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THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Janusz Medrysa**

Respondent: **The London Borough of Tower Hamlets**

Heard at: **East London Hearing Centre**

On: **13, 14, 15, 20, 21 March 2019 and 22 March 2019 (in Chambers)**

Before: **Employment Judge Burgher**
Members: **Ms L Conwell-Tillotson**
Mrs G Everett

Representation

Claimant: In person

Respondent: Ms R White (Counsel)

JUDGMENT

The Claimant's claims fail and are dismissed.

REASONS

Issues

1. At the outset of the hearing the following issues were identified as relevant.

2. The Claimant is white Polish. He claims direct race discrimination. The Tribunal is required to consider whether the Respondent had subjected the Claimant to the following treatment, and if so whether it amounted to less favourable treatment because of race. The allegations are as follows;

2.1 Mr Stephen Willie's failure to provide the Claimant with copies of emails between the Respondent and the trade union in connection with the job valuation in 2011, as requested by the Claimant in an email dated the

14 of October 2016. The Claimant relies on a hypothetical comparator (Issue 1).

2.2 Between November 2016 and February 2017, the Respondent failed to progress the Claimant's Individual Right to Review (IRR) in accordance with its procedure, in particular failing to action the Claimant's request for an appeal submitted on the 24 January 2017. The Claimant alleges that Mr Stephen Willie Parking Appeals and Permits Manager, Ms Yvonne Osedumme Human Resources Executive, and Mr Roy Ormsby, Divisional Director acted in a racist conspiracy against him in this regard. The Claimant relies on Ms Petra Burcher, who is black Caribbean and a hypothetical comparator for this allegation (Issue 2).

2.3 At a meeting on the 1 December 2016, Mr Roy Ormsby behaved aggressively and in a threatening manner to the Claimant, shouting, pointing, accusing him of being unprofessional, talking across him, not letting him speak, standing up suddenly, leaning across the table in a physically intimidating manner and banging the table. The Claimant relies on a hypothetical comparator (Issue 3).

2.4 Mr Stephen Willie refusing the Claimant's requests for special leave on 22 May 2017 and 20/21 July 2017. The Claimant relies on Francis Avornyoste, black African, and Fitzroy Andrew, black Caribbean, as comparators (Issue 4).

2.5 Failing to follow its own procedure adequately or at all in the handling of the Claimants Combating Harassment and Discrimination (CHAD) complaint that he made against Mr Ormsby. This allegation is against Ms Johura Begum, Human Resources Business Partner, Ms Karen David's HR Manager, Mr Aman Dalvi, Corporate Director. Following evidence, it seems that this allegation extended to Will Tuckley CEO, Zena Cooke, Corporate Director and Denise Radley, Corporate Director. The Claimant relies on Hasina Begam (Asian), Francis Avornyoste (black African), Terry Roque Black and Ms Lolita Sutherland (black) as comparators (Issue 5).

Evidence

3. The Claimant gave evidence on his own behalf and called Mr Terry Rocque, AND Ms Kathy McTasney, Employees General Union (EGU) General Secretary to give evidence. The Tribunal also read as statement of Mr Fitzroy Andrew who was not in attendance at the Tribunal to give evidence under oath or be cross examined.

4. The Respondent called Ms Karen Davies, HR Manager, Ms Johura Begum, HRBP, Mr Stephen Willie, Parking Appeals and Permits Manager and Mr Roy Ormsby, former Service Head/Divisional Director to give evidence on its behalf.

5. The Tribunal was also referred to relevant pages in an agreed bundle of 748 pages and admitted various additional documents relating to the Claimant's medical history and the Respondent's annual and special leave policy.

General observations

6. The Tribunal formed the view that the Claimant's central concern was the failure to have his job evaluated to a higher grade following the IRR procedure. Throughout the hearing the Claimant was focused on seeking to establish that his job grade should have been higher. This permeated his evidence, the approach he took to questioning the Respondent's witnesses and the clarifications he gave when asked about the relevance of various questions.

7. The Claimant sought to persist with seeking to pursue job grading issues despite the finding that they did not form part of a continuing act for discrimination following the judgment of Employment Judge Russell, which was sent to the parties on 16 March 2018. The Tribunal considered the questions the Claimant asked to seek to distil if they could have formed part of the background to be used to infer race discrimination. We concluded that they could not.

8. The Tribunal made it clear to the parties that it was only considering the issues of race discrimination as outlined in the list of issues and consistently reminded the Claimant of the scope of the Tribunal consideration. The Claimant spent significant time questioning witnesses on the IRR process with a view to seeking to show that it was wrongly decided. The Tribunal allowed the Claimant to question witnesses on matters which were seemingly irrelevant given the Claimant's insistence on asking such questions. As specified time had been timetabled for questioning each witness the parties were held to that time. However, had the Claimant focused on the issues that the Tribunal was required to determine the hearing could have been completed in a much quicker time than it was.

