Case No: 2301184/2018
2303527/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr. A Khawaja

Respondent: Transport for London

Heard at: London South, Croydon **On: 4-7 February 2019 and the 8 February 2019 and the 2 and 5 April 2019 (in chambers).**

Before: Employment Judge Sage
Members: Mrs. Dengate
Mr Sparham
Representation
Claimant: Ms Venkata of Counsel
Respondent: Mr Adkin of Counsel

JUDGMENT

1. **The Claimant's claims for direct discrimination were well founded.**
2. **The Claimant's claims for victimisation identified below at paragraphs 5(a), 5(c)(iv) and (v) are well founded.**
3. **The Claimant's claims for victimisation identified below at paragraphs 5(b), 5 (c)(i), 5 (c) (ii), 5(c) (iii), 5 (c)(vi), 5 (c)(vii), 5 (c) (viii) and 5 (c)(ix) are not well founded and are dismissed.**
4. **The Respondent made an unauthorised deduction from wages.**
5. **The Claimant's claim for payment of accrued holiday pay is well founded.**

REASONS

1. By a claim form presented on the 6 April 2018 the Claimant claimed race discrimination and by a subsequent ET1 presented on the 28 September 2018 the Claimant claimed victimisation, unauthorised deduction from wages and breach of contract.

2. The Respondents defended the claims.

3. The issues were agreed at a preliminary hearing on the 29 January 2019. It was agreed that the hearing would be limited to liability only.

List of Issues

Direct Race Discrimination.

4. Whether the Claims are in time:

4.1 Has the Claimant brought his claims of race discrimination within the time limit set by section 123 Equality Act 2010 This gave rise to the following sub issues:

4.2 What were the dates of the acts to which the complaint relates? The Claimant relies on the following incidents:

4.2.1 On the 17 March 2017, Susan Clark told the Claimant that: "Since English us not your first language, I did not assign you to attend any conference calls or the operations centre huddles. I think that you may give them the wrong information due to your lack of command of the English language"

4.2.2 From October 2016 to April 2017 the Claimant says that Ms Clark denied the Claimant the opportunity to take part in conference calls and operation centre huddles.

4.3 [it is no longer argued to be a continuing act].

4.4 Is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to the Equality Act? In respect of claim 1 the Claimant notified ACAS of a claim on the 5 February 2018 and the certificate was issued on the 5 March 2018. The ET1 was presented on the 6 April 2018. It is submitted by the Respondent that acts that took place on or before 10 December 2017 are prima facie out of time subject to any just and equitable extension. The Claimant submits that prima facie limitation expired on the 7 November 2017.

4.5 The Claimant relies on his South Asian Pakistani race.

4.6 Did the Respondent carry out the acts?

4.7 If so did it constitute less favourable treatment?

4.8 Did the Respondent treat the Claimant less favourably than it treated or would have treated others? The Claimant relies on the comparators of Morley Wills and Stephen Page both of whom are of British Ethnicity and in the alternative a hypothetical comparator in the same role as the Claimant in materially the same circumstances as the Claimant who was not of South Asian Pakistani origin.

4.9 Did the Respondent treat the Claimant less favourably, was this

because of his South Asian Pakistani race?

Victimisation.

5 Are the claims in time?

The Claimant relies on the following acts of the Respondent:

a) On or around the 19 January 2018, Nick Owen denied the Claimant the opportunity to see the notes of the meetings held in respect of his grievance between the investigating officer and the other witnesses;

b) Between the 10 July 2017 and the 19 January 2018, Mufu Durowoju and Paul O'Connor, the investigating officers, failed to interview two witnesses, Casper Vincent and Faisal Nadeem, who the Claimant informed them should be interviewed;

c) Mismanage the Claimant's sickness absence by disbelieving his illness and speaking to him aggressively. In particular, the Claimant relies on:

i. On the 2 February 2018, whilst the Claimant was signed off sick, Paul O'Connor sending the Claimant an email stating that he was "*expected to return to work….if you fail to attend then it will be treated as unauthorised absence and may result in disciplinary action "*

ii. On the 7 February 2018, Harpal Mehet informing the Claimant that the Respondent would give occupational health report precedence over the Claimant's GP fit note. This was despite the facts that the Claimant had not been assessed in person by occupational health;

iii. On the 9 March 2018, Mr O'Connor requiring the Claimant to attend a fact find meeting regarding his absence despite the Claimant being signed off sick;

iv. On the 12 April 2018, stopping the Claimant's sick pay and inviting him to a disciplinary hearing;

v. From the 12 April 2018 to 28 June 2018, failing to pay the Claimant's sick pay;

vi. On the 1 May 2018, requiring the Claimant to attend a discipinary hearing despite the Claimant being signed off sick;

vii. On the 20 June 2018, Occupational Health informing the Claimant that his issues were not medical and that he was fit to return to work, despite the fact that he was signed off sick by his GP for stress and depression, and that occupational health had not assessed the Claimant;

viii. On the 28 June 2018, constructively dismissing the Claimant.

ix. On the 10 August 2018, sending a letter to the Claimant requesting an overpayment in the sum of £1,259.43.

d) ACAS was notified on the 1 August 2018 and the certificate was issued on the 1 September 2018. The ET1 was submitted on the 28 September 2018. It is submitted by the Respondent that detriments that took place on or before the 28 June 2018 are prima facie out of time subject to any just and equitable

extension. It is submitted by the Claimant that prima facie limitation expires on the 2 May 2018 and that detriments are a continuous course of conduct ending on the 10 August 2018 and so and within time.

e) Protected acts: it is accepted that the Claimant did a protected act in raising his grievance alleging race discrimination on the 10 July 2017 and lodging a claim to the ET for race discrimination and victimisation on the 6 April 2018.

f) Detriments: did the detriments constitute unfavourable treatment to the Claimant? Did the Respondent subject the Claimant to the detriments because the Claimant had done a protected act or because the Respondent believed the Claimant had done or may do a protected act?

Unlawful deduction from Wages

6 The Claimant alleges that the Respondent made unauthorised deductions from his wages as follows:

6.1.113 days' pay in respect of annual leave amounting to £3038.75;

6.1.2Wages between 12 April 2018 and 28 July 2018, £13,382.82

7 Was the deduction (or part of it) required or authorised by virtue of a term of the Claimant's contract?

Breach of Contract.

8 The Claimant alleges that the Respondent breached his contract of employment by failing to pay him:

(a) 13 days' pay in respect of annual leave amounting to £3038.75;
(b) Wages between 12 April 2018 and 28 July 2018, £13,382.82

9 Was the deduction (or part of it) required or authorised by virtue of a term in the Claimant's contract?

Witnesses

The witnesses before the Tribunal for the Claimant were as follows:

The Claimant
Mr Valcent resigned from Respondent in March 2018
Mr Nadeem Principal Tunnel Traffic Coordinator
Mr Wills Principal Traffic Coordinator
Mr Omer Principal Tunnel Traffic Coordinator.

The witnesses for the Respondent were as follows:

Ms Mehet People Management Advice Specialist

Mr O'Connor Head of Strategic Coordination Team
Ms Clarke Principal Traffic Operator
Mr White London Streets Tunnels Operations Centre

Preliminary Applications.

10 The Respondent made an application for the direct race discrimination to be considered as a preliminary issue as they stated that this claim was out of time. The Claimant objected as this matter had been raised before Judge Harrington in July 2018 and the Tribunal has twice decided that it should not be dealt with as a preliminary point. It was stated that the direct discrimination and victimisation issues were related and there was a significant overlap in the evidence. The Claimant also raised a concern that if the Tribunal took the time point as a discrete issue this was likely to take the rest of the day and may result in the case going part heard. The Claimant had flown in from Pakistan and there would be a great detriment to the Claimant if the case went part heard.

11 The Tribunal considered the Respondent's application and we were in agreement that the issue of whether the claim for direct discrimination is in time should not be hived off as a preliminary matter. This was listed as an agreed issue in a previous preliminary hearing by Judge Harrington and we believe that this was the appropriate course to take. We accept the Claimant's proposition that the act of direct discrimination is referred to in the grievance and the facts will be before the Tribunal when considering the claim for victimisation therefore little if any time will be saved in dealing with this as a preliminary point. If we decided to do so there would be a real risk of going part heard in the time allowed for this case. We also considered that although the Respondent submits that there is 'clear blue water' between the acts of direct discrimination and the subsequent acts of victimisation (after Ms Clarke ceased to manage the Claimant) there is likely to be evidence that should be before the Tribunal when considering why the Claimant failed to present his claim within 3 months of leaving, this is likely to be dependent upon the time taken to deal with the grievance appeal. The issue of whether it is just and equitable to extend time is fact sensitive and the Tribunal needs to consider all the evidence before they can reach a decision. A decision can only be made after considering all the facts, not on looking at a selective number of documents and only hearing part of the evidence. The Respondent's application was refused.

Findings of Fact.

The findings of fact were agreed or if not on the balance of probabilities were found to be as follow:

12 The Claimant started working for the Respondent through an agency on the 9 May 2016 called AK Services. The Claimant was a Director of AK Services (there was one other Director). The Claimant was asked about this company in cross examination and he confirmed that he provided about 200 workers

via his agency, providing cleaning and security staff to the Respondent and other companies. The Claimant first met Ms Clarke when he started working as agency staff via his Company in late 2016.

13 Mr Omer confirmed that he had known the Claimant since they attended college together in Pakistan. Mr Omer also confirmed in cross examination that he was a close friend of Mr Nadeem and they sometimes met outside of work. Both the Claimant and Mr Omer are of Pakistani origin

14 Mr Omer told the Tribunal that his services were provided via AK Services after being asked by Kier Highways to cover staff shortages at the Respondent. The Claimant confirmed that Mr Omer's services were supplied via AK Services because he could not be placed directly by Kier Highways, so Mr Omer contacted the Claimant and his agency was used as an intermediary.

15 The Claimant became a permanent full-time employee on the 17 October 2016 and was subject to a six-month probationary period. The Claimant's wife continued to run AK Services with the one remaining business partner after the Claimant became a full time employee.

16 The Claimant was employed as a Principal Tunnel Traffic Co-ordinator. He worked a four day on and four day off rota and worked 12 hour shifts. The Claimant's evidence on the shift patterns were that the 'official' shift times were 6.30am to 6.30 pm but it was an 'agreed practice' to work from 6.00 am to 6.00 pm and if no breaks were taken you could leave 30 minutes early if working on a half day (paragraph 7 Claimant's statement). Ms Clarke agreed that these times were 'mutually agreed' (para 4 of the Claimant's statement), however she disagreed that if someone were to take a half days holiday they could leave work at 11.30. It was Ms Clarke's understanding that if half a day's holiday were taken they could leave at 11.45 and this only applied if they had not taken a break (para 5 of the Claimant's statement). The Claimant told the Tribunal that Ms Clarke and Ms Wills had left their shifts at 11.30 on previous occasions.

17 The Tribunal did not see the Respondent's Equality and Diversity Policy, none of the Respondent's witnesses referred to this policy in their statements.

