EMPLOYMENT TRIBUNALS

Claimant:	**Mr A Ramzan**		
Respondent 1:	**Ms R Baumgartner**		
Respondent 2:	**Sir M Sedwill**		
Respondent 3:	**Ms J Nicholson**		
Respondent 4:	**Mr T Dight**		
Respondent 5:	**Mr G Shirley**		
Respondent 6:	**The Home Office**		
Heard at:	**Sheffield**	**On:**	**2 July 2018 (reading day)** **3 to 6 July and 9 to 10 July 2018** **(14 August 2018 hearing to receive submissions and 15 August 2018 in Chambers for deliberations and Reserved Judgment)**
Before:	**Employment Judge Little**		
Members:	**Mr K Smith**		
	Dr P C Langman		

Representation

Claimant:	Mr M Salter of Counsel (instructed by Ironmonger Curtis)
Respondents:	Mr A Serr of Counsel (instructed by Government Legal Department)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:-

1. The complaints of direct race discrimination and indirect discrimination fail and are hereby dismissed.
2. The complaint of victimisation is dismissed on withdrawal.

REASONS

1. **The complaints**

Mr Ramzan presented his claim to the Tribunal on 4 December 2016. He was complaining of race discrimination. At that stage the claimant was represented by a friend. At a preliminary for case management on 4 September 2017 it was clarified that the precise complaints were direct discrimination, indirect discrimination and victimisation.

At a further preliminary hearing for case management conducted on 23 November 2017 the claimant, who was now represented by solicitors and counsel was permitted to amend his claim so as to cover in addition further acts of alleged discrimination said to have occurred after the date that the claim was presented. The claimant, in compliance with an earlier case management order had now provided two schedules which set out the matters of complaint as of the date of presentation with the second schedule setting out the matters of complaint post presentation of the claim.

At some point (it is not entirely clear when) the complaint of victimisation was withdrawn but it seems that this was never formally dismissed. In any event it has not been proceeded with before us.

At a further hearing for case management conducted on 5 February 2018, among other things the claimant was required to produce what was described as a consolidated document combining schedules 1 and 2. Contrary to an order made on that occasion, it appears that this consolidated schedule was never sent to the Tribunal and it does not feature in the pleadings bundle which the parties have put before us. However, on the first live day of hearing (3 July 2018) Mr Salter handed up the consolidated schedule. It was acknowledged that this document had been prepared by the claimant himself. It purports to set out 70 allegations of discrimination. All but two of these are said to be direct race discrimination.

<u>Indirect race discrimination</u>

These are allegations 10 and 12 in the schedule. The claimant's narrative in box 10 appears to quote from an email from Rebecca Corbishley of HR to Mr George Shirley on 18 March 2015 (pages 147 to 148) where she refers to the level at which all the candidates had been assessed but went on to state that this "does not remove the risk of indirect discrimination eg as a result of a flawed process/departure from agreed policy". Allegation 10 goes on to refer to "TCA Opportunities". The allegation at box 12 again appears to be based upon advice which HR may have given to one or other of the respondents.

At the beginning of our hearing the Tribunal asked Mr Salter to clarify what provision criterion or practice the claimant relied upon. We were told that this was set out in further and better particulars of claim which the claimant (at that time representing himself) had filed on 25 July 2017. The PCP is described as

> "(i) The (Home Office) policy of appointing staff to TCA (Temporary Cover Allowance) roles without following due process and
>
> (ii) The (Home Office) policy of giving more weight to examples provided at interview by candidates undertaking a TCA role. "

The particulars go on to describe the policy as putting BAME (Black Asian Minority Ethnic) candidates at a substantial disadvantage because rather than following due process the managers making the appointments (who were white) were disproportionately selecting white members of staff to fill these positions … since more white than BAME employees undertook TCA roles BAME employees were at a disadvantage when providing examples at interview since they could not give examples derived from working as TCAs." The particular disadvantage to the claimant was that he had never been given a TCA role and so could not provide those examples at his interview.

We should add that the allegation at box 12 as expressed by the claimant is hard to recognise as a complaint of indirect discrimination and it appears that the claimant may simply have picked up on an HR comment that managers needed to be trained in respect of indirect discrimination and bias.

We should also add that we have received little evidence in respect of the indirect discrimination complaint. We have not been referred to any statistical evidence showing the number of non BAME Higher Executive Officers who had been given TCA roles as compared with BAME Higher Executive Officers. However, there was on the part of the respondents a general acknowledgement that at the material time individuals tended to be approached for TCA roles rather than an invitation for expressions of interest being issued.

2. The issues

At the beginning of our hearing we asked counsel whether there was an agreed list of issues. There was not. The issues had not been defined at any of the four preliminary hearings for case management that had been conducted in this case although it must be acknowledged that in respect of each of those hearings there would have been quite a lot to occupy the Employment Judge's time.

For our benefit we set out below the issues which we have felt it necessary to consider in the determination of this claim.

<u>Direct race discrimination</u>

2.1. Is the Tribunal precluded from hearing any aspect of the claim which arose prior to 19 August 2016 because it is out of time?

2.2. Alternatively does the alleged conduct prior to that date extend over a period so as to be treated as in time because it is done at the end of that period?

2.3. Alternatively would it be just and equitable to extend time? Employment Judge Eeley gave Judgment at a preliminary hearing on 23 November 2017 to the effect that the earliest alleged discriminatory conduct complained of which was presented to the Tribunal within the primary limitation period was that relating to 19 August 2016 (this is the date when the claimant first saw the "Submission" document from the first respondent to the second respondent the submission being dated 4 December 2015 (page 547A)) and that any earlier alleged acts were prima facie out of time.

2.4. In so far as the Tribunal does have jurisdiction, did all or any of the alleged less favourable treatment occur?

2.5. To the extent that it did, can the claimant show facts from which the Tribunal could decide, in the absence of any other explanation, that that treatment was because of race?

2.6. If so, can the Respondent show on the balance of probability that it's treatment of the Claimant was in no sense whatsoever based on race?

Indirect discrimination

2.7. Did the sixth respondent have a provision criterion or practice of appointing staff to TCA roles without following due process? (The due process would be as shown in the Home Office Recruitment Principles document starting at page 2329 and specifically at 2334 "Advertise all temporary vacancies of at least three months duration using the EOI (expressions of interest) process set out below".

2.8. Did the sixth respondent have a PCP of giving more weight to examples provided at interview by candidates who were undertaking a TCA role?

2.9. If the sixth respondent had one or both PCPs, were they applied to persons with whom the claimant did not share the protected characteristic of race?

2.10. If so, did the PCP put persons with whom the claimant shares the protected characteristic of race at a particular disadvantage when compared to persons with whom the claimant does not share it?

2.11. If so did the PCP put the claimant at that disadvantage?

2.12. If so can the sixth respondent show the PCP or PCPs to be a proportionate means of achieving a legitimate aim?

3. The evidence

The claimant has given evidence but called no other witnesses.

The respondent's evidence has been given by Marrianne Mason (chair-person of interviewing panel); Laura Gregory (second member of the interviewing panel); Rebecca Baumgartner (HR business lead for diversity team – and first respondent); Jane Nicholson (HR director and third respondent); Claire Shacklock (deputy director and decision maker with regard to the remission of the claimant's second grievance) and George Shirley (head of temporary migration and fifth respondent). The Home Office had also served a witness statement from a Maria Leon, director for returns preparation and appeal manager for the second grievance appeal. The Tribunal read Ms Leon's statement but later in the hearing we were told that the Home Office would not be calling her and we were invited to give her statement such weight as we felt appropriate to in those circumstances.

4. Documents

The documents before us have been contained in eight lever arch files running to well over 3000 pages.

5. The Tribunal's findings of fact

Overview

Essentially Mr Ramzan's claim is in two parts. First, he alleges that in 2014 his lack of success in a recruitment campaign for Senior Executive Officers (SEO)

was because of his race. The second aspect of his case is that subsequently when he challenged his lack of success there was a cover up by the Home Office to hide the real reason. During the course of his cross-examination the claimant contended that this involved a conspiracy between nine people including all five individual respondents.

The Tribunal have been required to consider events over a three year period, beginning in July/August 2014 when the recruitment campaign was undertaken and ending in July 2017 when Ms Leon partially upheld the claimant's appeal in respect of his second grievance and remitted the case to a new decision maker, Claire Shacklock.

However, Claire Shacklock's reconsideration of the second grievance (assisted by Dawn Sherrington of the Home Office's Professional Standards Unit) is outside the period of claim which we are considering. At the beginning of the hearing we pointed out to Mr Salter that the claimant's witness statement from paragraphs 242 to 261 purports to deal with matters which are in fact outside the ambit of this claim. Mr Salter acknowledged this and indicated that there was no further application to amend.

Findings

5.1. The claimant describes his ethnicity and nationality as being British Asian.

5.2. The claimant began his employment with the Home Office on 28 October 2002. Initially that was as an Administrative Officer but the claimant was subsequently promoted to be an Executive Officer.

5.3. On 7 November 2005 there was a further promotion, this time to the role of Higher Executive Officer (HEO).

5.4. At the material time the claimant was working within the Temporary Migration section of the Home Office in Sheffield. (UK Visas and Immigration). The employment continues.

5.5. In or about May 2014 the Home Office began a recruitment campaign for two Senior Executive Officers operational lead in temporary migration. The job advert is at pages 2099 to 2100.

5.6. On 14 May 2014 the claimant made an application for one of those posts. His application form is at pages 2729 to 2737.

5.7. The recruitment manager for this campaign was a Phil Boyd. The panel appointed was chaired by Marrianne Mason and the other panel member was Laura Gregory who describes herself as the independent member of the panel.

5.8. We have been taken to various iterations of the Home Office (HR) Policy and Guidance for Recruitment and Selection and an example begins at page 2187. This guidance applies to campaigns advertised prior to 7 April 2014. We have also been taken to a version of this policy which was revised in September 2014 and begins on page 2212. Common themes are that the panel members are to ensure that they have completed various forms of mandatory E-Learning including a course on unconscious bias. The requirement for the panel is that it must consist of a minimum of two and one panel member should be "from outside the unit". If a panel member has a relationship with a candidate they have to

declare that and assess whether it is appropriate for them to remain on the panel. If the relationship is not a close personal one but rather a working relationship which would not affect the panel member's judgment, then it would be acceptable for the panellist to remain. The September 2014 revision provides that in those circumstances a note must be kept by the panel chair of such matters and how they were dealt with. Panels were to agree the timing and format of the interview before the process began. The marking criteria both for the sifting process and assessment at interview involved a rating of 1 to 7 where '1' was not demonstrated (the relevant competency) and '7' was outstanding demonstration.

5.9. The evidence that we have heard from the panel members, Ms Mason and Ms Gregory, was that both had had the appropriate unconscious bias training. However, they were not able to produce documentary evidence to that effect. We were provided with what we considered to be a plausible explanation as to how that electronic document had been lost somewhere in the system.

5.10. We were told that the panel had allocated one hour for each interview on the basis that the interview itself would probably be no more than 45 minutes and the remaining time would be used for the panel members to discuss and moderate their scores for that particular candidate. The panel members acknowledge that they did not keep any written record of how long each of the 10 interviews they conducted actually took. They say that they more or less stuck to their one hour proposed duration and they dispute the hearsay evidence from the claimant to the effect that one candidate (not the claimant) had an interview which lasted for 1 hour 45 minutes.

5.11. Ms Gregory maintains that she was independent in the sense of being from outside the unit because she was from a different operational command within Temporary Migration – that is different to the role that was being recruited for.

5.12. Prior to conducting interviews the panel carried out a sift on the basis of the online applications which had been received. The sift was carried out on the basis that the panel members were unaware of the identity, gender, race etc of the relevant candidate. A score of no less than 24 was required in order that the candidate could be shortlisted for interview. However, the Home Office operated a guaranteed interview scheme for disabled candidates. If such a candidate was at sift stage able to meet the minimum criterion they were to be automatically invited for interview. In this campaign a sift stage score of 24 was required for non-guaranteed interview scheme applicants. At sift the claimant only scored 23. His sift marking sheet is at pages 2661-2666. Nevertheless, the claimant was given a guaranteed interview because he was eligible under the guaranteed interview scheme. We have not been told what the claimant's disability is.

5.13. The competencies which were considered by the panel at interview are contained in the Home Office Competency Framework 2012 – 2017 which is in the bundle beginning at page 2338(36). This document describes competencies as the skills, knowledge and behaviours that

lead to successful performance. There are 10 competencies and for each a description is given of what that competency means in practice with some examples. There is what is described as "a high level summary" in respect of each competency. The evidence we have heard from the interview panel was that in respect of all candidates they interviewed one or other panel member would read out the overriding guidance which started the section dealing with that particular competency. We were told that this was to assist the candidate to focus on the particular competency that he or she would then be required to give examples of in their own work. The Competency Framework, in respect of each competency, then has sections relevant to various levels – Level 6 being Director General and Director; Level 5 being Deputy Director; Level 4 being grades 7 and 6; Level 3 is for HEO and SEO. It follows that the latter would have been the relevant iteration of each of the competencies chosen for assessment at interview.

5.14. The claimant contends that he, and he alone of the 10 candidates interviewed was assessed against the relevant competencies at Level 5 instead of Level 3. He says that that was done on purpose because of his race. Unsurprisingly this is disputed by the panel members. In Ms Mason's witness statement she sets out as an example the overarching guidance that was read, she says, to all candidates in respect of the 'Changing and Improving' competency (see paragraph 18 of her witness statement). They deny that they had ever been trained to assess at Grade 5 (at the material time each of the panel was a Grade 7). In paragraph 18 of Ms Mason's witness statement she purports to set out the overriding guidance as it appears in the competency framework for the competency of Changing and Improving, although it was noted during cross-examination that as set out in the witness statement a particular sentence begins "for leaders" whereas in the competency framework itself the reference is to "at senior levels". The panel approached the competencies on the basis that the SEO vacancies which were to be filled involved managing a large number of staff. It was Ms Gregory's evidence that an SEO would be viewed as a senior member of staff certainly by the people under them and she denied that 'senior levels' meant senior civil servants. The latter would be Deputy Director upwards.

5.15. When this aspect of the interview process was subsequently subjected to an informal review conducted by Andrew Bailey (see pages 13 to 15) he explained that his attention had been drawn to the fact that on a number of marking sheets, including the claimant's, there was a note of whether the candidate was able to show that they demonstrated a performance culture and whether developing a culture of change/innovation was shown. He commented that at first glance that surprised him because on the competency framework those sorts of things featured in the indicators for deputy directors at Grade 5. He therefore raised that issue with Ms Mason who explained to him that what the panel were actually looking for was evidence that a candidate could really show ability to deliver through a team of some size in a fast paced changing environment and that they were able to "bring people with them". Mr Bailey's conclusion in the light of that explanation was that he was satisfied that the panel had not been looking for 'unreasonable evidence'

as he put it. He was also satisfied that the same question had been put to all 11 candidates.

5.16. When subsequently this aspect of the interview process was considered as part of the claimant's first grievance, the decision maker (Mr Carlisle) accepted that during the interview the panel had read out the high level descriptors for each competency to set the scene. He found no fault with that as clearly it was with the intention of assisting the candidates in framing their competency examples appropriately. However he went on to conclude that the written feedback which had been given to the claimant had made reference to indicators which were above the level of role being recruited. He could understand why that had caused some confusion and concern. It was contrary to the guidance to assess candidates against indicators at a different level to those advertised. However he did not believe that that rendered the recruitment campaign flawed or invalid or that the claimant, or any other candidate, was disadvantaged. That was because there was a very high standard for that campaign and so strong high level examples were needed in order to be successful at interview. He had considered feedback sheets from other candidates from which it was evident that they too had been assessed against the same high criteria (see page 134 – part of Mr Carlisle's decision in relation to the claimant's first grievance).

5.17. **The Claimant's Interview – 4 August 2014**

5.18. The claimant's interview took place on 4 August 2014. Both of the interviewing panel completed their own marking sheet for each candidate. Ms Mason's handwritten marking sheet is at pages 2782(226) to 2782(231). The handwritten marking sheet shows the notes that were taken contemporaneously and although the form has columns for "positive evidence" and "negative evidence" there was clearly insufficient space for the handwritten comments to be put into those columns and so they are written across.

5.19. On the marking sheet for the Changing and Improvement capability, roughly in the area where marks are to be recorded Ms Mason has written a 3 followed by a dash and then another figure which appears to be written over as a 4. There is a circle drawn round those two numbers. There is then another score of 4 with a circle around that as well. The claimant contends that the not terribly clear figure after the 3 was originally written as a 7 but the claimant believes as part of the conspiracy against him and indeed to hide that conspiracy that the figure 3 and the dash have been added to make it appear that the choice was between those two scores with Ms Mason ultimately going for the 4.

5.20. The evidence of Ms Mason and Ms Gregory was that following each interview, if time permitted, or otherwise when time did permit, the two panel members would discuss their individual scoring of the candidate with a view to moderating and agreeing a total score. It is for that reason they say that some of the initial scores given are shown to be altered. Unsurprisingly Ms Mason denied the claimant's contention that she had initially marked him for a particular competency at 7 but then reduced that to 4 and endeavoured to cover her tracks in the way the claimant alleges. In the event the agreed total score for Mr Ramzan as recorded

on Ms Mason's handwritten sheets is 19. The claimant has contended that because generally there are much more handwritten notes on his marking sheets than those for other candidates (most of whom scored higher) that that is evidence that he was providing a lot of evidence which should have been reflected in a much higher score. Ms Mason and Ms Gregory dispute that. They say that in respect of candidates who ultimately they considered were not really ready for promotion, more was written down in order to assist that candidate by highlighting areas where they needed to develop.

5.21. The marking sheet completed by Ms Gregory (handwritten form) is at pages 2654 to 2660.

5.22. On the page which is in respect of the second skill or competency, 'Engaging People', the handwritten score given by Ms Gregory appears to be a 4 in a circle. This is in the bottom right hand corner of the document. However below it is another circle which may or may not have once had a figure within it. However, if it did, that figure is no longer legible. Ms Gregory's evidence was that the other circle was simply a doodle. In paragraph 11 of her witness statement Ms Gregory explains that this is a habit of hers. "I tend to doodle when I am listening, be that to candidates or within meetings". The claimant contends that the alleged doodle was in fact a higher score that was originally given but which Ms Gregory then falsely altered in order to mark the claimant down. The doodle/score is on page 2656. On page 2658, which is the marking sheet for competency 4 – 'Setting Direction' - in the top right hand corner is the figure 4. However, in the bottom right hand corner in the place where Ms Gregory had put her score on the competency 2 marking sheet there is an oblong which has been hatched out. Again, the claimant's case is that that was done to hide a higher mark which had been originally given. Again, Ms Gregory says that it was simply a doodle. The same competing arguments apply in relation to a diamond shaped hatched in which appears on page 2655, just above where a mark of 4 has been given. On page 2659 which is the marking sheet for competency 5 – 'Delivering Results' - at the bottom, there is a 3 followed by a dash or oblique and in a circle a less distinct figure which has been overwritten as a 4. It is impossible to determine whether the 4 obliterates a different figure, or whether the 4 has simply been emphasised. As the score given on this sheet at the top right hand corner is 4 that is some support for the latter suggestion. However the claimant again contends that an originally higher score has been altered. Ms Gregory's handwritten marking sheet also shows a total agreed score for the claimant of 19.

