Case No: 2200619/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr C Jones	**v**	**(1) Driver & Vehicle Standards Agency** **(2) Mr Graham Owen** **(3) Mr Brian Lewis**

Heard at: Watford **On:** 2-10 July 2018

Before: Employment Judge Manley
Mrs S Goldthorpe
Mr S Bury

Appearances:

For the Claimant: Mr R Johns, Counsel
For the Respondent: Ms A Carse, Counsel

JUDGMENT having been sent to the parties on 31 July 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and issues

1. This hearing was to determine complaints of race discrimination, harassment related to race and victimisation, all matters arising under the Equality Act 2010. The legal and factual issues took some time to clarify but were eventually set out at a preliminary hearing in June 2018. As one of the original respondents was dismissed the list of issues below is with the new numbering for respondents as above:-

Introduction

1. The Claimant brings the following claims against the Respondents:

    a. Direct discrimination (Section 13 Equality Act 2010);

    b. Harassment (section 26 Equality Act 2010); and

    c. Victimisation (section 27 Equality Act 2010).

2. The Claimant relies on his race, being a black person of African origin, as being the protected characteristic under Section 9 Equality Act 2010.

THE LEGAL ISSUES

Direct Discrimination

3. Did the Respondents treat the Claimant less favourably than they would have treated an actual or hypothetical comparator who was not black and / or of an African origin as follows:

    a. Denying the Claimant opportunities in his requested role as a Vehicle Examiner in Enforcement and / or desired geographical locations within the M25 – Yeading, Edmonton, Belvedere, Purfleet, Mitcham or South Mimms (HRTI) - from March 2014;

    b. The Third Respondent belittling and mocking the Claimant for his accent and allegedly poor grammar in September 2014 by laughing at him and stating words to the effect that "*you will never become a Vehicle Examiner, your English is terrible*";

    c. The Claimant was only allowed to attend a short bout of training, when not withdrawn from it, ahead of the VET examinations compared with his colleagues, in particular Mr Ballantyne which would not have provided the Claimant with adequate training and preparation;

    d. The Claimant was given other duties to undertake, between November 2014 and January 2015, which prevented him from receiving or undertaking the required on the job training required in preparation for the validation board for the VET role unlike Mr Ballantyne;

    e. The Claimant was only given the option of moving to the centre at Chelmsford in or around July or August 2015 in order to avoid alleged potential redundancy;

    f. The Second Respondent stated in an email in or around July 2016 that there were no available VEE positions available for the Claimant under his management;

    g. The Claimant's level transfer request was not granted in or around October 2016;

    h. The Claimant was overlooked for a VEE position in Mitcham, in favour of Perry Mitchell, a white British colleague in or around October to December 2016. This was allegedly on the grounds of distance from

the Claimant's home, despite the distance travelled by Stephen Middleton and Steve Whawell from their homes to their respective centres within the M25 and Perry Mitchell's travelling distance; and

i. The First Respondent had failed to internally advertise a VEE role in Edmonton in or around December 2016.

4. If so, has the Claimant proved facts from which the Tribunal could fairly and properly conclude, in the absence of any explanation from the Respondents, that this treatment was because of race?
5. Can the Respondents show a non-discriminatory reason for the acts of potential direct discrimination identified?

Harassment

6. Did the Respondent engage in unwanted conduct towards the Claimant by way of the acts described at paragraphs 3.a. to 3.i. above?
7. Was the conduct related to the Claimant's race?
8. Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, offensive or humiliating environment for the Claimant?

Victimisation

9. Whether the Claimant's grievance of 24 October 2016 was a protected act within the meaning of s27(2) EqA?
10. If so, was the Claimant subjected to the following detriments as a result of raising a grievance on 24 October 2016:
    a. The Claimant's level transfer request was not granted in or around October 2016;
    b. In or around November 2016, the Third Respondent stopped the administration staff from ordering the new protective uniform requested by the Claimant;
    c. The Claimant was overlooked for a VEE position in Mitcham, in favour of Perry Mitchell, a white British colleague in or around October to December 2016;
    d. The First Respondent had failed to internally advertise a VEE role in Edmonton in or around December 2016.

Limitation

11. Whether the Claimant's claims as set out above are brought within time for the purposes of s123 EqA, or, if not, whether it is just and equitable for the Tribunal to extent the period during which those claims can be brought.

Vicarious Liability

12. Should the Second and Third Respondents' acts be treated as done by the First Respondent by virtue of their employment with the First Respondent?

Remedy

13. If he is successful in his claims the ET will be required to determine whether the Claimant should receive an award for injury to feelings.

14. Should compensation be increased or decreased to reflect any unreasonable failure to follow the ACAS Code? If so, by how much?

2. The tribunal's task is, as always, to listen to the oral evidence, read documentary evidence, find facts that are relevant to the issues and apply the relevant legal tests. Those legal tests are agreed by the representatives and are set out in the list of issues and the section below on the law.

The hearing

3. On the first day we read the witness statements and essential documents. We then heard from the claimant and two other witnesses on his behalf, Mr Martin and Mr Wakeling, who were colleagues of the claimant. We also heard, on behalf of the DVSA, from Mr Owen who is himself a respondent, Mr Lewis who is also a respondent, Mr Carey who is the HR Business Partner and from Mr Ballantyne who is a Vehicle Examiner. We read a witness statement from Ms Thomas who was the Grievance Officer but no cross examination of her was necessary.

4. We had a considerable number of documents that were contained within three lever arch files. As is common in these cases we did not need to read all those documents, but we read those to which we were referred.

The facts

5. These then are the facts relevant to the issues. Of course, we may well have heard other matters referred to which we consider are not directly relevant.

6. The claimant commenced employment on 16 June 2008 with VOSA which was a predecessor of the DVSA. He started as a Vehicle Inspector at level 3 working at the Edmonton HGV Testing Centre. DVSA is a government department with around 4,600 employees. Its main role is inspecting and testing HGV, PSVs and overseeing MOT Certificates processes for cars.

