



EMPLOYMENT TRIBUNALS

Claimant

Mr Hugo Walters

v

Respondent

**City of Bradford Metropolitan
District Council**

PRELIMINARY HEARING

Heard at: Leeds

On: 14, 15 & 16 August and
30 October 2018

Deliberations 31 October 2018

Before: Employment Judge T R Smith

Members: Mr G Corbett
Mrs L Anderson-Coe

Appearance:

For the Claimant: Mrs Jane Callan, of Counsel

For the Respondent: Mr Daniel Sills, of Counsel

JUDGMENT

1. The Claimant's complaint of direct race discrimination contrary to section 13 Equality Act 2010 is not well founded and is dismissed.
2. The Claimant's complaints of victimization contrary to section 27 of the Equality Act 2010 are not well founded and are dismissed.

REASONS

1. Background.

- 1.1 It was agreed, having discussed the matter with the parties that the Tribunal would initially seek to determine if all or any of the Claimants complaints succeeded and, if so, it would then deal with remedy, separately, given the time constraints on the substantive hearing.

- 1.2 In the course of evidence reference was made to the identity of a couple who were seeking to foster children and also a person who had been fostering children. The Tribunal, with the agreement of the parties, referred to the former as “couple A” and the latter as “B”.

2. Issues

A list of issues that the Tribunal was required to determine was agreed at a preliminary hearing chaired by EJ Cox on 7 December 2017.

For clarity those issues are set out in full, below.

“Mr Walters is black Caribbean. He brings one claim of direct discrimination and two claims of victimisation as follows.

1. *In August 2015 Mr David Byrom decided that Mr Walters should be the subject of a management investigation as a result of a complaint made by two potential foster carers about Mr Walters conduct, in which he was alleged to have shouted at them, adopted a rigid attitude and given them inaccurate information about the fostering process during a telephone call and at a home visit. Mr Walters believes that Mr Byrom made this decision because Mr Walters is black. He relies on the result of a 2015 Freedom of Information request he made, which confirmed that the Council had “no record of a management investigation relating to any manager in Children’s [services] which was the result of a complaint from a member of the public.”*
2. *The Council delayed in dealing with Mr Walters grievance about what he considered to be race discrimination by Mr Byrom from 16 November 2015, when he presented his grievance, to 17 July 2017, when he received the outcome. Mr Walters believes that this delay was because the grievance included an allegation of discrimination. Those responsible for the delay were Mr Byrom, Ms Gani Martens (who commissioned the investigation of the grievance) and Mr Philip Hunter (the second investigation officer).*
3. *In his report on Mr Walters grievance, Mr Hunter did not deal with Mr Waters allegation of race discrimination by Mr Byrom. Mr Walters believes that this was because his grievance was alleging discrimination and also because Mr Walters had raised a grievance in 2014 alleging discrimination by Mr Byrom.*

At a subsequent case management hearing on the 04 June 2018 a potential jurisdictional point, namely that of time in relation to the complaint of direct discrimination (claim 1) was identified.

With the agreement of the parties the Tribunal formulated this issue as follows:

“Was the Claimant’s complaint of direct discrimination presented to the Tribunal before the end of the period of three months beginning when the act complained of was done? If not, would it be just and equitable to extend time?”

Both parties were legally represented when the issues were discussed and agreed.

No further issues were identified by counsel at the commencement of the Tribunal hearing.

No application was made at any stage either before or at the hearing to amend or vary the agreed issues or to amend the Claimant's claim form.

It was clarified before the Tribunal that in relation to the two complaints of victimisation the protected act was "*making an allegation (whether or not expressed) that A or another person has contravened this Act*" under section 27 (2) (d) of the Equality Act 2010 ("EQA10").

The "allegation" was clarified by Ms Callan as information the Claimant gave to an investigation resulting with a grievance outcome on 20 August 2014 and the Claimant's own grievance dated the 16 November 2015.

It was further clarified in the course of the hearing that in relation to the complaint of direct discrimination the Claimant relied upon an actual comparator, Mr Mark Ludlam. However, Ms Callan said, in the alternative, the Tribunal could construct a hypothetical comparator who was "in the neighbourhood" of Mr Ludlam.

3. The Law

3.1 Burden of proof

3.1.1 The proper approach to the burden of proof is set out in section 136(2) and (3) of EQA10 which provides: -

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

(3) but subsection (2) does not apply A shows that A did not contravene the provision".

3.1.2 The effect of the above provision is that there is a two-stage test, firstly the Claimant must establish a prima facie case and if that is done, in effect, the burden of proof is then reversed.

3.1.3 In deciding whether or not a prima facie case has been made out, the Tribunal should ignore the substance of any explanation offered by the employer for the treatment, turning to it only once the burden has shifted. However, this does not mean that at the first stage the Tribunal can only consider evidence produced by the Claimant and ignore the Respondents evidence. The Tribunal must have regard to all the facts at the first stage to determine what inferences, if any, can be properly drawn, **Laing -v- Manchester City Council [2006] ICR 1519.**

- 3.1.4 In **Madarassy -v- Bishop Douglass Roman Catholic High School 2007 ICR 897** the Court of Appeal stated at the first stage the Respondent is entitled to adduce evidence to show that the alleged acts did not occur or, if they did occur; there was not less favourable treatment of the Claimant; or that the comparator or comparators chosen by the Claimant or the situations chosen by the Claimant were not like the Claimant, or the situations with which comparison was sought to be made; and that even if there was less favourable treatment it was not on prohibited grounds.
- 3.1.5 Prior to the introduction of the EQA 10 guidance was given by the EAT in **Barton-v- Investec Henderson Crosthwaite securities Ltd 2003 IRLR 332** as modified by the Court of Appeal in **Wong -v- Igen Ltd 2005 IRLR 258**. These are usually known as the revised **Barton** guidance. Although **Barton** was a case on the Sex Discrimination Act 1975 and reference was made to the questionnaire procedure in the judgement which has now been abolished it is equally applicable to a case of race discrimination. Whilst the Tribunal has primarily been guided by section 136 (2) EQA 10 The Tribunal has found it helpful to take account of the **Barton** guidance.
- 3.1.6 That guidance is as follows: –

“1.... It is for the Claimant who complains of... discrimination the prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employee has committed an act of discrimination against the Claimant which is unlawful... These are referred to below as “such facts”.