5.23. Within volume 7 of the trial bundle there are copies of the marking sheets, handwritten and typed, in respect of all 10 candidates. The handwritten sheets show similar examples of two figures being given, apparently as provisional scores, with a final figure as the actual score. For example, see page 2782 (38). There are also examples of overwriting. For instance, on page 2782 (40) there is a circle with a 5 written in bold ink which may obliterate a different figure or then again may simply be an emphasis to the original figure. A further example of what appear to be two alternative scores, one of which has been more or

less obliterated appears on page 2782 (88). Within a circle it seems there were two figures but now only the 6 is clearly legible and the other figure is possibly a 5. The same applies on page 2782 (90). On page 2782 (91) in the top right hand corner are two circles, on the left is a circle with two overwritten figures which may be 5 and 6 and to the right is another circle where clearly there is a 5 and a 6. On page 2782 (98) the only legible score is a 5 but immediately below that it appears that something has been crossed out, although this is no longer legible, certainly on the not terribly good photocopy we have. On page 2782 (115) there is another example of two alternative scores being given with one pretty much obliterated. On the basis that the legible score is 6 then one might guess that the now illegible number was 5. On page 2782 (164) the visible score is 6 but beneath that is, if not a doodle, a score which is now no longer legible having been scribbled on. Another similar example appears at 2782 (166). At page 2782 (194) the visible score is 7 but below and to the left is a circle which may once have had figures in it but it has been scribbled out or it may be a doodle. 2782 (205) no score at all is legible. Instead there are two circles which possibly had figures in them but both have been obliterated by scribbling.

5.24. Obviously the Tribunal are not handwriting experts. As will be seen, the claimant would become anxious that the Home Office's own team of experts should carry out a forensic examination of the handwritten marking sheets but as will also be seen that was never acceded to. Similar requests have been made during the preliminary hearings in this case. As recently as the preliminary hearing for case management conducted by Employment Judge Smith on 14 May 2014 the claimant renewed his application for leave to call a handwriting expert. The Judge declined that application stating that there was no evidence before him that a handwriting expert could offer any reliable evidence as to the alleged changed numbering on the score sheet. Further there was no evidence before the Judge that the handwriting expert would even be able to provide a reliable report on the issues that caused the claimant concern. There was no agreed joint letter of instruction and no prospective expert had been identified. The trial was close.

5.25. It follows that the observations that we make are based upon our own lay judgment of what the copy, in some cases not very good copy documents appear to show. We have not seen the original handwritten marking sheets, if they still exist.

5.26. On 15 August 2014 the claimant was informed that he had been unsuccessful at interview. As we have noted, his score as agreed and moderated by the two panel members was 19. The pass mark was 24.

5.27. Candidate 1 scored 29; candidate 2 scored 27; candidate 3 scored 26; candidate 4 scored 27; candidate 5 scored 26; candidate 6 scored 28; candidate 7 scored 28; candidate 8 scored 26 and candidate 10 scored 29.

5.28. The evidence we have received from Ms Gregory and Ms Mason is that if their individual scoring differed they would tend to allow the higher mark, although generally they found that they were within one point of each other to begin with. The overall view that Ms Mason took of the

claimant's performance at interview (paragraph 26 of her witness statement) was that whilst Mr Ramzan's responses contained appropriate evidence, when he was probed deeper it was not always possible to ascribe positive results to his actions. Some of his evidence amounted, she said, to little more than a description of current duties and that was unlikely to attract high scores without further thought from the candidate about what actions he or she was taking once given a task to positively affect results.

5.29. On 10 September 2014 Ms Mason conducted a feedback session with the claimant. On page 59 is a document which we initially understood to be Ms Mason's note of the feedback meeting. However, whilst being cross-examined Ms Mason was not sure whether it was her note. We observe that in the bundle the note appears as Annexe I to the review report subsequently prepared by Andrew Bailey. Annexe I is described as 'Note of scoring and feedback, obtained through FOI request'. The record of the feedback on that document is as follows:

> "Presentation and delivery good. Delivered responses with confidence. Knowledgeable on detail and subject matter in respect of functional role. More evidence required of pace, deadlines, challenges and attaining higher level requirements, for example embedding culture of performance, learning, change across wider units. Would benefit from opportunities to undertake TCA (temporary cover allowance) to SEO for larger operational commands".

The claimant, subsequent to that meeting, prepared his own note and that appears at pages 60 to 61. In that note the claimant says that he had had a very good interview and had prepared really well with several mock interviews. He did not agree with the scores he had been given. He suggested that for the various competences he should have been scored at 5 or 6. He disputed Ms Mason's suggestion that 3 was a good score. Ms Mason disputes that the claimant's note is completely accurate. She says that she explained to the claimant what evidence they were looking for under the competences and how the claimant could develop experience to better meet what was expected under the competency framework. She took the view that the claimant was not engaging with the feedback but instead wanted to tell her why she had got the scores wrong. At this point in the witness statement Ms Mason says that she felt that some of Mr Ramzan's answers at interview appeared somewhat scripted and that his ability at the feedback meeting to repeat points made at the interview reinforced that perception.

The Network complaint

5.30. Remaining dissatisfied with the outcome, the claimant approached a Mr Raj Mushtaq of The Network, a Black, Asian and minority ethnic (BAME) group within the Civil Service. Mr Mushtaq sent an email to Mr Philip Boyd on 16 September 2014. Mr Boyd is a deputy director in Temporary Migration and as we have noted, he was the recruitment manager for the campaign in which the claimant had been a candidate. A copy of that email is on page 4 and attached to it is a document setting out the concerns which The Network had with regard to the campaign.

The attachment is at pages 5 to 7. The document begins by stating that The Network wished to bring to Mr Boyd's attention it's grave concern regarding the way the SEO recruitment had been handled in Sheffield. Network members, it was said, had complained about it both with regard to the handling of the campaign and the outcome that had been reached. The document went on to state that it was The Network's view that the recruitment procedures had not been followed thus leaving candidates being treated unfairly "and has led directly to a poor diversity outcome in respect of racially equality". The document then goes on to pose various questions which challenged the independence of the panel and although not named, reference is made to the possible lack of independence of Ms Mason because -"four of the candidates were from her business unit and would have been directly line managed by her – is this not a conflict of interest?"

5.31. The document went on to state that - "The Network members interview" (in other words the claimant's interview) had lasted well over an hour and the written and oral feedback was not a true reflection of what was said at the interview - "this leads the Network to conclude that bias was prevalent in the decision making process". The document went on to suggest that some areas in the feedback, where reference was made to further evidence, were not indicators in the competency framework at SEO level. The key concerns were outlined as - "The Chair of the panel (Ms Mason) has given three people on her own team three of the SEO posts and placed one on the reserve list – this decision has left Network members questioning the fairness of the campaign. How can the outcome of this campaign be seen as being open and fair competition". It was alleged that the recruitment principles set out in the respondent's recruitment policy had not been applied. The document continues - "The Network states that members have been subjected to unfair treatment and would like a full review and audit of the entire recruitment campaign by an independent people (sic) that has the confidence of The Network".

5.32. **Mr Bailey's report**

5.33. In response to this Mr Boyd commissioned what was described as an independent informal review and that was conducted by a Mr Andrew Bailey of the migration policy unit. His report dated 3 October 2014 is at pages 13 to 15 in the bundle. Mr Bailey noted that no formal grievance had been raised and so he said that his work and findings should not be taken as to prejudice any future formal investigation. His summary was that he had found no evidence that the process or the interviews had been conducted unfairly. Nor was there any evidence that the results of the recruitment exercise should be put in any doubt. Having reviewed the interview paperwork, Mr Bailey had been struck by the fact that the majority of the candidates had scored high marks. He was surprised at that but having spoken to Ms Mason he understood that that was because a high standard had been set at the sift stage and therefore a number of very good candidates had made it through to the interview. Having looked at the interview notes for the claimant, Mr Bailey's view was that they were pretty rough and were difficult to interpret. That being said it was acknowledged that the claimant's

overall marking sheet did have more feedback on it than for many of the other candidates.

5.34. He also noted that on a number of the marking sheets, including the claimant's, there was reference to whether the candidates were able to show that they demonstrated a performance culture and a culture of change and innovation. Mr Bailey said that at first glance that surprised him because on the competency framework those sorts of things featured in the indicators for deputy directors. Again, he had raised that issue with Ms Mason and he said that the explanation she had given was that what the panel were actually looking for was evidence that a candidate could really show ability to deliver through a team of some size and scale in a fast paced changing environment and would be able to "bring people with them". Mr Bailey's conclusion in the light of that explanation was that he was satisfied that the panel were not looking for unreasonable evidence. He also accepted Ms Mason's explanation that the same question on that topic had been put to all candidates. He went on to note that ideally the interview paperwork would have shown more detail of the evidence of all candidates. However he did not think that what had been provided was unusual in his experience of recruitment campaigns. He did not believe it gave rise to any evidence of candidates being treated unfairly but it made a review and comparison of candidates retrospectively more difficult.

5.35. Mr Bailey then went on to review the process that had been followed and the issue of potential bias. He noted that the respondent's recruitment and selection guidance stated that a second panel member should come from "outside of the unit" of the recruiting line manager but it did not further define what a 'unit' was. Nevertheless, Mr Bailey understood that Ms Gregory had come from outside the G6 command although within the same G5 unit. He said that in his experience that was not unusual. In an ideal world he suggested that a completely independent panel member might be employed, that is somebody from a different directorate. That would help to show transparency. However, that was purely a suggestion on his part and he did not find that in this case the fact that Ms Gregory came from within the same G5 command as the recruiting line manager was wrong in any way.

5.36. Mr Bailey indicated that both panel members had confirmed to him that they had successfully completed unconscious bias training. He had been struck by the fact that Ms Mason had not appointed one member of her team who had been on TCA for over two years. Whilst that member of staff was a strong performer he had not scored highly enough at interview. Mr Bailey's view was that that clearly showed that Ms Mason had not favoured individuals purely because they had been working for her and doing a good job for her.

5.37. Mr Bailey goes on to record what he was told by the panel members about the claimant's performance at interview. That was that his evidence, whilst well presented, did not always show as much scale, challenge or depth as that from other candidates. Ms Mason had commented to Mr Bailey that the successful candidates tended to draw well on recent experience at TCA SEO level or from high profile work on task forces which then enabled them to show the level of skill, challenge,

depth that the panel were looking for. In terms of the length of the interview, Mr Bailey noted that whilst the complainant Mr Ramzan, said that his interview had lasted for over an hour, Mr Bailey had been told by Ms Mason that all interviews were of a similar length. Mr Bailey's overall conclusion was expressed in these terms:

> *"I have had limited evidence to review – as I noted earlier, a lot of the interview paperwork is light on detail. Notwithstanding that, having considered what was put before me, alongside the discussions I held informally with Marrianne and Laura (Ms Mason and Ms Gregory), I am satisfied that the recruitment process was followed correctly and interviews held fairly and consistently. I therefore find no reason to doubt the outcomes from the panel".*

It is to be noted that Mr Bailey did not interview or otherwise contact the claimant prior to preparing his report. It must also be noted that despite Network's complaint having referred to "a poor diversity outcome in respect of racial equality" and bearing in mind The Network's constituency, Mr Bailey makes no reference to race, bias or discrimination in his report. The references to bias are limited to whether Ms Gregory was truly independent and whether Ms Mason might have favoured those who worked for her.

5.38. On 26 November 2014 Mr Boyd sent an email to Mr Mushtaq and a copy is at pages 9 to 10 in the bundle. Reference is made to a meeting between those two gentlemen in the preceding week. Mr Boyd was of the view that it was acceptable to have one panel member from the unit where the vacancy existed. With regard to the independent panel member, in the circumstances of this case Mr Boyd was satisfied that there had been no breach of the process guidance. Nevertheless, he said that he would recommend that in any future temporary migration recruitment exercises careful consideration should be given to the independent panel member being external to TM. As to the length of the interviews, whilst best practice would be to interview for about 45 minutes, the fact that the interviews had taken longer than that, perhaps an hour, did not suggest that they were conducted inappropriately. However, Mr Boyd would recommend that as a matter of best practice in future interviewing managers should periodically refresh and re-familiarise themselves with the best practice guidance.

5.39. In terms of the level of questioning and whether that had been aimed at a higher level than that for which the candidates were being interviewed, Mr Boyd commented that whilst the indicators at SEO level did not specifically refer to demonstrating and developing a performance culture, the indicators were just that. They were not an exhaustive list of criteria. Because the vacancies were SEO roles in fast paced operational commands Mr Boyd considered that consideration of the ability to deliver through a team of some size or scale would be relevant. In any event it was noted that such questions were put to all candidates and were not just asked of certain individuals.

5.40. Mr Boyd did not therefore consider that the process was flawed or that any candidate had been treated unfairly or disadvantaged. Again, there was no reference to race or racial bias in Mr Boyd's response.

The Claimant's first grievance

5.41. On 3 December 2014 the claimant lodged a grievance. A copy of the grievance notification form is at pages 122 to 129. The claimant contended that the recruitment campaign had been conducted unfairly and procedures had not been followed. The claimant had been treated unfairly compared to others "which has led to being victimised and discriminated". In a lengthy exposition of his key concerns, the claimant raised the issue that all the candidates who had been under Ms Mason's direct line management had been successful by either being appointed or placed on a reserve list. He felt there was a conflict of interest. The claimant also understand that those four individuals had been given temporary cover allowances by Ms Mason without an expression of interest advert going out. Further the claimant contended that the feedback was not a true reflection of what had been said at the interview. The claimant remained of the view that he had been given Grade 5 feedback as well as Grade 6 and 7 feedback. He believed that he had been judged against regional director indicators when he had applied for an SEO position and not a Grade 5 post (SEO is level 3). The Claimant suggested that Mr Bailey had confirmed that there had been Grade 5 feedback – but having analysed what Mr Bailey actually said we find that that is not accurate. The Claimant went on to complain that recruitment principles within the HR recruitment policy had not been applied because some candidates had been given much longer time at the interview than others and there had been a failure to record times of interviews on the marking sheets. The claimant went on:

> *"More alarmingly and incredibly all five of my competency scores have been thoroughly scrubbed and changed by Marrianne Mason (Chair person) on her marking sheet, why? It is clear my marks have been downgraded for some reason. I have been given 4s on four of the competencies and 3 on one which indicate the original marks were higher. If one looks at the scrubbed off marks closely they looked like 6 and 7s. Therefore, my score tallies up to anywhere between 30 to 33 but have been reduced to 19. I have asked for the original marking sheets so these can be passed to the forgery unit to confirm the original scores but this has not been forthcoming".*

The claimant believed that over a third of his marks had been taken off and he pointed out that that was an issue which had not been dealt with by Mr Bailey. The claimant also alleged that undisclosed notes had been taken by Ms Gregory in a notepad which the claimant had observed at the interview.

We should add that the explanation that Ms Gregory subsequently gave about this, and which she has given to us, is that she did have a notebook but only used it to set out the times when the various interviews would take place and then to record the overall agreed scores for each candidate. A copy of the relevant page of that notebook appears at page 111 in the bundle and it does record the various candidates who were interviewed on Tuesday 22 July 2014, Wednesday 23 July 2014, Monday 28 July 2014, on 4 August 2014 and some of the

scores achieved but only for those interviewed on Tuesday and Wednesday.

The claimant observed that to his knowledge no BAME candidate had been successful and it had been over eight weeks since his representative (Network) had asked for confirmation of how many people applied for the post and how many of those were declared BAME staff. Mr Ramzan criticised Mr Bailey for only speaking to "one side" and being happy with Ms Mason's explanation rather than considering whether there was evidence to support that. The claimant noted that Mr Bailey had stated that those candidates who had been on TCA to SEO had secured more points because they had shown greater challenge/depth. The claimant described that as totally discriminative as – "you might as well not bother short listing those who have not been on or are doing TCA."

The claimant felt that because Mr Bailey had identified lessons to be learnt it was astonishing that Mr Boyd had nevertheless concluded that the process was impartial and fair. The claimant suggested that until a proper mechanism was put in place on recruitment selection and a zero tolerance was introduced, then the culture in Sheffield would continue to see individuals like himself being treated less favourably than others. In his conclusion within the grievance the claimant described the case as being complex and a gross misconduct issue which also included discrimination and victimisation. Accordingly, he would like the Professional Standards Unit (PSU) to be appointed to investigate the complaint. It was no coincidence that BAME staff struggled with career progression "faced with these glass ceilings and abuse of HR recruitment policy".

The Verney investigation

5.42. A Mr Jon Verney was appointed to be the investigation manager for this grievance. He interviewed the claimant on 22 January 2015 and the notes of that interview are at pages 36 to 39. The claimant explained that he knew from his own experience that he was doing well in the panel interview because the interviewers were busy writing. He believed that marking comments had been against higher level competences. The claimant referred to the scores that he had been given and said that on Ms Mason's original notes on the bottom right hand corner of every page a mark had been thoroughly scrubbed out. In fact it would subsequently be clarified that this criticism was directed at Ms Gregory's notes, not Ms Mason's. In respect of Skills competency mark the claimant believed that the initial score must have been higher than 3 and so he believed that it had been reduced not increased by one. The claimant reiterated his request that the Professional Standards Unit (PSU) be commissioned to undertake a full investigation.

<u>Ms Mason interviewed by Mr Verney</u>

5.43. On 26 January 2015 Mr Verney interviewed Ms Mason and the notes of that interview are at pages 104 to 105A. Ms Mason explained that the campaign had been to fill two vacancies but it had then been possible to

put other highly performing candidates in a reserve list. Ms Mason was asked whether she had declared a conflict of interest because she knew some of the candidates because they worked for her. She explained that because of the time she had worked in temporary migration it was likely that she had worked with most of the staff. She conceded that people who had been acting up for a couple of years (eg on TCA or SEO roles) would have gone into the interview with higher level examples that they would then need to articulate to be successful. Ms Mason was asked about the allegation that the feedback had been at Grade 5 level. She answered that both she and Ms Gregory had used the overarching paragraph at the top or beginning of each competency cluster to set the scene and explain what was required of individuals at senior levels. In that context 'senior' included SEO.

