Case Number: 3401428/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Kiragu Mwangi	**v**	**Royal Mail Group Ltd**

Heard at: Watford **On**: 9 -11 October 2017
Discussion: 23 November 2017

Before: Employment Judge Henry
Mrs L Thompson
Mrs I Sood

Appearances:

For the Claimant: In person
For the Respondent: Mr S Peacock, Solicitor

JUDGMENT

The unanimous decision of the tribunal is that:

I. The claimant has not been discriminated against on the protected characteristics of race pursuant to section 13 of the Equality Act 2010.

II. The claimant has not been victimised pursuant to section 27 of the Equality Act 2010.

III. The claimant's claims are dismissed.

Reasons

1. By a claim form presented to the tribunal on 6 December 2016, the claimant presents complaints for discrimination on the protected characteristic of race, claiming direct discrimination and victimisation.

2. The claimant commenced employment with the respondent on 21 June 2010. The claimant remains in employment.

The issues

3. The issues for the tribunal's determination were clarified at the outset of the hearing, as follows:

Direct Discrimination (Section 13)

3.1 Has the respondent subjected the claimant to the following treatment falling within Section 39 of the Equality Act 2010, namely,

3.1.1 Responding and dealing with the claimant's grievance of 18 February 2016

3.1.2 Mr Doyle not furnishing notes of the meeting of 2 November 2016.

3.2 Has the respondent treated the claimant as alleged less favourably than they treated or would have treated a comparator? The claimant relies on Ms Ali, and/or hypothetical comparator, who being a non-black African then presents a complaint against a white member of staff.

3.3 If so, can the tribunal find primary facts from which the tribunal could properly and fairly conclude at the difference in treatment was because of the protected characteristic of race.

3.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Victimisation (Section 27)

3.5 Has the claimant carried out a protected act? The claimant relies upon the following:

3.5.1 Grievance of 18 February 2016, and

3.5.2 Telephone communications of 29 April 2016 and 5 May 2016.

3.6 If there was a protected act, has the respondent carried out any of the following treatment because the claimant had done the protected act?

3.6.1 HR promised they would chase up the grievance and have it resolved.

3.6.2 Some form of manipulation of the Royal Mail tracking system to mislead the claimant into thinking that his communications had not been received.

3.6.3 Mr McNally's failure to follow up on a letter and get back to the claimant as stated he would.

3.6.4 On 7 November 2016 at a fact-finding meeting, a complaint made against the claimant by the manager, Mr Ali Jawwad, that the claimant acted aggressively.

3.6.5 Email exchange of 24 February 2016 for the respondent to address the claimant's grievance of 18 February 2016 within 30 days.

3.6.6 Biased investigation by two alleged independent investigators namely Mr Gary Trunks and Ms Cindy Chattaway, in that Ms Chattaway relied on false evidence and Mr Trunks presumed guilt before completing his investigation.

3.6.7 Ms Chattaway denied the claimant an appeal against her finding that the claimant's grievance had been made in bad faith. [The claimant has withdrawn this complaint].

3.6.8 Ms Chattaway's conclusions regarding Ms Ali and the claimant's grievance were conflicting and biased against the claimant.

3.6.9 It was further clarified that the claimant does not claim that his suspension was an act of victimisation.

4 At the commencement of the hearing, the claimant made application for strike out of the respondent's response pursuant to earlier applications on 4 April 2017 and 5 May 2017, that; he had not been furnished with CCTV footage, that protocol for keeping CCTV for 28 days was not appropriate, and that there had been non-disclosure of the protocol agreement with the Union. The claimant further sought strike out on the respondent's late exchange of witness statements, furnished on 26 May 2017, having been ordered to have been furnished on 4 May 2017; the application now being heard on 10 October 2017.

5 The application for strike out was refused.

6 The tribunal was satisfied that the respondent was not in breach of their protocol in respect of CCTV footage being stored, and the claimant, by the respondent furnishing witness statements on 26 May 2017, as opposed to 4 May 2017, on the hearing commencing some four months thereafter, the claimant has not suffered any prejudice for which the interest of justice would be served by a strike out.

Evidence

7 The tribunal heard evidence from the claimant and from Mr James Doyle – Production Control Manager and Ms Cindy Chattaway – Independent Casework Manager on behalf of the respondent.

8 The witness's evidence in chief was received by written statements upon which they were then cross-examined. The tribunal had before it a bundle of

documents exhibit R1, R2 and C1. From the documents seen and the evidence heard the tribunal finds the following material facts.

Facts

9 The respondent is the Royal Mail, a national company engaged in the delivery of letters and parcels.

10 The claimant was employed as an Operational Postal Grade Post Person based at the respondent's South Midlands Mail Centre, working within the respondent's meter preparation area on the late shift between 17.00hrs and 22.00hrs.

11 On 18 February 2016, the claimant presented a complaint against his manager, Mr Morrison, in respect of an incident on 16 February 2016, by which the claimant states, Mr Morrison requested that he "stopped the work that he was doing and perform another duty," which the claimant maintains in his view, that, although it appeared to be a *"reasonable management request it was specifically aimed at moving him around to cause upset."* advising that this had not been the first time that this had taken place, where he believed there was an ulterior motive, the claimant stating;

> "The operational reason given by Adam for moving me was that the task I was performing was "unproductive" although it was the same task I have been performing every single working day during the additional one hour contained in my amended contract (17/11/15). On raising my concern he threatened to send me home."

12 The claimant thereon set out a definition for bullying, and then making reference to a further incident having taken place two months previous, he states that he was required to move from an area he was working, on the premise that it was being set aside for "quality control duties", which did not then take place, the area then converting to its previous function, and further on 2 October 2013, that Mr Morrison had required that he move to a section where he had not been trained, which after he raised concern that he had not been trained on that area he (Mr Morrison) "disdainfully waved me away", which on the claimant raising with him the need to treat employees with dignity and respect regardless of his position as a manager, he states Mr Morrison then accused him of being "aggressive" and being "argumentative."

13 The claimant's grievance then advanced the following:

> "**VEXATIOUS AND OFFENSIVE CLAIMS**
> During the informal discussion with Adam following the incident on 16/02/16 he stated that I had waved my hands aggressively and 'was frothing at the mouth'. He also stated that he felt threatened. I requested, given the severity of his claim and the potential for it being a malicious or vexatious claim, that he put it in writing to allow me to seek advice. To this he declined. Multiple times both on the shop-floor and during the informal meeting he remarked that he 'felt worried for me' statements I found to be derogatory. He then stated that he would have to send me home for refusing to follow the 'reasonable' management request. I continued to make the point that the request comprised bullying given the background.

I would request that Adam substantiate his claims of me being aggressive to the point of 'frothing at the mouth' as these are serious allegations. Such allegations of 'aggressive behaviour' carry a disciplinary action up to and including summary dismissal. In the absence of that such allegations constitute malicious and vexatious claims.

FAVOURITISM AND VICTIMISATION
I told Adam that I had been tipping bags for the last 3 years or so, literally on a daily basis, and cannot remember a time when any of the ladies working in the metered section had tipped bags an entire single evening. This I stated was clearly a breach of the company's Code of Business Standards (including the Equality and Fairness Policy) and the wider law (not restricted to the Equality Act 2010) as it treated one set of employees more favourably than another. I have raised the matter with various managers at different times including with Surinder (23/01/13), Rosy (8/02/13), Rina (15/08/13), John and Linda (in the last 2 or so months).
The other possibility, I stated, was that individuals in the area had been requested to perform this task but had declined and to the best of my knowledge no disciplinary action had been taken against any of them. It then became inexplicable why Adam was so quick to want to send me home for the same indiscipline that was clearly a persistent occurrence in the work area. It is not enough that Adam admitted that managers can 'sometimes get it wrong' when the matter is clearly contained in the company's Code of Business Standards and the wider law while at the same time moving with speed to discipline me on a one-time 'misconduct'.

