EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Ahmed	**v**	**Jemca Car Group Limited**

Heard at: Watford **On**: 14-18 January 2019 (inclusive)
22 January 2019
29-30 January 2019 in chambers

Before: Employment Judge R Lewis
Mrs G Bhatt MBE
Mr S Bury

Appearances

For the Claimant: Mr Mukhtiar Singh - Counsel
For the Respondent: Mr Richard Wayman - Counsel

RESERVED JUDGMENT

1. The respondent is correctly named above.

2. The following claims are upheld:

   2.1 The respondent harassed the claimant, contrary to Section 26 Equality Act 2010, in language used at around 09:00 am on 23 May 2017;

   2.2 The respondent victimised the claimant, contrary to Section 27 Equality Act 2010, in failing to support or facilitate his application for PHI on or about 11 January 2018.

3. All other complaints brought by the claimant, whether of discrimination, harassment, or victimisation, and howsoever expressed, fail and are dismissed.

REASONS

1. This was the hearing of a claim presented on 17 November 2017. It was brought only under the provisions of the Equality Act, and only under the protected characteristic of religion. The claimant is a Muslim.

Procedural background

2. A telephone preliminary hearing took place on 27 April 2018. The claimant was represented by Mr Singh and the respondent by the solicitor who continued to represent it. The order was sent to the parties on 26 May 2018. Judge Manley's order by consent listed the claim for 7 days, including remedy hearing.

3. The Tribunal had before it at the start of the hearing three main bundles including well over 1,200 pages; a respondent's bundle which was not in usable condition and which Mr Wayman re-ordered during the course of that day; and a medical bundle containing a consultant psychiatrist's report obtained the previous month, to which was annexed a large number of unnumbered documents drawn from the main bundle. The consultant's report indicated a potentially complex remedy hearing. There were 13 witness statements, that of the claimant and 12 on behalf of the respondent.

4. Neither party had drawn to the attention of the Tribunal the possibility that the listing was no longer viable, particularly as in the event one of the originally listed 7 days was not available. The Judge therefore proposed and the parties agreed that the allocated time be available for the liability hearing only; that the first day be taken on reading; and that oral evidence be completed in the second to fifth days inclusive. In the event, oral evidence stretched into the sixth day, and was followed by written and oral closing submissions. Separate case management orders have been made to deal with the remedy hearing.

5. While we are grateful to counsel for their professionalism in agreeing a timetable, and adhering to it, a case which was listed on a joint professional estimate of 7 days including deliberation and remedy has now been allocated a total of 13 days. The parties would have assisted the Tribunal in accordance with the overriding objective by alerting it at an early stage to this possibility.

Medical points

6. The claimant appeared to struggle with what seemed to us signs of stress. We made clear that if he needed additional breaks during evidence, he should take them; and that if he wished to leave the room at any time during the respondent's evidence, he should do so. We changed the layout of the Tribunal room, so as to avoid the claimant being seated for a lengthy period next to the respondent's witnesses. Mr Singh did not ask for any other arrangement or adjustment.

7. Although this hearing dealt with liability only, the psychiatrist's report was, in the words of counsel, "before the Tribunal" and Mr Singh sought to rely upon it as evidence of the impact on the claimant of the events of 23 and 24 May 2017, as identified by Dr Hallstrom when he examined the claimant in December 2018.

8. The Tribunal read Dr Hallstrom's report, and put forward a brief summary of matters which might assist it at this stage, upon which counsel were invited to comment. The summary is the following:

8.1 It is agreed that Dr Hallstrom uses the words "fixated" and "obsessional" about the claimant more than once in his report;

8.2 Both sides agree that both words were well used;

8.3 The claimant accepts, and the respondent notes, paragraphs 116 and 117 of Dr Hallstrom's report, which say in their entirety:

> "There was obviously a significant pre-existing vulnerability to developing stress-related symptoms, panic attacks and depression, prior to the events of 2017 in relation to external events.
>
> It seems that the events in the office subsequent to 23rd May 2017 had a profound psychological impact upon him. On one level the verbal abuse that he allegedly suffered was not so bad, on the other hand, it seemed to strike a sensitive spot. He seemed to be threatened by one colleague in a rather menacing manner, although some of the accusations may have been art of general but inappropriate banter. There was a racial and religious element to it."

8.4 It is agreed that the claimant has been ill. The respondent reserves its position as to the timing of his illness and its causation.

Pleading issues

9. The agreed list of issues, set out in Judge Manley's order, was agreed to represent the totality of the issues, but was problematical for the Tribunal in a number of respects. In particular, a number of the allegations were expressed in broad general terms. We note in particular issues 6d(ii); 6f, and 6g.

10. Issue 6f for example pleaded, "Failing to support the Claimant as a victim, including [two specific examples]. " The first eight words appear to us so broad as to be incapable of a fair trial. They included as a given fact (that the claimant was a victim of discrimination) that which he had to prove. The two specifics which follow plainly are capable of determination. In the course of the second day of the hearing, Mr Singh applied to amend by the addition of the words "and have regard to the Return to Work Report" at issue 6f. The application was refused: it was not in the interests of justice to permit the claimant to add a new claim, of which he had had full factual knowledge since about September 2017, so late in the hearing.

11. Issue 6g pleaded in part: "Asking the claimant questions and communications as part of the disciplinary and grievance investigations whilst off sick and subsequently ….." Mr Singh applied likewise to include within those words "in light of the Return to Work Report of 29 August 2017, pages 311 and 318a". The Tribunal allowed that amendment, because it was part of the factual matrix before the Tribunal and already encompassed within issue 6g. We approached with caution the near unlimited interpretation which Mr Singh sought to attach to the word, "communications".

Case management

12. The paperwork before the Tribunal was unwieldy, and a significant proportion of it was not referred to. An agreed core bundle of the handful of documents to which repeated reference was made would have been of immense help.

13. The bundles contained duplicate material, irrelevant material, and material difficult to trace because it was partly timed, and usually in the bundle in reverse order. The respondent's witness statements contained swathes of irrelevant material. Although there was irrelevant material in the claimant's witness statement, it was a lesser proportion of the whole. The Tribunal agreed with counsel at the start of the hearing that where counsel did not cross-examine on such material, they would be taken to exercise professional judgment that it was irrelevant and need not take up the limited time of the Tribunal, and would not be taken to have agreed any point made by the opponent on which there had not been cross-examination. We were grateful to counsel for their pragmatism in adopting this approach.

14. Much of the case turned on a total of about 30 minutes of CCTV footage. It was of high visual quality. The sound recording was difficult to decipher, because large portions of it were the sounds of several people speaking at once. We watched it a number of times during the hearing. The respondent provided the footage on memory stick for our use during deliberations. Unfortunately, we were not able to play it.

15. The respondent had prepared a few pages of transcript of the CCTV sound for management purposes during the events in question (161-164). There appeared to have been no consideration of preparing an agreed transcript for the use of the Tribunal in these proceedings. Mr Wayman told us in closing that on his "umpteenth" hearing, he had identified two phrases which were potentially significant and which at that late stage the respondent conceded had been said.

16. We were told that the parties were in possession of recordings of telephone conversations made at the respondent's premises and disclosed to the claimant under the provisions of subject access. They were not played or transcribed and in the event played a very small part in the events before us. Counsel agreed the wording of one material phrase (see **XXX** below).

17. The amount of irrelevant material before us was in part at least, we understood, generated by about seven Subject Access Requests made by the claimant. The Tribunal has no jurisdiction to deal with subject access. We make no comment or finding on how the respondent dealt with the requests. We add as a matter of general experience that SARs generate significant quantities of material, the vast majority of it not helpful in Tribunal proceedings.

18. The Tribunal was told that there had been very late disclosure by the respondent of email material, which was included in a respondent's bundle and purportedly annexed to witness statements. In the event, and while the Tribunal was reading on the first day, Mr Wayman helpfully removed this material from the respondent's bundle, re-organised the respondent's witness statements, and the material was not referred to again.

19. On the fourth day of the hearing, the claimant applied to adduce the evidence of Mr Shaun Barlow, who had signed a witness statement on the evening of the third day of this hearing, 16 January 2019. The Tribunal refused to admit the evidence. It dealt with an allegation of which the claimant had full knowledge since (according to Mr Barlow's statement) on or about 31 October 2017. If relevant, it could have been served much earlier. Its relevance to liability appeared to us at best marginal, and certainly not sufficient to justify its lateness.

General approach

20. Before we move to findings of fact, we set out a number of matters of general approach.

21. In this case, as in almost all others, witnesses referred to a wide range of issues, some of them in depth. Witnesses appeared often to focus evidence on points about which they had strong feelings. Where we make no finding at all about a matter of which we heard; or where we do make findings, but not to the depth or extent to which the evidence went, our approach should not be taken as oversight or omission, but as a reflection of the extent to which the point was of assistance to the Tribunal.

22. While the above is a common place in our work, it was a particular issue in this case, where the presentation of paperwork, witness statements and oral evidence was, on both sides, marked by an unusual lack of self-discipline.

23. The Tribunal noted that Mr Singh formally put to each witness on behalf of the respondent a conspiracy theory of which there was no extrinsic evidence, but which relied entirely on extrapolation and interpretation of other primary facts. He put to the witnesses that early in these events, a corporate decision was taken which was, in effect, that because the claimant was a Muslim, and because he had made a complaint of

religious discrimination, he would be managed out of the business, and ultimately dismissed. It was put to witnesses that they were conducting themselves in accordance with that decision. We do not criticise Mr Singh for fulfilling his professional obligations. We find that there was no evidence whatsoever to support any part of that proposition, and that we reject it. We deal below with other aspects of the conspiracy approach.

24. We read evidence from the respondent about the claimant as a person: his personal life, his social behaviour, and comments and criticism about the claimant as a person which went far beyond the matters set out in the issues. A large part of that evidence was based on speculation and gossip. Mr Wayman did not pursue any of this line of evidence in cross-examination. Almost none of it related to the matters set out in the list of issues, and it should be taken that we have disregarded that evidence in its entirety, save where a finding specifically refers to it **(eg paragraph XXX below, Mr Angus)**.

25. As is frequent in the work of the Tribunal, both sides adopted a binary approach. The respondent's witnesses in particular took an unnuanced view, which gave little or no recognition to points which with hindsight might not have been best said or done. A striking example was that when asked about an email from Ms Bray (the most senior HR employee) describing the claimant as a "rat bag" Ms Cavanagh felt unable to accept that that was not appropriate communication in a professional HR setting. To his credit, the claimant in evidence showed some insight to short comings in his own language and behaviour. It was evident that he found this difficult. He accepted with hindsight that in particular the language which he had been captured using on CCTV was not acceptable and not appropriate.

26. We make the observation that binarism, namely a rigid adherence to one's own rightness, and refusal to recognise one's own errors or shortcomings, and therefore a refusal to acknowledge potential strengths in an opponent's case, is not an approach which generally assists the Tribunal, because it rarely reflects the reality of the work place. Our experience is that human error and misunderstanding are the everyday currency of every work place; there was little recognition on either side that that might explain any part of these events.

27. When we considered the case as a matter of overview, the two sides' differences in approach were striking. Taking in each instance the claimant's case first, it seemed to us that we were asked to consider approaches which were complex versus simple; devious versus straightforward; conspiracy based versus strewn with human error; and pre-planned versus reactive. In each instance, the latter word (representing the respondent's general approach) seemed to us more in accord with our understanding of everyday workplace reality, and ultimately with our analysis of the evidence in this case.

28. Mr Singh correctly cautioned the Tribunal to bear well in mind that each of the matters relied upon factually by the claimant was pleaded in the

alternative as a claim of direct discrimination, and/or harassment, and in the further alternative as a claim of victimisation. Rather than repeat some cumbersome formulation, we use the general term "prohibited factors" to apply to a claim which falls under all three sections. Where therefore we state that we find that a certain matter was not the consequence of any prohibited factor, we mean that we have found that the fact or matter in question was neither direct discrimination, nor harassment, nor victimisation.

29. We have departed from chronology in our findings, which we think will make our Reasons easier to follow. For the sake of consistency, we have given all timings in the 24 hour clock.