5.44. Ms Mason was also asked about the "scrubbing out" allegation. Ms Mason said that the marks in question were on Ms Gregory's marking form not hers. Ms Mason suspected that it was related to the practice the panel had applied at all the interviews. They had individually scored the candidate and then if those scores differed or were borderline had given the higher score as the final mark. Ms Mason denied that questions had been asked at Grade 5 level. She felt that the claimant's perception that his scores should have been around '7' did not reflect his performance. She gave as an example that whilst the claimant had referred to managing a multi-million pound contract, he had to show evidence of challenge, managing difficulties and managing efficiency.

5.45. Ms Mason pointed out that one candidate (PT) had not been selected for a post but he had worked directly for Ms Mason on a TCA for a significant period. Ms Mason said that she took the claimant's comments in his grievance which suggested that there had been race discrimination as a personal affront. The claimant did not know Ms Mason and had made assumptions. She described herself as having been married for 25 years to a BAME man and their two daughters identified as black. She was well aware of the challenges that people faced through discrimination and had herself been on the receiving end of direct racism and discrimination for the majority of her life based upon her relationship and values. The suggestion that she discriminated on ethnicity personally upset her.

Ms Gregory interviewed by Mr Verney

5.46. On the same day (26 January 2015) Mr Verney interviewed Ms Gregory and the notes of that interview are at pages 109 to 110. She was notified of the claimant's allegation that marks had been scrubbed out on her score sheet and Ms Gregory confirmed that the marks in question were on her scoring sheet not on Ms Mason's as had been stated on the grievance. She said that those were not marking out of higher scores as the claimant alleged. She acknowledged that on some pages it was clear that there were two scores and in each case she and Ms Mason had agreed on the higher score. They had taken turns as the questioner and there were notes on Ms Gregory's sheet on the competencies where Ms Mason had been asking the questions. She confirmed that the notebook referred to had just listed the people being interviewed. She had brought the notebook in question to the meeting. She said that she

had not written on the notebook during the course of the interview and instead believed that she had placed it on a stack of chairs. Ms Gregory acknowledged that the time of the interview should have been recorded. She said that one hour time slots had been given but that had not been enough time. She believed that it was necessary to draw out the best from each person. As interviews were running over and people were waiting outside the panel had not been able to agree scores during the scheduled 15 minute break. The panel had agreed that it would be Ms Mason who would give the verbal feedback. Ms Mason had also produced the typed summary sheets (a composite of the panel's handwritten sheets) and to assist her in doing that, Ms Gregory had explained to her the positive and negative points from her contemporaneous notes. With regard to the level of questioning, Ms Gregory acknowledged that she and Ms Mason had read to each candidate the overarching paragraph at the top of each relevant competency and that had been done at previous interviews for a different campaign. References to 'senior level' did not mean that the competency was Grade 5.

5.47. In relation to the information which the claimant had given at interview he had not been fundamentally wrong in his answers but when contract management was being discussed the panel had tried to push him on what was challenging but that information wasn't there. Although Ms Gregory had tried to re-phrase the question it appeared that Mr Ramzan had not got the point as he believed that if the contract was of a high monetary value that was enough. However in a case the claimant had referred to, where two suppliers were working together, there was no evidence of complexity. Ms Gregory went on to state that the claimant had not scored the lowest on interview. However, when being cross-examined before us Ms Gregory was obliged to accept that this was wrong and that he had.

The Verney report

5.48. Mr Verney's investigation report was dated 2 February 2015 and is in the bundle at pages 23 to 27. Mr Verney discussed the scrubbing out of scores issue setting out the claimant's allegation and Ms Gregory's explanation that the marks in question were simply her highlighting where scores were among many notes. She had denied scrubbing out a higher mark and lowering the mark.

5.49. He went on to refer to the Grade 5 feedback issue and set out the interview panel's explanation for why the overarching paragraph had been read and the reference to senior levels. He set out the explanation of why the panel had considered the claimant's example of managing a multi-million pound contract to be insufficient, having regard to lack of evidence of difficulty or challenge. The panel had also noted that the claimant had obtained his interview through the guaranteed interview scheme and that his sift score had been lower than any other interview candidate.

5.50. In his conclusions Mr Verney noted that Ms Mason and Ms Gregory rejected the grievance and particularly rejected the claim that there had

been discrimination based upon ethnic origin. He noted that a number of candidates were on TCA and the panel had accepted that examples from TCA roles could give greater weight to a candidate's application. It was acknowledged that a number of staff had been given TCA within temporary migration without the expression of interest process being followed.

5.51. On the conflict of interest point, Mr Verney noted that the policy said that if the relationship was a working relationship then it would be acceptable for the panellist to remain and he took the view that the conflict of interest point had been "closed off" when Ms Mason had been selected by Mr Boyd as a panel member. He noted that it was accepted that start and end times for each interview had not been recorded on the marking sheets. He took the view that candidates should have been interviewed for the same time to show demonstrably equal treatment. He acknowledged that although there were no timings, the interviews for other candidates could have overrun as well.

The grievance before Mr Carlisle – 5 February 2015

5.52. Mr Oliver Carlisle had been appointed as the decision manager in relation to the claimant's grievance and it was to him that Mr Verney's report was sent. A grievance hearing took place on 5 February 2015. The claimant was accompanied by David Levy of The Network. Minutes of the meeting are at pages 117 to 121. Having heard the claimant's case and discussing it with the claimant, Mr Carlisle took time to consider.

5.53. The grievance response or outcome was issued on the following day, 6 February 2015 and a copy is at pages 132 to 136. This document begins with Mr Carlisle indicating that he partially upheld the grievance. He said that it was clear that there were some parts of the recruitment process that were not administered correctly and that colleagues across the business should learn from that. However, he did not believe that those failings had any significant impact on the outcome of the recruitment process and he found no evidence that the claimant was advantaged or disadvantaged any more than any other candidate as a result. He found no evidence that ethnic origin played any part in how the claimant or any of the candidates had been assessed. He found no misconduct case to answer against either of the interviewing panel, but he noted that they and others involved in recruitment in temporary migration generally would want to take on board the lessons learned from that investigation.

5.54. On the specific points, Mr Carlisle did not uphold the allegation that the claimant's performance at interview should have justified much higher scores. He pointed out that scores attributed by the assessors to each competency example were by their very nature subjective. What the individual perceives to be a suitably higher level example may not be considered as such by the assessor. The fact that the claimant believed that the examples he gave warranted higher scores could not be proved either way and it was not the role of the grievance process to adjudicate in such disagreements. It should not be inferred that the positive notes which Ms Mason had raised with the claimant in the feedback session

supported the view that the original scores were wrong. Instead the standard feedback model of offering positive feedback first was being applied so as to offer words of encouragement to a disappointed candidate.

5.55. In respect of the allegation that the handwritten marking sheet scores had been changed to the detriment of the claimant, that allegation was not upheld. Mr Carlisle explained that he had examined the marking sheets referred to and whilst there were various amendments and doodles made he did not believe that to be in any way inappropriate. It was perfectly understandable that during an interview the assessor's opinion of the standard of the example being provided would change and the markings and comments changed likewise. In respect of the claimant's contention that scores had been, as he put it, 'thoroughly scrubbed off' rather than simply crossed out, that could not be proved and having examined Ms Gregory's marking sheets for other candidates it could be seen that her practice of drawing thick and bold style doodles and markings was consistent. Mr Carlisle took the view that there was no more editing on the claimant's marking sheet than there had been on anybody else's. Where it was possible to identify the previous marked score it was evident that those marks had actually been raised. Mr Carlisle had decided that it would not be appropriate to have the marking sheets examined by forgery experts as that would be an inappropriate use of departmental resource and would only be justified where there was sufficient evidence elsewhere in the investigation to suggest that there had been a deliberate attempt to disadvantage the claimant. Mr Carlisle did not believe that to be the case.

5.56. On the issue of interview times not being recorded, this aspect was partially upheld. However, that had applied to all the candidates and so Mr Carlisle did not consider that the claimant had been disadvantaged nor was it indicative of any kind of discrimination. On the issue of whether the duration of various interviews had varied considerably, the absence of times made that more difficult to establish, but he noted that there was a general agreement that interviews had overrun. Again, that was contrary to the recruitment guidance. However, the absence of timings made it impossible to conclude whether or not the claimant had been disadvantaged or for that matter advantaged any more than any of the other candidates. Mr Carlisle felt that overall the quantity of notes taken at each interview and recorded on the sheet suggested that all candidates had been given broadly similar times.

5.57. In relation to the complaint that the claimant had been assessed at Grade 5 or Grade 6, that part of the grievance was partially upheld. We have already explained how Mr Carlisle dealt with this in paragraph 5.13 of these reasons.

5.58. Mr Carlisle summarised his decision (see page 135) in these terms:

> "In summary, I agree with Amjed's assertions that parts of this recruitment campaign were flawed and could have been done better: the recording of information on interview marking sheets (assessor's names, times, scores), the consistency of interview times, the quality and consistency of feedback. But I do not feel

that any of these administrative failings fundamentally altered the outcome of the campaign, neither did they advantage or disadvantage any specific candidates, Amjed included. Recruitment campaigns are long and complex and there is as much pressure on panellists as there is on interviewees. While the guidance exists to ensure best practice and consistency I do not think it would be helpful or proportionate to suggest that small administrative deviations from it would render the outcomes of the overall process invalid.

Furthermore, I can find no evidence that the outcome of Amjed's interview was in any way impacted by ethnic origin. This is a serious allegation and the only evidence put forward to support it is that the successful candidates were all non BAME staff. This may be the case (definitive detail from HR is not available) but even so does not prove that Amjed or any other BAME staff were discriminated against. It is acknowledged that more needs to be done across the Home Office to improve the representation of BAME staff at more senior grades, and work is being done centrally to look at that wider issue, but it should not therefore follow that every BAME candidate that is unsuccessful has been the victim of discrimination. Amjed scored reasonably well in a competitive recruitment campaign against a lot of high calibre candidates with more relevant or high level examples and his failure to secure a post was a result of this rather than any malpractice or discrimination."

The Claimant appeals Mr Carlisle's decision

5.59. On 17 February 2015 the claimant lodged an appeal against the grievance outcome. A copy of the grounds of his appeal appears on page 184 to 186. On the Grade 5 issue the claimant observed that whether or not the other candidates had been assessed against Grade 5 was not his concern because he had not put in a collective grievance but rather a grievance for himself. It would seem that the claimant did not have race discrimination in mind at that time on that point. On the TCA issue the claimant said that it was evidenced that there was a culture in temporary migration of appointing staff without following due process. In terms of the outcome sought, the claimant suggested that malpractice had now been proven as far as Grade 5 assessment was concerned (although of course that is not what Mr Carlisle said – he had only said that it was inappropriate that higher level indicators were referenced as negatives in the written feedback). The claimant considered that the outcome should be that he was now placed on what he described as 'marked time', which we assume means on a reserve list. The claimant reiterated his request that the PSU be commissioned to carry a full independent investigation to decide whether there was a misconduct case to answer. The claimant warned that if a satisfactory conclusion could not be reached he would refer the matter to the Director General, the Permanent Secretary and the Civil Service Commission.

The appeal before Mr Shirley

5.60. Mr George Shirley was appointed as the appeal manager. Mr Shirley is a Grade 5 civil servant and at the material time was head of temporary migration. Mr Shirley received assistance from Rebecca Corbishley who was an HR business partner. On 18 March 2015 Ms Corbishley sent an email to Mr Shirley (147 to 148). Having read the grounds of the claimant's appeal, she commented that the fact that all candidates had been assessed using G5 competencies (which in fact they hadn't) did not remove the risk of indirect discrimination and she said that it was hard to justify using those competencies as they exceeded the requirements for the post. In turn that could have differential impact on BAME candidates if they had had less senior exposure because they had not been given the opportunity to act up on TCA. Ms Corbishley went on to suggest that possible actions were for there to be a PSU investigation into the interview assessment process, and, presumably alternatively, that wider lessons be shared and implemented, perhaps corroboratively with the staff network. She suggested that there was a need to go further than had been indicated in Mr Carlisle's findings. In terms of redress, Ms Corbishley said that the respondent was neither in the position to confirm the candidate met or did not meet the requirement of the post and so posed the question of whether the interviews should be re-done. Referring to the recruitment panel she suggested that they should be contacted because they needed to understand the direction of the case and if it were to go Tribunal they would be the key individuals responsible for defending the process followed and the outcomes arrived at. In paragraph 12 of Mr Shirley's witness statement he seeks to qualify Ms Corbishley's comments on the basis that she had not seen the entirety of Mr Carlisle's report and all she had seen was what was described as the final determination of Mr Carlisle and the claimant's appeal. She had not seen the annexes to the report.

The grievance appeal hearing – 16 March 2015

5.61. The appeal hearing took place on 16 March 2015 and the minutes are at page 142 to 146. The claimant was again accompanied by Mr Levy. The claimant stated that his interview and assessment had been unfair. The claimant said that he had now spoken to a friend who had told him that the friend's wife interview (presumably in the same campaign) was one hour 45 minutes long. The claimant said that he had prepared on the assumption that the interview would be 45 minutes long but said that his had lasted one hour 10 minutes. The claimant raised his concern about Ms Mason interviewing people who included members of her own staff. Mr Shirley said they were in a business where a manager could not get away from interviewing his or her own staff and he did not see it as a conflict of interest but rather just part of the job of a manager. The claimant said that he had no big issue with it.

5.62. On enquiry by Mr Shirley, the claimant confirmed that the investigation by Mr Verney had been carried out correctly and that he had been impartial.

5.63. On the issue of what the claimant described as his scores being manipulated the claimant said that he had asked for the interview sheets to be assessed by forgery colleagues to establish the initial scores but Mr Carlisle had refused that. The claimant said that he had asked a

friend in the forgery department (eg those within the Home Office who check the validity of travel documents, passports etc) if they would be able to check what was under the scrubbed out marks and he said that the friend had confirmed that they would and that they could take a look at it in their own time over their lunch break. Mr Shirley pointed out that at the original grievance hearing the claimant had complained of victimisation and discrimination but Mr Shirley understood that the claimant was now challenging the discrimination less and it was more about being treated unfairly on the basis of the failed procedure. The claimant replied "Yes. I take back the discrimination grounds on ethnicity as this is impossible to prove. The victimisation still stays though" (page 145).

5.64. Mr Shirley said that he would think about the claimant's request that the PSU undertook a new investigation. The meeting concluded with Mr Shirley indicating that he would not give a decision that day because he needed to take detailed advice.

The appeal outcome

5.65. A grievance appeal determination meeting was then arranged for 23 April 2015 and the minutes are at pages 164 to 167. Again, the claimant was accompanied by Mr Levy. Mr Shirley accepted that there had been "process failings". He had considered whether the interviews could be re-run but he concluded that because of the passage of time and what he described as "problems via employment law" he felt that the exercise could not be re-run. Mr Shirley intended to reform the recruitment process including the allocation of TCAs.

5.66. He offered the claimant an opportunity for coaching or mentoring which he, Mr Shirley, offered to provide personally. He went on to suggest mediation in the workplace and that had been offered to Ms Mason and Ms Gregory as well.

5.67. The claimant's response at the meeting was to indicate that he felt let down and disappointed. As he saw it, two people who had committed serious malpractice were getting away with it. He appreciated the offer of support but that did not solve the issue. The claimant said that there had been a failure to understand that he was the one, as he put it, "screwed over". Mr Shirley said that he had not accepted that the claimant should have been successful in the interview but he understood the claimant's frustration.

5.68. Subsequently Mr Shirley prepared a written appeal response and a copy appears at pages 188 to 191. Mr Shirley stated that in so far as there had been administrative flaws in the campaign those were not exclusive to the claimant. He did not conclude that those failings meant that the claimant had been denied an SEO post by malpractice. In those circumstances he had ruled out any consideration of the claimant being promoted to SEO on marked time. He went on to refer to a new policy that he intended to introduce – Recruitment Principles – and he said that that would confirm how in Temporary Migration, TCA and talent opportunities would in future be advertised.

The Claimant seeks the intervention of the Permanent Secretary and Ms Baumgartner becomes involved.

5.69. The claimant then began endeavours to make contact with the Home Office Permanent Secretary Sir Mark Sedwill. On 18 May 2015 the claimant sent an email to a Ben Archibald, Sir Sedwill's private secretary. A copy of that email is on page 202. The claimant explained to Mr Archibald that he wished to bring to the Under Secretary's attention *'a sensitive confidential matter which has resulted in a massive injustice relating to BAME staff in terms of progression within the department. I am active member for BAME staff in HO'*.

5.70. The claimant's email was referred to Ms Rebecca Baumgartner. She is a Grade 6 civil servant within the Home Office human resources function and at the material time was the business lead for the diversity team. The matter was delegated to her following earlier delegation to Mr Ken Sutton, Head of Diversity and Ms Baumgartner's line manager. Ms Baumgartner made contact with the claimant and on 22 May 2015 the claimant sent her an email (page 228). He attached various documents which he described as "*the reports and other useful emails linked to my grievance*". He requested that he be given the opportunity to meet Sir Mark Sedwill or other senior civil servants "*so that confidence can be restored for not just myself but rest (sic) of the BAME staff in Sheffield*". The claimant went on "*What has happened here has been a grave miscarriage of justice. What further concerns me is the knock on effect and impact this will have on BAME staff in Sheffield especially in terms of future staff surveys etc*". He concluded by saying that he had a full bundle of documents which he would bring with him to a meeting.

5.71. Steps were taken to arrange a meeting but this could not occur until 29 July 2015. In part the delay was because the claimant had been away for a month for Ramadan. Ms Baumgartner's evidence (paragraph 7 of her witness statement) is that prior to this meeting although she had received a volume of material from the claimant she had not read into the full background of the case. She said that her priority was to meet the claimant so that she could hear about his issues from him directly. At the meeting in addition to the claimant and Ms Baumgartner was a Tony Dight. At the material time Mr Dight was the senior human resources business partner at the Home Office. Mr Dight is of course the fourth respondent to this claim, however we have not heard any evidence from him – he had not prepared a witness statement. For that matter the same applies to Sir Mark Sedwill who is the second respondent. We have not seen any minutes or notes of this meeting but it seems that following this meeting Ms Baumgartner drafted an email which, eventually, would be sent to Mr Shirley. The draft is at page 344 and the email that was actually sent is at page 350. We should add that the latter, dated 4 August 2015 erroneously gives the impression that that was the date that Ms Baumgartner and Mr Dight and the claimant met. In the draft (and final) email Ms Baumgartner notes that the claimant had accepted that some of what were described as the claimant's suggestions had been implemented including new processes being in place and a recommendation that all recruitment panels should try to have a BAME member of staff on them. We should add that in fact

those were Mr Shirley's reforms albeit the claimant's grievance was part of the catalyst for that. Ms Baumgartner went on to record (as in fact Mr Shirley would only be too aware) that the claimant was still unsatisfied with the process and his main concern was that one of the interviewers manipulated the scores he was given deliberately to disadvantage him. Ms Baumgartner went on to write as follows:

> "It is clearly a complex case where there has been an admission of administrative failure. As a department there are ceilings beyond which it is difficult for BAME staff to progress".