9. Ms White made numerous concessions throughout the hearing, supporting the Claimant's position. In particular, it was conceded that the Claimant did not have his CHAD complaint dealt with, it was conceded that Mr Roy Ormsby had not responded to his IRR resubmission and it was conceded that Mr Steven Willie had not provided the Claimant with emails requested relating to 2011.

10. Mr Roque's statement was not necessarily supportive of the Claimant's direct race discrimination complaint. Mr Roque provided a summary of his concerns against Mr Willie and underlined the Tribunal's impression that the Respondent's policies were not being implemented, regardless of race.

11. The Claimant also referred to the Employment Tribunal claim brought by Ms Sylvie Olukoya as evidence that Mr Willie and Mr Ormsby had a propensity to discriminate. We understand that Ms Olukoya succeeded in a disability discrimination complaint before the Tribunal against the Respondent and that her other complaints, including race discrimination, were dismissed.

12. There was no direct evidence of the Claimant's actual nationality or colour being a factor in this claim. The Claimant was not asserting that any alleged discriminators had a propensity to disfavour Polish people or white people. The Claimant sought to rely on inferences from the treatment of alleged comparators.

Respondent's relevant procedures

13. The relevant policies that applied at the time were as follows.

14. The Respondent's CHAD procedure states that it should be used if that individual feels that they have been discriminated against contrary to the council's equal opportunities policy or if they have witnessed such discrimination or harassment. The procedure may also be used in respect of bullying and ridicule or demeaning behaviour whether or not linked to any particular feature of the employee, such as their sex, race, religion or belief, age, sexual orientation, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity. The CHAD procedure states that the complainant must be sure that the allegations are in respect of harassment or discrimination otherwise the council's grievance procedure may be a more appropriate way of addressing the complaint.

15. The CHAD procedure requires the supervisor to consider where whether there is a prima facie case raised by the complaint. If the supervisor concludes there was not a prima facie case the complainant should be informed in writing and may then provide further detail amended complaint or no further action will be taken.

16. If there is a prima facie complaint an investigator should be appointed within five days and an investigation completed within 4 weeks. The CHAD procedure allows for the investigation to be extended by a further 10 days in the case of more complex cases. However, in very complex cases or cases which have exceptional circumstances it is stated that the timescale may be significantly longer than this.

17. The Respondent's grievance procedure states at paragraph 20.4 that the grievance procedure should not be used where there are other more specific processes which would apply such as CHAD, grading/salary appeals, performance management, disciplinary and disciplinary appeals.

18. The Respondent's job evaluation procedure provides for the trade union officer and human resources official to evaluate and assess a role. If there is a failure to agree between the trade union and human resources there is a process for an appeal panel to a senior human resources officer and a trade union representative. The job evaluation procedure also provides for a separate process providing individuals with a right to review (IRR) to consider whether additional duties are being undertaken above their job description. The IRR requires the employee to apply to the manager and demonstrate that there are additional duties that are being performed regularly and consistently. Stage 1 of the IRR procedure is the application to the manager to review the job description against the duties. The manager must then require authorisation from the Service Head. If the Service Head rejects all or part of the claim, the post holder has a Stage 2 Appeal to a Corporate Director.

19. The Respondent has a special leave procedure that states that special leave entitlement is granted dependent on the circumstances in each case taking into account all relevant factors including the amount of times previously granted to the employee as special leave. It is stated that as a general guideline and employee will be allowed up to 5 days special paid leave in any 12 month period as special leave. It states that time taken will be granted as a combination of special paid leave annual leave flexitime, time

off in lieu and/or unpaid leave in equal amounts, for example, a request for 4 days dependents leave equals two days special paid leave and 2 days annual leave.

Comparators

IRR

20. We were informed that Ms Petra Burcher is black Caribbean. She submitted an IRR application in 2012 following being assimilated to a lower grade post. Her application was refused at Stage 1 IRR and she then appealed to a Corporate Director under IRR Stage 2 and her appeal and request was rejected. Neither Roy Ormsby nor Stephen Willie were employed by the Respondent at the time and therefore they had no involvement at all in her process.

Special leave

21. In 2014, Francis Avornyoste, who is black, applied for annual cover for 2 weeks absence for his sick wife. Mr Willie had not long been employed by the Respondent suggested that Mr Avornyoste apply for special paid leave. This was authorised but the application was subsequently revoked by Human Resources. Consequently, Mr Willie gained a better understanding of the operation of the special leave policy within the Respondent.