7. The claimant's entry into VOSA was at Administrative Officer (AO) level and he made several attempts to progress over the next few years to the next level, level 4, Executive Officer (EO) to become a Vehicle Examiner. We heard evidence and accept that staff at all levels are required to be flexible and, where possible, multi-skilled.

8. In February/March 2014 the claimant was successful at promotion board. He was one of four people later made offers. Several others also passed the promotion board so as to appear on the merit list while they wait for an appropriate vacancy.

9. The people on that merit list were successful applicants. The list that we saw appears to be for the larger region and they were placed in order on the list depending on their scores. There were three people above the claimant and the tribunal heard evidence about how that occurred given that his score was the same and the person listed above him. We not need to go into detail about that as the claimant was later made an offer.

10. The tribunal does not know for sure what roles the other three people were offered. It is quite possible that they were placed in Enforcement roles. On the evidence we have heard, it is quite likely that they would also have been required to do some testing.

11. The claimant was offered a role at Edmonton as a Vehicle Examiner, often referred to as VE. It is also sometimes referred to in the documents and by people who had worked there for some time as a "PTO" role. The claimant was appointed to the VE role in September 2014. The job description makes it clear that the VE role can involve both testing and enforcement, but it appears individuals might be asked to concentrate more on one aspect than the other. At the point the claimant was offered this role, he was to concentrate on testing.

12. The evidence before the tribunal and accepted by the claimant was that there was a skills shortage in his area of people who could carry out testing.

13. The claimant's evidence was that he was promised that he could move into enforcement by Mr Lewis (who was his line manager at the time) and Mr Lewis's line manager Mr Owen. Any such promise is denied by Mr Owen and Mr Lewis. The tribunal find that no such promise was made because there was clearly a need for someone to continue to carry out testing. The claimant did tell Mr Lewis that he was keen to move into enforcement.

14. He was encouraged to undertake training for individual vehicle approval (IVA) which was an area where the DVSA needed testers.

15. The claimant believed that there was a higher status for enforcement duties or roles. That is denied by the respondent's witnesses and there is no other evidence to that effect. The claimant agreed that officers at all levels were carrying out testing work from time to time. The claimant told the tribunal that his career choice was to move into enforcement, but the tribunal cannot find there was any particular benefit to enforcement roles

as against testing.

16. Mr Owen was the Area Manager for the area where the claimant was working. His evidence was that, at the busiest time, he was responsible for about 100 people and his area included Testing Centres at Edmonton, Mitcham, Yeading, Purfleet and Belvedere. It did not include, at the time, South Mimms, although Mr Owen later became responsible for a larger area which did include South Mimms.

17. In September 2014 the claimant alleges there was an incident when Mr Lewis was nearby when he was working in one of the lanes where the vehicles were checked. In his witness statement the claimant alleged that Mr Lewis said in front of a customer:

"You'll never be a VE, your English is terrible."

18. That is denied by Mr Lewis. Mr Lewis's evidence, which we accept, is that customers could not be in the lanes and that he did not make that remark. There were no witnesses to that alleged remark (apart from, on the claimant's evidence, a customer).

19. The tribunal find that that remark was not made. We say so for several reasons. First, the claimant's version has changed about what was said. For instance, in the further particulars sent during these proceedings, where that incident was described, there was no mention of Mr Lewis saying that his English was terrible.

20. Secondly, no complaint was made at the time and when the claimant did mention it to Mr Lewis in January 2015 in an email, he did not allege that Mr Lewis had said "*Your English is terrible*". We will come later those emails in January 2015. In any event, the tribunal cannot understand why Mr Lewis would say something about the claimant never being a VE when at that point he had passed the promotion board and was in fact a VE.

21. There was a discussion between the claimant and Mr Lewis around this time about a written report. Suggestions were made by Mr Lewis about the claimant rewording it but that does not appear to be the incident as described by the claimant. The tribunal's view is that the claimant has reinterpreted an earlier discussion as time has passed.

22. On a more general level, the first respondent had begun a process known as Next Generation Testing (NGT) at this time. This was a strategic decision made by the department. Mr Carey described in his witness statement how it was expected that it would lead to different processes for HGV testing. Some testing could be at designated premises and authorised testing facilities. It was believed that it would save customers time and money and give them choice. It could also help with part of the government's intention to reduce state sector premises.

23. Employees in front line roles were informed they had to apply for roles within the new NGT structure. The claimant was interviewed by phone in December 2014 for a *"SVSA Technical Team Leader"* role but he was unsuccessful. In the meantime, because of the need for IVA Testing, the

claimant was undergoing training to be qualified to undertake that part of testing roles. Another employer, Mr Ballantyne, who had worked for the VOSA and DVSA since 1989 as a VE, was also undergoing IVA training.

24. The claimant believes that he had less training than Mr Ballantyne. He believed that Mr Ballantyne had had two weeks training in Norwich and four weeks in Southampton. The tribunal heard from Mr Ballantyne who told us that that was not the case. Mr Ballantyne told the tribunal he had had two weeks training at Avonmouth with the claimant. He also attended Barnsley for a week and some practice shadowing of a week in Southampton, 2 x 2 days in Gillingham and two days in Norwich.

25. Mr Lewis gave evidence, which was largely agreed by the claimant, that the claimant spent various days or parts of days on familiarization in various places (Gillingham, Colchester and Edmonton). There was some documentary evidence to indicate when officers were undergoing training, where this information had been gleaned.

26. On the respondent's calculation the claimant had spent fourteen days and two short days in familiarization whereas Mr Ballantyne had undertaken thirteen days. The claimant did not necessarily accept that he received all training that was suggested in cross examination as he said he was recalled from at least one session. He also did not agree that the time spent at Edmonton was necessarily familiarization. The tribunal finds that there was really very little difference between the level of IVA training for these two officers which cannot be accounted for by the fact that they were both unlikely to receive exactly the same amount of training. In broad terms, these two officers had very similar levels of training with the possibility that the claimant had slightly more than Mr Ballantyne.