She went on to state that the diversity team were working to understand the barriers to progression and how unconscious bias could be reduced within the recruitment process. In the draft version of the email Ms Baumgartner was suggesting to Mr Shirley that he should commission what was described as an independent investigation, specifically to look at the issue of whether there was any prejudice within the process.

In the version of the email that was actually sent Ms Baumgartner wrote as follows:

> "As the request to address Jed's letters came from the Permanent Secretary I am going to have to respond to him. It would be really helpful if I could say that we have addressed all of Jed's concerns and to this end I would like to suggest you commission an independent investigation …"

That paragraph continues as does the draft to which we have just referred – 'I would like to suggest that you commission……' Ms Baumgartner goes on to state that the claimant had agreed that if an independent review was held he would accept the outcome of the review whatever that might be. In the actual email to Mr Shirley Ms Baumgartner concludes by enquiring whether an independent review is something which Mr Shirley would feel able to commission. If not she invited him to provide her with his reasoning so that she could put that in her note to the permanent secretary.

5.72. On 4 August 2015 Mr Shirley responded to Ms Baumgartner's email which he had received earlier that day. He said he was happy to discuss the matter over the telephone. He went on to write:

> "I think I'd like to discuss the informal review/independent investigation element of the email below – because we have already undertaken both an informal review undertaken by someone outside of TM and a formal investigation undertaken by an independent investigator as part of the grievance process".

5.73. Ms Baumgartner's evidence is that shortly *before* receiving that email she had sent an email to the claimant and a copy appears at page 349. In it she said "*As we discussed I am planning to recommend an investigation, so at this point I don't think I need further information*. Ms Baumgartner's evidence to us was that she made that statement "before hearing from Mr Shirley. We note that Ms Baumgartner's email to the claimant is timed at 11.30am whereas Mr Shirley's email to Ms Baumgartner is timed at 12.49.

Respondent considers whether the PSU should be involved.

5.74. After a period of leave, on 2 October 2015 Ms Baumgartner made contact with a Mark Hartley-King of the PSU (see page 372). She informed Mr Hartley-King that she had been asked by a member of staff if an investigation could be conducted because the member of staff believed that scores on an interview panel were altered to reflect lower scores. She enquired whether the PSU would be able to do a forensic type of examination of the documents which would be able to identify what was originally written on a document '*which has now been scribbled out.*' She acknowledged that this was an unusual request.

5.75. Mr Hartley-King replied on the same day (page 372) and said that he was not sure that he could justify an actual forensic analysis but he would be willing to put a trained officer on it to independently examine the papers and report back.

5.76. On the same day Ms Baumgartner wrote to Mr Shirley and forwarded to him the response from Mr Hartley-King (see page 371). She wrote:

> "I think we should as a minimum have an examination of the papers. Please can you let me know who the contact is to arrange for the original papers from the recruitment campaign to go to PSU."

5.77. Mr Shirley replied to this email on 5 October 2015 (also page 371). He said he would definitely like to discuss the matter and went on -

5.78. "As I have said before we have already formally investigated this case as part of the grievance process, so I'm not sure why we are progressing in this way – we have already followed process in this case and reached a conclusion following an investigation. I'm not sure what further is to be gained, and I have not agreed to a re-investigation."

5.79. He went on to remind Ms Baumgartner that he had instigated work to improve the recruitment practices in temporary migration including introduction of the recruitment principles document. Noting that the PSU had said that *any* independent officer (as opposed to a PSU officer) could do an investigation, he concluded that that was what had happened when the grievance manager (Mr Carlisle) had commissioned an independent trained investigator (Mr Verney). He also mentioned that the claimant had not responded to his offers of mediation and support and he suggested that that should be the focus of a response.

5.80. Ms Baumgartner responded to Mr Shirley's email later that day and a copy is on page 377. She wrote:

> "I think there is still doubt about whether Jed's scores were altered in a way which others weren't – I expect you know the answer to this if you have access to the paperwork. Either there is a case to be considered on this specific point or there isn't but I can't see the harm in asking the question. Was this question answered in the grievance and if so perhaps you can provide me that answer. "

5.81. Mr Dight (who had been copied into this email trail) sent his own email to Ms Baumgartner and Mr Shirley on 6 October 2015 (page 376). He said "*You could go either way on this one and my own mind has changed a*

few times. That said, I do have some reservations about the merits of a further investigation on this but would not rule it out if that was the decision going forward. I would need to be convinced about the merits of a further investigation."

5.82. He went on to note that the recruitment had not been handled in line with HO policy but all candidates had been treated in the same way. There was not going to be an unpicking of the results at that stage because the candidates had been substantively promoted. Mr Shirley had put in a range of measures to mitigate the same sort of thing happening in the future and offers of support had been made to the claimant. The two line managers in the recruitment exercise had been told about the standards expected of them in the future. In those circumstances Mr Dight posed the question "*So what is another investigation going to yield*?".

He went on to write that if the issue was about honesty and integrity and the individual believed that interview markings had been changed to fit the panel outcome then that would be something different, but Mr Dight did not know how that could be proven unless PSU could do it forensically. He went on to state that if the PSU could forensically tell if it was true that any changed scores were not revised down then it might be worth a look "as this would go to the heart of the behaviours and conduct that we expect of our managers. But if not?"

The Claimant contacts the PSU

5.83. On 27 October 2015 the claimant sent an email to the PSU (pages 404 to 405). He said that he was bringing a serious matter to their attention. He went on to write (inaccurately) that it had been *"acknowledged BAME was assessed (sic) at Grade 5 for the SEO position. It is alleged that scores were manipulated by senior managers to suit their own interests, which were contrary to civil service behaviours and employment law."*

5.84. He went on to write that HR had recommended referral to the PSU over six months earlier and that was "reiterated by a panel of Grade 6s". However, he said senior management were now delaying referral due to what the claimant described as potential ramifications to senior managers. He made reference to HR having confirmed the risk of indirect discrimination. The claimant went on to say that he was more or less led to believe that there had already been a referral to PSU because of what Ms Baumgartner had indicated to him. The claimant now felt that the referral was being avoided and that this could lead to evidence being destroyed. The claimant went on to say that he suspected that a cover up was taking place and so in the interests of the Civil Service Code of Conduct and Behaviours it was imperative that an independent investigation by PSU took place "for the wrong doings that have gone on".

5.85. Mr Steve Tucker, head of investigations corporate security (PSU) replied to the claimant the following day (page 404). He said that he had spoken to Ms Baumgartner and understood that she was about to write to the claimant regarding the matter. Mr Tucker explained that the PSU needed to be commissioned to undertake an investigation and the process would start with the submission of an HIN01 form. As we understand it, what Mr Tucker was explaining was that an individual

could not request the involvement of the PSU.It had to be by a suitable level of management.

5.86. The communication from Ms Baumgartner which Mr Tucker had referred to was her email to the claimant of 29 October 2015. This was copied to Mr Dight and Mr Shirley. A copy is at page 418. Ms Baumgartner apologised for the delay and said that she had now reviewed the documents fully. She wrote:

> "In going through the material I note that the key issue around the interview scoring sheet markings was fully considered as part of an investigation and that the subsequent findings in the appeal hearing were as follows:
>
> - The allegation that scores on the handwritten interview marking sheets had been changed to your detriment – not upheld.
> - The investigation finding was that there was no more editing on your marking sheet than anyone else's.
>
> In view of the above, and after reading all the relevant documentation I do not feel it would be appropriate to pursue another investigation on this matter when the issue has already been carefully and independently (we assume the missing word is 'investigated'). Before coming to this decision I did contact PSU about the possibility of a further investigation but in light of the fact that this issue has already been reviewed, a fact I was not aware of at the time we met *(that is 29 July 2015*) I do not now feel it would be appropriate to launch a further investigation into the same issue".

5.87. On 30 October 2015 the claimant, perhaps misunderstanding the advice that he had received from Mr Tucker, proceeded to try to submit a HIN01 form to the PSU. A copy of that is at pages 444 to 447. The claimant described the persons under investigation as Ms Mason and Ms Gregory. Among other things the claimant stated that HR and subsequent reviews had recommended that the PSU conduct an investigation and there were signs of a cover up and preferential treatment given to non BAME applicants.

5.88. In the early part of November 2015, a petition was prepared and the claimant was the first signatory. A copy of that petition is at pages 496 to 499. It begins:

> "As BAME members of staff we are aware BAME staff have been assessed 3 to 4 levels above the required competency criteria during a recruitment exercise.
>
> Therefore, we urge the department to conduct an independent investigation (Professional Standards Unit) to restore BAME confidence."

As all other signatories to the petition have been redacted it is difficult to analyse how many signatures there were. We note that in paragraph 152 of the claimant's witness statement he says that the petition

comprised up to 50 BAME staff. The petition was sent to Sir Mark Sedwill.

The Submission to the Permanent Secretary – December 2015

5.89. As Ms Baumgartner had indicated in her correspondence with Mr Shirley and Mr Dight there was a need to respond to the permanent secretary about the matter which the claimant had brought to his attention. To this end a submission was drafted and ultimately Ms Baumgartner was responsible for this document. On 4 December 2015 it was sent to the Permanent Under Secretary (PS). A copy of that Submission is at pages 547A to 549A. This was a document which would lead to a further dimension to this case being added because the claimant raised a further grievance and ultimately this matter (the Submission) was the subject of a PSU investigation – albeit that this investigation post dates the period which it is agreed this Tribunal is dealing with.

5.90. Ms Baumgartner explained to us that the purpose of the Submission was to give the permanent secretary options for responding to the claimant's email of 9 November 2015, which had attached to it the petition referred to above. She explained that in the Civil Service a Submission is a formal document and it must usually be approved by a senior Civil Servant before it can be sent. Although the submission was prepared with the assistance of others, Ms Baumgartner accepts primary responsibility for its contents.

5.91. In the Submission (pages 547A to 549A) and which is addressed to the PS, Ms Baumgartner reminds the PS that the claimant had written to him in May 2015 and then again subsequently, with the petition. The submission goes on to say that the case had already been thoroughly investigated and the claimant's grievance had been partially upheld because elements of the process had not been followed, although this was the same for all candidates. Reference was made to the meeting of 29 July 2015 between Mr Dight, Ms Baumgartner and the claimant. She said that at the time of that meeting Mr Dight and herself were unaware that there had been what is described as a 'formal investigation' already. The submission goes on to say that discussions with the Professional Standards Unit had concluded that nothing would be served by another investigation "as PSU confirmed that it would not be possible for them to conduct a forensic investigation to show in what way scores had been changed". The submission went on to provide a summary to the effect that it was acknowledged that elements of the recruitment were not handled in line with policy but all candidates had been treated consistently; it was now too late to re-run the exercise; Mr Shirley had put measures in place to try to avoid such problems occurring in the future – the new recruitment policy; offers had been made to support the claimant and the two line managers who had conducted the interviews had been told about the standards expected of them in the future. Ms Baumgartner expressed the view that the claimant's belief that his markings had been dishonestly changed could not be proven without a forensic investigation and the latter was not viable. The submission concluded as follows:

> "It is unfortunate that Amjed has had difficulty accepting the findings of the investigation and the offers made to him but this being the situation I do not feel that any further consideration will provide him with any more satisfaction".

As next steps Ms Baumgartner suggested that the PS should write to the claimant as per a letter which had been drafted by her and which appeared as annexe C to the submission.

5.92. In the grievance which the claimant would subsequently raise about, among other things, this submission (that was his grievance dated 14 November 2016 page 1138 to 1143) the claimant would contend that the Permanent Secretary had been given misleading and false/inaccurate information in order to obtain his approval for the case not to be sent to the PSU for investigation. (see page 1141).

5.93. As analysed by a Mrs Shacklock (who in a period which is beyond the ambit of this claim had the second grievance remitted to her) the claimant would complain that he did not understand why the submission made reference to the possibility of the interview process being re-run. Further he complained that the reference in paragraph 8 of the submission to a forensic examination not being viable was misleading and untrue. He referred to the offer he had apparently received from the Sheffield forgery unit that they could carry out an examination. It transpired that Mrs Shacklock made her own enquiries about this with the PSU who told her that an internal forgery unit would not have the skills or equipment to carry out a forensic examination to the standard required. In those circumstances Mrs Shacklock considered that Ms Baumgartner's reference to a forensic investigation not being viable was not misleading or untrue because to go to an external provider would not be proportionate or therefore viable.

5.94. In the event the only aspect of the claimant's second grievance concerning the submission that was upheld (in the period beyond that which we are considering) was that a quote set out in annexe C (the proposed draft letter to the claimant) was attributed to "a trained investigator". In context that suggested that it was a quote from Mr Verney. However, in fact it was a quote from Mr Carlisle who was the decision maker. It is to be noted that annexe A to the submission was Mr Carlisle's decision and so would contain the passage wrongly attributed by Ms Baumgartner to Mr Verney. It was only this aspect of the claimant's remitted second grievance that Mrs Shacklock would ultimately uphold. She did not find any other elements of the submission to be misleading and the submission had not led to the claimant being treated unfairly (see her decision at page 2027).

Mrs Nicholson becomes involved – December 2015

5.95. On 14 December 2015 Ms Baumgartner sent an email to the claimant (page 644). She said that Jane Nicholson would like to meet the claimant and Mr Rafique the chair of the Network "*so that we can create an action plan to move forward and draw a line under this matter*." Mrs Nicholson was at the material time an HR director – Grade 5. She is, of course, an individual respondent to this Claim.

5.96. The meeting took place on 8 January 2016. It was treated as an informal meeting and so no notes or minutes were taken. Ms Nicholson's evidence to us was that at this meeting the claimant told her that it was the first time that anyone from HR had actually spoken to him. She goes on to note that it was clear to her from the conversation that the claimant was never going to be satisfied until there had been an investigation or review into his own case. She told the claimant that she was not stepping in to investigate his case but made it clear that she was interested in what she describes to us as the wider allegations about the Sheffield office. The claimant repeated his request that there should be a PSU investigation. Writing to a Marian Asomaning of HR (whose precise role in this matter we are unsure of) on 8 January 2016 (page 776 to 777) the claimant described the meeting he had had that day with Ms Nicholson and Mr Rafique as being *'positive/constructive'*. He went on to say that he had '*supplied some damning evidence'*. The claimant went on to write in this email that the PSU were aware of the case and had given a clear indication that they were willing to undertake an investigation but that one person (we believe the claimant is referring to Mr Shirley) was resisting that "due to the malpractice, corruption that has taken place".

5.97. Ms Nicholson's evidence to us was that following her meeting with the claimant she was concerned about the wider allegations that were being raised about the Sheffield office including the claimant's case. Her inclination was to refer the matter to the PSU for an investigation or review. Her evidence in cross examination was that she did not at this time (8 January 2016) appreciate the difference between a PSU investigation and a PSU review.

5.98. She sought comments from others and Ms Baumgartner responded on 11 January 2016 (page 774) saying that referral to the PSU would be fine and Ms Nicholson could do that. Ms Baumgartner went on to say to Ms Nicholson that she had not been in a position to commission an investigation but it would have been her preferred option.

5.99. Also on 8 January 2016, a letter was written by Julie Taylor (Director General People and Transformation) to the claimant (see pages 762A to 762B). It appears that this letter was based upon the Submission to the PS which Ms Baumgartner had made in December 2015. On the issue of involvement of the Professional Standards Unit her letter noted that subsequently it had become clear that a full and thorough formal investigation by a trained investigator had already been conducted so further investigation by the Professional Standards Unit would repeat and cover the same ground. The letter went on to say that the diversity team (we assume this meant Ms Baumgartner) had subsequently confirmed with PSU that the type of forensic investigation the claimant sought '*was not something they themselves would take forward*'. As this letter was received by the claimant shortly after his meeting with Ms Nicholson and Mr Rafique, some confusion was caused in the claimant's mind and this led him to write back to Ms Taylor on 11 January 2016 (page 766) when he commented that it looked as though he had already pre-judged the issue of referring the case to the PSU despite what had been said by Ms Nicholson at the 8 January meeting.

5.100. On 27 January 2016 Mr Rafique wrote to Ms Nicholson reflecting on the 8 January meeting. (See pages 783 to 784). He described the claimant's case as "*just the tip of the iceberg for BAME staff in the region".* He went on to state that The Network genuinely believed that only a PSU investigation would give the claimant the closure he sought and give the local BAME staff the confidence "*that poor behaviour will be addressed and change will occur going forward. Why are we afraid of an independent investigation free of management bias/interference if supposedly malpractice did not occur in this campaign*?" The letter continued *"The Network has some wider concerns around recruitment practices in the Home Office which in our opinion is leading to a culture of inequality being embedded*".

5.101. Although we have noted at the material time Mrs Nicholson did not realise the distinction between a PSU investigation and a PSU review, Ms Nicholson in paragraph 11 of her witness statement explains that an investigation looks into the misconduct of specific persons and would usually be reserved for very serious allegations of misconduct. On the other hand, a review could be more general looking at a subject topic or scenario. She goes on to say that there was enough "noise" from the claimant and the Network to suggest that she needed to look into what was going on.

5.102. On 2 February 2016 the claimant sent an email to Ms Nicholson (801 to 802). The claimant stated that all he had wanted was for PSU to investigate and he had the upmost confidence in the PSU. The claimant offered some advice to Ms Nicholson as to what forms needed to be filled in for a referral to the PSU.

5.103. On 3 February 2016 Ms Nicholson had a meeting with Mr Steve Tucker head of investigations at the PSU. Mr Tucker wrote to Ms Nicholson on the same day to summarise what had been discussed (see pages 825 to 826). He noted that the Network had raised concern about an underlying culture of discrimination within the Sheffield office. He noted that those concerns had originated with the ongoing dissatisfaction of the claimant. The email goes on as follows:

> "You have examined the paperwork attached to that particular case and have concerns about the marking".