Incident on the 19 January 2017

18 There was a dispute about when the Claimant could leave shift when taking half a day's leave as seen in the above paragraph. The Claimant had booked half a day's holiday on the 19 January 2017 and sought permission to leave at 11.30 but he alleged that Ms Clarke (who was the Supervisor) showed signs of aggression to him and then took him into a room and was aggressive. Mr Tenten intervened, and the Claimant was allowed to leave at 11.45.

19 The Claimant said that after the above incident on the 19 January 201 Ms Clarke became increasingly negative towards him and at times reprimanded him in front of the team (see his witness statement at para 11). The Claimant provided no specific examples (other than the 19 January) of when Ms Clarke was negative towards him.

The Allegation that Ms Clarke denied the Claimant training opportunities.

20 The Claimant alleged that Ms Clarke denied him access to training opportunities and to take part in conference calls and huddles which were describe as development opportunities.

21 The Claimant was taken in cross examination to page 82 of the bundle which was an email dated the 2 March 2017 where Ms Clarke informed the Claimant and others of a Metropolitan Police familiarisation day, he stated that he was pleasantly surprised at having this opportunity, but he did not go on the course. There was no suggestion that this was due to any act or default by Ms Clarke.

22 The Tribunal were told (by Mr O'Conner) that conference calls occurred twice a day and huddles were held on an ad hoc basis; they tended to be attended by the Supervisor or if the Supervisor was not there a deputy could be nominated. Mr O'Connor in re-examination indicated that the Operations Manager usually attended. Both the Claimant and Mr Omer indicated that attending huddles and conference calls was a training and development opportunity. The evidence of the Claimant and Mr Omer was consistent that when they were managed by Ms Clarke they were not allowed to attend huddles or conference calls. The Claimant said that failing to allow him to attend huddles and calls was less favourable treatment as compared to his White colleagues.

23 Ms Clarke accepted in cross examination that Mr Tenten was keen for people to go on courses however she raised the high cost of one course (presentation skills course) and she had to get Mr White's approval. Ms Clarke denied that the Claimant was prevented from going on courses because he was Pakistani. Ms Clarke denied telling the Claimant that she would not allow him to attend huddles or conference calls. She told the Tribunal that as he was in his first few months of employment she would not ask a person to act up as this was during his probationary period.
Ms Clarke accepted in cross examination that all the emails she referred to in her statement at paragraph 19, which she relied upon as evidence that she was supportive of the Claimant attending training, either did not refer to training courses or they referred to courses that the Clamant had attended prior to Ms Clarke taking over as his manager. Ms Clarke stated in cross examination that she felt that training courses "could have been used

incorrectly" but did not clarify what she meant by this, she then added that she felt that she had been "supportive with everything". There was no evidence to suggest that Ms Clarke had been supportive of the Claimant going on courses or that she had referred him for any training opportunities, her evidence on this point was unreliable.

The Performance Review on the 17 March 2017

24 Ms Clarke told the Tribunal that at the start of the performance review meeting on the 17 March 2017, she informed the Claimant that he was an "intelligent worker with a good work ethic" and the Claimant accepted that during the first couple of minutes the review was going well. The Tribunal find as a fact that the review meeting started positively, and this was corroborated in the notes seen at page 92 of the bundle.

25 The Claimant alleged that during the review she made the comment that "*since English is not your first language, I did not assign you to attend any conference calls or operations centre huddles. I think that you may give the wrong information due to your lack of command of the English Language*". Ms Clarke denied she said this.

26 Ms Clarke accepted that if she had said this (which she denied) she would not say this to someone who was White British. She explained that she needed to discuss the Claimant's potential to provide incorrect information when reporting in incidents. Ms Clarke told the Tribunal that she had tried to discuss this with the Claimant at the time she heard the comment (the word alight) and he was "quite aggressive" towards her. She decided therefore to discuss it in the performance review. In paragraph 10 of her statement she felt she was being understanding by commenting on how the confusion arose about the word 'alight' and confirmed that she said to the Claimant *"I could see why the confusion arose as English was not his first language*". She stated that it was a concern when the Claimant mistook the meaning of the word 'alight' to mean on fire.

27 The Tribunal find as a fact and on the balance of probabilities that the alleged comment about English not being the Claimant's first language and the last sentence of the quote were made by Ms Clarke. The Tribunal considered that Ms Clarke accepted that she said words to the effect that confusion had arisen because English was not his first language, which was remarkably similar in content and context to the Claimant's allegation. The Tribunal also took into account that Mr White for the Respondent accepted that this was said and he asked her to apologise, which she did. The Tribunal also saw corroborative evidence that Ms Clarke had expressed similar concerns to Mr Omer. He described his concern of Ms Clarke's openly expressed views on race religion and immigration and he escalated his concerns about this in

2015 and in July 2017 (see below at paragraph 41-2). Mr White also accepted that she was no ‘shrinking violet’.

28 Ms Clarke alleged in cross examination the Claimant was “ranting and shouting” during the performance review but she accepted that this description was not used in her meeting notes taken on the day or in her statement. The Claimant in cross examination stated that he had no recollection of the incident of where the word alight was used and stated that she raised the concern about an incident after he had challenged her about her comment about English being his second language. The Claimant said that at the time of the review meeting Ms Clarke did not refer to the word alight. He confirmed however that, if the incident had happened, it would have been appropriate to raise it with him. He told the Tribunal that the first time he learned of this word (and the controversy surrounding this) was when he received the interview notes of the grievance (in Mr White’s notes on page 159 which was sent to the Claimant on the 4 December 2017 see below at paragraph 62).

29 After the review meeting came to an end, it was agreed that the discussion that ensued in the control room was confrontational and Ms Clarke said that she became distressed and was crying. At that stage Mr Tenten got involved.

30 The Tribunal heard evidence from Mr Wills to suggest that there was a discussion in front of him where the Claimant asked Ms Clarke to repeat what she had said to him in the review meeting. The Claimant did not mention in his statement that he had asked Ms Clarke to repeat the words she had said to him in front of Mr Wills, it also did not appear in his grievance letter at page 105 and 129 of the bundle, however the Claimant’s evidence in cross examination was that this happened as confirmed by Mr Wills. Mr Wills was the only person who stated that the Claimant had asked Ms Clarke to repeat what she had said in the review to him and she did; this was not consistent with the contemporaneous documentary evidence. The Tribunal find as a fact that the subsequent exchange that was alleged to have occurred before Mr Wills was inconsistent and was not supported by any contemporaneous evidence. The grievance made no reference to Ms Clarke repeating the alleged comment in front of Mr Wills. The Tribunal noted that on page 105 of the bundle (of the grievance) a reference is made to Mr. Wills in relation to a discussion after the review meeting where the Claimant asked Mr Wills if he could recall an incident where he had given wrong information due to a lack of command in the English language and he could not. The Tribunal felt that had he asked Ms Clarke to repeat the comment at that time to Mr Wills, this would have been included in the Claimant’s grievance. As it was not the Tribunal conclude that this evidence was unreliable.

Handling of the Claimant’s complaint against Ms Clarke.

31 The Claimant raised a concern about what was said to him by Ms Clarke with Mr. White and a meeting was arranged with Ms Clarke and Mr Tenten. The Tribunal heard from Mr White who stated that he took both parties into separate rooms and spoke to them, he confirmed that notes were made by both managers, but the notes had been lost and Mr Tenten had since left the organisation, there were therefore no notes kept of these meetings. Mr White told the Tribunal that Ms Clarke was due to change shifts and after the shift changes the Claimant would not be working with her "for the foreseeable future, but there would be times when overtime and on-call arrangements would mean that they would have to work together" (paragraph 7 of his statement). The Claimant's recollection of what he was told was that he would not have to work with Ms Clarke again; this was disputed by Mr White. The outcome of the meeting was not confirmed in writing.

32 Ms Clarke accepted that one of the outcomes of the mediation, was that she should apologise to the Claimant and was sent for training in the Management of Conflict at Work. Ms Clarke accepted that she was 'happy' to give this apology however the Claimant did not feel that the apology was genuine. It was agreed that Ms Clarke did not need to refer to English being the Claimant's second language in the review meeting. Mr White accepted in cross examination that this comment was inappropriate and put it down to a clash of personalities; he did not feel it was due to the Claimant's race or ethnicity.

33 Mr White told the Tribunal that the dispute was in relation to the use of the word 'alight' and it was put to him in cross examination that the Claimant was not aware of the controversy surrounding this word; this was disputed by Mr White. Mr White was taken to the Claimant's grievance dated the 10 July 2017 and he confirmed that there was no reference in this document to the word alight. Mr White also denied that the Claimant complained that he was being denied training opportunities.

34 The Claimant went on annual leave for 28 days until the 17 April 2017.

35 Ms Clarke was no longer the Claimant's supervisor when he came back from leave.

36 The Claimant was informed by Mr Austin (his new supervisor) on the 23 June 2017 that he would be working a shift with Ms Clarke on the 25 June 2017; the Claimant raised a concern with Mr White. The Claimant stated that he would not work with Ms Clarke as acted she had acted in a discriminatory way following the review earlier in the year. He was told by Mr White in a telephone conversation on the 23 June 2017 he would have to work with Ms Clarke and would be liable face disciplinary actions if he refused. The Claimant told Mr White that he would rather resign than work with Ms Clarke. Mr. White told the Claimant that in his view the incident was 'closed'. Mr

White's handwritten telephone notes of this discussion were at pages 95-6. In the end Mr Austin took the shift. The Claimant in cross examination stated that he felt that this situation could have been avoided.

37 The Tribunal were taken to an email from Mr White to Ms Ryan of HR on pages 97-8 which provided a chronology of the incident; this was dated the 28 June 2017 and referred specifically to the misunderstanding of the word 'alight'. This document was produced by Mr White after the incident on the 23 June. The Claimant never had sight of this document before these proceedings. On the third day of the Tribunal hearing the Respondent produced a document referred to as R1 which referred to an incident where the word 'alight' was used, it was noted however that this document was not provided to the Claimant during his employment with the Respondent. The document appeared to corroborate that there was an incident some time in February 2017 when the Claimant and Mr Wills were on shift together where the word 'alight' was used in a bulletin, but no evidence that this document was produced to the Claimant or that a misunderstanding had arisen in the control room of the meaning of the word alight.

The Claimant's grievance.

38 The Claimant raised a grievance on the 10 July 2017 pages 103-7. At page 105 the Claimant alleged that Ms Clarke said to him that "**since English is not your first language, I did not assign you to attend any conference calls or operations centre huddles. I think that you may give them the wrong information due to your lack of command in the language".** The Claimant decided to pursue a grievance in July 2017 relation to the incident of the 17 March, because he was distressed at being asked to work with Ms Clarke who the Claimant felt had "racially discriminated towards me" (page 106). It was noted that the Claimant referred to discrimination a few times in his grievance and he asked that the matter be fully investigated and then addressed under the Respondent's Equality and Diversity Policy.