REQUEST UNDER THE DATA PROTECTION ACT 1998
Adam has now accused me, on two occasions, of aggressive behaviour without committing to those statements or substantiating them. In the last instance he has gone as far as stating that I was 'frothing at the mouth' in a fit of anger. I am concerned that he is attempting to depict me as 'an aggressive individual' or is privy to information that may suggest the same. I would like to here exercise my rights under **Section 7 Rights of access to personal data** and FORMALLY REQUEST from my employer – Royal Mail Group, a description of the following:

- personal data of which I am the data subject,
- the purposes for which they are being or are to be processed,
- the recipients or classes of recipients to whom they are or may be disclosed,
- source of the data."

14 The claimant's grievance was acknowledged as received on 19 February 2016, being advised that it had been registered and that he would be contacted, once an investigating manager had been appointed.

15 The respondent's bullying and harassment policy is at R1 page 44.

16 With regards to complaints received by the respondent, they are allocated to managers for investigation at team meetings. These team meetings are generally held once per month. The allocation of complaints to managers are premised on managers' workload and a fair allocation of complaints.

17 In accordance with the allocation procedure, the claimant's complaint was allocated to Mr Murray, of which the claimant was advised on 22 February 2016. The was advised that his complaint was being addressed under the bullying and harassment policy, and had been referred to Mr Christopher Murray, WCM Champion, who would arrange to meet and discuss his

complaint with him. The claimant was further informed of his right to be accompanied by a Trade Union representative.

18 On 24 February 2016, the claimant was informed that as a result of a number of issues, his case was being re-allocated to another investigating manager, with apologies being given for any difficulties being caused. The claimant was advised that Mr James Doyle, Production Control Manager, would take over the investigation and would be in touch "soon to discuss the next steps in regard to your case."

19 The tribunal pauses here, to consider the allocation of cases to Mr Doyle, as it is Mr Doyle's evidence that on 19 February, he had been allocated via the team meeting allocation process, a grievance raised by an individual in Leicester and formally allocated the case by the Employee Relations Case Management Team by correspondence of 19 February, being a standard letter which provides;

> "Thank you for agreeing to investigate the above mentioned complaint.
> **Below is important information to help you with your case, please take the time to read this carefully before you begin."**

20 The subject heading provided, "*allocation of investigating manager B&H complaint"* followed by a reference number and the name of the complainant.

21 In respect of this complaint, on 23 February 2016, Mr Doyle made contact with the complainant at the Leicester Mail Processing Unit, following which Mr Doyle held a first meeting with that complainant on 26 February 2016.

22 With regards this complaint, the claimant has submitted that it has been fabricated by Mr Doyle in order to account for his subsequent inaction in respect of his dealing with his (the claimant's) complaint, which we herein address. The claimant challenges the correspondence in respect of this complaint in that, communication was had via the Leicester Mail Processing Unit as opposed to the individual's home address, and that a statement in respect thereof was unsigned.

23 The tribunal deals with this briefly, in that, there is clear evidence of HRSC Gateway of the Employee Relations Case Management Team, on 19 February 2016, allocating the "challenged" complaint to Mr Doyle, such that the tribunal is satisfied that it was a genuine complaint, there being no suggestion that HRSC Gateway were complicit in any a fabrication. The tribunal is satisfied that the complaint allocated to Mr Doyle was genuine and there is no basis to support the claimant's submission in this regard.

24 Turning to consider the claimant's complaint, it is Mr Doyle's evidence that having received the allocation of the case from Leicester, when he was thereafter furnished with particulars relating to the claimant's complaint, he had in error, mistakenly assumed that they were one and the same case.

25 The correspondence sent to Mr Doyle from the Employee Relations Case Management Team on 24 February 2016, re-allocating the claimant's

complaint to him, under the subject heading reallocation of investigating manager B&H complaint, was followed by the reference number and the claimant's name, Mwangi. The correspondence then advised, "thank you for agreeing to take over the investigation of the above mentioned complaint, from investigating manager Chris Murray," providing additional information as expressed by the complainant, stating;

> "Patrick states that the comments Adam made to him ref to him frothing at the mouth and looking aggressive are serious allegations in that they imply or create a picture of someone out of control, as though they have serious mental health issues. He feels that the comments made were vexatious. He feels that Adam's attitude and behaviour towards him makes him feel degrading. He wants him to realise that he cannot treat people this way. He feels that if he was white that he may treat him differently. He feels that comments Adam has made are serious allegations, and the gravity of them makes him feel that the only option is for a formal investigation. He feels that mediation will not address the gravity of the situation and the serious impact his comments had on Patrick. He states that Adam makes him feel worthless, hopeless, disrespected and demoralised and feels Adam always has an ulterior motive. He feels that Adam does not treat him with dignity and respect."

26 The correspondence then identifies the target period for completing the case of 30 working days, identifying that the complaint was logged on the national database on 19 February for completion by 1 April 2016.

27 The correspondence further provided;

> "What you need to do now:
> Meet with the complainant as soon as possible – this should normally be arranged within three working days.
> Give them your contact telephone details.
> Regularly communicate to the complainant and respondent(s) in the case.
>
> On completion of the case:
> Communicate the findings of the case to appropriate parties including the respondent(s).
> Email the case summary to HRSC.gateway@Royalmailcom."

28 Mr Doyle did not make contact with the claimant as directed.

29 It is Mr Doyle's evidence that, whilst the correspondence states that he had agreed, he has no recollection of his so agreeing, and that it had not been so agreed at a team meeting, but that having been aware of the Leicester case, which he was then addressing, he advances that when further correspondence came in, in respect of the claimant's complaint, he had not then expected a further complaint for him to address and merely assumed that the correspondence he was then receiving was in respect of the Leicester complaint.

30 By correspondence dated 28 April 2016, received by the respondent on 29 April, the claimant raised a complaint in respect of a number of issues as to discrimination and health and safety in respect of the distribution of work in the "Meter Area," giving consideration to disabled employees, such that work was then disproportionately allocated giving rise to health and safety

concerns, data protection concerns arising on a frequent change in managers, and breach of Fiduciary duty where the respondent has duties in respect of; *clearly defining jobs and undertaking risk assessments, Ensuring a safe work environment and protecting staff from bullying and harassment from colleagues and management.* The claimant further raised concern in not having had any communication from the respondent or Mr Doyle in respect of his complaint of 18 February, following their correspondence of 24 February 2016, for which completion was to have taken place by 1 April 2016, which had then passed.

31 Equally on 29 April, at approximately 9.44am, as a result of receiving the claimant's correspondence, HR called the claimant on 29 April, making enquiries as to his complaint of 18 February being addressed, for which a note of the call, provides;

> "The last time he heard from James Doyle, has not contacted him at all.
> *Why wait so long?*
> No answer. Said he was not sure how it all worked.
> Requested data from Kate, saw B&H should be resolved in 30 working days.
> Breach of data protection has this occurred?
> No this has not happened.
> Would investigate this at the time if it happened.
> Said I would email James Doyle to find out why nothing has been done and call him back."

32 The tribunal pauses here, as the claimant raises issue in respect of his correspondence of 28 April, which he sent by special delivery post recorded as 28 April 2016 at 15.37, which the claimant states, that, on making enquiries of the tracking record, the tracked record evidenced that the document was received on 3 May 2016, for which the claimant advances, the respondent has tampered therewith so as to mislead him on his making his enquiries of the tracking system. The tribunal here notes that the respondent has always acknowledged that the correspondence was received on 29 April 2016, and as such, reference to the 3 May was not something that the respondent had regard to, and indeed, they have always advised the claimant that the correspondence had been received on 29 April 2016.

33 With respect the tracking record and the respondent's tampering therewith, the claimant has not been able to state who he alleges would have sought to tamper therewith, or to what aim, in light of the respondent having acknowledged at all times that they had received the correspondence on the 29 April, or of HR's contact with the claimant on the 29 April, and further that no issue, as far as the claimant's complaint was concerned, arose thereon.

34 The tribunal finds no merit or substance to the claimant's contention in this respect, which is of no material relevance to the facts in this case.