Judicial notice

30. The events in this case followed from the bombing at the Ariana Grande concert at the Manchester Arena on 22 May 2017. In the course of evidence, Mr Singh asked whether it was necessary to call general evidence about terrorist bombings. The Judge suggested matters of which the Tribunal might take judicial notice. This was not challenged or raised further by either side at the time. At the end of evidence, the Judge invited counsel to set out in writing their agreement on judicial notice, so that there could be no misunderstanding or doubt about a sensitive matter. The parties produced a summary of the Judge's remarks, which we now set out, in faired form, as the agreed basis of the judicial notice taken by the Tribunal.

31. This hearing proceeded on the basis that by consent the Tribunal took notice of the following:

    31.1 That since the IRA cease fire of 1994 there has been an assumption that if a serious terrorist act takes place in England, it has been carried out by Islamist supporters;

    31.2 That is particularly the case if the target of the terrorist act is something as self-evidently harmless as a young people's concert (such as the Bataclan in Paris, and the Manchester Arena itself);

    31.3 That suicide bombing is a tactic generally understood to be used exclusively by Islamist attackers;

    31.4 That in all the circumstances of the Manchester Arena attack, there was a general understanding, even before the identity of the bomber was known, that it was an Islamist attack;

    31.5 That the word Islamist is used to express what purports to be a political event, and is not used as a religious term.

Hindsight and iteration

32. We had to take particular care about the wisdom of hindsight. In this case, hindsight was compounded by a number of factors. The primary event, described below, lasted 4-5 seconds. While those involved knew that they were being filmed, none of them knew that they were also being audio recorded. They were speaking in an office setting, which we also describe below, and without any thought that their words would be the subject of days of forensic dissection 21 months later. No one thought at the time that the event was particularly important. We must consider these events through the spectrum of realism, not the artificial techniques of the legal professions; and applying a fair and realistic expectation of the standards and behaviour of management and witnesses. That is not to import into this case an approach which is a "range of reasonable responses", which we fully understand was not applicable.

33. Hindsight operates in a number of different ways in the work of the Tribunal. Usually, the word conveys its everyday sense, namely the caution which we should apply when asked to assess how people behaved at a particular time, on the knowledge then available to them, in the light of events as they presented at that time, and responding to the emotions and pressures of the moment. There is of course some luxury in viewing those events months later in the relative calm of the Tribunal. In this case, we were asked to consider, with the benefit of hindsight, actions and words which were not well done or well said. The claimant struggled with this at times. He recognised that the behaviour and words captured on CCTV in the "build-up" clip were not to his credit, and he admitted in evidence, and through counsel in closing, that he had said things of which he could not be proud. That was well said. The respondent demonstrated little reflection or second thought, although it had ample opportunity to do so.

34. The issue of hindsight had further implications. The volume of email traffic from the claimant, and the number of meetings in the chronology, and the involvement of a number of managers, meant that it was open to Mr Singh to pursue shortcomings and inconsistencies in different iterations, and he did so with thoroughness and enthusiasm. We were concerned that this approach should engage a realistic standard of reasonable management and other behaviour. Routine inconsistency between accounts given by the same person of the same event does not trouble us.

35. Inconsistency, as a factor in our adjudication, is particularly unhelpful in a case which at the time of the events was not identified as of great importance to anyone except the claimant, and was regarded as a routine management matter, to be dealt with in accordance with the normal procedures, and which but for this case was concluded within about two weeks after the events in question. As a matter of general approach, we attach greater weight to an account given at or close to the time in question than to one given long after the event.

Witnesses

36. The Tribunal heard in order the following witnesses:

- Mr David Anichebe, interposed as he is no longer employed by the respondent. At the time of these events he was employed as Customer Consultant and was a relatively new starter within the company. He was primarily involved with the claimant in what is described as incident 2. His evidence lasted 25 minutes.

- The claimant gave evidence for a day, stretched across most of the second day and the start of the third.

- Mr Tony Igbinigibe gave evidence for 1 hour. He was and is employed as Customer Consultant, and was central to incident 1.

- Mr Mohamed Hussain gave evidence for 10 minutes. He is a Muslim. He was part witness to the events and was then a Trainee Consultant.

- Mr David Angus was and is employed as Customer Consultant and was involved in incident 1; his evidence lasted 20 minutes.

- Mr Wayne Fennessy gave evidence for just over an hour. He is General Sales Manager. His role in events immediately after incident 1 and in the investigation process is described below.

- Mr Milton Charalambous is now employed as Finance Renewals Manager and was at the time of these events employed in a role which we accept placed him on equal footing with Customer Consultants although included Manager in his title. He was central in the build-up incident. His evidence lasted about 30 minutes.

- Mr Richard Stevenson is Used Car Sales Manager and was involved in management and investigation processes set out below. His evidence lasted about 45 minutes. Mr Stevenson's evidence was that in the past his friendship with the claimant had been such that the claimant had been best man at his wedding and godfather to his child. Alone of the respondent's witnesses he seemed alive to the sadness of the broken friendships which underpinned parts of this case.

- Mr Ross Knights is Service Manager, and was involved in the investigation procedures, and in particular in the capturing of CCTV; he gave evidence for an hour.

- Mr Allan Thacker, General manager, gave evidence for 3 hours. He chaired the meeting on 27 September 2017 which dealt with return to work, discipline and grievance matters.

- Ms Kat Craigs, Group HR Advisor, gave evidence for 2.5 hours. She was the claimant's point of contact with the company for a

considerable part of these events and provided HR advice and support to a number of managers, notably Mr Thacker.

- Mr Parminder Randhawa, General Manager at the respondent's Edgware Road premises, heard the claimant's appeal against Mr Thacker's decision and gave evidence for some 35 minutes.

- Ms Sian Cavanagh, Senior HR Advisor, was involved in some correspondence with the claimant and supported Mr Randhawa in dealing with the claimant's appeal. Her evidence took about one hour.

The Legal Framework

37. There was little dispute between the parties about matters of law. The claim was brought purely under the provisions of the Equality Act and the protected characteristic relied upon was the claimant's Muslim religion in accordance with Section 10.

38. The claim was brought is part under Section 13 which provides as far as material:

> "A person discriminates against another if because of a protected characteristic A treats B less favourably than A treats or would treat others."

39. Section 13 engages Section 23(1), which provides as follows:

> "On a comparison of cases for the purposes of Section 13 ... there must be no material difference between the circumstances relating to each case."

40. The claim was also brought under the provisions of Section 26 which provides so far as material:

> "A person harasses another if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment…"

41. Section 26(4) provides as follows:

> "In deciding whether conduct has the effect referred to ... each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

42. The Tribunal drew to the attention of the representatives Section 212 which so far as material provides as follows:

> ""detriment" does not, subject to sub-section (5), include conduct which amounts to harassment;"

43. Section 5 did not arise in this case as it appeared to us to relate only to the protected characteristic of marriage and civil partnership which is excluded from Section 26(5).

44. Section 27 provides so far as material:

> "A person victimises another person if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done or may do a protected act.
>
> The definition of protected act in Section 27(2) is broad and so far as material includes Section 27(2)(d), ie
>
> " .. making an allegation (whether or not express) that A or another person has contravened this Act."

45. Section 109 provides so far as material that:

> "Anything done by a person in the case of [his] employment must be treated as also done by the employer."

46. Section 109(4) provides the so-called statutory defence. No issue was raised by either side on the application of s.109, and the claim was conducted on the understanding that the respondent is liable for all the facts and matters of which the Tribunal heard.

47. The limitation provision is set out in Section 123 and provides so far as material:

> "Proceedings on a complaint ...may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable."

48. Section 123(3) provides as follows:

> "For the purposes of this Section (a) conduct extending over a period is to be treated as done at the end of the period; (b) failure to do something is to be treated as occurring when the person in question decided on it."

49. The burden of proof provision is set out at s.136, and we noted ss.136(2) and (3):

> "If there are facts from which the court could decide, in the absence of any other explanation, that .. A contravened the proivision concerned, the court ust hold that the contravention occurred .. But .. not .. if A shows that A did not contravene the provision."

50. We were referred to a number of authorities, notably *Richmond Pharmacology Limited v Dhaliwal 2009 IRLR 336*; *Evans v Xactly Corporation, UKEAT/0128/18*; and *Peninsula Business Services v Baker*

2017 IRLR 394. The Tribunal invited the parties to consider *R v Immigration Officer at Prague Airport 2005 IRLR 115*, but in the event little reliance was placed upon it. Mr Singh in closing submitted that the case stated the proposition that a stereotype based on race remains a stereotype even if it is true of many members of the group.

51. We respectfully adopt Mr Singh's helpful distillation of the submissions at paragraph 21 to 23 of his closing submissions. We accept and note that we should deal with the allegations first by considering whether harassment has taken place, and Mr Singh drew to our attention a three-stage test drawn from *Richmond Pharmacology*: we should ask whether the respondent engaged in unwanted conduct; did it have the statutory purpose or effect; was it on prohibited grounds or, using the language of the 2010 Act, was it related to a protected characteristic.

52. He reminded us of the role of both subjective and objective tests in considering the second stage, and of the importance of context, including the claimant's reaction at the time.

53. It was common ground that s212(1) contains what Mr Singh called the anti-overlap provision quoted above, which we understand to preclude the tribunal from finding the same detriment to be a contravention of both ss 13 and 27 (although we add that we can find no authority on the application of the sub-section, and that while this judgment was being drafted, the EAT, in Gan Menachem v De Groene UKEAT/0059/18 remitted the case for remedy on the unchallenged finding that a number of matters were both detriments and acts of harassment)

'Banter'

54. There was much reference at this hearing to banter. There was no suggestion on either side of a working definition. We take the definition of "playful and friendly exchange of teasing remarks." The definition embraces four separate points. First, banter involves exchange, namely a process in which more than one speaker is involved. Secondly, the word 'remarks' reminds us that banter is the spoken word. It is therefore imprecise, open to interpretation, and dependent on tone and context. Thirdly, the words 'playful and friendly' remind us that it is in the nature of banter that it is expressed without overt hostility; the use of hostile remarks would not be called banter. Finally, the word 'teasing' usefully reminds us what distinguishes banter from other forms of interaction. It is in the nature of banter that it is expressed and intended as a tease. As such, it can be about an infinity of topics, and has no inherent link with protected characteristics.

55. We add that almost by definition any activity based on the spoken word carries imprecision and uncertainty at its heart. There are countless variables in play, including immediate context, long-term context, as well as tone, pitch and volume.

Findings of fact – setting the Scene

56. The respondent is a Toyota dealership which employs several hundred employees, about 50 of them at its premises in Enfield. The claimant, who was born in 1979, has been employed by the respondent since April 2014 in a sales capacity, and remains employed.

57. The claimant was one of a sales team of about 12 men. At the time with which we were concerned, in May and June 2017, the sales team occupied a long, narrow shared office, with a bank of desks and screens facing a wall on one long side, and floor to ceiling glass on the other long side, opening out onto the showroom and public area.

58. Members of the sales team had in some cases known each other for many years, and worked together as colleagues in other work places and dealerships. Their earnings were potentially substantial, with significant possibilities of commission. There was nevertheless little evidence of the rivalry which can be generated by competition for sales and commission. The claimant was a successful salesman, and by and large a popular colleague.

59. Friendships within the group extended beyond work. There was ample evidence of the claimant and others socialising outside work, enjoying spare time activities together, and meeting each other's partners and family members. There was ample evidence that they spoke and joked together in a manner which all considered to be acceptable banter.

60. Mutual teasing and joking were part of everyday conversation, and almost everyone joined in. No individual was identified as a constant subject of banter. The evidence was that all, including the claimant, gave as good as they got. Interaction was at times noisy and boisterous. Some of the respondent's witnesses described the claimant as having a reputation as 'a joker' and the claimant agreed that he was an occasional prankster. None of this is a criticism of any of those involved, including the claimant; the point to be made is that the claimant was a full participant in the work-based friendships.

61. We accept that the claimant spoke candidly and in the same spirit about his life away from work, and was thought to have, as one witness put it, "an active social life." If the claimant had any psychiatric history of vulnerability, there was no evidence that this was known to any of his colleagues before the events in this case.