2. If the Claimant does not prove such facts he or she will fail.

3. It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of... discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases, the discrimination will not be an intention but merely based on the assumption that “he or she would not have visited”.

4. In deciding whether the Claimant has proved such facts, it is important to remember that the outcome this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

5. It is important to note the word “could” At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was a unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

6. *In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.*

7. *These inferences can include, in appropriate cases, any inference that it is just and equitable to draw.... From and evasive or equivocal reply to a questionnaire [the Tribunal reminds itself that the compulsory questionnaire process has been abolished]*

8. *Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts.... This being that inferences may be drawn from any aid applying the relevant code of practice.*

9. *Where the Claimant has proved facts from which conclusions could be drawn that the employer has treated the Claimant less favourably on the ground of [the protected characteristic], then the burden of proof moves to the employer.*

10. *It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, the act.*

11. *To discharge the burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of [the protected characteristic]*

12. *That requires a Tribunal to assess not merely whether the employer has proved an explanation from the facts on which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question*

13. *Since the facts necessary to prove an explanation would normally be in possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge the burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or a code of practice”.*

3.2 Direct discrimination

3.2.1 Direct discrimination is defined in Section 13 EQA10 as follows: –

“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.”

3.2.2 There are two key elements in the legal concept of direct discrimination namely less favourable treatment and the reason for that treatment. That said a number of their Lordships in **Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11** took the view it may be sometimes appropriate to look at the latter issue first. In other words, it may be appropriate for the Tribunal to

identify the reason for the treatment the employee complains of. If the answer is that the reason is a protected characteristic then a finding of less favourable treatment would likely follow as a matter of inevitability. **Shamoon** may be particularly appropriate where there is no actual comparator and a hypothetical comparator is relied upon

- 3.2.3 The test for direct discrimination is less favourable and not unfavourable treatment as the aim of the EQA 10 is to ensure that people are treated equally.
- 3.2.4 If an employer treats an employee unfavourably that will not in itself amount to direct discrimination, see **Glasgow City Council -v- Zafar [1998] ICR 120.**
- 3.2.5 The Court of Appeal in **Bahl-v-the Law Society [2004] IRLR 799** reiterated that unreasonable behaviour cannot found an inference of discrimination. An employer is not obliged, therefore, to lead evidence that others have been treated equally unreasonably. However, if there is no explanation for the unreasonable treatment the absence of an explanation (as opposed to the reasonableness of the treatment) might found an inference.
- 3.2.6 The test for what amounts to less favourable treatment is objective, **Burrett -v- West Birmingham Health Authority [1994] IRLR 7.**
- 3.2.7 In identifying a comparator there must be no material differences between the complainant and the comparator, see section 23 (1) of the EQA 10.
- 3.2.8 Turning to the “because of” question there are two categories of case, the first whether treatment issue is discriminately on its face and the second where the treatment is not objectively discriminatory in which case an investigation is required into the Respondent’s reasons for their actions or inactions in order to determine whether the less favourable treatment was because of the protected characteristic. The protected characteristic must be a substantive or effective reason even if not the sole or intended reason for the less favourable treatment for liability to be established.
- 3.2.9 The Tribunal must ask itself why the Respondent acted as it did

3.3 Victimisation.

- 3.3.1 Victimisation is defined in section 27 (1) of the EQA 10 as follows: –

“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, all they do, a protected act.”

A protected act is defined in section 27 (2) of the EQA 10 as follows:

– *“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 expressed) that A or another person has contravened this Act.*

3.3.2 It must be established that the employer is subjected the employee to a detriment “because” of the protected act. It follows therefore that the protected act must be an effective or substantial cause of the employer’s detrimental actions, but does not need to be the principal cause.

3.4 Time

3.4.1 Section 123 EQA10 states: –

“...Proceedings on a complaint ... may not be brought after the end of –

(a) the period of three 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....

(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.”

3.4.2 A Tribunal has a wide discretion in determining whether or not it is just and equitable to extend time.

3.4.3 That said the power of the Tribunal is a discretion and the burden is on the Claimant to convince the Tribunal that it is just and equitable to extend time. The discretion is the exception rather than the rule, **Robertson-v-Bexley Community Centre 2003 IRLR 434CA.**

3.4.4 If there are circumstances which would otherwise render it just and equitable to extend time, the length of extension required is not of itself, a limiting factor unless the delay would prejudice the

possibility of a fair trial see **Afolabi -v- Southwark LBC 2003 EWCA Civ 15.**

3.4.5 Whilst the Tribunal in exercising its discretion is not required to adopt the checklist set out in section 33 of the Limitation Act 1980 it can be a useful tool for the Tribunal to consider.

3.4.6 Factors set out in section 33 include: –

1. The length and reason for the delay.
2. The extent the cogency of the evidence may be affected
3. the extent, if at all of the failure of the employer to cooperate
4. What action the Claimant took when the Claimant became aware of a potential claim and in particular how promptly they acted
5. Action taken by the Claimant to obtain professional advice when aware of the claim.

3.4.7 The above is not a comprehensive checklist and other relevant matters that may be considered including the length of the extension sought.

3.4.8 A likely highly significant factor is whether the delay would affect the conduct of a fair trial **DPP -V- Marshall 1998 ICR 518.**

3.4.9 In determining whether there was an act extending over a period of time, as distinct from a succession of unconnected or isolated specific acts the focus should be on the substance of the complaints that the employer was responsible for and whether it was an ongoing situation or a continuing state of affairs, see **Hendricks -v- Commissioner of Police for the Metropolis 2003 IRLR 96 CA.**

3.4.10 **Hendricks** was followed in **Lyfar -v- Brighton and Sussex University Hospitals NHS Trust [2006] EWCA Civ 1548.**

3.4.11 Whether the same person or persons were responsible for the alleged acts is a factor that may also shed light on the issue of an ongoing situation, see **Aziz -v- FDA [2010] EWCA Civ 304.**

4. **Submissions**

4.1. The Tribunal is grateful for the assistance of two experienced counsel and the manner in which they presented their respective cases.

4.2. Both counsels submitted detailed skeleton arguments. Copies are on the Tribunal file.

4.3. There was no dispute as to the legal principles the Tribunal had to apply, merely the application of the facts to the evidence.

- 4.4. In the circumstances the Tribunal means no discourtesy to both counsel by not repeating those submissions. The parties are assured the Tribunal had full regard to them.