35 At 9.58am on 29 April, HR wrote to Mr Doyle making enquiries of the claimant's complaint as allocated to him on the 24/2/2016, asking for an update, advising;

> "In order for me to update Patrick.
> As a matter of urgency, can you please provide the following:
> - current state of your investigation
> - Issues/barriers which are causing delay
> - Expected conclusion date.
>
> ……..…………….."

36 On the 5 May 2016, the claimant again contacted HR making enquiry as to the progress of his case, the content of the discussion had however, is not recorded, albeit it is noted that HR chased up their correspondence of 29 April with Mr Doyle advising, "Mr Mwangi has called today regarding his case"

37 On HR making enquiries of Mr Doyle for an update, it is Mr Doyle's evidence that he had informed HR that he was dealing with the matter, in the belief that the enquiries were being made in respect of the Leicester case, which on a resolve having been had on 4 April 2016, he had assumed that what was required and sought from HR was the information being uploaded onto the PSP system (People's System Portal), which information Mr Doyle states he would equally have provided to his line manager who, having been copied into the request for an update, would have pursued the issue with him at their meetings, in that he would not have been allowed not to progress a complaint without challenge from his manager.

38 The tribunal pauses here, as it is the claimant's contention that in the summer of 2016 he approached his manager, Mr McNally, within the South Midlands Mail Centre, requesting assistance in pursuing his grievance of 18 February 2016, for which Mr McNally took a copy of the letter from the Employee Relations Case Management Team of 26 February 2016, which as stated above identified that Mr Christopher Murray had been appointed to address his complaint. The claimant states Mr McNally then promised to follow up on the matter. It is the claimant's further contention that, no assistance was then forthcoming from Mr McNally, and submits that the failure of Mr McNally to act as promised was an act of victimisation.

39 It is not in dispute that no action was taken by Mr McNally, it being submitted by the respondent that, for whatever reason no action was taken by Mr McNally, it had not been on account of the claimant having done a protected act, in that by the correspondence of 22 February 2016 advising of Mr Murray being appointed to address his complaint, there was nothing therein raising issue as to any complaint coming within the Equality Act, or raising a matter coming within the Equality Act.

40 It is also relevant here to note that, following the claimant furnishing Mr McNally with a copy of the correspondence of 22 February 2016, the claimant has not thereafter chased the matter up with Mr McNally. Equally, it is relevant to note that, Mr McNally having at the material time no knowledge of the claimant's complaint, there is no evidence of him subsequently becoming aware of the details of the complaint, or otherwise of the claimant's telephone calls to HR.

41 The tribunal accordingly, can find no basis upon which to support the claimant's contention that the inaction of Mr McNally, was because he had done the protected acts of raising his grievance of 18 February 2016, or of his telephone communications of 29 April 2016 or 5 May 2016.

42 On 22 September 2016, a colleague of the claimant raised complaint against the claimant, in respect of aggressive and unacceptable behaviour, which matter was referred to management which was subsequent reduced to writing on 28 September 2016. The complaint was that, in respect of a "York" having been placed behind a colleague's workstation, the claimant thereon addressed the individual raising concerns as to safety, for which the complainant alleged that the claimant "started raising his voice at me and shouting *"YOUNG LADY, YOU CAN'T LEAVE THIS F****G YORK HERE, IT'S A HEALTH AND SAFETY ISSUE*"**.** The complainant states that she thereon responded that, he could not speak to her like that for which the claimant responded "I talking to you like that and I'm telling you, you can't leave this f****g York here!" which after the claimant being further challenged as to his language and the complainant stating that, if the claimant had a problem with her he was to take it up with her manager, the complainant states that the claimant responded *"I don't need to tell the manager, I'm telling you and now that you've been f****g told, move along now young lady!"* for which the complainant then advised that she reported the matter to her manager.

43 The complainant further accounted for further incidents, following which she identified that *"every day since that first incident took place he's been calling me all sorts of names the one that he uses the most is him calling me a "COCKROACH" and whilst calling me that he stomps his foot on the ground as if he is stepping on a cockroach. I feel I have been disrespected so many times by this one individual, that its gotten to the point enough is enough",* and for which she requested an investigation.

44 On the claimant being spoken to by the manager on 22 September 2016, in respect of the complaint against him, the claimant thereon presented a complaint, advising;

> "malicious claim/victimisation.
> On 22/09/16 I was summoned for an "informal" talk initially regarding "shouting" at a work colleague Ayan where my line manager – Rosie stated that she had listened to Ayan's side of the story and now wanted to hear my side of the story. I stated to the manager clearly that I had neither shouted nor swore at her but rather had informed her multiple times that she ought to place the York in the appropriate area as it cluttered the area and could lead to injury. Each time she replied that I ought to speak to the manager regarding the matter. I explained to the manager, during the "informal" talk, that my understanding is that I am responsible for my own health and safety and that of others and the need to have to speak to the manager about it was unnecessary. It transpired that it is Rosie who instructed Ayan to place the York in the area.
>
> However, as the conversation went on I was informed that I would receive a letter in the post regarding the matter (thereby invoking a formal procedure contrary to the initial claim) and that I had "sworn" at the work colleague (not "shouting at" as initially indicated). It appears the manager was making things up as she went along and appeared to have prematurely concluded that I was the one in the wrong.

> My view is that the matter has been staged to incriminate and/or victimise me, especially in light of and in spite of the ongoing matter of bullying and harassment that has been outstanding since February 2016 involving Adam. It is also a clear malicious and vexatious claim."

45 The claimant then went on to address the issue of *"rampant use of racial slurs"* giving a catalogue of instances where he alleged that staff and management had often uttered the words *"monkey"* and *"kaffir"* in his presence between 2012 and 2015, and in more recent times to September 2016 the words *"monkey arse",* further stating, *"the use of the words "monkey arse" is regular in the meeting area especially when both staff and management are using it as a proxy for "first class". Other racially inclined words in the work area are kaffir and monkey. I complained about the use of the slur word kaffir as far back as 7/7/14 and 5/1/14 to the then line manager Khaled*
…"

46 The claimant then addressed issues relating to health and safety, in respect of FPS machines and training received, in their operation. The claimant concluded his correspondence under the sub-heading, *"unresolved instance of bullying and harassment"* stating;

> "As noted above there remains an outstanding bullying and harassment grievance which Royal Mail has continually refused to address. This is despite assurances from Head Office that the matter would be dealt with and the allocation of an independent manager to look into the matter. I have also approached one of the shift leads – Mark who took a copy of the relevant letter but to this day there has been no response whatsoever.
>
> In light of the events of today there was clearly an application of double standards at SMMC (and selective application of the firm's policy and procedures as well as litigation) at best or clearly an attempt to victimise me through presenting a malicious and vexatious claim."

47 On 13 September 2016, the claimant was invited to a formal interview for 7 October 2016, in respect of, alleged bullying and harassment, in that he had *"used foul/bad language when addressing a fellow colleague in an aggressive way."* The claimant was advised that the interview would be an opportunity for him to state his recollection of events and present other information that he felt was important to be taken into consideration when carrying out the investigation. The claimant was advised of his right to representation, and further advised that it was the aim to conclude the investigation within 30 working days, albeit that, it may be that some investigations take longer and should that be the case he would be notified accordingly.

48 By correspondence of 3 October 2016, received by the respondent on 5 October 2016 the claimant raised a bullying and harassment complaint, stating;

> "I am writing in regard to what I believe is outright discrimination and victimisation (bullying and harassment) and an attempt to have my employment terminated through unfair means. I have followed the proper channels within the grievance and disciplinary procedure (bullying and harassment) right up to and including involving the Employee

Relations Case Management Team but the matter remains outstanding. It is for this reason that I seek your intervention in the matter."

49 The claimant thereon set out the events relating to his complaint against Mr Morrison of February 2016, and after setting out his efforts to have his grievance addressed, as above set out, the claimant then provided;

> "On 30 September 2016 I received a hand delivered letter … by the relevant investigating manager John Sutton alleging bullying and harassment by a work colleague who claimed I "used foul/bad language when addressing them in an aggressive way." (Although indicated in the letter, I suspect this is an incident on 22 September 2016 in which I was summoned by my line manager – Rosie and John Sutton for a talk regarding shouting at a colleague). In this instant, however, an investigation date, time and room venue are given and all this within a matter of a week. My suspicion is that again a malicious and vexatious claim has been made against me yet again to suggest "aggressive behaviour" and hence dismissal."