We have not heard from Mr Tucker and when this was put to Ms Nicholson in cross-examination she said that that is not what she had told Mr Tucker and he was wrong. Mr Tucker went on to note that Ms Nicholson was going to have a discussion with a Mr Mike Wells, the Chief Operating Officer for UKVI to discuss the possibility of commissioning the PSU to undertake a management review of the processes and procedures used, whether staff had completed the compulsory unconscious bias training, what the results of recruitment campaigns had been over say the previous 12 months and other procedural matters "and in the process, review the paperwork for Mr Amjed (sic) case".

5.104. On 4 February 2016 Ms Nicholson sent an email to Ms Baumgartner (page 809) in which she enquired whether the claimant's case was "on the risk register". She went on to say that she thought that there was a

real risk that *"if we don't resolve his case then he may make this public*". When being cross-examined in respect of this email Ms Nicholson said that the register contained '*risks that we needed to be aware of in the Home Office'*. 'Risk' included publicity.

The Terms of Reference for a PSU Review – February 2016

5.105. By 10 February 2016 discussions were taking place as to what the terms of reference should be for a PSU review. On that date an email was written by Victoria Smith, HR director to Ms Nicholson and Mr Tucker. Ms Baumgartner and Mr Dight were copied into that. A copy appears at pages 834 to 835. It includes the following passage:

> "We obviously need to be very careful about how we land this with Ian (Martin) director ICM and George (Shirley) first and then with the rest of the Sheffield team. It would be helpful if they could be persuaded to think of this as their idea and seek to involve as many people as possible so that the enquiry is seen as transparent and inclusive. From speaking to members of the Network I think some individuals will need to honestly consider their impartiality and the level of emotional attachment we expect from hiring managers …. How we do that sensitively and constructively will be one of the challenges coming out of this process".

5.106. In an email of 14 February 2016 (page 840) Ms Baumgartner writing to Mr Dight observed that Ms Nicholson had thought that "if we could persuade the business to commission this (the PSU review) then it could be a very positive thing for them to say that they had led rather than it seeming to come from outside".

5.107. A Denise Fox, the PCS branch chair for South Yorkshire was brought into the discussion and on 22 February 2016 she wrote to Ms Nicholson (page 857). She enquired whether the investigation would include the terms of reference that the claimant had outlined in the HINO1 form that he had completed himself. She enquired whether any wrongdoings that came to light would be 'accountable' and would there be an assurance that the claimant would not be victimised now or in the future? Ms Nicholson replied to this email on the same date (also page 857) in which she pointed out that it was a review that was going to be conducted not an investigation. The aim of the review was to look at how the department could learn and improve. She acknowledged that the claimant should not be bullied or victimised for raising the case and went on "*this is one of the reasons that I want to take a wider focus so that this is no longer seen as a 'Jed issue'*".

5.108. A draft terms of reference was produced in February 2016 and in an email from Mr Dight to Mrs Nicholson, Ms Baumgartner and others, including Mr Rafique, (page 862) Mr Dight commented that he had set the review period to run from 1 April 2014 "as this allows for the Jed competition to be included but also provides an opportunity to capture some more senior appointments that we have made in early April 2014, which I think are worth including".

5.109. The approach being taken by the respondent is captured in a communication from Ian Martin, Director ICM, to a Sarah Rapson, another Director General (page 912) which described the claimant's letter in May 2015 and the subsequent petition as the catalyst, although Mr Martin goes on to refer to the specific case (the claimants) as having been through a thorough investigation with the outcome being that a grievance had been partially upheld. He went on to note that a number of people had been subsequently asked to look at the case and most recently that was Jane Nicholson. He went on to state that "*We do not intend to reinvestigate this case. I have, however, agreed with Jane the HR business team and George Shirley that instigating a PSU led review of recruitment practices in TM (Sheffield) would be sensible. PSU has credibility and will be perceived as "independent" which is important. This would allow us to independently review and learn lessons about our recruitment practices, assess the impact of the recruitment principles that have been put in place (eg Mr Shirley's new procedure) and make recommendations for future changes that would support best practice, and use any recommendation to inform future recruitment practices across UKVI*". Attached to that communication as annexe A is the draft terms of reference (see page 913).

5.110. On 6 April 2016 the claimant sent an email to Ms Nicholson commenting on the draft terms of reference. The claimant said that he had been given assurances by Ms Nicholson that those found guilty of any wrong doing would be held to account and that any appropriate sanctions and disciplinary actions would be taken. Having seen the terms of reference the claimant noted that it was simply a review of process and procedures and nothing more. The claimant expressed the view that Mr Dight had agreed that there would be a PSU investigation "until George Shirley pulled this" and now Mr Dight was involved with the terms of reference himself. The claimant went on:

> "I'm bitterly disappointed how this has all been handled and where it is going. I feel once again this is being covered up and PSU investigation into my case has been avoided to prevent the proper correct action being carried out".

5.111. Mrs Nicholson replied to this email on the same day (see page 926). She said that:

> "We have always positioned this as a review and not an investigation – hence we have not made reference to any sanctions in the terms of reference. I am clear, however and have agreed with the PSU that this review will follow the principles of an investigation. This means if PSU find anything that we feel needs further exploration then we would be able to follow up with a formal investigation".

She went on to describe the PSU as doing an in depth review of recruitment processes.

5.112. The claimant replied later on 6 April (see page 930). He said that if the review was to follow the principles of an investigation then he was content with that. However, he asked that the PSU look into his case and interview him first.

5.113. The effective version of the terms of reference for the PSU review are dated 7 April 2016 and a copy is at page 946.

PSU Review commissioned

5.114. Ultimately it was Mr Dight who formally commissioned the PSU review. In February 2016 there had been a discussion between Ms Nicholson, Ms Baumgartner and others including Mr Rafique as to who would be the best business sponsor for the review. (This is dealt with in emails at page 861). The view expressed by Ms Baumgartner was that she thought that Mr Shirley would be the best business sponsor because - "*that way it is being led from Sheffield. If it is Ian Martin it could still be seen as a central imposition albeit within UKVI*". Mrs Nicholson's comment is *"Wasn't George involved in the previous reviews". If so then I don't think he is the best person*".

5.115. On 8 April 2016 Mrs Nicholson wrote to the claimant (page 963). She said that she had asked the PSU whether they could prioritise speaking to the claimant but had been told that because of the way they conducted reviews – applying PSU principles – they would not confirm who they might interview or when.

5.116. On 6 May 2016 Mr Shirley sent a message to all temporary migration staff at Sheffield. A copy is at pages 973 to 974. In it he referred to individuals and staff Network groups having raised concerns with him and other managers about the application of the recruitment and selection processes within TM. The feedback had focused in part on the treatment of staff with protected characteristics particularly BAME staff. Mr Shirley said that he had responded to this by developing the TM recruitment principles implemented in June 2015. Mr Shirley presented the imminent PSU review (notification of which to the staff was the purpose of this message) as being a response to the local recruitment principles (presumably those which he had introduced). The purpose of the review was described as an assessment of the impact those principles had made and whether there was any need to make additions or alterations. There was also a need to identify lessons learned. He said that to ensure objectivity the review was to be undertaken by the Professional Standards Unit. He said that it was not an investigation into a specific incident.

The PSU Review – June 2016

5.117. The PSU review was conducted by Lindy Beach, a Senior Investigating Officer. She was assisted by two other investigating officers, Mr Logan and Mr Hatcher. The review was conducted during June 2016 and the management review document was published on 29 July 2016. A copy is in the bundle at pages 1020 to 1038.

5.118. The full title of the review is:

> "A Home Office management review on the application of recruitment and selection processes in Temporary Migration in Sheffield from April 2014 to present, and an assessment of the efficacy of the Temporary Migration Recruitment Principles, introduced in 2015. "

The review considered 16 recruitment campaigns including the one which involved the claimant. In the executive summary to the review what were described as 'emerging findings' included:

"

- Whilst the review team found evidence of poor practice and procedural failings within almost all the recruitment campaigns it examined, there was no evidence to suggest that any specific group within protected characteristics were more disadvantaged as a result than any other, or indeed more than the workforce in general.
- Notwithstanding the above, there is a strong perception amongst TM staff in Sheffield (and at other TM sites) that recruitment and selection has been informed by membership of friendship groups where professional lives have become intertwined with social/personal lives. Staff attribute their failure to progress to their exclusion from the group(s) and this indirect form of discrimination is more keenly felt amongst staff with protected characteristics, especially black, Asian and minority ethnic (BAME) staff."

The review noted that the catalyst for commissioning the review was that an unsuccessful BAME candidate had alleged that his failure to secure a position was either directly or indirectly attributable to his ethnicity. The investigating officers had contacted various staff representative or support groups, all of whom had responded bar two, one of which was the Network.

5.119. The review went on to refer to the perception which had been expressed by both staff and their representatives that at interview in order to join the senior grades one would have to have either served at the office at a particular time or gained favour with one who has. Staff representatives had stated that that issue was particularly pertinent in Sheffield due to their members perception that a small group of staff who had risen through the grades together since approximately 2002 imposed undue influence on the recruitment process. That group of staff had been referred to variously as "the clique", "the golden circle", "the in crowd", and "the boys club". It was a group of colleagues who socialised together and worked in a climate of reciprocal support and mutual benefit. One staff representative was quoted as describing this as "an issue of behaviours and inclusion, rather than one of discrimination". That was because many staff the representative considered to be outside the group did not have any apparent protected characteristic whereas it was likely that some members of the group did. The same perception had been voiced very strongly by the staff who had used such terms as 'the group', 'face fits culture', 'the G7's blue eyed boy/girl', 'cliquey nature' 'cultural friendship group', 'jobs for the boys', 'the gang', 'the gang culture'. The review went on to note that the vast majority of those who were interviewed stated that it was their own failure to engage with the social scene which was considered to be the platform upon which the relationships within the group formed that was the main contributory factor to their exclusion from the group rather than whether or not they had a protected characteristic. Nevertheless they acknowledged that such factors as religious restrictions for instance on the consumption of

alcohol and caring responsibilities and working pattern were factors which meant they did not socialise. "*Therefore, indirectly, they believed that it could be argued that as this links to protected characteristics they were being discriminated against*". Of four BAME staff interviewed only one felt that ethnicity was a contributory factor to their perceived exclusion from the group. Gender (female) was considered the major restriction in so far as it was linked to caring responsibilities. The review had not gone so far as to interrogate senior managers as to their private lives although personnel records provided some evidence to demonstrate that a significant number of the senior management team in Sheffield had been in temporary migration since 2007 and there had been few external appointments at G7 or above. The review concluded that that did not demonstrate any evidence of decisions, conscious or otherwise, to indirectly influence the progression of certain members of staff but it did provide some explanation as to why that perception was felt so acutely.

5.120. The report went on to state that the overwhelming view of those interviewed was that the new TM recruitment principles demonstrated a genuine commitment from the senior management team to address many of the issues highlighted earlier in the report. The report went on to refer (p1034) to a handful of staff stating that they were aware of staff being allocated new roles or appointed on temporary cover allowance (TCA) without the person being subject to a fair and open competition even after the introduction of the recruitment principles, but no details were provided.

5.121. The summary to the review report (page 1038) includes the following:

> "This review has identified a number of issues with the application of recruitment and selection processes in TM in Sheffield, and acknowledges that some of those have the potential to disadvantage certain groups of staff. That said, the review could find no evidence that staff with protected characteristics were more adversely impacted by local practices than any other staff in TM."

5.122. A meeting took place in September 2016 with the claimant, a Network representative Mr Motraghi, Ms Nicholson and Mr Dight. Mrs Nicholson gives the date of this meeting as 12 September 2016 (see paragraph 21 of her witness statement) whereas the claimant refers to the meeting as being on 14 September 2016 (see paragraph 193 of his witness statement). In any event it appears that no notes or minutes of this meeting were taken. Ms Nicholson's evidence is that it was clear at that meeting that the claimant would not accept the findings of the PSU report. The claimant's evidence is that he was told that he had changed the dynamics of recruitment and that what had happened to him would not happen to anyone else. However, he was not given a remedy. The claimant then goes on to say that he again raised what he describes as the false and misleading information contained in the submission which had been sent to Mark Sedwill. The claimant says that that comment was met with complete silence. He goes on to say that Mr Dight then asked him what he wanted, to which the claimant replied he wanted an SEO position. When this was put to Mrs Nicholson in cross-examination

she said that she did not remember silence or shocked faces nor whether the claimant raised the submission point.

The Claimant raises issues about the Submission – September 2016

5.123. On 29 September 2016 the claimant wrote to Mr Sedwill by email. It was a lengthy email and a copy is in the bundle at pages 1121 to 1123. The reason for the claimant writing this email was his recent receipt via a subject access request of a copy of Ms Baumgartner's submission to the permanent secretary in December of the preceding year. The claimant provided Mr Sedwill with a copy of that report and then went on to refer to what the claimant described as some of the major issues he had with it. The claimant then referred to his concerns about the initial interview process in the campaign and he wrote in these terms:

> "What I find most disturbing and worrying is that from when I brought this matter to your attention there has been a catalogue of serious issues/significant errors and misinformation including from Senior Directors in what can only be described as deliberate attempts to contain and conceal information to prevent Professional Standards Unit investigation which was recommended both by HR and the review panels. "

5.124. The evidence from Ms Nicholson was that she understood the permanent secretary's office on receipt of the claimant's email had sought input from someone called the Chief People Officer (Gail Winter) who in turn sought Mrs Nicholson's view. Ms Nicholson's response to Ms Winter of 19 October 2016 is at page 1119. She sought to review the claimant's case by bullet points and included reference to the PSU review which she described as finding that some cases of recruitment had fallen short of best practice but no evidence of discrimination against any protected group was found, nor any evidence that would support the claimant's concerns. She added that "*We are not now surprised that he is trying to resurrect this discussion. My recommendation is that we refer the matter back to HR where we will reiterate that we have already undertaken a review of this case and are not intending to re-open this matter. "*

The Claimant's second grievance – November 2016

5.125. On 14 November 2016 the claimant submitted a grievance – his second. A copy appears at pages 1138 to 1146. The grievance is directed at Ms Nicholson, Ms Baumgartner and Sir Mark Sedwill the permanent secretary. The main subject matter of the grievance was the submission prepared by Ms Baumgartner in December 2015. The claimant said that when he received a copy via his SAR:

> "To my astonishment it contained false/inaccurate information that had been sent to the PS in order to continue with the cover up of the alleged malpractice by senior staff members"

The claimant had interpreted the submission as saying that the recruitment campaign in which the claimant was unsuccessful had been in line with Home Office policy. This may have been because of the claimant's misunderstanding of the passage in the December 2015 submission "the grievance was partially upheld due to elements of the

process not be (sic) followed, for all candidates, in line with Home Office policy". We note that when being cross-examined on this Ms Baumgartner acknowledged that that could have been written more felicitously. However it is difficult to read it without coming to the conclusion that there is an acknowledgment that Home Office policy was not followed, In any event that apparently was not the claimant's view and certainly he expressed concern about this in the second grievance. The claimant went on to allege that the submission revealed that a decision not to refer his case to the PSU for investigation had already been made without waiting for the review to conclude. The claimant alleged that Ms Baumgartner had forwarded the submission to the PS' office *"knowing full well the PS had been given false/incorrect information*". The claimant's theory was that the individuals who had helped to prepare that submission, Ms Nicholson, Mr Dight and Mr Shirley and Ms Baumgartner "*were not banking on me seeing the submission which confirms why the request under SAR was refused on four occasions* …."

The claimant had also reached the conclusion that what he described as the wider PSU review had also confirmed that the claimant had been assessed at Grade 5 level for an SEO post. We would observe that quite clearly the PSU report does not go into anything like that detail and in fact makes no specific reference to the detail of the claimant's case at all – which really we thought was the claimant's major concern. In terms of requested outcome, among other things the claimant wanted a PSU investigation and he wanted promotion to SEO which should be backdated to 2014 "*as evidence points my scores having been lowered to suit the needs of the panel and to ensure that I did not reach the pass mark"*. He wanted those responsible for any wrong doings to be held to account.

5.126. Initially a Mr Birtwistle was appointed to be the decision maker in respect of the claimant's second grievance and a Terri Carpenter was to do the investigation work. However, Mr Birtwistle left the Home Office and it was in those circumstances that a Tracey Tolley was appointed in place of Mr Birtwistle. In the event Ms Tolley would both carry out the investigation and determine that grievance.

5.127. On 4 December 2016 the claimant presented his claim to the Employment Tribunal.

The investigation and hearing of the second grievance – May 2017

5.128. Ms Tolley did not interview Sir Mark Sedwill as part of her investigation. When at the grievance hearing the claimant queried this omission he was told that Sir Mark Sedwill had not seen the correspondence or the Baumgartner submission and instead his office would have dealt with it. However, the claimant contends in his witness statement (paragraph 222) that Mark Sedwill had approved the submission and contends that it was discriminatory of Ms Tolley not to interview him as he was a key person to the grievance.

5.129. The grievance hearing took place on 25 May 2017 before Ms Tolley. In addition to the claimant a Ms Shah (HR) and Mr Jones (the claimant's companion) were present and there was a minute taker, Ms Beaumont.

Her notes are at pages 2397 to 2504. The claimant complains that Ms Tolley was acting as judge and jury and that she too has discriminated against him. The only passage in the lengthy minutes that we were taken to was a comment attributed to Ms Tolley (page 2404) in which she states "*we're having to go through the motions with this hearing/grievance for the court hearing. On GLD advice in order that it was covered off prior to the ET."*

The second grievance outcome (Tolley) – June 2017

5.130. On 6 June 2017 Ms Tolley issued the grievance outcome (1494 to 1501). Ms Tolley records that she had spoken to Ms Baumgartner, Mr Dight, Ms Nicholson and Mr Rafique, although she described that as having been conducted on an informal basis.

5.131. She did not uphold that part of the grievance where the claimant contended that the Submission had suggested that Home Office policy had been followed. She read "in line with Home Office policy" as relating to a reference to the investigation process not the recruitment process.

5.132. Nor did she uphold the part of the grievance where the claimant contended that he had been promised a PSU investigation as she acknowledged that at the time of the relevant meeting neither Ms Baumgartner nor Mr Dight had read all the documentation.

5.133. In relation to the mis-attribution of the quote in the annexe to the submission Ms Tolley noted that the text of the submission had referred to "as Jon's investigation report states". Whilst it was not a direct quote from the investigator it was a matter of record on the grievance and therefore it was not misleading the permanent secretary.

