EMPLOYMENT TRIBUNALS

Claimant: Rhodri Tomos

Respondent: Institute and Faculty of Actuaries

Heard at: Liverpool **On:** 14, 15, 16, 17 and 18 May 2018
24 May 2018
(in Chambers)

Before: Employment Judge Shotter
Ms F Crane
Mr R Cunningham

REPRESENTATION:

Claimant: In person
Respondent: Miss A Del Priore, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows: -

1. Claims of race discrimination brought 13 and 19 of the Equality Act were received outside the statutory time limit. An employment tribunal shall not consider such a complaint unless it is presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done). It was not just and equitable to consider such a complaint which is out of time if, in all the circumstances of the case, the Tribunal does not have the jurisdiction to consider the complaint which is dismissed.

2. The respondent did not unlawfully discriminate against the claimant under section 13 of the Equality Act 2010 by treating him less favourably than a hypothetical comparator on the grounds of his nationality/national origin, and the claimant's claim for direct race discrimination is not well-founded and is dismissed. The claimant was not indirectly discriminated against under section 19 of the Equality Act 2010, the protected characteristic relied upon being British nationality and national origin, his age of 37 years, and sex (male), and his claim for indirect discrimination is not well-founded and is dismissed.

3. The respondent did not victimise the claimant under section 27 of the Equality Act 2010. The alleged detriments suffered in 2012 numbered 1(i) to (iv) and (vi) were lodged outside the statutory limitation period, it is not just and equitable to extend time and the complaints are dismissed. The claimant's remaining claims for unlawful victimisation brought under section 27 of the Equality Act 2010 are not well-founded and is dismissed.

REASONS

Preamble

The pleadings

1. By the first claim form received on 31 May 2017 (ACAS EC 26 May 2017) the claimant brings a complaint of race discrimination relating to the respondent's "CA3 Rule" seeking a declaration that it was discriminatory and unenforceable under Section 13 of the Equality Act 2010 ("the EqA") on the protected grounds of nationality and national origin, the less favourable treatment relied upon being the respondent's requirement that UK national members are required to pass examination CA3 and the SA series as a condition of the conferment of a fellowship qualification. There was not a similar requirement for affiliated members applying for fellowship under a Mutual Recognition Agreement ("the MRA"). The claimant alleged further the respondent had not identified a CA3 equivalent provided by affiliated overseas associations of actuaries to which it offers a direct exemption for the CA3 exam.

2. The claimant's comparator is any international student being a national, with origins other than British, who is not resident in the UK but is resident in a country that is a member of an association with the benefit of the MRA and who has passed all the equivalent exams to those that UK students must pass save for the CA3 and SA Series.

3. The claimant claims indirect discrimination under section 19 EqA on the protected grounds of nationality and national origins as to the terms on which the respondent was prepared to confer the fellowship qualification on the claimant and by not conferring it. The claimant relied on three provisions, criteria or practice ("PCP's"), however, at the case management Preliminary Hearing the claimant clarified the PCP he relied upon was "the respondent allows the conferring of a fellowship on members of foreign actuarial associations with the benefit of a MRA without the need for CA3 or the SA series of exams.

4. The claimant did not bring a complaint of victimisation until a number of documents were sent to the Tribunal on 20 July 2017 that included amendments to his claim incorporating victimisation and discrimination relating to the continuous Professional Development ("CPD") Scheme. The claimant confirmed the claim related to the disparity in treatment between people who held his British nationality and national origins and those who achieved the status of fellow by virtue of MRA's. There was no claim for victimisation arising out of the 2011 protected acts. At a

Preliminary Hearing held on 29 September 2017 the claimant was given leave to amend his claim to include:

(1) Direct race discrimination arising from the respondent's requirement for him to sit and pass the SA2 exam in order to qualify as fellow.

(2) Direct race discrimination arising from the respondent's refusal to grant the claimant exemption from the requirements of its CPD scheme.

(3) Indirect age and sex discrimination arising from the application of the CPD scheme to the claimant. This complaint relates to the respondent's PCP of requiring persons to be engaged under an employment contract in order to be eligible for exemption under the scheme.

(4) Victimisation arising from the respondent's treatment of the claimant.

5. The claimant issued a second claim form received on 20 November 2017 (ACAS EC 16 October 2017) alleging victimisation under Section 27 EqA. The claimant maintained he had received documents on 26 August 2017 following a subject access request ("SAR") that revealed he had been victimised in 2012 and he alleged further victimisation since 29 August 2017 relying on a protected act in June 2011 when he complained about the respondent's "two-tier pricing policy based on nationality." The claimant claimed a number of detriments, which were also sent out in the Scott Schedule.

6. A Scott Schedule was produced and further information was provided to the claimant by the respondent in accordance with the 30 January 2017 case management orders.

7. The respondent agreed the claimant had carried out protected acts in June and July 2011 and on 27 March 2017. It did not accept the claimant had suffered all of the detriments set out in the agreed list of issues. The respondent denied it had treated the claimant less favourably as alleged by the claimant and listed (i) to (iv) in the list of issues.

Agreed issues

8. The issues agreed between the parties are as follows:

Section 13 Equality Act 2010 ('EA') Direct Race Discrimination

1. Did R treat C less favourably than it treats or would treat others (who do not share his nationality/national origins and whose circumstances were not otherwise materially different) because he is a British national and/or of British origin by:

i. requiring him to pass CA3 (now CP3) in order to grant him FIA?
ii. requiring him to sit and pass SA2 in December 2016 in order to grant him fellowship status?
iii. refusing to grant C an exemption from the requirements of its Continuous Professional Development Scheme?
iv. By failing to confer the relevant qualification of FIA on him by 31 December 2011.

2. In answering the above questions, what are the circumstances of C's correct comparator?

Section 19 EA – Indirect Discrimination

1. Did R apply the following PCPs to C?

i. Conferring a fellowship on members of foreign actuarial associations with the benefit of an MRA without the need for them to pass CA3 or the SA series of exams?

ii. Applying its CPD exemption terms (category 5), i.e. requiring persons to be engaged under a contract of employment in order to be eligible for exemption from the requirements of the scheme?

2. Did R apply or would it apply the PCPs to persons who do not share his protected characteristic?

- In respect of PCP 3.a., C relies on his British nationality and national origin.
- In respect of PCP 3.b., C relies on his age (38 years) and his sex.

3. If so, did the PCPs put, or would they put, persons who share C's protected characteristic at a particular disadvantage when compared with persons with whom C does not share it?
4. Did it put, or would it put C at that disadvantage?
5. Can R show it to be a proportionate means of achieving a legitimate aim?

Section 27 EA - Victimisation
Protected Acts

R admits that C did the following protected acts:

i. In June 2011, he complained to R that its two tier-pricing policy based on nationality contravened the Equality Act 2010;
ii. in July 2011, C informed R he was taking the matter to the Equality and Human Rights Commission.
iii. on 27 March 2017, C made allegations that R was in contravention of the Equality Act 2010 and suggested this could be challenged in an Employment Tribunal.

Alleged Detriments

1. Did R treat C as set out below, and, if so, did it do so because C had done or because R believed C had done a protected act?

i. giving C a fail result in the SA2 exam in July 2012?
ii. failing to provide an adequate response to a subject access request on 6 August 2012?
iii. charging C for an examination counselling report on about 26 July 2012 without revealing that there was an irregularity in the recording of his examination marks?
iv. Karen Brocklesby on 6 August 2012 failing to inform C that R had 'no marks' or 'no data' in respect of that examination?
v. Suzie Lyons misinforming C on or after 29 August 2017 that his exam script was retained by the principal examiner and that the marks were recorded upon the script?;
vi. Karen Brocklesby 'keeping a watch' on C's SA2 examination progress from about April 2012?
vii. Mr Cribb on 29 August 2017 failing to follow R's 'Putting Things Right' process by failing to assign another member of staff to conduct that process?
viii. Suzie Lyons on or about 27 October 2017 threatening C with a disciplinary process?
ix. Suzie Lyons threatening in the letter of 27 October 2017 to make an application for costs?
x. From 27 March 2017 –
    (1) C was stone-walled by R and suffered evasive conduct from it?
    (2) C received inferior service as a member from R?
    (3) C has been starved of information and documentation reasonably requested in his capacity as a member?
    (4) C has suffered huge delays in getting responses?
    (5) C has been denied direct phone or email dialogue with staff members when he identifies himself?
    (6) C has not received sufficient Subject Access Request information?
    (7) C has been ignored when he has drawn R's attention to these concerns?

Section 145(2) EA: Void and Unenforceable Terms

1. Does R apply the 'CA3 rule', that is a requirement on 'UK members' to pass CA3 (CP3) as a condition for conferment of FIA?

2. Does R apply the 'SA2' rule, that is, a requirement on UK members to sit and pass SA2 as a condition for conferment of FIA?

3. Does R apply the CPD exemption Rule (Category 5) to C?

4. If so, does such rule promote or provide for treatment of C that is contrary to Sections 13 and 19 of the EA so that it unenforceable?

Time Limits

1. Having regard to the issue of the EC certificate in Claim 2403017/2017, insofar as any of the matters claimed therein occurred before 29 January 2017, they are potentially out of time, so that the Tribunal may not have jurisdiction.

2. Having regard to the issue of the EC certificate in Claim 2423885/2017, insofar as any of the matters claimed therein occurred before 16 July 2017, they are potentially out of time, so that the Tribunal may not have jurisdiction.

3. If so, in respect of such matters, can C prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

4. If not, can C show that it would be just and equitable for time to be extended so that the tribunal may find that it has jurisdiction?

Witness evidence

9. The Tribunal heard from claimant on his own behalf, and Roopesh Davda, a student actuary working in Switzerland who had been studying for the exams over a period of some 15 years.

10. On behalf of the respondent the Tribunal heard from Suzanne Lyons, head of legal services, Gillian Ozer, membership manager of subscriptions and administrations, Clifford Friend, director of education and now the director of engagement and Learning, Benjamin Kemp, general council, and Karen Brocklesby, registrar during the relevant period, and head of quality and assessment.

11. The claimant believed he was providing factual and credible evidence to the Tribunal; however, its basis was flawed because he is not involved and does not have the experience or knowledge to meaningfully comment on the educational systems abroad. The same point can be made in connection with Roopesh Davda, who has issued Tribunal proceedings making similar claims against the same respondent; his evidence was not entirely objective and without self-interest. Roopesh Davda cannot provide any meaningful assessment of the educational systems aboard, and like the claimant he misses the point that actuaries seeking fellowship are fully qualified in direct contrast the student actuaries being required to sit a CA3 exam. It is relevant that the claimant and Mr Davda have been undertaking their actuarial qualifications on a part-time basis whilst working over a number of years, when for example, trainee actuaries in Spain can become qualified after undertaking a full-time 3-year degree.

12. Suzanne Lyons was a credible witness; even if an answer did not necessarily show the respondent up in the best of light she remained open and honest with her responses. Gillian Ozer was also a credible witness, and the claimant indicated during the liability hearing he thought she had provided a very good witness statement. Clifford Friend explained how the respondent carried out the assessments and mapping between the countries, no actual evidence of this was

produced; the claimant was unable to undermine this evidence due to his lack of knowledge and expertise in this area. Taking the evidence in the round it is credible that the respondent would not accept qualified actuaries from aboard without appropriate skills and competencies because it could reflect badly on the respondent's worldwide reputation which was at a "gold standard" level. Clifford Friend brought into question the claimant's belief that actuaries who qualified abroad were not as well qualified as actuaries who had qualified in the UK to work in the UK, and the Tribunal preferred the more credible evidence given by Clifford Friend that they were due to the assessments and mapping that took place.

13. Benjamin Kemp was a credible witness, who had tried hard to get it right with the claimant when he raised a number of issues, including sensibly directing all those issues to be dealt with by his most senior solicitor, Suzanne Lyons. Benjamin Kemp had responsibility for the duty of care owed to staff; staff complained about the claimant upset over his actions. He believed Suzanne Lyons had the gravitas to deal with and stand up to the claimant, unlike other members of staff, and she was in a position to be the fount of information gathered from the organisation. The Tribunal, when analysing the evidence, had in its mind the fact that this was not an employee/employer relationship but one of member and professional association responsible for qualifications and standards. This relationship dictated the responses between the parties, and the claimant had lost sight of the fact that Benjamin Kemp, Suzanne Lyons and Karen Brocklesby particularly, were running the organisation for its 30,000 or so members and not one member alone. He also lost sight of the fact the respondent was not sufficiently resourced to respond immediately when he sent email after email with deadlines, and Benjamin Kemp's evidence on how the respondent attempted to deal with the claimant, albeit criticism could be made, was credible. Administration errors were admitted to, and at times the respondent was defensive, so as to avoid further communications and confrontation.

14. Karen Brocklesby admitted to making a mistake concerning the claimant's request for marks following a fail result in the SA2. Karen Brocklesby gave an explanation to the Tribunal – which it was in a spread sheet, she did not remember all of the fields in the spreadsheet, she did not bother looking for the mark in the belief that the claimant was not entitled to it and exam counselling would address his issues. Karen Brocklesby's decision-making process was affected by the fact that the claimant's request was the first SAR the respondent had ever received and she did not know what to do with it. The Tribunal found her to be credible witnesses, although she could have dealt with the claimant's request better by carrying out a proper search at the time, the Tribunal accepted on balance that her failure to do so was not causally connected to the protected act. The Tribunal has dealt with Karen Brocklesby's credibility below, having found her to be an honest witness.

15. The Tribunal was referred to five agreed bundles of documents, witness statements together with additional documents produced during the hearing and written closing submissions together with copies of case law received from the respondent. The Tribunal has considered written and oral submissions together with case law to which it was referred, which it has dealt with below. The Tribunal does not intend to repeat the oral submissions in their entirety and has attempted to incorporate them into this judgment with reasons. The Tribunal has made the following findings of the relevant facts.

Facts

16. The respondent is a global body based in the UK with 30,000 members consisting of qualified associate and fellow members, student members and some affiliated members. 46% of the membership is based overseas. In 2017 over 21,000 individuals sat 35,564 examinations held by the respondent, who also accredits 46 University partners in the UK and aboard. There are approximately 70,000 qualified actuaries in the world.

17. The respondent is not for profit based on a Royal Charter. It has offices across the country and is not a large employer with some 130 members of staff including the witness the Tribunal has heard from.

18. In August 2013 the Actuaries Code was published, which applied to all members of the Institute and Faculty of Actuaries, and under a number of principles set out within the Code was principle 1: "Integrity – members will act honestly and with the highest standards of integrity. Members will show respect for others in the way they conduct themselves in their professional lives." With reference to paragraph 5 "Communication" the Code provided that: "Members will ensure that their communication, whether written or oral…is appropriate."

19. Through a Mutual Recognition Agreements ("MRA") different actuarial associations agree to recognise each other's qualifications, for example, the Society of Actuaries in America recognise the respondent and vice versa with the result that qualified actuaries from the other member association can become a member of the respondent without having to sit the same exams as the claimant, specifically CA3 (now CP3) and SA2. Qualified actuaries had to pass their own exams held/approved by the actuarial association into their country.

20. Within the European Union the MRA is underpinned by the Mutual Recognition of Professional Qualifications directive 2005/36/EC. In December 2015 the UK Department for Business Innovation and Skills issued Guidance for Competent Authorities on Implementing Professional Qualifications Directive 2005/36/EC. The respondent is a Competent Authority subject to statutory Implementing Regulation under which, in principle, the qualification of a foreign national body must be recognised. The Guidance set out a general system for recognition including assessment of qualifications without a qualified member of another organisation having to sit the exams.

21. The respondent currently has 8 bilateral MRA's and is party to a multilateral European MRA referred to as the "AAE." MRA's can differ in their specific requirements, underlying all MRA's is a level playing field for qualified actuaries. In order to achieve this respondent ensures the qualifications, as best as possible, are equal. Clifford Friend oversees the process of overseas actuarial association's curricula demonstrating a number of competency standards. One way of ensuring this was to map the standards, for example, a requirement that a certain standard of communication is achieved by all but this is tested in different ways and using different languages. The AAE carried out the mapping for all EU association's

qualifications to ensure they meet the agreed syllabus, and the respondent is also involved in this process. In short, the objective of the agreements is to achieve a freedom on the part of actuaries to trade/work in other countries without the barriers.

22. The claimant is not in a position to give any evidence that this process is not effective and that foreign qualifications was not of the same standard as the respondent's, particularly the Spanish 3-year degree course which he had no personal experience of. Professor Friend in oral evidence confirmed the universities worked closely with the regulators in Spain and Romania, courses are closely mapped and focused on AAE requirements in contrast to UK universities who are free to choose the materials in their course programme which do not map to the respondent's requirements which are carried through to AAE requirements. The fact a Spanish actuary qualified in Spain does not mean he or she were any less qualified that an actuary in the UK qualifying through professional exams whilst working or a mixture of University exemptions and professional exams whilst working, which theoretically is the shorter route in the UK.

