Case: 1805068/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Bassey**

Respondents: **(1) The Commissioners for Her Majesty's Revenue and Customs**
(2) Katie Finn
(3) John Ritchie
(4) Gemma Cooper
(5) Nigel Lodge
(6) Michael Rhodes
(7) Peter Atkinson
(8) Ayesha Khan
(9) Kirsty Roger
(10) Steve Billington
(11) Andrew Winkworth
(12) Toni Bovill

AT A HEARING

Heard at: **Leeds** **On:** **12th, 15th, 16th, 17th, 18th, 26th, 29th and 30th April, 1st and 7th May and 19th June (reserved decision) 2019**

Before: **Employment Judge Lancaster**
Members: **Mr Q Shah**
Mr K Lannaman

Appearance:
For the Claimant: **In person**
For the Respondent: **Mr P Smith and Mr H Wiltshire of counsel**

JUDGMENT

1. The Claimant's application that Employment Judge Lancaster recuse himself is refused.

2. The Claimant's application for an adjournment to recall witnesses after the close of evidence and re-list the case for a further 3 days of evidence and submissions, to be conducted by telephone, is refused.

3. The claim is dismissed.

4. There will be a costs hearing before the full tribunal listed for ½ day on a date to be fixed not earlier than 5 weeks from the date this Judgment is sent out.

REASONS

Case Management/ Procedural Decisions

1. Paragraphs 1 and 2 of the Judgment are decisions concerned with the conduct of the hearing that are now identified in the record at the request of the Claimant, pursuant to rule 61 (2) of the Employment Tribunals Rules of Procedure 2013.

2. Reasons for these decisions have already been given orally. At the request of the Claimant they are also now given in writing.

The application for recusal

3. An application was made on 15th April 2019 that I recuse myself. This was Day 2 of the final hearing, day 1 having been a reading day.

4. The Claimant had already applied that I recuse myself from any further involvement in the case following the interim relief hearing on 4th May 2018.

5. I refused that application on 23rd May 2018. The short reasons given then remain valid.

6. The Claimant unsuccessfully appealed both the substantive decision on interim relief and that refusal of his application. The appeal was initially rejected at the rule 3 (7) stage by the then President of the Employment Appeal Tribunal (EAT), Mrs Justice Simler DME. The Claimant then applied under rule 3 (10) of the Employment Appeal Tribunal Rules and there was a hearing before His Honour Judge Barklem, when the appeal was dismissed.

7. The EAT expressly endorsed my case management decisions at the interim relief hearing. Those included decisions to admit for my summary consideration a witness statement from Mrs Bovill and also a bundle of documents prepared by the First Respondent.

8. It has since come to light that there was an inaccuracy in Ms Bovill's statement which has been corrected in a subsequent statement. That was an assertion which was in

fact incompatible with an email contained in the bundle that was disclosed at the same time.

9. The suggestion that I therefore either did take into account, or might reasonably be thought to have taken into account, material in the statement which I in fact knew at the time to be inaccurate, but without adverting to the discrepancy between it and the disclosed documents, is groundless.

The application for adjournment

10. This case has been substantially disrupted by the repeated non-attendance of the Claimant. Reasons for the case management decisions made in his absence on 16th April, 18th April and 1st May 2019 have already been given in writing.

11. On 1st May 2019 the decision was taken to proceed in the absence of the Claimant and the evidence was concluded on that day, when the Respondents closed their case. There was then an adjournment until the afternoon of 7th May 2019, when closing submissions had already been scheduled to be heard under the amended timetable for the hearing which had been agreed on 26th April 2019.

12. On 4th May 2019 the Claimant applied for an adjournment and a re-listing of the hearing to permit cross-examination of witnesses. He also applied for the hearing to be now conducted by telephone. Because 4th May was the Saturday of the Bank Holiday weekend that written application was not in fact received until Tuesday 7th May 2019. The application was repeated orally at the commencement of the resumed hearing at 1.30 pm on that day.

13. The Claimant still did not have any detailed medical evidence to explain his non-attendance, in particular his absences on 30th April and 1st May 2019.

14. The only recent information from a doctor is the letter dated 26th April which the Claimant had produced on 29th April 2019. That states:

"I can confirm once again that Julian has a diagnosis of depression and his dose of citalopram was increased on 29/3/19. The last time I saw him face to face in the surgery was in January 19 however he has seen some of my colleagues since this time and I have contacted him via telephone regarding this report. I can pass on the information that Julian states that he did not attend court on 16th -18th April as he had attended on 15th and found the court room to be crowded and to have a number of people present who he had complained about. He found the experience overwhelming and struggled to sleep; he also felt low in mood and so did not attend. He informs me he is requesting that he has a telephone hearing."

15. The complaint about a crowded courtroom was not something that had been raised by the Claimant when he had attended on 15th or 26th April 2009, nor had he referred to this reason in his emails of 16th, 17th or 18th April when he said simply that he was too unwell to attend. The majority of those present in the hearing were, of course, named Respondents who were there because the Claimant had brought claims against 11 individuals as well as against his employer.