5.134. Ms Tolley took the view that the decision to opt for a PSU review rather than PSU investigation had been agreed between Ms Nicholson and the Network chair Mr Rafique because "(they) felt there were wider ranging issues across Temporary Migration than just the one campaign Mr Ramzan had been involved in." She concluded that at no stage in the process had Mr Rafique felt he had been misled. She recorded him as feeling strongly that he agreed to try and help the claimant and that there was no other remit, he was happy with the outcome of the commissioning of PSU review. Ms Tolley noted that the claimant was clearly aggrieved about those events and believed at the time that this was an opportunity to get the PSU investigation he had been requesting. Ms Tolley concluded that neither Ms Nicholson nor Mr Rafique had intended to mislead the claimant because they were very clear in what they were attempting to achieve.

Appeal against second grievance outcome – heard by Ms M. Leon – July 2017

5.135. The claimant launched an appeal against the grievance outcome. He did this by way of a grievance notification appeal form dated 19 June 2017 a copy of which is in the bundle at pages 1464 to 1467.

5.136. The hearing of this appeal was determined by a Maria Leon. As we have noted, we have read the witness statement of Ms Leon but in the event, she was not called by Mr Serr. The appeal hearing took place on 5 July

2017 and the minutes are at pages 1519 to 1523. Again, Mr Ramzan was accompanied by Mr Jones. A Ms Tabak was present from HR and Emma West took the notes.

5.137. Ms Leon's decision given on 7 July 2017 is recorded at pages 1561 to 1566. With regard to the 'going through the motions' comment Ms Leon noted that that was not on the original record of the minute although Mr Ramzan had said that he had made amendments when it was shared with him. (It may therefore be that the passage we have quoted above results from an amendment by the claimant although this was not explored when investigated at the hearing before us). Ms Leon said that she had spoken to the decision maker who did not recall making such a comment.

5.138. On the basis that there had been what Ms Leon described as a detailed discussion at the grievance hearing, she did not uphold the part of the grievance that alleged that Ms Tolley had just been going through the motions.

5.139. The claimant had also complained in the appeal about Ms Tolley not appointing a separate investigating manager. Here Ms Leon recorded that the claimant's concern was that he was aware that originally Mr Birtwistle had appointed Terri Carpenter as an investigation manager and that she had then said that she could not continue in that role because she felt that the grievance was complex and needed an investigator trained in discrimination. Accordingly, the claimant had been led to believe that there would be a formal investigation of the grievance. Ms Leon concluded that it was not ideal to go from Ms Carpenter recusing herself on the grounds of complexity of the grievance and then to proceed (as Ms Tolley had done) with just informal enquiries. Accordingly Ms Leon upheld that part of the grievance.

5.140. The conclusion reached by Ms Leon was that it was appropriate to remit the case to a new decision maker who would commission a PSU investigation into the issue of whether Ms Baumgartner's submission contained misleading information.

5.141. In the event the new decision maker was Clare Shacklock (to whom we have referred above) and the PSU investigator appointed was Dawn Sherrington.

5.142. However, the steps taken by those individuals in relation to re-hearing the claimant's second grievance took place in the period of end of August 2017 to beginning of March 2018 and, as agreed with the claimant's counsel, whilst the claimant spends four or so pages of his witness statement dealing with those matters, they are all outside the remit of the claim which is before the Tribunal.

6. The parties' submissions

6.1. <u>The respondent's submissions</u>

Mr Serr had prepared a skeleton argument which was read and considered by the Tribunal prior to the resumed hearing on 14 August 2018 when oral submissions were made by both counsel. Mr Serr had

structured his written argument so as to address the complaints chronologically and by topic. We should add that on our enquiry, Mr Salter agreed the topics as summarised by Mr Serr. The first topic under the heading of direct race discrimination was the recruitment process July 2014 to September 2014. Mr Serr contended that the claimant's assertion that he had been unsuccessful at interview because his scores had been deliberately manipulated and he had been assessed at a higher grade than was relevant because of race, were baseless, unsupported by the evidence and irrational. The claimant's prospects had been inauspicious prior to interview and we were reminded that he had only secured an interview under the sixth respondent's guaranteed interview scheme. Moreover, the claimant had been unsuccessful in five subsequent recruitment exercises where in each case he had failed to get through the sift. In any event the claimant had not been assessed at a higher grade than the SEO grade. Mr Carlisle's findings indicated no disparate treatment and Mr Serr reminded us that the claimant had not adduced any evidence of disparate treatment.

Mr Serr described the claimant's allegation that his scores had been deliberately manipulated downwards as the heart of his claim. However, that had not survived cross-examination or rational assessment and could only be categorised as baseless. Why would the recruitment panel, who had never met the claimant before the interview and who had received the appropriate equality training, be inexplicably motivated to deliberately manipulate his scores to his detriment thereby potentially placing their own careers in jeopardy? If the interviewers had been so motivated to ensure that the claimant was not successful there was no need for them to go through the torturous process which the claimant suggested of initially marking him 6 or 7 but then erasing that score and replacing it with a lower one. As the claimant was the penultimate candidate to be interviewed the panel would be aware of what were the winning scores at that time and so, had they had the mindset which the claimant asserts, they could simply have given him low scores. The marking sheets had been retained in circumstances where if the claimant was right, they could have been destroyed and replaced with a clean sheet not showing out any changed or rubbed out scores. Mr Carlisle had accepted Ms Gregory's explanation of her doodles and other marks as simply being a stylistic quirk. The claimant had no evidence whatsoever that his scores had been reduced and his assertion to the contrary when writing to the second respondent in September 2016 could only be described as a deliberate falsehood. The PSU review conducted by Lindy Beach had found nothing to support the claimant's case on direct discrimination. Notably it stated that the record keeping errors identified by Mr Carlisle had been common to all recruitment campaigns, irrespective of the interviewees. Mr Serr maintained that only one of the original successful candidates had come from Ms Mason's line management chain and that a number of unsuccessful candidates had also come from that reporting line.

The second topic covered by Mr Serr's skeleton argument is the informal review conducted by Mr Bailey and commissioned by Mr Boyd. Mr Serr noted that whilst the claimant referred to that period (September 2014 to December 2014) in his pleaded case, the precise nature of his criticisms

still remained somewhat opaque. This review did not result from a formal grievance raised by the claimant but instead had been prompted by concerns raised by Mr Raj of The Network. Mr Bailey's findings could not be seriously impugned and certainly revealed no evidence of discrimination.

The third topic was the outcome of the claimant's first grievance as articulated by Mr Carlisle's decision. Mr Serr contended that the basis of the criticism of Mr Carlisle's decision was also unclear. The claimant had accepted that the investigation of that grievance, conducted by Mr Verney, had been appropriate and impartial - that being in his evidence given in cross-examination. Mr Carlisle had concluded that the presence of editing and thick and block style doodles and markings was not confined to the claimant's marking sheets but was present throughout all other candidates' marking sheets in that campaign. In those circumstances it was impossible to understand how the decision not to refer the marking sheets to forgery experts could be described as a sham reason to hide the alleged real reason of the claimant's race. Mr Carlisle had concluded that to instruct such experts would be an inappropriate use of departmental resource and could only be justified where there was sufficient evidence elsewhere in the investigation to suggest that there had been a deliberate attempt to disadvantage the claimant. Mr Serr went on to point out that undertaking a forensic examination of the kind suggested by the claimant would be highly unusual for any employer. It would signal a grave lack of trust and confidence in the staff who had undertaken the recruitment exercise and it would be likely to result in permanent damage to the relationship between the Home Office and Ms Gregory and Ms Mason. Mr Serr's submission was that there would have to be very significant evidence indeed to even contemplate embarking on such an exercise and there would need to be an assurance that it could be undertaken and would be likely to produce a positive result.

The fourth topic identified by Mr Serr is the appeal to Mr Shirley against the outcome of the first grievance. The appeal was not designed to be a re-hearing under the Home Office grievance policy. Mr Shirley who had only been formally appointed into his role as Head of Temporary Migration in March 2015 had been wholly uninvolved in the 2014 recruitment exercise and had no obvious reason to wish to hide any deficiencies or wrong doing connected with that recruitment exercise. Whilst administrative failings had been found, those were not exclusive to the claimant's interview. Mr Shirley had decided that it would be wholly impracticable to re-run the campaign.

Mr Serr went on to address the HR advice which Mr Shirley had received from Rebecca Corbishley. He noted that the claimant was highly critical of Mr Shirley's alleged failure to follow that advice and in particular disagree that the matter should be referred for a PSU investigation at that stage. We were reminded that Mr Shirley's evidence was that the advice from Ms Corbishley in her email of 18 March 2015 (page 147 to 148) was a provisional view based on the documentation which she had been sent – primarily Mr Carlisle's grievance decision but not any of the annexes. Further we were reminded that she referred to a PSU

investigation as one possible action. Subsequent advice by HR was that re-interviewing was not advised. We were reminded that Mr Shirley had, in response to the identified procedural failings, introduced what Mr Serr described as a robust set of transparent recruitment principles. The fact that he had done that undermined any suggestion that he was trying to cover up discrimination in the department.

The fifth topic was Ms Baumgartner's refusal to refer the matter to the PSU and the Submission which she had sent to the Permanent Secretary. We were reminded that Ms Baumgartner's involvement was triggered by the claimant's email to Sir Mark Sedwill's office of 18 May 2015. Other than to provoke further action, having exhausted the internal grievance process, it was unclear what the claimant's assertion to the Permanent Secretary was based on. It did not reflect the grievance or appeal findings. Ms Baumgartner did not know the claimant and had not been involved in any of the previous processes. She was a member of the diversity team brought in specifically to assist the claimant. It was unclear why she would be motivated to cover up wrong doing or herself discriminate against the claimant in any way. Noting that Ms Baumgartner's initial view had been to recommend an investigation, Mr Serr pointed out that this was prior to her being aware that a formal investigation had already been undertaken by Mr Carlisle. Ultimately Ms Baumgartner's decision not to recommend a PSU investigation had also been informed by her own communications with the PSU, who Mr Serr contended, had stated that they could not justify a forensic analysis. In any event such an analysis could not have been undertaken by the PSU, it would have to have been done externally.

Turning to the Submission to the Permanent Secretary, Mr Serr noted that that issue had been canvassed at length before us. The respondent adopted what Mr Serr described as the careful and extensive findings of Dawn Sherrington and Claire Shacklock which rejected the suggestion that the Submission was inaccurate or misleading, save for the mis-attribution of a quote. As Ms Baumgartner had indicated in her evidence that was a simple error. Further Ms Sherrington had found that the reference in the Submission to "unaware" meant unaware that findings had already been reached with regard to the marking sheets. Mr Serr described the recital to the petition, of which he said the claimant was the author to be positively misleading as it baselessly suggested that BAME staff had been systematically discriminated against.

The sixth topic identified by Mr Serr is Ms Nicholson's recommendation of a broader PSU review. Ms Nicholson had been introduced to the process in order to assist the claimant and to try and draw a line under his grievances. Ms Nicholson's decision to recommend a PSU review had been rational, genuine and wholly untainted by discrimination based on the claimant's race. Her approach to recommend a PSU review had been endorsed by The Network and the intention was that the review would address any systemic problems within Sheffield in respect of recruitment and promotion for BAME staff and other workers with protected characteristics. The PSU review which followed, whilst critical of certain practices, did not find any evidence of discrimination. Mr Serr contended that the claimant's assertion that Ms Nicholson had

discriminated against him was inconsistent with various facts such as her ordering the PSU review at all; her indicating that she did not want that review watering down by the terms of reference being changed and by her ensuring that the period to be considered would be extended to cover the recruitment exercise which was a subject of the claimant's grievance. Further she had tried to ensure that the claimant was interviewed by Ms Beach of the PSU.

The seventh topic identified by Mr Serr is the further complaint which the claimant made to Sir Mark Sedwill (September – December 2016) and the claimant's complaints about the respondent failing to respond to his freedom of information or subject access requests. Noting that the claimant had written to Sir Mark Sedwill's office on 29 September 2016, Mr Serr said that it was of deep concern that within that email the claimant stated that his scores had been independently examined and that each mark had been lowered to his detriment to ensure he did not reach the pass mark. Mr Serr described that assertion as being entirely false because no such examination had taken place. The allegations of discrimination against Sir Mark Sedwill were baseless. He had not been involved at all in responding to that email. Others within his office had dealt with the matter.

In relation to the alleged failures to respond to freedom of information or subject access requests, we were invited to be reticent about making any adjudication in circumstances where Parliament had prescribed a specialist Tribunal, the First Tier Tribunal (Information Rights), to deal with decisions taken by the Information Commissioner's office in respect of freedom of information decisions. The Employment Tribunal had no general jurisdiction or specialist knowledge. In any event such requests were centrally administered by the respondent and there appeared to be no general failure of any named individual to deliberately withhold material requested. In relation to Ms Nicholson's failure as identified by Ms Shacklock, that had been because Ms Nicholson was relying upon her own PA. Ms Sherrington had not found non-compliance with the SAR request to be motivated by a desire to hide anything or for an improper purpose.

Turning to the claimant's indirect discrimination complaint Mr Serr noted that the claimant only pleaded two indirect discrimination complaints out of a total of 70 allegations. He described this part of the claimant's case as extremely difficult to follow and that it appeared to be essentially a re-branding of the direct discrimination claims. An assertion that the claimant was unable to provide sufficient evidence to score highly in interview because he had not been on a TCA was not properly pleaded and it was inconsistent with his direct discrimination complaint which was that he *did* provide sufficient evidence, but had been wrongfully marked down. There were a number of other problems with such a contention. The claimant had acted as an SEO on higher responsibility allowance for some periods. There was no clear evidence that other candidates did act up on temporary promotion or for what period. Nor was there any evidence that such acting up actually provided a material advantage in the interview.

Mr Serr then turned to the question of time limits and set out the guidance given by the Court of Appeal in Hendricks v Metropolitan Police Commissioner with regard to conduct extending over a period. The correct test was whether the acts complained of were linked and were evidence of a continuing discriminatory state of affairs. A relevant factor would be whether the same person or persons were responsible for each of the acts. Mr Serr contended that in the case before us there was no linkage identified between the promotion interview, the subsequent grievance and appeal and then the actions of Ms Baumgartner and Ms Nicholson.

It was clear that the indirect discrimination complaint had crystallised in August 2014 when the claimant was interviewed for the post. The claimant had provided no evidence that it would be just and equitable to extend time limits.

Oral submissions

In his oral submissions Mr Serr restricted himself to comments on the claimant's skeleton argument. Referring to paragraph 15 of that document he said that there had been no evidence that the claimant was a high performing employee. Instead he had only been promoted once and there had been subsequent unsuccessful attempts at promotion. Commenting on the assertion in paragraph 16 of the claimant's skeleton that the claimant had over four years since the interview advanced his own view with consistency, Mr Serr observed that it may have been consistent but it was also misconceived.

Mr Serr then went on to review and comment upon various points raised within paragraph 17 of the claimant's skeleton (which runs over 10 pages.)

In respect of paragraph 19 of the claimant's skeleton argument Mr Serr said that there was no evidence for the assertion that the "clique atmosphere" had resulted in the three local Network representatives stepping aside "as they feel they are no longer able to provide assurances to local BAME staff that change will ever occur in this business area". In fact Mr Serr pointed out that Mr Rafique of The Network had informed Dawn Sherrington that his conversations with Ms Nicholson had not led to any undue pressure being placed upon him as chair of The Network and that the meetings were cordial and both he and Ms Nicholson had been working together to achieve the best outcome for Mr Ramzan. Further The Network had supported the terms of reference for the PSU review.

6.2. The claimant's submissions

As we have noted, Mr Salter had also prepared a written skeleton argument. Mr Salter commented that it appeared that much of the underlying factual basis was not seriously disputed by the respondents in that the claimant had attended for interview; was subsequently dissatisfied with the scoring process, had then made various complaints and remained unsatisfied by the respondent's responses to those concerns. The claimant contended that the actions of the respondent were motivated by the claimant's race.

In terms of the Tribunal's jurisdiction, Mr Salter believed that the respondent's argument that the complaints were time barred was misconceived. It was demonstrably clear that the whole course of conduct was one unbreakable chain from the day of the interview in 2014 until the claimant presented his claim form. The actors and complaints were constant throughout the period. In any event the respondent had not been prejudiced in defending the claim and had declined to call various witnesses who were available to be called.

In paragraph 11 of the skeleton Mr Salter observed that it would be utterly disproportionate to go through the 68 allegations of direct discrimination to explain why and how those acts occurred. Many were complaints that were repeatedly demonstrated by the respondents. Mr Salter noted that there were 29 allegations on the theme of the respondents' failures in respect of a PSU investigation; 30 allegations about the respondents' failures to follow advice and procedure (with regard chiefly to the recruitment exercise) and 8 allegations in respect of the failure to disclose and withholding of information.

With regard to the indirect discrimination complaint, Mr Salter contended that the evidence produced by the respondents showed the application of a PCP which disadvantaged BAME candidates and clearly disadvantaged the claimant in his interview. Mr Salter noted that HR had referred to a risk of indirect discrimination and there had been an acceptance that if temporary cover allowance positions were not advertised that added another layer (see Rebecca Corbishley's advice to Mr Shirley 18 March 2015 pages 147 to 148). Further Mr Verney's report recorded that Ms Mason and Ms Gregory had believed that examples from TCA roles could give greater weight to a candidate's application. It appeared that there were a number of staff who had been given TCA in Temporary Migration without an expression of interest process. Further Mr Salter noted that the feedback which Ms Mason had given to the claimant on 10 September 2014 indicated that the claimant would benefit from the opportunity to undertake a TCA for an SEO in a larger operational command. Further, in an email which Mr Rafique of The Network had sent to Ms Nicholson there was an indication that BAME staff were less likely to have been recognised for secondments or TCA opportunities.

The claimant realised that it would be unlikely that direct evidence of discriminatory intentions would be found in the papers. However, there were sufficient material to show quite clearly that he had been treated less favourably by the respondents in the assessment of his performance in interview and as a result of his subsequent complaints and that the respondents practice and procedures placed him at a particular disadvantage. There was ample evidence to provide the Tribunal with material from which it could safely draw inferences of discrimination. The respondent had proffered numerous unexplained contradictory and often just plain wrong explanations.

The claimant's ability to improve and progress had been thwarted by an unfair interview process where he had been assessed according to demonstrably inappropriate criteria and had his marks lowered to ensure that he did not reach the pass mark.

Throughout the four years since the interview the respondents had agreed with the claimant's position only to change their positions often for no apparent reason, or at least non demonstrated by the material before the Tribunal.