62. The claimant was, and was known to be, vocal in standing up for what he understood to be his rights. He agreed in evidence that he had made complaints about aspects of workplace events before those in this case; and that he had told colleagues that he had brought tribunal proceedings against a previous employer. We accept that he had also told colleagues that he had made consumer complaints. The contents of this paragraph are relevant only to Mr Anichebe's use in incident 2 of the words 'another complaint.'

63. We know that some of the words in this section of our judgment are in some cases read as critical or euphemistic words to describe work places where there may be an underlying acceptance of verbal bullying or racial prejudice. For that reason we repeat for avoidance of doubt that none of the above constitutes a criticism of the respondent or any individual, including the claimant. We consider it relevant to the context of these event to set out our findings that the claimant was an active and at times boisterous participant in the language and events used by this group of colleagues, both at work and away from work. We repeat that some of the friendships were long and real. We have referred above to the example of Mr Stevenson.

64. Line management at Enfield sounded to us more confused than it might have been in practice. Some staff had job titles which included the word Manager because that was a Toyota requirement, even though the individual had no managerial responsibility. The claimant's line manager was Mr Fennessy. On an immediate basis, responsibilities rested with the most senior manager on site at the particular time. HR support was provided centrally, from the HR team based at the Edgware Road premises.

65. As a glance at the list of witness names illustrates, the workforce reflected the diversity of the Enfield vicinity. The claimant was the only Muslim member of the sales team. Although his birth name was Mushthaque, he was at his own request known to friends and colleagues at Bobby. In October 2017, and partly in response to the events in this case, the respondent issued an internal memorandum to all staff entitled "Positive work environment." We accept that it was correctly described as a reminder about diversity and mutual respect at work, and was not an innovation.

66. Mr David Anichebe joined the respondent in about March 2017 and worked in the sales area. He resigned on 5 June 2017 as part of the events with which we were concerned. His dislike of the claimant was clear in his witness statement and oral evidence. While Mr Anichebe was employed, and therefore in a matter of weeks before the events with which we were concerned, CCTV was installed in the sales area. Mr Fennessy was candid about the reason: following reconfiguration of the office, Mr Fennessy had been moved to work upstairs, and wanted CCTV so that he could keep an eye on the sales team and see that they were working. We were told that there were two cameras, one at each short end of the room where the sales team worked. We saw footage from one camera only and can make no finding as to whether both cameras worked. The quality of the footage was television quality. The sales team, including the claimant, were aware that CCTV was in use. The footage that we saw, taken on 23 May 2017, showed no sign that the presence of cameras inhibited the language or behaviour of anyone. We accept that until these events, it was not understood by anyone, managers included, that the CCTV operated on an automatic overwrite after 7 days, meaning that footage of the 23rd of the month could not be seen again on or after the 31st of the same month; and that it was not

known that the footage had audio recording as well. The quality of the audio recording was high, but difficult to decipher because in much of the footage which we needed to consider, more than one person was speaking loudly at a time.

Incident 1

67. We remind ourselves of the judicial notice section above. On the evening of Monday 22 May 2017 the Ariana Grande concert at Manchester Arena was the subject of a suicide bombing attack in which (including the bomber) 23 people died, the youngest of them aged eight.

68. On the morning of 23 May, the bombing was headline news on radio and television channels, and for reasons set out in our judicial notice section, was identified as bearing the hallmarks of Islamist terror.

69. The claimant was due at work at 08:45. CCTV footage from shortly before 09:00 shows a number of his sales team colleagues at work by then; the claimant arrived at work a few minutes late. We accept that the subject of conversation among them was that morning's news report of the bombing. We find that there was general conversation about how terrible the event was, and what had been heard on the news, bearing in mind that the news coverage was developing in the course of the day.

70. There was no evidence to support Mr Singh's questioning that that short conversation expressed a general fear or hatred of Muslims, or was Islamophobic. We find that it was not.

71. The claimant could be seen approaching the office a few seconds before he came in through the door. When he came in three things were said. Mr Igbinigibe laughingly said, "Here comes our terrorist." The laugh sounded to us as if Mr Igbinigibe was attempting to make a joke, and laughing at his own joke. Mr Igbinigibe was seated more or less opposite the door through which the claimant had just come when the remark was made. From the long end of the room to the claimant's right Mr Angus said, "Where were you last night?" Mr Wayman's diligent listening to the audio added the words, "then, Bobby" at the end of that phrase. Mr Igbinigibe laughed again and said, "Were you in Manchester?" Automatic timing on the CCTV showed that the three remarks were made in 4-5 seconds. They form what was what referred to as "incident 1."

72. The claimant in reply said that the remark or remarks were "not even funny." He went on to say words to the effect that children have lost their lives, and that he had had to explain the morning news to his own young child before leaving for work.

73. The footage immediately after incident 1 continued for about another three minutes. During that time the claimant can seen pacing around the sales office, at times repeatedly patting his jacket as if looking for something (his phone as it turns out). He fist-bumped with Mr Igbinigibe and with another colleague, Mr Socrates, and he appeared distracted.

He did not say a great deal. Mr Oguh arrived for work a couple of minutes later, and Mr Igbinigibe laughed again, and said that Mr Oguh's dreadlocks made him "look like a terrorist." The claimant left the sales room at about 09:05, and the footage ended.

The forecourt conversation

74. It was common ground that the claimant left the sales office at about 09.05 to go back to his car to collect his phone, and that on the forecourt he met Mr Fennessy. Mr Fennessy was on his way to an off-site meeting that would last almost the whole day.

75. There was a conflict of evidence about what the claimant said to Mr Fennessy. The importance of the conflict was that it formed a vital building block in the claimant's claims about incident 2. Mr Fennessy's evidence was that the claimant said, "They're talking about Manchester". As Mr Fennessy had not heard that morning's news, the remark meant nothing in particular to him, and did not prompt him to ask any questions. The claimant's assertion, which seems first recorded in an email of 6 June, was that he had made Mr Fennessy a clear and concise complaint about incident 1 (202), and had therefore made a protected disclosure.

76. In the claimant's witness statement, he wrote that when he spoke to Mr Fennessy he told him, "People had made inappropriate remarks to me about the Manchester bombings which I didn't find funny and wanted it looked into" (WS12). Mr Fennessy's witness statement was as stated. In cross-examination Mr Fennessy added that the claimant had made a passing comment about going to get his phone, did not refer to any event, and did not refer to anything that was not funny.

77. In a WhatsApp to Mr Fennessy at 14:25 the claimant referred to incident 1 (155). The document should be read in full. It made no reference to Manchester or terrorism, but complained of a personal attack on the claimant, his mother and his partner. It twice said that he had been called Mohamed.

78. In a later WhatsApp at 16:46 the same day (159) the claimant expressed a slightly different version of the conversation:

> "I also told you first thing this morning when I walked over to you outside that he made a remark finding it funny what happened at the concert and asking me where was I last night?"

79. We prefer Mr Fennessy's evidence. We find that the claimant said to him words to the effect, 'They're talking about Manchester' and no more, which Mr Fennessy did not understand. We find that if the claimant had said 'Manchester bombing' Mr Fennessy would have reacted, both to the news (he had not heard about the bombing) and to the allegation. We find that if Mr Fennessy had been told something which indicated conflict within the sales team, or language which appeared to cross the banter

boundary, he would have reacted at the time. He would not simply have left the site for the rest of the day to do other work.

80. It follows that we find that the claimant said the words quoted above by Mr Fennessy. We find that the claimant did not do a protected act during the forecourt conversation. Even if Mr Fennessy had known about the bombing, the words used by the claimant do not engage a protected characteristic under the Equality Act, and we do not draw an inference to that effect from the fact that the claimant had left a room in which he asserted that the bombing was being talked about.

Discussion of Incident 1

81. The list of issues before Judge Manley ordered that the first two of the above remarks were agreed matters (subject to minor correction) but that there was dispute as to the use and / or interpretation of the word "Manchester". The three remarks were pleaded on behalf of the claimant as a single aggregated incident of direct discrimination and / or harassment. We treat them as a single incident, not just because that was how they were pleaded, but because given the brevity of the incident, that seems to us to represent the reality.

82. We discussed and interpreted the incident as concluding when Mr Igbinigibe said the word "Manchester". Our task, like that of the respondent, has been made more complex by repeated iteration and reflection in the long period between the incident and the hearing in this Tribunal; by the positioning adopted by the parties and witnesses in the course of that process; and by the application on both sides of hindsight.

83. We ask at the first stage whether the three remarks together constituted unwanted conduct. We find that they did. We then ask were they 'related to a relevant protected characteristic,' (s.26(1)(a)), namely that of religion (which need, we note, not in law be the religion of the claimant). We find that they did. In so finding, we accept that context is important. We rely on the 'judicial notice' section of this Judgment. We note that all of these points were live and heated on the morning after the Manchester Arena bombing. The claimant was, and was known to be, a Muslim, and the only Muslim in the sales team. We accept that there were other factors: that the remarks were intended, at least in part, as a joke; that the claimant was known as a joker; that the claimant was late. These are part of the factual matrix. We do not understand the sub-section to require that the protected characteristic should be found to be the sole or main matter to which the event is related. We consider that it is sufficient that it was material. We find that it was.

84. We secondly ask whether taken together the remarks had the <u>purpose</u> of creating a "hostile" environment, using that word to embrace the entire language of Section 26(1)(b)(ii). We find that they did not.

85. When interviewed about the footage, Mr Igbinigibe at first denied having used the word "terrorist" at all; he then denied having called the claimant

a terrorist. He made reference to the claimant being a personality who terrorised those around him. We find that when the claimant came into the room, in which a conversation about the bombing was taking place, Mr Igbinigibe thoughtlessly said the first thing which came into his head, and which he thought of as a joke. His purpose was not to create a hostile environment. We add that his purpose was certainly not to hurt or offend the claimant.

86. When Mr Angus was interviewed, he said that he called out the question which he did, not with reference to the bombing of the night before, but because the claimant had arrived late, and Mr Angus understood that when the claimant was late for work (which we were told was not uncommon) it might have been because of active socialising the night before. The respondent accepted that explanation. We accept that Mr Angus did not have as his purpose the creation of a hostile environment. He followed Mr Igbinigibe in calling out attempts at a joke. Mr Igbinigibe's second remark embraced both his own purported joke, and that of Mr Angus.

87. The above paragraph should not be read as justificatory or endorsing the use of any language of Mr Igbinigibe or Mr Angus. It sets out our findings about spontaneous remarks made in split seconds, which have been subject to the artificiality of lengthy analysis nearly 2 years later.

88. When we go on to consider the effect of the remarks, in accordance with s 26(1)(b) we note the following evidential matters. The claimant's immediate reaction was that the remarks were "not funny." That was an important and honest reaction. It showed that he recognised that an attempt at a joke had been made. It also made clear that he did not share the joke. His reference to the death of children showed perhaps what had most struck and hurt him in the morning's news. We accept that the footage appeared to show him distracted and agitated. He did not give his colleagues an immediate challenge. We can see that he showed Mr Igbinigibe an apparent sign of friendship in the fist-bump, and that he then left.

89. We must then consider the matters specifically set out at Section 26(4). The first was the perception of the claimant.

90. The claimant's perception was difficult to grasp. We accept that we have contemporaneous footage of how he presented. We then have 21 months of hindsight, during which he suffered psychiatric illness. The task of considering the first incident in isolation has been muddied by the subsequent footage (discussed below) and by subsequent processes.

91. We find that the claimant's perception was that the news that day, and common conversation, had been dominated by the words terror and Manchester, linked with Muslims or with Islam; and the first two were the response to his arrival at work. When we consider the other circumstances, we have regard to the general jokiness of the work environment, but we do not find that that assists matters greatly. As Mr

Singh helpfully put it, we should not fall into the trap of assuming that because the claimant accepted some things that were said, he thereby agreed to everything being said. We find it helpful to ask what was the ordinary and natural meaning of the words heard by the claimant. Although they were not said seriously, we find that he perceived that he had been associated in some way with the Arena bombing.