23. The respondent requires either an aptitude test or a one-year adaptation period of any EU qualified actuary, who wants to become a Fellow of the respondent, the latter being the preferred option of many. One-year adaptation entails a qualified actuary working in a UK based company and being mentored by a Fellow, who is required at the end of the term to certify knowledge of the regulatory environment of the UK, which is likely to be different to that in their country. The one–year adaptation course is not about the actuaries' competence, this has already been established in his or her home country of origin via the professional body. The claimant criticised the respondent for offering a qualified actuary the one-year adaptation route on the basis that it was not rigorous and open to fraud, this was not accepted by the respondent given the Professional Code of Practice expected of Fellows and the possibility of disciplinary action if there was fraud. The claimant did not rely on any actual instances of actual fraud taking place, and it was mere suspicion and supposition on his part as the claimant could not accept a foreign actuary was able to satisfy the competencies in one year.

24. The claimant criticised the language skills of the qualified actuaries from foreign actuarial associations seeking fellowship of the respondent, on the basis that his communication skills were tested, but the respondent did not test the English of those actuaries seeking a one-year adaptation. The claimant's argument is based on a misconception; the respondent does not test English whether it is that spoken by the claimant or actuaries from aboard; it is not their responsibility to do. The respondent tests communication skills and these have already been tested by the foreign actuarial associations who granted the qualification of actuary. The CA3 exam was a test of the claimant explaining actuarial terms to lay audience, it was not a test of his English language capabilities evidenced by the fact that the examiners criticised his voice and body language during his presentation and his failure to focus on the key points; all things that come down to communication and so the Tribunal finds.

25. It takes approximately around 5 to 7 years to qualify as a Fellow in the UK, but this period can be longer. The claimant, who joined the respondent as a student member in 2001, has been studying for and taken a number of exams on a part-time basis whilst working with a varying degree of success, over a considerable number

of years, leading to him qualifying as an actuary. The claimant has since issuing these proceedings qualified as an actuary and is now a Fellow of the respondent, the highest award possible.

26. The claimant had and continues to run his own business known as Tomos Consultancy Services Limited, and during the relevant period he was not an employee.

The first and second protected acts

27. By December 2011 the claimant had passed on his exams save CA3 and SA2 exams, which were known to be tough exams with low pass rates. It was agreed in Tribunal that events prior to June 2011 were irrelevant. The claimant was unhappy with what he perceived to be a two-tiered pricing policy whereby he as a UK student had to pay £545 to sit "CA1! (Which he passed) and a student from a "special" overseas country e.g. India had a "much reduced fee." The claimant accused the respondent of discrimination on the basis of nationality on 8 June 2011 and on 22 July 2011, the first and second protected acts for the claimant's victimisation complaint.

28. The respondent informed the claimant in an email sent 2 June 2017 "we offer lower rates to other countries due to the difference in earnings potential etc." In an email sent 6 June 2011 it confirmed reduced rate were also available to the claimant if he earner less than £8460 between 1/10/10 – 30/9/11 but this could not be backdated.

29. In the 8 June 2011 email to the respondent's membership team the claimant referred to receiving advice from the Equality and Human Rights Commission ("EHRC") that charging reduced subscription rates and reduced exam fees to overseas members could fall foul of S.5 of the Equality Act 2010 (EqA") requesting full written reasons within 21 days.

30. The claimant was provided with a long explanation on 11 July 20111, with which he did not agree suggesting the respondent should obtain a "second opinion" maintaining it discriminated directly on nationality and expressed his "astonishment" at the suggestion that it was "quite alright for me to be discriminated against when its only £90" which was a reference by the respondent to the subscription differential of £90 not amounting to a particular disadvantage in the email of 11 July.

31. The claimant referred the matter to the EHRC on 22 July 2011, the second protected act relied upon.

32. Karen Brocklesby was aware of the claimant's communications, and had asked questions around pricing of educational services.

33. In January 2012 the claimant sat and failed the CA3 exam (which became the CP3 exam as at September 2017).

34. On the 23 April 2012 the claimant sat and failed the SA2 exam despite his belief that he had performed well enough to pass by giving "very good answers." The claimant believed he had prepared well for both exams, at a considerable cost in

time and money to him. He was unhappy with the fact that he had almost passed having achieved an "FA" the highest fail grade.

35. The ECHR approached the respondent and wrote to Derek Cribb, the chief executive, on 23 April 2012 concerning the exam fees requesting information, which was provided. A meeting took place following which no further action was taken. The respondent had satisfied the ECHR it was not acting unlawfully.

36. On 26 April 2012 the claimant was informed he had failed the CA3 exam and on 27 April 2012 a Subject Access Request ("SAR") was sent to the respondent as follows; "I have just received the shocking news of failing CA3…I have no idea how this happened as I was confident I had performed well enough to pass. Therefore, I need more information how this result came about…this includes the examiners comments and marks awarded…" This was the first SAR received by the respondent, whose staff, including Karen Brocklesby, was unclear as to how to handle it.

37. Liz Harman, the deputy registrar, requested guidance on what information was to provide and "can we avoid giving anything relating to the examiners…results do come in electronically but the sheets have other students' details on as well… [presumably that is our reasons for saying no…A lot of his queries could be answered via exam counselling but he is known to us (as Karen will testify) and can be difficult to deal with!" The reference was to Karen Brocklesby, and the Tribunal accepted that she also took the view the exam counselling offered to the claimant would deal with his questions. Karen Brocklesby became involved and informed Liz Harriman "Please don't do anything on this. Stephanie has been dealing with him in the past and because of another issue would like her to pick this up too." In a separate email she asked if the claimant was taking exams in April.

<u>Alleged detriment 6: Karen Brocklesby 'keeping a watch' on C's SA2 examination progress from about April 2012.</u>

38. On 27 April 2012 Karen Brocklesby emailed Stephanie Farrell, in house-solicitor, Trevor Watkins, director of education, and Derek Cribb seeking legal assistance and setting out the following "Trevor/Derek – this is for info and also possibly related to the EHRC request. I have also checked what he is sitting this April, and he sat SA2 so will be keeping a watch on his progress on that." Karen Brocklesby had made the connection with the EHRC complaint, it was serious enough to remind the chief executive and head of education and her team were concerned about how much information the claimant could be given as he was known to them as being difficult to deal with.

39. The respondent's practice was not to provide examination marks to students. Grades were provided, and the failed grades fell into four categories. The claimant was awarded the first, "FA" being the closest to the pass mark. He achieved a mark within 95% to 99% of the pass mark. Somewhere between 33-40% of those sitting the exam passed SA2. The examiners are qualified actuaries independent to the respondent overseen by a head examiner. The papers are marked independently by two examiners who are unaware of each others marks and the senior examiner can ask for the scripts. The senior examiner is responsible for bringing together the marks. The claimant alleges Karen Brocklesby was involved in the exam and the

respondent failed him because he had made a protected act. There was no evidence of this before the Tribunal; it would require a conspiracy of examiners to do so.

40. Karen Brocklesby gave evidence how the claimant's results were set out in a list, which the Tribunal had sight of with names redacted, the claimant's entry showing "FA." In her witness statement she stated at the time of the SAR request the claimant's SA2 exam script was with the principal examiner, who also held the marks. In oral evidence Karen Brocklesby said the mark does not go onto the electronic system only the grade goes on the system and that was held indefinitely. The spreadsheet was sent by the examiner with a mark and a grade, and whilst the mark was not ordinarily disclosed or uploaded, Karen Brocklesby confirmed it should have been given to the claimant at the time in response to the SAR, and she was at fault for not doing so due to a mistake on her part. The spreadsheet was on the electronic system, and Karen Brocklesby did not look for it. This was the first time Karen Brocklesby had admitted the mistake. In oral evidence Karen Brocklesby confirmed the respondent knew a spreadsheet existed, the claimant's name was on that spreadsheet and she couldn't remember all of the columns. She stated, "I never saw the marks, I never went to get the marks…I'm not going to look at everyone's data." On the balance of probabilities, the Tribunal found Karen Brocklesby did not look for the marks because she genuinely believed the claimant was not entitled to them, she could not be bothered, her experience of the claimant was that he was difficult to deal with, and she correctly believed exam counselling and not the a global mark would clarify matters for the claimant.

41. The claimant brought to the Tribunal's attention the fact that within a short space of time on the afternoon of 27 April 2012 Karen Brocklesby linked the request for a mark with the ECHR and referred it to the Chief Executive. The Tribunal is aware from the evidence before it she was aware the spreadsheet had come in and had the knowledge and experience that it was possible the claimant's mark was on the spreadsheet. She did not instruct her department to look for the spreadsheet, and nor did she look for it herself. The Tribunal took the view that as head of quality and assessment, she would have been aware of what information was available, and she was conflicted with a request for information that would not ordinarily been disclosed. There were a number of factors in Karen Brocklesby's mental processes including the claimant being a difficult man to deal with, the policy not to release exam results and so on, and the Tribunal found, taking all of the evidence in the round, the influence of the claimant's protected act was a trivial if non-existent influence.

42. The Tribunal accepted by not providing the claimant with his mark he could theoretically have been caused a detriment. However, had a mark been supplied it would not get the claimant any further because he was aware already of the "FA" fail i.e. that he was within 95% to 99% of achieving the pass mark.

43. On the balance of probabilities, the Tribunal did not find the claimant suffered a detriment objectively assessed. The reason he wanted the mark was to find out where he went wrong and one overall mark as opposed to the "FA" grade provided, would not have achieved this. Exam counselling was the only way the claimant could assess his performance question by question, and by August 2012 the claimant should have realised that an overall mark would not have assisted him. The claimant was preoccupied with the principle of obtaining a mark and as he preceded down

this path his written communications became numerous, demanding and on occasions understandably objectionable to the respondent. The Tribunal has had sight of these communications, there are too many to set out in this judgment. The Tribunal noted when viewing the correspondence from the claimant he repeatedly attacked the respondent and its staff's professionalism, on a number of occasions insisting on short deadlines for questionnaires to be completed with yes or no answers.

The exam counselling report

44. The claimant underwent exam counselling based on a discussion around the claimant's script. The report ran to 11-pages dated August 2012. Feedback was given for every question with recommendations, for example, the claimant's writing style was said to be "rather long-winded" and he was unable to plan his time.

45. In a letter dated 25 May 2012 Karen Brocklesby wrote to the claimant "we are providing you with a copy of all data to which we believe you are entitled under the Act…. Any information requested to which you are not entitled under the terms of the Act but which the Profession has chosen to provide you is disclosable entirely at the Profession's discretion. Please note that the Profession will not engage in any further correspondence relating to the information which has been shared at the Profession's discretion." The claimant has criticised Karen Brocklesby for these communications on the basis that he was entitled to be informed there was no marks and no data. The position was made clear to him; he had been provided with all the information the respondent believed he was entitled to. The 25 May 2012 letter was relevant to assessing the limitation period which expired on 24 August 2012 in relation to the claimant's complaint.

46. Karen Brocklesby also wrote to the claimant as follows: "We enclose redacted copies of the marking schedules and spreadsheets held by the profession which confirm your marks and the examiner's comments on both your presentation and the written components of your CA3 exam. These documents represent the only relevant data held by the profession in relation to the first part of your subject access request. The profession is not privy to examiners' discussions, nor do we have any input into the pass mark set by examiners. Under the terms of the Act you are not entitled to receive confirmation of the pass mark for this exam, the presentation slides and video or the script. It is, however, possible for you to review your exam script under the profession's exam counselling service…You have stated that you wish to make a complaint because you were asked questions in the course of your exam. We would be grateful if you could more clearly state the basis of your complaint…The questions posed by the examiners in the course of your assessment are designed to make the experience more true to life."

47. The claimant was provided with a number of documents. He was not provided with a global mark. The claimant responded to the Karen Brocklesby letter on 27 May 2012 indicating: "What I have received has generated more questions than answers and I am now even more convinced that you have made a serious error in failing me on this assessment and I have concerns about the integrity of the assessment…I am perplexed by your statement 'the profession is not privy to examiners' discussions nor do we have any input into the pass mark set by examiners'. Your attempts to distance the profession from its exams, examiners and

standards makes no sense at all. This is the profession's exam. Aren't the examiners paid by the profession?" The letter ran to some three pages which culminated in the claimant stating: "As you can see, I have raised some very serious concerns about the integrity of the CA3 exam on Jan 30-31, which is disappointing after I invested a substantial amount of money preparing and attending this two-day course. Please provide an appropriate response and revisit my grade, as I am in no doubt that my efforts deserved a pass."

48. Following a further exchange, on 31 May 2012 Karen Brocklesby wrote to the claimant: "As stated in my letter (of 25 May 2012) I'm afraid that we are not prepared to engage in further correspondence relating to the information that has been shared at the profession's discretion. If you would like to understand further why you were unsuccessful then we do offer an exam counselling service…"

49. The party to party correspondence continued and on 7 June 2012 the claimant emailed Karen Brocklesby: "I'm afraid that exam counselling won't address the issues I've highlighted in the terms of inconsistencies and contradictory remarks between the CA3 examiners e.g. an examiner saying 'all points covered' then awarding only 10 marks out of 20 (twice)'; 'voice ok' VS; 'voice not loud enough'; 'slides ok' VS; 'slides too detailed', 'unsure of himself' versus no such observation from the other, and so on."

50. Karen Brocklesby responded "I'm sorry I haven't replied sooner but I have been checking out what the rules under the Data Protection Act are about data we do not hold. We can in fact supply you with a copy of your presentation that was filmed which we will arrange to do but as this is held by a third party this may take some time. If you believe that there is further personal data you feel we have not provided to you under your CA3 subject access request then please let me know so we can investigate further. I am not trying to be unprofessional but the information you are requesting is about our processes and procedures which is not subject to this Act and the information we have provided in our correspondence should give you reassurance that your exam papers were marked correctly and the grade awarded was correct. I am afraid that engaging in a discussion about our processes will not change this and as previously indicated your comments will be taken into consideration during the CA3 review. If you wish to understand why you were unsuccessful in the CA3 exam that exam counselling is available to you. Whilst the closing date may have passed, I feel it was appropriate that given your concerns we offer this service to you where you would get to review your presentation and script with a counsellor…I'm afraid that I will not be entering further correspondence with you on this matter but I've passed your documentation and comments to our Director of Education, Dr Trevor Watkins, for consideration."

51. The claimant responded on 7 June 2012: "Dear Madam, why do you suggest exam counselling when: (1) The deadline has passed; (2) It wouldn't address the issues I've raised with regard to the presentation assessment…. I'm extremely disappointed that you have refused to engage with my reasonable complaint and failed to defend the integrity of this very expensive CA3 assessment. I find it all very unprofessional and rather disgraceful. Please advise where I can now direct my complaint."

52. The claimant wrote to Mr Cribb on 12 June 2012 in response to his email of the same date referring to the correspondence passed by Karen Brocklesby. Dr Watkins responded: "In terms of the fairness of the assessment, while it will always be more difficult to assess presentations objectively compared to making mathematical type problems, a great deal of effort went into making the assessment criteria as fair as possible. As Karen pointed out, we have been reviewing CA3 as part of our regular review process and we are likely to make some changes in the light of the experience of running the CA3 practical exam over the past two years. Your comments will be taken into account as part of the review. In relation to your result, notwithstanding any change in the process, your result will stand and you will need to apply to re-take CA3 practical exam. You can opt for a re-take, a one-day exam, which is less expensive than the original one. There is nothing more I can add to what Karen has already told you. If you wish to make a formal complaint, then you should contact the Chief Executive…" The claimant was provided with the Chief Executive's direct email address, undermining the claimant's evidence at the liability hearing that he was not provided with any direct contact details for the respondent's employees.

53. The claimant wrote: "How can you declare the result stands when you have not addressed any of the complaints? Surely then the right thing is to declare this result VOID and refund the very expensive exam fee." It is clear from the claimant's correspondence during this period that his sole objective was to void the exam result and achieve a pass.

54. On 13 June Dr Watkins responded: "I see no argument for either refunding the fee or declaring your result void. You were treated in exactly the same way as all other candidates as far as I can ascertain. I'm thus unable to agree to your request."

55. The claimant was unhappy with this response accusing Dr Watkins of "stonewalling" and asking him to either address the matters or refer it as a formal complaint to Mr Cribb. Mr Cribb emailed the claimant on 13 June 2012 informing him of the information necessary, which would be considered by a senior member of the Executive "who has not had any substantive involvement in the matter, Anne Moore". The claimant submitted a complaint in relation to his CA3 exam, which was investigated by Anne Moore.

<u>Alleged detriment 2: charging the claimant for an examination counselling report on about 26 July 2012 without revealing that there was an irregularity in the recording of his examination marks</u>.

56. The claimant paid for exam counselling relating to the SA2 exam in or around July 2012 which he received. The 26 July 2012 charge was relevant to assessing the limitation period which expired on 25 October 2012 in relation to the claimant's complaint.

<u>Alleged detriment 1: giving the claimant a fail result in the SA2 exam in July 2012</u>

57. On the 12 July 2012 the claimant sat and failed the SA2 examination and in relation to this complaint the limitation period expired 11 October 2012.

58. On the 19 July Karen Brocklesby emailed Trevor Watkins concerning the claimant's SAR "So you are aware. On this occasion we have nothing to send him."