16. The Claimant had not, in fact requested a telephone hearing until 7th May 2019. It is unclear how he envisages such a hearing being conducted. Ordinarily the Respondents will be entitled to be present at the hearing and witnesses will be expected to be not only heard but also seen by the tribunal when they give evidence (in which case they must also be able to be seen by the parties and by members of the public: rule 46 Employment Tribunals Rules of Procedure 2013).

17. The doctor's letter does not make any reasoned argument for the Claimant being allowed to conduct the hearing by telephone. Indeed, the writer does not "feel well placed to assess someone's medical fitness to attend court".

18. We do not, in these circumstances consider that it would be just and equitable to require the Respondents' witnesses to give evidence only by telephone, where the Claimant has already given evidence in person. If any adjourned hearing were to be conducted by electronic communication the only possibly appropriate method would be by video link.

19. The very earliest possible dates on which a further 3 days could have been accommodated by this tribunal panel was ascertained to be sometime in mid-July. Even then that would have required other listed cases being taken out. There is no guarantee that the Claimant would then attend for 3 consecutive days so that the evidence and submissions would in fact then have been completed. A further listing date for a reserved decision would also then have had to be found. In these circumstances no additional enquiries were made as to whether a video link could also be facilitated on these dates; it is not available at this tribunal building.

20. It is not always unfair to refuse an application for an adjournment on medical grounds; see O'Cathail v Transport for London [2013] ICR 614 at paragraph 47. That is clearly the case where, as here, there is not in fact clear medical opinion supporting the need for such an adjournment.

21. Seeking to balance the adverse consequences of proceeding without the Claimant having been afforded the opportunity to cross-examine most of the Respondents' witnesses against the rights of the Respondents, particularly the named individuals, to a hearing within a reasonable time and the effect on other litigants waiting to have their cases tried, we have concluded that no further adjournment should be granted.

22. The relevant chronology and the reasons for proceeding in the Claimant's absence on 1st May are set out in the reasons for the case management order on that date. This is not an ideal situation but we have sought to manage it fairly to all parties. So, we have arrived at the position where the case is now concluded, save for submissions which the Claimant is ready and able to make. He has also had the opportunity to give his own evidence in full and to make some challenge to the Respondents' evidence. It is not therefore a case where he has been completely excluded from participation in these proceedings.

23. It would not, in all the circumstances be fair to the Respondents, many of whom also report experiencing severe stress as a result of this case, to reverse our earlier

decision. We do not require them now to re-attend on a future date, at least 2 months hence, to allow the possibility, contrary to their current expectations, of their being cross-examined.

The issues

24. By a claim originally brought on 7th April and subsequently amended the Claimant has brought a large number of complaints.

25. A complaint of religion and belief discrimination has been struck out as having no reasonable prospect of success

26. The complaint that the 12th Respondent. Toni Bovill, is individually liable for automatically unfair dismissal was struck out, but has now been re-instated by consent following an unopposed appeal to the Employment Appeal Tribunal.

27. In a table of issues prepared for this hearing the Respondent has identified from the pleadings a total of 88 jurisdictional and substantive issues to be determined. The Claimant has additionally prepared his own list of a further 19 questions.

The Background

28. The Claimant joined the First Respondent's graduate entry Tax Specialist Programme (TSP) on 8th September 2016. Selection for this programme is highly competitive.

29. The Claimant moved from London to Leeds when he commenced his training.

30. The Claimant failed to pass both his 9 month and 12 month milestones and could not continue on the programme. He unsuccessfully challenged the decision to fail him and that refusal of his appeal was confirmed on 19th February 2018. The scheme rules are clear that a double failure will result in removal from the programme. His employment therefore ended on 2nd April 2018, before he had completed 2 years continuous service.

The complaints:

Sexual Harassment

31. There is a single identifiable allegation of potential sexual harassment.

32. Under section 26 (2) of the Equality Act 2010 it is harassment if a person engages in unwanted conduct of a sexual nature and that conduct has the purpose or effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her or him. In deciding whether the conduct did have that effect the tribunal shall take into account the perception of that other person, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

33. The allegation is that throughout a tutorial on 21st September 2017 three of the other trainees (the named Respondents Peter Atkinson, Ayesha Khan and Kirsty Roger) together with the tutor, Ian Willoughby, stared at the Claimant's groin. It is also alleged that Mr Atkinson made unspecified sexual gestures.

34. This conduct would, of course, be capable of amounting to sexual harassment. We are satisfied, however, that it simply did not happen. The allegation is a lie.

35. We have heard the Claimant's evidence and do not believe him. His account is inherently implausible and is not at all credible. There were a number of other people present, it was a joint tutorial with another year group, so that if events had happened as the Claimant asserts this behaviour would have been clearly seen by independent witnesses, not directly associated with the alleged harassers. There is no reason why three people, two female and one male, should, without anything being said, decide to start staring at the Claimant's groin. The Claimant has never, either in the course of an internal investigation nor at this tribunal, been able to give any description whatsoever of the alleged sexual gestures. That is despite the fact that he asserts that this same conduct had also happened on an earlier occasion.