5. **Evidence**

- 5.1. The Tribunal heard oral evidence from: -
- 5.1.1. The Claimant, Mr Hugo Walters, Team manager
 - 5.1.2. Mr David Byrom, Head of Service, Through Care and Resources in Children's Specialist Services
 - 5.1.3. Ms Gani Martins, former Interim Assistant Director of Children's Services with the Respondent.
 - 5.1.4. Dr Philip Hunter, Strategy Manager for Employment and Skills.
- 5.2. The Tribunal also had before it a bundle of documents which initially totalled 525 pages but during the course of the hearing was supplemented so as to total 580 pages.

6. **Findings of fact**

6.1 **Introduction.**

- 6.1.1. The Tribunal has limited itself to making only findings of fact that are material to the agreed and identified issues.
- 6.1.2. The Claimant, for example, in his evidence in chief, went to considerable lengths to explain his concerns as to the alleged procedural and substantive errors, as he saw them, in the management investigation after it was initiated. These were not issues identified by EJ Cox or the legal representatives.
- 6.1.3. It is for this reason that the Tribunal has not addressed much of the evidential dispute that was ventilated, over a number of days, for the simple reason it was not relevant to the issues we had to decide. This judgement should be read in that context.

6.2 **Structure of the Respondent.**

- 6.2.1 The Claimant was employed by the Respondent as a Fostering Team Manager.
- 6.2.2 He was appointed to that post in November 2002.
- 6.2.3 The Claimant identifies himself as black Caribbean

- 6.2.4 Ms Patsey Burrows was, for the majority of the time to which the Claimant's complaints relates, his line manager. Her job title was Manager for Fostering and Adoption.
- 6.2.5 Ms Burrows replaced a Mr Jonathan Helbert sometime in June 2015.
- 6.2.6 Ms Burrows left the Respondents employment in April 2017 although it would appear she was on one-month notice and handed her notice in, sometime in March 2017 and then used accrued holiday entitlement to bridge the gap from March 2017 until April 2017 such that she was not at work after handing in her notice.
- 6.2.7 Ms Burrows identified herself as Black British.
- 6.2.8 Ms Burrows in turn reported to Mr David Byrom, Head of Service, Through Care and Resources in Children's Specialist Services.
- 6.2.9 Mr Byrom identifies himself as white British
- 6.2.10 Ms Gani Martins was the former Interim Assistant Director of Children's Services. She had approximately six managers reporting to her, one of whom was Mr Byrom.
- 6.2.11 She identified herself as black African.
- 6.2.12 Dr Hunter is employed by the Respondent as Strategy Manager for Employment and Skills. He commenced his employment with the Respondent in April 2010.
- 6.2.13 He identifies himself as white British.
- 6.2.14 Dr Hunter reported to Mr Terry Davis, Assistant Director and then Ms Judy Kirk, Deputy Director
- 6.2.15 The Respondent is a large local authority.
- 6.2.16 It outsources its HR function to an organisation known as "HR plus".

6.3 Fostering.

- 6.3.1 Part of the Respondents Children's Services has a responsibility for fostering.
- 6.3.2 Foster carers play a vital role in the lives of looked after children.
- 6.3.3 Fostering is the first option the Respondent would look to if a child or children could not stay in their own home.
- 6.3.4 The Respondent has a shortage of foster parents in proportion to demand.
- 6.3.5 Shortage of foster carers is a major concern for the Respondent.
- 6.3.6 The Respondent was and is anxious to encourage potential foster parents, whilst at the same time, having to balance the best interests of the children in its care.

6.4 Freedom of information evidence.

- 6.4.1 The Claimant sought to rely upon replies he received from the Respondent in relation to, two freedom of information requests, and also what was known as a Hay report as primary facts which he invited the Tribunal that it could conclude there had been discrimination.
- 6.4.2 The Tribunal did not find any of the above documentation of assistance in reaching its determination and specifically did not reach stage one (establishment of primary facts) such that an explanation was required from the Respondent.
- 6.4.3 The Tribunal will deal firstly with the freedom of information requests.
- 6.4.4 A request was made on 17 April 2018 (pages 521A to 523A) which requested information as to black and white employees who had been subjected to a final written warning or dismissal over a specified time frame.
- 6.4.5 With respect this information is not directly relevant to the Claimant as he was never subjected to dismissal or a final written warning.
- 6.4.6 In any event the Tribunal does not find the statistics helpful. They showed the Respondent had a declared workforce consisting of 26% BAME staff.
- 6.4.7 22% had been subjected to a final written warning (BAME's underrepresented) and 31% to dismissal (BAME's overrepresented)
- 6.4.8 Given statistical variations the Tribunal was not satisfied this showed a primary finding conscious or unconscious discrimination towards BAME employees by the Respondent, let alone a primary finding supportive of the Claimant.
- 6.4.9 Similarly, the freedom of information request dated 5 June 2018 (pages 524A to 525A) which enquired as to complaints by foster carers against employees of the Respondent which resulted in formal or informal action did not assist the Tribunal as the Respondent lacked historical information to deal accurately with the request and could only indicate that one white member of staff had been subjected to informal action and one black member of staff had been subjected to formal action.
- 6.4.10 The Claimant sought to draw from this information that subjecting him to a subsequent management investigation was an act of direct race discrimination as no white manager had ever been subjected to one. The Tribunal found this is too simplistic a conclusion. It depended on the complaints and the nature of those complaints. This in itself did not demonstrate a primary case to which the Respondent was required to answer

- 6.4.11 The Claimant relied upon a Hay report to support an inference in his favour.
- 6.4.12 The Hay report did not assist the Tribunal for the reasons set out below. The report can be found in the bundle (pages 112 to 160).
- 6.4.13 It was commissioned by the Respondent and addressed how the Respondent could develop its workforce. The report does, briefly, refer to BAME staff being under represented at middle and senior management levels and also noted women occupied lower paid and part time posts.
- 6.4.14 The authors of the report noted that the Respondent's position was broadly comparable with other local authorities with a diverse population.
- 6.4.15 The authors noted that appointments statistics to higher grades posts for BAME staff required more investigation and the possibility of discriminatory practises could neither be ruled in or out without further investigation.
- 6.4.16 None of the Claimants complaints related to promotion.
- 6.4.17 Neither does the Respondent's complaints log assist the Claimant which he referred to in order to invite the Tribunal to draw an adverse inference. There was one complain dealt with informally against a white manager and one formally against a black manager, the latter being the Claimant.