59. On 16 July 2012 the claimant submitted a second subject access request regarding the CA2 examination he undertook in April. He had received a FA grade, and requested a copy of the minutes of the examiners' meeting. There exists numerous correspondence and emails culminating in the claimant applying for an exam counselling application and an examiner's report in relation to the April 2012 examinations dated July 2012. The examiners' report was written by the Principal Examiner, in a report which ran to 13 pages, and it set out information aimed at helping candidates including those who had previously failed the subject. On 1 August 2012 Lynsey Smitherman, a qualified actuary provided the claimant with a report prepared on his SA2 exam counselling script, following which the claimant requested an appeal.

60. Dr Trevor Watkins emailed Derek Cribb on 3 August 2012 as follows: "Just so you're aware, he [being the claimant] has requested exam counselling reports on CA3 and SA2. The SA2 one has been done (by Lynsey who did not know who he was). He has immediately come back with a lot of queries basically arguing the toss. Karen is now directing all communications with him through her and not letting Lynsey get into arguments with him. The CA3 request has just come in. We offered him a counselling report as part of the response to the complaint. He is almost certain to query it, in my opinion, given his past actions. In addition, we have a subject access request under the Data Protection Act for SA2 but we are not holding any marks for that subject." Derek Cribb responded: "…I assume we are responding to the SA2 to say no data?"

61. The claimant emailed Lynsey Smitherman on 3 August 2012 concerning the SA2 counselling report, referring to a "trick question" asked of him in the exam and stating, "I thought this exam was also testing practical knowledge but I seem not to have been given credit here, while people who have invented unreal/unlikely scenarios have been given credit". The claimant proceeded to argue why he, unlike others "was in tune with practical reality" and he was "astonished that others have invented unlikely contexts…but these people have received credit? What nonsense!"

62. The Tribunal has had sight of the exam counselling document setting out a report on the claimant's exam script, and the overview confirmed by Lynsey Smitherman was: "In my opinion, you did not pass this exam because for some question parts you did not cover a wide enough range of distinct and valid ideas to demonstrate sufficient breadth of knowledge and understanding. You do not appear to have managed your time well during the exam, and therefore answered at only a very high level the final two question parts tackled, which were worth almost 30 marks in total." She confirmed he had been rated "FA" and was therefore close to the standard required to pass and made a number of recommendations, including studying the examiner's report for the exam and her comments. The claimant did not accept that he had underperformed and looked-for fault on the part of the respondent to explain the result and a reassessment resulting in a pass.

63. The claimant responded on 6 August 2012, "I get the impression from your response below that asking questions is unwelcome". The claimant criticised the questions within the exam, describing one as a "trick question": He wrote; "The

examiners having credited people who played along with this unreal situation and made speculations, whilst people like me who argued according to commercial reality that such a situation would not really be in place have received no credit. This is a very serious issue for people like me with a near fail…The right thing to do is for the exam question to be referred to the relevant people to reconsider the marking for this question and reassess grades. It may be inconvenient, a loss of face and so on to revisit this…but surely the integrity of the exam unfairness should be paramount…It doesn't look like you are really interested in genuine appeals and this puts the profession in an awful light."

Alleged detriment 2: failing to provide an adequate response to a subject access request on 6 August 2012?

Alleged detriment 4: Karen Brocklesby on 6 August 2012 failing to inform the claimant that R had 'no marks' or 'no data' in respect of that examination?

64. The exchange of email continued, with Karen Brocklesby responding on 6 August 2012: "Questions from candidates on their exam counselling report are welcome but not where it begins to stray into whether the system is fair or not and how other candidates perform…The appeal service is offered for those students who feel that the grade awarded was unjust and they can apply stating the reason why they felt it was unfair…One of the benefits of the exam counselling process is that the script has to be reviewed again, and if at any time it is felt that there was some error in the grade awarded we can review the script further as we believe in fairness to all candidates and would not sacrifice this belief for either the concerns of a loss of reputation to the profession or an inconvenience. I am afraid that in your case it was felt that this was not warranted and the grade awarded was a correct one, so I believe that there is no reason to go back to the examining team…You are aware of our complaint procedure if you are unhappy at any time."

65. The claimant was unhappy, but he did not appeal and in an email sent 9 October 2012 (the Tribunal does not intend to set out all of the correspondent) he wrote to Karen Brocklesby after a line of emails concerning the claimant's criticism of the exam counsellor, Lynsey Smitherman, who she described as "a highly qualified and experienced actuary who is there to try and help you identify areas where improvement could be made for future exams, which she has done in her report. If you disagree with the comments then you can discuss the matter with myself. In the meantime, I am instructing Lynsey to send any further correspondence received from you with regards to this directly to me". She referred to the claimant already having been made aware of how the papers were marked with regard to the pass mark, and she referred him to a number of documents concerning this, concluding: "I am afraid that as per out previous discussions we do not engage in discussion around pass mark determination."

66. The claimant continued to criticise the questions set out in the 2012 exam in a number of emails and Karen Brocklesby in the email of 9 October 2012 dealt with his criticisms of the exam question as follows: "It is not felt that there was an issue with the question or the solution. It is true that sometimes questions are contrived in order to examine a particular point of the course but it is not felt to be true in this case. Neither does it seem to have caused issues with other candidates." It is evident from the email that Karen Brocklesby responded to the claimant in detail with reference to

the counselling report and other information, which the Tribunal does not intend to repeat. It is clear from the exchange of communications Karen Brocklesby was trying her best to deal with the claimant's demands and despite her best efforts, the claimant responded on 9 October: "Predictably, my complaint is rejected. This is not a credible response and I find the moving the goalposts approach very disingenuous." The claimant set out in detail his criticisms of the exam questions and interpretation of the counselling report, with reference to students who have been credited by "justifying the imaginary situation in question and invent reasons".

67. In an email sent 19 October 2012 to Trevor Watkins and Karen Brocklesby the claimant alleged that: "The problem is that the credibility and integrity of that decision is shot to pieces and there are contradictions and inconsistencies in coming to that decision. Looks like fail, decided first, then scrambling around for any old rubbish to justify. People have been caught out by the reasons not corroborating. Answer the specific points please and confirm whether a quota system for pass/fail was in place as I was 20th out of 20 to present that day so was wondering if the examiner's lack of enthusiasm was because they had already found their passes for the day which meant that I had no chance of passing."

68. The claimant's emailed concerns continued to be sent to Dr Watkins. For example, on 22 October he referred to: "…A quota going on. Or somehow the profession magically attracts a similar proportion of failures onto each of these courses…If you intend to continue ignoring my questions, please confirm so that I can 'move on'. I draw attention to this matter elsewhere." In response Dr Watkins on the same date: "I'm afraid I have nothing more to add to my previous emails and will not be corresponding further with you on this topic."

69. The claimant responded: "This is disgraceful. What a terrible example you have set." The claimant ignored completely Trevor Watkins' earlier emails (there were a number) in which he assured him on 19 October 2012: "We do not have quote system for exam passes. We test the learning objectives for the subject and those who reach the appropriate standard pass and those who don't fail. Indeed, we have had a recent CA2 practical exam where all 20 candidates passed. I can also assure you that no-one involved in assessing your scripts would have been aware of any complaints you raised with the profession."

70. It is notable that the claimant never let this matter go, the email exchange continued (taking events out of chronology) on 15 August 2017 David Bowie, Chairman of the Board of Examiners, wrote to the claimant concerning the SA2 examination taken in April 2012 in response to the issues he had raised previously. He wrote: "The process of setting examinations and assessing them is very vigorous, for SA2 the papers are set and marked by examiners who are experienced life insurance practitioners and examiners. The papers are scrutinised by an independent panel comprising an exam board officer and staff actuary and road tested by recent qualified actuaries before…set. In addition, the whole process is overseen by the FRC…Written examinations in all circumstances inevitably involve somewhat artificial context, but I am satisfied that the SA2 examination paper (and this question) should have enabled well prepared candidates to demonstrate the level of knowledge to pass." David Bowie rejected "…any notion that the assessment process lacks integrity…Neither the setting and marking of the question nor the situation described in the question encourage or suggest that actuaries or trainee

actuaries should behave in any other way than fully in line with the letter and spirit of the actuarial code…I realise that you are disappointed by the result of your examination, by which the exam board stands, but I hope that you appreciate that the assessment process is one that is rigorous, fair and appropriate for the profession."

71. In February 2013 the claimant wrote to Derek Cribb and Philip Scott saying that actuaries "have been removed from the UK Government shortage occupation list" and alleging that the "profession's hierarchy" had nothing to say in connection with the Government's flawed…and very bias process". He questioned why, and "this change in behaviour requires a serious explanation". The claimant also criticised the respondent for its Christmas cards because "Christmas had been omitted from the message because it might offend Jews…and members abroad such as in China and so on…I consider such explanations to be bogus…I strongly suggest you address these issues as they are quite embarrassing for the profession".

72. At some point the claimant stayed his membership with the respondent and the amount of correspondence reduced. By the end of October 2012 all of the claimant's complaints regarding SA2 and CA3 exam assessments were dismissed by the respondent, and the claimant's complaints were declared closed. In evidence before the Tribunal the claimant confirmed his confidence in the respondent and their assessment "was at rock bottom. My hunch was something was just not right about this picture." In his written evidence the claimant jumps to August 2017. In the intervening years the claimant did not issue proceedings for victimisation, he possessed knowledge that the exam global pass mark would not be disclosed and yet he did not take steps to issue proceedings despite his experience and knowledge of discrimination.

73. Despite the claimant jumping to August 2017 in his evidence in chief, the Tribunal has considered the earlier written communications that resulted in Benjamin Kemp taking the decision for Suzanne Lyons to be the only person communicating with the claimant. In oral evidence on cross-examination Benjamin Kemp explained how staff were upset by the claimant's communications, hence his decision for Suzanne Lyons to be the only contact for the claimant within the organisation. The contemporaneous correspondence supports this evidence.

74. On 7 April 2014, responding to a letter he had received from Tim Morrison, (the respondent's Data Protection Officer) the claimant made a further subject access request concerning an individual student's response to a complaint against him submitted by the claimant, as well as the report produced in that individual's disciplinary investigation. The claimant was informed he would receive a copy of "our adjudication panel's determination when this has been made" and any information contained in response to the claimant's allegations or the disciplinary report if it contained the claimant's personal data. The claimant's response was: "This is unacceptable. I am afraid that section 31 of the DPA does not excuse you from releasing this information. I am offended that the IFOA are trying that on instead of doing the right thing in this case." The claimant proceeded to set out his arguments concerning why the individual's statement should not be released to him, and he threatened: "Please fulfil your obligations under the DPA and release the response,

or I shall have no choice but to refer the matter to the Information Commissioner's Office."

75. The claimant was informed in a letter dated 14 April 2014 from the Deputy Data Protection Officer that: "The release of information in relation to the investigation of an actuary prior to completion of this process could prejudice the proper discharge of the regulatory function of the IFOA. The process involved in complaining about a member through IFOA is explained on our website…You will receive a copy of our adjudication panel's determination when this has been made.

76. The claimant did not accept this explanation, and he "communicated" his "dissatisfaction of the refusal to disclose the case report and the accused defence" and so the exchange of emails continued with the claimant indicating: "With respect, I did not ask for repetition of the words previous stated. I asked for an explanation of how releasing [Mr W's] defence to me could prejudice this investigation…That sounds like the case manager is very influential steering this adjudication panel in this way. Please confirm for my complaint whether the case manager is advising this? Or is that also something I am denied knowledge of?"

77. The Data Protection Officer responded on 17 April repeating the position set out in the letters of 4 and 14 April, to which the claimant emailed: "Unacceptable. Must be a very strange defence [from Mr X] if nothing there about me given the whole matter is with regards to inaccurate statements made about my work experience. You seem to think your processes are above the DPA. What are you hiding? Off to the ICO I go." This was followed by a number of emails and letters which the Tribunal does not intend to repeat.

78. Tim Morrison, Head of IT Services, emailed the claimant on 19 August 2014 concerning the threat to report the matter to the Financial Reporting Council the claimant having alleged "as an example of the ridiculous secrecy and unfairness of this IFOA process and how you failed to comply with the DPA… again". Tim Morrison confirmed: "We have complied with our obligations under the Data Protection Act and do not propose to correspond with you any further in relation to this matter. Accordingly, and as you rightly point out, the Information Commissioner's Office is the relevant entity with which to raise your concerns." The emails continued through to October culminating in an email sent 13 October 2014: "Following your subject access request you have already been provided with the material to which you are entitled. The ICO has concluded that we have provided everything that we are required to provide. The ICO process is concluded, as is the disciplinary process. There is no further recourse under the disciplinary scheme and we will not be disclosing the adjudication panel's papers. The matter is now closed."

79. In 2016 the claimant communicated with the respondent by email concerning reinstating his membership and verifying some other person's exam results, alleging on 14 March 2016: "With the current setup, the profession is inadvertently providing double cover for cheaters/fraudsters…That's just not right, surely?"

80. There was a considerable amount of correspondence exchanged on the MRA subject, which the Tribunal does not intend to repeat. For example, on 14 October 2016 the claimant wrote:" You recall you mention the Equality Act 2010…the Actuarial Association of Europe agreement I understand that in Spain only an

undergraduate degree in actuarial science is necessary to be a qualified actuary. To become FIA qualified in the UK the IFOA only requires Spanish qualified actuaries to pass one essay exam or one-year experience in the UK. In contrast UK members must 5-7 years, 15 exams after an undergraduate degree to obtain FIA etc…why?" The claimant did not issue proceedings in relation to this complaint until 31 May 2017.

81. The Tribunal was taken by the claimant to an email received from Switzerland Actuarial Association, Fchweizerisce Aktuarvereinigung, who confirmed that the easiest way for the claimant was to pass his remaining CA3 in the UK – "…and then register as qualified IFOA actuary here in Switzerland. Then there are no additional exams necessary. If you start the education in Switzerland, you have to pass several exams. We recognise a couple of the exams from the UK but for Swiss specific areas, you have to pass additional exams and final colloquia (in one of our national languages, not in England). One exam/course is in French or German only, all the other university exams are in English…As you may see; bring your education to an end in the UK."

82. The claimant also wrote to the German Actuarial Association which responded as follows:" In order to apply for a membership in the German Actuarial Association on the basis of a mutual recognition agreement, you would need to be a qualified actuary in the Actuarial Association of your home country. Furthermore, we would need confirmation of your employer stating that you're either working in Germany or on topics relating to the German insurance market. In principle, it would be possible to complete your actuarial apprenticeship in Germany, but I suppose that this would be more complicated and expensive. You would need to pass all the exams containing topics which are not covered by the IFOA exams you took. As several of our courses deal with particularities of the German insurance market, this might count for quite a few exams…" The communications from the Swiss and German Actuarial Associations underline how the claimant as a qualified actuary in the UK would also benefit from the MRA, a fact the claimant fails to understand both in the terms of his complaints and hypothetical comparator, and so the Tribunal found.

83. On 22 December 2016 Patricia McLoughlin emailed the claimant as follows: "We fail to see how the IFOA is purportedly in breach in the Equality Act because of the terms of that MRA. As a British citizen, you would be perfectly entitled to sit e.g. the Spanish exams, and use that same agreement to be mutually recognised in the UK once you had completed SAO or done a year's adaptation period. It does not prejudice British actuaries, either directly or indirectly, as those terms are used in the Act." The claimant failed to comprehend the effect of the MRA as explained by Patricia McLoughlin, and at this liability hearing gave evidence that as he could not speak Spanish it was irrelevant.

84. The claimant had failed the CA3 communications exam in November 2016 and passed the SA2 on 20 December 2016. All that remained between him and his Fellowship qualification was the CA3 which became the CP3 in September 2017 (which he did pass then). The claimant was not happy following his fail in November 2016 and he made a number of subject access requests thereafter, including one on 2 February 2017 for all details relating to the CA3 exam taken in November 2016 and the SA2 exam also taken in September 2016. There were numerous emails sent

by the claimant concerning the information he was seeking regarding those exams. It is clear by reference to the bundle a number of response emails were sent by the respondent concerning the claimant's requests, which the Tribunal has not been taken to and does not intend to repeat. For example, on 1 and 2 March 2017, the Data and Information Governance Manager, forwarded information including electronic copies.

85. The claimant was unhappy with the responses to his earlier failed exams and wrote to the respondent on 2 March 2017: "What on earth were the examiners referred to that I was moving around/rocking too much on the CA3 presentations? Marks lost in the voice category too. What's wrong with my voice, please, that should deny me becoming a qualified actuary…I feel thoroughly let down to lose so many marks because of something as silly as this?" The claimant expressed concerns over the mutual recognition agreement between the respondent and the Actuarial Association of Europe (AAE) and he made contact by telephone and emails which were exchanged on this subject.

86. The exchange of communications continued on 10 March 2017 Karen Brocklesby wrote:" I am afraid that the IFOI will not debate the academic judgment of our examiners with individual candidates. To do so would be to counter IFOA policy which follows good practice in the Education sector. I hope you appreciate our position and understand that this response brings a close to the matter."