36. The Claimant did not report this alleged conduct immediately. He raised a grievance on 28th September 2017. In the interim, on 26th September 2017, the Claimant had taken a test where he believed he had performed badly. The Claimant had thoroughly familiarised himself with the 1st Respondent's policies and was aware, therefore, that underperformance is expressed to be a possible effect of having experienced harassment. The clear inference therefore is that the Claimant has made a false accusation of harassment partly in order to deflect attention from and seek to excuse his poor performance.

Time Limits

37. In any event this claim is at least some three months out of time.

38. The ordinary three month time limit for bringing this complaint expired on 20th December 2017. The Claimant did approach ACAS to commence Early Conciliation before this date, but only in respect of the 1st Respondent. The fifteen day extension under certificate number R207516/17/00 would still mean that the claim ought to have presented no later than early January 2018. He did not commence Early Conciliation in respect to the individually named Respondents until 21st March 2018, six months after the event: there is therefore no extension of time afforded under these provisions.

39. The length of this delay, in the context of tribunal claims, is significant and there is no reason given for this delay. The Claimant did not act promptly in bringing this complaint to the tribunal. In these circumstances, even if the allegation had merit, it would not be just and equitable to extend time for bringing the claim under section 123 of the Equality Act 2010.

Victimisation

40. The Claimant also relies on his grievance alleging sexual harassment as being a "protected act" so as to found further complaints of victimisation. These complaints of victimisation (unfavourable treatment because of having made an allegation of a contravention of the Equality Act) are principally in respect to the counter-grievance raised by his three fellow trainees that he had made a malicious accusation against them.

41. Under section 27 (3) of the Equality Act 2010 "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."

42. Because the allegations were a lie they were necessarily made in bad faith and are not the doing of a protected act.

43. It is correct that the First Respondent's internal procedures did not uphold the allegation of a malicious complaint; that was because neither the decision maker at first instance or at the or the appeal, who had not interviewed the Claimant because their decisions were made after his employment had ended, felt able to pronounce upon his motivation. We, however, are quite satisfied that the allegations were in fact wholly untrue and that the alleged harassers should have been vindicated with a finding that this had therefore been a "malicious" act, whatever the precise reason for the Claimant having lied.

44. As there is no protected act then there cannot be any victimisation. It is not therefore victimisation for his fellow trainees to have raised their grievance, nor for the First Respondent to have accepted it and neither could it be victimisation for the Claimant, some two weeks later, to have been told to stop contacting the Second Respondent.

Racial Harassment

45. There is also a single allegation of racial harassment.

46. Under section 26 (1) of the Equality Act 2010 it is harassment if a person engages in unwanted conduct related to race and that conduct has the purpose or effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her or him. In deciding whether the conduct did have that effect the tribunal shall take into account the perception of that other person, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

47. In a specialist training session on capital allowances on 29th June 2017 the discussion led to consideration of when private art collections might attract exemption from capital gains tax. One of the trainees, Andrew Winkworth, then made a passing comment that one local stately home, Harewood House near Leeds, which possessed such a private collection and had previously had tax issues had been "involved with slavery". That statement is, of course, historically accurate.

48. At the end of the meeting the Claimant loudly and publicly asked Mr Winkworth to explain his comment about slavery, which he did. When Mr Winkworth, quite reasonably, volunteered to discuss it further the Claimant however declined and said words to the effect of "not at this time".

49. Because the Claimant had made an issue of this passing reference to slavery in a manner which had made his fellow trainees feel uncomfortable, three of them including Mr Winkworth made well-nigh contemporaneous records of the conversation which they passed on to a manager, Katie Finn. We accept these contemporaneous accounts as accurately reflecting the circumstances and the tone in which this comment came to be made by Mr Winkworth. We are satisfied that there was nothing untoward about it and that it arose naturally out of the discussion that was being had.

50. However, six days later, on 4th July 2017, the Claimant himself raised this issue with Ms Finn, seeking to categorise it as "something horrific" which had happened. At this point the Claimant alleged that Mr Winkworth had also been "smirking" at him when he made the reference to slavery. We are satisfied that the smirking did not happen. It is a later allegation that is inconsistent with the contemporaneous accounts and we find that it is a lie. We are satisfied that the Claimant has fabricated this detail in order to bolster his complaint of harassment.

51. In this context we accept as both honest and accurate the observations of Mr Winkworth in his witness statement where he says:

> "The Claimant has always treated his colleagues with indifference or rudeness, but I felt that things really changed around the time of the June incident. It seemed he became malevolent and was looking for incidents he could manipulate. It became quite intimidating to work with him and there was a feeling of apprehension in the trainee group. It was noted among the trainee group that when he was in the office, he often seemed to be reading guidance on the intranet regarding disciplinary procedures etc. rather than doing any case work."

52. The comment alone is not conduct which in the circumstances can reasonably be said to amount to harassment. That is the position even allowing for the Claimant's own perception at the time that it was an incident which he might take exception to and later seek to raise as an issue.

53. In reaching unanimously this conclusion as to the reasonable effect of such a passing comment, we have been assisted in particular by the wisdom of Mr Lannaman, who is of black Jamaican descent and well-placed to help us evaluate objectively the impact of historical references to slavery and the wealth that accumulated from it.