7. The complaint of direct discrimination.

7.1 Findings of Fact

- 7.1.1. A letter was received by the Respondent's on 30 June 2015 (pages 168 to 170) from couple A addressed to Ms Burrows. The Tribunal had full regard to that detailed letter.
- 7.1.2. The principal criticism made by couple A was directed to the Claimant, although it is proper to say some minor adverse comments were also made of two other members of the fostering team. The letter was copied to couple A's local MP.
- 7.1.3. The complaint related to the alleged conduct of the Claimant on the 13 March 2015.
- 7.1.4. To put the complaint in context a member of the fostering team, Mrs Rafiq, visited couple A and she was concerned whether they could be accepted for fostering as they were considering starting their own family.
- 7.1.5. Couple A contended they had always informed the Respondent of their wish to start their own family.

- 7.1.6. Mrs Rafiq decided to take advice on whether the fact couple A's wish to start a family impacted upon their ability to be considered as foster parents. She therefore sought advice from the Claimant who she contacted by telephone.
- 7.1.7. The Claimant spoke to Mrs A by telephone in the presence of Mr A and they were later to allege that the Claimant was shouting, not listening and not letting Mrs A complete sentences. Mrs A was left crying. Mr A claimed he was present and heard the conversation and he refused to speak to the Claimant due to his behaviour.
- 7.1.8. Couple A went on to describe in their letter the Claimant as rude, uncompassionate, aggressive and domineering and wouldn't let people start or finish sentences and would not listen to anything they had to say.
- 7.1.9. The Claimant decided that couple A could not be considered as foster parents.
- 7.1.10. The Claimant then decided to visit couple A, after speaking to them on the telephone, who were still accompanied by Mrs Rafiq.
- 7.1.11. As a result of this meeting further complaints were made by couple A as to the Claimant's attitude but they accepted he agreed that they could proceed to be considered as foster parents.
- 7.1.12. Couple A stated that although they spent a considerable amount of time completing documentation, buying a bigger house, and attending a week-long course; after dealing with the Claimant, they had made the decision to withdraw from the fostering process because they were not prepared "*to work for/alongside a man Hugo's [the Claimant] personality*" They also alleged they were aware of other complaints against the Claimant from other people that they met on the fostering course.
- 7.1.13. The Claimant in cross examination initially would not accept that the letter from couple A, looked at in its entirety, raised serious allegations. He did however concede that the allegations were one of concern and that a manager allegedly giving inconsistent information (an allegation made against the Claimant) was unhelpful.
- 7.1.14. The Tribunal found the Claimant evasive on whether the letter raised serious concerns. He had to be reminded on a number of occasions to answer the question.
- 7.1.15. He only accepted, after repeated questioning, that couple A may have thought he had talked over them.
- 7.1.16. In the subsequent internal proceedings, he accepted the complaint from couple A was an "extreme" case and in cross examination that it was unusual to receive such a letter of complaint.

- 7.1.17. The Claimant accepted that both himself and Ms Rafiq needed to be interviewed in order to respond to the complaint of couple A.
- 7.1.18. At this juncture the Tribunal ought to briefly mention the Claimant's disciplinary record.
- 7.1.19. The Tribunal was satisfied that on 16 April 2015 (568 to 577) the Claimant received a first written warning from Mr Paul O'Hara, Families First Manager.
- 7.1.20. The allegations related to the Claimant's alleged aggressive manner, treatment of colleagues and unprofessional conduct. Although the central incident occurred on the 26 September 2013 it was clear that the determining officer heard evidence of other incidents of alleged inappropriate behaviour from the Claimant which was considered. (see page 567)
- 7.1.21. The first written warning was to expire on 16 October 2015.
- 7.1.22. The warning related to the Claimant's conduct to colleagues and those events giving rise to the warning occurred prior to the events complained of by couple A on the 13 March 2015.
- 7.1.23. It was extant when couple A made their written complaint on the 30 June 2015.
- 7.1.24. The Claimant did appeal the written warning but that appeal was rejected as is evidenced by letter of 26 of August 2015 (578 to 580).
- 7.1.25. The Tribunal now returns to the complaint.
- 7.1.26. Given the letter from couple A was addressed to Ms Burrows she visited couple A on the 13 July 2015, having spoken to them first on the telephone.
- 7.1.27. Her notes were before the Tribunal (pages 171 to 175).
- 7.1.28. Couple A repeated their concerns.
- 7.1.29. Ms Burrows she put to couple A possible explanations for their perception of the Claimant's behaviour, for example he was stressing the particular needs of some children or questioning if they had fully recovered from the loss of their own baby as a result of a miscarriage (pages 173 and 174). Couple A maintained their complaints.
- 7.1.30. Having put various explanations to couple A and having heard their response Ms Burrows concluded the meeting by telling couple A that she would "*use the HR processes available to me to address Hugo's conduct*".
- 7.1.31. The Tribunal assessed the concerns of couple A as serious.

- 7.1.32. Ms Burrows considered there ought to be a management investigation although she did not have the authority to instigate one.
- 7.1.33. A management investigation is a fact-finding exercise to be used before deciding if a case should proceed to a disciplinary hearing (page 83)
- 7.1.34. However, although that is what she recommended the person who took the decision that the Claimant would be subjected to such an investigation was Mr Byrom.
- 7.1.35. Before such a decision was communicated to the Claimant Mr Byrom took advice.
- 7.1.36. On or about 27 July 2015 (176) HR plus repeated back a discussion they had with Mr Byrom.
- 7.1.37. The note records that Ms Burrows was to conduct a management investigation and that the Claimant already had a warning on his record which was in relation to similar behaviours and conduct as alleged by couple A.
- 7.1.38. Whilst the Tribunal noted that HR plus were dependant on the information given them by Mr Byrom it is notable that HR plus did not suggest that proceeding by way of a management investigation was outside the Respondent's policies or disproportionate. HR plus noted the seriousness of the allegations by couple A and the extant written warning (568) for similar type behaviours.
- 7.1.39. Mr Byrom also took advice from the Respondent's complaints manager who was also of the view a management investigation was appropriate.
- 7.1.40. On 25 August 2015 the Claimant was spoken to by both Mr Byrom and Ms Burrows and was told that a member of the public, a prospective foster carer, had made a complaint.
- 7.1.41. He was advised that a management investigation would be initiated regarding the complaint and the investigation would be led by Mr Vaughan Chapman, Service Manager Leaving Care Service. This was confirmed in a letter from Mr Byrom of 26 August 2015(210).
- 7.1.42. The Claimant responded on 1 September 2015 by email to Mr Byrom complaining that the complaint had not been investigated by his line manager in that Ms Burrows had not discussed the complaint with him. He complained the Respondent was failing to follow own complaints procedure. The Claimant intimated that he would raise a grievance against Mr Byrom.
- 7.1.43. The same HR advice, that is the need for a management investigation was maintained throughout the process.