92. We find that the repetition of the terrorist word to Mr Oguh assists us to find that Mr Igbinigibe thought that his joke was so well made that it was worth repeating in the context of the common currency of the days conversation. There was no evidence of Mr Oguh reacting in any particular way; and we know that he was not a Muslim. Neither of those points seems to us to take matters any further forward.

93. We find that the words violated the claimant's dignity and/or created an offensive environment because they associated him with a criminal mass murderer.

94. Was it reasonable to have that effect? That has also been a difficult question for us. In some part of his understanding, the claimant knew that Mr Igbinigibe was joking. We have described above the footage between the remarks and 09:05, when the claimant left the room.

95. However, we return to a finding which is not unusual in banter cases. Our finding is that the respondent crossed the line of what was acceptable, and that it was reasonable in the circumstances that the words had the statutory effect.

96. In the alternative, was the act one of direct discrimination? We remind ourselves that the question here is not one of motivation, but of treatment of the claimant, and that the purpose of the legislation is the protection of the characteristic. **We find**

The build-up

97. The claimant alleged that in the period between incident 1 and the build up, all of which had been captured on CCTV which the respondent did not retain, Mr Anichebe had on a number of occasions called him or referred to him as 'Muhammad,' using the name to belittle the claimant, and in the knowledge that it was not the claimant's name. The claimant alleged further that the footage of this incident had been deliberately withheld. Mr Anichebe denied this, and no other member of the sales team confirmed having heard it.

98. We find that the allegation has not been made out. Given the claimant's state of mind at 09:05, we think he would have reacted vigorously at the time if that had happened. We could also see no reason why Mr Anichebe, whose father is a Muslim, would use the word Muhammad in some derogatory sense. There was no reference to this in the unrestrained language used by the claimant in the build up footage

described below. We accept that Mr Anichebe disliked the claimant as an individual for a number of reasons which were not related to religion.

99. Later in the morning, occurred the events described to us as the build-up. This was found in footage retained by the respondent which lasted from about 12:00 until 12:18.

100. It primarily involves the claimant, Mr Anichebe and Mr Charalambous. We accept the respondent's evidence that although Mr Charalambous' job title included the word Manager, he in fact had no managerial responsibility and was on equal status with the other two. However, it appears from the footage and from the respondent's subsequent actions that he was regarded as senior to them.

101. The conversation was described by Mr Singh as unpleasant, and not one of which the claimant was proud. The claimant accepted that he regretted it. Mr Anichebe is Jewish, as the claimant knew at the time. Mr Anichebe's father is Muslim, as the claimant did not then know, and indeed only discovered at this hearing. Mr Anichebee is black. The footage that we saw showed a long discussion in which the claimant was the main speaker. He loudly challenged Mr Anichebe's Jewish identity, and expressed ill-informed views about Judaism and Christianity. A repeated point was the claimant's disbelief that Mr Anicheb, a black man, was Jewish. Mr Anichebe became upset, and Mr Charalambous asked him to leave the room to calm down. The footage ended at 12:18.

102. The footage included reference to Jesus, Moses and Muhammad. The word Muhammad was, in context, used by Mr Anichebe with reference to the Prophet. It was not, in the footage which we heard, used as a name of the claimant, or to belittle or stereotype the claimant.

Incident 2

103. Incident 2 was a clip of about 3 minutes, starting at about 12:31. In other words, it followed the build-up section, after which there was a 10 minute break in the footage, for part of which Mr Anichebe had been out of the room. It opens with three people in the sales room, one of whom, Mr Gindi, left the room. The crucial portion then followed, during which only the claimant and Mr Anichebe were present.

104. Mr Anichebe is seen and heard speaking aggressively to the claimant. He is clearly aware of being alone with the claimant and at one point shuts the door.

105. Mr Anichebe said to the claimant "Are you writing another complaint?" He then confronted the claimant with personal criticism of his dress, demeanour and appearance. He used the word 'loser' more than once. There was an exchange; the claimant in reply said more than once, "Go fuck yourself" and "Go fuck your mum."

106. Mr Anichebe remained seated and wheeled his office chair to where the claimant was seated. Mr Anichebe told the claimant that he would hit him if he repeated that phrase. The claimant took off his glasses and Mr Anichebe kept his on. There was a further exchange between them of which "fuck" was the most recurrent audible word. There was no physical contact. The exchange seems to have been brought to an end by others entering the room.

Discussion of incident 2

107. The claimant pleaded at issue 6b that incident 2 took place as an act of harassment and/or direct discrimination on the grounds of the claimant's religion (26) and / or as an act of victimisation. We disagree for the following reasons:

107.1 We reject the premise that the incident followed from Mr Anichebe using the name Muhammad in some derogatory way;

107.2 In the wholly uninhibited exchange of language in incident 2, there was no reference to any religion;

107.3 The trigger of Mr Anichebe's physical threat to the claimant was plainly the phrase "Go fuck your mum" used by the claimant;

107.4 We attach weight to the claimant's statement, written the next morning, 24 May, in which he said that Mr Anichebe called him "Musthaque Ahmed" (166) which he repeated at the interview shortly afterwards as, "He referred to me by my full name" (169). It was common ground that the claimant was called Bobby at work, and did not use his birth name. The point seems to us important because the sting of what the claimant said was not the use of Muhammad, but that Mr Anichebe had called him something different from the name in daily use.

107.5 We do not accept that religion was a factor in Mr Anichebe's language or conduct, whether seen as the reason why he did as he did, or considered as a matter to which his actions or words related;

107.6 The claimant relied heavily on the words "another complaint" which he said meant, "complaint in addition to the protected disclsoure made earlier this morning to Mr Fennessy." The claimant's case was that he had complained to Mr Fennessy at about 09:05 about discrimination in the sales office; that knowledge of that complaint had found its way to Mr Anichebe by 12:20, so that Mr Anichebe chose to victimise the claimant by attacking him (verbally and physically) in incident 2.

107.7 We have found that the first strand of that allegation fails because we do not accept that the claimant made a complaint of discrimination to Mr Fennessy. We add that there was no

evidence whatsoever to show that Mr Fennessy had communicated anything to Mr Anichebe before 12:20, either directly or through a chain. We accept Mr Fennessy's evidence that he left the site shortly after speaking to the claimant and did not return until the end of the day. We accept Mr Anichebe's evidence that by 'another complaint' he meant a complaint in addition to all those of which the claimant had previously spoken (**XXX).**

107.8 For present purposes, we find that as there was no protected act in the conversation at 09:05 with Mr Fennessy, and as Mr Anichebe did not know of the conversation, a complaint of victimisation in relation to incident 2 is unsustainable and must fail. We accept Mr Anichebe's evidence that he was one of those who thought and knew of the claimant as a serial complainer, to which his remark referred.

Subsequent messages

108. At 12:56 on 23 May, 20 minutes after incident 2, the claimant wrote his first formal complaint about these events by email to Mr Fennessy and Mr Charalambous (419). It is a short email "to put on record." It was a selective summary of incident 2. It says that Mr Anichebe "became quite aggressive and directed personal views calling me Muhammad" as well as "putting me down" and "got right in my face." We agree that the latter two phrases were accurate. The word Muhammad was not in the audio of incident 2. It was in the build up.

109. We do not wish to follow the parties or counsel into applying an unrealistic forensic standard to office emails. We note, however, the absence from the email of any reference to any of: incident 1; the context of the news about the bombing; to being called a terrorist; or to the forecourt conversation with Mr Fennessy. We accept that the claimant put down a marker about his relationship with Mr Anichebe. It was not a marker about the wider allegation of Islamophobia within the sales team to which Mr Singh made repeated reference.

110. We have struggled with the question of whether by using the phrase "he became quite aggressive and directed personal views calling me Muhammad" the claimant has done a protected act within the meaning of Section 27(2). We note, but in this context disregard that within 24 hours of the end of incident 2, the claimant had given at least three different version of what he had been called by Mr Anichebe (Muhammad; Mushthaque; Mr Ahmed), none of which was found on the CCT which we saw. We find that the above phrase constitutes a protected act. The claimant had worked for the respondent for a number of years under the name of Bobby. It may not have been known that his given name was Musthaque not Muhammad. The claimant's email states that in a hostile context a colleague has used the name Muhammad in a context which is

inappropriate, unasked for, and not applicable. Not without misgivings, we accept that that may imply allegation of harassment.

111. At 14:25 the claimant sent a WhatsApp to Mr Fennessy (155) which again was confined to a complaint about Mr Anichebe and about incident 2 and again stated "I was called Muhammad." Given the specific wording of that document we have no hesitation in finding that it was a protected act.

112. In his second WhatsApp at 16:46 (159) the claimant for the first time gave an account of incident 1, but an incomplete account. He attributed both the Manchester remarks to Mr Anichebe not Mr Angus or Mr Igbinigie. He did not mention terrorism. Nevertheless, in light of our judicial notice, we find that that was a protected act.

113. Drawing the above together, we find that at all times material to this case, with one exception, the claimant had the protection of having done a protected act. The one exception was incident 2. We find that that took place before any protected act.

Later events on 23 May

114. In about the late morning of 23 May, the claimant spoke to Mr Charalambous, who had seen the "build-up" and sent Mr Anichebe out of the room. They went upstairs to a separate area and Mr Charalambous noted that the claimant seemed upset. He asked Mr Stevenson, whom he saw passing, to join them. It will be recalled that Mr Stevenson had been a close friend of the claimant in the past.

115. Mr Stevenson spoke to the claimant and then to Mr Anichebe separately. He understood that there had been some falling out between them. He was not in the short term concerned with the details, but about managing a conflict. He described Mr Anichebe as "upset but calm" and the claimant as "highly irritated and loud," asking for CCTV and for a complaint to be made to the police.

116. Mr Stevenson decided that in the short term the claimant and Mr Anichebe should be separated. He cannot be criticised for that decision. He understood that Mr Anichebe was content to continue working in the sales office, but he formed the view that the claimant was too upset to do so. He asked the claimant if he would work upstairs in the board room, which the claimant refused to do.

117. Mr Stevenson took the view that the claimant was not in a state to return to the sales office; and that as he had refused to work separately upstairs, the appropriate action was to send him home. He then took the view that as a matter of visible parity of treatment, he should also send Mr Anichebe home. That was thoughtful management, showing an immediate, instinctive recognition of the need to maintain the appearance of even handedness between two colleagues.

118. Both went home. Mr Stevenson took HR advice, and then made telephone contact with both, asking them to come back to work early the next morning for an investigation meeting.

119. A recurrent theme in the claimant's lists of issues and complaints was the respondent's failure to identify the claimant as victim and then support him. Repeatedly in evidence the claimant appeared to suggest that he should have been identified as victim without need of any further inquiry into the facts, or consideration in the balance of the rights of others.

120. If those complaints are made against Mr Stevenson's actions on 23 May, we reject them. He proceeded with fairness, on the information reasonably available to him, and addressing the short-term problem which he saw. He treated the claimant and Mr Anichebe equally. His decision was untainted by any prohibited factor. He cannot be faulted for having done so.

Events of 24 May

121. The claimant attended work early the next day, and was given use of a computer on which he wrote a statement (166). Apart from his emails and WhatsApps the previous day, it is his first detailed description of the events of 23 May. He set out a summary of incident 1. He did not refer to the words terrorist or Manchester, but focused on "Where were you last night". He concluded, "On reflection I now deem it to be a religious hate statement." He gave an account of the build-up which was at best selective, down playing his remarks about religions, and attributing the first use of the phrase "fuck your mum" to Mr Anichebe, without admitting that he had used the same phrase a number of times, and was seemingly the first to do so (in reaction to being called a loser). He twice wrote that Mr Anichebe had called him "Musthaque Ahmed," but made no reference to being called Muhammad.

122. The claimant was interviewed by Mr Stevenson with Mr Knights as note taker. The topic was noted as "Incident between Bobby Ahmed and David Anichebe" (167-170). The claimant said that Mr Anichebe had addressed him as "Mr Ahmed." He said that in the forecourt conversation he had told Mr Fennessy, "On reflection I think that's a very bad statement due to my religious background". He spoke again about the incident 2 confrontation and stated, "I would like this reported to the police as well it's not only my safety but the safety of my family as well. I would also like all the CCTV footage handed over to the police."