27. On 3 December 2014 the claimant was unsuccessfully interviewed for a role in the NGT structure. Again, this was for a testing role.

28. On 23 January 2015 the claimant failed the IVA assessment. The assessor set out why the claimant had failed and advised that he concentrate on certain areas. He was concerned that "*several fundamental engineering principles had to be explained to the claimant.*" He suggested the claimant should refresh awareness of basic motor vehicle engineering and that he read some kit car industry media.

29. After discussion about the claimant having failed the IVA assessment with Mr Lewis, the claimant sent an email on 26 January 2015 to Mr Lewis. It reads as follows:

> *"Hello Brian,*
>
> *Following the meeting I had with you this morning, I feel very uncomfortable with the outcome the meeting and the fact that my technical ability was called in to question. I would like to remind you that before I got a job with VOSA I have had to go through technical assessment exercise and before I passed my Vehicle Examiner board I wrote a technical exam which is a requirement for the position,*

What I can not understand is why you have said to me to read Fundamental of motor vehicle technology book and then you would have to have an assessment before we know how to go further. Is this an HR procedure for staff that have failed sign out? or is this suppose to be set as precedent?

Just like back in September 2014 when we had a meeting following an issue over a VIC customer and during this meeting you told me that my English grammar is not good enough, hence you are considering enrolling me for English Language class for me, despite the fact that I worked in the UK for 14 years and studied in English, I find these type of comments unnecessary, unacceptable, demotivating, humiliating and belittling.

I feel absolute stressed and demotivated at the moment and would be considering my option regarding future IVA training."

30. Within a few hours, Mr Lewis had replied to that email as followings:

"Hi Christian,

I'm sorry to hear that you feel stressed and demotivated following our conversation, that was not my aim. My intention was, as always, to help and assist you in any way that I can. When we discussed the piece of work submitted to me in September we went through the response by you to a customer complaint. I explained at the time that some aspects needed to be rephrased or reworded. I suggested that it may be worthwhile attending a report writing Course and you thought that it was a good idea to attend some form of training on technical report writing."

Later on in that email Mr Lewis says as follows:

"In our conversation this morning you said you were very stressed and that you may not want to carry out IVA in the future. I explained to you that you are the only PTO I have at Edmonton on the testing side and that IVA is a required skill for the position. I am willing to give any help and assistance that you may need to enable you to become proficient, any thoughts you may have that would help to achieve this end will be given serious consideration.

If you do not want to carry out IVA inspections could you please tell me what duties you want to do as a PTO based at Edmonton. As my sole PTO I rely on you to carry out many duties but essentially IVA to meet our customer demands.

Regarding the possible assessment that we spoke of this was to give me an indication of your fundamental knowledge already identified by yourself so that I can tailor any future help to meet any identified needs, this of course will be voluntary by yourself

and not mandatory in any shape or form.

If I have caused you any discomfort in any way then please accept my apology, my aim was with the best of intentions was to help you to achieve the required standard."

31. This led to a couple of further email exchanges and on 29 January the claimant wrote this Mr Lewis:

"Dear Brian,

As I've expressed to you today at the meeting. I am really serious that I completely misunderstood you and hence I sent you an email about the incident on Monday. Following your response to my email, I believe you have a genuine interest in helping me for my personal development as my Line Manager. I am willing to work with you to develop myself in order to be able to fulfil this stage of my career with DVSA. I regret the whole incident and I am very sorry.
Thanks."

32. This claimant told the tribunal that, although he still believed that Mr Lewis had belittled him in September, he wrote this email because he was trying to be civil. As indicated, the tribunal took those emails into account when we decided whether Mr Lewis was likely to have made the remark attributed to him in September 2014 and we have found that he did not (as set out above at paragraph 19).

33. In any event, the claimant did sit what is referred as the NTTA exam and/or the MOT exam at a later point and told us that he passed it easily with 90%. We heard from Mr Wakeling that Mr Lewis had told him that he had made the claimant sit that exam, but it is clear from the evidence before us that the claimant was told that sitting that exam was voluntary.

34. On 24 April 2015 the claimant passed the IVA assessment. On the assessment document the assessor wrote: "*My thanks go to Brian Lewis, Christopher Ballantyne and Laurence William who Christian has told me helped with his development, education and confidence following the first sign off."* The claimant himself also expressed his thanks about Mr Lewis's support in an email to Mr Carey and in an email to Mr Ballantyne and Laurence Williams (which was copied to Mr Lewis) where he referred to "*Brian telling me I can do it."* Again, the tribunal finds that these comments would not have been made by the claimant if he had thought that Mr Lewis had belittled or humiliated him or got in the way of him being trained for IVA testing.

35. On 15 May 2015 the claimant was notified that he might later be put at risk of redundancy. That letter starts:

"We recently advertised NGT posts available at your substantive level. As you were either unsuccessful in your application or you did not apply for any of these posts, unfortunately, this mean you will not have a role when NGT is rolled out in your area and your

current post subsequently ends.

Please be aware that until your area is affected DVSA would like you to continue to work in your current role. We will contact you again about twelve weeks before your role is scheduled to end, at which point your status will change to 'at risk'. This will be explained to you in more detail at this point and what this means to you."

36. That then was the position in May 2015. The claimant attempted again to secure a role in NGT and was unsuccessful. Towards the end of June 2015, Mr Carey gave him feedback on that.

37. On 21 July 2015 Mr Owen was told by someone in HR that the claimant was matched to a role in VE Enforcement at "*either South Mimms or Chelmsford*". Neither of these centres were in Mr Owen's area but the claimant was as he was still at Edmonton.

38. Mr Owen responded that he still needed the claimant for testing duties but indicated that he would not obstruct a transfer. Mr Owen's evidence was that he spoke to Mr Welham who was in the area for Chelmsford and South Mimms. Mr Welham he told him that the claimant would be placed in Chelmsford. There was some confusion in Mr Owen's evidence about this because it appears that Mr Welham was not formally the Area Manager until a little bit later. The tribunal accepts Mr Owen's evidence that he was told this by Mr Welham who was the most senior Technical Manager at the time even if he might not have been formally the Area Manager. That was the information given to Mr Owen by Mr Welham that the post would be at Chelmsford.