39 The Respondent's grievance procedure was at page 436 of the bundle, it stated that 'where practicable the invitation to the formal meeting should be sent within 7 calendar days of receiving the grievance. The time limit of 7 days appeared to apply to all stages of the process. There was a requirement for the process to be completed within 7 days. It was also noted at paragraph 2.6 that "any further delays along with the reasons will also be confirmed in writing".

40 The Claimant was signed off sick from the 12 July 2017 until 2 August 2017 with work related stress.

Mr Omer's relationship with Ms Clarke

41 The Tribunal noted that the evidence in support of the less favourable treatment in relation to the Claimant's opportunity to act up were at pages

113A-B of the bundle (dated the 24 July 2017) which was a complaint made by Mr. Omer about Ms Clarke's communication with him about him attending conference calls. It was noted that Mr Omer at the time was not a probationer as he had been a permanent member of staff for 3 years. He complained that Ms Jaskiewicz had acted up 9 times and in comparison, he had only acted up on 2 occasions during the same period. He complained that he had been denied an opportunity and was being undermined by Ms Clarke when she challenged him about attending a conference call. it was accepted that after this incident, Ms Clarke apologised and accepted that she had not taken on board his feelings as she believed that he was not interested in undertaking this duty (pages 113B-C of the bundle). Mr Omer gave evidence to the Tribunal and he was taken in re-examination to his email in the bundle at page 142E dated the 2 January 2015 where he complained about Ms Clarke's "strong personal views regarding race religion and immigration" and complained that he felt uncomfortable and alienated by the discussions that took place. He stated that he had felt this way for the last couple of months. The Tribunal therefore noted that this was not the first time that Mr Omer had cause to complain about Ms Clarke's treatment of him.

42 It was put to Mr Omer in cross examination it was Ms Clarke's evidence that he had a good relationship with her, this he denied. The Tribunal find as a fact that his evidence was credible on this point and supported by contemporaneous documentary evidence and was preferred to that of Ms Clarke. He explained that in the first few weeks of becoming permanent he had a good relationship however he explained that the relationship deteriorated due to her firm views on race, religion, and immigration. He explained feeling alienated when he worked with her.

The Grievance Investigation

43 The Claimant was invited to a grievance meeting by a letter dated the 8 August 2017 (page 123-4 of the bundle), there was no explanation provided for the reason for the delay in calling the meeting or why the 7-day time limit had been exceeded as according to the procedures a meeting should have been called by the 17 July however the Tribunal accept that some delay was inevitable because of the Claimant's sickness absence. The grievance policy at page 437 made specific reference to the notes taken of the witnesses being disclosed to the aggrieved person. The grievance procedure also stated that the outcome of the grievance should include the information that had been taken from the witnesses. There was no reference to the need to keep the notes confidential or to withhold them from the aggrieved person. The Tribunal noted that some of the witnesses were given anonymity which meant that the Claimant was unable to see the evidence that had been gathered in connection with the investigation of his grievance. This the Claimant submitted was an act of victimisation.

44 The grievance meeting took place on the 21 August 2017 the minutes were on pages 127-132 of the bundle, the meeting was conducted by Mr Durowoju, there was a person from HR present (Ms Mehet). The Claimant stated in the meeting that Ms Clarke was unsupportive of him attending any meetings. He referred to the incident on the 19 January 2017 and to what he perceived to be Ms Clarke's increasingly negative attitude towards him. He gave his account of the events of the performance review meeting and he referred to Ms Clarke's failure to book him on to any training courses referring specifically to two courses Presentation Skills and Valuing People (which was a course for new starters but the Claimant was not booked on to the course until May 2017). He stated in the grievance hearing that the first time Ms Clarke had raised any concerns about his proficiency in the English Language was in his performance review, but he stated that she was unable to give any examples save for saying that there was an incident involving Mr Wills. He then went on to explain his concern about being instructed to work with Ms Clarke and explained that he found the situation deeply distressing and he found Ms Clarke to be very aggressive and intimidating.

45 The Claimant asked that Mr Omer and Mr Nadeem be interviewed, he told the Tribunal in cross examination that he wanted Mr Nadeem to be interviewed because he was of a similar background to him and he had been managed by Ms Clarke. After the interview the Claimant emailed Mr Durowoju on the 23 August 2017 (page 218 of the bundle) asking him to interview Mr Valcent and Mr Wills, he stated that both were off sick but happy to be contacted. The Claimant provided further information to Mr Durowoju by an email dated 3 September 2017 (page 144 of the bundle).

46 Mr Wills gave evidence to the Tribunal and he confirmed in cross examination that he was interviewed over the telephone and the interview was 'quite lengthy'. He confirmed in the interview that he was a witness to the incident on the 17 March. There were no notes available of this interview however he accepted that the precis of the thrust of the interview was correct, that in his view Ms Clarke did not have "all the relevant experience or expertise to act as a supervisor".

47 Mr Omer was interviewed as part of the grievance investigation on the 7 September 2017 (see page 151 of the bundle). He confirmed that he felt that Ms Clarke had an issue with ethnic minorities and she held "strong opinions on race, religion and immigration". He denied that he had a good relationship with her in 2017 stating that it deteriorated in 2015 (see above). He complained that he had not been given a chance to cover as acting supervisor, he also reported that Ms Clarke could be quite aggressive to him in front of other team members "but her attitude changed when white members of staff were present". Mr Omer confirmed in cross examination that he had raised a concern about Ms Clarke failing to allow non-White staff the opportunity to progress and confirmed his concerns were raised with Mr

White and his Deputy Mr Chris Smith. Following escalating his concerns, he received an email from Ms Clarke apologising (page 113B-C of the bundle see above at paragraph 41).

48 Ms Clarke was interviewed on the 8 September 2017 (pages 155-8 of the bundle). Ms Clarke accepted in the interview that she had said to him that she accepted that "mistakes could be made as English is his second language". The minutes reflected that Ms Clarke felt the Claimant acted 'supercilious' towards her and never spoke to her in the same way that he spoke to men. There was then a discussion in the meeting and Mr Tenten suggested that there could be cultural difference between the Claimant and Ms Clarke to explain the way that he communicated with her. Ms Clarke indicated that she intended to raise a grievance against the Claimant as in her view he had "on occasions been hostile and abusive [towards women in the department] in a sexist way". No details were given of when this was alleged to have taken place or what had occurred. Although the Claimant complained in his grievance that he had not been nominated for training courses or for developmental opportunities, there appeared to be no discussion with Ms Clarke on this point, but she provided an email in her defence (see above at paragraph 23). The Tribunal take this to be the email referred to above.

49 Mr White was interviewed on the 11 September 2017 (pages 159-164 of the bundle). It was noted in Mr White's interview he stated that he was aware that Ms Clarke "had strong views and would gladly express them". When asked by the Tribunal what views he was referring to he stated that she was no 'shrinking violet' and she was not afraid to challenge management but was unable to give the Tribunal any specific examples. The Claimant first saw this document on the 4 December 2017.

50 Mr Austin was interviewed on the 21 September 2017 (pages 176-7 of the bundle), he confirmed that he was aware that the Claimant had raised a grievance and he knew that the issue was "affecting his concentration". He stated that he had worked with the Claimant prior to taking over and this was when they were dealing with a fire in the Blackwall tunnel, he stated that he was so impressed with the Claimant that he nominated him for a Bronze award. Mr Austin confirmed that he had no concern about the Claimant's communication skills. Mr Austin was asked if he had any concerns about the Claimant's attitude towards women and he replied he did not and noted that the Claimant had been "pleasant and courteous" when women had been in the control room.

51 Mr Austin's evidence to the grievance investigation did not appear to support Ms Clarke's view of the Claimant. He did not corroborate her evidence that the Claimant had been hostile and abusive to women and the Tribunal on the balance of probabilities conclude that Mr Austin's view was on balance more likely to be accurate. The Tribunal conclude that the view of two independent witnesses (Mr White and Mr Omer) was that Ms Clarke was no shrinking

violet and was able to challenge others, it was inconceivable that had the Claimant acted in this way she would not have challenged him at the time, especially considering that she was his supervisor at the relevant time.

52 Ms Jaskiewic was interviewed on the 18 September 2017 (page 175-6 of the bundle) and Ms Williams on the 15 September 2017 (page 163 of the bundle).

53 There was no evidence to suggest that Mr Durowoju attempted to contact Mr Valcent or Mr Nadeem, as we did not hear from him we heard no explanation as to why this was.

Grievance outcome report.

54 The report was in the bundle at pages 178 to 191 dated the 26 September 2017. Mr Durowoju explained the reason for the delay in completing the report was due to annual leave and sick leave (page 181 of the bundle). He concluded at paragraph 1.6.6 that the comment the Claimant alleged Ms Clarke had made was "*very discriminatory in nature considering AK has never demonstrated either verbally or in writing any lack of command of the English language*". When Ms Clarke was taken to this quote in the report, she again denied saying it. In the report under the heading conclusions Mr Durowoju stated that the statement "*itself is discriminatory*" and then commented that *"there is no evidence that during his time in LSTOC, AK does not have a good grasp of the English language. I can confirm that during my interview with him, it was clear he is very articulate, and I have no reason to doubt his effective use of the English language*".

55 Mr Durowoju was critical of management for failing to confirm the outcome of the agreement in writing that the Claimant would not be working with Ms Clarke again. He concluded that in the light of this agreement it was understandable that the Claimant would react in the way that he did. He stated that in the absence of any verifiable evidence of what was discussed, it was difficult for him to agree that the Claimant should be taken through a disciplinary hearing for refusing to work with Ms Clarke.

56 Mr Durowoju made several recommendations (page 188 of the bundle) including that management need to "*be made aware of the need to accurately record complaints against any member of staff and follow up any decision in writing to both the complainant and the accused*". It was also recommended that appropriate training be given to supervisors in setting objectives, performance management and performance review conversations. Mr Durowoju concluded in his draft letter at pages 190-1 dated the 28 September 2017 that there had been no breach of the Equalities Policy. It was concluded that it was reasonable for the Claimant to refuse to work with Ms Clarke in the light of the undertaking made by Mr White that he would not have to work with Ms Clarke, however this undertaking was rescinded going forward. It was also concluded that the issue that arose on the 17 March 20717 had been dealt

with by management in line with TfL policy and appropriate action had been taken at the time. It was concluded that after this incident there had been no evidence that Ms Clarke had demonstrated any discriminatory behaviour towards the Claimant or any other person. This letter was never sent to the Claimant. The Tribunal were told that Mr Duowoju left, and Mr O'Conner was assigned to take over the case and we saw an email confirming this dated the 17 October 2017 (page 195 of the bundle).

57 The Claimant chased up the outcome of the grievance on the 2 October 2017 (page 252), Ms Mehet replied saying that the 'report is almost finalised'; the Claimant then chased up the grievance outcome on the 10 October and the 3 November saying that *"the situation is affecting my work ability and causing me undue stress*". Ms Mehet replied to inform the Claimant that this matter had been passed to Mr O'Connor and reminded the Claimant of the services that occupational health could offer. The Tribunal noted that the Respondent did not appear to keep the Claimant informed of the delay or the reason for it, this appeared to be a breach of the grievance policy (see above at paragraph 39), which provided at all stages for a 7 day turnaround, it was noted that it had been 5 weeks since the report had been finalised by Mr Durowoju.