50 The claimant then set out the basis upon which his suspicions were based, namely that, accusations of *"aggressive behaviour"* made against him was supported by management for investigation whilst his complaint had been outstanding for months, and that correspondence he had sent to the respondent were reportedly not received over a week later (sent to SMMC), whereas the correspondence he had sent to HR or the Employee Relations Case Management Team had been received within a couple of days, advancing that, it was suggestive of a manipulation of systems and structures within the Royal Mail SMMC, for which the claimant maintained was "*evidence of a collusion, she denied me an investigation even in light of the seriousness of both sets of allegations – namely bullying and harassment (aggressive behaviour) and a malicious and vexatious claim."*

51 The claimant then addressed issue of; attempts having been made to dissuade him from raising a counter claim to the 22 September 2016 allegations against him, an attempt to delay a resolution of his complaint or otherwise obstruction to the investigation, and an ability of management within SMMC to act with impunity, identifying that the respondent had failed in their duty to protect him from bullying and harassment, and of a breach of the ACAS Code of Practice on discipline and grievance and the Trade Union and Labour Relations (Consolidation) Act 1992.

52 The claimant equally by correspondence dated 3 October 2016, raised a complaint against Ms Ali, stating;

> "In light of the contents of the letter handed to me by John Sutton on 30 September 2016, and dated the same, the meeting I had with my line manager Rosie on 22 September 2016 and the instruction from John Sutton on 30 September 2016, that I do not engage with Ayan Ali in anyway until the investigation date, I would like to bring a claim of malicious and vexatious claim against Ayan Ali."

53 The claimant then set out his view of the unsafe practice of Ms Ali in leaving the York in the work area as she did, further stating;

> "It is in light of this and my statutory duty to take reasonable care for my health and safety and those of others (who may be affected by my actions or inactions) that I challenged Ayan (as I have other colleagues) to take the York to the designated area and **NOT** leave the York where she had placed it. I challenged her twice during this incident and on each occasion she replied that I needed to see the manager about the matter. On my third utterance I told her I need not see the manager because I myself are responsible for the health and safety of work space for which she again replied I ought to see the manager about. I then admittedly told her "to move on."
>
> At no time during the exchange did I use foul/bad language or act aggressively.
>
> It also comes as a surprise that Ayan would choose to level the accusations of bad and/or foul language against me especially given the racial banter that is banded around the area by her in particular, the use of the slur words "kaffir" and "Monkey Arse." I have outlined this rampant use of racial slurs in the work area in the letter to SMMC dated 22 September 2016."

54 The claimant then set out the incident where he alleged such language had been used and of his raising the issue with management, being advised that the manager could do anything about it, since it was his word against theirs, and there were no witnesses.

55 The claimant thereon addressed the incident of his working on the FPS machine, whereby he would seek to distance himself from Ms Ali stating*, "this is because if I were to choose to stay on that machine what would follow would be mutterings of the word "kaffir and other offensive words."*

56 The claimant concluded his correspondence advising, *"it is my intention, where the matter to proceed to legal proceedings, to rely on CCTV imaging as permitted under s35 of the Data Protection Act 1998 for my defence."*

57 On 5 October 2016, the claimant telephoned the respondent raising a complaint in respect of; his complaint of February 2016 still being under investigation by Mr Doyle, of a complaint having been made against him (the claimant) under the bullying and harassment policy for foul and bad language for which he stated he had no details, of his having had an informal meeting with his manager Rosie and that he had raised a counter complaint against Ayun Ali, and that a meeting having been arranged for 7 October 2016, he would be attending alone.

58 The claimant was thereon advised that, Mr Doyle had been written to in respect of his bullying and harassment complaint of February 2016, and that a response was expected within the next 48 hours, at which time the claimant would be advised of how matters would proceed. This was confirmed in correspondence of the same date from the Employee Relations Case Management Team.

59 The claimant was further advised in respect of the further issues raised by his call, that they did not require a formal investigation within the bullying and harassment complaint procedures, as they were already being separately investigated as part of other bullying and harassment processes, in which the claimant had been named as a respondent. The claimant was further advised

that he would be able to raise all the information he felt relevant which could be addressed with Mr Doyle, and that the further issues being raised by the claimant were to be addressed at the meeting as arranged for 7 October 2016.

60 Equally of 5 October 2016, Mr Doyle was again chased up for an "urgent update" in respect of the claimant's February 2016 complaint, the correspondence stating "*despite requests, to date, we have not received any updates at all regarding this case. Furthermore, it should have been resolved by 1 April 2016, but remains open,"* Mr Doyle being asked for an update as to the current state of his investigation, issues/barriers causing delay and an expected conclusion date, asking for a response within 48 hours.

61 It is Mr Doyle's evidence that, having received this correspondence, enquiries were then made as to the claimant's complaint, whereon his error was identified, of his having confused enquiries in respect of the claimant's complaint, with that of the Leicester complaint he had received on 19 February.

62 Mr Doyle responded to HR, that;

> "There has been an error with this case of mine. I have checked with our resourcing team and I was allocated two cases to deal with on the same day. I have got confused as I thought I was only allocated one. I have dealt with one but this one has been missed.
>
> I am writing to Mr Mwangi today to invite him to an interview on Thursday to explain the error and start the investigation.
>
> Due to the delay, I would look to conclude this as soon as possible and would estimate that I should conclude the case within 10-14 days."

63 By correspondence of same day, the claimant was written to, being advised of how, his complaint of bullying and harassment would be addressed and further advised of Mr Doyle's explanation for the delay in addressing his complaint from February 2016, as above set out.

64 On 12 October 2016, Mr Gary Trunks was allocated to hear the claimant's complaint against Sarah O'Shaughnessy of 17 August 2016, where the claimant alleged he was called monkey arse, the claimant being interviewed on 20 October 2016.

65 On 22 October 2016, the claimant was invited to an interview in respect of his February 2016 complaint against Mr Morrison, for Monday 31 November 2016. This date however, was in error, the intention having been for 31 October 2016.

66 The claimant was advised that the meeting would discuss in full, the basis for his complaint and explore how the respondent might be able to resolve his concerns, asking the claimant to give consideration beforehand as to how the matter could best be resolved, and to facilitate discussions of options available. The claimant was then advised of his right to representation and asked to advise of his attending the meeting.

67 It is here noted that, in addition to the date for the meeting having been incorrectly stated in the correspondence, the reply slip equally contained a wrong date for the meeting, recording it as the 14 January 2016.

68 On 31 October 2016, on Mr Doyle attending for the meeting, and on the claimant not in attendance, Mr Doyle noted his error with the dates, for which the meeting then did not take place. In respect hereof, on 1 November 2016, Mr Doyle sought to hold a meeting with the claimant for 2 November, which on inviting the claimant to the meeting, presented the claimant with correspondence in respect thereafter. It is Mr Doyle's evidence that the claimant informed him that he could not attend the meeting at such short notice, for which Mr Doyle states, a meeting was subsequently arranged for 17 November 2016.

69 It is the claimant's evidence here that, the meeting did take place on 2 November, for which in support of his contention he has furnished a diary, being loose A4 sheets of paper, recording a meeting having taken place on 2 November. From a perusal of the claimant's entries, the entry for 2 November is in stark contrast to the further entries of events, which entries are quite detailed recording discussions had, whereas the entry for the 2 November is brief and records nothing of the content of the record of the meeting presented by Mr Doyle, (as set out subsequent herein) and of which the claimant accepts is a true record of the discussions had, such that one would have expected, at least, some detail in the claimant's note, of Mr Doyle for example, seeking to resolve matters by mediation, with the claimant as he alleges refusing, being a material set of circumstance, where the claimant states that he insisted on the matter being dealt with formally. Instead, the claimant's note merely records the framework for the meeting to take place; there is no detail of the discussion had around his complaint, or the fact that Mr Doyle had accounted for the delay in addressing his complaint on an error on his part, which the claimant then did not accept. No particulars of these discussions are referenced, which is out of sync with the claimant's other entries in his diary.