Paragraph 17 of the skeleton explains that the claimant's consistency should be contrasted with the respondents, who were unreliable witnesses. As we have noted above, paragraph 17 of the skeleton sets out at great length the claimant's analysis of the respondent's case and the evidence which they have presented to the Tribunal. Sub-paragraphs deal with the background as the claimant sees it; examples of the respondents disregarding their own policies and procedures; examples where the claimant considers that the respondents' witnesses were seriously inconsistent with the contemporaneous evidence; a further section dealing with areas where the claimant contends that the respondents' evidence was inconsistent with what he describes as 'accepted fact' and finally a section which begins " The respondents' evidence purports to create an impression which sits uncomfortably with: (i) the clear and apparent amendments to the only British-Asian claimants interview scores along with the downward marking of the only other BAME candidate in the interview process; non BAME scores were amended up". This is followed by 15 further sub paragraphs where the claimant reiterates his case, including the contention that numerous people had failed to correct the obvious, serious and highlighted error in the Submission to the Permanent Secretary.

In paragraph 18 of the skeleton argument the claimant sets out his case under the heading of 'The Respondents' attempts to explain away these difficulties are unpersuasive'. This includes the observation that if one panel member had failed to follow the recruitment policies that could be an oversight but when both panel members utterly fail, that raised serious questions as to just how robust the respondent was on procedural compliance.

At paragraph 19 Mr Salter states that most damming for the respondent was the evidence which it had commissioned itself – in other words the PSU review. That made it clear that the claimant's experiences were utterly consistent with the 'clique atmosphere' in the office. The skeleton concludes with the submission that having regard to all the inconsistencies in the respondents' case and the lack of any reliable evidence to support their assertions, it was clear that the respondents could not discharge the burden which they bore of proving that there was a non-discriminatory reason for the treatment which the claimant received. At best all the respondent could credibly assert was that the claimant had been the victim of some institutional incompetence although the reality of the respondents' case was that they contended that the claimant had been simply wrong in his contentions.

<u>Oral submissions</u>

In relatively brief oral submissions Mr Salter reminded us that the other minority ethnic candidate was Mr Mills. Contrary to Mr Serr's suggestion that the claimant had not been a high performer, Mr Salter reminded us

that in paragraphs 3 to 7 of the claimant's witness statement he made reference to having received three promotions.

Returning to the time issue point, there was a course of conduct. That was clear. It had a common factual basis and it all arose out of the interview. There were numerous actors but those were common throughout the piece. There was no material gap of time. Failing which the Tribunal should exercise it's discretion that it would be just and equitable to extend time.

The Employment Judge noted that no evidence had been received from the claimant about any basis for such an extension. Mr Salter said that there was little to be given – there had been no prejudice to the respondent. The respondent had not called for 40% of the named respondents. None of the respondents' witnesses that had a problem recollecting and the Tribunal had a wide discretion. Whilst there had been no overt evidence there were the inconsistencies which the claimant had sought to identify.

7. The Tribunal's conclusions

7.1. The time issue

As we have noted, at a hearing on 23 November 2017 Employment Judge Eeley found that the earliest of the discriminatory acts complained of which had been presented within the primary limitation period was that related to 19 August 2016. It was on that date that the claimant says he received via a Subject Access Request a copy of the Submission which Ms Baumgartner had sent to the Permanent Secretary on 4 December 2015.

The claimant's primary contention is that we should view everything that happened, or allegedly happened, in the period from his initial interview on 4 August 2014 to the presentation of his claim to the Tribunal on 4 December 2016 as conduct extending over a period, which should therefore be treated as being done at the end of that period.

The claimant is not assisted by the provisions of the Equality Act 2010 section 140B as he sought ACAS early conciliation on 7 November 2016 and the Certificate was issued on the following day.

We have been referred to the guidance given by the Court of Appeal in the case of **Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530. In that Judgment Mummery LJ said that the focus should be on the substance of the complaint where it was alleged that there was an ongoing situation or a continuing state of affairs which was discriminatory. The Court of Appeal were considering the provisions in the Sex Discrimination Act 1975 which required a consideration of whether there had been an act extending over a period – whereas we are dealing with the provisions of the Equality Act 2010 section 123(3)(a) which refers to conduct extending over a period. It is not in dispute that the guidance given in Hendricks remain good law despite the slight change in the statutory language. It was necessary to distinguish between an act extending over a period said the Court of Appeal (or for

our purposes, conduct extending over a period) as distinct from a succession of unconnected or isolated specific acts.

In the case of **Aziz v FDA** [2010] EWCA Civ.304 the Court of Appeal noted that in considering whether separate incidents formed part of an act extending over a period one relevant, but not conclusive, factor was whether the same or different individuals were involved in those incidents. Mr Serr's submission is that what is required is 'linkage' and that the claimant has not established that. The claimant's case is of course that the link is the conspiracy he alleges. He says that originally that was between Ms Mason and Ms Gregory but that subsequently various other actors were drawn into that conspiracy – chronologically, Mr Carlisle; Mr Shirley; Mr Dight; Ms Baumgartner; Sir Mark Sedwill; Ms Nicholson and then Ms Tolley.

We take the view that we should accept jurisdiction on the basis of what the claimant *contends* to be conduct extending over a period. We need to have that jurisdiction to go on to consider whether or not there was a conspiracy. We acknowledge that there is an artificial aspect to this approach because having found jurisdiction the basis for that could be regarded as illusory if ultimately we concluded that there was no conspiracy and so insufficient "linkage". However, we take comfort from the fact that the conduct extending over a period point has never been viewed by the respondents as so spurious or lacking in prospects of success so as to justify there being a preliminary hearing to determine the issue – although we appreciate that that would be an unusual occurrence. There is of course the practical point that we are now being required to consider what is in effect a preliminary point at the conclusion of a nine day hearing. We have not observed the respondents' witnesses being in any difficulty in recollecting relevant matters which, on the whole have been adequately documented.

Our observations above relate essentially to the direct race discrimination complaints (which is the main thrust of the claimant's case). In relation to the indirect discrimination complaint Mr Serr suggests that we should view that differently because that complaint crystallised in August 2014 when the claimant was interviewed and rejected for the post. We have however taken into account obiter comments of her Honour Judge Eady QC in the case of **Robinson v Royal Surrey County Hospital NHS Foundation Trust and Others** UK EAT/0311/14/MC. This is, we confess, an authority we have considered *after* the hearing and we acknowledge that we have not given the parties the opportunity to address us on it. In paragraph 65 of the Judgment of the Employment Appeal Tribunal in that case the learned Judge, whilst not adjudicating on the point, felt that she could allow that it might be appropriate to consider conduct extending over a period to be established even if the acts complained of fell under different headings. That is to say comprised different types of discriminatory conduct. The Judge went on to acknowledge that such an assessment would inevitably be fact and case specific but gave an example that conduct alleged to be direct discrimination, such as putting an employee on particular shifts was the other side of the coin to a failure to make reasonable adjustments which would be putting her on different shifts.

We accept that there is a greater conceptual difference between direct discrimination and indirect discrimination but in the circumstances of the case before us we do not consider it to be appropriate to entirely divorce the consideration of TCA's from the other matters of complaint.

If we should be wrong on this approach we consider that it would be just and equitable to extend time in respect of the indirect discrimination complaint in circumstances where again we do not consider that the respondent has been prejudiced in defending this complaint by the passage of time.

7.2 Was the claimant treated less favourably at the 4 August 2014 interview for an SEO position? If so was that because of his race?

In the sense that the claimant was unsuccessful at that interview and so was not appointed as an SEO, or put on a reserve list, there was less favourable treatment than those who were successful in one or other of those ways. The successful candidates were not British Asian, the claimant's protected characteristic being that racial origin. The Court of Appeal in the case of **Madarassy v Nomura International Plc** explained that the burden of proof does not shift to a respondent simply on the claimant establishing a difference in status (protected characteristic) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They were not without more sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

The claimant criticises the composition of the interview panel; the procedure they adopted and followed and he makes the particularly serious allegation that the initial high scores he believes he was given were then "scrubbed out" so that it appeared he had scored lower marks.

We deal with each criticism in turn.

(a) The independence of the panel

Here the claimant is contending that the panel were biased. However, we believe he is not alleging that that bias was because of race when this part of his case is properly analysed. Instead he contends that Ms Mason was biased because among the candidates were individuals who had worked for her and so inclined to treat them more favourably. Even if this criticism was valid, it would have applied to any of the candidates who did not happen to work under the line management of Ms Mason. It would not therefore be because of race. It would not be disparate treatment. In any event, whilst some of those candidates whom she line managed were successful, one was not. This suggests to us that on the balance of probabilities Ms Mason approached her task on the basis of merit rather than favouritism. We also bear in mind Ms Mason's explanation that as she had been in the department so long it would be virtually impossible for her not to know something of the candidates in a recruitment exercise. We remind ourselves that a relationship which was nothing more than a working relationship was not grounds for recusal under the Respondent's policy.

With regard to Ms Gregory's independence we conclude that when properly analysed she met the requirement that she was from outside the Unit, as required by the recruitment policy because she was in a different operational command to that which the role was being recruited for. In any event, if there had been a breach of that policy it would have applied equally to all the candidates.

(b) Failing to record interview times and the length of interviews

Ms Mason and Ms Gregory acknowledged during the internal process and before us that they were at fault in not recording the start and finish times of the interviews they conducted. That failing applied to all the interviews they conducted for this campaign. Because of the absence of that information it is now impossible to be certain how much time was given for each candidate's interview. The claimant seems to be complaining that he was interviewed too long – one hour and 10 minutes - whereas the interview guide times for such interviews is that they should be no more than 45 minutes (see paragraph 10 of his witness statement). However, he has also given anecdotal/hearsay evidence that one of the other candidates was interviewed for one hour and 45 minutes, which we assume is being offered as an example of more favourable treatment. The evidence of Ms Mason and Ms Gregory was that they had planned a one hour slot for each candidate and broadly tried to stick to that. We find no evidence that duration of the claimant's interview was significantly different from the length of anybody else's.

(c) The level at which the claimant was assessed

Here as we have noted, the claimant contends that he alone of the 10 candidates had been assessed against Grade 5 criteria rather than SEO criteria. The claimant says that he believed that this was designed by the Home Office in order to ensure that he did not receive a promotion because of his race (see paragraph 16 of his witness statement). On the balance of probabilities, we do not find this to be the case. Whilst appreciating that it is our task to reach our own conclusions on the balance of probabilities we agree with the findings that Mr Bailey made at the time and with the decision which Mr Carlisle reached with regard to this part of the claimant's first grievance. In the context of this campaign, the demanding nature of this particular SEO role and the generally high quality of the candidates, a high bar was set – but not a Grade 5 bar. This is another area where, despite the claimant's assertion to the contrary – that it was designed to ensure his failure alone - there was no disparate treatment.

(d) Had the panel received unconscious bias training?

As we have noted, their evidence to us was that they had but they have been unable to provide documentary evidence of this. Ms Gregory explained that what she understood to be a computer glitch when systems were changed led to documentary evidence that she had undertaken training in 2013 "disappearing" from the system. She went on to suggest that she had been able to take a screenshot first which she thought might have been put into the bundle although

in the event it was not. Ms Mason's evidence was that she had undergone conscious bias training prior to 2014 but not subsequently. Again, she could not produce a record. The claimant indicated to us that he had been able to access his own training record without difficulty.

On the balance of probabilities we accept that both panel members had received the necessary training. It appears unlikely that they would have been appointed if they had not. The absence of documentary evidence before us is unfortunate but not pivotal. We also remind ourselves in this context of the evidence which Ms Mason gave that she had been married to a person who she described as BAME for a lengthy period of time. Both she and her children had been victims of discrimination or racism by association. Whilst again not in any way conclusive, we take the view that a person with this family background is, with or without specific training, unlikely to be unaware of the dangers of unconscious bias when making decisions at work.

(e) Did the panel manipulate or forge the claimant's scores?

This allegation is particularly directed at Ms Gregory on the basis that it is her score sheets that the claimant contends show higher scores being scrubbed out but the claimant's case is that Ms Mason colluded or conspired with Ms Gregory in taking that alleged action. Neither panel's handwritten scoring sheets are particularly neat and, as we have found, do show, in the claimant's case scores which have been overwritten which could either have obliterated a different score or simply emphasised the score that had originally been written. There is also what Ms Gregory contends is no more than doodling. This includes hatched in circles and a diamond shape. In other examples what may initially have been two alternative scores within a circle have been overwritten so that only one score is visible.

As we have mentioned in our findings, Ms Gregory's stylistic approach to note making in an interview can also be seen in marking sheets she made in respect of other candidates. At its highest it may be that some of the doodles on the claimant's marking sheets are somewhat more elaborate than on the marking sheets which Ms Gregory made in respect of the other candidates.

The claimant invites us to infer on the primary evidence before us that the only explanation for what we see on the marking sheets and the ultimate scores he received is that because of his race initially higher marks were falsely changed to ensure that he did not get selected. We might add that although the claimant suggests that Ms Gregory and Ms Mason had not received unconscious bias training, what he is alleging against them is that they consciously discriminated against him.

We do not find that there is material from which we can infer this to be the case so as to shift the burden to the respondent. If for instance the claimant had scored highly at the sift but significantly less well at interview that might raise suspicion. However, that was manifestly not the case. The claimant's score at sift was in fact insufficient to

secure him an interview at all and as we have noted, it was only because of the guaranteed interview scheme operated by the Home Office in the context of the claimant's disability that he got to be interviewed at all. We also accept Mr Serr's argument that if it had been the panel's plan to ensure that the claimant scored badly, it would have been a much more straightforward exercise simply to give him low marks in the first place rather than allegedly giving very high marks only to realise that they would have to change those marks to bring them down to a level where the claimant could not succeed. Mr Serr also points out the implausibility of the two panel members taking the alleged steps which, if discovered might well have ended their own careers. Further we accept that if attention is given to the actual narrative of the sheets rather than the doodles, there are negative comments about the claimant's performance at interview and the examples he gave. The claimant thought that he had shown the necessary competences by the evidence he put before the panel, but they believed he had not.

Without intending this in a pejorative sense, it is clear to us that the claimant has a high opinion of himself, or at least a high opinion of how he performed at that interview in August 2014. The claimant believes that his performance should have justified a score which was in the early 30s and so the only explanation which can contemplate to explain his actual score of 19 is that there had been deliberate manipulation and that had occurred because of his race. We might add that it is only in the claimant's comments within the skeleton argument that it is suggested that doodles or marks on other candidates scoring sheets represent their initial lower scores being *increased* – that is increased outside the range of opposing scores which in a given case the panel may individually have awarded in the process. We are also concerned that subsequently the claimant sought to inform Sir Mark Sedwill that he had had his scores independently examined and that "each mark was lowered to my detriment to ensure I did not reach the required pass mark". (See the claimant's email to Sir Mark Sedwill of 29 September 2016 page 1117). We agree with Mr Serr's categorisation of that as a "deliberate falsehood".

It follows for all these reasons that the unanimous conclusion of the Tribunal is that the claimant was not subjected to direct race discrimination at the interview or during the subsequent discussions and moderation by the panel which led to his score being 19 with the result that he failed to be appointed to one of the SEO vacancies or a reserved list.

7.3 <u>The Bailey review</u>

We start this part of our conclusions with the observation that the remaining aspects of the claimant's case are premised on there being an attempt to cover up the falsification of the claimant's interview scores by Ms Mason and Ms Gregory. As we have found that there was no such improper action, the aspects of the claimant's case that we are about to deal with are significantly undermined, because in our judgment there was nothing to cover up. Although the claimant puts his case as there

being an ever growing conspiracy, we have taken the approach that we need to examine the remaining aspects of the case in order to detect whether there has been unlawful discrimination albeit not resulting from an attempt to cover up. Whilst taking that approach we are mindful that that is not really how the claimant is putting his case.

Returning to the work undertaken by Mr Bailey, we note that he is not within the list of 9 conspirators which the claimant referred to during the course of cross-examination. However, the claimant does criticise Mr Bailey for failing to interview the claimant himself and only speaking to Ms Mason and Ms Gregory. In paragraph 36 of his witness statement he says that that was in itself discriminatory and unfair treatment. He also says that Mr Bailey failed to consider whether there might have been a manipulation of his scores (paragraph 38). On the latter point it is unsurprising that this matter was not considered by Mr Bailey because it is not referred to in The Network's email to Mr Boyd. Naturally the claimant would say that Mr Bailey would have been aware of this had he interviewed the Claimant. However, as Mr Serr points out in paragraph 24 of his skeleton argument, the claimant had at this stage not raised a formal grievance and so Mr Bailey had only been commissioned by Mr Boyd to deal with the issues raised by The Network. The Network complaint was raised on behalf of "Network members" and we find that Mr Bailey and Mr Boyd were entitled to proceed on the basis that the concerns had been sufficiently articulated in The Network email without the need to check that a quite long email from The Network was anything other than the whole of the complaint being raised. In these circumstances we do not find that there was less favourable treatment of the Claimant. We also observe that the claimant is quick to describe Mr Bailey's perceived failings as discriminatory. The claimant may be doing this because he believes that a cover up was beginning. However, we find that the claimant has not proved facts from which we could decide in the absence of any other explanation that either Mr Bailey or Mr Boyd had contravened the provisions of the Equality Act.

7.4. <u>The claimant's first grievance</u>

<u>Mr Carlisle's decision</u>

Mr Carlisle is one of the alleged conspirators. Mr Verney who investigated the grievance is not. The claimant does not appear to have any criticisms of Mr Verney's report other than it was, as the claimant puts it in paragraph 60 of his witness statement, "she said, he said" with no conclusion reached. As we have noted, Mr Carlisle upheld some aspects of the grievance (failure to record interview times confusion about higher level indicators in the written feedback and the interviews overrunning) and to that extent Mr Carlisle had acknowledged that parts of the recruitment campaign were flawed – albeit that this applied to all candidates. However, we find that in paragraph 86 of the claimant's witness statement he misrepresents the tenor of the grievance outcome when he states that it confirmed "that there is clear evidence that the process had not been administered correctly and that the Grade 5 indicators were used". The claimant then goes on to refer to his astonishment that Mr Carlisle, having examined the marking sheets and the scores that had been changed, did not conclude that there had been

malpractice. The claimant also complains of Mr Carlisle's rejection of the claimant's suggestion that "forgery experts" should be instructed. The claimant says (paragraph 91 of his witness statemen) that that made him feel angry, frustrated and confirmed his suspicions of a cover up starting to take place.

Whilst we accept that having a grievance not entirely upheld could be regarded as unfavourable treatment (although of course that depends on whether the grievance in question was valid), we again find that the claimant has not shifted the initial burden of proof on him. We should add that we agree with Mr Serr that undertaking a forensic examination of the marking sheets would have been a highly unusual course and that it would have indicated a grave lack of trust and confidence in the members of the interviewing panel.