22. On 3 November 2014, Mr Fitzroy Andrew, who is black, applied for flexi leave. His then manager, Mr Darren Houston informed him that he had been granted paid special leave. Mr Willie had no involvement in this process.

23. Mr Fitzroy Andrew also applied for and was granted paid special leave for 17 and 18 November 2016 in view of his wife's serious illness. Mr Willie sanctioned this in accordance with the Respondent's special leave policy.

CHAD

24. Ms Hasina Begam, who is Asian, submitted allegations against Ms L Mohammed in respect of incidents on 28 April 2014 and 22 July 2014. A CHAD investigation was instituted on 20 October 2014 and statements distributed to witness on 3 March 2015. This timescale was not compliant with the timescale or in accordance with the Respondent's CHAD processes and is consistent with the Respondent's HR's failure to monitor and enforce compliance with its procedures.

25. Ms Lolita Sutherland, who is black, submitted a CHAD complaint in 2017. We have no details of how this CHAD was dealt with, if at all.

26. Mr Francis Avornyoste is black African. We have no evidence of him submitting a CHAD but there were emails demonstrating him submitting a complaint in May 2016 which he stated he gave up when her realised it '*was a complete waste of time*'. The Claimant's evidence was that Mr Avornyoste was not informed by HR about their final decision and Mr Avornyoste left work under distress and frustration at the time.

27. Mr Terry Roque, who is black, made a grievance not a CHAD complaint. Whilst the Claimant contended that Mr Willie prevented Mr Roque from pursuing a CHAD Mr Roque did not state this. Mr Roque stated that in respect of his grievance he was fobbed off with offers of mediation and the complaint was then '*brushed under the carpet and an investigation never took place'*. Mr Rocque also stated that he made a complaint on 13 December 2017 regarding Mr Willie conspiring to dismiss him. This was investigated on 20 June 2018 by Sergio Dogliani and there is still no outcome.

28. In this context the Tribunal find that there is clear incompetence within the Respondent in the management of administration of grievance and CHAD complaints, contrary to its written procedures. The Respondent's Human Resources seemingly consistently fails to hold management to account in respect of relevant timescales and required standards of communication.

Facts

29. The Claimant is white Polish. He was employed as a debt recovery officer by the Respondent on 4 July 2011. Whilst the Claimant stated a number of times during his evidence that English is his second language we find that he is highly proficient in his use of both written and oral English and that he was not disadvantaged in his ability to put forward his contentions either in employment or throughout the Tribunal hearing.

30. The Respondent is one of the most ethnically diverse local authorities within the country.

31. The Claimant worked under a job description as a debt recovery officer. He believed that he should have had a higher grade for the work he was actually doing.

32. All the job roles within the Respondent had been through a job evaluation process agreed with the trade unions. Had this not been the case the Respondent would have been in breach of relevant local government agreements made between the trade unions and the Greater London Provincial Council (GLPC). The Respondent adopted the GLPC agreement and recognised Unison, Unite and GMB for collective bargaining purposes.

33. The Claimant was a member of the EGU, a union which was not recognised by the Respondent. Ms McTasney, is the General Secretary of the EGU and she assisted the Claimant at relevant times when pursuing matters under the Respondent's procedures. However, we find that Ms McTasney did not have a proper understanding of the relevant legislation or of the Respondent's internal policies and procedures. This was apparent in respect of her evidence relating to parental leave and her responses in respect of race discrimination. She stated that she did not know the Claimant's race but that he was from the '*other side of the river'*. Ms McTasney stated that Mr Ormsby was the correct person to meet the Claimant in respect of his IRR concerns on 1 December 2017 as he was more senior than Mr Willie. She stated that the Claimant was seen within the Respondent as a moaner.

34. The Claimant's concern about the grading for his role continued throughout his employment. Consequently, he submitted an IRR request on 10 August 2016 to his manager Mr Gerry Bergin. Mr Bergin liaised with Mr Willie to consider the request and enquiries were made of HR relating to the procedure.

35. Ms Yvonne Osedemme, Human Resources Business Partner, informed Mr Willie by emails dated 9 September 2016 and 21 September 2016 that the correct procedure would be to appeal to a Corporate Director under stage 2 of the procedure. Mr Ormsby was not a Corporate Director.

36. In accordance with the IRR stage 1, Mr Ormsby was required to authorise the outcome of the IRR. He did this by email dated 19 September 2016.

37. On 26 September 2016 the Claimant met with Mr Willie and a full discussion of the Claimant's IRR request of 10 August 2016 was discussed. The Claimant was informed of the main reasons of disagreement with his IRR request.

38. On 3 October 2016 Mr Willie sent an email asking the Claimant if he had any other comments following the meeting of 26 September 2016. The Claimant replied the he was busy but would respond later in the week.