- 7.1.44. The Claimant conceded that some form of investigation was necessary given the nature of the complaint. However, he said an inference should be drawn as the Respondent had not complied with its own procedure by considering mediation first. The Tribunal now turns to that procedure.
- 7.1.45. Mediation appears in paragraph 9.5 of a document entitled "Fostering Services Statement of Purpose" (pages 543 to 567).
- 7.1.46. The document is predominantly focussed on recruitment and pay for foster carers. It is not a disciplinary policy.
- 7.1.47. Paragraph 9.5, which specifically refer to mediation, relates to complaints by foster carers as to their terms and conditions. It has nothing to do with complaints as to the conduct of the Respondents officers in dealing with foster carers or potential foster carers. It follows the Claimant's understanding of the policy was flawed.
- 7.1.48. Paragraph 9.3, which the Respondent used in conjunction with its disciplinary procedure, in addressing the concerns of couple A does not include a mediation clause.
- 7.1.49. In any event the Tribunal accepted the evidence of Mr Byrom that the allegation was so serious a management investigation was required.
- 7.1.50. In the circumstances the Claimant's contention that the Respondent should have considered mediation under paragraph 9.5 is not a well-founded criticism.
- 7.1.51. The Claimant was entitled to complain as to the delay in dealing with the management investigation, the lack of clear details of the complaint and the timing of the interview of Ms Rafiq. However, this was not an allegation of discrimination that was before the Tribunal
- 7.1.52. The Claimant was informed that there was no case to answer on the 12 April 2016. (299).
- 7.1.53. The Claimant was entitled to expect the matter was addressed with speed and competency given the distress the Tribunal accepts he would have suffered due to having the proceedings ongoing for so long.
- 7.1.54. Nevertheless, the Tribunal noted that the compliant of direct discrimination was that Mr Byrom decided that the Claimant should be the subject of a management investigation, not the conduct of it. It was the decision to refer the Claimant to a management investigation that was said to be the act of direct race discrimination.

7.2. Discussion.

- 7.2.1. The Tribunal was required to determine whether Mr Mark Ludlam was a comparator within the meaning of section 23 of the EQA

2010.A complain had been made by B as withdrawal of the ability to foster.

- 7.2.2. Mr Ludlam was a white British manager at the same level as the Claimant. He reported, as did the Claimant, to Ms Burrows.
- 7.2.3. The Tribunal noted that both incidents arose from complaints from members of the public. The Tribunal also found that both complaints had the possibility of bringing the Respondent into disrepute.
- 7.2.4. Despite the above factors the Tribunal concluded that the circumstances involving Mr Ludlam and the Claimant were materially different.
- 7.2.5. The Tribunal reached this conclusion for the following reasons.
- 7.2.6. Firstly, the allegations against the Claimant could properly be viewed as one of conduct. The issue involving Mr Ludlam was one of capability in his failure to follow regulation 28 of the Fostering Regulations and not advising B of her rights under the regulations.
- 7.2.7. Secondly and significantly the Claimant was subject to an extant warning for conduct issues when the complaint was received from couple A and that warning related to attitudinal issues with the Claimant. There was no evidence Mr Ludlam was subject to an extant warning of any kind.
- 7.2.8. Thirdly the Claimant himself found when investigating the case of B that she had disengaged from communication with the Respondent. In the Tribunal's judgement this may have impacted on Mr Ludlam's assessment of the situation. The situation was wholly different with couple A who were fully engaged in the Respondents' process.
- 7.2.9. Fourthly the decision to deregister B was not the ultimate decision of Mr Ludlam. The decision was taken by Ms Burrows as is evidenced by the document dated 1 December 2016 (page 420) and the letter sent by her to B dated 11 January 2017 (page 446). In effect Mr Ludlam had made a recommendation which she endorsed. She was more senior to Mr Ludlam but failed to spot his error. It cannot be said that the capability error lay solely at the door of Mr Ludlam or was obvious if a more experienced manager did not note it.
- 7.2.10. Whilst each of these factors does not carry equal weight, when the Tribunal sat back and looked at the overall picture, reminding itself that it is very rare indeed for a comparator to be identical, and bearing in mind the statutory wording it still reached the conclusion that Mr Ludlam was not a valid comparator within the meaning of the EQA10. There must be "*no material difference*" under section 23 EQA10 and here the Tribunal is satisfied that here there was.

- 7.2.11. The Tribunal then turned to how a hypothetical comparator would have been treated to examine if the Claimant then would have been treated less favourably.
- 7.2.12. The Tribunal has concluded that a white manager with the same record and in the same circumstances would also been subjected to a management investigation.
- 7.2.13. In order to reach this conclusion, the Tribunal has carefully weighed the evidence to examine the motivation of Mr Byrom and in particular to analyse whether race, whether consciously or subconsciously played a part in his decision to institute a management investigation. The Tribunal has reminded itself that admissions of decisions being tainted by race are rare and inferences may have to be drawn from primary facts.
- 7.2.14. The Tribunal concluded that the institution of a management investigation by Mr Byrom was not an act of direct race discrimination.
- 7.2.15. The complaint from the Respondents perspective was a serious concern given the shortage of foster carers and the Claimant himself, with his lengthy experience, regarded it as “extreme”. This adds to the plausibility of Mr Byrom’s evidence as to why he took the decision he did.
- 7.2.16. The Claimant conceded that some form of investigation was necessary given the nature of the complaint.
- 7.2.17. Mr Byrom did not take the decision to embark on an management investigation without consulting HR plus.
- 7.2.18. The Claimant was subject to an extant warning relating to attitudinal issues.
- 7.2.19. The Tribunal has concluded that the Claimant was not subject to direct discrimination.
- 7.2.20. Race played no part whether consciously or unconsciously in Mr Byrom’s decision in the treatment of the Claimant by the institution of a management investigation.
- 7.2.21. The complaint of direct discrimination must be dismissed.