39. On the claimant's behalf, Mr Owen also asked what the position would be about London weighting as the claimant would be moving out of the M25 area.

40. On 17 August 2015 Ms Chadwick from HR told Mr Owen that there had been some progress with the job match for the claimant. Ms Chadwick said this:

"Things have moved on after she sent this email. She did speak to Christian on Friday to explain that there was a job match to a VE post in Chelmsford and that whilst he may receive a posting letter to confirm he's no longer At Risk, he will be required to remain in testing until he can be released depending on the NGT rollout. He was very happy with this arrangement. He will retain any London Allowance etc for 2 years on mark time under the MEC Agreement."

41. Mr Owen replied as follows:

"*Can fully support that arrangement. Our hopes are that when we get around to replacing the other 4 PTO posts that Brian currently has, one of these will allow Christian to be released to his Enforcement role."*

42. As we understand the position, the reference there to 4 PTO posts are posts which were vacant but Mr Owen, at that point, was not allowed to fill.

43. There was then a letter sent to the claimant about the Chelmsford post. It indicates that there was a post for him as VE (Enforcement) based at Chelmsford. The Line Manager was said to be Mr Welham and it says this:

> *"We reserve the right to loan you back to Testing as required whilst NGT continues to roll out in the vicinity."*

44. The claimant accepted the VE (Enforcement) role at Chelmsford in a short email. He knew at that point that he would be staying at Edmonton for the time being. He also knew that he might be at risk of redundancy if he did not accept the role offered because of the NGT process. The position was that the claimant was therefore nominally at Chelmsford from around January of 2016 and the cost centre changed to that area for the purposes of expense claims and personal protective equipment. This later caused some problems, one of which we will come to, but for all practical purposes and in reality, the claimant remained at Edmonton on VE level concentrating on testing including IVA. Mr Lewis's evidence was that the claimant told him he did not want to go to Chelmsford although he was also unhappy about remaining on testing.

45. Mr Wakeling gave evidence that, at some point, Mr Lewis made various comments about the claimant to him. In summary, Mr Wakeling says that Mr Lewis said to him that the claimant would struggle with VE duties because of his lack of vehicle knowledge; that he may struggle to make people understand because of his English and the claimant would never be a VE in his area. Mr Lewis denies all these conversations.

46. It was difficult for the tribunal to determine what might have happened where there are no other witnesses and no other evidence. We must decide, on the balance of probabilities, having heard the evidence of both the relevant individuals (Mr Lewis and Mr Wakeling) what is likely to have occurred. We have heard nothing which would indicate that Mr Wakeling has anything to gain by coming to the tribunal and saying that this had been said if indeed it had not ben said. It might be thought that Mr Lewis would seek to protect his position as a manager.

47. The tribunal finds that there may well have been some passing remarks made by Mr Lewis to Mr Wakeling. It is possible that he referred to the claimant's vehicle knowledge and to some problems with report writing because that is consistent with what Mr Lewis said that he had discussed with the claimant after the first failed IVA assessment. It was not suggested by Mr Wakeling that there was any connection between these remarks that might be interpreted as negative and the claimant's race. We also find it difficult to understand why Mr Lewis would have made a comment about the claimant never being a VE in his area given that is exactly what the claimant was. This was not said.

48. In any event, Mr Lewis ceased being the Edmonton station manager around October 2015 and Mr Ballantyne took over. Mr Lewis and Mr Ballantyne were aware that the claimant's substantive post was in

Chelmsford as VE (Enforcement) but there was no evidence that the claimant pressed to go to Chelmsford. He appeared to be content to remain at Edmonton for the time being.

49. On 17 July 2016 the claimant applied for a "Level Transfer". In the application, he said this:

> *"I've been appointed as a Vehicle Examiner based in Chelmsford since August 2015, however, I have not officially assume the position due to Testing operational demands of Area 15 where I'm currently based.*
> *However, since my appointment my circumstances changed as my mother has been diagnosed with XXX and I have been her main Carer since December 2015. I am hereby seeking a transfer from Chelmsford to any of the above location in London in order to be able to support and care for my aged mother".*
>
> The locations specified by the claimant on that document are – *"Within London M25; London HRTI Team; South Mimms HRTI Team; London Enforcement Task Force Team. Anything outside of M25 would not be suitable as I would not be able to cope with my carer duties."*

50. That application was sent to HR and on 21 July 2016 the claimant got this response:

> *"Thank you for your email.*
>
> *Unfortunately the Voluntary Level Transfer List is currently under review and therefore has been suspended for the time being.*

51. Neither Mr Owen nor Mr Lewis had any involvement in this matter which was dealt with by HR. It would appear to the tribunal to be a reasonable step to suspend the transfer list while they had a number of members of staff at risk of redundancy and there were clearly a lot of people moving around at this time. The tribunal accept that the Level Transfer Scheme was suspended and that was the reason that it was not taken forward at that point.

52. The claimant asked the tribunal to consider two other staff members whom he believes have been moved on compassionate grounds. It appears that one person was moved on those grounds in 2014 well before Next Generation Testing was implemented. It was suggested that proposed comparator was white. Another proposed comparator was discovered in documents disclosed for these proceedings. This person is known as "Employee 14" and the document suggests that he could be moved on compassionate grounds. Again, the tribunal has no information about when that request might have been made, whether it was granted at all, and indeed some of the document suggests that it did not actually happen, certainly not immediately. We do not know the race of that member of staff.

53. In August 2016 HR and managers were also trying to assess where "At

Risk" and IVA qualified testers were placed. An email from Mr Evans (Mr Owen's line manager) sets out the different positions of officers including the claimant. It was acknowledged that the claimant still kept the Chelmsford VE post but he was actually still at Edmonton "*due to the workload he has been testing full-time*. *He agreed to be flexible and continue to IVA test until a replacement is in place. In this instance, therefore, no change*".