87. In the claimant's email sent 27 March 2017 concerning the AAE agreement, he wrote: "It's surely part of your statutory duties to be aware of the Equality Act and where your policies or agreements may fall foul of it…I'm aware these matters can be challenged in an Employment Tribunal…You should really be explaining to me, by supplying supporting documentary evidence from 2010/2011, what considerations under the Equality Act were made before that agreement was signed…It doesn't appear that you can demonstrate an equivalence to justify that e.g. for me as a British subject, I must pass CA3 to become qualified, while no such equivalent standard of competency testing of English actuarial communication has been identified on the continent, yet they are not required by the IFOA to pass CA3 to obtain FIA…Your advice...is rather reckless – the idea that I can exploit a loophole by moving to a European country, qualifying there and getting back, here to get FIA. The course of action presents many unfair hurdles and therefore constitutes discrimination also. Again, there exists case law on this. I'm asking the IFOA to withdraw from the AAE agreement until your review into these matters has been concluded…I'm asking for a proper and substantive response…within 14 days."

88. Karen Brocklesby's response did not bring a close to the matter; the claimant emailed by return:" I don't appreciate that position since there are problems going on with your marking that fall short of standards I am accustomed to in the Education sector." As far as the claimant was concerned, Karen Brocklesby's indication that matters were closed were unacceptable to him, and he requested information concerning the criticism by examiners of his movements and voice, including the email sent 28 March 2017 when he wrote: "Please explain the ramifications of your answer in (3) in relation to people with disabilities and/or impairments in relation to movements and/or voice."

89. In an email sent to Karen Brocklesby on 1 April 2017 the claimant referred to a handbook from Imperial University that said: "Students could choose their CA3 subject in advance and have weeks to prepare". Compare this with the IFOA CA3 exam where the topic(s) are only revealed in the exam paper on the day – we have a sensational discrepancy! Therefore, I ask you to overturn my CA3 result from 2012 with a suitable uplift adjustment…I have already put if to the IFOA the serious breaches of the Equality Act, where you don't require CA3 from European qualified actuaries before awarding FIA. I fail to see how you can defend such a three-tier situation when it comes to CA3. This is your opportunity to put things right once and for all."

90. The claimant also wrote to Clifford Campbell concerning his subject access request sent on 1 April 2017 for statistics since 2011 on how many people that IFOA have conferred the FIA qualification via the mutual recognition agreement with the European Actuarial Association. He requested "a breakdown by nationality". The request was refused as it did not relate to the claimant's personal data. The claimant complained: "I have made a complaint of discrimination under the Equality Act last week in reference to this European agreement. There needs to be a transparency here, or I'll have to get a court or Tribunal to get this data released." There followed a further exchange of emails between the parties dealing with the claimant's subject access request with the claimant, on 21 March 2017, requesting an "exact audit trail on what happened to these queries from this point onwards..."

91. In an email sent to Karen Brocklesby the claimant wrote on 4 April 2017: "This delay is absolutely unacceptable. I'm no longer putting up with delay tactics. You should be reminded that I have already raised serious discrimination concerns with the IFOA where I've requested 14 days for a response. Lack of or unacceptable responses by next Monday on these matters related to the CA3 and I'll be completing an ET1."The claimant's response was in relation to Karen Brocklesby's email when she wrote: "I hope you will appreciate that I will need to spend time reviewing the questions you have posed and seeking guidance in areas that I'm unfamiliar with or which relate to historic matters, therefore I am afraid that I will not be able to meet your request of providing a full response by the end of this week. I anticipate, taking into consider the upcoming exam session and Easter break, that it will take around three working weeks to pull together the required response. I will keep you posted as to progress with regards to this."

92. The claimant wrote to Kimberley Russell on 5 April 2017: "I have been enquiring about this discrimination for many months now and so don't accept this proposal of a further delay…I consider this a delay tactic. If no satisfactory response to the serious matters with generous 14 days time limit which expires Monday, including the matters rose separately with Karen Brocklesby where I've received similar excuses, then I shall conclude you are unable/not interested in responding properly and I'll submit an ET1 on Monday evening for these Equality Act breaches of racial discrimination." This email was in response to Kimberley Russell's indication to him on 5 April that his recent correspondence has been sent to the respondent's General Counsel for consideration and reply. General Counsel was on annual leave and she responded to one of his queries. An exchange of email correspondence prior to this reveals Kimberley Russell apologising for delay, as she had been out of the office travelling.

93. During this period the claimant, Suzanne Lyons and Jeanette Deans, General Counsel Coordinator exchanged emails. The claimant referred to Suzanne Lyons's communications as a "non-response" indicating "I will not tolerate any more time-wasting. The discrimination claim I made is easy enough to understand and the IFOA have been given since 27 March to respond. No answers have been given. It is for the IFOA to urgently address this matter or we'll just do it through an employment tribunal, where you will find it rather difficult to defend this evasive conduct."

94. In response Jeanette Deans gave the claimant a date and time for a meeting with Suzanne Lyons to which the claimant responded on the same day as follows: "I have submitted ten points in my email of 27 March 2017. I require answers to all of those in writing/email … if cogent substantive answers are not provided by the end of the week then these matters will be put before a judge. I fail to see how the offer of a phone call from Suzie on Thursday when in her letter she doesn't show an acceptable understanding of the situation, does in any way meet these reasonable requests. … I respectfully ask that your staff be better informed of the situation and its urgency before writing to me and wasting my time with non-responses and further delays." He also wrote later at 8:19pm "… I require answers to the following – do you agree that none of my questions of the last 28 days since March 27 have been answered? y/n" This was followed by 10 y/n question marks which included "Is this the first time the IFOA have failed to substantively respond to a claim of racial discrimination within 28 days?"

95. On 26 April the claimant wrote "… These matters are urgent I demand Suzie Lyons call or email me directly today to explain what exactly she wants to discuss in the proposed telephone meeting tomorrow … to more fully understand my position she must – 1. List the question and points I've made … state which ones have been answered … identify and reflect on the unanswered questions."

96. Suzanne Lyons attempted to ring the claimant three times on April 27, 2017 with no success and she was unable to leave a voicemail. She requested the telephone call was rearranged for the next week but this did not take place.

97. The exchange of emails continued between the claimant and other employees of the respondent, including Liz Harriman, the Deputy Registrar (Exams) who dealt with his complaint that he was no longer allowed to see the CA3 video, which was available to students who were enrolled to take the exam as part of an exam cohort and not open to everyone. The claimant responded on 4 May "How do you say that supplying these videos may prejudice the integrity of the exam? In what way? That makes no sense at all … I'd like to watch them once more. Please supply them immediately."

98. Exchange of emails took place concerning the proposed telephone conversation with Suzanne Lyons, the claimant requesting "further information on her thoughts" when he was invited to reschedule the meeting. The claimant wrote to Suzanne Lyons on 5 May "It doesn't appear you are forthcoming with your response here. What exactly would you want to discuss with me on the telephone that you wouldn't want documented and seen by a judge?"

99. On 8 May 2017 Suzanne Lyons wrote to the claimant as follows: "I refer to my letter of 24 April 2017 offering to speak with you to discuss the issues that you have

raised with colleagues, unrelated to the ongoing county court action between us." Suzanne Lyons was concerned with the claimant's contacting numerous staff across the respondent in relation to a number of overlapping issues and the high volume of sometimes duplicative correspondence being sent and received on an almost daily basis. The claimant had issued County Court claim number D0QZ398J claiming loss flowing from the alleged breach of contract connected to the IFOA examination syllabus, which external solicitors acting on behalf of the respondent were dealing with. The claimant's claim was successfully defended by the respondent and by the time of these employment tribunal proceedings it was at an end.

100. In the letter of 8 May 2017 Suzanne Lyons explained the purpose of the telephone conversation which was "to provide you with an opportunity to explain your concerns directly to me so that I can fully understand the issue and what resolution is possible and appropriate ... as I understand it, you are concerned that the IFOA is engaged in alleged racial communication, relating to our CA3 communication exam." She confirmed that the respondent was happy to co-operate and participate with ACAS, an independent third party, facilitating a conversation. The claimant was reminded that all correspondence was to be directed to her "as your point of contact at the IFOA." The letter was copied to an ACAS conciliator. It has been agreed between Suzanne Lyons and Ben Kemp, who was concerned about the welfare of the staff dealing with the correspondence which he perceived to be discourteous, disrespectful and upsetting to staff. Ben Kemp took the view that a single senior member of staff should engage with the claimant and not numerous employees including the Chief Executive from whom the claimant sought personal responses to correspondence. Ben Kemp consulted with Derek Cribb who agreed, and Suzanne Lyons as Head of Legal Services agreed to take the lead in corresponding with the claimant.

101. It is noted that the claimant, following receipt of Suzanne Lyons's email sent on 8 May 2017, immediately emailed Derek Cribb under the subject matter "unacceptable response on discrimination." He referred to "Your organisation has allocated your Deputy General Counsel, Suzie Lyons, to respond to all my queries following the discrimination complaint I have made dating back to October 2016 I must draw your attention to her letters dated 25 April and 8 May 2017. In these letters she states a desire to understand better the complaint I am making. I have explained extremely clearly and repeatedly in correspondence, going back to October 2016, what the issues are and where exactly you are breaching the Equality Act so that your organisation is without excuse… [my emphasis] at best, as Suzie Lyons's letters show, especially for someone in her position, a tremendous naivety and ignorance of the matter and correspondence … therefore you must find someone more up to speed and/or competent to respond on these extremely serious matters. Alternatively, these letters could be a deliberate and calculated attempt by your organisation to give the impression to a third party in the future … so as to be excused from your failure to date in taking action to eliminate this discrimination. Let me assure you that if these matters end up in the employment tribunal then the full chronology of complaints and information you've received on them will be presented to the judge, so that you are without excuse. The only communication channel Suzie Lyons is willing to engage is in a telephone call, where she refuses permission for it to be recorded. None of my questions to Suzie Lyons have been answered either in writing or otherwise. This is unacceptable. I demand that (1) you put an end to this time-wasting and (2) with immediate effect get rid of the racist CA3 (and its

successor CP3)." It is not disputed the telephone call did not go ahead on the basis that the claimant wanted to record it, and Suzanne Lyons refused with the result that the claimant chose not to take part. It is clear that at the very latest date of October 2016 the claimant was aware of the matters which gave rise to his discrimination complaint and yet he did not issue proceedings until 31 May 2017, some 4-months after the expiry of the primary limitation period. No reason was given by the claimant for this.

102. The claimant also sent yes/no questions to Jeanette Deans on 10 May and exchange of communications continued, the claimant ignoring the request for all communications to be channelled through Suzanne Lyons. He emailed Karen Brocklesby a number of questions relating to the "CA3" including a request for an audit trail making it clear "By sending these questions to you I am holding you personally responsible for passing them to the SCF to be asked and answered." Karen Brocklesby reminded the claimant that Suzanne Lyons had been appointed as his direct point of contact and correspondence passed to her. During this period the claimant applied to become an examiner for the respondent, he also continued to email a number of employees other than Suzanne Lyons including Kimberley Russell, corporate secretary, Claire Hill, Education Services Manager, and so on. In short, the claimant's communications were sent to a variety of employees of the respondent.

103. On 19 May the claimant emailed Clifford Campbell with the subject "access request" to reveal all communications relating to the instruction that all his communications and correspondence be referred to Suzanne Lyons.

104. The claimant also raised allegations during this period that "there's even more issues of discrimination" for the respondent to address and questioned whether foreign nationals who were seeking the MRI method of seeking fellowship had to carry out CPD. Emails continued with the claimant alleging he was stonewalled and victimised by the respondent in an email he sent to Suzanne Lyons 5 June 2017. In an email to Karen Brocklesby the claimant sought explanation of the "rationale I was not subject to WBS as I had joined pre- 2004, but not that WBS is becoming PPD I'm going to be subject to PPD?"

105. The claimant alleged age discrimination when he wrote to Karen Brocklesby on 23 May requiring a response by 26 May 13:00 setting out four demands, including all "mark deductions to CA3 presentation assessment QTQ2 of November 2016 and for the CA3 fail result to no longer stand, be overturned "and fellowship conferred with immediate effect" plus "calculated a fair compensation amount … to me for this shamble." A substantial number of emails were sent by the claimant to various employees of the respondent, including Karen Brocklesby and Jeanette Deans. In the email of 16 June, the claimant referred to the letters from Suzanne Lyons being "evasive, weasel phases…I am being stonewalled. I am denied proper answers. I am treated with contempt and disrespected. Put short, I am being victimised. I must now ask Suzie Lyons whether she is acting under instructions to behave in this matter? If so by whom, as I must consider whether to add additional respondents to the tribunal claim." Despite the claimant's reference to victimisation on the 23 May 2017 the Employment Tribunal proceedings received on 31 May 2017 raised no such complaint. There was no reference to victimisation allegations until the 20 July 2017

request for an amendment and in the second claim form received 20 November 2017.

106. In a letter from Jeanne Taylor sent on behalf of Clifford Campbell dated 15 June 2017 the claimant was informed there was no documentation relating to the instruction from senior management/directors for all communications to be handled by Suzanne Lyons in response to the claimant's subject access request dated 19 May 2017. In an email sent 16 June 2017 the claimant requested Suzanne Lyons "urgently explain to me who decided and instructed staff that you would be made the point of contact with me, who instructed that all queries I make of the IFOA must be forwarded to you." Communications between the claimant and Suzanne Lyons continued, these are too numerous to set out with this judgement and reasons.

107. On the 19 June 2017 Suzanne Lyons emailed the claimant concerning his email dated 16 June 2017 confirming the Chief Executive Officer and General Counsel asked her to manage and coordinate contact on behalf of the respondent, and she was "reviewing your remaining enquiries to assess what is outstanding. Those issues relating to the court proceedings you have raised will be dealt with separately." The claimant responded "I don't find your response acceptable at all you're not answering what I asked I am being stonewalled and fed weasel words. I've received inferior treatment compared to other members. Your Chief Executive General Counsel and you need to stop victimising me." The claimant also alleged in a separate email to Jeanette Deans and Suzanne Lyons "…the IFOA have failed to comply with the Data Protection Act by failing to provide an audit trail… looks like a cover up. It's time you acted in a more transparent and professional manner" The claimant threatened to report the respondent to the Information Commissions Office, he also emailed Emily Long, Quality Manager regarding some minutes he emailed to diversity@acutaries.org.uk concerning the alleged discrimination of contractors. It is clear from a number of the communications, one of the claimant's primary concerns was whether the respondent would accept the "two CA3 presentations I did…as satisfying any PDD requirements for a fellow to sign off a presentation.

108. As a result of the claimant communicating with a variety of employees Katherine Murray, the marketing and communications manager, emailed two of those employees on 28 June 2017 with instructions not to respond to emails from the claimant and to forward them to Suzanne Lyons. The reason given was "he is suing us and should only be dealing with Suzie but has been emailing all our mailboxes, so I just wanted to make you aware." The claimant was also written to by Suzanne Lyons on 28 June 2017 in which she referred to "your various emails…I have explained that the decision for me to coordinate contact on behalf of the IFOA was with you was by discussion. ... I have reviewed your request for information from the IFOA. Most is now the subject matter of active litigation between us, in country court of employment tribunal setting. We are therefore unable to discuss this further outside of those forums." She referred to a number of links attached which provided some of the information the claimant requested. The claimant responded by return "it appears your victimisation of me is continuing and as "Head of Legal Services" you should be thoroughly ashamed of yourself for this conduct. Who regulates you" The claimant proceeded to raise a number of queries, alleging age discrimination. The Tribunal considered all of the relevant correspondence in some detail, and it is clear the claimant's communications were not ignored as alleged by him during the liability

hearing, and the Tribunal is satisfied the respondent was doing the best it could given its limited resources to staff and the nature of the claimant's communications.

109. The claimant alleged the respondent breached the Data Protection Act which he described as "shameful conduct" referring to the request made on 19 May 2017 for all communications to be released concerning instruction that all correspondence was to be referred to Suzanne Lyons, despite the fact that this had been dealt with more than one occasion, the claimant having been informed there was no written document and the instruction had come from Ben Kemp and the Chief Executive. Emails continued to be exchanged, the claimant giving Suzanne Lyons fourteen days to "explain and perform a U turn" in relation to PPD and so on. Phone conversations took place between Clifford Campbell and the claimant concerning his SAR request and on 3 July 2017 the claimant continued to press Suzanne Lyons for documentation in relation to the instruction that she deal with him. In a letter of 4 July 2017, he wrote "you should have recorded details of such meeting and instruction, especially when it involved treating a member differently after the member had raised a discrimination complaint. Given your legal training there is no excuse not to. The problem is you're engaged in evasive conduct over many weeks and left many of my reasonable questions and information requests unanswered. This is victimisation. Was this conduct as a result of their instruction or did you decide to behave in this manner yourself?."

110. The claimant in his emails insisted on Suzanne Lyons providing documentation referring to the Chief Executive Officer and General Counsel having spoken to her about managing and coordinating contact with the claimant. The claimant would not accept Suzanne Lyons's response and continued to send emails to various employees of the respondent too numerous to set out within this judgement. The claimant also had conversations with Liz Harriman, Registrar of Exams, and posted on the respondent's diversity forum his criticisms of the respondent.