70 Mr Doyle is adamant that the meeting did not take place on 2 November, but on 17 November, and has provided the letter of invite for the meeting on 17 November and a copy of notes from the meeting identified as 17 November. The claimant challenges this record, stating that he did not receive the correspondence of 1 November inviting him to the meeting for 17 November and no meeting took place on that day.

71 Despite this, with regards the meeting having taken place, which the parties agree did take place, albeit on different days, the claimant accepts that the notes presented by Mr Doyle of the meeting is a true record of discussions had, save for reference to mediation being agreed to, by him.

72 Notes of the meeting are at R1 page 182a and 182b.

73 The tribunal here particularly notes that at the commencement of the meeting, Mr Doyle sought to apologise to the claimant for the delay in his case being heard, the notes of the meeting recording;

> "JD had been allocated a number of bully and harassment and grievance cases and he had assumed he had completed them all, he hadn't and PM's was missed. JD apologised to PM for any distress that this had caused him and assured him that he would investigate the case as quickly as possible.
>
> PM responded that a lot had happened since he had raised the complaint. He stated that because he had raised a complaint against his line manager, a complaint had been raised about him by another OPG. PM said that since he had complained, people had been out to get him and he wasn't being treated fairly. He added that he felt that the delay in hearing the case had been deliberate and felt that it had been done to cause him distress.
>
> JD stated that this was not the case. He apologised again and stated that the delay had not been intentional and was nothing to do with him personally.
>
> PM responded that he didn't accept this and said that the delay was because he had complained about a manager."

74 After the parties restated their respective positions in respect of the delay, the claimant was then asked to set out his complaint. The claimant advised of his having been asked by Mr Morrison to move to a different work area and that when he wanted to know why he was being moved and not others, Mr Morrison got angry and shouted at him on the floor in front of others, which the claimant said caused him distressed. The claimant thereon added *"it was a shame that this complaint wasn't heard earlier and properly as the complaint was fairly minor and could have been resolved informally by PM and AM talking",* which on the claimant being asked for clarification, stated that *"he understood that some times people are under stress and they can lose their temper. He ….… understood why AM may have lost his temper but wanted an apology and it not to happen again."*

75 On Mr Doyle then asking the claimant if he still wanted to resolve the complaint informally, the claimant stated that he didn't, *"as the case had been delayed and managers were working against him,"* to which Mr Doyle explained that, the delay had nothing to do with Mr Morrison, further advising that should he wish to raise a separate case against the delay, then he was welcome to do so, but that they should at least try to resolve the original complaint, which the claimant had said was fairly minor.

76 The tribunal pauses here, as the claimant accepts that the above referred account was a true reflection of discussions had, but challenges the further entries which records that;

> "PM said that he will try mediation with AM but was unsure if it would work. He did accept that the informal approach would be the best for resolving his issue with AM."

77 Whilst the claimant accepts that this was said in the meeting, he objects to the further entry, that;

> JD asked PM again if he would be happy to have an informal resolution session with AM and if he was happy that JD facilitated this. PM said that he would be to meet AM and was happy for JD to facilitate the session.

78 The claimant denies having here agreed, stating that he had advised that he had taken the matter to the formal process and expected a formal resolve. This account is not however recorded by the meeting notes.

79 The meeting then concluded on Mr Doyle asking the claimant whether he wanted to add anything, the claimant stating for the second time that, he felt that a complaint had been raised against him because he had raised a complaint against Mr Morrison and that the delay had been because he had complained against his manager.

80 On The claimant having nothing further to add, the meeting concluded and the claimant thanked for attending, being informed that he would be invited to a formal resolution session shortly. The claimant was also advised that he would be furnished with a copy of the notes from the meeting for him to make minor adjustments before signing and returning them.

81 The document furnished to the tribunal, as the notes of the meeting of 17 November 2016, in providing for the claimant's signature, states *"signed as a true account of the meeting that took place on 31 November 2016."*

82 On 21 November 2016, Mr Doyle wrote to the claimant in respect of the meeting enclosing copies of the notes, asking that the claimant confirm and sign to acknowledge them as a true record, advising that should the notes of interview not be returned by 28 November without an acceptable explanation, he would regard them as not being disputed and make his decision thereon.

83 The tribunal pauses here, as it is the claimant's contention that he did not receive the notes of the meeting, that the correspondence arranging the meeting for 17 November had not been received by him, and as above stated, that the meeting took place on 2 November and not 17 November, for which, together with the correspondence above referred to, in respect of Mr Doyle being chased for an update to his complaint, the claimant argues that those documents had been fabricated to conceal the true state of affairs, namely that, Mr Doyle had not actioned his complaint on account of his being, a black individual raising a complaint against a white manager.

84 The tribunal has spent much time trying to understand the circumstance, which has not been aided by Mr Doyle's mis-statement of dates in documents, however, giving consideration to all the circumstances operating at the material time, the tribunal is satisfied that the factual matrix is as presented by the respondent, and that the meeting between the claimant and Mr Doyle took place on 17 November, and that the notes were sent to the claimant on 21 November 2016. However, it is relevant here to note that, whilst the tribunal has addressed this issue, because it is presented as central to the claimant's claim and he places much emphasis thereon, as regards the material facts to this case, what is of importance, is that the meeting did take place and the discussion had.

85 On 6 December 2016, Mr Doyle again wrote to the claimant in respect of their meeting of 17 November, advising;

> "As agreed in the interview I will try and resolve the issue informally by setting up a facilitated session with Adam Morrison, you and me.
>
> I am aware that you are currently on precautionary suspension for a separate issue. This makes it difficult for us to hold the session. I will therefore schedule the meeting once your suspension has finished.
>
> I therefore conclude that the complaint that you raised in February 2016 is now concluded."

86. In parallel to the above events, on 7 November 2016, the claimant was invited to a fact-finding meeting with the late shift manager, Mr Jawwad, in respect of the claimant having failed to attend a previous fact-finding meeting called in respect of an incident on 26 October 2016, when the claimant was accused of raising his finger in a colleague's face.

87. The purpose of the meeting, which was scheduled for 8 November 2016, was to *"establish the facts and to determine if any formal action under the conduct policy is required."* Following the meeting, Mr Jawwad determined that no further action should be taken thereon.

88. The claimant here submits that, the respondent continued *"to lay further claims of aggressive behaviour by me without evidence or follow up. This includes the invitation to attend an investigation meeting on 8 November 2016……… to which, to date, I have not received any notes to the meeting or elaboration on the allegation against me. This was clearly an attempt impute aggressive behaviour on my part to further cause me detriment."*

89. In cross examination however, the claimant accepts that he did have a meeting with Mr Jawwad and the allegation had been put to him, the claimant's evidence being that, he had not done the act and that it was part of a conspiracy against him, stating that what was discussed, was that *"I raised a finger at a colleague and I was aggressive",* and for which the claimant accepts that, Mr Jawwad accepted his explanation and no further action was taken.

90. The claimant further accepted in the cross-examination that, he had been spoken to on 3 November in respect of the incident, and that he had requested that he be written to in respect of the matter, for which the correspondence of the 7 November, inviting him to the fact-finding meeting on 8 November, was produced

91 It is also here recorded that, there is no evidence before the tribunal that Mr Jawwad was aware, or otherwise a party to any of the protected acts or complaints, on which the claimant relies.

92 In parallel to the above events, on 12 October 2016, Mr Trunks was appointed to consider the claimant's grievance against Ms O'Shaughnessy.

93 On 20 October 2016, Mr Trunks interviewed the claimant, and on 4 November 2016, Mr Trunks interviewed Ms O'Shaughnessy, notes of which are at R1 page 122.