58 Ms Mehet emailed Mr O'Conner asking to meet and informing him that a meeting needed to be arranged with Ms Clarke for her to "elaborate on her mitigation" (page 211 of the bundle dated the 2 November), Mr O'Connor referred to this as Ms Clarke's counter grievance (paragraph 6 of his statement). Mr O'Connor noted that the Claimant had asked for a number of witnesses to be interviewed (Mr Valcent and Mr Nadeem) and he gave a number of reasons in his statement as to why he decided not to interview them. In outline he concluded that as they did not witness the event, they had to nothing to add. He also decided not to interview Mr Wills even though the interview notes taken had gone missing, he was content to rely on comments made in Mr Durowoju's draft document.

59 The Tribunal noted that a decision was taken to interview Ms Williams and Ms Jaskiewic, who also were not witnesses to any of the alleged acts. It was put to Mr O'Connor in cross examination that he should have interviewed the Claimant's addition two witnesses and he replied *"If I knew I would be sitting here I would have interviewed everyone. I used my best judgment. I approached it dispassionately and, on the evidence*". The decision not to interview the Claimant's witnesses was a disadvantage to him. Mr O'Connor's evidence to the Tribunal was candid and he accepted that in hindsight he should have interviewed everyone. Although his approach was not best practice or thorough, there was no evidence to suggest that this was a detriment because the Claimant had raised a complaint of discrimination.

60 The first time Mr O'Connor contacted the Claimant was on the 23 November 2017 (page 263 of the bundle), when he emailed him with information that his grievance outcome would be available on or before the 1 December 2017

however this was then delayed because he "*needed to confirm one point in relation to your grievance*". Mr O'Connor was asked in cross examination whether he carried out any further investigations into the issues raised by the Claimant in relation to the claim that that he was denied the right to attend huddles and he replied that he felt he had enough information. He confirmed to the Tribunal that after the grievance was assigned to him, he conducted no further investigations therefore it appeared to be inaccurate to state that the outcome of the grievance had been delayed due to a need to deal with an outstanding issue. It was noted by the Tribunal that the initial grievance report was dated the 26 September 2017 and there appeared to be no good reason for the subsequent two-month delay in conveying the decision to the Claimant.

61 It was the Claimant's case that failing to provide him copies of the statements of Ms Williams, Ms Jaskiewic and Mr Austin was victimisation. Ms Mehet told the Tribunal that the reason why the statements were withheld was because the witnesses expressed a desire for confidentiality; she also decided that the notes of Mr Omer should not be shown to Ms Clarke. The Claimant accepted that this had been done at the request of the witnesses but indicated that his concern was that the witnesses that he had put forward had been interviewed. The Claimant told the Tribunal that none of the witnesses that he suggested should be interviewed had requested that their notes be withheld from him therefore there appeared to be no good reason for withholding them.

62 The Tribunal saw the outcome letter which was dated the 30 November but not sent to the Claimant until the 4 December 2017 (pages 260-2 and 267). Attached to the letter were the statements of Mr. White, Ms. Clarke and his own meeting notes. The outcome letter was significantly different to the draft letter written by Mr Durowoju however the decision was the same in that his grievance was not upheld. In the decision Mr O'Connor accepted that it was not Ms Clarke's intention to cause offence but accepted that she could have handled it more sensitively. It was noted that no criticisms were made of the management's handling of the situation (apart from suggesting that it would be good practice to communicate the outcome in writing), this was a major change in the findings and recommendations of the original report, which had been openly critical of management actions. Another major difference in the outcome was that Mr O'Connor made no reference to the finding and conclusion that the comment was found to be "*inflammatory and at worst discriminatory*" even though he had conducted no further investigations and had not had the benefit of seeing the live evidence from those interviewed.

63 Mr O'Connor accepted in cross examination that the comment made by Ms Clarke on the 17 March was racist (even though he did not say this in the outcome letter). Mr O'Connor accepted in cross examination that he did not interview Mr Valcent or Mr. Nadeem despite being aware that the Claimant had asked for them to be interviewed. He accepted that in hindsight he should have interviewed everyone and accepted that they could have brought

something to the table. Mr O'Connor accepted in cross examination that he did not investigate Ms Clarke's failure to allow the Claimant to attend huddles, and he stated that "I looked at in the round" and stated that he would not expect anyone in their probationary period to undertake this role. There was no corroborative evidence that supported this. He also added that he did not feel he needed any more information.

64 The Claimant went off sick on the 7 December 2017 with work place stress. It was noted that he had previously indicated to Ms Mehet that the significant delay was causing his stress in November 2017.

65 The Claimant asked to meet with HR before he put in an appeal against the outcome by an email dated the 5 December 2017 (page 267 of the bundle) but it appeared that no meeting was arranged.

The Claimant's appeal.

66 The Claimant submitted his appeal on the 11 December 2017 (page 274-7). In outline the Claimant complained that there had been an inadequate investigation of his complaints and he challenged why the outcome had accepted Ms Clarke's version of the events and not his. He also felt that the issue relating to denial of training and acting up had not been addressed in the report. The Claimant ended his grievance by understanding the need for confidentiality but asked for confirmation that all his witnesses had been interviewed (including Mr Valcent, Mr Nedeem, Mr Page, Mr Tenten, Mr Wills and Mr Omer).

67 The Claimant was invited to a grievance appeal hearing on the 20 December 2017 (page 279-80 of the bundle) by Mr Owen (who did not give evidence to the Tribunal).

68 Mr Smith requested an occupational health referral for the Claimant on the 9 January 2018 (page 296) as the Claimant was still off sick. In this referral it was stated that "*this issue has now been resolved and the concluded outcome has been communicated to Mr Khawaja*". The specific question asked was "*Is the Claimant now fit to return to work now that the work place grievance has concluded and delivered an outcome?"* The referral form also asked whether reasonable adjustments were required to assist the employee to return to work and if he was not fit for substantive duties whether he was able to undertake temporary alternative duties.

69 At the time this OH form was completed the Claimant had not received the outcome of the grievance appeal therefore it was appeared to be inaccurate to state that the issues had been resolved.

70 The occupational health advice was via email from Dr Chavda was at page 303 dated the 15 January 2018. The email was written without speaking to

the Claimant and without seeing his GP records. The first three sentences of this brief email set out the facts that were included in the OH referral. It provided an opinion that "*as the workplace issues are addressed, I would expect that the Claimant can resume his full duties"*, it was noted that this was expressed as a mere expectation. The email indicated that there was no information in the referral about any barriers to returning. The recommendation was to *"discuss a return to work with him directly*". The Claimant disputed that at the date that this advice was produced all the workplace issues had been addressed as he still had not received the grievance appeal outcome.

71 The Claimant was sent the appeal outcome on the 19 January 2018 (page 304 -7 of the bundle). At page 306 in relation to the Claimant's appeal point that his witnesses were not interviewed it was concluded "*You raised a number of witnesses who you felt should have been interviewed, but whose statements you have not been provided – this understandably led you to conclude they had not been interviewed. I would confirm to you that these witnesses were interviewed as part of the investigation, however the initial Grievance Chair had committed to confidentiality of those statements. This is something I consider should not have happened, but as you will appreciate given the undertakings made to those members of staff it is difficult for me now (sic) release those statements*". This statement was misleading for several reasons. Firstly, the Claimant had sought confirmation in his appeal that his six witnesses had been interviewed (page 277 of the bundle) and in fact only two had been interviewed. It was false to state that his witnesses had been interviewed. It was also false for Mr Owen to say he had read the statements because for five of his six witnesses either they had not been interviewed or (in the case of Mr Wills) no notes had been taken of the interview. The third false statement was that all statements were covered by a confidentiality assurance however this only covered three witnesses and none of those promised confidentiality were the people that the Claimant had asked to be interviewed. The Claimant was misled and disadvantaged by this significant misrepresentation of the facts.

72 The Tribunal heard no evidence about the conduct of the appeal and Mr Owen did not give evidence to the Tribunal. We find as a fact that the Claimant was subjected to a disadvantage we also conclude that the reason the Claimant was subjected to a disadvantage was because he had done a protected act. The Respondent was unable to provide a non-discriminatory reason for misleading the Claimant in response to his questions raised in his appeal about the conduct of the investigation. There was no evidence to suggest that Mr Omer had objected to the Claimant seeing a copy of his interview notes and no issue of confidentiality had been raised by Mr. Wills. We conclude therefore on the balance of probabilities and on the evidence before us that the Claimant was subjected to a detriment because he had raised a complaint of race discrimination against the Respondent.

73 It was put to the Claimant in cross examination that the grievance was complete and him being unhappy with the outcome was not the same as saying he was unable to return to work and the Claimant disputed that this was the case.

74 The Claimant sent in another sick note on the 30 January 2018 (page 308 of the bundle) signing him off for another 4 weeks with work related stress.

75 The advice from Ms Mehet to Mr O'Connor about managing the Claimant's sickness absence (page 310 dated the 1 February 2018) was as follows: "*I think you need to go back and say that we have medical advice from OH to confirm that he is fit to return to work as his workplace issues have been resolved. Explain to him that the advice from OH takes precedence over the advice from his GP as they are our occupational specialists and understand the role he does when providing their advice. Explain that you expect him to return to work as of his next shift and that if he fails to attend it will be treated as unauthorised absence and he may face disciplinary action"*. The Tribunal noted that the OH advice was dated the 15 January 2018 (see above at paragraph 70).

76 It was noted that the OH advice only expressed an expectation that the Claimant would be fit to return however the presentation of another sick note indicated otherwise. There was no mention made by Ms Mehet of the need to have a return to work discussion with the Claimant to identify barriers to him returning to work, as advised by OH, this appeared to be a significant omission in the steps suggested by OH to facilitate an early to work.

77 Mr O'Connor contacted the Claimant by telephone on the 2 February 2018 and the minutes of this call were seen on page 318. The Tribunal find as a fact that Mr O'Connor conducted the call following almost precisely the advice that was given to him by Ms Mehet the day before (see above). The Tribunal further conclude that the minutes reflected that the tone adopted in the call appeared to be abrasive. Mr O'Connor threatened the Claimant with disciplinary action if he failed to return to work by the day shift on the 7 February 2018, despite being signed off sick. The Tribunal find as a fact that the clear intimation in this oral exchange, as confirmed in the email note, reflected that Mr O'Connor did not believe that the Claimant was genuinely sick, despite having GP fit notes that indicated to the contrary. The Claimant was instructed that he must return to work, contrary to the advice given to the Claimant by his GP (who stated that the Claimant was absent due to wok related stress). The Tribunal find as a fact that OH had given only generic advice without having seen or spoken to the Claimant and based their advice on a misunderstanding that the grievance procedure had, at that time, been resolved. At the time of this phone call, the Claimant had not been called to a meeting to discuss his absence or to discuss any barriers to returning to work which was part of the OH advice provided to management on the 15 January 2018. This was a detriment. However, when it was put to Mr O'Connor that he

took this approach because the Claimant was being difficult he denied this saying that "we have umpteen grievances and they are dealt with the same". The Tribunal find as a fact that the subjective view of Mr O'Connor was that all grievances were all handled in this way, irrespective of their content. There was no consistent evidence to suggest that he adopted this approach because the Claimant had done a protected act.