54. On 1 September 2016, a Mr Wilkinson resigned from a VE (Enforcement) role in Edmonton. The claimant emailed HR stating he was aware that a VE had resigned from Edmonton and requesting a Level Transfer to Edmonton. He mentioned caring responsibilities for his mother but did not say where she lived.

55. On 2 September 2016 the claimant was told by Mr Ballantyne that the VE post was not to be based at Edmonton but would be at Mitcham but he did not know when that decision was made.

56. Mr Owen gave evidence that he had taken the decision to move the VE (Enforcement) role to the South West of his area, namely to Mitcham as there was a need for cover there and he was aware that Edmonton was due to close. He mentioned that in an email in July that the claimant did not see.

57. The claimant was upset by the move of the VE role to Mitcham and he raised it with Mr Carey and with Mr Ballantyne. The claimant was then on sick leave from 5 September 2016. On 7 September 2016 Mr Carey telephoned the claimant. He told us that he explained the business reasons for the VE (Enforcement) role to be in Mitcham but it is quite clear that the claimant continued to be concerned. Adverts for external recruitment for several VE roles including Mitcham were placed by HR on 6 September 2016.

58. Mr Carey told the tribunal that he asked the claimant if he was interested in Mitcham. The claimant raised concerns that he believed things were being done behind his back and that he had been prevented from getting a VE position at Edmonton because of his race. Discussions continued about the post and the claimant's position.

59. During September there were several emails and telephone conversations. As well as discussions between Mr Carey and Mr Owen, they included Mr Evans who was Mr Owen's manager. There was a time when it appeared the claimant might be offered the Mitcham role.

60. On 13 September Mr Owen wrote to Mr Carey as follows:

> *"Christian wanted a London based job to be available for his mother. We therefore suggested he stayed on IVA to remain in London but he declined that offer stating he wanted to be a VE in London - I don't know why being a VE would be better.*
>
> *Now he is saying that he will take the Mitcham based post?? How will this work if he lives, as you said, in Edgeware, North*

> *London. Under MEC he could never get to the area need - SW London nor to a South London ATF within 45 minutes. In fact, he could take as much as 1½ to 2 hours in either direction."*

61. Mr Carey said that he would speak to the claimant about the travel concerns. He also gave his opinion to Mr Owen about what the claimant might have perceived about these various moves.

62. On the morning of 14 September 2016 Mr Evans emailed Mr Owen and Mr Carey about the Mitcham possibility for the claimant:

> "*Bottom line is he can have the Mitcham VE post as he is job matched to it. Now, Graham you need to sit down and explain to him what that means for him. The post is at Mitcham so his working day starts there and I would suggest whilst he is training he needs to be there at 08.00. If he can't get to work on time that's his issue and unfortunately will be managed just like everyone else for not being at work on time.*
>
> *I can understand your concern as I can't see how he's going to do it getting across London but that's his problem to sort after all he may move. What it will need is focus line management, it looks like a risk before he even starts."*

63. Mr Owen replied to that on the same morning. He made some reference first with respect to what he believed had been comments about race discrimination and went on as follows:

> *"If I'm required to give him the Mitcham post I would disagree with your interpretation of the MEC rules - I believe his working day will start 45 minutes into his journey from home towards Mitcham and obviously his home - so I would estimate we will lose 2-3 three hours in travel time.*
>
> *Lastly, I would point out that Christian is the only full-time substantive lvl 4 IVA trained examiner - Chris B goes part-time shortly and Perry Mitchell's a T &G Vi who hasn't applied for NGT.*
>
> *So in reality we may as well keep him on IVA and simply give him a letter stating that as soon as he can be released from IVA he becomes a VE in Redbridge."*

64. Later on 14 September around 6pm, Mr Owen wrote to Mr Carey. He expressed concern about the travelling distance between Edgware (the claimant's home) and Mitcham and said it "*makes no business sense*". He mentioned paying excessive amounts of travel time and he then suggested this:

> *"Have you given any thought to locating him at South Mimms which receives London Weighting and is probably the nearest office to where he lives??"*

65. Mr Owen had also heard that the claimant was raising allegations of race discrimination and he therefore indicated that he was cautious about meeting with him. Mr Owen told us that he shortly went on sick leave and it is clear from the documentation that he was facing serious family and/or health issues at this time. The claimant was still on sick leave in mid-September. The claimant told HR by emails in mid September that he wanted to apply for a Level Transfer to the Mitcham role. Mr Owen and Mr Carey were aware he had asked for this. He did not apply via the external recruitment process.

66. On 5 October 2016 the respondent confirmed to staff with IVA testing skills that they were no longer At Risk. Because Mr Owen had had some concerns about meeting with the claimant or possibly because he was on sick leave another manager, Mr Hesmondhalgh, met the claimant for an informal meeting to discuss the situation. He put in a note later that he had explained the business reasons for the VE (Enforcement) role to go to Mitcham.

67. In the meantime, Perry Mitchell (who had been placed at risk) applied through the external process and was appointed to the Mitcham VE Enforcement post. The letter to Mr Mitchell is dated 3 November 2016 and refers to recent interviews with a start date of 1 December 2016. From the documentation we can see that Perry Mitchell has different addresses at different times, in South Ockendon and in Stanford le Hope. We do not know the distance that he might have had to travel to that Mitcham post.

68. Mr Owen was not aware of where Mr Mitchell lived and was not involved in that external recruitment. He did know where the claimant lived because he had been told that in discussion about his compassionate move request and in discussions about him caring for his mother. He believed at the time that the claimant's mother was in North London. It was put to Mr Owen in cross examination that she lived in South London, but he said, and we accept that was the first that he had been told about that and indeed the tribunal can see no reference to that in any of the documentation before us.

69. The claimant returned from sickness absence on 17 October 2016 and he submitted a grievance on 24 October. It does not appear that that was taken forward directly at that time but was later considered.