39. On 10 October 2016 Mr Willie sent an email to Ms Begum and Ms Osedemme asking whether the right of appeal should be directed to Roy Ormsby as Service Head or whether it should be directed to a Corporate Director. He also asked them if they were satisfied that the procedure was correctly followed. Mr Willie was wrongly informed by telephone from someone in HR that the appeal should be to Mr Ormsby by 1 November 2016. The IRR appeal should not have been to Roy Ormsby as Service Head but to Mr Aman Dalvi Corporate Director for the department. This error regarding the appeal was evident in the IRR outcome letter dated 11 October 2016 that Mr Willie sent with the knowledge and approval of HR.

40. The Claimant was unhappy with the IRR outcome letter and focused on the following paragraph of the letter.

> *In addition you asked for further clarification in regard to the sign off to the job evaluation to the debt recovery officers job description in 2011 where I have liaised with human resources representatives where they have verbally confirmed that both the council and trade unions reached an agreement with various email audit trail which will be time-consuming to obtain copies.*

41. On 14 October 2016 the Claimant sent an email to Mr Willie, copied to Zena Cooke, Corporate Director and Will Tuckley, Acting Chief Executive contesting the validity of the paragraph and challenging whether the 2011 job evaluation had been undertaken correctly. He 'officially' requested all the emails referred to in the quoted paragraph to be sent to him and Ms McTasney. The email ended with the Claimant stating that he was seriously considering launching legal action against the council and the he requested to be contracted by email only.

42. The Claimant maintained that Mr Willie was lying in respect of the quoted paragraph no job evaluation that had taken place and as such there could be no documents in respect of an evaluation that did not take place. The Claimant pointed to the fact that the Respondent was not able to provide copies of any archived emails or documents in respect of the 2011 job evaluation process as part of the disclosure for the Tribunal. We do not accept the Claimant's suspicions in this regard. Mr Willie was not employed at the time of the earlier job evaluations and was simply relaying to the

Claimant what he had been informed by the human resources department. The documents would have been time consuming to retrieve, if they could be retrieved at all.

43. Mr Willie was disappointed by the Claimant's email. He was concerned that it was copied to very senior individuals within the Respondent and with the threat of legal action. Mr Willie believed that he had been clear that he was informed by HR that he could not provide emails in respect of the job evaluations in 2011 and that any concerns that the Claimant had could be dealt with at the appeal. Mr Willie responded to the Claimant's email on 14 October 2016 inviting the Claimant to appeal any matters he was concerned with.

44. The Claimant replied to Mr Willie's email, 2 and a half hours, later repeating his request for the documents supporting the job evaluation of 2011. He made numerous other concerns to him and copied the email to Ms Cooke, Mr Tuckley, Mr Ormsby and Ms McTasney.

45. Mr Willie did not respond to this email as he had discussed this with Mr Ormsby and was concerned about the continual ping pong effect of restating positions. Mr Willie was aware that Mr Ormsby would be now dealing with the matter.

46. The Claimant submitted an official complaint to Ms Zena Cooke, Corporate Director, on 14 October 2016. This involved the handling of his personal development review (PDR) and his concerns about human resources management of it. Ms Cooke informed the Claimant on 18 June 2017 that she would not be taking his PDR official complaint any further.

47. The Claimant did not appeal his IRR outcome. However, on 3 November 2016 Mr Ormsby offered the Claimant a meeting which he could attend with his trade union to discuss any issues he had. Mr Ormsby stated that the Claimant had had the management response to the IRR and if he wished to discuss issues further he should make an appointment through Mr Ormsby's PA to discuss. Contrary to the Claimant's evidence we do not consider this to be an instruction by management to force and intimidate him to attend a meeting with Mr Ormsby against his wishes.

48. A meeting with Mr Ormsby was arranged and this took place on 1 December 2016. The meeting was attended by the Claimant, Ms McTasney, Mr Ormsby and Ms Begum. Mr Ormsby considered this to be an extra meeting as a continuation of stage 1 and provided clarification of the reasons why the IRR was rejected and how the Claimant could seek to progress it. The meeting took place around a table, with Mr Ormsby and Ms Begum on one side and the Claimant and Ms McTasney opposite. It was agreed in evidence that Mr Ormsby and the Claimant were talking over each other at times and that the meeting became heated. Mr Ormsby stated, and we accept that, the Claimant interrupted him, talked over him and did not listen to him. These were behaviours that the Claimant consistently demonstrated throughout the Tribunal hearing. The meeting ended with the Claimant being invited to resubmit his IRR for an IRR application review that Mr Ormsby would undertake. The Claimant was content with this course of action.