Time Limits

54. In any event this claim is just over six months out of time.

55. The ordinary three month time limit for bringing this complaint expired on 28th September 2017. The Claimant did not approach ACAS to commence Early Conciliation before this date. He did not commence Early Conciliation in respect to the

individually named Respondent, Mr Winkworth, until 6th March 2018. There is therefore no extension of time afforded under these provisions.

56. The length of this delay, in the context of tribunal claims, is significant and there is no reason given for this delay. The Claimant after first raising the matter on 4th July 2017 elected not to pursue it further by way of any formal grievance and he did not act at all promptly thereafter in bringing this complaint to the tribunal. In these circumstances, even if the allegation had merit, it would not be just and equitable to extend time for bringing the claim under section 123 of the Equality Act 2010.

Direct Race Discrimination

57. An application to amend the claim to include allegations of direct race discrimination was first made on 18th July 2018. Up to that point the principal thrust of the case had been that the Claimant had been subjected to detriments and ultimately dismissed because he had made protected qualifying disclosures, and that he was therefore entitled to claim interim relief from dismissal because "whistle-blowing" was the principal reason for termination of employment. It is now the over-arching complaint that everything that has happened to the Claimant is because he is black.

58. It is direct discrimination under section 13 of the Equality Act 2010, because of a protected characteristic, to treat someone less favourably that others were or would be treated who did not share that characteristic but were otherwise in not materially different circumstances.

59. Under section 136 of the Equality Act 2010 it is for the Claimant to prove facts from which the tribunal could decide, in the absence of any other explanation, that a material difference in treatment is a contravention of section 13, that is in this case that it was because of race.

60. The Claimant makes a general allegation of institutional racism within HMRC. As was explained by the then President of the Employment Appeal Tribunal, Lindsay J, in Commissioners of Inland Revenue v Morgan [2002] IRLR 776 at paragraph 38 onwards there is no statutory or other offence of a body being "institutionally racist", whether as that concept is used in the MacPherson Report or according to any other definition. It will only be potentially relevant as "a step in the reasoning towards a conclusion that the body was or was not guilty of some unlawful discrimination that fell within the Act".

61. The Claimant has established that he was the only trainee of black African heritage known to have been admitted onto the TSP programme in Leeds. There had, however, been numerous other BAME trainees on the programmes. This fact is not however something from which we could infer that, having secured a place on the programme in a national competition, any alleged problems that the Claimant encountered thereafter in the Leeds office were because he was black African.

62. The isolated comment by Mr Winkworth, which we have held not to constitute racial harassment, is not a fact from which we could possibly infer direct discrimination in any other instance.

63. For the first time the Claimant has alleged in cross-examination that "there were little comments people would make with regard to race; comments about things being dark or textured hair." There are no specific details as to who made these comments or when, what precisely was said or what was the context. This too is not therefore something from which we could possibly infer discrimination under section 136.

64. The Claimant has failed therefore to prove any primary facts, even taking these three matters together, from which we could make a finding of discrimination. The burden of proof does not shift to the Respondents and the claims fail.

Disability

65. It is for the Claimant to show that he meets the statutory definition of disability within section 6 and schedule 1 to the Equality Act 2010. That is, in the context of this case, he must suffer from a mental impairment which has a substantial adverse effect upon his ability to carry out normal day-to-day activities and that adverse effect must at the material time have been likely to last for more than twelve months.

66. The Claimant relies upon a diagnosis of depression first made in a doctor's note ("fit note") dated 7th December 2017. The decision to dismiss was made on 19th February 2018, two and a half months later. The resulting termination of employment was on 2nd April 2018, still less than four months after that diagnosis.

67. The Claimant had previously been recorded as absent from 30th August to 19th September 2017 with "work related stress". The Claimant refers to this condition having in fact been first diagnosed by a doctor on 6th September 2017. There is no fit note for this date but this does not appear to be particularly significant; the Claimant has not sought to produce such a note, and the return-to-work form a dated 21st September 2017 gives stress as the reason for absence. There is, however, evidence that the initial period of absence at this time was said to be because the Claimant had flu. The full period from 30th August up to termination would still be only a little over seven months.

68. The fit note of 7th December 2017 (referring to "stress, anxiety and depression") was not provided by the Claimant until 19th December 2017, and it was closely followed by a further note dated 21st December 2017 which said he was not fit to work because of "work related stress and anxiety".

69. The Claimant did return to work on 19th January 2018 but was absent again for a short period from 26th to 30th January 2018 because he was "feeling unwell".

70. The Claimant then went off sick again on 1st February and did not physically return to the workplace. There was a further fit note submitted on 19th February 2018, the date of the dismissal decision, but it has not been produced. The Claimant says that he was first prescribed anti-depressant medication on 9th February 2018, but there are no medical records to confirm this.

71. In fact the Claimant has disclosed no medical records whatsoever.

72. The Claimant declined to be referred to Occupational health, so there are no reports.

73. The two fit notes from 7th and 21st December 2017 that are in the bundle and upon which the Claimant relies were both provided, not by a GP with whom he was registered, but by a service called "PushDoctor". For a fee the patient is able to arrange a short-notice appointment with a doctor, but not in person. The Claimant's appointments were via Skype. There is no suggestion that the doctor has access to the patient's medical records. At the interview on 7th December 2017 the doctor did not carry out any diagnostic test to substantiate the diagnosis of depression made on that occasion.