123. Mr Anichebe was interviewed by the same two at 11:04 (171). He had previously written a statement (173) in which he made serious allegations against the claimant, including drug abuse, bullying, racism and anti-Semitism; he also stated that he, Mr Anichebe, was the first to stand up to the claimant's bullying behaviour.

124. After the interviews, both were suspended on full pay pending further investigation (175). The decision to suspend was made by Mr Knights,

and confirmed in writing by Ms Chazhoor of HR. The suspensions lasted until each had a disciplinary interview. The claimant has never returned to work, and remains an employee of the respondent.

Discussion of suspension

125. The information available to the respondent at the end of the interviews with the claimant and Mr Anichebe on 24 May left open the question of fault, and any identification of perpetrator and victim (assuming, as did the claimant, that that binary approach was well-founded). The respondent had the difficulty that Mr Anichebe had made allegations against the claimant which were both better written and on their face more serious than those raised by the claimant against Mr Anichebe. While the claimant had made references to the police and to preservation of CCTV, it was Mr Anichebe who had made allegations of serious criminality.

126. Mr Stevenson and Mr Knights understood the need to proceed with caution and with the appearance of even handedness. It was a reasonable course to suspend both prime actors, treating them on equal footing, pending further enquiry.

127. There was at that time no information in the hands of either decision maker which suggested that any other person might need to be the subject of investigation or suspension.

CCTV footage

128. Mr Knights' evidence was that before interviewing the claimant and Mr Anichebe he had searched, found and viewed the CCTV footage of their dispute: it would have been easy to identify because of the clear image of Mr Anichebe wheeling his chair over to the claimant's work station when nobody else was in the room. Mr Knights was then aware that there was both video and audio (172). After the interviews he watched what he understood to be the build-up (WS6) but not incident 1.

129. Mr Knights later typed up his notes of the interviews. He understood that the relevant proportion of footage was that between about 12:00 and 12:30. He also understood that there was a question about something said when the claimant came to work at around 08:45 (167). He therefore proceeded on the basis that the CCTV footage which needed to be considered in detail fell into three categories: the claimant's arrival around 08:45; the confrontation at around 12:30; and the dispute which was the build-up to the confrontation.

130. As we understood it, Mr Knights made arrangements for the relevant clips to be identified and saved. He needed external technical help with this. The saved material was the totality of footage seen by this Tribunal. Some technical issue arose about the format in which the footage was saved, so that it could be passed from Enfield to HR for further work.

131. Mr Knights' evidence, which we accept, was that in the time it took for the above steps to be taken – typing his notes, identifying and saving the CCTV clips, technical advice, liaison with HR – it was found out that footage was overwritten automatically after 7 days, and that therefore by 31 May 2017 no more footage of 23 May was available, other than that which had been earlier saved by Mr Knights.

132. The lost footage, and what it might contain, was a point which seemed to us to grip the claimant, even at this hearing, and after a long time. We find, for avoidance of doubt, that we accept the account given by the respondent of how it dealt with the footage. It follows that we accept that the lost footage was lost by oversight or accident; and that by 31 May 2017 no one could do anything to retrieve it.

133. After all this had happened, the saved footage was seen by Ms Craigs in HR. We accept the accuracy of the time line which she wrote on 5 June (200a). On 1 June she watched the footage and transcribed it in bare outline (161-165). Incomplete though her transcripts were, she was the first person to identify the use by Mr Igbinigibe of the word "terrorist." That had not been part of the claimant's case or complaints.

Investigations on 2 June and subsequent disciplinaries

134. Ms Craigs immediately identified the potential gravity of the use of that word. She and Mr Fennessy carried out a number of investigation meetings on 2 June. They interviewed (following the order in the bundle): Mr Igbinigibe at 11:50 (178); Mr Gindi at 14:09 (181); Mr Hussain at 12:26 (184); Mr Angus at 12:44 (187); and Mr Charalambous at 12:05 (189).

135. Mr Igbinigibe at first denied the use of the word terrorist, but when told that it had been recorded, said, "I never called him a terrorist". He was suspended pending further investigation. Mr Hussain could not remember the use of the word. Mr Angus said that he did not remember asking the claimant where he had been, but that if he did, "It would have been to do with what he gets up to at night," which we understood to refer to the claimant's reputed social activities. Mr Gindi's replies indicated in general terms that he had overheard a conversation in which both the claimant and Mr Anichebe went beyond banter. His remark, "Problem is you have muslims downstairs" did not seem to us to carry any weight, when read in context of his previous comments about banter. Mr Charalambous likewise had a recollection of banter between both the claimant and Mr Anichebe.

136. The respondent identified at that point that there was evidence of the use of language which appeared unacceptable, and identified that the evidence was of four possible perpetrators. The speed of its reaction between 1 and 3 June to the discovery of the word terrorist is wholly at odds with the claimant's allegation of Islamophobia. In letters which were hand delivered on Saturday 3 June the respondent invited the claimant,

Mr Charalambous, Mr Igbinigibe and Mr Anichebe to disciplinary hearings to be held on Monday or Tuesday 5 or 6 June.

137. Mr Thacker conducted the meetings. He issued a final written warning to Mr Charalambous, essentially for "fuelling" the build-up conversation about religion between the claimant and Mr Anichebe and failing to intervene in it; and a final written warning to Mr Igbinigibe for use of the word 'terrorist'. Both warnings were stated to be effective for 12 months. Mr Igbinigibe had told Mr Thacker that the word was used as banter and Mr Thacker wrote to him (215a),

> "I have listened to your apology and explanation for why you made the comments. However, it cannot be tolerated that such a comment is made under any circumstances. To call someone a terrorist is insensitive and incredibly offensive. I understand that the sales office engages in numerous conversations which involve banter, however your comment has clearly gone beyond any form of banter. I trust that I am clear on this matter and you understand that you must never make such a comment again to anyone. Whilst you stated you made the comment without malice, it is wholly inappropriate to make such a comment which cannot be tolerated or condoned in any circumstances".

138. Mr Anichebe's disciplinary meeting on 5 June did not reach a conclusion, as Mr Anichebe resigned in the course of the meeting with immediate effect. It seems to us likely in the extreme that if he had not resigned, he would also have received at least a final written warning. If that had happened, then by the end of the claimant's disciplinary, on 27 September, all four main actors in this story would have been dealt with identically.

Discussion of issues arising before 5 June

139. Issues 6c(i) and (ii) were that the respondent directy discriminated against the claimant by failing to retrieve and retain the CCTV and/or concealing it. That claim fails because the factual basis has not been made out. The respondent retrieved and retained footage shot at the times which it had been told were relevant. It dealt with the CCTV in accordance with normal management process and its then understanding of the system's technical capabilities. Its management of the CCTV was in no respect whatsoever related to or tainted by any prohibited factor.

140. The claimant alleged discrimination in that the respondent failed to pass the footage to the police. The respondent was under no obligation to provide the footage to the police. It provided it to the claimant who in turn passed it to the police (which in due course took no action, 394). Issue 6c(iii) fails because we find that the decision not to pass footage to the police was a decision taken as part of routine management, and was wholly unrelated to any prohibited factor.

141. Issue 6d(i) was that on prohibited grounds the respondent failed to investigate and deal with perpetrators. We disagree. There were four

primary actors in the events of the morning of 23 May: Mr Anichebe, Mr Charalambous, Mr Igbinigibe and the claimant. One resigned during a disciplinary and three were issued with final written warnings.

142. The respondent took no disciplinary action against Mr Angus. It accepted that the only words which he used were "Where were you last night?" which are inherently ambiguous. It accepted that they were not a bantering reference to the Manchester bombing, but a reference to the claimant's lateness and his social activities. Witnesses commented that the claimant arriving slightly late for work was not unusual. Mr Angus in interview did not dispute the words which he had used; the CCTV showed that the context was noisy, instantaneous and uncertain. It is notable that the claimant made no complaint against Mr Angus, and his complaint was that Mr Anichebe had used the words. Mr Angus' explanation was accepted. We find that the respondent's acceptance of his explanation, and its decision to take no action against him, was wholly untainted by any prohibited factor.

143. The claimant complained under issue 6d(iii) that the respondent failed to inform him of the outcome of action against the perpetrators. The claim has its heart a binary premise which we have rejected, namely that the claimant was victim and that others were perpetrators. We agree that he was not notified. It would in the experience of this Tribunal be unusual to inform a colleague of the outcome of disciplinary proceedings against colleagues. The claimant had no entitlement or reasonable expectation of being informed, save perhaps in general terms (e.g. that matters had been "dealt with" or "concluded"). We find that prohibited factors played no part whatsoever in any failure to inform the claimant. We express ourselves in those words, because we find that there was no decision not to inform the claimant. The matter simply did not occur to the HR team.

144. Issue 6c(iv) encapsulates some of the Tribunal's problems in this case. It states that the claimant was discriminated against by "Selectively using part of the CCTV to justify discipline against the claimant. The claimant believes that footage will also show that he was referred to as Muhammad."

145. We have found that there was selection of CCTV. The selection was based on the allegations which were under investigation. Information about the allegations was provided by parties including the claimant. We have accepted the integrity of the explanation for the selection, and for the loss of further CCTV. The selection exercise was wholly untainted by any prohibited factor, as is perhaps demonstrated by the fact that it underpinned all four disciplinaries.

146. The CCTV footage was the basis of the disciplinary action against all four individuals. Notably, it was thanks to CCTV, and the diligence of Ms Craigs, that the "terrorist" usage was uncovered and was the basis of a disciplinary complaint against Mr Igbinigie.

147. The second sentence is not a matter which is capable of trial or determination. There was no evidence of the misuse of the name Muhammad and the claimant's belief that such evidence could be found is not a claim of discrimination. We find that the management of CCTV in relation to the claimant and three others was wholly unrelated to any prohibited factor.

Events after 5 June

148. As stated, the claimant on Saturday 3 June received an invitation to a disciplinary hearing to be held 48 hours later on Monday. The sequence of events which then followed was an entanglement of a number of strands, now summarised, not in chronological order. (1) The claimant never returned to work. With effect from 9 June, he was signed off sick (830). He remains off sick. (2) According to the report of Dr Hallstrom, his mental health has deteriorated. We avoid any further finding or comment, in light of issues which remain to be determined at a remedy hearing. (3) The respondent wished to proceed with the disciplinary hearing which was to have taken place on 5 June and which in the event took place in the claimant's absence on 27 September. On that day, the claimant's suspension was lifted. (4) The claimant on 6 June triggered the respondent's grievance procedure, which in the event was also heard in the claimant's absence on 27 September. During his absence (5) his entitlement to pay was governed by the respondent's procedures for sick pay and/or suspension pay. (6) He was referred to an organisation called Fit For Work, in the hope that this could facilitate his return, although he remained signed off sick. (7) The claimant made applications for PHI and for holiday. The former was unsuccessful, and the latter was at first refused and then granted.

149. Each of these matters was the subject of legitimate correspondence and interaction. However, (8) throughout this period, the claimant wrote to the respondent and (9) to others, including the Information Commissioner and the police, lengthy repetitive correspondence and emails, using hostile, confrontational, language with expectations of reply which were not reasonable. The quantity and tone of the claimant's correspondence may well have been related to his health (**see Dr Hallstrom's agreed findings at XXX above)**. The practical point is a short one: we accept that the whole situation involving the claimant was complicated and difficult for the respondent to manage. It generated ill will towards him among those in HR who were tasked with managing it.

150. Within that framework, we do not now proceed to set out a detailed history of the correspondence and interactions between the parties, but to deal with them thematically and so far as relevant to the issues before us.

Remaining general issues

Issue 6d

151. Issue 6d was in some ways a reformulation of issue 6c. We have dealt with the allegations at 6d(i) and 6d(iii) which relate to dealing with perpetrators. The remainder of issue 6d was stated to be:

> "The claimant contends that on the facts there was an unsafe work environment for the claimant to return to work…the respondent failed to ensure the claimant would feel safe returning to work with the same."