8. The two complaints of victimisation.

8.1 Findings of Fact

- 8.1.1. The Tribunal considered it helpful to set out a brief chronology as part of its reasoning.
- 8.1.2. On 16 November 2015 the Claimant raised a grievance with Ms Martins (page 317 to 318).

- 8.1.3. The grievance was directed against Mr Byrom, Ms Burrows and Mr Chapman (who had been involved as investigating officer in the management investigation).
- 8.1.4. The Claimant complained he was subject to a management investigation initiated by Mr Byrom and Ms Burrows and the Respondent's own complaints procedure had not been followed and that no other manager within children's services over the last five years had been subject to a management investigation.
- 8.1.5. The Claimant stated that Mr Byrom had adopted a different approach when complaints were made against white managers within the fostering service. This the Tribunal accepted was an allegation that fell within section 27(2)(d) EQA10. (The Tribunal observes at this point the Claimant produced no credible evidence at any stage to support this assertion other than by reference to Mr Ludlam)
- 8.1.6. The Claimant also complained of breaches of confidentiality which in essence related to the fact he had been sent invites to meetings in relation to the management investigation which could have been viewed by other members of staff
- 8.1.7. The Claimant complained that details of the complaint from couple A had not been shared with him and he had not been provided with terms of reference until 26 October 2015.
- 8.1.8. Finally, the Claimant made a complaint about Ms Burrows management style which he stated was bullying and aggressive.
- 8.1.9. The Claimant stated he required a full investigation to be carried out by an independent investigation officer entirely independent children's services and the current management investigation be placed on hold pending the outcome of the investigation into his grievance. He also asked for certain other measures of support.
- 8.1.10. Ms Martins was appointed as the commissioning manager in relation to the grievance. On the balance of probabilities, she was appointed no later than 18 November 2015 (319).
- 8.1.11. The Tribunal finds that she took advice from HR plus as to the appointment of an investigating officer and at the conclusion of the investigation knew she was required to take a decision as to what further steps, if any were to be taken.
- 8.1.12. Ms Martins was only appointed as interim Assistant Director in August 2015. The Tribunal find that in essence although Ms Martins could have technically rejected the proposal by HR plus as to the identity of the investigating officer the reality was her knowledge within the organisation was limited and she accepted the recommendation put forward.

- 8.1.13. The person that was appointed as the investigating officer was Ms Najum Saleem. She was the joint chair of the black workers group within the Respondent. The Claimant takes no point as to any apparent delay up to the appointment of Ms Saleem.
- 8.1.14. The Tribunal found that Ms Saleem did seek to speak to the Claimant on a number of occasions soon after her appointment as is evidenced by the HR log (325).
- 8.1.15. An appointment was arranged eventually for the 17 December 2015 but the Claimant cancelled on the 15 December 2015. (327) In fairness to the Claimant it appears his out of office was on which suggests he was absent from work.
- 8.1.16. On the balance of probabilities, the Tribunal finds that Ms Saleem met the Claimant informally on 24 December 2015. The purpose of this meeting was that Ms Saleem wanted to satisfy herself that she did not know the Claimant and there was no conflict of interest. There was a brief discussion as regards the Claimant's grievance.
- 8.1.17. Nothing of substance appeared to happen in January 2016.
- 8.1.18. An invite to a meeting with Ms Saleem was arranged for the 5 February 2016. It did not proceed. The Tribunal were not told why. It would appear from the invitation letter that this meeting related to a further grievance raised by the Claimant on the 11 January 2016.
- 8.1.19. A meeting was arranged for the 4 March 2016 but adjourned for reasons that were not before the Tribunal.
- 8.1.20. The only formal documented meeting the Tribunal was taken to between the Claimant and Ms Saleem was held on 16 March 2016 (387 to 389). At that meeting the Claimant indicated he did not wish to be specific about the outcomes he was seeing but wanted to know the results of the management investigation first.
- 8.1.21. In the Tribunal's judgement there was a delay between the lodging of the Claimant's grievance and the first formal meeting with Ms Saleem. However, the Claimant did not attach any fault or blame to Ms Saleem or the Respondent.
- 8.1.22. On or about 12 April 2016 Ms Saleem" stepped away from the role as investigating officer because she did not think she was impartial enough (335).
- 8.1.23. The Tribunal observes that this was curious behaviour particularly given Ms Saleem had taken steps at the end of 2015 to satisfy herself that there did not appear to be a conflict of interest. No suggestion was made by the Claimant that in any way pressure, direct or indirect was placed upon Ms Saleem to relinquish her role as investigating manager.

- 8.1.24. Ms Saleem did not directly inform Ms Martins of her decision although on 12 April 2016 the Respondents HR department indicated they would speak to corporate HR to see who could pick up the investigation and that Ms Martins would be advised of progress. Ms Martins was not. Ms Martins was left in the dark.
- 8.1.25. As will be recalled the Respondent concluded its management investigation on the 13 April 2016 and determined the Claimant had no case to answer in relation to the complaints made by couple A.
- 8.1.26. On 8 June 2016 the Claimant chased Ms Martins as to the progress of his grievance (which by now had been added too). The Tribunal is satisfied from the exchange of emails of the 8 to 14 June (390 to 391) that this was the first time Ms Martin was aware that HR had not appointed another investigator. She chased the matter upon the 8 June 2016, that is the very day she was aware of the problem.
- 8.1.27. On or about 22 June 2016 Dr Hunter was appointed as the new investigating officer into the Claimant's grievance.
- 8.1.28. The delay was in the Tribunal's judgement not the fault of Ms Martins but of the Respondents HR department; Dr Hunter was not selected by Ms Martins.
- 8.1.29. The Tribunal found Dr Hunter an honest and open witness. Sadly, he was not experienced.
- 8.1.30. He had no equal opportunities training although the Tribunal did accept he sought to address that by consulting the ACAS guidance on race discrimination in the workplace.
- 8.1.31. He had never carried out a grievance investigation, let alone one that was complex with allegations of discrimination.
- 8.1.32. Dr Hunter invited the Claimant to a meeting on the 30 June 2016. The Claimant was unable to attend and it was left to the Claimant to liaise with Dr Hunter's colleague as regards setting up a new meeting.
- 8.1.33. Rather than engaging with Dr Hunter the Claimant sought to escalate his concerns to the Respondent's Chief Executive. He also wished to further expand on his original grievance as is clear from his letter of the 12 September 2016 (see page 405)
- 8.1.34. Dr Hunter chased the Claimant by e-mail of the 20 September 2016 to arrange a meeting with him
- 8.1.35. A meeting finally took place on the 12 October 2016 between the Claimant and Dr Hunter (406).
- 8.1.36. The Claimant having questioned Dr Hunter as to his experience indicated he felt Dr Hunter was not a suitable investigating officer. Given the lack of experience of Dr Hunter the Tribunal had considerable sympathy with that proposition. In fairness to Dr

Hunter he did then consider his position and discussed it with HR plus, but the Tribunal finds was persuaded to continue.