111. On the 10 July 2017 Clifford Campbell's dealt with the SAR report concerning the instruction to Suzanne Lyons confirming no other written information was available and the claimant's 19 May SAR had been answered in full. He also dealt with the SAR dated 28 June 2017 for all personal information held. In a telephone conversation with the claimant Clifford Campbell requested the claimant to inform him of one of three options in relation to the SAR described by the claimant as "absolutely everything WITH NO CONSTRAINTS APPLIED." Clifford Campbell requested dates and key word parameters information from the claimant. The claimant responded 10 July "the response is not satisfactory. I was expecting to see a copy of the communications cascaded down to staff … did Suzie Lyons discuss with both CEO and GC or only GC there is now ambiguity on this and perhaps more than one meeting – who made this decision? When? What exactly was instructed? … we can of course get Derek Cribb, Ben Kemp and Suzie Lyons down to the hearings in person to explain what's been going on…"

112. The claimant still could not accept the explanation given and the emails continued. The claimant was provided throughout this period with various communications from Clifford Campbell concerning his SAR which was certainly not being ignored and so the Tribunal found. On 17 July 2017 Clifford Campbell had instructed Capital Support to carry out a number of searches and place the searches

in folders including all emails from 2001 to present containing a number of key words including Rhodri Tomos 18468. The claimant's subject access request was being dealt with, the claimant having provided key words for the search. The claimant was also informed by Clifford Campbell if he was unhappy with the respondent's response he had a right to report his concerns to the Information Commissions Officer ("ICO") which the claimant did. The ICO had no criticisms of the respondent or the manner it had dealt with the claimant's numerous SARs.

CPD exemption

113. On 18 July 2017 the claimant applied for a CPD exemption which he was ineligible for as he was not in a contract of employment. The claimant's response was that it was discriminatory in various ways and "disgraceful the IFOA have such an issue with contractors." The claimant was aware that he was required to complete two hours of stage 3 professional training provided free of charge on the respondent's website. The claimant's emails continued to a number of personnel within the respondent including Kimberley Russell, the corporate secretary. The claimant's claim in respect of CPD exemption was brought within the statutory time limits.

114. On 7 August 2017 the claimant wrote to Suzanne Lyons "I'm seeking an urgent response to these questions by 10 August 13:00 hours. I intend to refer to the handling and outcome of this query in the employment tribunal". The claimant referred to 6 questions a number of which related to his work experience and his belief that he was exempt from work-based skills. In a second email the claimant sought agreement from the respondent that "the IFOA fully endorses Mr Tomos's actuarial work experience, which overwhelmingly satisfies and comfortably exceeds our requirements of three years actuarial work experience required for conferring fellowship. We do not seek any further evidence or verification of Mr Tomos's work experience – be this past present or future – and provide an irrevocable guarantee that should Mr Tomos pass CP3 then all requirements for being conferred fellowship will have been met." The respondent understandably was unable to agree the whole-scale endorsement sought by the claimant.

115. The Claimant followed this up by letter dated 10 August 2017 alleging Suzanne Lyons was continuing to behave in a "disrespectful and evasive" way, and the correspondence continued to be exchanged between the claimant, the respondent and Clyde and Co, the respondent's legal representatives.

Victimisation time limit. 29 August 2017

116. On 29 August 2017 the claimant wrote to Stephen Miller of Clyde and Co, the respondent's legal representatives pointing out there was "no time limit on victimisation. I made a protected act back in 2011 when I complained about the IFOA's two-tier pricing policies being discriminatory on the basis of nationality. I've just analysed the email evidence from 2012 in my recent subject access request .. one thread shows unidentified IFOA staff members discussing my CA3 SAR of April 2012." The claimant referred to a member of staff indicating she "would be keeping watch on his progress on that" in relation to April SA2 exam, alleging "for someone to be singling me out and monitoring my April 2002 SA2 attempt is sinister." The Tribunal finds the claimant was aware by 23 May 2017 and in the alternative at its

very highest, the 29 August 2017 at the latest, that there was a possible complaint of victimisation for the events that had taken place in 2012. He did not issue proceedings within a reasonable period thereafter despite being aware of the time limits and threatening to issue proceedings over a period of months prior.

Alleged detriment 7: Mr Cribb on 29 August 2017 failing to follow R's 'Putting Things Right' process by failing to assign another member of staff to conduct that process.

117. The claimant emailed Derek Cribb on 30 August 2017, which he described in the liability hearing on cross examination as a "putting things right" ("PTR") request that should have been dealt under the Putting Things Rights Procedure and Derek Cribb should have followed the PTR process, which he failed to do despite being responsible for PTR. The claimant maintained his complaint of 30 August 2017 fell under PTR Section 1 about the service standards of the respondent and the circumstances which may give rise to a complaint – mistakes, discourtesy, failures of process and inadequate communication. All of the matters raised by the claimant had been complained about previously in one form or another. Derek Cribb did not read the email as a complaint being brought under the PTR, there was no reference to this procedure and the claimant had complained repeatedly in the past with no reference to PTR. The Tribunal accepted there was no satisfactory information on the balance of probabilities to put the respondent on notice that this time the claimant wanted his complaints dealt with under the PTR, the fact he sent the complaint to Derek Cribb was not indicative.

118. In the email of 30 August 2017 the claimant alleged the respondent had "failed to respond to the SA2 subject access request of 16 July 2012 which was sent to Karen Brocklesby thus a breach of the Data Protection Act," he complained about the way in which the SA2 had been marked, how he had failed with a fail grade FA and charged £200 for an exam counselling report delivered 1 August 2012, alleging the "sinister conduct of an as yet unnamed IFOA staff member…making a sinister promise to keep watch on my SA2 progress in between exam date and result date. This is a scandal…in terms of litigation we're talking at least of breach of contract, victimisation and perhaps more." The claimant requested the respondent disclosure the identity of staff involved in 2012. A number of the complaints had been raised repeatedly by the claimant in the past.

119. In an email dated 12 September 2017 Suzanne Lyons dealt with the repeated request for information and his criticisms; "I do not consider that a court could objectively take a view that any "sinister undertone" is intended by this comment. This is particularly in light of your proactive engagement with us at the time, necessitating on-going regular engagement with staff that required prior knowledge and had an understanding of the issues you raised in order to respond. Comments were made by staff employed by the IFOA and during the course of their employment … I do not consider their identities to be relevant to any complaint you may wish to pursue against the IFOA .." In closing submissions and in his witness statement, the claimant indicated that Suzanne Lyons was a "completely unsuitable" person to be writing to him regarding the complaint given the fact that on 20 July 2017 he had raised a victimisation claim against the respondent with Suzanne Lyons at the heart of that complaint. The claimant responded to Suzanne Lyons's communication in an email to Stephen Miller of Clyde and Co: "I don't care about Suzie Lyons's opinions. She is not CEO Derek Cribb is. Names need to be revealed.

Actions taken. Remedies proposed. "Nothing to see here" won't do. Mr Derek Cribb has until 13:00 Friday 15 September to take responsibility and put things right regarding these scandalous emails."

Alleged detriment 5: Suzie Lyons misinforming the claimant on or after 29 August 2017 that his exam script was retained by the principal examiner and that the marks were recorded upon the script.

120. During this period the claimant also continued to raise the issue of PPD and the respondent's transitional arrangement plans, threatening legal proceedings. Suzanne Lyons responded to the claimant in a letter dated 19 September 2017 relating to CP3 currently being addressed disagreeing with the claimant's email of 3 August 2012 in which he expressed his belief that the examination paper of 2012 was not marked. Suzanne Lyons confirmed she had "double checked the position as a matter of fact, we hold the grade relating to the 2012 exam referred to and no additional details" having obtained clarification on this point from Karen Brocklesby, who was involved in the 2012 queries raised by the claimant. Suzanne Lyons at paragraph 4 of her letter referred to the claimant's contact with CEO "requesting a response to the same issues that you and I are corresponding on, or which are the subject matter of formal dispute and managed by our external solicitors. I explained in my letter of 12 September 2017 that Mr Cribb in the 'putting things right' process and that he is not in a position to personally respond to you on this point. Please confirm whether you wish to initiate the 'putting things right' process or instead whether you intend to initiate separate proceedings." She reminded the claimant that she was "happy to continue to correspond with you with a view to resolving where possible any concerns that you may have, multiple emails to different members of staff are a bar to efficient progress and response. The time frames you have most recently set are not reasonable in all the circumstances." The Tribunal took into account Suzanne Lyon's motivation when she provided the claimant with the above information, concluding she had not intentionally misinformed him and genuinely believed his exam script was retained by the principal examiner and that the marks were recorded upon the script. Suzanne Lyons was entitled to take at face value the information she was given, albeit it was incorrect. Karen Brocklesby did not intentionally provide incorrect information and there was no causal link with the claimant's race, age, sex or the fact he had in 2011 complained about alleged discrimination in respect of fees and reported the respondent to the EHRC.

121. The claimant responded by 19 September email referring to him rejecting Suzanne Lyons' "spin you provide and suggest it's time you gave it up … Mr Cribb has failed to show up never mind put things right. He's had plenty of time and gets paid enough. If he's not up to the job he should resign. If he continues to hide behind spin doctors then his inaction will be continued continue to be exposed externally …I've previously warned you I no longer tolerate solicitor delay tactics and will expose them at every turn." The claimant did not confirm he wanted to initiate the "Putting Things Right" process.

122. In a further email sent 22 September 2017 the claimant referred to "no transparency on who had made those nasty, sinister comments about me in 2012 …if no proposal from you by Monday 6pm to resolve these matters, the new claims go in." Despite the claimant's repeated threats and the fact, he had known since 29 August 2017 of the comments, the second claim form alleging victimisation under

Section 27 EqA, was received on 20 November 2017 ACAS having issued an Early conciliation certificate on 16 October 2017.

123. The Claimant's correspondence continued, including an email sent to Karen Brocklesby in which he set out four questions relating to the 2012 examination which Suzanne Lyons responded to on 28 September 2017. The claimant raised a number of issues including his work experience and the CP3 examination and in paragraph 5 of her email Suzanne Lyons wrote the following; "you indicated that you do not think that all your queries have been answered, and have referred to specific emails from you in March, April and July to the IFOA. I would like to reassure you again that every effort has been made to ensure that all your queries have been dealt with and continue to be dealt with in a propitiate reasonable and timely manner. There is a distinction between responses where the conclusions are ones that we must "agree to disagree" and a failure to respond. I accept that there are areas of disagree remaining between us. I will continue to respond and address the points that you raise as they arise…" The claimant responded complaining Suzanne Lyons had provided "no further information or answer to my questions except noting my "disagreement" despite the fact that on a straightforward and commonsense reading of her letter the claimant had been informed information provided by him on 7 August 2017 relating to his work experience was taken by Suzanne Lyons as being a complete statement of this and the informal feedback does not equate to a formal assessment of work experience. She confirmed the respondent was unable to comment on the claimant's correspondence relating to the CP3 examination feedback and comments from other candidates were routinely reviewed at the conclusion of the process. The Tribunal was satisfied that t cannot be said that no information was provided, and the claimant misconstrued the email by stating that no information was provided.

<u>CPD requirements</u>

124. The claimant on 16 September 2017 emailed the respondent's Head of Membership Patricia Mcglochlin as follows "I see that CPD requirements don't fully apply for people who have taken parental contractual parental leave. What about actuarial contractors like myself, who don't work 12 months a year … isn't it discrimination that we would be subject to full CPD compared to new parents? Parental leave means those parents will be receiving a salary when not in the office, while contractors could not be earning at all. I think the profession needs to seriously consider its inflexibility toward contractors."

125. In an email sent 21 September 2017 Patricia Mcglochlin responded "the IFOA have offered partial exemptions from the full requirements of the CPD scheme …the recent changes were driven by a review of the CPD and practising certificates to identify and remove any barriers to diversity for our members. As a result, we identified a number of mechanisms which impacted unfairly on members who take periods of maternity leave. As you are no doubt aware maternity and pregnancy are protected characteristics under the Equality Act 2010...it is unclear to my why you would, solely on the basis of your status as a contractor, be afforded protection under the Equality Act 2010...apart from the issue of discrimination and in addition to your actuaries' code of obligations I would suggest that as a contractor you have a vested interest in keeping your skills and competence up to date it is also arguable

that having gaps in your observance of the CPD scheme would put you at a disadvantage in securing new appointments."

126. On 11 October 2017 the claimant sent a number of emails to Suzanne Lyons and Derek Cribb including a request for yes or no answers to Derek Cribb relating to four questions dealing with, for example "did you mark my SA2 for 2012 exam paper?**"** This question was asked despite the claimant having been informed previously on numerous occasions his exam paper had been marked and graded. The claimant alleged Karen Brocklesby had "deliberately not marked and a fail grade awarded in retaliation at your linking of me to the EHRC investigation of you in April 2012?" requested answers by 5pm "today" and for Derek Cribb to "put things right" by 17:00 Friday.

127. On 13 October 2017 Suzanne Lyons sent the claimant a three-page letter dealing with his emails from 28 September 2017 to date, other than matters arising from the litigation she confirmed the work based skills did not apply to the claimant, and he was required to complete an application for work place experienced assessment using form A, which had been provided. She gave the claimant some guidance as to completion. With reference to the claimant's emails dealing with whether the respondent was holding any marks for the SA2 she wrote "your most recent emails do not provide any further information which gives me cause to revise my previous comments on this matter." She reiterated her earlier response of 19 September 2017 which the claimant appeared to ignore; "in relation to the email of 3 August 2012, I do not agree that a reasonable interpretation of my response to you can be that your examination paper was not marked. For the avoidance of doubt, in my response to you on this issue is that the individual concerned did not have access to the information before him/her, and that comment cannot be interpreted more broadly than this. In light of your comments this week, I have double checked the position. As a matter of fact, we hold the grade relating to the 2012 exam referred to and no additional details. I understand that the process at the relevant time was to retain exam scripts for the principal examiner and to destroy these after one year. The IFOA refutes any suggestion that the SA2 exam script from 2012 was deliberately not marked and a fail grade ("FA" as it was referred to at the time) awarded. It is my understanding that you re-sat this exam in September 2016 and the grade awarded to you as a pass. I … have nothing further to add at this time."

128. By this stage having successfully passed the SA2 exam, the claimant was seeking damages for loss of earnings, the cost of study materials, exam fee and exam counselling fee together with interest. The claimant responded on 13 October 2017 "from this point onwards, I expect you to have some quality control in place and for submissions to be fact checked. I will not be as forgiving next time. I am not here to provide quality control for you. On this occasion I shall not submit complaints to the ET or your regulators." In a separate email of the same date the claimant alleged victimisation concerning his work experience.

129. On 22 October 2017 the claimant emailed "urgent questions" for Suzanne Lyons to address regarding the April 2012 SA2 attempt, by a deadline of 5pm 27 October and he attached the questions separately. The attached letter ran to a number of closely typed pages. The claimant threatened to join Karen Brocklesby as a named respondent before "I raise litigation…I would like to give you the opportunity to answer important questions regarding this matter. A failure to respond may

damage you and your employers defence in any upcoming litigation or investigation of this complaint by an external body. The bold underlined answer will be the answer assumed in the event that you fail to provide a response." Within the body of the letter the claimant requested the date when Karen Brocklesby became aware the Equality and Human Rights Commissioners' Investigation.

130. Karen Brocklesby, a named respondent in another employment tribunal claim, was upset by the communication and she emailed Suzanne Lyons and Ben Kemp on 23 October explaining "the only reason I am or have ever been in contact with these individuals is because of the work I carry out in my role for the IFOA...I'm struggling to understand why we should be subject to this type of behaviour when we are carrying out our roles. Whilst I appreciate that this type of behaviour is only from a few individuals it is of a recurring nature and aggressive and for those of us on the receiving end can at times be distressing. The IFOA has a duty of care to its staff and this type of behaviour from our members is unacceptable."

Alleged detriment 8: Suzie Lyons on or about 27 October 2017 threatening the claimant with a disciplinary process.

Alleged detriment 9: Suzie Lyons threatening in the letter of 27 October 2017 to make an application for costs.

131. During this period, the claimant sent correspondence to Derek Cribb about a number of matters including CPD exemption and an allegation that a factually incorrect statement had been made. The claimant sent a number of emails to Suzanne Lyons concerning his work experience and on 27 October 2017 Suzanne Lyons wrote to him regarding the issues he had raised attaching for his information an application for work based assessment in the correct format which she had completed on his behalf "for processing in the normal manner, based on the information you have provided." In short, in order to assist the claimant Suzanne Lyons had transcribed the information he had provided previously into the correct format (which the claimant had ignored) and passed it on. This was not an act that ordinarily would have taken place with members as a matter of course, it was unusual and done to assist the claimant. In the 27 October 2017 letter Suzanne Lyons invited the claimant to make "any corrections/additional pieces of information that you would like included ... by return." The claimant was informed his comments regarding the SA2 2012 exam had been passed to external solicitors to address "on the basis that you have intimated your intention to raise proceedings over this matter. Your allegations are denied, and are considered to be wholly without basis. My letter of 13 October 2017 is referred to. In the event that you do raise proceedings, we will seek full recovery of costs from you."