152. It must be recalled that the allegation is of direct discrimination. Particular difficulty arises from the language adopted early on in this sequence by the claimant, and by his rigid adherence to it. In an email of 6 June, which the claimant adopted as a grievance, he repeatedly referred to an "unsafe Islamophobic environment" "a hostile sales team" "Islamic hate crime" and "disgusting Islamophobic views and hatred towards my religion."

153. We have found that one individual had, in a thoughtless exchange lasting less than five seconds, and using language which the claimant had recognised as an attempt to be funny, discriminated against the claimant and harassed him. The claimant had alleged that a second individual had inappropriately mis-named him. The former individual had by 6 June been placed on a final written warning which we have quoted above (the claimant did not know this), and the second had resigned. There was never evidence of an unsafe environment, or of a hostile team, or (Mr Anichebe apart) of any hatred towards the claimant as an individual or towards Islam or Muslims in general or of disgusting views.

154. The only evidence of physical threat to the claimant came from Mr David Anichebe. We have found that his threat was verbal only and was made in response to the claimant's remark about Mr Anichebe's mother. There was no basis for the claimant to feel physically unsafe in the work environment. He was one of a group of about ten friends and colleagues, working under constant CCTV.

155. We saw no evidence whatsoever on which the claimant might allege, as Mr Singh also did, that there was a wider Islamophobic culture among those who had been friends and colleagues for many years.

156. The difficultly with the pleaded allegation is that it is that the claimant has been discriminated against because he has not been made to feel safe. It cannot be a form of unlawful discrimination to fail to allay subjective feelings which have no objective evidential basis. We find that the respondent addressed the issues which were before it at conclusion of the proceedings on 5 and 6 June 2017, so that the claimant thereafter had no reason to fear or doubt his ability to return to work. Mr Anichebe never returned to work after 5 June, and the claimant therefore had no reason to be in fear of him after that date.

157. In closing submission Mr Singh wrote, "the perpetrators have not been dealt with." We have rejected that pleaded issue at **XXXX** above. Mr Singh also wrote, "The respondent refuses to acknowledge that the

comments were Islamophobic." We do not accept that an act of discrimination is committed by a respondent which after investigation and deliberation fails to adopt the complainant's language. Mr Thacker's written warning made clear that the language used had been unacceptable and was never to be repeated.

Issue 6f

158. Issue 6f was not well expressed, and must be considered in three separate elements. The first was "failing to support the claimant as a victim." Expressed in that language, the allegation appears to us too broad and too vague to be capable of adjudication or fair trial.

159. The pleaded language is in addition binary. It did not acknowledge workplace reality, which was that while the claimant may have been victim at 09.00, Mr Anichebe was not a perpetrator at that point, and that by 12.20, Mr Anichebe could be seen as victim, and the claimant as perpetrator. By 12.30, both had given and received offensive language, and both could claim to be victims, as well as being perpetrators. That is a more complex, nuanced workplace situation than the pleaded language allows.

160. We find that from 24 May onwards, the claimant misunderstood the reality of management, and the importance to professional management of being seen not to pre-judge issues, and of dealing with employees on the basis of evidence, and parity. No one could be identified as victim until there had been a proper factual enquiry. That factual enquiry led to disciplinary action against four individuals. The enquiry, as stated, led to the identification by the respondent of the offensive word "terrorist" and the disciplinary action against Mr Igbinigibe.

161. The fundamental point, which is that the respondent should have identified the claimant as victim without further enquiry on the basis of his bare assertion is unsustainable and we reject it out of hand on any basis. We also reject the further allegation which was that having investigated the respondent should have identified the claimant as main victim, and not disciplined him but should have proceeded to discipline others. That course would have involved disregarding the CCTV evidence, and the nature and effect of the claimant's language to Mr Anichebe.

162. Insofar as we can grasp this issue through the framework of the Equality Act, it fails because we find that prohibited factors played no part whatsoever in the management decisions complained of.

June to September 2017

163. When we turn to the period between early June and late September 2017, we find it more helpful to consider first the course of the disciplinary proceedings, and then separately the course of the grievance proceedings, up to the point where they were both determined together on 27 September.

The disciplinary proceedings

164. As stated, the claimant was suspended on 24 May, and a number of investigatory meetings took place on 2 June. We find that Mr Thacker, on advice from HR, then took the decision to convene disciplinary meetings (against four individuals) which were to be held on 5 and 6 June.

165. We accept that the letter of 3 June to the claimant (194) expresses Mr Thacker's decision to begin the proceedings, and his reasons for doing so. It can be seen to parallel the format and language of his letters to the other three who were subject to proceedings. The letter to the claimant enclosed eleven items of evidence and offered arrangements for access to the CCTV footage.

166. We find that the allegations arose out of the evidence found in the CCTV footage which was available to the respondent: ie the claimant's ill-informed generalised remarks about Mr Anichebe, his race and religious identity, Judaism and Christianity, spoken at loud volume, with assertive body language, in an open plan space visible to the public. We find that there was a reasonable evidential base for disciplinary action against the claimant.

167. The final disciplinary point was an allegation that the claimant had falsely accused Mr Anichebe of being the speaker of the words "Where were you last night" which had in fact been said by Mr Angus. We were troubled by this allegation, because the respondent was aware that the incident was split second, confused, emotive and noisy. It was possible that the claimant had made a genuine mistake about the speaker of those words. Given however the context of what appeared to be extreme hostility between the claimant and Mr Anichebe, we find that inclusion of that allegation was a point for legitimate inquiry, untainted by a prohibited factor.

168. We find that the decision to institute and pursue the disciplinary procedure against the claimant stood entirely free of any prohibited factor. We add that in light of the simultaneous disciplinaries against three colleagues, it would have been extraordinary not to have done so. Issue 6e fails.

169. The disciplinary papers were delivered to the claimant at home by hand on Saturday 3 June, inviting him to attend a disciplinary meeting 48 hours later on the Monday morning. The claimant asked for a postponement (196) and also asked for some further paperwork. Mr Thacker replied at 11:20 on 5 June (199) postponing the meeting by 26 hours to 14:00 on 6 June. At this hearing the respondent maintained its position that the claimant had been given sufficient notice of the disciplinary hearing. We do not have to decide if he was given fair or sufficient notice; we find that the claimant was given the same notice as three others who were involved in related disciplinary processes.

170. The claimant asked for another postponement to arrange for union accompaniment, and for further information. He repeated complaints of being the victim of a crime and repeated that he would contact the police (5 June, 201). He wrote about the CCTV footage. On 6 June he wrote to Mr Thacker at length a letter which he confirmed the same day was a formal grievance (202-3 and 219). We deal separately with the grievance process, although the two were entangled at the time.

171. On 6 June Ms Craigs was appointed the claimant's point of contact for the respondent (221). He was asked to write only to her. It was put by Mr Singh that this was an attempt to "isolate" the claimant. We do not find that word well-used. We find rather that the respondent made a legitimate attempt to impose structure and some form of discipline on the claimant's correspondence, which at that stage involved at least five different managers. It was plainly a legitimate managerial decision that correspondence should be channelled through a single individual.

172. Ms Craigs agreed to postpone the disciplinary hearing for what she said was for a final time to 13 June. There was a significant exchange between the claimant and Ms Craigs on 6 June (224). On the afternoon of that day Ms Craigs wrote,

> "The CCTV footage you are requesting does not exist, having spoken to the provider our system overrides after seven days therefore I have established on the 30 May the footage would have been overwritten with new footage. I have spoken with the ICO and been advised that there is nothing inappropriate for a CCTV system to operate in such a way."

173. The claimant replied in a form of words which captured many of the problems of this tribunal:

> "I just feel that someone within the company had been able to watch the whole footage used clips of the day and choose what they felt was relevant footage without giving me the opportunity also to decide whether it was footage relevant supporting my defence in its entirety. As there were many statements made against me in the sales office that day that have now been deleted "omitted" due to clear negligence from what I can see."

174. However sincerely written, those forms of words (a) subordinated the analysis of evidence to feeling; (b) asserted bad faith, of which there was no evidence; (c) made unprovable allegations which remained the basis of the conspiracy allegation ('someone within the company'); and (d) inflated the events ("many statements made against me"). As a result, the claimant expressed concerns which it was beyond the reasonable capability of the respondent to meet.

175. On 9 June the claimant submitted his first sick note, which was for two weeks for "work related stress ... anxiety and depression" (251).

176. On 13 June outcome letters, setting out final written warnings, were sent to Mr Igbinigibe and Mr Charalambous (251a).

177. The claimant did not attend the disciplinary meeting on 13 June, writing that he was not well enough to do so. On 20 June Ms Craigs wrote to ask him if he was well enough to attend, and sending him a letter to be delivered to his GP asking whether or not he was "medically incapable of attending an outstanding disciplinary hearing and grievance hearing" (254). The claimant submitted a further sick note to 6 July, confirming his unfitness to attend work or any meeting (263).

178. Ms Cavanagh (covering for Ms Craigs) suggested a Fit For Work assessment (261). We understand Fit For Work to operate as a form of voluntary, independent health assessment. The relevant paperwork was sent to the claimant early in August. He agreed to take part, and returned papers to the respondent. Ms Craigs submitted the Fit for Work referral in mid-August. An assessment took place on 23 August, leading to a report which was sent 29 August (311).

179. The report should be read in full. It was stated to be "advisory only" and anticipated a return to work date of 20 September. It identified a mental health issue as the obstacle to the claimant's return to work, but in summarising the claimant's problem as he described it, it gave a contentious and unhelpful summary of background events. It is perhaps clearest to note the most obvious omissions. There was no reference to disciplinary action against colleagues, or that the claimant was awaiting a disciplinary hearing, or that he had presented a formal grievance, which also awaited a resolution. The claimant was certificated, at his own request, to the beginning of December, yet appears to have suggested a return date of 20 September. The claimant is recorded as stating that he felt "threatened by your colleagues which resulted in you feeling unsafe at work," yet the only physical threat was from a former colleague who was no longer employed. The claimant is recorded as stating "you would not be able to communicate effectively to customers and colleagues," when he had shown himself a significant communicator by email.

180. In that context, which was incomplete, contentious and selective, the work place adjustment that was suggested was "mediation between both parties to facilitate an early resolution to the work place issues." Ms Craigs in principle over the telephone expressed her agreement. It was entirely to the respondent's credit that she did so, despite the obvious short comings in the report. Ms Craigs tried to arrange to meet the claimant (319). In doing so emails were by mistake to the claimant's work email address instead of his icloud address. The claimant did not receive them. As a result, he did not attend at least one meeting (5 September) to discuss the report. This was no more than honest if regrettable human error.

181. **Missing: Although the precise sequence is not clear, it appears that by the time it was found that the claimant had not received the mis-sent emails, arrangements had been made for his disciplinary and**

grievance hearing to take place on 27 September, and it was decided that any discussion of the Fit For Work report would be dealt with at that meeting.

182. The email mistake was realised on 12 September (355). On 7 September, when communication was re-established, the claimant emailed Ms Craigs, "I would like to have the questions in advance in order to provide written representations in absence of the grievance meeting and disciplinary hearing" (332a).

183. In reply Mr Thacker on HR advice told the claimant on 11 September to send him questions to be considered. **??? Ref and not clear**

184. Mr Thacker understood that the claimant had simply not turned up at a meeting on 5 September, not then realising that the reason was that he had not received the invitation. However, acting on the claimant's request for written questions, and on his apparent decision not to attend a meeting or meetings, Mr Thacker told the claimant that there would be a meeting to consider his grievance and return to work, followed by the disciplinary hearing, all to be heard together, and in the claimant's absence if necessary. He attached 30 pages of over 200 questions to be answered by the claimant in preparation for the meeting.

185. Ms Craigs pointed out that the questions were based on the understanding that the claimant would not attend, and that therefore they needed to cover all the variables. That explains why the questions appear at times as cross-examination on paper. We take, purely as an example, the questions about the claimant's assessment with Fit For Work (326):

> "Did you mention your pending grievance meeting and disciplinary hearing? If no, why? If yes, did the advisor give you any guidance on how to resolve this matter? If yes, what was that advice?"