94 Mr Trunks further held interviews Mr Jawwad and Ms Mahmud on 4 November, with Ms Rycraft on 7 November, and Mr Khalide Ibrahim on 18 November, notes of which interviews are at R1 page 127,129,131a and 183, respectively.

95 By correspondence of 18 November 2016, Mr Trunks furnished the claimant with the evidence and witness statements relevant to his investigation, seeking the claimant's comments thereon, before making a decision. The claimant responded providing his comments on the material provided, making comment in respect of the witness's statements, that:

> "In view of my wider concerns and other ongoing investigations/conduct cases it is most conceivable that the individuals interviewed could have colluded to agree on a common position – a straight denial. While appreciating the difficulty of proving the words were uttered by SOS it is equally problematic to suggest that I, at the spur of the moment in 22 September 2016 letter to SMMC ……… decided to concoct an allegation with a specific time and date in order to falsely implicate a senior manager (SOS)."

96 On 25 November 2016, Mr Trunks completed his investigation, and furnished the claimant his outcome, advising the claimant that his complaint had not been upheld. The claimant was advised of his right to appeal.

97 Mr Trunks further advised that, he had reason to believe that the claimant's complaint had not been made in good faith, based on evidence that the claimant had given him as the reasons for his bringing the complaint. Mr Trunks explained that, complaints that were not brought in good faith undermined the validity of the procedure and damaged the basis of good working relationships, advising *"I had considered whether further action should be taken under the conduct policy and decided that this should be investigated further. As such, I will forward the relevant paperwork to your manager to consider your case shortly after the completion of appeal period or after the appeal conclusion, if it is still appropriate."*

98 Mr Trunks' report further set out the following:

> "…on 18 November 2016 as I was reviewing the documentation and reflecting on what Mr Mwangi had said to me in the initial interview with him, I came to the conclusion that it was appropriate for me to take the unusual step of recommending that precautionary action be taken so that Mr Mwangi be removed from work. This was as the evidence he had given to me at that interview indicating that the reason he had raised a complaint was in response to a case which he said that at that time was being pursued in respect of his behaviour and if this was borne out that would be misuse in the procedure and as such a serious matter. The aim of this precautionary

recommendation was primarily to protect other employers from further complaints being raised about them on that basis."

99 Mr Trunks' recommendation was acted upon and the claimant subsequently suspended. The tribunal has not however seen the letter of suspension.

100 By correspondence of 27 November 2016, the claimant presented an appeal against Mr Trunks' findings, which, after setting out his account in respect of his complaint, he thereon challenged Mr Trunks impartiality, stating;

> "Mr Trunks assumption of my guilt is contained in his remarks (page 6) that "…the evidence he (Mr Mwangi) had given to me…indicated that the reason that he had raised the complaint was in response to a case … in respect of his behaviour, and if this was borne out that would be misusing the procedure…" Mr Trunks continues; "the aim of this precautionary recommendation was primarily to protect other employees from further complaints being raised about them on that basis".
>
> Why would Mr Trunks presume the case against my behaviour would be borne out: without having the full facts of that case? Rather than Mr Trunks suspending me without the assumption of guilt, he has done the opposite and first assumed my guilt, then gone on to suspend me. Not only is Mr Trunks exceeding his fact-finding role but assuming guilt and then recommending disciplinary action based on that assumption. The suspension here is no longer precautionary but a disciplinary sanction. This puts his motive in the investigation into question."

101 With regards Ms Ali's complaint against the claimant, this was allocated to Mr Sutton, Work Area Manager to investigate. On his subsequently being unable so to do, the complaint was furnished to the Royal Mail Human Resource Service Centre (HRSC) on 28 September, which was then re-allocated to Ms Chattaway, an independent Casework Manager, being independent from the operational side of the Royal Mail's activities. On 2 November 2016, Ms Chattaway was also appointed to investigate the claimant's complaint of 3 October 2016, against Ms Ali.

102 The tribunal pauses here, as the claimant has taken the tribunal to correspondence from Mr Sutton, inviting him to a formal interview on 7 October 2016, and in respect of which, on 24 October, Mr Sutton advised HR that there was no case to answer against the claimant, asking that he be called to discuss the matter. There is no further evidence provided to the tribunal in respect hereof, Ms Chattaway giving evidence to the tribunal that she was not aware of such investigation being concluded by Mr Sutton, and that she had interviewed Mr Sutton in respect of her investigations, and at which time Mr Sutton had not advised thereof. It is Ms Chattaway's evidence that, having been tasked to investigate the matters, she had investigated the complaints of the claimant and Ms Ali from scratch, on the basis of the allegations presented by the parties.

103 The tribunal accepts the evidence of Ms Chattaway.

104 On 8 November 2016, Ms Chattaway commenced her investigations, conducting an interview with the claimant followed by an interview with Ms Ali, on 9 November 2016.

105 As above referenced, on Ms Chattaway interviewing Mr Sutton, she asked whether he had undertaken a conduct investigation into the alleged behaviour of the claimant on 22 September towards Ms Ali, he advised that he had been tasked to do a bullying and harassment investigation, stating that he had interviewed the claimant and Ms Ali, but had not furnished notes thereof to the parties, although he had been chased by the claimant for them. Mr Sutton stated that he had been unable so to do because of pressures of other work commitments, for which he advised the claimant that he would carry on his investigation without a signed copy of the claimant's notes of interview. On Mr Sutton then being asked whether he had made any decision on the allegation of bulling and harassment, Mr Sutton stated he had not. Equally, on Ms Chattaway asking whether Mr Sutton had told either party that he thought there was no case to answer, he equally stated he had not.

106 Ms Chattaway conducted interviews with a further eleven members of staff, and sent copies of the notes of interviews to the claimant on 22 November, for his consideration.

107 The tribunal again pauses here, as the claimant raises objection to Ms Chattaway interviewing two of the eleven members of staff, on grounds that they had not been present at the material time and that had the respondent retained CCTV evidence, as above referred, they would have been aware thereof and would not then have interviewed them. In considering the evidence of these two individuals, one individual giving evidence in favour of the claimant, the other unable to give any evidence relevant to the issues, for which Ms Chattaway discounted that evidence, and of which the claimant accepts to have been the case, the tribunal has been unable to find any substance to the claimant's contentions, relevant to any of the issues for the tribunal's determination. The tribunal however, makes reference hereto, as the claimant was passionate about making the point before the tribunal.

108 Ms Chattaway's case report into the complaints by, the claimant against Ms Ali, and Ms Ali against the claimant, is at R1 page 210 to 231.

109 With reference to Ms Ali's complaint against the claimant, Ms Chattaway upheld the first allegation against the claimant of his calling her a cockroach, on the claimant admitting to having called Ms Ali a cockroach and having made a stamping, squashing motion, albeit only on one occasion. Ms Chattaway found that this behaviour had been both unwanted and inappropriate, and therefore contravened the Royal Mail's acceptable standard of behaviour.

110 With reference to the second allegation of the claimant speaking to Ms Ali in an aggressive and inappropriate manner on 22 September, by raising his voice and shouting "*young lady you can't leave this f****g York there,*" on the claimant admitting that he had challenged Ms Ali regarding where she had left the York, although denying that he shouted, sworn or generally been

aggressive towards her, and on evidence of a number of witnesses having witnessed the altercation and heard words used, albeit not swearing or shouting; one witness however recording that Ms Ali had, at the time, stated that the claimant had used foul and abusive language to her, Ms Chattaway concluded that the claimant had challenged Ms Ali in an appropriate manner. She did not however, believe that the claimant had sworn at Ms Ali. It was Ms Chattaway's finding that the claimant had challenged Ms Ali in a condescending manner which had been inappropriate and unwanted, and again contravened the respondent's accepted standards of behaviour, for which she upheld the allegation.

