatedly pursuing matters that had already been resolved and when he had been warned of the consequences of doing that.

142 The second part related to the allegations that the Claimant had raised when he attended at the clarification meeting. The allegations against Mr Rad and Ms Galey related to matters that had preceded 21 May and there was no reason why they could not have been included in that grievance. When the Respondent had finally got to the stage of clarifying the Claimant's original grievance, he had turned up at the meeting with further wide-ranging generalised allegations of discrimination without giving any sound basis for the allegations that he was making. He did not raise a formal grievance in respect of them but just turned up with a document setting them out. He had been making allegations like this for months and had been told that it was unacceptable. We concluded that Ms Wheat initiated the disciplinary process in respect of them not because they contained allegations of race discrimination, among other things, but because of the manner in which he had raised them. It was becoming impossible to manage the Claimant when every management action led to wide-ranging unsubstantiated allegation of bullying, harassment, discrimination, breach of human rights, etc.

143 What we have said about the meeting of 21 October at paragraph 121 (above) applies equally in respect of the victimisation complaint in respect of it. Ms Wheat's comments about a reference did not amount to a detriment and she did not say what she did because the Claimant had done any of the protected acts but in an attempt to try and resolve the differences between them.

144 We, therefore, concluded that the complaints of victimisation in respect of failing to deal with the Claimant's grievance and the meeting of 21 October were not well-founded and that we did not have jurisdiction to consider any of the other complaints of victimisation.

Unfair dismissal

145 We concluded that the Claimant decided to resign around 14 October when he was offered employment by Capita at Barnet Council. The decision had been made before the meeting of 21 October 2015 and was not the result of, or in response to, anything said at the meeting.

146 We then considered whether the Claimant had established a breach of the implied term of trust and confidence in respect of the matters set out at paragraph 2.1(a)-(f). The factual conclusions that we reached in respect of those matters earlier in our conclusions apply equally to this part. We have found some shortcomings in respect of the matters relied upon by the Claimant. We have found that there was a delay in making some of the reductions to the Claimant's workload when he returned to work on 9 May 2014 and that one-to-one meetings did not take place as often as they should have, there was a delay in setting up the stage 1 absence review hearing and in sending the Claimant the outcome, and that Mr Pindoria did not agreed or communicated the objectives at the start of the year, had used very vague objectives, did not complete part of the appraisal, delayed in sending the appraisal to the Claimant, did not deal with his appeal against his rating and there was a delay in investigating the Claimant's grievance. We considered the shortcomings in respect of the appraisal to be the most serious of those, but even they do not, in our view, amount to conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. The Claimant clearly did not regard them to be serious because they did not feature in his resignation letter of 21 October 2015. The Claimant's primary concerns about the appraisal were the fact that he received a rating of 2 and that he was moderated at BCMT level. We have not found that the rating of 2 was unjustified or that that moderation by BCMT was wrong or improper. We concluded that there was no breach of the implied term of trust and confidence and that the Claimant did not resign in response to any repudiatory breach. There was, therefore, no dismissal.

Employment Judge Grewal
31 July 2017