78 The Claimant emailed Mr O'Connor on the 6 February 2018 (page 320 of the bundle) informing him that he had only spoken to OH once and he commented that he "*doubt if they have a good idea of my situation and the related proceedings*". He stated that he had been seeing his GP regularly and had followed their advice. He stated that for this reason, he preferred to follow the advice of his GP. The Claimant stated that "*You did make it clear that this will lead to disciplinary action from your side but I fear that I may be risking my own safety as well as that of the general public who are affected by my work if I am made to follow your order*". The Claimant told the Tribunal in cross examination that at this date he was unwell, and the situation was affecting him personally and the stress was taking a toll on him. Mr O'Connor was taken in cross examination to this email and it was put to him that the Claimant was acting reasonably by following his GP advice and he replied "*we are directed to take advice of OH over the GP. There is a complaints procedure*". In Mr O'Connor's view the Claimant was disregarding OH advice. The Tribunal conclude on the balance of probabilities that the Respondent adopted a rigid and formulaic approach to sickness absence due to work related stress that was perceived to be linked to the conduct or the outcome of a grievance. Mr O'Connor's evidence corroborated that this approach was followed in all cases. The Tribunal find as a fact that this appeared to be a policy that was followed in all cases; there was insufficient evidence to suggest that the harsh approach adopted in this case was a detriment because the Claimant raised a grievance alleging discrimination.

79 Ms Mehet replied and failed to engage with the Claimant's objections, her response was seen on page 319 dated the 7 February 2018 stating that as OH "understand the nature of your role" their advice "takes precedence" over the advice of a GP. She advised him to take it up with OH.

80 The Claimant followed this advice and wrote to Dr Chavda (see page 319 of the bundle) making it clear that "*I fear for my safety if I return to work at this point as TfL have failed to address my concerns for racial discrimination and my ex managers aggressive behaviour towards me*". He copied this to Ms Mehet. In Dr Chavda's reply she stated that he should book another referral as she could not arrange this herself. The reply to the Claimant's complaint was seen at page 344 dated the 2 March 2018 and was copied to Mr O'Connor and Ms Mehet. In the response Dr Chavda stated that she was only giving "*general advice to your managers and HR on how to deal with work related issues (as it is not strictly medical), I advised that when work issues are resolved, then it is likely that you would be able to return to work*". She

went on to state that "*Following our discussions, you stated that the referral was incorrect i.e. that your work issues were not resolved and there were a no (sic) of issues that I have not been made aware of. Therefore, I recommend to you that you discuss this again with your manager and consider a re-referral as I cannot arrange to see you of my own accord*". Ms Mehet was copied in to these emails but refused to arrange a re-referral suggesting that the Claimant follow the complaints procedure (page 345 dated the 26 February 2018) stating that "*I am unsure why you have been advised that another referral needs to be made to OH*". This response did not answer the Claimant's question, nor did it engage with the specific concerns raised in his email.

81 Mr O'Connor spoke with the Claimant on the 14 February 2018, in this discussion the Claimant indicted that he did not agree with the advice given by OH and he had raised a complaint and had requested a consultation in person. The Claimant was recorded to have said that "*he's not happy with the way his recent grievance was dealt with by TfL, that he fears for his safety and is not comfortable coming back to work to LSTOC as he does not feel safe*". In the conversation the Claimant referred to ACAS.

82 There was a further telephone conversation between the Claimant and Mr O'Connor on the 23 February 2018 (page 336 of the bundle) where they discussed his absence. Mr O'Connor asked the Claimant about when he could return to work, and the Claimant was recorded to have said that he could not give an answer to this question as *'he feels he's been discriminated against and been subject to aggressive behaviour from his supervisor'*. The minutes showed that Mr O'Connor asked the Claimant what he expected the company to do and the reply was '*he was not happy with the outcome of the grievance and he feels that TfL have not done him justice'*. The Tribunal noted that the focus of the Claimant's dissatisfaction appeared to be the grievance outcome. He confirmed that ACAS had been in touch. It was confirmed that there would be weekly calls and Mr O'Connor agreed to speak to OH and to take any necessary steps.

83 The Tribunal saw the Claimant's email to Ms Mehet dated the 23 February 2018 which confirmed that he had spoken to Dr Sheetal from OH, he told her that he felt that it was "*important that occupational health make a decision about my health after meeting with me. Please advise?".* The Tribunal note that this was a specific question put to Ms Mehet and she did not appear to respond. Ms Mehet's evidence to the Tribunal was that the Respondent gave precedence of the OH report over the GP report and when someone was referred to OH they asked them several questions, they can ask that the employee is referred or alternatively that the employee if they are unhappy with the advice can follow the complaints procedure. In her view that was the process that the Respondent followed. There was no evidence to suggest that the process followed by Ms Mehet in this case was a detriment because the Claimant had raised grievance alleging discrimination and had indicated he was going to proceed to Tribunal. Her approach was again formulaic and

procedural and failed to engage with the Claimant's specific concerns. The Tribunal were satisfied that this impersonal and rigid approach would have been applied to anyone who was off sick with workplace stress after a grievance process had been finalised, irrespective of whether the grievance included complaints of discrimination (as by this date the Claimant had received the appeal outcome).

The Disciplinary Fact Find Meeting

83. The Claimant was invited to a fact find meeting on the 9 March 2018 to discuss his absence from work; the Tribunal saw the invitation to the meeting on page 355 sent by Mr O'Connor. HR provided Mr O'Connor with a script to follow in the meeting (page 356 of the bundle). The questions to ask the Claimant included what issues did he feel had not been resolved and if there were any other issues at work affecting him, this appeared to comply with the advice given by OH that a conversation should take place about any barriers to him returning. The minutes were on page 359-60 and they reflected that they discussed his absence from work and it was confirmed that the Claimant had been off sick from the 7 December 2017 to the 9 January 2018 and then from the 30 January 2018 to date. The Claimant was told that the grievance was resolved; the Claimant did not agree that this was the case. The Claimant told Mr O'Connor that he had informed Dr Chavda that "*he doesn't feel safe*" and the concerns he had raised in the grievance had not been addressed. He also explained that "*he feared for his mental and physical health as Susan was aggressive towards him*" and he repeated his concerns of discrimination and felt that they had not been addressed. He also informed the meeting that he had contacted ACAS. The Claimant asked for a further referral to OH. The Tribunal find as a fact that the conduct of the meeting was not a detriment to the Claimant. The meeting was an opportunity for the Claimant to discuss his concerns with the Respondent possibly with a view to returning to work. This meeting complied with the advice given by OH and had the potential to resolve matters and to facilitate a return to work.

84 After the meeting Mr O'Connor sent the notes to the Claimant (13 March 2018 page 365), the Claimant's comments were at page 366 of the bundle.

Second Protected Act.

85 The Claimant presented his ET1 on the 6 April 2018. The Claimant confirmed in cross examination that he did not have to work with Ms Clarke after April 2017. The claim was presented one year after the last act of alleged direct discrimination. He told the Tribunal in answers given in cross examination that he was not aware of Employment Tribunals even though he ran his own business. He also denied that he was aware of time limits that applied to cases of discrimination. He explained that the reason he delayed taking any action was because he wished to exhaust the grievance procedure before presenting a claim. He stated that he did not delay after learning of the appeal outcome because he contacted solicitors in February and on the 5 February

2018, he contacted ACAS. There was no evidence of any delay after the outcome of the grievance appeal had been delivered.

Policies and Procedures relevant to the issues about payment of sick pay.

86 The Tribunal were taken to the Attendance at Work Policy paragraph 5.1.9 which referred to the circumstances where sick pay could be stopped (see page 447). It stated that an employee is taken to be on unauthorised absence if one of the circumstances set out below apply and (the relevant provisions) were:

86.1 Failure to complete a working day or shift without authority;
86.2 Found to be acting in a way incompatible with doctor's advice and
86.3 Failure and/or refusal to attend return to work meetings and review meetings without good reason.

If any of the above situations were found to apply it would lead to sick pay being stopped. This list at page 447 of the reasons why sick pay could be stopped was not stated to be a list of examples or a non-exhaustive list. The examples referred to above appeared to be the only circumstances (relevant to the facts of this case) where the Respondent could stop sick pay and to take disciplinary action.

87 The Tribunal were taken to paragraph 20 of the Claimant's contract at page 73 where it stated that if any payment is due to the Employer from the Employee "the Employer may recover any amount due …by deducting it from your salary"

88 The Tribunal were taken to page 464A to the guidance on Company Sick Pay Scheme which stated that eligibility for Company sick pay was at the Company's discretion. At page 464B it stated that to retain the right to be paid company sick pay "*employees must follow the absence reporting process as outlined in the Attendance at Work Policy*". If the employee failed to comply with the Attendance Policy provision or the if the employee's absence was attributed to their own misconduct, this "may" lead to forfeiture of sick pay. The Tribunal noted that the Respondent had some discretion whether sick pay would continue to be paid under certain circumstances but there was no mention in the policy of the ability to back date the decision to pay sick pay and to claw back contractual sick pay already paid.

89 The Tribunal were also taken to page 466F of the bundle which was the Department for Work and Pensions Guidance which dealt with whether an employer can disregard a GP's fit note. It stated that a GP's statement is "strong evidence of incapacity unless there is evidence to the contrary". It then went on to deal with the situation of where there was a difference of opinion between a GP and OH and it advised that any such dispute should be

"resolved by communication". It also went on to state that the employer can make decisions about what it considers to be the most appropriate evidence. The Tribunal note that even though there was a dispute on the evidence in this case, Ms Mehet refused to allow the Claimant to be re-referred to OH to resolve any dispute. OH had not had the benefit of a consultation with the Claimant and they had not seen his medical records. They had also not provided 'medical evidence', it was described as advice to HR. Although there was a dispute on the way forward, the GP and OH reports had a different focus and served a different purpose, one giving advice on the Claimant's state of mental and physical health and the OH report providing advice on how to manage the Claimant going forward.

Reasons given for why the sick pay was stopped.

90 It was Ms Mehmet's evidence at paragraph 35 of her statement that the Claimant's sick pay was stopped because it was her view that he was acting in a way that was "incompatible with OH advice". It was noted that this was not what the policy said, there was no evidence that the Claimant had acted contrary to any doctor's advice that had been given to him. It was the consistent evidence before the Tribunal that the Claimant was following the advice of his GP. The Tribunal also note that the Claimant had not received advice from OH. When it was put to Ms Mehet that the Claimant was acting in accordance with his GP's advice, she accepted that he was.