- 8.1.37. Whilst the Claimant remained unhappy as to the appointment of Dr Hunter and raised this with other senior officers within the Respondent he did agree after some time to engage with Dr Hunter.
- 8.1.38. A further meeting took place on the 12 December 2016 (421 to 423). The Claimant maintained his concern as to the appointment of Dr Hunter. Dr Hunter identified what he called "5 strands" from the Claimant grievance(s) and discussed with the Claimant who he, the Claimant, wanted interviewed. He did not identify Mr Byrom.
- 8.1.39. The strands did not expressly refer to the complaint of race discrimination by Mr Byrom instigating a management investigation against the Claimant which was an important aspect of his grievance.
- 8.1.40. That said, the wording of the strands was clearly provisional as Dr Hunter invited the Claimant to come back to him with either agreement or alternative wording. Dr Hunter wanted the strands clarifying so he could start interviews in January 2017. The Tribunal does not find Dr Hunter was seeking to avoid investigating a complaint of race discrimination against Mr Byrom.
- 8.1.41. The Claimant did not expressly respond to the wording of the strands but did raise a number of concerns in bullet format which, in part differed from the original grievance as amended. Some were new and some were not specific terms of reference (see for example, page 433)
- 8.1.42. There then followed an exchange of e-mails. The Tribunal concluded that Dr Hunter was distracted from his role by those e-mails. It was the Claimant's grievance and he had sufficient information to investigate it whether the strands were agreed or not.
- 8.1.43. In early March 2017 Dr Hunter met the Respondents complaints manager to go through all logged complaints within fostering to examine if there was any inequality of treatment. The Tribunal is satisfied that was a thorough examination and Dr Hunter was genuinely attempting to see if there was any evidence of inequality of treatment
- 8.1.44. Interviews with staff, three, were arranged in April and they took place between the 3 to 15 May 2017.
- 8.1.45. The last statement was returned to Dr Hunter duly approved on 16 June 2016.
- 8.1.46. In relation to the management investigation Dr Hunter looked at the complaint from couple A, Ms Burrows notes of her visit, the HR records and associated papers.

- 8.1.47. He was also aware of the Claimant extant written warning and the reasons for it.
- 8.1.48. An investigation summary was prepared (536 to 540). It is undated. It specifically dealt with whether there was any evidence that the decision to subject the Claimant to a management investigation was tainted by race discrimination. Dr Hunter found it was not. He did not interview Mr Byrom. The Tribunal will return to this point. He attempted to interview Ms Burrows but she had left the Respondent's organisation and refused to engage with the process.
- 8.1.49. Dr Hunter partially upheld the Claimant's grievance in relation to the manner he had been treated by Ms Burrows which were unpleasant and confrontational but not tainted by race. The Claimant was not the only employee to experience such behaviour, so found Dr Hunter. Had Ms Burrows still been employed by the Respondent Dr Hunter indicated he would have recommended disciplinary proceedings.
- 8.1.50. An outcome letter was sent to the Claimant on the 17 July 2017 (pages 479 to 481)

8.2 Discussion. Victimisation: delay.

- 8.2.1 The Tribunal is satisfied that Mr Byrom had no direct or indirect involvement in the control or conduct of the Claimants grievance. No evidence of any such involvement was before the Tribunal. There was no evidence of any friendship between Dr Hunter and Mr Byrom. Indeed, they did not know each other, save by name.
- 8.2.2 He had no responsibility for the delay, which the Tribunal accepts was inordinate, even allowing for the Claimant's combative attitude, in dealing with the grievance. The Tribunal accepted the evidence of Ms Martins that at no stage was there any discussion between herself and Mr Byrom as regards the Claimant's grievance. Ms Martins was in a temporary position and had no friendship and owed no allegiance to Mr Byrom.
- 8.2.3 The Tribunal is satisfied that there was a measure of delay whilst Ms Martins was the commissioning manager. The reason for that delay was for a myriad of factors none of which related to the Claimant making an allegation of race discrimination.
- 8.2.4 Firstly, there was the limited action and subsequent withdrawal by Ms Saleem as investigating officer. The Tribunal noted the Claimant made no criticism of Ms Saleem.
- 8.2.5 Secondly the failure of Ms Saleem to inform the commissioning manager she was conflicted.
- 8.2.6 Thirdly the failure by HR to recommend to Ms Martens a new investigating officer promptly or at all until the Claimant raised

matters with Ms Martens which then resulted in Dr Hunter being appointed.

- 8.2.7 Fourthly some fault must lie with Ms Martens as she did not actively manage the grievance investigation. She could have been more active diarising the grievance and seeking regular reports. Had she done so she would have been aware of the problems and then been able to seek to address them. The Tribunal is satisfied that having carefully examined the mental processes of Ms Martens and looking at the objective evidence that the Claimant's race played no part in any delay whilst Ms Martens was the commissioning manager. The Tribunal found Ms Martens to be a transparent and honest witness and given she frankly accepted she herself had been a victim, in the past of race discrimination, was satisfied that race played no part in the delay. She was not a person who would countenance race discrimination. Delay was caused by relying upon others without being more proactive.
- 8.2.8 Ms Martins left the Respondents employment in August 2016. The majority of the delay which the Claimant took issue with occurred after she had left.
- 8.2.9 The quality of the investigation is not a complaint before the Tribunal, only in relation to complaint two, one of delay. The delay was caused principally with Dr Hunter's inexperience in dealing with what was a challenging grievance. The Tribunal noted that the Respondent did not regularly comply with its own indicative time periods in dealing with grievances as is illustrated in a further freedom of information request (511 to 512) made by the Claimant (though the Tribunal notes the delay with the Claimant was the longest and the data needs to be treated with care as it does not record race) so is not persuaded to draw an adverse inference from delay alone.
- 8.2.10 Whilst Ms Callan made valid submissions as to Dr Hunter's lack of experience in dealing with discrimination claims (he had none) and his lack of training in such matters and why it might have been reasonable for the Claimant to have little confidence in him due to that lack of experience that was not the act of alleged victimisation the Claimant relied upon.
- 8.2.11 The Tribunal is satisfied from the reasons given in its findings of fact that race played no part in any delay by Dr Hunter.
- 8.2.12 The Tribunal is satisfied that the delay in the grievance process was not in any way connected with the Claimant's race.
- 8.2.13 That is not to say that the Tribunal does not deplore the fact that the Claimant had to wait so long for his concerns to be resolved or that an experienced investigator was not appointed, particularly having regards to the resources of the Respondent.