49. On 2 December 2016 the Claimant sent an email to Mr Ormsby thanking him for the opportunity to meet. He stated that he found the meeting to be '*quite constructive, despite the hot atmosphere'* of the discussion and that he was disappointed due to the

time limitations. The Claimant forwarded information that he believed would be useful to Mr Ormsby in undertaking the '*IRR application review'*. This is not consistent with the allegations the Claimant now makes before us of the nature of the Mr Ormsby's behaviour to him during the meeting or that he believed that he was being prevented from pursuing an IRR stage 2 appeal by Mr Ormsby.

50. We find that there were raised voices in the meeting with people talking across each other trying to get points across. However, these were for short periods. We do not find, as the Claimant alleges, that Mr Ormsby aggressively shouted at him or accused him of being unprofessional, or that Mr Ormsby stood up suddenly, leaned across the table in a physically intimidating manner or that he banged the table. None of the other attendees of the meeting who gave evidence before us, including Ms McTansey on behalf of the Claimant, attested to this. We do not find that the Claimant was intimidated during this meeting. The Claimant does not have difficulty in recording his concerns and the failure to mention these concerns in his email of 2 December 2016 further undermines the credibility of his allegations in this regard.

51. The Claimant revised his IRR submission which he submitted to Mr Ormsby on 23 and 24 January 2018. Mr Ormsby was asked for a response by Ms McTasney on 8 February 2017 and he replied on 9 February 2017 apologising saying that he would get back to the Claimant when he had reviewed it.

52. A reorganisation took place within in the Respondent between January and February 2017. This added markets, enforcement and environmental health as sections to Mr Ormsby's responsibilities alongside a further 250 to 300 staff. This meant that Mr Ormsby was now responsible for 700 staff.

53. Mr Ormsby stated that he had reviewed the Claimant's resubmitted IRR within 4 weeks of receiving it but found nothing in it more than processing and administrative duties that were part of the Claimant's overall role. However, Mr Ormsby did not notify the Claimant of this review outcome nor did the Claimant chase Mr Ormsby for a response. The Claimant did not submit a stage 2 appeal in accordance with the IRR process. We do not accept, that having read the IRR procedure, that the Claimant could have reasonably believed that he was prevented from submitting a stage 2 IRR appeal. The Claimant knew that Mr Ormsby was required to approve stage 1 of the IRR and that Mr Ormsby was had agreed to review his IRR stage 1. Further he knew that Mr Ormsby was not a Corporate Director to be able to undertake an IRR stage 2 appeal.

54. The Claimant submitted a CHAD against Mr Ormsby on 5 May 2017 to Ms Cooke and Mr Tuckley. Mr Aman Dalvi was the relevant Corporate Director who should have dealt with this but he did not do so. Mr Dalvi retired from the Respondent on 31 May 2017 without considering it.

55. The Claimant's CHAD posed 7 questions. Questions 1, 4 and 5 related to the Claimant's grading concerns. Questions 2 and 3 related to the Claimant's PDR concerns. In question 6 the Claimant asked why he was humiliated in respect of the above 5 matters and queries whether it is his accent and that he is sometimes not able to explain as well as others and he felt he was been treated as if he was stupid. In question 7 of the CHAD the Claimant asks why again and states that he feels that he feels he is discriminated because of his accent and culture.

56. The core of the Claimant's CHAD complaints related to his feelings arising from his discontent with the PDR and IRR process and that he was discrimination based on 'accent and culture'. Ms Begum determined it was not a CHAD for the purposes of the procedures.

57. Ms Cooke dealt with the PDR part of the Claimant's CHAD and notified the Claimant that she would not take it further on 18 June 2016.

58. Ms Denise Radley, Corporate Director, sent a letter to the Claimant dated 17 November 2017 inviting the Claimant to a meeting regarding the remaining aspects of the Claimant's CHAD to take place on 5 December 2017. The meeting took place on that date however Ms Radley did not provide any outcome of the meeting to the Claimant.

59. The Claimant took time off to look after his sick daughter on 22 May 2017. He then applied to be paid special leave for this date. This was declined by Mr Willie on 26 May 2017. The Claimant had already taken 28 hours paid special leave, he had 196 hours annual leave and nearly 10 hours flexi credit that could be used for pay. Mr Willie declined the paid special leave in accordance with the procedure. The refusal was not surprising given the amount of annual leave and flexi credit that the Claimant was able to call on.

60. The Claimant took time off to look after his sick daughter on 20 and 21 July 2017. He then applied to be paid 2 days special leave for these dates. This was declined by Mr Willie on 26 July 2017. The Claimant had already taken 29 hours paid special leave, he had 21 hours annual leave and 4 hours flexi credit that could be used for pay. Mr Willie also believed that the Claimant could have made alternative arrangements given that his wife, who would ordinarily have looked after their daughter, had over a month's advance notice of a hospital appointment that she was required to attend and that she would have been able to do everything normally during the 24 hour period of her blood pressure monitor being fitted.