91 In re-examination when asked for the reason why sick pay was not paid, Ms Mehet said it was the continued failure of the Claimant to return to work once the Respondent had formally resolved the grievance. She also told the Tribunal that his sick pay was stopped because of his failure to attend return to work meetings but accepted they only happened once they returned to work. It was also found as a fact above that the Claimant attended a meeting on the 9 March to discuss his sickness absence. Both Ms Mehet and Mr O'Connor accepted that they had not invited the Claimant to attend a return to work meeting therefore he could not have failed to attend. The Tribunal conclude that there can have been no failure of the Claimant to attend a meeting he had not been invited to. The Tribunal find as a fact that the reason for stopping the Claimant's sick pay was not for one of the reasons relied upon in the Attendance Policy set out above and the Respondent appeared unclear as to why his contractual sick pay was stopped.

92 The Tribunal further conclude that the decision to stop the Claimant's sick pay (and to backdate the decision to do so) was a detriment to the Claimant. The Tribunal considered the reasons given by the Respondent for stopping his pay and the reasons given appeared to be contradictory and inconsistent. The Tribunal have found as a fact that OH had not given the Claimant advice, the advice given was generic advice to HR and not provided with the benefit of seeing the Claimant or his medical records. The advice was provided to HR not to the Claimant. OH confirmed that their advice was 'not strictly medical'. There was no credible evidence to suggest that the Claimant had failed to

accept advice from OH. There was also no evidence that the Claimant failed to attend return to work meetings as no such meeting had been called. The Tribunal note that the Claimant had attended a meeting on the 9 March to discuss his absence. The third reason was that the Claimant had failed to return to work after the completion of the grievance. This was because he was signed off sick. The only permissible reason that fell within the Attendance Policy for concluding that the Claimant was on an unauthorised absence was that he had failed to complete a working day or shift "without authority", however the absence was covered by a valid fit note and there was no evidence before the Respondent to suggest that the reason cited on the sick note was not genuine.

93 Mr O'Connor's report was at page 387 dated the 12 April 2018. The allegation was that the Claimant "[*failed] to abide by company sick pay rules, by refusing to accept the advice contained within OH memo dated 15 January 2018*". The report concluded that the Claimant was found to be in breach of the Attendance at Work procedure at section 5.1.9 because he was on an unauthorised absence because he *"failed and/or refused to attend return to work meetings and review meetings without good reason*". Ms Mehet confirmed that she approved Mr O'Connor's decision in the report to recommended that the Claimant be invited to a disciplinary hearing.

Communication of the decision to stop the Claimant's sick pay.

94 Mr O'Connor telephoned the Claimant on the 12 April 2018 at 11.35 (page 393) and he was told that his sick pay would be suspended. It was not clear if the Claimant was told in the phone call that the Claimant's sick pay would be suspended and backdated to the 7 February 2018 on the grounds that in their view "*the advice of OH takes precedence over the advice of his GP*". The report recommended that the Claimant face disciplinary action due to what they described as his unauthorised absence which they stated was "failure and/or refusal to attend work meetings and review meetings without good reason" (page 390). It was the Claimant's evidence that his sick pay was stopped shortly after he presented his ET1.

95 The Tribunal find as a fact and on the balance of probabilities that stopping the Claimant's sick pay was a detriment. We also conclude that on balance it was a detriment because he had done a protected act because the reasons given by the Respondent for stopping sick pay were not consistent with the facts before them and had been made before the completion of the disciplinary process and before the Claimant had an opportunity to respond to the allegations against him (or to provide medical evidence).

96 The Claimant was paid his full salary until the 31 March 2018 but due to the Respondent's decision to retrospectively stop his sick pay, it was the Respondent's view that by that date, he owed them the sum of £6002.25.

97 The Claimant was invited to a disciplinary hearing on the 1 May 2018 (page 396) by a letter dated the 24 April 2018 from Ms Cooney, the offence was one misconduct (not gross misconduct). The reason the Claimant was called to a disciplinary hearing was due to his failure to abide by the company sick pay rules by refusing to accept advice contained in the OH memo dated the 15 January 2018 contrary to TfL's Attendance at Work Policy and Procedure section 5.19. The Claimant claimed that being invited to a disciplinary hearing was a detriment because of his protected acts.

98 There was no evidence to suggest that Ms Cooney's decision to hold a disciplinary hearing was a detriment because he had done a protected act. She was acting on the recommendation in Mr O'Connor's report and there was no evidence to suggest that she was aware at the time she invited him to a meeting that he had done a protected act as although the Claimant's grievance was referred to, there was no evidence to suggest that she was aware that allegations of race discrimination had been pursued. This allegation is not well founded on the facts.

99 The Claimant attended the hearing chaired by Ms Cooney who decided that before she could reach a decision, she would refer the Claimant to OH and he consented to this. The minutes were on page 402- 403. The Claimant accepted that this decision was the right step to take. The notes reflected that the Claimant told Ms Cooney that it was not possible for him to return to work because of the unjust outcome of his grievance and the "contrived biasness" of the Respondent that caused him to fear for his safety. The Claimant was also aware by this stage that some of his witnesses had not been interviewed despite assurances being given to the contrary by Mr Owen. The Claimant told Ms Cooney that he did not feel "mentally fit" to work in a safety critical environment. In the meeting the Claimant confirmed that he had applied to Mr O'Connor for an earlier relocation to get back to work.

100 The issue before the Tribunal was whether the decision to continue suspension of his sick amounted to a detriment. It was noted that Ms Cooney refused to reinstate his sick pay in the meeting. He referred in the meeting to the unjustified decision to stop his sick pay retrospectively and referred to starting the ACAS early conciliation process. The Claimant explained in the hearing why he felt unsafe to return to work because it was his concern that *"safety of tunnels and general public may be compromised*" and he felt highly vulnerable if he were left alone with Ms Clarke. Ms Cooney failed to reinstate the Claimant's pay despite his representations. This was a detriment to the Claimant and we conclude on all the facts that this was a continuation of the decision made by Mr O'Connor to suspend the Claimant's pay which we have concluded was a detriment because the Claimant had by this date, done two protected acts.

101 The Tribunal did not hear from Ms Cooney, so we were unable to identify her reason for failing to reinstate his sick pay in the hearing, after hearing his

representations. In the absence of any evidence in relation to the reason why sick pay continued to be suspended after this meeting, we conclude that it was because the Claimant had done two protected acts. We conclude that this is the case because the Claimant was able to provide a reason for his absence from work and there was consistent evidence to suggest that this had been causing him distress for some time. We refer above to the evidence of Mr Austin who confirmed in the grievance investigation that the grievance was affecting his concentration in September 2017 (see above at paragraph 50), this situation would not have been eased or ameliorated after the Claimant received the appeal outcome and after becoming aware that his witnesses had not been interviewed and he had discovered that Mr Owen had been less than honest with him. The Claimant also informed Ms Mehet that the significant delay in concluding the grievance process had added to his stress. This would have increased the Claimant's feeling that the Respondent had not acted fairly or even-handedly towards him during the grievance process. The Tribunal also note that this was a safety critical role and if the Claimant's view was that he felt that safety of the public would be adversely impacted, this was something that should have been investigated before concluding that the Claimant was on an unauthorised absence.

102 The Tribunal saw the OH report dated the 25 May 2018 (page 406-7 of the bundle) it was concluded that although the Claimant was fit to return to work, it acknowledged that there were barriers to him returning to his original role and referred to "*specific workplace issues*" and suggested that the Claimant was fit for "*alternative work*". The Claimant agreed that he was not fit to return to the same position and stated that this was affecting his health. This report was not a detriment to the Claimant. The conclusion reached was that the Claimant was fit for alternative work which was consistent with the Claimant's representations in the hearing where it was accepted that there were barriers to him returning to work. This advice appeared to be accurate and consistent with the facts before them. The Tribunal also took into account that the Claimant's comments on the report appeared to confirm that he agreed that he was not fit to return "to the role in the same position". This report was not a detriment.

The Claimant's resignation.

103 The Claimant resigned on the 27 June 2018 (page 408 of the bundle) giving one month's notice, he gave no reason for his decision in his letter. He confirmed in cross examination that he found out that the Respondent was considering alternative work after he put in his resignation.

104 Mr Owen replied to the Claimant's resignation on the 29 June 2018 (page 410 of the bundle) and commented that he felt that the grievance was still ongoing and was being dealt with by Ms Cooney, however this was incorrect as she was dealing with the disciplinary issues in relation to his failure to abide by the sick pay scheme. He referred to other options for roles within the

organisation. The Claimant replied that he was presently undergoing a disciplinary process and his grievance had been exhausted. The Claimant told Mr Owen that he had requested a relocation when talking to Mr O'Connor on the telephone, but his request was denied. He also stated that the suspension of his salary had further aggravated the situation. The Claimant ended the email by stating that he had exhausted all his options within TFL and had taken another work opportunity. The Claimant confirmed in cross examination that he received a job offer for a role in Pakistan in the middle of June and he told the Tribunal that he felt he had no option but to resign and take the role. The Claimant denied when it was put to him in cross examination that Mr White had stated that he had been told that the Claimant had always intended to return to Pakistan. The Claimant accepted that he was helping his family build a family home with his brother in Pakistan

105 The Claimant said that he resigned because his pay was stopped and due to how he felt. The Tribunal find as a fact considering the Claimant's oral evidence and his email sent on the 1 July 2018, conclude that he did not resign due to a fundamental breach or due to a final straw. We have found as a fact that the Claimant was aware that his salary had been stopped on the 12 April 2018. He did not treat himself as dismissed at that stage and he failed to take any action to reserve his rights. The Tribunal took into account that when his sick pay was stopped, the Claimant had the benefit of legal advice. He did not state that this was the reason or one of the reasons he resigned in his letter of the 1 July, he only suggested that he faced a difficult decision in respect of planning his future with his family and the suspension of his salary merely aggravated the situation but was not the reason he decided to resign. In the final paragraph of the letter he stated that he had taken another work opportunity and "*hence cannot continue with my work with TFL*". The Tribunal conclude that the reason he resigned from his position was that he had another role in Pakistan and he resigned to take up that role. The Claimant's claim for constructive unfair dismissal is not well founded on the facts.

106 The Respondent wrote to the Claimant reclaiming overpayment of sick pay of £1259.43 on the 10 August 2018 (page 412). It was put to the Claimant that this was just an administrative act, the Claimant denied this as this letter arrived after the preliminary hearing in this case. The Tribunal however saw no evidence to suggest that the administrative function of sending a letter asking for the Claimant to pay back salary, which they contend was an overpayment, was a detriment because he had done two protected acts. The Claimant provided no evidence to suggest that the person who sent the letter (or the person who gave the instruction to send the letter) was aware of the protected act. The burden of proof does not shift.

107 The Claimant conceded that he was owed 11 days annual leave (not 13), this accorded with Ms Mehet's evidence in her statement at paragraph 54. We conclude that this head of claim is well founded.