74. Based solely upon what the Claimant had told her in that interview Dr Stutters comments that the Claimant's mental health was suffering as a result of bullying and discrimination a work and he would need to have a full review of his working circumstances in order to support him and to reduce stress and avoid contact with the members of staff involved before returning to work and that if this did not happen it could result in his mental health deteriorating further.

75. These comments were not repeated in the subsequent PushDoctor fit note from Dr Woudenburg.

76. The Claimant did then in fact return to work in January, on the expiry of that last four-week sick note. and his line manager was changed at that point.

77. On this scant evidence the Claimant has not shown that at the material times -that is in January and February 2018 when it is alleged that he was subject to any form of disability discrimination - it was likely (in the sense that it "could well happen") that he would continue to suffer any substantial adverse effects of depression for a period exceeding twelve months.

78. The Claimant was not therefore a disabled person at the material times. All complaints related to alleged disability, whether a failure to make reasonable adjustments or unfavourable treatment because of something arising in consequence of disability, necessarily fail.

Protected Disclosures

79. A protected qualifying disclosure is defined by section 43B of the Employment Rights Act 1996 as the disclosure of information which in the reasonable belief of the worker is both made in the public interest and tends to show one of the prescribed matters.

80. The Claimant seeks to rely upon six separate disclosures, all made to his employer.

First Disclosure

81. On 26th February 2017 the Claimant raised a grievance that he had been bullied and treated unfairly by Katie Finn in a 1-2-1 meeting with her, as his line manager, on 10th

February 2017. This included an assertion that criticisms of his "attitude" constituted region and belief discrimination, because "belief" is to be equated with "attitude".

82. Unfortunately, the Claimant has limited social and inter-personal skills. There is clear evidence that a number of his fellow trainees were concerned from the start of the programme that the Claimant rebuffed any attempts at friendship and was isolating himself from the rest of the group, such that they were in fact anxious as to his well-being. This on occasions manifested itself in the Claimant leaving the room if other trainees entered it. He also on occasions spoke inappropriately to his colleagues, creating an uncomfortable atmosphere. These concerns were communicated to management. We have already referred to the later assessment of Mr Winkworth, which in our view correctly encapsulates the Claimant's behaviour towards his peers.

83. Also a tutor, Alexander Chadwick, reported to Ms Finn his assessment of the Claimant as "borderline ignorant". That is using "ignorant" in the colloquial sense of "rude". Whilst it is correct that Mr Chadwick had not raised these concerns directly with the Claimant, who was otherwise, after a poor start, now performing satisfactorily in terms of his preparation for and contribution to the academic content of tutorials, this was his honest and accurate assessment of his inter-personal interaction with him.

84. Ms Finn was therefore perfectly right to raise these concerns with the Claimant in a 1-2-1 session.

85. It is a pattern which has emerged throughout this case that whenever the Claimant is subjected to scrutiny over his performance or conduct or when he disagrees with any decision he responds by making counter-allegations, frequently in somewhat hyperbolic language, seeking to discredit the person who has challenged him.

86. In this instance the tone of the grievance is intimidatory, requiring that Ms Finn and the trainees who had raised their concerns to her be removed for gross misconduct, and seeking to frame the complaint in terms of discrimination.

87. The claim of religion and belief discrimination before the tribunal has correctly been struck out as having no reasonable prospect of success.

88. We are satisfied that the Claimant did not reasonably believe that this complaint properly amounted to religion and belief discrimination, and that it was therefore a breach of a legal obligation under the Equality Act. He is an intelligent person and we find that he cannot have believed and therefore did not genuinely believe that his construction of a "discrimination" claim in this way actually disclosed any contravention of the Equality Act.

89. In any event this is not a matter which raises any public interest and the Claimant again cannot have believed and therefore did not reasonably believe that it did. The issue concerns his appraisal at work and not any matter of wider concern.

90. Because this allegation has been the subject of a Deposit Order on the grounds that there was little reasonable prospect of the Claimant showing that he had the required

reasonable belief there is a potential liability for costs under rules 39 (5) and 76 of the Employment Tribunals rules of Procedure 2013.

Second Disclosure

91. As we have already said the Claimant on 4th July 2017 raised a complaint to Ms Finn regarding Mr Winkworth's comment about slavery on 29th June 2017. This was not pursued further as a formal grievance.

92. This, we have found, did not amount to racial harassment and the allegation contained within the complaint that Mr Winkworth had been smirking when he made the comment was a lie.

93. We are satisfied therefore that the Claimant did not genuinely believe that this amounted to a breach of any legal obligation under the Equality Act, let alone as he now alleges that it was a criminal offence under the Public Order Act.

94. Nor in all the circumstances did the Claimant reasonably believe that it raised any issue of public interest. The comment arose naturally, as the Claimant well knew, solely in the context of a discussion between the trainees about tax allowances. Any possible further issue as the sensitivities regarding any reference to slavery would have been properly a purely internal matter for debate between those trainees.