61. The Claimant sent an email to Mr Willie asking him to explain the reason for the refusal to pay special leave for this occasion. Mr Willie replied that he would provide answers but did not do so. However, on 1 September 2017 Mr Willie reconsidered the Claimant's request and decided to pay one out of the two days special leave the Claimant claimed for 20 and 21 July 2017. This meant that the Claimant had the full 5 days paid special leave paid for the year in accordance with the Respondent's policy.

Law

62. Section 13 of the Equality Act 2010 states:

Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) – (4)…

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others

63. Section 9 of the Equality Act 2010 states:

"Race

(1) Race includes –

(a) colour;
(b) nationality;
(c) ethnic or national origins.

(2) In relation to the protected characteristic of race –

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.

(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.

(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group."

64. When considering discrimination based on inferences the case law states that the Tribunal should ask itself the following questions:

(a) Whether the Claimant can establish facts from which Tribunal could infer, in the absence of any explanation, the Respondent discriminated against him on the grounds of disability or age (a prima facie case of discrimination); if so

(b) Whether the Respondent can establish a non-discriminatory explanation for the treatment (*Igen Ltd v Wong* [2005] EWCA Civ. 142).

65. The burden of proof provisions are found at section 136 of the Equality Act 2010. This states:

"136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*
>
> *(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."*

66. The burden is on the Claimant to prove, on a balance of probabilities, to establish a prima facie case of discrimination. The Court of Appeal, in Madarassy v Nomura International Plc [2007] EWCA Civ. 33, at paragraph 56. The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination). It was confirmed that a Claimant must establish more than a difference in status (e.g. race) and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.

67. Even if the Tribunal believes that the Respondent's conduct requires explanation, before the burden of proof can shift there must be something to suggest that he treatment was due to the Claimant's colour or race. In B and C v A [2010] IRLR 400, EAT at paragraph 22:

> *"The crucial question is on what evidence or primary findings the tribunal based its conclusion that C would not have feared further violence from a female alleged aggressor (and so would have accorded her due process). As we have already noted (paragraph 19), the tribunal does not spell out its thinking on that point. There was no direct evidence on which such a conclusion could be based: no such situation had ever occurred, and the tribunal refers to no admissions by C, or other evidence of his attitudes, that might have supported a view as to how he would have behaved if it had. It is of course true that the tribunal was in principle entitled to draw appropriate inferences from the nature of the behaviour complained of. C's behaviour was certainly sufficiently surprising to call for some explanation: in the public sector in particular it is second nature to executives to follow appropriate procedures, and the explanation offered by C for his failure to do so in the present case – namely that he was seeking to avoid repeat violence (see paragraph 16 above) – is irrational since he could have mitigated the risk to precisely the same extent by suspending the claimant. But the fact that his behaviour calls for explanation does not automatically get the claimant past 'Igen stage 1'. There still has to be reason to believe that the explanation could be that that behaviour was attributable (at least to a significant extent) to the fact that the claimant was a man. On the face of it there is nothing in C's behaviour, or the surrounding circumstances, to give rise to that supposition*). "

68. It is not sufficient, to shift the burden of proof onto the Respondent, that the conduct is simply be unfair or unreasonable if it is unconnected to a protected characteristic. In St Christopher's Fellowship v Walters-Ellis [2010] EWCA Civ. 921 at paragraph 44:

> *"The Respondent's bad treatment of the Claimant fully justified the finding of constructive unfair dismissal, but it could not, in all the circumstances, lead to a finding, in the absence of an adequate explanation, of an act of discrimination. Non-racial considerations were accepted as the explanation for the Respondent's similar treatment of the Claimant in the other instances in which the Claimant alleged race discrimination in relation to participation in recruitment. In the case of Ms Haywood the Respondent made a genuine mistake about the nature of the relationship, which they would not have made if they had properly investigated the nature of the relationship with the Claimant and communicated with her, but their failure to do so was accepted to be the result of a genuine belief. The fact that it was mistaken could not, in the context of scrupulous attention to recruitment procedures, reasonably be held to have the effect of indicating the presence of racial grounds and so shifting the burden of proof to the Respondent to prove that it had not committed an act of race discrimination."*

69. The Claimant referred to the case of Nagarajan v London Regional Transport [2000] 1 A.C. 501 where Lord Nicholls stated at 512-513:

> *"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."*

Conclusions

70. In view of our findings of fact and the law set out above, our conclusions are as follows:

Issue 1

71. We conclude that Mr Willie did not fail to provide the Claimant with copies of emails between the Respondent and the trade union in connection with the job evaluation in 2011, as requested by the Claimant in an email dated the 14 October 2016. Mr Willie was informed by HR that the emails were not available. Mr Willie intimated this to the Claimant in his letter of 11 October 2017. Mr Willie could not provide what he did not have. Specifically, we do not conclude that Mr Willie deliberately lied to the Claimant. He was entitled to rely on the information provided to him by HR in respect of the job evaluation that took place before he was employed.