108 In relation to the Claimant's claim for wages, he confirmed that he was claiming the sum of £13,382.82. He was taken in cross examination to page 464A where it stated that sick pay was discretionary. The scheme provided that sick pay would "*normally be paid for a maximum of one year comprising of six months at full pay and six months at half pay in a rolling year*". The Tribunal have found as a fact that there was no power in the Respondent's Attendance Policy to withdraw sick pay retrospectively. We have also found as a fact that the decision to withdraw Company sick pay from the 12 April 2018 (backdated to February 2018) until the expiry of his notice period was not consistent with the limited reasons set out in the sick pay rules. There was no evidence that the Claimant had failed to follow the advice of OH as no advice had been given and there was no evidence he had failed to attend meetings as none had been called. As we have found as a fact that there was no power to stop the Claimant's contractual entitlement for the reasons given (and in the way they did) the Tribunal also conclude that there were no payments due to the employer therefore to deduct the payments from the Claimant's salary was a breach of contract and an unauthorised deduction.

The law

13 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.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

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

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

123 Time limits

(1) [Subject to [sections 140A and 140B],] Proceedings on a complaint within section 120 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.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment Tribunal thinks just and equitable.

(3) 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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

13 Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994

3 Extension of jurisdiction

Proceedings may be brought before an [employment Tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
(b) the claim is not one to which article 5 applies; and
(c) the claim arises or is outstanding on the termination of the employee's employment.

Submissions.

109 The Claimant produced written submissions, the Respondent produced a skeleton argument and provided oral submissions. They will be referred to as appropriate in our decision.

Decision

110 The unanimous decision of the Tribunal is as follows:

111 We first have to deal with the time point in relation to the claims for direct discrimination. The Claimant accepted in closing submissions that his claims relating to Ms Clarke are out of time. The claims of direct discrimination are one off acts and not continuing acts they are therefore out of time.

112 The Tribunal then must consider whether it is just and equitable to extend and in consideration of this we must consider the Claimant's evidence in relation to his knowledge of the time limits and of his right to claim in the Employment Tribunal. The Claimant told the Tribunal that he was not aware of the existence of Employment Tribunals or of the right to claim discrimination at the time he raised his grievance. The Tribunal accept the Claimant's evidence as being credible on this point. Although he ran his own business he would not necessarily have been aware of time limits in Tribunal unless he had been taken to Tribunal by one of his employees and he stated that he had not. The Claimant only became an employee in 2016 and it was

credible for someone who had only been an employee for a short space of time to be unaware of time limits in Tribunal. He said that the reason he delayed taking any action was to await the outcome of the grievance process; this process did not end until the 19 January 2018. The Tribunal consider that it was reasonable to do so. We also found as a fact that he pursued his claim expeditiously after that date. The Claimant sought legal advice in February and contacted ACAS on the 5 February 2018. There was no delay after the grievance appeal was delivered.

113 When considering whether it is just and equitable to extend time, the Tribunal also have to consider whether from the Respondent's point of view they are disadvantaged by allowing a claim to proceed out of time; the Respondent stated that they had been adversely impacted in respect of the cogency of evidence. There was no evidence before the Tribunal that the cogency of witness testimony was adversely impacted by the delay. The Respondent's witnesses could give clear evidence as to what happened in the review meeting. The Respondent was able to produce all relevant witnesses who gave clear evidence on all matters. The Respondent did not appear to be disadvantaged either in the production of witness evidence or when their witnesses were being cross examined, none said that the passage of time meant that their memories had faded, in fact they were all clear in their recollections. The Tribunal conclude that there was no disadvantage to the Respondent and the balance of prejudice would fall disproportionately on the Claimant were the discretion not applied to allow the claim to proceed out of time. We conclude that it is just and equitable to allow the claim to proceed out of time.

114 Turning to the first claim for direct discrimination (paragraph 2.1 page 35 of the bundle) in relation to the incident on the 17 March 2017. This incident is referred to above in our findings of fact at paragraph 24-27 and 38 (the grievance) above. We have concluded on the balance of probabilities that the evidence of the Claimant is preferred to that of Ms Clarke that the comment was made. The Tribunal also found as a fact above 54 that the grievance investigation concluded after interviewing all the relevant witness (the Claimant and Ms Clarke) that the comment was made, and it was, in the words of the original investigation officer to be "very discriminatory in nature". Although this was the finding of the original investigations officer, this was not included in the final report sent to the Claimant by Mr O'Connor. Ms Clakre accepted that she would not have said this to a White British person (see above at paragraph 26), there was sufficient evidence to show that this was less favourable treatment of the Claimant because of race. There was therefore sufficient evidence for the burden of proof to shift to the Respondent on this point. The Tribunal also took into account that the Respondent had an Equalities Policy, but no mention was made of this policy by any of the Respondent's witnesses and no one appeared to refer to receiving any Equalities training. We raise an adverse inference from this. As the Respondent was unable to show that this was in no sense whatsoever on that ground we find the Claimant's claim to be well founded.

115 The second allegation of direct discrimination is that Ms Clarke was

alleged to have said to the Claimant that she was not putting him forward for any control centre briefings or huddles because English was not his first language and he was not put forward for any training courses. We have made a number of findings above about this matter. We have concluded that Ms Clarke accepted that she did not put him forward for briefings and huddles but provided a number of reasons for this, firstly that the Claimant was at the time on probation and secondly he had not indicated that he interested in attending so she did not put him forward. The Tribunal took into account our finding of fact that Ms Clarke had made the comment about English not being his first language and we also concluded that she had failed to allow the Claimant and Mr Omer to attend briefings and huddles, giving different reasons for each person, both were of the same ethnicity, we refer to our findings of fact in relation to Mr Omer. The Tribunal note that when the Claimant was managed by Mr Austin, he was regularly attending conference calls (twice a month) and there had been no question of his command of the English language being a concern. Although the Claimant was no longer on probation at this time, the Tribunal note that Mr Omer was not on probation when he complained in July 2017 about the same issue (see above at paragraph 41-2).

116 Although we accept the Respondent's submission that it would be reasonable and understandable for Mr Wills to undertake this role due to his extensive experience, we did not hear that this was true of others who had been given the responsibility on a regular basis but not of the same ethnicity (Ms Jaskiewicz for example). We did not feel that Mr Wills was a suitable comparator due to his extensive police experience and we have decided that a hypothetical comparator would be more appropriate. We conclude that a hypothetical comparator who was in the same role as the Claimant but was not of South Asian Pakistani origin. It is concluded that a hypothetical comparator would have been allowed to attend huddles and conference calls.

117 We also considered Ms Clarke's evidence in relation to nominating the Claimant to attend training courses, she conceded in cross examination that the training courses she referred to in her statement did not support her evidence that she was supportive of the Claimant attending (see above at paragraph 23) as they referred to courses the Claimant attended prior to her taking over as Supervisor. Her evidence did not suggest that she was supportive of the Claimant attending training courses and this called into question the credibility of her evidence. The Tribunal conclude therefore on the balance of probabilities that this was less favourable treatment of the Claimant because of race. We also conclude that it was because his race taking into account the supporting and corroborative evidence of Mr Omar and the unsatisfactory nature of Ms Clarke's evidence. The Respondent have failed to show that the allocation of training opportunities, including attending huddles and conference calls was in no sense whatsoever less favourable treatment on that ground. This head of claim in well founded.

118 Turning to the Claimant's complaints of victimisation, it is accepted that there are two protected acts, the grievance and the ET1 which was presented on the 6 April 2018. The first allegation is in relation to the conduct of the appeal and more particularly the decision made by Mr Owen in relation to his conclusion that all the Claimant's witnesses had been interviewed and his

conclusion reached about the issue of confidentiality. We refer to our findings of fact about this above at paragraph 71-2. We conclude that this claim is in time as we have seen that the grievance process began in July 2017 and was not concluded until 19 January 2018, there was a significant delay in dealing with this matter and the Respondent has failed to provide a satisfactory reason as to why their time limits had been exceeded at each stage of the process. The Claimant became ill during the grievance process and his ill health continued until the termination of his contract. As we have found that this was a continuing state of affairs we conclude that the claims for victimisation (which all relate to his grievance and sickness absence) are part of a continuing act and are in time.

119 We have found as a fact above at paragraphs 71-2 that Mr Owen's representations to the Claimant were false on a number of grounds and we will not repeated them in our decision. Although it was suggested by Ms Mehet that confidentiality had been promised to the witnesses that could not be breached, this did not explain why the Claimant had been misled as to which of his witnesses had been interviewed. He was not told that his witnesses had not been interviewed and for Mr Owen to state categorically that he had read all the statements significantly misled the Claimant creating an entirely false impression of the extent and thoroughness of the investigation and the manner in which the Respondent approached the evidence. We considered that the claim was in respect of the Claimant being denied the opportunity to see the notes of the meeting and we conclude that Mr Owen by giving false information to the Claimant denied him the right to see the minutes in his possession but also significantly misled the Claimant as to the sufficiency of the grievance investigation. The Claimant was not shown the minutes of the interview with Mr Omer even though he did not ask for confidentiality in relation to the Claimant (only Ms Clarke). We have considered the Respondent's submissions that there was an issue of confidentiality, but this did not appear to be relevant to this witness. We further conclude that Mr Owen failed to provide copies of the statements to the Claimant as it would have showed that his other witnesses had not been interviewed. We conclude that this was a detriment because the Claimant had done a protected act there being no other explanation put forward to justify the conduct. This head of claim is well founded.

120 The next head of claim for victimisation is that Mr Durowoju and Mr O'Connor failed to interview Mr Valcent and Mr Nadeem as requested and the issue above it at paragraph 5(b). We have found as a fact that this was a detriment to the Claimant however we have concluded that Mr O'Connor's explanation of why he failed to do so was honest and credible and showed that it was not because the Claimant had done a protected act. We refer above to our findings and conclusions at paragraphs 45, 53, 59 and 63. Mr O'Connor used his judgment and although he did not do a thorough or searching enquiry after the matter was assigned to him, he used his best judgment on the facts. Although this was insufficient in the all the circumstances, which he accepted in cross examination, there was no evidence that his failure to interview these further witnesses was because the Claimant had raised a grievance alleging discrimination. This head of claim is not well founded on the facts and is dismissed.

121 Turning to the next issue in relation to the email and telephone call on the 2 February above at issue 5(c) (i) and our findings of fact at paragraphs 75 and 77. We concluded that Mr O'Connor was following advice from Ms Mehet and he was applying a rigid policy approach to sickness absence that was linked to grievances. There was no evidence to suggest that this approach, however harsh, was a detriment because the Claimant had raised a grievance alleging discrimination as it appeared that this approach was applied in all grievances irrespective of the substance of the grievance. This head of claim is not well founded and is dismissed.

122 Turning to the complaint in the list of issues at paragraph 5(c)(ii) above, we have concluded that Ms Mehet applied a policy approach to the issue in relation to the conflict between the OH report and the GP advice. She applied a strict policy view stating that this was the approach they adopted and as OH had concluded the Claimant was fit to work, they preferred the evidence of OH. Although rigid and lacking in compassion or understanding of the Claimant's concerns, there was no evidence that she treated the Claimant unfavourably because he had pursued a grievance alleging discrimination. Had Ms Mehet followed the OH advice, she would have called the Claimant to a meeting to discuss whether there were any barriers to him returning to work (see above at paragraph 70). This was not done and as a result the Claimant faced a disciplinary hearing rather than a return to work discussion. We conclude that the Ms Mehet's strict policy approach would be applied in all cases and therefore there was no evidence that it was a detriment because the Claimant had done a protected act.