186. From what the respondent had by then read of the claimant's state of mind, and his repeated references to Islamophobia, feeling unsafe, reports to the police, and being threatened, many of the questions were appropriate potentially to one-to-one conversation, but at best naïve on paper. We note the questions about Mr Angus' words:

> "Is it possible that you may have been asked where were you last night ...because you had walked into work late? If not, why not? Could this have been a playful comment which may have been misinterpreted or taken out of context? If not, why not? We have spoken to Dave who has been cited in your original statement, he states it was playful and related to lateness, does this change how you feel regarding hostility? If no, why not? What makes you believe it was hostile?" (332)

187. We do not need to find whether the questions were fair, sensible or reasonable, even when sent to an employee who was able to put his views on paper. We find that the questions were lengthy. We accept

that the claimant found them oppressive and threatening, in the sense that they challenged his firm convictions. He did not reply to any of the questions in any form.

188. The question for us is that identified at issue 6g, "The Claimant says he found the respondent's questions oppressive, lengthy and threatening, in light of the Return to Work report." The last eight words refer to the advice for mediation. We find that the use of a written questions procedure was offered as a voluntary mechanism and accepted by the claimant. We accept that it was open to him to reply to some questions in part, if he wished. We find that the formulation, style and number of the questions, though open to many criticisms, was wholly untainted by any protected factor. It was an attempt to close what presented to the respondent (not unreasonably) as an issue which had lasted a long time and reached unmanageable proportions.

189. The respondent extended the claimant's time for reply. It postponed the meetings which eventually took place on 27 September. On 21 September the claimant withdrew from the Fit For Work process (392). On 3 October Mr Thacker wrote to the claimant to give the outcomes of the meetings. In one letter (401-403) he dealt with the disciplinary allegations. Mr Thacker addressed himself to CCTV footage and the transcripts. He upheld the allegations of aggressive language and behaviour towards Mr Anichebe and issued a final written warning for 12 months. He upheld the allegation that the claimant had made false accusations against Mr Anichebe.

190. The claimant appealed (419). He reiterated his XXX point, which is XXXX and the claimant assertion of failure to deal with it. The appeal was considered in the claimant's absence by Mr Randhawa, who was not based at Enfield but was a senior manager of another site, and rejected by lengthy letter of 23 October (434).

Discussion of the disciplinary

191. We have set out above our findings on issue 6c(iv) (selective use of CCTV).

192. In the complaint of direct discrimination about the disciplinary process, the claimant relied on Mr Angus, Mr Anichebe and Mr Igbinigibe as comparators.

193. The choice of comparators gave rise to logical difficulty. First, any comparator must fall foul of s.23: each did something materially different from the others. However, once the disciplinary process was triggered, Mr Anichebe was treated identically to the claimant. He was suspended on the same day after the same process, called to a disciplinary hearing, and as he did not remain until the end of that, it cannot be said that he was treated less favourably. There is no reason to believe that he would not have received at least a final written warning for his undoubted and undenied aggressive conduct and language towards the claimant. It was

also submitted that the Mr Anichebe's actions were more serious than those of the claimant, and that therefore any apparent identity of treatment was not in fact based on a true similarity of treatment. We do not agree that that is a proper interpretation of the build-up and incident 2. It is a matter for argument to whether the claimant and Mr Anichebe spoke and conducted themselves equally badly to each other, or as to which would weigh heavier in the balance.

194. The case of Mr Igbinigibe gave the claimant one straw at which he clutched, namely that Mr Igbinigibe was not suspended until 2 June. The claimant therefore sought to argue that there was less favourable treatment in that Mr Igbinigibe was suspended a week later than he was. The reason for the delay was submitted by Mr Singh in closing to be as follows: "after Ms Craigs had viewed the footage on 1 June 2017, but after management had viewed it and evidently saw nothing wrong taking place."

195. That was disingenuous wording, unworthy of the subtlety of Mr Singh's approach to this case. It overlooks the fact that no complaint had been made about the use of the word terrorist; that the quality of the audio is relentlessly noisy and difficult to decipher; that it was not suggested that Mr Knights had heard the word terrorist, and made an informed decision that it was not important or to disregard it (or indeed to delete it); and that the trigger for Mr Igbinigibe's suspension, and the reason why he was suspended and when he was suspended was that Ms Craigs had, for the first time, heard him use the word terrorist and suspended him immediately. The reason for the apparent difference in the dates of suspension was the difference in dates on which the respondent identified potential misconduct.

196. We find that the conduct of the disciplinary procedure, including both first line hearing and appeal, were matters of management judgment, in the light of a multi-factorial problem. We accept that in certain respects the procedures adopted by the respondent fell short of an appropriate standard of fairness or reasonableness. We accept that in some respects there were occasions when the respondent made mistakes, e.g. when emails were sent to the wrong address. We accept that not everything put on paper or email by the respondent was well done. We could see much to criticise in the written questions.

197. The question for us is whether it has been shown in any respect that these matters were related to the claimant's protected characteristic, or to the fact that he was a complainant of discrimination. We do not consider that that has been shown in the slightest respect. We find that managers sought to deal with a difficult situation and a difficult individual. There was no reason to believe that a non-Muslim individual in the same situation, conducting himself over time as the claimant did, would have been managed differently.

198. Once it had been identified that the claimant also presented a grievance, the two questions were run together, and managed together by the same

HR staff, operational managers and in the same correspondence trail. When we ask about the grievance process the parallel questions which we have asked about the disciplinary, we come to the same conclusions and we repeat them.

199. The grievance issues included an over-arching issue as to issue 6c, which was a failure to investigate the grievance. It is correct that after 6 June, when the claimant had presented a formal grievance, the respondent did not re-open matters. It identified the grievance as covering the same factual territory as the disciplinary, namely the events of 23 May and their consequences. It had by then interviewed all the participants in the footage incidents whom it could identify, and it had retained the footage. It is difficult to see what else it could have done. Certainly, it was under no obligation to recall its employees (and Mr Anichebe if he had agreed to cooperate) to put to them what would inevitably have been the same questions about the events of 23 and 24 May.

Sick pay

200. The second limb of issue 6f was "including reducing his pay whilst off sick." In his witness statement the claimant expressed this allegation in straightforward language: "I have received no income from my employers since June 2017 and have relied on SSP and Universal Credit" (WS56). That assertion is not borne out by the claimant's payslips for the period since June 2017 (817ff), and we do not understand this issue to have been pursued by Mr Singh. We set out brief findings in case we have misunderstood the claimant's position.

201. The claimant was contractually entitled to SSP only (689) whilst certificated sick. He has been certificated sick since 9 June 2017 (830). He was suspended from 24 May (175) until 27 September 2017 (403).

202. The question of overlap between sick pay and suspension is addressed in the company handbook:

> "When subjected to disciplinary action, or when suspended on full pay, if you fall sick, no additional company sick pay will be paid, and rather, you will be entitled to only SSP where you are eligible."
>
> (82, December 2017, identical to the October 2015 wording at 689).

203. We have seen no evidence that the claimant was paid other than in accordance with his terms and conditions of employment. This part of the claim fails because the factual basis for it has not been made out.

PHI

204. The third limb of issue 6f was, "failing to facilitate his Permanent Health Insurance."

205. We find that the claimant's entitlement to PHI was set out in his contract (56):

> "You will also be eligible to participate in the Employment's Group Permanent Health Insurance in that if you are unable to work for a period in excess of 26 weeks due to illness then this insurance will generally pay you 60% of your basic salary less SSP. This is subject to the Employer being able to ensure you are subject to the provision of the insurance policy with time to time in effect."

206. The word facilitate in the pleaded issue is not quite on point. As the decision on whether or not to allow a claim was the independent decision of insurers, we accept that the respondent could not facilitate PHI in the sense of bringing about the payment. Reading the pleaded sentence as a whole we read "failing to support the claimant ... including..failing to facilitate his PHI" which we interpret more broadly as a complaint of a failure to support the claimant's PHI claim. In fact, it is related to one matter summarised in closing submission by Mr Singh to the effect that the respondent took proactive steps to prevent the claimant from obtaining PHI. This in turn related to a comment made on the application by Ms Craigs. Although in closing Mr Singh also referred to an audio recording of a conversation, we attach no weight to that as a standalone issue because the conversation was with the broker not the insurer. It is however of evidential weight in the claim about the dealings with the insurer, to which we now turn. We find as follows.

207. **On 9 June 2017 the claimant was issued with a medical certificate for two weeks; on 22 June for another two weeks; and on 22 June, he was issued with a back dated certificate, backdated to 9 June, and stated to be for six months (830-832). All were issued by the claimant's GP practice.**

208. Early in August 2017, by which time the claimant had been certificated sick for only two months, he raised a question with the respondent about eligibility for PHI. We suspect a misunderstanding then arose. The claimant was seen by his GP on 4 August 2017 (14/49 of GP records attached to Dr Hallstrom's report). The GP recorded "needs Med3 to cover six month period from start of depression to get insurance cover from work." We very much doubt that the claimant was given the advice that PHI required a single medical certificate for the whole of six months; it is much more likely that he was told that eligibility depended on six months unbroken certificated absence.

209. The same GP record notes a conversation on the morning of 8 August, from which it appears that a receptionist gave the claimant the message, "unable to do a sick certificate for six months – has to be a to whom it may concern letter."

210. Later that morning, the claimant was seen by Dr Nath, who noted that she had issued a Med3 valid from 9 June 2017 to 9 December 2017 for a diagnosis of anxiety and depression.

211. Ms Craigs is recorded by the GP as having called Dr Nath the same afternoon and the note records the following:

> "Calling to clarify Doctors note – Said that it has been done by me but gave no further details. Querying length of time was issued for six months ... Advised HR can't discuss patient or his details further with them unless patient agrees to this."

212. We find that the position on 8 August 2017 was that the GP practice had issued a 6-month Med 3, backdated by two months. That may have been unusual. Dr Nath had nevertheless confirmed to Ms Craigs that the certificate was properly issued.

213. As matters progressed, the claimant presented as a source of difficulty for the HR team, who found that he generated a large volume of challenging and demanding correspondence. Our bundle contained an email from Ms Natalie Bray, Group HR Manager, **to whom** of 21 September 2017 headed with the claimant's name and stating "He's such a rat bag! He just wants PHI!" That language was neither professional nor prudent. Its relevance to our task is that it indicates the mindset of the HR team towards the claimant. Ms Bray was the senior member of the team.

214. Late in 2017 the paperwork for the claimant's PHI application was completed. It made its way to Ms Craigs, who before writing a comment spoke to the respondent's broker, and is audio-recorded as saying (in wording agreed between counsel): "I believe he is deliberately off sick and I have I feel have evidence for it."

215. When in January 2018 Ms Craigs came to complete the PHI form on behalf the respondent she found a discretionary section headed "Any other comments/relevant information." She wrote so far as material (504b),

> "I strongly believe that Bobby is after financial gain of which is a false claim ... he has now raised a claim for discrimination and is taking us to Tribunal. Whilst off sick, approximately two months into his sickness he requested that I process a claim for PHI. I explained in line with his terms and conditions and in line with the process at Jemca we will only process a claim 26 weeks into continued sickness absence. He then presented me with a Dr's note signing him off sick for a further four months taking him up to the 26 weeks and then requested I process it. I queried this with his Dr as I have never come across a Dr signing an employee off for four months due to depression and anxiety as they usually reassess the employee on weekly/monthly basis, however the Dr was unable to cooperate due to patient confidentiality. Therefore, this summary provides my argument for why I believe this to be an ingenuine (sic) claim."

216. The claim was subsequently rejected (442) for reasons stated to be unrelated to Ms Craigs' comments. We understand that a separate issue

is being dealt with about that outside the Tribunal. On its face the rejection (442) is an independent insurance based decision.

217. We accept that as an HR professional Ms Craigs was entitled to be troubled by a GP certificate which went back two months from date of issue and then forward four months. She was entitled to be sceptical, and cannot be criticised for promptly making contact with Dr Nath. Likewise, Dr Nath cannot be faulted for confirming that the certificate was genuine, but declining to give any further information in the absence of patient consent.

218. The factors which trouble us about 504b are the following:

218.1 Ms Craigs could have left the section blank; it was a request for discretionary comments. She volunteered a comment.