The decision of Mr Shirley at the grievance appeal

Mr Shirley is an alleged conspirator and of course also an individual respondent. The claimant's case is that Mr Shirley was the most vigorous conspirator in attempting to cover up something which had not allegedly happened on his watch. In particular the claimant contends that Mr Shirley was instrumental in blocking an investigation by the PSU and this was because, according to paragraph 94 of the claimant's witness statement, Mr Shirley "realised at the time that the truth would unfold. I believe that this was a deliberate action or was motivated by race in order to ensure that the process was not amended and/or re-run". The claimant draws our attention to the advice that Ms Corbishley of HR gave to Mr Shirley in the 18 March 2015 email (pages 147 to 148). He is particularly interested in her suggestion that one option would be a PSU investigation. The claimant is critical that Mr Shirley failed to take on board HR advice (see paragraph 102 of his witness statement).

We find that the claimant seeks to read too much into Ms Corbishley's initial view. As we have noted, Mr Shirley's evidence was that Ms Corbishley had made these comments without having seen the whole of Mr Carlisle's report. The claimant says that he is baffled by Mr Shirley's email of 19 March 2015 to HR (see pages 156 to 157) which he describes as Mr Shirley having already made up his made that it was not deliberate discrimination and that there was no merit in having a PSU investigation. However, we note that that email was written three days after the grievance appeal hearing and it notes that whilst "originally in the grievance discrimination was the key issue" the thrust of Mr Carlisle's decision was that everyone had had the same issues. We note that at the 16 March grievance appeal hearing the claimant had said that he 'took back the discrimination grounds of ethnicity as this is impossible to prove' (see page 145).

Returning to Mr Shirley's email of 19 March 2015, he notes that the claimant either wanted to be an SEO or have a PSU investigation commissioned. Mr Shirley records that he did not think that there was merit in the latter because there had already been two investigations (Bailey and Verney) and both had concurred that there had not been discrimination, although there had been some administrative failings.

On the appointment as SEO issue, Mr Shirley noted that the claimant had not passed at interview so there were no grounds to simply promote. Mr Shirley goes on to record that he cannot ignore the administrative failings and at that stage he was considering whether the interviews should be re-run, but not just for the claimant. As we know ultimately the position on that was that too much time had elapsed and that it would not be practical or fair to the other candidates.

The claimant describes himself as being furious at Mr Shirley's appeal decision (see paragraph 110 of the claimant's witness statement). However again we find that the claimant has not proved facts from which we could conclude, absent a proper explanation, that Mr Shirley had discriminated against the claimant.

We should add that it was specifically put to Mr Shirley in his cross-examination by Mr Salter that he had deliberately overlooked the claimant's allegation about Ms Gregory's notebook (extract at page 111). The allegation was put that he had not raised that issue, did not notice or had shut his eyes, to which Mr Shirley responded that he could not recall. When it was suggested that this had been done because of the claimant's race Mr Shirley said that he did not accept that at all. We find that this allegation put by Mr Salter on instructions to Mr Shirley is nothing more than an assertion. Again, the claimant has not discharged the initial burden.

7.5. <u>The involvement of Ms Baumgartner</u>

Ms Baumgartner is of course an individual respondent. The claimant is concerned that Ms Baumgartner had initially suggested to Mr Shirley that he should commission an independent investigation (see her letter of 4 August 2015 at page 350) but had then changed her mind or, as we understand the claimant's case, had been drawn into the conspiracy. It is also clear that by October 2015 Ms Baumgartner thought that there should be as she put it "*as a minimum … an examination of the papers*" - a reference to the marking sheets this being set out in her email to Mr Shirley of 2 October 2015 at page 371. Ms Baumgartner returned to that issue in an email of 5 October 2015 to Mr Shirley (page 377) when she expressed the *view "I think there is still doubt about whether Jed's scores were altered in a way which others weren't*" and she could not see the harm in asking the question.

When asked about this during her cross-examination Ms Baumgartner said that looking back now she believed that around this stage she had begun to lose her objectivity. She said "I felt I'd taken on the claimant's grievance myself".

Ms Baumgartner was to change her position, because when she wrote to the claimant on 29 October 2015 (page 418) she said that she did not now feel that it would be appropriate to pursue another investigation. The claimant contends that Ms Baumgartner adopted this approach "to prevent the actual truth that my scores had been amended from being uncovered" and that this was because of the claimant's race (see paragraph 135 of the claimant's witness statement). The claimant goes on to describe Ms Baumgartner's response as being well planned and the result of collusion designed to engage in a cover up. The claimant

alleges that Mr Dight (an individual respondent) was also guilty of changing his mind for discriminatory reasons.

The Tribunal take the view that the respondent's vacillation on the PSU investigation and/or forgery investigation was unfortunate. As the claimant was and is convinced that his scores had been manipulated and there was now a cover up, this vacillation clearly fuelled the claimant's conspiracy theory.

Nevertheless, we must view the matter objectively and on the basis of the evidence before us, acknowledging that direct evidence of discrimination is unlikely to be available and that we need to draw appropriate inferences from the facts that we have found. Should we infer that Ms Baumgartner's vacillation was because she, as an HR professional and the Home Office's business lead for diversity had realised that the claimant was being discriminated against and decided to go along with that, or had that realisation but was then subjected to undue influence by Mr Shirley?

The unanimous decision of the Tribunal is that we cannot possibly draw any such inference. The logic of the claimant's case in this stage is diminished because we have found no manipulation and this means that it is unclear which of the foregoing propositions represents the claimant's case.

During her cross-examination it was alleged that Ms Baumgartner had intentionally delayed consideration of whether there should be a PSU investigation because of the claimant's race. She responded that that was not the case and that her being on leave had caused some of the delay. When paragraph 135 of the claimant's witness statement was put to her she replied that she was sorry that the claimant felt that way but that was not what she was doing (failing in her duty of care and preventing the actual proof being uncovered). She said that she was trying to reach a situation where the claimant could draw a line under the matter.

We find that the explanation which Ms Baumgartner gives is satisfactory. Her initial view that there should be an investigation was expressed at a time when she was unaware that there had been the informal review by Mr Bailey followed by the formal investigation by Mr Verney and the grievance decisions of Mr Carlisle and Mr Shirley. Her change of mind with regard to the examination of the marking sheets was in our judgment influenced by the guidance she obtained from the PSU and not by undue pressure from Mr Shirley. We find that Mr Shirley's resistance to any further investigation is understandable having regard to the extensive enquiries, investigations and discussions which had been undertaken by Messrs Bailey, Verney and Carlisle and his own engagements.

For all these reasons we find that Ms Baumgartner did not discriminate against the claimant with regard to her ultimate approach to a PSU investigation.

7.6. The Submission to the Permanent Secretary

This is another area where the claimant makes severe criticism of Ms Baumgartner. He alleges that she sent misleading and inaccurate information to the Permanent Secretary to prevent a PSU investigation (see paragraph 154 of his witness statement). However, he also contends that Ms Nicholson, Mr Dight and Mr Shirley were complicit in the production of this allegedly misleading Submission. The Submission would in due course be the subject matter of the claimant's second grievance. Aspects of that were ultimately upheld by Mrs Shacklock and that was with regard to the mis-attribution of a quote.

It was put to Ms Baumgartner in cross-examination that this mis-attribution was not just 'incompetence' but rather it was done deliberately to conceal discrimination by the Home Office against the claimant. Ms Baumgartner disagreed with this proposition and she could not see how misattributing a quote could in any way be regarded as misleading on the grounds of race. The quote was genuine. It was just misattributed.

Mr Serr in his submissions in effect invites the Tribunal to adopt what he describes as the careful and extensive findings of Dawn Sherrington and Claire Shacklock rejecting the suggestion that the submission was inaccurate or misleading, save in that one respect. We take the approach that it is our task to make findings of fact but, having had the benefit of reading the investigation which was carried out on the remitted second grievance, we find ourselves in agreement with the analysis and the conclusion which was reached in that process.

7.7 The involvement of Ms Nicholson

Ms Nicholson is another alleged conspirator and of course also an individual respondent to this claim. The claimant contends that Ms Nicholson, like Ms Baumgartner, was initially in favour of a PSU investigation but then, on the claimant's case on racial grounds, changed her mind.

Their initial shared views on the PSU issue are expressed in Ms Baumgartner's email to Ms Nicholson of 11 January 2016 (page 774). We remind ourselves that Ms Nicholson's evidence was that having only recently joined the Civil Service from the private sector, she was unaware of the distinction between a PSU investigation and a PSU review. Ultimately Ms Nicholson recommended that there should be a PSU review but the claimant alleges that in doing so she was "*trying to obtain (*The*) Network buy in by selling the PSU review as a bigger wider concern about diversity issues in Sheffield …. I believe this is part of a cover up*" (claimant's witness statement paragraph 170).

Although the claimant has alleged that Mr Rafique of The Network was being put under pressure to agree to a PSU review, nobody from The Network has been called to give evidence for the claimant. In fact we have been referred to Mr Rafique's email of 25 February 2016 (page 869) in which he states that his organisation believed that an independent review led by the PSU would be in the best interests of Network members based in Sheffield and that would benefit all Network

members including the claimant. Network he said endorsed that approach.

When it was put to Ms Nicholson in cross-examination that she had not commissioned a PSU investigation to ensure that the claimant's concerns were not looked at and that this had been done on the grounds of race, she replied that that was absolutely not true. She accepted that having spoken to a Sarah Rapson, a Director General, who had referred to "the club" in the Sheffield office (see the email exchange at page 864) she had been concerned about Sheffield. As we are reminded in Mr Serr's skeleton argument, the facts that Ms Nicholson decided to commission a PSU review, resisted it's terms of reference being "watered down"; ensured that the period considered included the recruitment exercise which the claimant was complaining about and tried to ensure the claimant was interviewed by the PSU investigator, militate against the claimant's argument that he was less favourably treated by Ms Nicholson because of race.

As far as Ms Nicholson's alleged change of mind is concerned we accept that her misunderstanding of the difference between an investigation and a review would have caused some confusion for the claimant and more fuel for his conspiracy theory. However, we find it to be an acceptable explanation and Ms Nicholson endeavoured to provide clarity to the claimant in her email of 6 April 2016 (page 926). We bear in mind that at the time the claimant accepted her assurance that if the PSU review disclosed anything which needed further exploration then that would be followed up with a formal investigation.

The unanimous conclusion of the Tribunal is that the claimant has not discharged the initial burden in relation to his complaint of direct race discrimination by Ms Nicholson.

7.8. <u>The alleged failure to disclose and the withholding of information</u>

This aspect of Mr Ramzan's complaint is in relation to the various Subject Access Requests (SAR) that he made during the course of the period of time we are considering. The claimant alleges that in respect of a SAR he made on 1 March 2016 that Ms Nicholson contacted his union representative querying whether the claimant really wanted to go through with the request as she would rather tackle the issues he had raised in less bureaucratic ways. The claimant says that he felt that he was being pressurised and treated less favourably as that was not the way to behave if an SAR request had been made (see paragraphs 175 and 176 of the claimant's witness statement).

The claimant does not refer to Ms Nicholson's email prior to the one from which he quotes. Both emails are on page 894. The first relevant email is from Ms Nicholson to Ms Fox, the claimant's union representative. She enquires of Ms Fox whether she knew that the claimant had made a request for Ms Nicholson's email correspondence. She did not want to sound unsupportive of the claimant but she was not sure that helped them with the claimant's situation and just created extra work when everyone is busy already. Ms Fox replies to Ms Nicholson "*I didn't know that he had done this! He may have submitted it when he thought things weren't happening*".

It would seem therefore that the claimant's union did not share the view now expressed by the claimant about being pressured.

The claimant also fails to refer to the next email which Ms Fox sent to Ms Nicholson (page 898) in which she says that she has just had a quick chat with the claimant and he had stated that he applied for the disclosure before Ms Nicholson had met with them because he felt he was not achieving anything. She went on to write "*he is happy for you not to follow this up as he believes you have been upfront with us*".

As Mr Serr points out in his skeleton argument (paragraph 51), two further SAR requests directed at Ms Baumgartner and one at Mr Dight were responded to promptly and without opposition.

In these circumstances it would seem that the only genuine cause for concern which the claimant had was in relation to a request made to Ms Nicholson. That was made on 1 March 2016. In her evidence to us Ms Nicholson acknowledged that she had failed to respond to that request. Her explanation was that at around the same time there had been a separate request, not it seems from the claimant, but from someone who was dealing with what Ms Nicholson describes as an internal investigation into the claimant's case. It was in those circumstances that Ms Nicholson believed that the request had already been dealt with. In fact Ms Nicholson said that this misunderstanding was made by her PA rather than her personally. In cross-examination it was also put to Ms Nicholson that there had been a deliberate failure by her to provide the requested documents and that that was because of the claimant's race. We assume that this is still part of the alleged cover up as far as the claimant's case is concerned. In any event we do not find unlawful discrimination here.

7.9. Summary of conclusions in relation to direct race discrimination complaints

For the reasons set out above it is the unanimous decision of the Tribunal that all aspects of the complaint of direct race discrimination fail.

7.10. Indirect discrimination

7.10.1. Did the sixth respondent have a provision, criterion or practice of appointing staff to TCA roles without due process?

Mr Salter's brief written submission on this part of the claim (paragraph 12 of the skeleton) reads

"The evidence produced by the Respondents shows, it is contended, the application of PCP that disadvantages BAME candidates, and clearly disadvantaged the claimant in his interview. HR stated risk of indirect discrimination and accepted if Temporary Cover Allowance (TCA) were not advertised this adds another layer, Mr Verney report dated 2 February 2015. A number of candidates were on TCA or deputising at the time of the interviews. Ms Mason and Ms Gregory did believe the examples from TCA roles could give greater weight to a candidate's application. It appears there were a number of staff given TCA across Temporary Migration

without an expression of interest. Respondent's own feedback {this we believe is a reference to the written feedback by Ms Mason given on 10 September 2014} *states* (that the claimant*) would benefit from opportunities to undertake TCA to SEO for larger operational commands. Network further confirm BAME staff are less likely to have been recognised for secondment/TCA opportunities*".

We are assuming that the claimant is still relying on the two PCPs and we are now dealing with the first of those.

We note that in the PSU review report prepared by Lindy Beach reference was made to:

"A handful of staff related that they were aware of staff being allocated new roles or appointed on temporary cover allowance (TCA) without the post being subject to fair and open competition, post introduction of the recruitment principles (eg those introduced by Mr Shirley*) but they were reluctant to provide details when pressed*".

In Mr Verney's report there is an acknowledgment that a number of staff had been given TCA within temporary migration without the expression of interest process being followed.

The Recruitment Principles which Mr Shirley would subsequently introduce (February 2017) includes a section dealing with filling temporary vacancies. It provides that temporary vacancies including TCAs which were of at least three months duration would have an expression of interest process applied to them. (see page 2334). However as far as we are aware there was no written policy on TCAs (in terms of recruitment or appointment to them) at the material time. From the evidence before us we conclude that at the material time the sixth respondent the Home Office did have a policy of appointing staff to TCA roles without following an expression of interest or any other due process.

7.10.2. <u>Did the sixth respondent have a PCP of giving more weight to examples provided at interview by candidates who were undertaking a TCA role</u>?

Feedback provided by Ms Mason (page 59) records that she told the claimant at the feedback meeting that he would benefit from opportunities to undertake TCA to SEO for larger operational commands. Within the Verney report it was noted that both Ms Mason and Ms Gregory believed that examples from TCA roles could give greater weight to a candidate's application.

We have difficulty accepting that this could properly be described as a practice. A practice would be something which happened routinely and across the board. In the context which we are considering a candidate would not have a better chance of success simply because they had been or were on

a TCA. It would depend on the quality of the evidence they gave. Whilst being on a TCA might make it more likely that they would give good evidence to which greater weight would be given, that is unlikely to be automatic. Indeed, Ms Mason's evidence was that one of the candidates who was unsuccessful had been on a temporary promotion to CEO level for two years. Accordingly, as there was no 'tick box' approach to TCA in the context of an interview for a substantive post, we do not find there to be this PCP.

7.10.3 Was the (first) PCP applied to persons with whom the claimant did not share the protected characteristic of race?

We find that it was.

7.10.4. Did that PCP put persons with whom the claimant shares the protected characteristic of race at a particular disadvantage when compared to persons with whom the claimant does not share it?

We consider that we have no, or no sufficient, evidence before us to make this finding.

The reference which Ms Corbishley makes to indirect discrimination (page 147) is predicated on the unanswered question *"if they (BAME) have had less senior exposure perhaps because other candidates have been given the opportunity to act up on TCA*" (page 148).

This is not HR indicating that they believe indirect discrimination has occurred, but simply that it could occur in such circumstances. The claimant also relies upon the statement in Mr Rafique's email to Ms Nicholson of 27 January 2016 (page 783) where he writes *"BAME staff are less likely to be have been (sic) recognised for secondments/TCA opportunities or recognised through the PDR process".* Mr Rafique does not give any evidence for that bald statement.

We find that because there is no satisfactory evidence that there was a group disadvantage the indirect discrimination complaint fails at this point.

However, we remind ourselves that in the context of this PCP the potential disadvantage is not being appointed to a TCA post and that is not what his claim is about. Rather it concerns the alleged consequences of not being appointed and it is in this regard that the second aspect of his indirect discrimination complaint fails because we found that there was no PCP for it.

We might add that even if we had found the second PCP to exist we would have been in exactly the same position with regard to the lack of any statistical or other reliable evidence to indicate group disadvantage.

We share Mr Serr's difficulty in understanding the basis of the indirect discrimination complaint as the claimant has sought to describe it in his schedule. (Items 10 and 12). That particularly applies in relation to the narrative in box 12. We have however endeavoured to deal with the indirect discrimination complaint as it has been presented to us at the hearing.

Finally, we need to refer to the findings of Ms Beach in the PSU review with regard to the group of staff within the Sheffield office referred to variously as 'the clique, the boy's club, the golden circle' etc. We are not surprised that Ms Nicholson was concerned when this matter came to her attention and the Tribunal accept that such a state of affairs *could* be a breeding ground for unlawful discrimination, rather than just objectionable favouritism or nepotism. As we have observed (in paragraph 5.96 above) Ms Beach's review had found that those who referred to being excluded from the group did not think it was because they had a protected characteristic although it was acknowledged that such factors as religious restrictions on alcohol consumption and caring responsibilities might play a part. In any event we remind ourselves that the claimant is not relying on a provision criterion or practice of being in a particular social group at work. We therefore do not consider that this aids his indirect discrimination complaint.

For these reasons the unanimous Judgment of the Tribunal is that the indirect discrimination complaint also fails.

Employment Judge Little

Date: 12 October 2018