Third Disclosure

95. On 23rd August 2017 the Claimant raised a grievance against Gemma Cooper, a business learning manger, alleging that she had physically assaulted him on 4th April 2017 and again on 23rd June 2017.

96. The Claimant had earlier, on 21st July, at a meeting where Ms Cooper carried out a critical assessment of his performance in a case review meeting, claimed that she had hit him with her handbag on 23rd June. Ms Cooper apologised if this had happened inadvertently as she had not been aware of anything and that it certainly had not been deliberate.

97. At a further review meeting on 10th August 2017 to discuss concerns which the Claimant had raised about Ms Cooper's alleged unprofessionalism he reiterated the complaint about the handbag incident and also raised for the first time an allegation of, as yet unparticularised, earlier violence. At this point Ms Cooper ended the meeting.

98. Once again we have heard the Claimant's evidence as to these alleged incidents and do not believe him. His account is inherently implausible and is not at all credible. On the first occasion he was in an end-of-year review meeting with his trade union representative also present and he says that Ms Cooper deliberately swivelled in her chair, though the details are imprecise, and kicked him on the shin. He did not react in any way at the time and did not complain to his representative. On the second occasion he was being supervised at a meeting with a tax payer, whose financial adviser was also present. At the end of that meeting he alleges that Ms Cooper

deliberately swung her handbag to hit him on the leg. Again he did not react in any way at the time and did not complain to the potential witnesses.

99. These events did not happen. The Claimant's account is a lie.

100. Even though the Claimant reported these alleged assaults to the police at the time, but has not as yet taken them any further, we are satisfied that he in fact knew the allegations to be false and that he did not have any genuine belief that a criminal offence had been committed.

Fourth Disclosure

101. As we have already said in the context of the victimisation complaint the Claimant, on 28th September 2017, raised a grievance alleging sexual harassment.

102. This, we have found, was a lie.

103. The Claimant did not, therefore, in fact believe that there had been any breach of the provisions of the Equality Act.

Fifth Disclosure

104. On 16th October 2017 the Claimant raised a further grievance against Ms Finn alleging "harassment" following his making the complaint of sexual harassment. This appears to be an allegation purportedly under section 26 (3) of the Equality Act, of being treated badly because of his reaction to sexual harassment. The fact that it did not correctly identify the legal label (which would appear to be victimisation) is not, however, fatal to the claim.

105. The substance of the complaint, that the Claimant's work had been reallocated following his return from sick leave and that he had been told to refrain from contacting Ms Quinn, were not however complaints that were properly addressed against her. The Claimant had been told at meetings on 11th and 12th October 2017 – as documented in the manager's notes -that these decisions had in fact been taken by Nigel Lodge, who had by then been assigned as his line manager in place of Ms Finn.

106. In these circumstances we are satisfied that the Claimant did not in fact believe that Ms Finn had breached any legal obligation. The entire complaint is knowingly based upon the false premise that the Claimant had raised a genuine complaint of sexual harassment. It is a further attempt to intimidate Ms Finn at a point where the Claimant was well aware that he was at great risk of failing his performance milestones (QAF). He had been informed on 9th August that he had not, at that stage, provided evidence to pass the nine month milestone and his probation period had been extended by six months on 11th August 2017. Shortly before this grievance the Claimant had sought to challenge Ms Finn's independence as his QAF assessor but had been informed that she would continue in that capacity.

Sixth disclosure

107. The Claimant says that he made the final protected disclosure in an email to Anna Crawley in December 2017. He did not.

108. The actual email was sent on 25th January 2018. It is in the bundles.

109. The fact that Mr Smith in his closing submission mistakenly failed to identify the Claimant's error in the pleadings, and therefore stated that it appeared that there was no sixth disclosure at all is not material.

110. The allegation in the email is of gross misconduct and in the pleadings is of misconduct in a public office. It is alleged that, when in responding to the last grievance against Ms Finn, Mr Lodge asserted that the decisions complained of were in fact made by him that is a deliberate misrepresentation.

111. This allegation in the email is based solely on the Claimant's assertion in the email that in October that he had been told by Mr Lodge that these decisions were taken by Ms Finn.

112. We find that, as we have already stated, the notes of those October meetings do not support this assertion by the Claimant.

113. In deciding that the grievance against Ms Finn did not meet the threshold for acceptance Mr Lodge was, in fact, rejecting a complaint which as we have said was knowingly based upon a false premise. This complaint to Ms Crawley is also, therefore, building further upon the lie that the Claimant had been subjected to sexual harassment.

114. In these circumstances the Claimant did not reasonably believe that Mr Lodge had breached any legal obligation. At most he is asserting, wrongly as we find, that he had been told different things on different occasions. There is no reasonable basis whatsoever for the subsequent assertion that this amounted to an offence of misconduct in a public office. This dispute also could not reasonably be thought to have engaged any issue of public interest.

115. Because this allegation has been the subject of a Deposit Order on the grounds that there was little reasonable prospect of the Claimant showing that he had the required reasonable belief there is a potential liability for costs under rules 39 (5) and 76 of the Employment Tribunals rules of Procedure 2013.