218.2 She wrote at a time when there was open hostility within HR towards the claimant **(933** ???), who was identified in evidence as the single most difficult and demanding employee that some members of the team had dealt with professionally. We do not challenge the sincerity of that view;

218.3 We can see no legitimate reason why Ms Craigs volunteered the information that there was a claim for discrimination and a Tribunal claim. We cannot see their relevance to the claim.

218.4 She had told the broker that she had 'evidence' that the claimant was 'deliberately' off sick; we do not know what that evidence consisted of, as it has never been produced, and was not tendered to the insurer.

218.5 She used the language of falsehood, implying an allegation of fraud;

218.6 Most significantly she gave an incomplete and misleading account of her interaction with Dr Nath. In reply to Ms Craigs Dr Nath had confirmed that she had signed the Med3. The Med 3 was therefore the clinical assessment of a qualified medical practitioner. That piece of information was not given to the insurer;

218.7 The information that Dr Nath could not co-operate due to patient confidentiality was accurate but so incomplete as to be misleading in the context of an allegation of falsehood. Dr Nath's full response was that the certificate was genuine and she had signed it; but that she was unable to give further information without patient consent;

218.8 Five months had elapsed between Ms Craigs' conversation with Dr Nath and completion of the PHI form, but there was no

> evidence of the respondent having pursued any concerns about the Med3 through the proper channels of either seeking patient consent from the claimant, or referring him for independent clinical examination.

219. We ask ourselves what was the reason why Ms Craigs wrote as she did. We do not find that it was because the claimant is a Muslim: we are confident that the claimant's religious belief played no part whatsoever. We do not accept that her actions properly fall within the definition of harassment, because we accept that they do not relate to the protected characteristic.

220. When we consider where the reason falls under Section 27 (victimisation), we must take care to note that although it refers to the Tribunal proceedings the presentation of the ET1 is not itself relied upon as a protected act.

221. We find that the claimant's history of complaining, including complaining of discrimination, was a material factor in the respondent volunteering information which was gratuitous, incomplete, misleading, and intended to hinder his access to PHI. We find that the respondent subjected the claimant to a detriment because he had done protected acts. His claim of unlawful victimisation, which forms issues 6f and 11-13, therefore succeeds.

Annual leave

222. Issue 6h was "Failing initially to permit annual leave during sickness absence".

223. On 8 August 2017 the claimant's brother sent an email to Ms Craigs asking if the claimant could use 14 days of annual leave entitlement in August.

224. Ms Craigs replied the same afternoon (294):

> "In response to his request to use his annual leave I had put him on full pay whilst awaiting to receive his Dr's certificate, however, as I have seen a picture of his Dr's certificate I can revert his full pay back to SSP as the Dr's note would have fully covered his absence from 9 June to present. Therefore, I will be unable to allow him to use his annual leave which he has accrued but not taken."

225. The reference to the picture was to 296, which was the six month medical certificate referred to above. The claimant challenged the refusal and Ms Craigs wrote on 9 August to set out the position (291):

> "In response to your statement with regards to being aware that you are entitled to take accrued leave whilst absent on ill health ground, technically sickness absence is for rest and cooperation from an illness and annual leave is time away from work to pursue leisure activities. However, whilst

> I accept that in certain circumstances annual leave may be granted at the employee's request during long term sickness, an employer also has the right to refuse annual leave requests in line with legislation.
>
> Within your specific circumstance you are suspended from work and invited to attend a disciplinary hearing and then subsequently went off sick, given that those matters remain outstanding the company is denying your request for annual leave at this time. However, on conclusion of the outstanding matters we will further review your request, and give due consideration to do your annual leave request at that conjuncture."

226. The pleaded word is "initially." On 5 November (ie after the end of his suspension on 27 September, and therefore while he was on sick leave) the claimant wrote to Ms Cavanagh asking for his leave to be processed (1139). She replied on 13 November, saying, "Your annual leave will be processed as requested." It was accepted that this was then done.

227. Mr Singh made no submission on the point in closing, save to refer to HR screenshots (447 and 448), which in the absence of clarification could not assist us. Mr Wayman was similarly laconic, writing, "It is accepted that the claimant was initially denied the opportunity to take annual leave while he was off sick..the Respondent has no defined policy on this." He referred to the reasons given by Ms Craigs on 9 August and the fact that the reasons were acted upon, namely that the claimant was permitted to take annual leave once the disciplinary suspension was concluded.

228. We find that the claimant asked for annual leave at a time when he was both signed off sick and suspended pending disciplinary action. When the disciplinary action came to an end, he re-applied and was allowed to take annual leave, although he remained off sick.

229. From those simple facts we infer that the reason why annual leave was initially refused was the existence of disciplinary action, that being the variable which changed. That being so, we find that prohibited factors played no part whatsoever in the short-term decision to refuse annual leave.

The claimant's general theory

230. We have above dealt with the case sequentially, and dealing with individual issues as they arose in sequence. We wish in conclusion to deal with the over-arching case presented by the claimant.

~~231. A particular example not just of hindsight but of retrospective justification is illustrated by paragraphs 35 to 37 of Mr Singh's closing submission, in which he criticises Mr Knights for his selection of footage, for failure to "record" conversations about Manchester before the claimant's arrival, and for his failure to analyse the religious nature (as the claimant put it) of the audio footage. However, that submission disregards the state of affairs at the time in question: three specific incidents and their approximate times had been identified, and they were focused on; the~~

~~audio footage is noisy, and the person who listens (as the Tribunal did) forewarned about what they might hear is not in the same position as the person listening without expectation; thirdly, the standard to be expected of Mr Knights was that of a fair and competent manager, not that of trial counsel; and most strikingly, as stated above, it was Mr Wayman, and no other representative, party or witness, who placed the word Manchester in a full sentence.~~

232. We do not repeat out findings about the alleged selection of CCTV material. In closing submissions on the point, Mr Singh drew the conclusion (paragraph 37) was that there was a cover up or an enormous failure to investigate "and it is no coincidence that so many of the respondent's employees made such failures." We find on the contrary that what that episode shows indicates is that applying an ordinary everyday standard of reasonable competence in human affairs, error, omission and inability to read the future are common experience and not themselves probative of bad faith or conspiracy.

233. A part of the claimant's conspiracy theory was based on the submission that the respondent was afraid of suffering reputational damage if incident 1 were widely known. That is pure surmise. We do not accept, taking the claimant's case at its highest (and higher than we find) that the respondent was placed in fear of harm by a revelation that an employee had used offensive language, in the absence of evidence as to how the respondent as a corporation responded to that event. There was no evidence of fear of harm on the part of the respondent.

234. Mr Singh submitted that the respondent's denial of incident 1 was an act of victimisation. It may also have been put as an act of discrimination of harassment, in light of the wording of issue 6f, focused on the claimant's victimhood.

~~235. That seems to us an argument which runs the risk of precisely what Mr Singh cautioned the respondent against, namely disaggregation. The respondent did not disentangle or analyse the events of 23 May in the artificial way in which the Tribunal and counsel did. It is not the expectation of any work place that that should happen. The blunt fact is that in both the build-up and incident 2 the claimant gave as good as he got; and in the build-up, it could be said, a great deal more. The account given of the event by the claimant omitted the crucial word subsequently uncovered by Ms Craigs. Identifying victim and perpetrator in the work place setting would have required at an early stage a simplistic and binary approach, which in our view would have done no justice to Mr Anichebe. However, we remind ourselves and we stress that our task is not to offer management guidance, but to consider the extent to which the respondent managed the issue of the claimant's alleged victimhood on grounds of any of the prohibited factors, and we find that they played no part whatsoever.~~

236. A pervasive, fundamental problem in the claimant's approach was one that is not unusual in discrimination cases. The claimant identified a

series of adverse events which he had experienced or perceived. He asserted that they were occasioned by prohibited factors. He then proceeded on the assumption that the negative factors were themselves probative of causation; they were not. This is the error alluded to by Mr Justice Underhill, as he then was, in *HSBC Asia Holdings v Gillespie UK EAT 2010/0417* at paragraph 20,

> **"**It is unnecessary when one reads the word "culture" in this context to reach for one's revolver, but it is nevertheless an imprecise term, and it needs to be appreciated how an allegation of a "discriminatory culture" fits into the proper legal approach. In a case of (direct) discrimination the ultimate question will always be whether the claimant was treated in the way complained of by one or more individuals on the proscribed ground (or – as we will soon be saying – because of the protected characteristic). Where there is a dispute about whether the particular acts complained of occurred, or whether they were done with a discriminatory motivation, proving that (say) sexist behaviour or talk was common in the workplace, which is essentially what a discriminatory "culture" means, may well assist in the determination of that dispute (though it should not be allowed to distract the tribunal's ultimate focus from the particular acts complained of). In harassment cases it may also be relevant in another way, in as much as "a discriminatory culture" may be an acceptable synonym (though synonyms are best avoided so far as possible) for the statutory language of a "hostile, degrading, humiliating or offensive environment". In the present case evidence showing a discriminatory culture in the Group Risk department is plainly relevant for either or both of those reasons."

237. Mr Singh referred on a number of occasions to Islamophobia, and referred more than once to hatred of Muslims in the work place. That was language not to use loosely. They were utterly serious allegations, expressed in high-flown language. We reject every element of all of them.

238. We do not repeat our findings about Mr Igbinigibe's words of 23 May, nor do we seek in the slightest to justify Mr Igbinigibe's language. We note the following. However wrong, both phrases were said laughingly. We heard no evidence in this case of any person other (arguably) than Mr Igbinigibe expressing hostility towards anyone for being a Muslim; or hostility towards the faith of Islam; or hostility towards Muslims in general. We heard no evidence of any anti-Muslim sentiment or behaviour by anyone towards anyone before 23 May. We heard no evidence, taking the context of this case, of any wider discussion about the Manchester bombing, which could have come close to generalisations drawn on that terrible event. We heard no evidence of a history of Islamophobia, or of hostility towards the claimant as a Muslim which preceded the event of 23 May. We heard no evidence of inappropriate language about the claimant, Islam or Muslims used by any person other than Mr Igbinigibe (allowing in that sentence for the ambiguity of the phrase used by Mr Angus).

239. We heard evidence of open hostility towards the claimant from two sources. One was Mr Anichebe, whose statement (173), disciplinary interview, and evidence to this Tribunal made clear that his dislike of the claimant was a dislike of the individual and his behaviour, and was unrelated to any prohibited matter. (We repeat that the claimant said in evidence to the Tribunal that it was not until this hearing that he knew that Mr Anichebe's father is a Muslim). The only other source of hostility which we saw expressed towards the claimant was in the language used by members of the HR team. We have relied on this in part in upholding the claimant's victimisation claim. We do not consider that our findings are findings of Islamophobia, or of fear or hatred of Muslims, in the way in which those phrases and words were used by Mr Singh.

240. We note that the respondent's work place was located in the London Borough of Enfield, and take notice of the fact that that is a multi-cultural borough, with a significant Muslim presence. We note the absence in this case of background evidence of the type often adduced in discrimination cases. In context, there was no evidence of any history of conflict involving Muslims in the work place. There was evidence of the claimant having disagreements with colleagues as an individual, but no evidence that those related to any prohibited matter.

241. A further instance of the same tendency in the claimant's approach can be found in Mr Singh's reference in closing to a "hostile campaign" against the claimant. The word campaign implies persons acting in concert according to a pre-planned strategy to achieve the desired objective. There was no evidence of a campaign (or, to use the more dramatic term, a conspiracy). There was no evidence of personal hostility towards the claimant other than that of Mr Anichebe, and on the contrary ample evidence of a network of long and warm friendships of which the claimant was for a long time an active member.

Summary of cross-references

242. We here set out, for ease of reference, in table form, cross reference to our conclusions on each pleaded issue, with reference to paragraph numbers above of this Judgment.

For issue 6c(i), see above;
For issue 6c(ii), see above;
For issue 6c(iii), see above;
For issue 6c(iv), see above;
For issue 6d, see above;
For issue 6d(i),

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Employment Judge R Lewis

Date: ……4/3/19..

Sent to the parties on: ...12/3/197.....

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For the Tribunal Office