132. The Tribunal considered Suzanne Lyons's mental processes and motivation for her reference to costs, and it was satisfied that this was untainted by any discrimination. Suzanne Lyons was aware, from the claimant's numerous and repeated threats of litigation, a further employment tribunal claim was going to be lodged in relation to the SA2 2012 exam. The claimant was already involved in litigation and she genuinely believed the victimisation claim as threatened was wholly without basis and it was on this assessment the reference to seeking recovery of costs was made. The threat of costs was completely unrelated to the protected act, and exclusively caused by the threat of new proceedings, the ongoing litigation and a

further prospective claim which Suzanne Lyons considered, in her legal opinion, to be weak.

The alleged threat of a formal disciplinary under the Actuaries Code.

133. Suzanne Lyons also referred to the claimant's communication with Karen Brocklesby. She referred to "having previously confirmed to you that the appropriate body to pursue any concerns that you may have against the IFOA is the IFOA and not individual members of staff, who are engaging with you in the proper course of work. Please note that I consider this consider this communication to have threatening and intimidating undertones which the IFOA takes seriously I ask you to direct any grievance with the IFOA to the IFOA, and not members of the staff or our external agents personally... we take very seriously any allegation of professional misconduct. To make such an allegation without proper basis would of itself be a serious matter and potentially call into question the professionalism of the person making that allegation. May I, in this context, take the opportunity to remind you of your own professional obligations under the Actuaries Code."

134. The claimant has described in these proceedings the reference to the Actuaries Code by Suzanne Lyons to be a "veiled threat" by referring him of his professional obligations. The Tribunal did not agree, and it accepted Suzanne Lyon's explanation was untainted by discrimination. At the liability hearing the claimant attempted to argue that the reference to the Actuaries Code was a threat of formal disciplinary made by Suzie Lyons who "runs the disciplinary scheme for the respondent." The Tribunal did not accept the words, given their ordinary meaning, did not amount to a threat to discipline the claimant. Having considered the motivation of Suzanne Lyons and giving the letter of 27 October 2017 it's common sense and ordinary meaning, the Tribunal is satisfied there was no threat to discipline the claimant bearing in mind the substantial amount of emails and communication sent by the claimant repeating a number of allegations and criticisms of the respondent in correspondence aggressive and confrontational in tone, it was not unreasonable for Suzanne Lyons to remind him of his professional obligations under the Actuaries Code.

135. The claimant responded by emailing Suzanne Lyons on 30 October referring to the Financial Reporting Council which had oversight of the respondent, seeking guidance on what part of the Actuaries Code Suzanne Lyons relied upon to in her letter of 27 October. The claimant also wrote a lengthy email to Derek Cribb setting out his responsibilities as a CEO stating "before I raise litigation and consider whether to name you as a respondent in addition to your employer, I would like to give you the opportunity to answer important questions regarding this matter. A failure to respond may damage you and your employers defence in any upcoming litigation or investigation of this complaint by an external body. The bold underlined answer will be the answer assumed in the event you fail to provide a response." The claimant referred to the irregularities in his SA2 April 2012 assessments, subject access requests, putting three things right and a number of yes/no questions that had allegedly remained unanswered totalling 18. A similar letter was sent to Suzanne Lyons which the Tribunal does not intend to repeat. The claimant indicated "I would consider any reasonable proposals you have for settling this matter. I believe I've given you all the necessary information to do this" his objective being settlement of his claims. The claimant unrealistically expected Suzanne Lyons to

respond by 3pm in relation to the lengthy email sent 2 November 2017 regarding the alleged Actuaries Code threat.

Putting Things Right Policy

136. The claimant emailed Anna Clark, head of the chief executive's office, regarding Mr Cribb who had allegedly had not put things right having and had failed to "address the unprofessional and unethical behaviour under his watch that led to an unsubstantiated fail grade for my SA2 April 2012 exam." In response on 3 November 2017 Anna Clerk wrote "the putting things right policy of the IFOA is designed to address service complaints relating to the IFOA and does not deal with issues of policy. Matters which are the subject of formal proceedings or which had been intimated to the IFOA as likely to result in formal proceedings are more appropriately dealt with in that forum. As such, your questions of 4 October relating to the allocation of staff resources to manage your communications (issue one and two) WBS (issue three) will not be considered under this process... your questions in relation to work assessment (issue four) are premature insofar as this relates to an ongoing assessment, albeit I have passed your observations… we therefore consider there to be no issues currently appropriate for consideration by the putting things right policy at this time." This followed an earlier email 6 October 2017 sent to the claimant by Anna Clerk which the Tribunal does not intend to repeat.

137. On 4 October 2017 the claimant wrote to Mr Cribb regarding several matters "in addition to those of 2012 – need to be put right urgently by you as IFOA CEO". The claimant referred to Derek Cribb's instructions to Suzanne Lyons for her to "manage and coordinate on behalf of IFOA with me since 25 April 2017. This has put me at a detriment in several ways. As a result, I have added victimisation to my ET claim. I believe this victimisation is continuing and am asking you to put a stop to it." With reference to CPD exemption refusal, the claimant alleged the refusal had been given "directly by the relevant IFOA CPD staff member on 2 August 2017, within 2 weeks of my application." The claimant also referred to work experience requirements, disputing his WBS exemption status and putting things right seeking Mr Cribb to cancel his instructions regarding Suzanne Lyons's communications management of him with "immediate effect," for him to contact staff members directly, confirm his existing actuarial work experience meets the "experience requirement" for Fellowship and confirm the PPD system disregards all his existing work experience.

138. The claimant was informed by Suzanne Lyons in a letter dated 6 November 2017 his request for an update on progress and further information in relation to the work assessments had been passed to her colleagues, who would be in touch with the claimant directly. She had nothing to add in relation to the claimant's assertions regarding the exam SA2 2012 concluding "I have explained that no reasonable adverse inference can, or should, be drawn from the email excerpts that you have identified. I have further explained that the more reasonable explanation for the email extracts is that our system at the time was for the principal examiners to hold exam marks, and not the IFOA, and that only the grades were held by us. This has been confirmed on more than one occasion, not least in my letters of 13 and 28 October 2017." Suzanne Lyons based this information on that she had obtained previously, and she was unaware that as at 2012 the respondent held a global mark in addition to the grade on computer. She confirmed that the questionnaires address to Derek

Cribb and Karen Brocklesby had been passed to the external solicitors and that the 26 October 2017 was mischaracterised as a threat. She explained "I consider it appropriate given the nature and tone of some of communication with our staff, to remind you of your obligations under the Actuaries Code" The claimant was also informed that there were no proposals for settlement.

139. Thereafter, the claimant made contact with a number of the respondent's employees, including Matthew Tennant who communicated with him concerning the work experience report and its process as part of the final review stage. Following an exchange of emails which included the claimant writing directly to Karen Brocklesby on 15 December 2017 requiring the name and contact details of the principal examiner of the 2012 exams and requesting that she "break her silence and tell the absolute truth about what had happened." The claimant also received correspondence from Suzanne Lyons, including the letter of 7 December 2017 which informed him that the letter he had sent to Karen Brocklesby dated 5 December relating to the SA2 2012 exam had been passed to external solicitors to address in addition to providing other information which the Tribunal does not intend to repeat.

140. In an email sent 19 December 2017 the claimant wrote to Suzanne Lyons "I no longer wish to receive communications from you on behalf of the IFOA or otherwise. Your responses during 2017 have been disgraceful and will be brought to the full attention of the ET judge and your professional body." This communication followed from a letter sent to the claimant by Matthew Tennant confirming that the claimant's work experience had been reviewed and "given the historic nature of the experience provided ... your work experience form will now be approved and sent over to your educational services team who will start the transfer process, subject to your examination results."

141. The party to party's correspondence continued into 2018 which the Tribunal does not intend to relate, however it notes in a letter sent to the claimant dated 27 January 2018 it was reiterated that "mark ranges … are given to assist those candidates who have failed the examination to assess the degree of improvement required… FA 95-99 of the pass mark" and the claimant were referred to further support available on the website. The claimant was provided with a number of letters with supplied information regarding his pass grades.

Law

Discrimination

Time limits

142. S.123(1)(a) EqA sets out the time limit for presenting a discrimination complaint. It provides that the relevant time limit for starting employment tribunal proceedings runs from the date of the act to which the complaint relates. S123(3)(a) states that conduct extending over a period of time is to be treated as done at the end of that period. Failure to do something is to be treated was done when the person in question decided upon it – S123(3)(b). In the absence of anything to the contrary, a person is taken to decide on failure to do something either when the person does an act inconsistent with deciding to do something else, or, if they do no

inconsistent act, on the expiry of the period on which they might reasonably have been expected to do it – S.123(4).

143. The time limit relating to any alleged act or failure to act runs from the date or the decision or the act and not from the date when it is communicated to the claimant, and as a consequence the time in relation to the claim of victimisation ran from the date the claimant was made aware the respondent did not hold a global mark having provided him with his FA grade.

144. Tribunals have a discretion to hear out of time discrimination cases where they consider it is "just and equitable" to so do – S.2123(1)(b) EqA, provided that it is presented within such other period as the Tribunal thinks just and equitable – S.123(1)(b). The burden lies with the claimant to convince the Tribunal it is just and equitable to extend time and he has failed to discharge that burden. The exercise of discretion is "the exception rather than the rule" – Robertson v Bexley [2003] IRLR 434. The claimant must lead some evidence as to why discretion should be exercised in his favour, and that that evidence may speak to the checklist set out in S.33 of the Limitation Act as modified by the EAT in British Coal Corporation v Keeble and ors [1997] IRLR 336 EAT, and he has failed to do so.

145. In the well-known Court of Appeal decision in Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA it was made clear that it was not appropriate for Tribunals to take too literal an approach as to the question of what amounts to continuing acts by focusing on whether the concept of a "policy, rule, scheme, regime or practice" fit the facts of a case. In Aziz v FDA [2010] EWCA Civ 304, the Court of Appeal approved Aziz and noted that in considering whether separate incidents form part of an act extending over a period "one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents."

S.13 Direct discrimination

146. The Tribunal was referred to S.13(1) that deals with the less favourable treatment of an individual, where the difference in treatment is because of a protected characteristic, the claimant is relying on race and national origin. The test to be applied was an objective one.

147. S.23(1) provides that on a comparison for establishing direct discrimination there must be 'no material difference between the circumstances relating to each case'. In the pivotal case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL (a sex discrimination case), Lord Scott explained that this means that 'the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class'. In the Shamoon case, the House of Lords held that the two male chief officers with whose treatment S sought to compare her own were directly comparable with her position in several respects: they were of the same rank; they served in the same branch; and they had similar responsibilities, including the responsibility for staff appraisals. However, the male officers were not appropriate comparators as there were two material differences that precluded such a direct comparison: there had been no complaints made against them and they were under the managerial control

of a different Superintendent. The correct task for the Tribunal was to consider how the claimant's Superintendent would have treated a male officer against whom similar complaints had been made, and the same point applies to the comparators relied upon by the claimant in that they are not directly comparable with him.

148. The EHRC Employment Code expressly states that the circumstances of the claimant and the comparator need not be identical in every way. Rather, 'what matters is that the circumstances which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator' (our stress) — para 3.23. In Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School [2003] ICR 937, HL (another sex discrimination case), Lord Hope held that, with the exception of the prohibited factor (be it sex, race or otherwise), 'all characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator'.

149. Under Section 53 EqA any authority or body which confers an authorisation or qualification for any trade or profession must not discriminate on prohibited grounds. It is unlawful for a qualification body to discriminate against a person in the terms on which it is prepared to confer a professional or trade qualification on him, by refusing or deliberately not granting any application for such a qualification or by withdrawing such a qualification or varying the terms on which it is held. The arrangements made for determining upon whom a relevant qualification should be conferred is also protected by the EqA together with harassment and victimisation of a person who holds or applies for such a qualification. It is not disputed the respondent is a 'qualification body' for the purpose of the Section 53 EqA. The respondent granting the fellowship qualification is applying a standard recognised by others i.e. employers, clients and overseas actuarial associations that will provide or facilitate access to the actuarial profession.

Indirect discrimination

150. S.19(1) of the Equality Act 2010 (EqA) states that indirect discrimination occurs when a person (A) applies to another (B) a provision, criterion or practice (PCP) that is discriminatory in relation to a relevant protected characteristic of B's. A PCP has this effect if the following four criteria are met:

- A applies, or would apply, the PCP to persons with whom B does not share the relevant protected characteristic (S.19(2)(a))
- the PCP puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share the characteristic (S.19(2)(b))
- the PCP puts, or would put, B at that disadvantage (S.19(2)(c)), and
- A cannot show that the PCP is a proportionate means of achieving a legitimate aim (S.19(2)(d)).

151. All four conditions in S.19(2) must be met before a successful claim for indirect discrimination can be established. That is, there must be a PCP which the employer applies or would apply to employees who do not share the protected characteristic of the claimant; that PCP must put people who share the claimant's protected characteristic at a disadvantage when compared with those who do not share that characteristic; the claimant must experience that disadvantage; and the

employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

152. The relationship between the four elements of an indirect discrimination claim and S.136 was considered by the EAT in Dziedziak v Future Electronics Ltd EAT 0271/11, a claim of indirect sex discrimination. There, Mr Justice Langstaff, then President of the EAT, stated: 'In this case the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it disadvantaged women generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming. Only then would the employer be required to justify the provision, criterion or practice, and in that sense the provision as to reversal of the burden of proof makes sense; that is, a burden is on the employer to provide both explanation and justification'.

153. The claimant bears the burden of proof in respect of the first three conditions in S.19(2), he or she must identify the PCP capable of supporting his or her case. Identifying the exact PCP that has been applied is important because of its implications for the other elements of the test for proving indirect discrimination. In particular, the extent of the disproportionate impact (if any) may have to be determined in relation to the proportions of people in the claimant's group and in the comparator group who are advantaged or disadvantaged by the particular PCP that has been applied.

Victimisation

154. Section 26 EqA provides (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
B does a protected act, or A believes that B has done, or may do, a protected act.
Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act

155. The initial question for the Tribunal (if the claimant were to have established he was subjected to a detriment by the respondent) is what consciously or subconsciously motivated a employee of the respondent, such as Suzanne Lyons and Karen Brocklesby, to subject the claimant to a detriment, which will necessitate an inquiry into the mental processes of the person responsible. The Tribunal considered conscious or sub-conscious motivation when it came to all of the evidence relating to the respondent's decision-making process, concluding there was no causal link between motivation and the protected acts relied upon by the claimant, on the balance of probabilities.

156. Employees may lose the protection of the anti-victimisation provisions because the detriment is inflicted not because they have carried out a protected act but because of the *manner* in which they have carried it out. Mr Justice Underhill, then President of the EAT, in Martin v Devonshire's Solicitors [2011] ICR 352, EAT held there were cases where the reason for the dismissal (or any other detriment)

was not the protected act as such but some feature of it which could properly be treated as *separable* — such as the manner in which the protected act was carried out. He maintained that such fine lines have to be drawn 'if the anti-victimisation provisions, important as they are, are to be confined to their proper effect and not to become an instrument of oppression' and trusted tribunals to distinguish between features that should and should not be treated as properly separable from the protected act.

157. On behalf of the respondent the Tribunal was referred to Woods v Pasab Ltd t/a Jhoots Pharmacy and anor [2013] IRLR 305, CA, where the Court of Appeal rejected the contention that the EAT had substituted its own finding of fact. The tribunal had committed an error of law by, among other things, attributing to JP Ltd the tribunal's understanding of the nature of W's comment and then making an unwarranted leap from that finding to a finding of discrimination. At paragraphs 26 and 27 of Lady Justice Hallet's judgment reference was made to the House of Lords decision in the Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48 the causation test set out by Lord Nicholls of Birkenhead in paragraph 29 of Khan and the requirement that one would expect to see an analysis of Ms Jhooty's thought processes both conscious and unconscious – paragraphs 36 & 38 in Woods.

158. Ms Delpiore referred to Nagarajan v London Regional Transport [1999] ICR 877 in which the House of Lords held if the protected acts have a "significant influence" on the employer's decision making, discrimination will be made out. Igen Ltd (formerly Leeds Career Guidance) and others v Wong and others [2005] ICR 931 and the clarification from Peter Gibson LJ that for an influence to be "significant" it does not have to be of great importance. A significant influence is rather "an influence that it more than trivial."

159. Baroness Hale in Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] ICR 841, HL, and Lord Nicholls in Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL, endorsed a three-stage test for establishing victimisation under the pre-EqA discrimination legislation as follows:

a. did the employer discriminate against the claimant in any of the circumstances covered by discrimination legislation?

b. in doing so, did the employer treat him or her less favourably than others in those circumstances?

c. was the reason for the less favourable treatment the fact that the claimant had done a protected act; or that the employer knew that he or she intended to do a protected act, or suspected that he or she had done, or intended to do, a protected act?

Detriment

160. The term "detriment" is not defined in the ERA, but it has been construed in discrimination law. A detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them in all the circumstances had been to their detriment. The Tribunal has considered this test in a number of detriments relied upon by the claimant.

161. In accordance with Aspinall v MSI Mech Forge Ltd UKEAT/891/01 and NHS Manchester v Fecitt [2012] IRLR 64, in the case of a detriment, the Tribunal must be satisfied that the detriment was "on the ground that the worker has made a protected disclosure" (section 47B(1), ERA 1996). A detriment must be more than "just related" to the disclosure. There must be a causative link between the protected disclosure and the reason for the treatment, in the sense of the disclosure being the "real" or "core" reason for the treatment.