72. The fact that the Respondent was unable to locate the emails was not in dispute. Whilst the documents and emails from 2011 were not properly archived this cannot be reasonably suggested as less favourable treatment against the Claimant by Mr Willie, who had no involvement in such archiving and was simply relaying what he had been told by HR. The failure to properly archive have affected every employee regardless of race.

73. There was no less favourable treatment in this regard. In any event, the Claimant has failed to provide any basis that race could have formed any part in Mr Willie's response to the Claimant's emails of 14 October 2016. This part of the Claimant's claim fails and is dismissed.

Issue 2

74. The Claimant alleged that between November 2016 and February 2017, the Respondent failed to progress his IRR in accordance with its procedure, in particular Mr Ormsby failed to action the Claimant's request for an appeal submitted on the 24 January 2017. The Claimant made this allegation against Mr Willie and Mr Ormsby.

75. We conclude that Mr Willie followed the advice he received from HR when he wrote the letter of 11 October 2017 that wrongly informed the Claimant to appeal to Roy Ormsby. However, Ms McTasney agreed that Mr Ormsby was Mr Willie was the appropriate person to appeal to at the time as he was senior to Mr Willie.

76. Mr Ormsby was in no doubt that as Service Head and not a Corporate Director, he could only review the Claimant's stage 1 IRR that had been decided, with his approval, on 11 October 2016.

77. In the meeting on 1 December 2016 Mr Ormsby explained why he did not believe the Claimant's role warrant a re-grading. This meeting ended with the Claimant being given another opportunity to resubmit the IRR to Mr Ormsby for reconsideration. The Claimant did this on 23 and 24 January 2016. This was a revision and resubmission of his IRR not an appeal. It was therefore a further opportunity afforded to the Claimant that was not included in the IRR procedure. The Claimant's evidence to us was disingenuous about the process he said he had to follow. An appeal against IRR stage 1 is stage 2 to a Corporate Director. The procedure does not provide an intermediate review or appeal within stage 1, but the Claimant was given this opportunity following the meeting of 1 December 2018. However, this was not an appeal to a Corporate Director and the Claimant was aware of the policy and the procedure. There was nothing precluding him exercising his right of appeal to a Corporate Director, especially in view of Mr Ormsby's failure to reply.

78. Ms Petra Burcher had her IRR stage 1 refused and exercised her right to appeal to a Corporate Director for stage 2. Her stage 2 appeal was rejected. The Claimant did not exercise a right to stage 2 appeal to a Corporate Director. As the Claimant did not request a stage 2 IRR appeal to a Corporate Director he was not comparable to Ms Burcher.

79. Mr Ormsby did not respond to the Claimant's written documents submitted for IRR review on 23 and 24 January 2017 despite indicating that he would respond to the Claimant once he had an opportunity to do so. Mr Ormsby said he overlooked the papers in his witness statement but before us stated that he reviewed the documents but did not respond. Despite the fact that Mr Ormsby was relatively new in his position and having a considerable amount of extra work it was incumbent on a person in his position to have responded to the Claimant within a reasonable time. This was a substantial failure by Mr Ormsby. However, we accept and that he was under a

significant amount of extra work and conclude that the failure to respond was not on grounds of race.

80. This aspect of the Claimant's claim is therefore dismissed.

Issue 3

81. We have found that there were raised voices in the meeting of the 1 December 2016 but no intimidating or aggressive behaviour by Mr Ormsby. The Claimant interrupted, spoke over and failed to listen to Mr Ormsby at times during the meeting. We observed that these are behaviours that the Claimant consistently displayed throughout the ET hearing.

82. Specifically, we find that the Claimant has failed to establish that Mr Ormsby behaved aggressively and in a threatening manner to the Claimant by shouting, pointing, accusing him of being unprofessional, talking across him, not letting him speak, standing up suddenly, leaning across the table in a physically intimidating manner, and banging the table. The Claimant's email of 2 December 2016 and none of the other attendees of the meeting, including Ms McTasney, who he called to give evidence on his behalf, supported his account. Further, had the meeting the been as the Claimant described we conclude that Ms Begum and Ms McTasney would have been likely to intervene.

83. As the alleged behaviour by Mr Ormsby did not take a meeting on the 1 December 2016 we do not conclude that there was no less favourable treatment.

84. In any event we do not find that any conduct that took place in the meeting on the 1 December 2016 was on grounds of race.