111 It was Ms Chattaway's recommendation that, the claimant be counselled as to the manner in which he challenged colleagues. Ms Chattaway also recommended that, in respect of the allegations made against the claimant, Ms Ali should be investigated under the conduct policy in respect of her conclusion that Ms Ali had embellished her evidence against the claimant, in respect of his having used foul and abusive language, Ms Chattaway's report providing:

> "I am recommending Ms Ali has her behaviours addressed under the conduct agreement for embellishing her evidence in respect of her allegations levied at Mr Mwangi on 22 September 2016. This is <u>not</u> a recommendation for "mis-use of the B&H process" (as the fact I have upheld a complaint would be contrary). Ms Ali was correct to bring her complaint, however I have arrived at a belief that whilst there were inappropriate behaviours levied at her by Mr Mwangi, they were not to the extent she later claimed.
>
> In respect of the precautionary steps taken I am recommending that Ms Ali is now allowed to return to the meter section."

112 Turning to the claimant's complaint against Ms Ali, with regards the claimant's reference to *"racial banter"*, to include comments of *"monkey arse"* and *"kaffir"* being directed towards him and other black African employees, on the witnesses to these events, as identified by the claimant, specifically denying such events, and on Ms Ali having identified that she had been unaware of the term *"Kaffir"*, until she research the term on the complaint being made against her, Ms Chattaway found there to be no evidence to suggest that the alleged offensive phrases had been used, or otherwise evidence to suggest that Ms Ali had been the type of person to make such comments. Ms Chattaway did not uphold the allegation.

113 In respect of this finding, Ms Chattaway holding reservations as to the claimant's motivation for making the allegations, recorded in her report, that;

> "In evaluating the evidence, I am satisfied that Ms Ali has not spoken to Mr Mwangi (and others he named) as he alleges. There is no evidence at all to support Mr Mwangi's allegations. In considering he gave the names of four other people who he alleged had been subjected to the same behaviours as himself; and witnessed by himself; (all of whom denied being subjected to any such behaviours); I cannot accept Mr Mwangi has raised this aspect of his complaint genuinely. Clearly, Mr Mwangi has other motivations for doing so, which he articulated at the interview with myself. When I asked Mr Mwangi why he was submitting his complaint he said "he had submitted his complaint against Ms Ali when she alleged he had used foul language towards her." This satisfies me that Mr

> Mwangi's motivations were to "retaliate" to Ms Ali submitting a complaint. This is not acceptable…"

114 With regards to the second allegation against Ms Ali, on Ms Ali admitting that she had left the York in a non-designated area, albeit disputing it to be in a unsafe position having checked with the colleague whom she had left the York behind and that they had been happy for her to do so, and was then left on their agreement, which was corroborated by the individual concerned; the York then not being in a position to block their passage or exit, Ms Chattaway saw no health and safety risk by Ms Ali's actions.

115 It was Ms Chattaway's finding that, she could not understand how the claimant could in those circumstances have perceived the actions of Ms Ali to have been intended to bully or harass him, in that, Ms Ali had not left the York behind the claimant, but behind another colleague with their agreement, and that whilst the claimant had a general responsibility to challenge what he considered unsafe practices, she could not perceive Ms Ali's actions to have been intended to bully or harass him. Ms Chattaway did not uphold this complaint.

116 On the findings above referred, Ms Chattaway gave consideration to whether the allegations had then been raised in good faith. Ms Chattaway determined that, although not upholding the claimant's allegation in respect of the positioning of the York, she nevertheless felt this had been raised in good faith albeit under the wrong procedure, which ought to have been raised as a grievance rather than a complaint of bullying and harassment. However, as regards the claimant's first allegation, Ms Chattaway concluded that this had not been raised in good faith, and that the claimant had not acted honestly or genuinely in making that allegation against Ms Ali, stating;

> "I find Mr Mwangi has not submitted his complaint in good faith but with the intention of showing Ms Ali in an unfavourable light to mitigate his own alleged behaviours."

117 As a consequence, Ms Chattaway recommended that the claimant's behaviour be investigated under the respondent's conduct policy. Ms Chattaway's report stated;

- "I am recommending Mr Mwangi has his behaviour addressed under RMG conduct agreement. This is in respect of his misuse of the B&H procedure/policy in submitting <u>allegation one only</u>; claiming Ms Ali has referred to himself and other black African colleagues as "monkey arse" and; "kaffir". This is a very serious allegation that Mr Mwangi levied at Ms Ali that would potentially have led to her continued employment being considered. I took great pains to explain to Mr Mwangi at the onset of his interview, the possible outcomes of raising a complaint falsely or not in good faith.

- In respect of the precautionary steps, having arrived at the findings detailed in this report I am recommending Mr Mwangi is precautionary suspended pending a full investigation under RMG conduct agreement. This is because I have formed a belief that Mr Mwangi has been disingenuous in bringing his first complaint (one) and there is a duty of care to our other employees not to put them in a position where such allegations could be levied at them, without foundation. …"

118 Ms Chattaway also made recommendations for the positioning of Yorks in designated holding areas as opposed to leaving them in the meter area.

119 The claimant presented an appeal against Ms Chattaway's findings by correspondence of 5 December 2016.

120 On 6 December 2016, the claimant presented his complaint to the tribunal.

121 The tribunal has been led to understand that the claimant has subsequently been dismissed, however, the claimant's dismissal is not a matter before this tribunal and the tribunal has received no evidence thereon.

Submissions

122 The tribunal received written submissions on behalf of the claimant and respondent, the submissions have been duly considered.

The Law

123 On a claim of unlawful direct discrimination, it needs to be established that, there was less favourable treatment and that the reason or an effective reason was one of the protected characteristics. Sometimes a claimant is able to point to someone else in the respondent's employment who has been treated differently in the same circumstances. Indeed, it is a requirement that a comparator must be on the basis of someone else who is in the same or not materially different circumstances.

124 Where there is no person who actually fulfils the requirement of the statutory comparator it is necessary to construct an imaginary or hypothetical comparator, a non-existent person who, had they existed, and had the same circumstances as the claimant, would have been treated more favourably.

125 It then becomes incumbent on the claimant to show that such an imaginary person would have been treated less favourably. At this point the test of comparison starts to merge with the test of motivation. The answer to the question *"what is there to show that the hypothetical comparator would have been treated differently?"* becomes almost the same as the answer to the question *"what was the reason for the treatment?"* Indeed, it is sometimes easier to go straight to the question of what was the motivation for the treatment rather than take it in the logical order, because if the answer to the question of motivation is answered in favour of the claimant it becomes relatively easy to find that there has been different treatment.

126 Proving unlawful discrimination is a difficult task for a claimant. No employer will admit to it and indeed discrimination is often operating at an unconscious level. S.136 of the Equality Act assists the claimant in this regard. Where the tribunal finds facts from which the tribunal could decide in the absence of any other explanation that a respondent had unlawfully discriminated, the tribunal must hold that the contravention of the Act occurred unless the respondent shows that it did not contravene the Act. In this regard, it is for the claimant to

show facts from which the tribunal might infer unlawful discrimination. Those facts may emerge either from the claimant's own evidence or from the evidence of the respondent and is for the tribunal to infer from a consideration of all the facts in the case. If this is not established, the claim fails at that point. If there are such facts, the onus is on the respondent to show that the protected characteristic was not part of their motivation.

127 The claimant may not be able to point to a comparator whose circumstances are not materially different from his own, the statutory comparator, but may point to cases where there are similarities, and if he shows differential treatment it may help him move the burden onto the respondent.

128 Normally speaking, the fact that the respondent has acted unreasonably in a particular regard does not in itself amount to facts that would raise the inference of unlawful discrimination. It is necessary to remark further that it is simply not enough to show that the claimant was treated in a particular way, and that he is of a particular protected characteristic. There are two stages to the test, not only must there be shown less favourable treatment, but it must be shown that the treatment was because of the protected characteristic, or that it can be so implied and upon which the burden, as above stated, shifts to the respondent.

129 As regards victimisation, it is for this tribunal to determine whether the claimant has done a protected act, intends to do so or is suspected of having done so.

130 A protected act occurs where the claimant has brought proceedings under the Equality Act, given evidence or information in connection with proceedings under the Equality Act, or done any other thing for the purposes of, or in connection with the Equality Act, or made an allegation (whether or not express) that there has been a contravention of the Equality act.