162. In Fecitt the Court of Appeal held where an employer satisfies the Tribunal that it acted for a legitimate reason, then that necessarily means that it has shown that it did not act for the unlawful reason being alleged. One of the main issues before the Court of Appeal concerned the causal link between making the protected disclosures and suffering detriment, and it was held that s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. "Where a whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical- eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed to genuine explanation…if the reason for the adverse treatment is the fact that the employee has made the protected disclosure, that is unlawful." Lord Justice Elias at paragraph 41 set out the following: "Once an employer satisfies the tribunal that he has acted for a particular reason – here, to remedy a dysfunctional situation – that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the tribunal considers that the reason given is false (whether consciously or unconsciously) or that the tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the Igen principles." This test is particularly relevant to the case of Mr Tomos and was applied by the Tribunal when considering the evidence, the detriments alleged and the explanation given by the respondent's witnesses.

Burden of proof-discrimination

163. Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

164. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once

the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case of race], failing which the claim succeeds.

Conclusion – applying the law to the facts

165. With reference to the agreed issues the Tribunal found the following when applying the law to the facts. Ms Delpiore submitted unless the claimant can show the respondent applied a rule that was inherently discriminatory the Tribunal must look at mental process. The Tribunal found the claimant did not satisfy it on the balance of probabilities a discriminatory rule existed in relation to the CA3 and SA2 examinations and CPD.

Time limits on the discrimination claims

166. The Tribunal has dealt with time limits in relation to the victimisation complaint below. In respect of the other complaints, having regard to the issue of the EC certificate in Claim 2403017/2017 on 26 May 2017, insofar as any of the matters claimed therein occurred before 25 January 2017, they are out of time and the Tribunal does not have jurisdiction to consider those complaints. Having regard to the issue of the EC certificate in Claim 2423885/2017 dated 16 October 2017, insofar as any of the matters claimed therein occurred before 16 July 2017, they are also out of time and the Tribunal does not have jurisdiction. In respect of such matters, the claimant has not proven on the balance of probabilities that there was conduct extending over a period which is to be treated as done at the end of the period. At the very latest date of October 2016 the claimant was aware of the matters which gave rise to his discrimination complaint and yet he did not issue proceedings until 31 May 2017, some 4-months after the expiry of the primary limitation period. No reason was given by the claimant for this. The claimant was aware by 23 May 2017 and in the alternative if the claimant were given the benefit of the doubt, by 29 August 2017 at the latest, that there was a possible complaint of victimisation for the events that had taken place in 2012. He did not issue proceedings within a reasonable period thereafter despite being aware of the time limits and threatening to issue proceedings over a period of months prior.

167. The claimant has not shown that it would be just and equitable for time to be extended so that the Tribunal may find that it has jurisdiction. The claimant was aware by the letter dated 25 May 2012 that he was supplied with all data the respondent believed he was entitled to under the DPA, and this did not include his global mark. The primary limitation period expired 24 August 2012. The first claim form was received on 31 May 2017. In numerous correspondences the claimant threatened to issue proceedings and he was well aware of limitation periods; he had complained to the Commission and was not inexperienced in equality matters. There was no satisfactory explanation given by the claimant for the delay. It is apparent with reference to the claimant's SAR and the internal communications disclosed to him 28 August 2017 the fact he had not been given the mark was nothing new, and the Tribunal did not find those internal communications to be discriminatory, accordingly there was no continuing act.

168. With reference to alleged detriments numbered 1(i) to (iv) and (vi) the statutory time limit has not been complied with. The claimant was aware of his fail result in the SA2 exam, the response to his subject access request, charging him for an examination counselling report and informing him that the respondent had no data in 2012. Proceedings were issued alleging victimisation on 20 November 2017 approximately 5 years after the cause of action occurred. The claimant was made aware via information provided by the respondent in response to a SAR that he may have a victimisation claim and wrote to Clyde & Co on 29 August 2017 threatening to issue proceedings for victimisation. Despite numerous threats which followed, the claimant did not issue proceedings for a period of approximately 2.5 months despite it being made clear to him in various emails, for example, Suzanne Lyons' email of 12 September 2017, that the respondent did not accept he had a legitimate complaint. The claimant was aware of time limits, yet he did not issue proceedings, gave no satisfactory reason to the Tribunal why this was the case and did not lead any evidence as to why the Tribunal's discretion should be decided in his favour and an extension of time given. It is notable the claimant incorrectly took the view on 29 August 2017 as evidenced by his email to Clyde & Co there was no time limit on victimisation.

169. The Tribunal has a wide discretion when it is considering whether or not to extend time and take into account in the exercise of that discretion the list of factors specified in S.33(3) of the Limitation Act 1980 in addition to the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent. In accordance with Robertson cited above the exercise of discretion in favour of an extension is the exception. It is for the claimant to convince it that it is just and equitable to extend time by providing material on which the Tribunal could properly exercise its discretion and extend the time limit; Mr Tomos has failed to discharge this burden. The Tribunal has been assisted by the factors listed in S.33 of the Limitation Act 1980, concluding the respondent has been caused prejudiced by the delay. This is evidenced by the fact that there was confusion in 2017 on the part of the respondent as to whether the global exam result for the 2012 SA2 existed or not, and that result has never been found. The passage of time also accounts for the confusion in Karen Brocklesby's evidence and the genuine belief held by Suzanne Lyons that there was no global mark. The respondent deals with many thousands of students who take exams; the evidence before the Tribunal which was not disputed by the claimant was that its processes for recording exam results had changed. The claimant is but one student of thousands. It is unsurprising the evidence relating to his exam became weaker over time and after a period of some 5 years had passed, written evidence was no longer available and memories faded and become confused.

170. With regard to all the circumstances of the case, in particular, the length of, and the lack of reasons for the delay; the considerable extent to which the cogency of the evidence has been affected by the delay and the lack of the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action and the fact that the complaints are unmeritorious; it is not just and equitable to extend the statutory time limit and the claimant's complaint of discrimination brought under sections 13 and 19 of the EqA with the exception of the alleged CPD exemption complaints and victimisation in respect of the alleged detriments suffered in 2012 numbered 1(i) to (iv) and (vi) are dismissed as the Tribunal does not have the jurisdiction to consider such complaints.

Section 13 Equality Act 2010 ('EA') Direct Race Discrimination

171. If the Tribunal is incorrect in its finding that the claimant was out of time in respect of the discrimination complaints, in the alternative had it the jurisdiction to consider those complaints it would have gone on to reach the following conclusions.

172. With reference to the first issue, namely, did respondent treat the claimant less favourably than it treats or would treat others who do not share his nationality/national origins and whose circumstances were not otherwise materially different) because he is a British national and/or of British origin by (i) requiring him to pass CA3 (now CP3) in order to grant him FIA status (ii) requiring him to sit and pass SA2 in December 2016 in order to grant him fellowship status, (iii) by failing to confer the relevant qualification of FIA on him by 31 December 2011 and (iv) refusing to grant the claimant an exemption from the requirements of its Continuous Professional Development Scheme, the Tribunal found that it had not.

173. With reference the second issue, namely, in answering the above question, what are the circumstances of claimant's correct comparator, the Tribunal found the hypothetical comparator relied upon by the claimant was not in the same position in all material respects as the claimant and fundamentally, the claimant has omitted a key characteristic that being the fact that he was not a qualified actuary at the relevant time. Ms Delpiore submitted an appropriate hypothetical comparator was someone who does not share the claimant's protected characteristics (British nationality/origins) and whose circumstances are not materially different. A non-UK national seeking a primary actuarial qualification under the IOFA fellowship route is not materially the same as a fully qualified actuary in another jurisdiction seeking to be a fellow of the respondent under MRA. The claimant was a student and he did not have the actuarial qualification at the relevant time, and therefore was in a fundamentally different position.

174. The Tribunal found the respondent would require anybody, whatever their nationality or national origins, seeking primary qualifications to complete the CA3 and SA2 exams or equivalent, and there is no evidence from which the Tribunal can infer that race was the reason or an inherently discriminatory rule.

175. Ms Delpiore further submitted there was no less favourable treatment of the claimant in comparison to a correct comparator; someone in student category 5 who are required to sit CA3 and SA2 or equivalent whatever their nationality or national origin. The rule does not affect qualified actuaries, and anybody not a student member in IFOA, such as qualified actuaries, are not the correct comparator. Further, she submitted, if the Tribunal were to consider mental processes this cannot be race discrimination because of the comparator, a proposition with which the Tribunal agreed.

176. In conclusion, the claimant has not satisfied the Tribunal that there are primary facts from which inferences of direct unlawful race discrimination can be made; the burden of proof has not shifted to the respondent and the claimant's complaint is not well-founded and is dismissed.

Section 19 EA – Indirect Discrimination

177. With reference to the first issue under this head, namely, did the respondent apply the following PCPs to claimant: (i) conferring a fellowship on members of foreign actuarial associations with the benefit of an MRA without the need for them to pass CA3 or the SA series of exams, and/or (ii) applying its CPD exemption terms (category 5), i.e. requiring persons to be engaged under a contract of employment in order to be eligible for exemption from the requirements of the scheme, the Tribunal found that it had not.

178. Ms Delpiore submitted the PCP's relied upon by the claimant were fundamentally misconceived and confused. The Tribunal agreed.

179. With reference to the first PCP, conferring a fellowship on members of foreign actuarial associations with the benefit of an MRA without the need for them to pass CA3 or the SA series of exams, the claimant was not part of the group of foreign fully qualified actuaries at the level of fellow. The PCP is incorrectly predicated on the notion that the claimant, as a student, was equivalent to a fully qualified fellow when he is not. The burden is on the claimant to make out a prima facie case, he has failed to do so and there is no requirement for the Tribunal to deal with the remaining issues. In short, the claimant cannot show the PCP he relies upon put, or would put, persons who share the claimant's protected characteristic at a disadvantage when compared with persons with whom claimant does not share it, and it cannot be said the claimant was put that disadvantage in the comparative exercise.

180. If the Tribunal is wrong, in the alternative, and had it found the claimant established the PCP relied upon (which he had not) and he had been caused a disadvantage, it would have gone on to find with reference to the last issue, namely, can the respondent show it to be a proportionate means of achieving a legitimate aim that it has shown this on the balance of probabilities. Ms Delpiore submitted the legitimate aims were compelling. The Tribunal agreed, not least by the existence of an obligation under EU law enabling free movement of persons and services (including professions such as qualified actuaries) in EEA countries reflected in domestic statute.

181. In addition, the respondent promotes and regulates the profession, foreign actuaries are not obliged to become fellows and they do so because it positively fosters good practice and enhanced relations worldwide, facilitating its member's ability to work and be recognised abroad. Ms Delpiore compared it to a trade agreement with mutual benefit for both sides, and she referred to the means being proportionate. The Tribunal accepted evidence given on behalf of the respondent that benchmarking and quality testing was rigorous with a view to establishing competence of the actuaries wishing to join. The fact that a test or adaptation period was offered to those actuaries already qualified in their own country is a proportionate means and fit for purpose, contrary to the claimant's assertion, for example, that Spanish actuaries are not appropriately tested. As indicated above, there was no satisfactory evidence to this effect apart from the claimant's say so, which was unsubstantiated and rooted in prejudice, the claimant believing Spanish qualified actuaries did not possess the English language skills necessary to practice

in the UK. The Tribunal noted the claimant's attitude towards men, women and other nationals working in the UK was fundamentally based on an unsubstantiated concern that foreign actuaries were threatening his ability to work when their qualifications were not equal to his, and nor were their language skills. The claimant argued his first language was Welsh, but despite this he had taken the exams in English and would not be in a position to conduct his profession in Welsh due to the technical terms. By analogy according to the claimant's argument, the language skills of foreign actuaries fell short; and the claimant took the view, albeit incorrectly so, that as his language skills were tested so should those of foreign actuaries. As indicated above, the Tribunal found as a matter of fact the claimant's language skills were not tested and it is irrelevant whether he could take his exams in Welsh or English and chose the latter.

182. In conclusion, with reference to the first issue, namely, did the respondent apply the following PCP to Claimant; (i) Conferring a fellowship on members of foreign actuarial associations with the benefit of an MRA without the need for them to pass CA3 or the SA series of exams, the Tribunal found that it had not, and the claimant's claim for indirect discrimination in not well-founded and is dismissed.

183. With reference to the second issue, namely, did the respondent apply the following PCP to claimant; (ii) Applying its CPD exemption terms (category 5), i.e. requiring persons to be engaged under a contract of employment in order to be eligible for exemption from the requirements of the scheme, the Tribunal found it had not. In respect of PCP (ii), he claimant relies on his age (38 years) and his sex.

184. Ms Delpiore submitted the second PCP relied upon by the claimant was not applied by the respondent; it is more nuanced. The claimant was not right that contractors were ineligible; the undisputed evidence before the Tribunal was that discretion was applied if the self-employed contractor was ill, disabled, and pregnant, on paternity leave and for a health and safety reason all of which may attract some form of statutory protection depending on the circumstances. None of these applied to the claimant.

185. With reference to the issue, did the respondent apply or would it apply the PCPs to persons who do not share his protected characteristic, the Tribunal found that it would not. The Tribunal accepted Ms Delpiore's submissions that at its highest, the PCP applied to all men and women, any age group, students and contractors and affects men, women and all ages equally. The claimant cannot show a particular disadvantage, it is neutral and does not disadvantage any group of men aged 38 years. A key element in indirect discrimination claims is the causal link between the PCP and the particular disadvantage suffered by the group and the individual. In some cases, the disadvantage is obvious, i.e. a PCP requiring full time work for women with children. In the claimant's case it is not obvious at all, and it was encumberant upon him to produce the necessary evidence showing men aged 38 cannot meet the requirement to undertake 2 hours CPD every 12-months and he has failed to adduce any satisfactory evidence with the result that the burden of proof has not shifted to the respondent. Accordingly, there is no requirement for the Tribunal to deal with the remaining issues in respect of the indirect discrimination claims; in short, the claimant cannot show the PCP put, or would put, persons who share his protected characteristics of age and sex at a particular disadvantage when

compared with persons with whom claimant does not share it, and it cannot be said the claimant was put that disadvantage in the comparative exercise.

186. The claimant in closing submissions explained the detriment to him in being required to take part in CPD was the very fact that he was being treated differently as a consultant in comparison to those in the workplace. Ms Delpiore submitted the PCP's relied upon by the claimant were fundamentally misconceived and confused. The Tribunal agreed. All men and women whatever their ages were required to undertaken 2-hours CPD per annum available to them free on the internet, unless they were ill, pregnant, on paternity leave and so on.

187. The claimant made assertions of sex discrimination without any coherent evidence or legitimate statistics to support his argument that females were risk adverse and less likely to work as consultants compared to men. The claimant relied upon an unnamed article produced in the bundle, which he argued supported his arguments on risk aversion that formed the basis of his assertion that women were more likely to be directly employed than men, and men aged 38 were more likely to be consultants and not employed. The claimant produced an article from Black Rock dated 10 November 2017, "Men v Women – Risk Aversion" produced by Nasdaq.com with no reference to the author or how the "Black Rock survey" was carried out. The article explored why women were more risk averse than men.

188. The claimant's argument that women sought the comfort of benefits, particularly maternity leave, and this was why very few were consultants, had no supporting evidence and was supposition on his part. The Tribunal is aware, from its judicial knowledge, that maternity leave is not generally available to contractors, who pay a reduced national insurance, however this is a far cry from saying that women prefer benefits to men. The Tribunal considered the article and gave it little weight, the writer was not named and nor were his/her credentials set out. The claimant, an experienced actuary recently fully qualified but working in the profession since his early twenties, did not produce the necessary statistical or other evidence to establish his indirect sex and age discrimination complaint.

189. If the Tribunal is wrong, in the alternative, it would have gone on to find with reference to the final issue relating to indirect discrimination, namely, can the respondent show it to be a proportionate means of achieving a legitimate aim concluding that it has shown this on the balance of probabilities. Ms Delpiore submitted the requirement to undertake CPD for 2 hours per annum by looking at free content provided by the respondent via the internet, was a positive thing, objectively viewed. The Tribunal agreed. It enabled the claimant to keep up-to-date free of charge, this was of benefit to him and his business and assured the respondent that all actuaries, including those who worked as sole practitioners, were kept up-to-date thus enhancing the reputation of the profession.

Section 27 EA - Victimisation

Protected Acts

190. With reference to the first issue, namely, did the respondent treat the claimant as set out in allegations 1(i) to (x) and if so, did it do so because claimant had done or because the respondent believed the claimant had done a protected act, on the

balance of probabilities the Tribunal found that it had not. The Tribunal has dealt with each allegation separately as set out below.