85. This aspect of the Claimant's claim is therefore dismissed.

Issue 4

86. In respect of special leave, the issue was not, as the Claimant contended whether he was able to take the time off in accordance with 'UK employment law', but whether he should have been paid special leave payment for taking the time off. It is not in dispute that the Claimant did in fact take time off for his family emergencies at the relevant times. His complaint is therefore that he was not paid special leave for the emergencies and that he was required to take flexi leave or annual leave in accordance with the policies

87. Mr Willie refused the Claimant's requests for paid special leave on 22 May 2017 and 20/21 of July 2017. The Respondent's special leave policy entitled him to do so. We find that the comparators relied on by the Claimant are not in the same or similar circumstances given the reasons given for their leave, the amount of paid special leave take and annual leave and flexi leave he had outstanding. The policy allows for a margin of management discretion. Further, the Claimant was, following review, able to be paid an extra day special leave which took him over the 5 days paid special leave provided for in the Respondent's special leave policy for the year.

88. Therefore, the Claimant has not established that he was subject to less favourable treatment. Further, and in any event, the Claimant has not established that race played any part in Mr Willie's refusal to sanction paid special leave.

89. This aspect of the Claimant's claim is therefore dismissed.

Issue 5

90. The Claimant claims race discrimination arising from the Respondent failing to follow its own procedure adequately or at all in handling of his CHAD complaint against Mr Ormsby.

91. The CHAD process specifies types of claims to be considered. There is a sifting process. Mr Begum took the view that the Claimant's PDR and grading concerns were outside the scope of CHAD procedure. However, it was still processed. Ms Zena Cooke addressed the PDR part of the Claimant's CHAD on 18 June 2017 and made it clear that she would not take it further.

92. The remaining parts of the Claimant's CHAD was eventually subject to a meeting with Denise Radley on 5 December 2017. However, no outcome has been provided to the Claimant. The failure to provide a response to this at all is a further substantial shortcoming in the administration and communication within the Respondent. We have not heard from Ms Radley in respect of her failure to respond and have no contextual information relating to her efficiency of response to CHAD complaints with other races or colour.

93. We considered whether this substantial shortcoming could form a basis from which the Tribunal could infer race discrimination. In doing so we considered the evidence provided of the comparators.

94. Hasina Begam, Asian, made allegations against Mr Mohammed. The incidents occurred on 28 April 2014 and 22 July 2014. A CHAD investigation was held on 20 October 2014 and statements distributed on 3 March 2015. We did not have evidence of the outcome of the CHAD or when the date this was provided. This was not compliant with timescales provided within the Respondent's CHAD processes and is consistent with the poor management of processes within the Respondent.

95. Lolita Sutherland, black, submitted a CHAD complaint in 2017. We have no evidence of how it was dealt with, if at all.

96. Francis Avornyoste, black African, did not submit a CHAD but made a complaint and stated it was a waste of time, he did not pursue and gave up. The Claimant's evidence was that Mr Avornyoste was not informed by HR about their final decision. This is consistent with the poor management of processes within the Respondent.

97. Mr Terry Roque Black made a grievance, not a CHAD complaint, although the Claimant contended that Mr Willie prevented Mr Roque from pursuing a CHAD. Mr Roque stated that nothing ever came of the complaint and he was fobbed of with mediation. He stated that he has formal complaint against Mr Willie on 13 December 2017 which was investigated on 20 June 2018 and he still has not been provided with an outcome.

98. We considered whether if a CHAD complaint had been submitted by a black or Asian person it would have been treated any differently and progressed. On the evidence we have we cannot conclude that it would have been. The Claimant's comparators have evidenced a discontent with the dilatory progression of complaints and the lack of actions of the Respondent in accordance with due process and stated procedures. Whilst we have not heard from Ms Radley we have no evidence at all to infer that her failure to respond to the Claimant following the meeting on 1 December 2017 could be on grounds of the Claimant's 'culture', colour or race. There are consistent failures of HR to case manage and hold managers to account in compliance with its policies and procedures within relevant timescales. It is evident that there is a very poor standard of communication that seems to be endemic within the Respondent. We conclude that there is incompetence within the Respondent concerning the management and administration of grievance and CHAD procedures. These failures apply to all staff regardless of race. Therefore, we do not infer race discrimination from this.

99. This aspect of the Claimant's claim is therefore dismissed.

100. Therefore, all of the Claimant's claims fail and are dismissed. We agree with the submission of Ms White that the Claimant sought to alleged race discrimination in respect of any matter that he was unhappy with. However, there was nothing to suggest that any treatment he was unhappy with was due to his colour or race.

101. The provisional remedy hearing listed for 11 June 2019 is therefore vacated.

Employment Judge Burgher

Dated: 3 April 2019