131 If this is established, it is then for the claimant to establish that he has been treated less favourably than the respondent treats or would treat a person who has not done a protected act.

132 Where the claimant establishes such a difference, it is for this tribunal to determine whether the claimant has proved facts from which the tribunal could conclude in the absence of an adequate explanation from the respondent that, the treatment was consciously or unconsciously done by reason of the protected act. On this being the case, it will be for the respondent to then prove that it did not treat the claimant less favourably by reason of that protected act.

Conclusions

Direct discrimination

Responding and dealing with the claimant's grievance of 18 February 2016.

133 On the claimant having presented his complaint on grounds that the respondent, as distinct from Mr Doyle, had failed to respond to his grievance or otherwise deal therewith, on the claimant accepting that the respondent's HR had, without delay, responded to the presentation of his complaint and his further contacts with them, the tribunal finds no evidence to support the claimant's contention that the respondent, as an entity, failed to respond or otherwise deal with his grievance, so as to ground his complaint for direct race discrimination.

134 On the claimant further submitting that the respondent, as an entity, failed to respond or otherwise address his bullying and harassment complaint because he, as a black person, had raised a complaint against a white manager, which claims the respondent then failed to address timeously, or at all, in contrast to other complaints, the tribunal having referenced the claimant's complaint against Ms O'Shaughnessy, O'Shaughnessy being a white manager, which complaint was addressed within eight days of receipt by Mr Trunks and concluded within six weeks, the tribunal finds no evidence to support the claimant's contention in this respect.

135 Turning to consider the actions of Mr Doyle, the claimant does not advance that Mr Doyle was predicated by considerations of race, relying on a general proposition that, the respondent as a whole, was motivated by racial considerations. Despite the above, for completeness the tribunal has considered the cause for the delay in dealing with the claimant's complaint and are satisfied that the explanation given by Mr Doyle, was a true account of events, namely that, he had failed to appreciate that he had two complaints to investigate and had reacted to the repeated enquiries of HR on the premise that he had addressed the complaint. Whilst this was an unfortunate set of circumstances, it does not raise considerations of race being a factor. There is no suggestion that Mr Doyle had previously, or otherwise, had a propensity to treating staff differently on grounds of race generally, or more particularly in addressing bullying and harassment complaints.

Mr Doyle not furnishing notes of meeting of 2 November 2016.

136 As set out above at paragraph 80 the tribunal finds that the meeting between the claimant and Mr Doyle did not take place on 2 November, but took place on 17 November 2016, and in respect of which the notes were sent to the claimant on 21 November 2016. The tribunal should however, restate that this finding is distinct from a finding that the claimant necessarily received the notes, which the tribunal cannot comment on based on the evidence it has received. This does not however, detract from the tribunal's findings that, there is evidence to support the notes being sent to the claimant.

137 The tribunal accordingly finds that the claimant has not been directly discriminated against on grounds of race as alleged.

Victimisation

138 On the claimant relying on the protected acts, being his bullying and harassment complaint of 18 February 2016, and his further contact with the respondent of 29 April and 5 May 2016, the tribunal finds as follows:

HR promised they would chase up the complaint and have it resolved.

139 As above stated at paragraphs 35 and 36, the tribunal finds that HR had responded in such fashion as they had stated they would to the claimant, and without delay on the occasions they were contacted by the claimant, and for which this tribunal finds no substance to the claimant's claim in this respect.

Some form of manipulation of the Royal Mail tracking system to mislead the claimant into thinking that his communication had not been received.

140 The tribunal finds no merit in this contention. The respondent had, at all material times, acknowledged receipt of the claimant's correspondence and had acted thereon, such that whatever the tracking system recorded, it has not been sought to be relied on by the respondent against the claimant.

141 Further, on the claimant being unable to suggest who in the respondent, or otherwise how it is alleged that the tracking system was altered, so as to raise a suspicion that the system had been manipulated, not to mention how it is then alleged that such manipulation was on account of the claimant's race, or how from the tracking system, the content of the claimant's correspondence could have been discerned from the details recorded on posting, the tribunal has not been able to understand.

142 The tribunal finds no substance to the claimant's contention in this respect.

Mr McNally's failure to follow up on a letter and get back to the claimant as stated he would.

143 As set out at paragraph 41 above, the tribunal finds no merit in the claimant's contention in this regard.

On 7 November 2016 at a fact finding meeting Mr Jawwad made a complaint against the claimant that he acted aggressively.

144 As set out at paragraphs 77 and 79 above, the tribunal has been unable to find any evidence to support the claimant's contention as to his being victimised on; a complaint having been made to Mr Jawwad against him; or on Mr Jawwad seeking to discuss the matter with the claimant; or on the claimant asking to be advised in writing, which was then duly done and a meeting held, from which the claimant's explanation was accepted and no further action taken.

145 The tribunal can find no basis for the claimant's contention; there being no suggestion that Mr Jawwad had been privy to the claimant's protected acts. Further, in circumstances where Mr Jawwad merely stated the accusations levelled against the claimant, there being no suggestion that Mr Jawwad was

the individual making the allegations, the tribunal can find no facts upon which to base the claimant's claim in this respect.

Email exchange of 24 February 2016 for the respondent to address the claimant's complaint of 18 February within 30 days.

146 For the reasons set out at paragraphs 27-29 and 56 above, whilst it is acknowledged that the claimant's complaint was not addressed within the procedural timeframe, the tribunal can find no basis upon which to ground the claimant's complaint for victimisation in respect of the email exchange.

Biased investigation by two alleged independent investigators, Mr Gary Trunks and Ms Cindy Chattaway - On Ms Chattaway relying on false evidence and Mr Trunks presumed guilt before completing his investigation.

147 With regard Ms Chattaway, as set out at paragraphs 89 and 94 above, the tribunal finds no substance to the claimant's claim of reliance on false evidence.

148 With regard Mr Trunks, on the claimant advancing a presumption of guilt, premised on Mr Trunks recommending suspension, where the claimant had informed him at the investigation interview, that, he had raised his complaint because of a complaint having been raised against him, and for the reasons clearly set out by Mr Trunks in his case report, the tribunal is satisfied that Mr Trunks' recommendation was premised on the information provided by the claimant as to his conduct, and were not predicated on considerations of race.

149 The tribunal finds no evidence upon which to support the claimant's contentions.

Mr Chattaway denied the claimant an appeal against his finding that the claimant's grievance has been made in bad faith.

150 This allegation was withdrawn by the claimant and was not then a matter for this tribunal's determination.

Ms Chattaway's conclusions re. Ms Ali and the claimant's complaint were conflicting and biased against the claimant

151 The tribunal accepts Ms Chattaway's clear account for the differential treatment between Ms Ali and the claimant, where Ms Ali's allegations having been substantiated, were found to have been embellished for which Ms Chattaway recommended Ms Ali be further investigated under the disciplinary code, albeit she could remain in work, whereas, the claimant's allegation against Ms Ali in respect of racial slurs, by the nature of the allegations being serious and having implications challenging Ms Ali's continued employment, particularly where they were being made by the claimant in an act of retaliation against Ms Ali for raising her complaint, and thereby raised in bad faith, the tribunal is satisfied that the gravity of the claimant's acts were of a more serious nature than that of embellishment by Ms Ali, and for which the action of Ms Chattaway were reasonable.

152 In these circumstances, the tribunal can find no basis to support the claimant's contention that the differential in treatment by Ms Chattaway, between Ms Ali and the claimant, were predicated on considerations of race or of the claimant having done the protected acts. It is also here pertinent to note that, both the claimant and Ms Ali are of similar racial group being defined as black African, such that considerations of race are highly unlikely to have been a consideration.

153. For the reasons above stated, the tribunal finds that the claimant has not been discriminated against on the protected characteristics of race or otherwise victimised pursuant to section 27 of the Equality Act 2010. The claimant's claims are dismissed.

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Employment Judge Henry

Date: ……26 April 2018…………..

Sent to the parties on: ..26 April 2018.....

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For the Tribunal Office