191. Ms Delpiore submitted the claimant needs to establish four things; a protected act took place before the matters he complains of as detriment, a prima facie case that he was subject to a detriment, and the person who did act knew of the protected act and had the required mindset as there is no doctrine of transferred malice. To shift the burden of proof the claimant must establish a causal nexus of the protected act and the matters he complains of was in the mind of the person who did the thing, and the claimant fails at each hurdle. The Tribunal was referred to the Court of Appeal decision in Anya v University of Oxford and anor [2001] ICR 847, CA. Neither employers nor claimants should fall into the trap of assuming that because an employer has acted unreasonably and unfairly in dismissing an employee it follows that the dismissal was discriminatory. It is well established that just because an employer behaves unreasonably it does not mean that there has been discrimination, but it may be evidence supporting that inference if there is nothing else to explain the behaviour — it is appropriate to take into account all relevant facts and circumstances and look to see whether the evidence supports the view that these acts were causative.

192. The Tribunal's starting point are the protected acts, which are as follows;

(i) In June 2011, he complained to the respondent that its two tier-pricing policy based on nationality contravened the Equality Act 2010;

(ii) In July 2011, the claimant informed respondent he was taking the matter to the Equality and Human Rights Commission.

(iii) On 27 March 2017, the claimant made allegations that the respondent was in contravention of the Equality Act 2010 and suggested this could be challenged in an Employment Tribunal.

193. If the Tribunal is wrong in its conclusion that the detriments which allegedly occurred in 2012 are out of time, in the alternative had they been lodged within time (which they were not) and had the Tribunal the jurisdiction to consider the complaints it would have when, dealing with those allegations, reached the following conclusions.

194. With reference to the first allegation that the respondent had given the claimant a fail result in the SA2 exam in July 2012 as a result of protected acts (i) and (ii) there is no evidence whatsoever to this effect. This is a very serious allegation made without any cogent or credible evidence and would require a conspiracy between two independent examiners, the chief examiner and employees of the respondent to intentionally fail the claimant on the basis that he had raised a complaint that the respondent charged a student from a "special" overseas country such as India a reduced fee of £90.00.

195. The examiners are qualified actuaries independent to the respondent overseen by a head examiner. The papers are marked independently by two examiners who are unaware of each others marks and the senior examiner can ask

for the scripts. The senior examiner is responsible for bringing together the marks. The claimant alleges Karen Brocklesby was involved in the exam and the respondent failed him because he had made a protected act. There was no evidence of this before the Tribunal, it would require her to conspire with the examiners which would be surprising given the fact that the papers are unnamed and one would question why independent examiners would risk their careers as actuaries to ensure the claimant did not pass; it is irrelevant to them whether or not the respondent was subject to a EHRC investigation on fees. The Tribunal cannot think of any reason why fees would be of any interest to the examiners, and it is unfortunate the claimant, who sees conspiracy from every angle, believed he had failed his exam as a result of victimisation and not his own shortcomings when taking the exam. It is not unusual for students to believe they have done well, when examiners take a different view. It is clear from the contemporaneous correspondence spanning a considerable period of time the claimant was convinced in his own mind he should have gained that pass mark, even when exam counselling showed otherwise.

196. When the alleged discriminatory act relating to the fee differential was first raised the claimant was provided with a detailed explanation as to why the difference existed i.e. due to earning potential. It is inconceivable such a conspiracy would take place, and the information before the Tribunal is that the exam counselling report prepared by Lynsey Smitherman set out the claimant's deficiencies. It is notable during this period the claimant was preoccupied with the possibility that he had been asked a "trick question," one that all those taking the exam had been asked, and the Tribunal has difficulty in comprehending how the claimant can say he was treated any differently from other applicants by being awarded a FA fail within 95% to 99% of achieving the pass mark. The clear evidence before the Tribunal is that the claimant had not performed sufficiently well in the July 2012 SA2 exam so as to merit a pass, and there was no causal connection with any protected act and so the Tribunal finds.

197. With reference to the second allegation that the respondent had failed to provide an adequate response to a subject access request on 6 August 2012, the Tribunal did not find this to have been the case. It is undisputed the claimant was not provided with his global mark when the information could have been accessed by the respondent on its computer. However, a reasonable response was provided to the effect that exam counselling would deal with the claimant's questions when a global mark would not. It is difficult to see, how objectively, the claimant could be said to have been caused a detriment when he was provided with a grade in accordance with the respondent's usual practice and not a global mark, especially given the detailed exam counselling that took place.

198. The Tribunal concluded the claimant had not suffered a detriment objectively assessed. The reason he wanted the mark was to find out where he went wrong and one overall mark as opposed to the "FA" fail provided would not have achieved this. Exam counselling was the only way the claimant could assess his performance question by question, and its very highest by August 2012 the claimant should have realised that an overall mark would not have assisted him. The claimant was preoccupied with the principle of obtaining a mark and proving the respondent wrong and it is this objective of proving the respondent was wrong and he was right that underlines this litigation.

199. It was submitted by Ms Delpiore Karen Brocklesby was frank as to why the claimant had not been given his marks; it was human error. It is undisputed she had provided the claimant with a CA3 SAR on the 25 May 2012 after the Commission had written to the respondent, which included marks held on the server when the SA2 were not. The Tribunal found the claimant failed to show the relevant reasons were operative in the mind of Karen Brocklesby and the burden of proof has not shifted. If it had, the Tribunal would have gone on to find respondent had an innocent and exonerating reason. In short, the 27 April 2012 Subject Access Request was the first SAR received by the respondent, and handled by Karen Brocklesby who was unclear as to how it should be dealt with, requesting guidance given the respondent's usual practice to provide grades and not global marks. The Tribunal accepted on balance Karen Brocklesby took the view exam counselling offered to the claimant would deal with his questions when a global mark would not.

200. Karen Brocklesby gave oral evidence how the claimant's results were set out in a list, which the Tribunal had sight of with names redacted, the claimant's entry showing "FA." In her witness statement she stated at the time of the SAR request the claimant's SA2 exam script was with the principal examiner, who also held the marks. In oral evidence Karen Brocklesby said the mark does not go onto the electronic system only the grade goes on the system and that was held indefinitely. The spreadsheet was sent by the examiner with a mark and a grade, and whilst the mark was not ordinarily disclosed or uploaded, Karen Brocklesby confirmed it should have been given to the claimant at the time in response to the SAR, and she was at fault for doing so due to a mistake on her part. The spreadsheet was on the electronic system, and Karen Brocklesby did not look for it. This was the first time Karen Brocklesby had admitted the mistake. In oral evidence Karen Brocklesby confirmed the respondent knew a spreadsheet existed, the claimant's name was on that spreadsheet but she could not remember all of the columns. She stated, "I never saw the marks, I never went to get the marks…I'm not going to look at everyone's data." On the balance of probabilities, the Tribunal found Karen Brocklesby did not look for the marks because she believed the claimant was not entitled to them. She was aware the claimant had subjected the respondent to an EHRC complaint and on the balance of probabilities the Tribunal found there was no causal link between the protected act and Karen Brocklesby's decision-making process. Exam counselling and not the marks would clarify matters for the claimant and that this was the way forward for him, and she genuinely but incorrectly believed at the time the global mark was not available and even if it were, he should not be given it in accordance with the respondent's practice.

201. With reference to the alleged detriment 1(iii) this claim is confused. It was submitted by Ms Delpiore the claimant undertook exam counselling which was the service he contracted for, the Tribunal accepts no detriment existed because a full report was provided and the claimant "got what he paid for". The claimant has not established an unlawful reason operated on the mind of the exam counsellor Ms Silverman.

202. With reference to alleged detriment 1(iv) it is difficult for the Tribunal to understand how objectively viewed, this can amount to a detriment. It is not. As far as Karen Brocklesby is concerned the Tribunal accepts that she genuinely (albeit incorrectly) believed there were no marks or data. This view was down to human error on her part and there was no causal link between the 6 August 2012

communication to the claimant and the two protected acts replied upon. In short, the Tribunal took the view it was not unfavourable treatment objectively viewed but human error, and another member of the respondent looking at the matter objectively would not have concluded he/she had been caused a detriment.

203. With reference to alleged detriment 1(v) Ms Delpiore submitted that the view held by Suzanne Lyons concerning where the exam scripts were held and by whom does not suggest a plot. It must be considered in the context of the claimant chasing information about his exam performance and the claimant using the Data Protection Act to get that information which the respondent's policy said he should not have and which in general other people are not given. The Tribunal concluded there was no causal connection between Suzanne Lyons, who genuinely believed the exam scripts some 5 years past had been retained by the principal examiner at the time and the marks were recorded on the script, and there was no causal connection with any of the protected acts. The Tribunal repeats its observations made above in relation to there objectively being no detriment in relation to a global mark not being provided to the claimant.

204. With reference to alleged detriment 1(vi) there was no evidence whatsoever of the claimant being caused a detriment as result of a watch being kept on his SA2 examination progress in April 2012. Had the claimant been better able to step away from the position he adopted from 2012 to these proceedings, and had he taken into account the communications sent to him concerning this alleged detriment, he would have realised that there was no "sinister undertone" especially in light of "proactive manner" of the claimant's engagement at the time as explained by Suzanne Lyons in a number of her emails including that of 12 September 2012. The Tribunal accepted the evidence that Karen Brocklesby was bracing herself for another request from the claimant after the SA2 examination and she was not wrong in her expectations as there were numerous requests spanning years. The reference to her "keeping a watch" is neutral and when understood in context and within the factual matrix in context, it was not an act of reprisal and cannot reasonable and objectively be considered as such.

205. With reference to alleged detriment 1(vii) the Tribunal has dealt with this above, concluding the claimant's email of 30 August 2017 was sent directly to Mr Cribb, it makes no reference to the 'PTR' procedure and nor on the face of the document could it be interpreted to be a complaint under the procedure. The claimant did not send it to the appropriate mail box as per the procedure or make it clear it was being brought under the 'PTR' procedure, having made countless complaints previously outside the procedure, including some of the complaints duplicated in the 30 August 207 email. When it finally became clear it was the claimant's attempt to engage PTR, the claimant having at first ignored the respondent's request for clarification, Suzanne Lyons responded that it did not fall within the 'PTR' because it substantially concerned litigation matters. It was not disputed the respondent's regulatory body accepted the respondent had taken the correct approach, and that it involved complaints that were essentially matters that were either the subject of litigation or future threatened litigation. There was no satisfactory evidence of any causal connection between Derek Cribb not following the 'PTR' procedure and the protected acts, the Tribunal concluding a member acting reasonably would have objectively concluded the 'PTR' procedure did not involve dealing with litigated claims and complaints.

206. With reference to alleged detriments 1(viii) and (ix) the Tribunal has dealt with this above, concluding the email communication cannot reasonably be interpreted as a threat to instigate a disciplinary process against the claimant. Suzanne Lyons was not involved in bringing complaints; her involvement was at a higher level. Ms Delpiore submitted the claimant sent "eye wateringly rude" correspondence and her actions was not motivated by the protected act; the Tribunal agreed. The Tribunal considered the motivation and mental processes of Suzanne Lyons, she was dealing with a difficult member who persistently sent confrontational and aggressive correspondence and who was undergoing the litigation process in two different jurisdictions. Members of staff were upset by the claimant's actions, for example, Karen Brocklesby. Suzanne Lyons was aware at the time Karen Brocklesby was distressed and had become a focus of the claimant's "vitriolic campaign" – there were strong welfare concerns for her and higher management. Devonshires solicitors was relied upon and had become involved in the litigation. Suzanne Lyons in her communication criticised by the claimant was merely expressing her concerns about the claimant's behaviour and belief that it could attract legal costs if he continued in his actions; this was a matter of fact and there was no causal nexus with the protected acts.

207. Finally, turning to the raft of wide general unsubstantiated detriments claimed at 1(x) the Tribunal found the following on the balance of probabilities: -

208. With reference to the allegations that from 27 March 2017 –

(1) The claimant was stone-walled by respondent and suffered evasive conduct from it, the Tribunal found this was not the case as evidenced by the factual matrix set out above, which it does not intend to repeat. It is notable the claimant misconstrued and refused to accept much that was written to him in the correspondence exchanges on the basis that the respondent was not doing what he wanted it to do in respect of the exam results, re-payment of monies and CPD exemption. Suzanne Lyons had a policy that she would deal with all of the claimant's correspondence every two weeks. It would have been helpful if she had informed the claimant of this at the time, nevertheless the claimant's concerns and objections were dealt with as best as possible, and even had they not been there was no causal connection to any protected acts. The claimant was giving unrealistic deadlines. Suzanne Lyons was trying to answer his queries as well as she was able, bearing in mind he had issued litigation proceedings and was threatening to issue further proceedings on the matters he had raised in correspondence.

(2) The Tribunal found there was no evidence to the effect that the claimant received an inferior service as a member from respondent. No evidence was given by the claimant as to what a "superior" service would have amounted to, and how he was treated differently to other members in the same situation, which is unsurprising as other members did not behave in the

way the claimant did as a rule. A great deal of time and resources were spent to deal with a situation where the claimant, who was not an employee, was but one of many thousands of members. Within the five-full leaver arch files covering this period the majority of the communications emanated from claimant's who believed the respondent's employees were conspiring against him, for no good reason. Being a member of an organisation does not entitle the claimant to test competencies of staff, set down unrealistic timescales and deadlines and expect responses to emails sent one day after another, sometimes two or three on the same day. The claimant lost sight of the fact that he was but a member of the respondent organisation; he attempted to control the process and this was not limited to the respondent, but also to his view of how the exams should have been marked in his favour because he thought he deserved a pass and that was the issue that underlined the bulk of these communications.

(3) The Tribunal did not find the claimant had been starved of information and documentation reasonably requested in his capacity as a member and refers to its finding above.

(4) The Tribunal did not find the claimant had suffered huge delays in getting responses, and refers to the factual matrix above from which it clear that many of the numerous responses were sent by return, and if they were not an explanation was given.

(5) The claimant was, at times, denied direct phone or email dialogue with staff members when he identified himself but this had no causal connection with the protected acts and flowed from the claimant's disruptive behaviour towards the respondent's employees when he believed he was not getting responses that would satisfy him. The claimant as a member had no right to insist he dealt with individual staff for the information sought, and it was wholly appropriate for him to deal with one person. The claimant upset staff, it was reasonable for Suzanne Lyons to deal with it. The claimant emailed a number of staff directly, as can be seen from the factual matrix, and they responded. He refused to comply with the direction given to him by Suzanne Lyons that he was to deal with her directly, and this resulted in a flurry of corresponding verging on abuse and subject access requests to discover the name of the person(s) who had reached the decision. The claimant had lost his perspective and the Tribunal found it was not a detriment for any telephone contact or otherwise to be made through Suzanne Lyons or a personal assistant. The respondent's role was not to manage the claimant's expectations, and Suzanne Lyon's attempts to set

up a face to face and/or telephone discussion failed because the claimant wished to take control and record the meeting.

(6) The Tribunal accepts the claimant had not received the global mark, but it is not in a position to conclude the respondent had failed to provide sufficient Subject Access Request information. The Tribunal is not an expert in the Data Protection Act regulations; this is a matter for the Information Commissioner (the ICO"). The claimant referred a complaint to the ICO, and there was found to have been no issue. There was a global mark which the claimant should have received but as indicated above, the Tribunal found no detriment or causation for the reasons already given concerning the mark.

(7) The Tribunal found the claimant was not been ignored when he has drawn respondent's attention to these concerns, far from it as evidenced by 5 full lever arch files of documents and the selection referred to in the factual matrix set out above.

Section 145(2) EA: Void and Unenforceable Terms

209. With reference to the first issue the Tribunal found the respondent did apply the 'CA3 rule', that is a requirement on 'UK members' to pass CA3 (CP3) as a condition for conferment of FIA.

210. With reference to the second issue the Tribunal found the respondent did apply the 'SA2' rule, that is, a requirement on UK members to sit and pass SA2 as a condition for conferment of FIA.

211. With reference to the third issue the Tribunal found the respondent did apply the CPD exemption Rule (Category 5) to the claimant.

212. With reference to the fourth issue the Tribunal found such rule does not promote or provide for treatment of claimant that is contrary to Sections 13 and 19 of the EA so that it unenforceable.

213. In conclusion, the claims of race discrimination brought 13 and 19 of the Equality Act were received outside the statutory time limit. An employment tribunal shall not consider such a complaint unless it is presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done). It was not just and equitable to consider such a complaint which is out of time if, in all the circumstances of the case, the Tribunal does not have the jurisdiction to consider the complaint which is dismissed. In the alternative, the respondent did not unlawfully discriminate against the claimant under section 13 of the Equality Act 2010 by treating him less favourably than a hypothetical comparator on the grounds of his nationality/national origin, and the claimant's claim for direct race discrimination is not well-founded and is dismissed. The claimant was not indirectly discriminated against under section 19 of the Equality Act 2010, the protected characteristic relied upon being British nationality and national origin, his age of 37 years, and sex (male), and his claim for indirect discrimination is not well-

founded and is dismissed. The respondent did not victimise the claimant under section 27 of the Equality Act 2010. The alleged detriments suffered in 2012 numbered 1(i) to (iv) and (vi) were lodged outside the statutory limitation period, it is not just and equitable to extend time and the complaints are dismissed. The claimant's remaining claims for unlawful victimisation brought under section 27 of the Equality Act 2010 is not well-founded and is dismissed.

10.7.18
Employment Judge Shotter

JUDGMENT AND REASONS SENT TO THE PARTIES ON

10th July 2018

FOR THE TRIBUNAL OFFICE