Protected Disclosure Detriment

116. Because the Claimant has not in fact made any protected qualifying disclosure all complaints under section 47B of the Employment Rights Act 1996 necessarily fail.

Unfair Dismissal

117. Because the Claimant has not in fact made any protected qualifying disclosure the complaint under section 103A of the Employment Rights Act 1996 also necessarily fails.

118. In any event because the Claimant had less than two years' employment it would be for him to show that the principal reason for dismissal was the making of protected qualifying disclosures. That would require him to prove either that the stated reason for termination was incorrect or that this was a "conspiracy" of the type envisaged in Royal Mail v Jhuti [2017] EWCA Civ. 1632 where senior managers manipulated information provided to the decision makers.

119. The Claimant has not in fact produced any evidence to show that the reason for dismissal was anything other than the stated reason, namely capability. The Claimant failed to demonstrate to his assessors that he had passed the milestones. He failed at nine months. He then had the opportunity to submit further evidence to pass at the same time as submitting additional evidence at the twelve month stage. He failed to pass either milestone. The decision was taken by Ms Finn and confirmed at an independent check by Ms Crawley. The Claimant appealed to a panel of three grade 6 managers, convened by Toni Bovill, the TSP director. He again had the opportunity to resubmit evidence of his satisfactory performance but did not do so. The panel did not physically meet but considered the appeal separately and unanimously confirmed that the Claimant had not passed. That decision was final and the purported appeal to Andy Leggatt on 26th March 2018 was accordingly rejected. Five managers have therefore assessed the Claimant's performance at the relevant milestones as being inadequate: that is the reason why he was dismissed.

120. Also there is no evidence whatsoever that the reason for dismissal may have been because of race or sex. We have no doubt that, by way of comparison, a white or Asian woman who had similarly failed to pass the milestones would have been dismissed.

121. Whilst, following the decision in Timis v Osipov [2018] EWCA Civ. 1321, an individual may also be liable for unfair dismissal if the principal reason for their decision to dismiss is the making of a protected qualifying disclosure that is not in fact the Claimant's stated case against Ms Bovill. In his evidence the Claimant asserts that his alleged extenuating circumstances were not taken into account at appeal and that therefore the dismissal was inevitable based upon his failure to pass the capability milestones. This is therefore an assertion that, as in Jhuti, the information that was put before Ms Bovill – or more properly before the full appeal panel – had been manipulated by other senior managers. It is not an allegation that the reason for the final decision itself was an act of protected disclosure detriment and so Osipov would not apply.

Specific allegations

122. The matters set out in the list of issues, in so far as they not already sufficiently dealt with in the substantive decision can, in the circumstances be disposed of shortly.

123. We are satisfied that the Claimant was, throughout, provided with an appropriate level of management support.

124. Ms Finn did not make a false allegation that the Claimant had failed to say "good morning" to her unless she said it first. Whilst it may be a generalisation that was her honest and accurate assessment of his customary level of interaction with her.

125. Neither Ms Cooper nor Ms Finn failed to take on board the Claimant's suggestions. Rather it was the Claimant who failed to accept proper direction and listen to concerns that management had about him.

126. The Claimant's request to transfer back to London was not ever specifically refused. That would have been a decision for Ms Crawley. It would however have been inappropriate because movement of trainees was only permitted in exceptional circumstances because of the highly restricted number of places on the TSP course at different locations. It was certainly not appropriate to grant such a request whist the Claimant was subject to performance review.

127. Ms Finn's response to the allegations of racial harassment, of which she already had an overview from other sources was entirely appropriate and proportionate.

128. The Claimant was placed on a performance improvement programme because his underperformance warranted that step. He was quite properly informed that failure to engage would have potentially adverse consequences. The setting of the targets and their adjustment to ensure that they were in fact SMART objectives, capable of assessment, was properly administered.

129. Ms Finn's requirement that the Claimant evidence personal interaction with his colleagues rather than merely by email is a perfectly proper approach to the demonstrating of this competency.

130. The extension of the Claimnt's probationary period was an appropriate and proportionate response to his underperformance.

131. Ms Finn and Mr Lodge did not deliberately omit to inform the Claimant what line of business he was working in, even if there was confusion in his mind. On 10th October 2017 he was informed that he would still be working in the Mid-Sized Business sector (MSB).

132. The Claimant's case load was removed and reallocated. This was a proper business decision to seek to ensure that necessary work upon these files was completed promptly, even if in the event cases were then re-allocated to the Claimant to complete. Further this decision was in order to free the Claimant to concentrate on resubmitting the evidence in support of having passed his milestones. The removal of case work for a short period did not prejudice the Claimant in submission of this evidence because it ought to have been available based upon the work he had already been supposed to be doing when handling those files.

133. The arrangements made by Mr Lodge for the reallocation of the Claimant to different premises which require the issue of a new security pass do not amount to "open mockery" of the Claimant.