70. The grievance is an eight-page document and the claimant raised various concerns. He gave the background to his work with DVSA, stated that Mr Lewis had made several derogatory comments behind his back, that Mr Lewis was hostile and had mentioned his English. The claimant said he had taken the Chelmsford post under duress and complained about moving the VE post from Edmonton to Mitcham. He believed that Mr Lewis was responsible for that and pointed out that Mitcham was two hours each way from where he lived. He raised various concerns about compliance with the staff handbook.

71. On 30 October 2016 the claimant emailed Mr Connell of HR saying that he had decided to put a hold on the grievance until further notice. Around this time the claimant alleges that he asked for PPE equipment (Personal

Protective Equipment) which he did not receive. It does appear that there were some difficulties with this because of the cost centre having changed.

72. The claimant's evidence was that he was told by someone in Admin (that he would not name) that Mr Lewis had told them not to order his PPE equipment. Mr Lewis denies this. It makes no sense to the Employment Tribunal that Mr Lewis would take such a step and the evidence is very weak. Idle gossip is not evidence and we find that no such block was implemented by Mr Lewis.

73. The claimant was encouraged to progress his grievance by HR, if he was still unhappy. He therefore filled in a pro-forma. On 28 November 2016 he started another period of sickness absence. He was notified shortly thereafter that the Edmonton site was to close and that he would be based at South Mimms under the line manager of a different manager, Mr Kumar about which he makes no complaint.

74. He was permanently transferred to South Mimms in early January 2017. He had a grievance interview and returned from sickness absence in March. He also presented his tribunal claim form in March.

75. A grievance meeting was held and, in July 2017, Ms Thomas sent a grievance outcome to the claimant. In large part the claimant's grievance was not upheld. She found no race discrimination, bullying or harassment. She did uphold his grievance in part. She says:

> *"You have not been proactive managed with a focus on continued improvement and individual development."*

76. The claimant appealed that grievance outcome, attended an appeal and he was sent an appeal outcome but not until December 2017.

77. As we understand it, the claimant remains in employment with DVSA at South Mimms as a Vehicle Examiner.

The Law and submissions

78. The applicable legislation is contained within Equality Act 2010. (EQA). The relevant claims are brought under different sections of EQA.

79. Section 13 of EQA defines direct discrimination as less favourable treatment because of a protected characteristic which includes race. Such a complaint necessitates a comparison between the treatment of individuals, one with and one without the protected characteristic relied upon. There must be no material difference between the circumstances relating to the claimant and the comparator (who may be hypothetical) (section 23 EQA). Establishing less favourable treatment alone will not be sufficient. The claimant must show facts from which the tribunal could decide that the less favourable treatment discrimination is on the prohibited grounds.

80. Section 26 EQA provides that (1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Section 26(4) EQA states:

In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

81. In this case, the claimant needs to show that the alleged actions by one or more of the respondents was related to the fact that he is Black of African origin, as well as showing that any such conduct had the purpose of violating his dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The tribunal should assess any conduct by reference to the matters at s26(4) EQA above. The case of *Richmond Pharmacology v Dhaliwal* [2009] IRLR 366 reminds the tribunal that we need to consider each part of the harassment test, namely what the unwanted conduct is, what was its purpose or effect and whether it was related to a protected characteristic.

82. Section 27 EQA provides that (1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

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

83. Here, the claimant needs to show that there were one or more detriments and that one or more of the responsible respondents was motivated by the fact that he had done a protected act (namely the grievance in October 2016). The important question here is, if any of those individuals did know, was that the reason or one of the reasons for taking the decision they took. In essence, was race the effective cause of the conduct complained of (see *O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615)?

84. Section 136 EQA sets out the burden of proof in relation to all the various forms of discrimination asserted here. It is for the claimant to show a *prima facie* case of discrimination on the grounds of his race. If he does, the burden shifts to the respondents to show that the alleged treatment was not on the grounds of race, failing which the tribunal is entitled to

conclude that the treatment was due to the protected characteristic asserted by the claimant. The case of *Madarassy v Nomura* [2007] IRLR 246 reminds us that the claimant needs to show more than a mere difference in race and/or treatment for the burden to shift to the respondents. In considering whether there was such treatment, the tribunal should take into account all the available evidence and not just that provided by the claimant (see *Laing v Manchester City Council* [2006] ICR 1519)

85. Section 123 EQA provides that discrimination claims under the sections above must be brought to a tribunal within three months of the act complained or within such other period as the tribunal thinks just and equitable. If there is *"conduct extending over a period*", the act is treated as being done at the end of that period. If the claims have been made out of time, the tribunal will consider whether it is just and equitable to extend time bearing in mind the guidance in *Robertson v Bexley Community Centre* [2003] IRLR 434. The first respondent does not seek to argue that it is not liable for any discriminatory acts found against the second and third respondents.

86. It is agreed by the representatives that that the law is as set out above. In summary, we have to consider whether the claimant has shown facts from which we could conclude that the discrimination or harassment or victimisation had occurred. If there are such facts, we look to the respondent for an explanation. Where appropriate we might also need to consider guidance contained in Equality and Human Rights Commission: Code of Practice on Employment 2011 which provides examples on good practice and examples.

87. We have written submissions from the representatives. They agreed that the legal tests to be applied are as set out above. In summary, the claimant's representative asked the tribunal to find that there was a "consistent thread of events" from which we could infer race discrimination had taken place. In particular, he reminded us of the move of an enforcement role to Mitcham from Edmonton. The respondents' representative referred us to a number of cases which proved guidance in discrimination cases and a number of them are mentioned above. The submissions were very helpful to the tribunal, particularly when we were deliberating.

Conclusions

88. Our conclusions will now be given by reference to the list of issues. The first question under issue 3 is whether the respondents treated the claimant less favourably than they would have treated an actual or hypothetical comparator who was not Black and/or of African origin in relation to the matters listed between issues 3a-si.

89. Issue 3a - Denying the claimant opportunities in his requested role as a Vehicle Examiner in Enforcement and/or desired geographical locations within the M25 – Yeading, Belvedere, Purfleet, Mitcham or South Mimms from March 2014.