8.3 Discussion. Victimisation failure to deal with allegation of race discrimination in relation to Mr Byrom

- 8.3.1 Dr Hunter knew of the Claimant's grievance and that it raised race discrimination complaints against, amongst others Mr Byrom. The Claimant stated that Mr Byrom had adopted a different approach when complaints were made against white managers within the fostering service. This the Tribunal accepted was an allegation that fell within section 27(2)(d) EQA10.
- 8.3.2 The grievance report did make an express finding on this allegation.
- 8.3.3 The grievance outcome letter dated 17 July 2017 (pages 479 to 481) states: -
- "That given the nature of the complaint it was reasonable and proportionate response from...Dave Byrom to initiate management investigation (sic).*
- 8.3.4 Dr Hunter goes on to make an express finding of no evidence of race discrimination.
- 8.3.5 Ms Callen, whilst not conceding the point, had difficulty in explaining how the complaint as framed could be made out on the evidence. Dr Hunter did deal with the Claimant's allegation of race discrimination by Mr Byrom.
- 8.3.6 Ms Callan invited the Tribunal in closing submissions to in effect, read the issue as meaning Dr Hunter had not dealt with the complaint adequately. That was not the complaint before the Tribunal and as we have noted no application was made to amend the issues and the issues are an important road map for the Tribunal and, in fairness to the Respondent, so it knows the case it has to meet. The Tribunal declined to read the agreed complaint as anything other than as agreed with E.J. Cox and the respective legal representatives especially at the submissions stage.
- 8.3.7 If we are wrong on the above point Ms Callan's best point was that Dr Hunter did not speak to Mr Byrom.
- 8.3.8 However, Dr Hunter did look at the complaint from couple A. He did have Ms Burrows notes of her meeting with couple A. He had full access to HR plus advice that had been given. He had spent time with the Respondent's complaints manager going through all complaints from 2010 to see how they were handled.
- 8.3.9 Dr Hunter reached the conclusion that on the evidence before him no explanation was required from Mr Byrom. In effect, he unwittingly applied the legal test that as, the Claimant had not raised primary facts from which discrimination could be inferred, there was no need for an explanation.

8.3.10 However even if we are wrong whilst the Tribunal would have expected as part of a grievance investigation for Mr Bryon to be interviewed we cannot say on the evidence placed before us it was an act of victimisation not to do so.

8.3.11 Whilst there is a common theme running throughout this case of poor treatment that is not the same as discrimination

8.4 Was the alleged act of direct discrimination in time?

8.4.1 The only issue taken by the Respondent as to time was whether the complaint of direct discrimination was out of time. No issue was taken as to the first of second alleged acts of victimisation.

8.4.2 The chronology is important

8.4.3 The Claimant was informed he would be subjected to a management investigation on the 24 July 2015 by Mr Byrom.

8.4.4 On the 16 November 2015 the Claimant raised a grievance as regards the institution of the management investigation by Mr Byrom and Ms Burrows, along with other concerns.

8.4.5 The Claimant specifically mentioned that a white manager would not have been subjected to a management investigation.

8.4.6 On the 12 April 2016 it was held that in relation to the complaint by couple A there was no case to answer.

8.4.7 On the 17 July 2017 the Claimant received his grievance outcome.

8.4.8 The claim form was presented on the 16 October 2017.

8.4.9 Mr Sills conceded that the claims of victimisation were in time.

8.4.10 On the face of matters, the claim of direct discrimination is out of time, applying the 3 month time limit in section 123 EQA10 even considering any extension for ACAS early conciliation.

8.4.11 However, is there an act extending over a period of time as contended by Ms Callan?

8.4.12 There is a continuing relationship between the Claimant and the Respondent.

8.4.13 The commencement of the management investigation led to the grievance.

8.4.14 The grievance itself specifically complained of the institution of the management investigation and that it was tainted by race discrimination.

8.4.15 Complaints of victimisation are agreed to be in time and they flow from the grievance procedure.

8.4.16 This was not a case where there were unconnected or isolated acts.

- 8.4.17 The Tribunal also considered that there was some commonality of personalities. For example, it was Mr Byrom who instituted the management investigation, it was alleged by the Claimant that Mr Byrom played a part in the delay of the grievance and finally that Dr Hunter did not deal with the Claimant's allegation of race discrimination by Mr Byrom.
- 8.4.18 Looking at the facts holistically the Tribunal concluded that the complaint of direct race discrimination was part of an alleged act extending over a period of time and thus it was in time.
- 8.4.19 If the Tribunal was wrong on that point it would have extended time as it would be just and equitable. There was no prejudice to the Respondent. A fair trial was still possible.
- 8.4.20 The Respondent was aware of the concerns of the Claimant from an early stage due to the engagement in the grievance process.
- 8.4.21 The cogency of the evidence was not affected.
- 8.4.22 Whilst the Tribunal have not lost sight of the decision in **Robertson-v-Bexley Community Centre 2003 IRLR 434CA**, the Claimant has established that it would be just and equitable to extend time.

9. Conclusion

- 9.1. All the complaints were in time and if the complaint of direct discrimination was not then it would be just and equitable to extend time.
- 9.2. The complaint of direct discrimination is not well founded and is dismissed as are both the complaints of victimisation.
- 9.3. None of our finding should be taken to mean that the Claimant did not at times suffer poor treatment from a large employer who should and could have done better.

Employment Judge T R Smith

Date: 15 November 2018