134. On 12th October 2017 the Claimant sent a large number of emails to Ms Finn. Her difficulties in seeking to manage the Claimant were, albeit unbeknown to the Claimant at that time, having an adverse effect on her mental health and he was therefore told by Mr Lodge to refrain from contacting her. This was not any material detriment to the Claimant, even though Ms Finn remained his QAF assessor, because as explained by Mr Lodge at the meetings on 11th and 12th October his principal points of contact would be through his tutors or through Mr Lodge as his new line manager.

135. The completion of exception reports where appropriate is an ordinary incidence of the Claimant's work and that is why he was required to produce them.

136. The Claimant did not produce the Push Doctor's fit note of 7th December until nearly three weeks later. Mr Lodge was perfectly entitled to contact him to require it and informing his that failure to do so could lead to the recording of an unauthorised absence is appropriate in the circumstances.

137. Mr Rhodes, as his new line manager, did carry out a sufficient and appropriate, albeit informal, review of the Claimant's working arrangements upon his return to work on 19th January 2018.

138. There is no evidence that the Claimant's subject access request was dealt with otherwise than in accordance with the relevant data protection regulations.

139. In the manager's checklist completed on review of the sexual harassment grievance Ms Finn referred to the Claimant having been transferred from a Leeds to a Manchester tutorial group because of his behaviours. That same wording was copied by Ms Cooper. The context is to explain why it would in fact be inappropriate for either of these managers, who had been the subject of complaints raised by the Claimant, should not in fact have any further dealing with this grievance, lest they be thought to be biased because of their previous experience of his behaviour.

140. Mr Rhodes suspended access to the Claimant's IT services during his long-term sickness absence because that was the policy.

141. Mr Rhodes initiated the sickness absence procedure with a view to removal of the Claimant on the grounds of ill health because that was appropriate given his levels of non-attendance within the probationary period. The procedure was never in fact carried through because it was superseded by the capability dismissal. The initial recommendation that this process be commence was proportionate. In his letter to Liz Cunningham commencing this process Mr Rhodes did not refer to the Claimant as suffering from depression as well as stress and anxiety because that was the stated diagnosis in the most recent sick note of 21st December 2017.

142. Mr Ritchie did not respond to the Claimant's emails in February and March 2018 because he was acting on HR advice that Liz Cunningham, now his nominal line manager, should deal with them.

143. Mr Billligton did not lie to the Claimant about what would be covered in his telephone grievance investigation into the sexual harassment allegation and nor did he then question him about "an email which did not exist". One of the alleged harassers, Ayesha Khan, had previously been accused by the Claimant of having falsely reported that he had failed to reply to an email which she had not in fact sent. This had been one of the matters raised by Ms Finn at the February 2017 1-2-1. Initially Mr Billington had not considered this relevant but in the course of his interview with the Claimant he changed his mind. The original email to which the Claimant had failed to reply, and which was regarding the trainees' attendance to gain experience at a call centre, had been sent by Ms Cooper. Shortly afterwards Ms Khan became the sole point of contact for the other trainees in coordinating their attendance. The Claimant also failed to reply to her subsequent emails on the subject. When Ms Khan conflated matters and suggested that it had been her initial email which had gone unanswered, rather than Ms Coopers, that is clearly a mistake but it does not warrant the Claimant's accusation that she was lying or that the email in question "did not exist".

144. The counter grievance in respect of the sexual harassment allegation was validly raised and properly accepted. It and the subsequent appeal were not, however, concluded until after the end of the Claimant's employment. There is no obvious detriment to the Claimant in not being informed of the outcome, particularly as it did not uphold the allegations of a vexatious complaint.

145. Although the Claimant has repeatedly asserted a failure to follow procedures and policies there is no evidence of any such specific failure. We are satisfied that the relevant policies were in fact properly followed.

146. In summary therefore, we find that there is, in any event, no treatment of the Claimant which he might properly consider detrimental which is not in fact fully explained without any causal link to any alleged protected disclosure or to the Claimant's race.

Additional matters

147. By an email dated 18th June 2019, that is after the close of evidence and submissions and the day before the date scheduled for the reserved decision, the Claimant purported to amend his claim by adding two further complaints of race discrimination and he also applied to strike out the Response at this extremely late stage.

148. The Claimant cannot simply amend his claim: he would require leave. Leave will not ordinarily be given at this stage in proceedings. In any event having concluded our deliberations the new claims would have no merit whatsoever.

149. Similarly, the allegations of unreasonable and vexatious conduct on the part of the Respondent are without foundation. We have been perfectly able, as we had intended to do, to consider the case on its merits and have reached our decision.

150. There will therefore be no further hearing to consider the Claimant's applications. The case is closed, save in respect to costs.

151. In the light of paragraphs 90 and 115 of our Judgment there will have to be a costs hearing.

152. The Claimant still has an outstanding wasted costs application which was adjourned to the end of the final hearing. That will be heard at the same time, also before the full panel.

153. By way of directions any final schedule of costs claimed by either side must be sent to the other party and to the tribunal within 21 days of the sending of this judgment, together with any written submissions or further submissions as to costs.

EMPLOYMENT JUDGE LANCASTER

DATE 11th July 2019

JUDGMENT SENT TO THE PARTIES ON

AND ENTERED IN THE REGISTER

FOR SECRETARY OF THE TRIBUNALS