90. The tribunal have found this aspect the most difficult. The claimant was promoted to VE (Vehicle Examiner) in September 2014 and was paid at that grade. He was based at one of his preferred locations of Edmonton and in fact was never moved until a move to South Mimms in early 2017 about which he makes no complaint. The matter which the claimant complains about is that he was not carrying out enforcement work but was rather carrying out testing work.

91. Although he has mentioned actual comparators, he has not been able to identify anyone else who was carrying out enforcement activities at their chosen location when testing skills were required elsewhere. The claimant accepted that there was a skills gap for qualified testers and that he and a number of officers at all grades had to carry out testing work. We have not found that testing was of any lower status to enforcement. With the exception of the Mitcham post which we will come to shortly, the claimant has not shown less favourable treatment because of race in relation to decisions taken by the respondent about his work.

92. The tribunal did have some concerns about the move of the VE role in Enforcement from Edmonton to Mitcham. We can appreciate that the claimant found that hard to understand. Given that he had expressed a desire to take up that post, it might have been particularly hard for him when another person was successful in securing that post through external recruitment.

93. The tribunal take the view that, with respect to that one matter, the claimant has shifted the burden of proof to the respondent under issue 4. We therefore do look to the respondents for such an explanation under issue 5.

94. Having considered the facts very carefully, we are satisfied that the respondents have provided an explanation for that treatment which amounts to a non-discriminatory reason. There were good business reasons to move the enforcement role because of a shortage of VE Officers in enforcement in the Mitcham area. As for the claimant's expressed interest in the Mitcham role, it was appropriate for Mr Owen to consider that travel time would cost the business if the claimant took up that post. It would involve the claimant in considerable travelling and Mr Owen genuinely believed that it would not help the claimant with his caring responsibilities. It was nothing to do with the claimant's race and the claimant cannot therefore succeed in that complaint. Further consideration of this issue appears below in paragraphs 99 and 100.

95. Issue 3b, - Mr Lewis's alleged comment in September 2014. The claimant cannot of course succeed on this issue because we have found as a fact that the comment was not made.

96. Issues 3c and 3d - these are related matters about the level of training and familiarization for IVA testing. Again, the claimant has not satisfied us that there was less training for him than Mr Ballantyne. The claimant has failed to show that other duties got in the way of training.

97. Issue 3e - the claimant was only given the option of moving to Chelmsford

in July 2015 in order to avoid alleged potential redundancy. It is factually correct that the claimant was told he would later be put at risk of redundancy and that was the basis of the Chelmsford offer. However, the tribunal does not accept that is a fact from which we could conclude under issue 4 that the treatment was because of race. There was clear evidence that there was considerable movement by several many officers. There is no shift in the burden of proof under issue 5 with respect to that offer of the Chelmsford post which the claimant accepted understanding, as he did, that he would remain at Edmonton in a testing role, for the time being at least.

98. Issue 3f - Mr Owen stating in an email that there were no available VE positions. It is correct that Mr Owen did state that he had no local VE posts. That was true because he could not recruit, and he knew that he had gaps in South West London. However, the tribunal cannot conclude that treatment was because of race. Even if those facts did indicate some difference in treatment connected to race, partly because as we know Mr Mitchell was eventually successful, as stated earlier and for the same reasons, the tribunal accepts the respondent's explanation for what happened with respect to the Mitcham post. There was no discrimination in that decision.

99. Items 3g, h and i are all to do with the transfer of the VE enforcement role from Edmonton to Mitcham. Issue 3g is that the claimant's Level Transfer request was not granted in October 2016. The first occasion when his level transfer request was not taken forward was in July 2016 when the scheme was suspended. It seems this issue is about the request made in or around 13 September 2016 as set out at paragraph 65. Although the tribunal see nothing which suggests the claimant was told again that there was a suspension to the scheme, we accept that it was suspended over the whole of this period. Decisions taken about the request to move to Mitcham, either by way of level transfer or any other way were reasonable decisions based on the travel time and what Mr Owen believed was the claimant's need to provide care for his mother. Those decisions had no connection to the claimant's race.

100. The claimant was not overlooked in favour of Perry Mitchell as he indicates at issue 3h. Mr Mitchell was successful in being appointed to the Mitcham post because he applied through external recruitment which the claimant did not. Decisions about the claimant and Mr Mitchell were taken by different people. which do not apply to the claimant. Even if the claimant had been able to show that this might have had some connection to his race, we are satisfied by the respondent's explanation that those steps taken with respect to the Mitcham enforcement role were not because of his race.

101. Issue 3i is the failure to advertise internally. As a matter of fact, there was no such internal advertisement. There is no evidence that would lead the tribunal to properly conclude that was because of race in the circumstances. As a matter of fact, the claimant made it clear that he was interested in that post. He did not apply for it through the external route and, having considered all the evidence carefully, we have accepted the respondents' evidence for the decisions made with respect to that post.

Those decisions did not amount to less favourable treatment because of race.

102. In summary, for the direct discrimination complaint, for most of the matters raised, the claimant has not proved facts from which we could fairly conclude that his treatment was because of race. We have looked at the respondents for an explanation with respect to what happened with the move of the VE role in enforcement from Edmonton to Mitcham and who was placed there eventually. That explanation is without discrimination and that complaint fails.

103. Issues 6, 7 and 8 go to the harassment complaint. It is clear from our findings of fact and the conclusions set out above for direct discrimination, that the claimant has not been able to show any unwanted conduct which was related to race. We understand and accept that the claimant was unhappy and perhaps with some justification because of significant changes to how work was to be carried out, but he cannot show that that was related to race.

104. Issues 9 and 10 relate to the victimisation complaint. The claimant's grievance of 24 October 2016 was a protected act. We therefore consider whether he was subjected to the detriments set out in issues 10a to 10d because he brought that grievance.