123 Turning to the head of claim at paragraph 5(c)(iii) in relation to calling the Claimant to a disciplinary hearing on the 9 March 2018, the Tribunal did not conclude that this was a detriment. The meeting was called to discuss the Claimant's sickness absence and he was able to explain why he felt unable to return to work and the reason he was still off sick. We have made findings about this matter above at paragraph 83. We conclude that this as not a detriment to the Claimant because he had done a protected act, it was because he had been off sick for some time. This again reflected the draconian approach adopted by the Respondent to those off sick with stress after the outcome of a grievance had been delivered. Although OH had recommended that the Respondent meet with the Claimant to discuss any barriers to him returning, this was conducted under the discipinary process (rather than as a meeting to facilitate an early return to work), although a harsh approach it achieved a similar goal. The burden of proof does not shift to the Respondent.

124 Turning to the issues at paragraph 5 (c)(iv) and (v) above in relation to stopping the Claimant's sick pay and doing so retrospectively. The Tribunal conclude that his sick pay was not stopped for one of the limited reasons set down in the Attendance at Work policy see above in our findings of fact at 86-92. The Tribunal also noted that Ms Mehet gave a number of different

reasons for stopping his sick pay, none of which appeared to be consistent with the wording of the policy nor were the reasons given consistent with the facts of this particular case. The policy specifically referred to not following doctor's advice however this was not relevant as OH did not give medical advice, this was confirmed by Dr Chavda who stated that her advice was not medical and was advice provided to HR, not to the Claimant. It was conceded by Ms Mehet that the Claimant had followed his GP's advice.

125 Similarly, there was no evidence to suggest that the Claimant failed to attend any meetings. We have found as a fact above that the Claimant attended every meeting he was invited to and appeared to be co-operating with the Respondent throughout his sickness absence. On the evidence before the Respondent at the time there appeared to be no consistent reason for stopping the Claimant's sick pay at the time and in the manner they did. It was particularly draconian to stop his sick pay retrospectively and there appeared to be no power to do so in any of the policies before us.

126 The Respondent in their closing submissions have said that the principle of no work no pay should apply and cited the case of *Luke v Stoke-on-Trent city Council [2007] EWCA,* however having looked at that case, the facts are distinguishable. In that case Ms Luke had declined all possible solutions to facilitate a return to work in a different locations despite management efforts. In the present case however, it was the Claimant who had asked Mr O'Connor to consider whether he could work in a different department away from Ms Clarke, but this was refused, he also repeated his request before Ms Cooney. The Respondent was advised by OH to discuss a return to work with the Claimant and to identify any barriers to him returning, those discussions took place for the first time in a formal disciplinary hearing. When the Respondent sent the Claimant for an OH assessment, it was identified that there were barriers to him retuning and they should look for an alternative role. This suggested that, had the Respondent followed the advice from OH at an earlier stage and identified and worked on overcoming any barriers to his return, the Claimant could have returned to work sooner. There was no evidence in this case that the Claimant failed to co-operate with the Respondent or that he had refused to return to work. As the factual scenario in this case is different to the decision in the Luke case, it is distinguished on the facts.

127 The Tribunal conclude that stopping the Claimant's sick pay was a detriment to the Claimant especially in the light of the manner in which this was done. The decision to stop his sick was taken before the disciplinary process had been completed and before the Claimant had an opportunity to answer the charges against him. We further conclude that the reason the Claimant's sick pay was stopped (and the reason it was retrospectively stopped) was because he had done a protected act. The Respondent believed by this stage that the Claimant may do a further protected act as he had informed Mr O'Connor in twice in February and once in March that he had approached ACAS and Mr O'Connor had confirmed that ACAS had been in touch. Even if the Respondent had not received notification that the claim

form had been presented, they would have had a reasonable belief that the Claimant may do a further protected act.

128 We considered that the Respondent had failed to provide a consistent reason for stopping the Claimant's sick pay. The reasons the Respondent relied on in the disciplinary policy to claim that the Claimant's absence was unauthorised did not fit the factual circumstances of this case. Although the Claimant did not attend work, his absence was covered by a valid fit note and there was no evidence before the Respondent to suggest that the reason for his absence was not genuine. The Tribunal have seen the Health and Welfare Handbook (page 466F) which states that a GP fit note is strong evidence of incapacity but if there appeared to be a difference in opinion between a GP and OH this should be resolved by communication; this communication did not happen until after his sick pay had been stopped. The decision to stop his sick pay was made after the fact find by Mr O'Connor but before the disciplinary hearing as we have found as a fact above at paragraph 83 where the fact find before Mr O'Connor was conducted on the 9 March 2018 and the decision was taken to stop his sick pay on the 12 April 2018. The Claimant did not attend the disciplinary hearing to answer the charge of failing to comply with the sick pay rules until the 1 May 2018 as seen above at paragraph 97-8 after the decision had already been taken by Mr O'Connor and approved by Ms Mehet that his sick pay should be stopped.

129 As the reason for stopping the Claimant's sick pay did not appear to be consistent and for a reason provided for in their policies and procedures, we raise an adverse inference from this. There was no evidence that the Claimant had failed to co-operate with the Respondent during his sick leave and no evidence he had failed to attend return to work meetings. Having failed to provide a consistent or credible reason for stopping the Claimant's sick pay (retrospectively) we conclude it was because he had done a protected act.

130 We further conclude that as the Respondent was unable to establish that the Claimant was on an unauthorised absence, as defined in the disciplinary procedure above. We found as a fact that the Attendance procedure provided for a limited number of specific circumstances where an employee could be found to be on unauthorised leave and they are referred to above at paragraph 86. None of the examples cited appeared to apply to the Claimant. The Respondent in their submissions state that his sick pay was stopped because he failed to return to work however this was not why Mr O'Connor decided that the matter should be escalated to a disciplinary hearing, it was for failing to take OH advice. The decision taken to stop the Claimant's contractual sick pay was an unauthorised deduction from wages.

131 Turning to the issue above at paragraph 5(c) (vi) in relation to the request for the Claimant to attend a disciplinary hearing, this was an invitation sent by Ms Cooney and our findings of fact are above at paragraphs 97-8. We have concluded that there was no evidence to suggest that she was aware that the Claimant had pursued a grievance alleging discrimination or that he had presented a claim to the Tribunal. It was reasonable for the Respondent to list

this matter for a disciplinary hearing as it related to the Claimant's contractual sick pay entitlement and was potentially an opportunity to put his case forward as to the reason for his absence and why he remained off sick with work related stress. This was not a detriment because he had done a protected act therefore the burden of proof does not shift to the Respondent.

132 Turning to the issue at paragraph 5(c) (vii) in relation to the OH report dated the 25 May 2018 and our findings in relation to this matter are above at paragraph 102. We have concluded that overall this report was not a detriment to the Claimant. The report appeared to be consistent with the facts. It recorded that the Claimant was fit to return to alternative work but there were barriers to him returning to his role. This appeared to be consistent with the Claimant's representations to Mr O'Connor that he wished to return to another department and this was corroborated by him when he attended the disciplinary hearing and when he emailed Mr Owen after he had handed in his resignation. As the report appeared to be consistent credible and an accurate reflection of the facts, it was not a detriment.

133 The next issue at paragraph 5(c)(viii) is in relation to the Claimant's constructive dismissal claim, our findings of fact about this are above at paragraphs 103-5 above. We have concluded that the Claimant resigned because he had another job to go to. There was no evidence that the Claimant resigned in response to a fundamental breach or that he resigned due to a final straw. The Claimant had been aware that his sick pay had been stopped in April 2018 but raised no complaint at the time and did not reserve his rights. The Tribunal considered that the Claimant had benefit of legal advice by February 2018 and had he felt that this was a fundamental breach he could have taken action to protect his interests going forward.

134 There was no other conduct that formed part of a series of acts or a final straw that could have resulted in a fundamental breach such that he was entitled to resign and treat himself as dismissed. Although the Claimant raised concerns about the grievance process and about the prospect of having to work with Ms Clarke again, he was aware by the 25 May that OH had recommended a return to an alternative role. Although the Claimant faced a disciplinary hearing, there was no evidence to suggest that this was anything but mere unreasonable conduct by the employer and not to be equated with a fundamental breach. All the evidence before the Tribunal suggested that the Respondent was keen for the Claimant to return to work, there was no evidence to suggest that the employer showed an intention to "abandon and altogether to refuse to perform the contract" (*Tullett Prebon PLC v BGC Brokers LP [2011] EWCA Civ 131).* In fact the opposite is true. It was also noted that the sanction for this discipinary charge, if found to be proven was a warning, it could not have led to dismissal. We conclude therefore that the Claimant was not constructively dismissed, he resigned to pursue another career opportunity.

135 The last allegation is at paragraph 5(c)(ix) which was the letter sent to the Claimant on the 1 August 2018, we refer to our findings of fact about this matter above at paragraph 106. There was no evidence to suggest that the

person who sent this letter (or the person who gave instructions for the letter to be sent) were aware that the Claimant had done two protected acts. There was no evidence that this was a detriment. This head of claim is not well founded on the facts.

136 The Tribunal having concluded that there was no right to deduct pay from the Claimant for the reasons stated above, we conclude that the decision to do so amounted to an unauthorised deduction from salary. There was no consistent evidence that the Claimant had breached the Attendance at Work Policy therefore the Respondent was not entitled to deduct pay from the Claimant under clause 20 his contract, as at the time the deductions were made they were unauthorised. The Claimant had a right to receive contractual sick pay in accordance with the terms of the scheme and in accordance with the terms of his contract (paragraph 11). There was no consistent evidence before the Tribunal to suggest that the Claimant had breached the terms of the sick pay scheme or the Attendance Procedure. The Tribunal has seen no power in any of documents referred to us that allowed the Respondent to back date a decision to withdraw sick pay. The Respondent unlawfully deducted SSP and contractual sick pay from 7 February 2018 to the 28 July 2018. The Claimant was entitled to be paid sick pay under the Sick Pay scheme according to the rules to receive SSP for his period of absence.

137 It appeared that the parties agree that the Claimant was owed a total of 11 days annual leave at the date of termination.

138 As this hearing was agreed to deal with the issue of liability only, the parties are encouraged to see whether they can now resolve matters without the need to list the matter for a further hearing to deal with remedy. The parties are given 28 days from the promulgation date to see if this matter can be settled. If not the parties are asked to provide to the Tribunal a list of agreed orders and directions, including an indication of the length of hearing, number of witnesses and how the Claimant's evidence is to be given (if he is unable to return to the UK to give evidence personally). The agreed list of orders and directions made shall be presented to the Tribunal no later than 42 days after promulgation. The matter will be listed for a remedy hearing in accordance with the agreed directions and considering any dates to avoid provided by the parties.

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Employment Judge **Sage**

Date: 24 May 2019

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