105. This has been slightly difficult for us to determine because some matters raised as detriments predated the grievance. The Level Transfer request at issue 10a was made for the first time in July 2016 and then repeated later in September and before the protected act. The decision to move the VE post in Enforcement to Mitcham was made well before the grievance. The email discussions about the difficulties of the distances for travel all happened in September. It is possible that the letter appointing Mr Mitchell was after the grievance, but that decision was not made by anyone who was aware of the grievance. The claimant therefore cannot show any connection between the protected act and those matters.

106. Issue 10b concerns the PPE. As our findings of fact make clear, we do not accept that anybody at the first respondent, and certainly not Mr Lewis, tried to block the claimant getting his protective uniform. In any event, we are not even sure that a large part of that postdated the protected act although it may well have straddled it. On the claimant's evidence the allegation about Mr Lewis telling Admin happened before the protected act and cannot therefore be a detriment.

107. Issue 10c concerns the claimant being overlooked for the VE position in Mitcham. On the evidence before us, Mr Mitchell was probably appointed to the post in Mitcham before the grievance of 24 October 2016. As stated in our other findings, the decision was taken on external recruitment and not by anybody who knew that the claimant had put in a grievance.

108. Issue 10d is a related matter of the first respondent failing to internally advertise the VE role in Edmonton. There was no VE role in Edmonton. There was only one such role which was moved to Mitcham and that was advertised in September externally well before the protected act.

109. The claimant has not been able to show anything which postdated the protected act which was causally connected to it. For completeness, he has also not shown any detriments because of that grievance and his claim for victimisation must also fail.

110. Finally, in relation to issue 11, this question arises is whether the claim is in time. It is not strictly necessary for us to decide what part of the claimant's claims were in or out of time as all his claims have failed. We do think that the complaints about the Mitcham post may well have been in time. Given that the claimant has failed to show any discrimination arising from that, we have not considered whether there was conduct extending over a period so as to bring other matters in time. That would be a difficult issue for the claimant given that decisions were taken by different people at different times for different reasons. We heard no evidence on whether it would be just and equitable to extend time.

111. All the claimant's claims must all fail and they are dismissed.

Costs

112. After the employment judge had given oral judgment as outlined above, the respondents' representative made an application for costs. A letter had been sent to the claimant on 2 July 2018 outlining the respondents' concerns about the claimant's prospects of success and alleged unreasonable behavior. The application was limited to consideration of what was alleged to be unreasonable behaviour. In the letter the respondents' representatives drew attention to various aspects. They referred to the claimant threatening to take "unfounded allegations" to the press and to post footage from a spy camera on You Tube. They pointed to the three versions of the particulars of claim and initially there were102 allegations. There were several versions of the list of issues as well as the claimant adding new matters in the witness statement. Despite being directed to narrow the claim to the most recent and serious allegations, it was said that the claimant shifted his position and the allegations exceeded that number. The claimant, who has been legally represented throughout, refused to agree to remove the two individually named respondents after he was told that there were no issues about the first respondent accepting liability.

113. With respect to preparation for the hearing, the respondents' representatives, reminded the claimant that there had been failures to meet case management orders which led to applications for unless orders and delays in receiving documents which led to further delays in preparing the bundle. At the point the letter was written, costs for the respondents, the claimant was told, were over £40,000 which did not include costs for a 10-day hearing. The respondents' representatives offered not to seek a costs order if the claimant withdrew by the following day. In the oral application, the respondents' representative told the tribunal that there were further problems with the claimant failing to agree a chronology and reading list. We were reminded that it is permissible to take the merits of a claim into account when considering whether behavior has been unreasonable.

114. The application was opposed by the claimant for several reasons. First, his representative stated, not all the delays were the claimant's fault as much of the preparation was in the hands of representatives. Secondly, it was not uncommon for claims to be brought with a great number of allegations and it was in the tribunal's interests that they had been reduced and that had been done so that the "core allegations" were within the 10 suggested. Thirdly, the hearing was completed well within the 10 days allocated to it. Fourthly, the individually named respondents would have had to attend as witnesses in any event and the claimant had believed he was targeted by them. Fifthly, some matters only came to light after the claimant's Subject Access Request documents had arrived and it was unfortunate but not unusual for there to be "slippage" in case management. Sixthly, although it was accepted that the claimant's representatives had not responded to the draft chronology and reading list in good time, that did not impact on the case.

115. The relevant rules for this application are between Rule 74-78 Employment Tribunals Rules of Procedure 2013. The tribunal may make a costs order where *"a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part) have been conducted*" (rule 76 (1) a). If the tribunal finds there has been such behavior, they may make a costs order under rule 78 of an amount not exceeding £20,000 or for an amount to be determined by detailed assessment. Rule 84 states that a tribunal may have regard to the paying party's ability to pay when deciding whether to make a costs order and in what amount.

116. The claimant answered some questions about his income and expenditure. He told the tribunal his net salary was around £2000 per month and his rent was £760 per month. He lives with his partner who works but their income goes towards paying various loans. Three children and a grandchild live with the claimant. He has educational expenses for two of his children and pays about £300 per month for car insurance. The family receives around £82 per week in child benefit.

117. The tribunal deliberated. We have formed the view that the claimant (and/or his representatives) have acted unreasonably in the conduct of these proceedings. This was not a strong case and the claimant has not succeeded in any part of the claim. Except for the move of the enforcement post to Mitcham and the claimant not being given that post, other matters raised have not even shifted the burden of proof to the respondents. Other parts of the case were weak, for instance, the claim about the PPE equipment. The tribunal was concerned by the number of respondents who were initially unnecessarily named and the refusal to remove the two remaining individually named respondents. The claimant listed 102 allegations at first and this led to delays because of the need to try to reduce them to a manageable level. The explanation for late compliance with case management orders is poor and led to extra costs for the respondents. Having taken into account the claimant's relatively limited means, the tribunal has decided to make an order for costs. This will only be a contribution to the respondents' costs which must, after this

hearing have exceeded £50,000. In the circumstances, we order that the claimant pay the sum of £2,000 to the respondents as a contribution towards their costs.

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Employment Judge Manley

Date: 31.08.18……

Judgment sent to the parties on

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For the Tribunal office