EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MR SHUNMUGARAJA	**V**	**ROYAL MAIL GROUP LIMITED**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 26TH 27TH 28TH FEBRUARY AND 1ST & 4TH MARCH 2019 (CHAMBERS DISCUSSION ON 23RD & 25TH APRIL 2019)

BEFORE: EMPLOYMENT JUDGE HOWDEN-EVANS
MRS J KIELY
MS K GEORGE

REPRESENTATION:
FOR THE CLAIMANT: IN PERSON, ASSISTED BY MR KHAN AND MR ADDISON

FOR THE RESPONDENT: MR PEACOCK (SOLICITOR)

RESERVED JUDGMENT

The tribunal's unanimous decision is that:

1. Contrary to s39(2) and s13 Equality Act 2010 the Respondent has directly discriminated against the Claimant because of his perceived religion.

2. Contrary to s40(1)a and s26 of Equality Act 2010 the Respondent has harassed the Claimant by unwanted conduct related to his race.

3. Contrary to s40(4) and s27 of Equality Act 2010 the Respondent has victimised the Claimant because he had carried out protected acts as defined therein.

4. The Claimant's claims of direct race discrimination; direct disability discrimination by association; direct sex discrimination by association; detrimental treatment following a protected disclosure; unfair dismissal following a protected disclosure and automatically unfair dismissal

(contrary to s100 Employment Rights Act 1996) are not well founded and are dismissed.

Reasons

1. References to the hearing bundle appear in square brackets throughout this Judgment.

Background

2. The Respondent has employed the Claimant at the Cardiff Mail Centre between 1st August 2007 and 23rd January 2018, initially as an Operational Postal Grade ("OPG") and subsequently as a Work Area Manager.

3. On 14th September 2017, the Claimant lodged a grievance with his employer. On 11th October the Claimant contact ACAS in accordance with their early conciliation procedures. The period of ACAS early conciliation lasted until 2nd November 2017.

4. On 9th November 2017, the Claimant presented an ET1 claim form alleging discrimination on the grounds of race, religion, disability and sex and asserting he had been subjected to a detriment following a protected disclosure.

5. On 27th November 2017, the Claimant was taken ill in work and started sick leave. The Claimant did not return to work and on 23rd January 2018 his employment was terminated. The Respondent asserts the reason for dismissal was the Claimant's ongoing non-cooperation with the Respondent's sickness absence procedures.

6. On 22nd February 2018, the Respondent filed an ET3 response form, comprehensively denying the allegations.

7. On 24th August 2018 there was a preliminary hearing before Employment Judge Emery, at which point the Claimant was permitted to amend his claim to include a claim of automatic unfair dismissal (contrary to s100 Employment Rights Act 1996).

8. On 8th February 2019 there was a preliminary hearing before Employment Judge Beard. Employment Judge Beard explained that the Claimant's "List of Issues" as annexed to his Order stood as the limit of the legal boundaries of the Claimant's case.

Claims

9. By the time of the final hearing, the Claimant was pursuing the following claims:

    9.1. Unfair dismissal following protected disclosure, contrary to s103A Employment Rights Act 1996;

9.2. Automatically unfair dismissal, contrary to s100(1)e Employment Rights Act 1996;
9.3. Victimisation contrary to s27 Equality Act 2010;
9.4. Harassment related to race, contrary to s26 Equality Act 2010;
9.5. Direct race discrimination, contrary to s13 Equality Act 2010;
9.6. Direct religious discrimination, based on his perceived religion, contrary to s13 Equality Act 2010;
9.7. Disability discrimination by association – whether the Claimant was treated less favourably because of another person's disability;
9.8. Sex discrimination by association – whether the Claimant was treated less favourably because of his colleague ("Z")'s sex.

The Issues

10. In compliance with previous case management directions, the Claimant had prepared a "List of Issues" which identified each of the allegations he was pursuing. Ahead of the final hearing, Mr Peacock, on behalf of the Respondent, had helpfully prepared a "Reframing of the List of Issues" document, which used the allegations set out in the Claimant's List of Issues to create a list of issues addressing the legal test for each particular type of claim. At the start of the final hearing, the employment judge took the parties through the Reframing of the List of Issues document to check it comprehensively covered every allegation and issue. By the time of closing submissions, the issues to be determined by the tribunal were as follows

11. <u>Unfair Dismissal following protected disclosure, contrary to s103A Employment Rights Act 1996</u>:

    11.1. Did the Claimant inform his line manager and senior managers of breaches of Equality Act and Public Sector Equality Duty?

    11.2. If the Claimant did, did these communications amount to qualifying disclosures?

    11.3. If they did, did they amount to protected disclosures?

    11.4. Was the reason or principal reason for dismissal these protected disclosures?

12. <u>Automatically Unfair dismissal, contrary to s100(1)e Employment Rights Act 1996</u>:

    12.1. Were the circumstances which led to the Claimant not attending work on 27 November 2017 and staying away from work between 27th November 2017 and his dismissal on 23rd January 2018 "circumstances of danger"?

    12.2. Did the Claimant reasonably believe these to be serious or imminent?

12.3. Did the Claimant take appropriate steps to protect himself or other persons from the danger?

12.4. Was this the reason or principal reason for the Claimant's dismissal?

13. Victimisation contrary to s27 Equality Act 2010:

13.1. Are any of the following protected acts?

13.1.1. The Claimant's letters of 22nd Jan 2014 [p334 & 336];
13.1.2. The Claimant's letter of 23rd Jan 2014 [p338];
13.1.3. The Claimant co-authoring Z's letter of 7th September 2015 [p113];
13.1.4. The Claimant's letter of 7th August 2017 [p135]; and
13.1.5. The Claimant's letter of 14th September 2017 [p132]? – *the Respondent accepts that this was a protected act*

13.2. Did the Respondent dismiss the Claimant because the Claimant had done a protected act(s)?

13.3. Did the Respondent threaten to and subsequently on 28th December 2017 actually stop the Claimant's contractual sick pay?

13.4. Did this amount to subjecting the Claimant to an act of detriment?

13.5. Did the Respondent undertake this act of detriment because the Claimant had undertaken a protected act(s)?

14. Harassment related to race, contrary to s26 Equality Act 2010:

14.1. Was the "sly dog" comment that was made by Mr Brown to the Claimant at a meeting with Mr John on 21st June 2017 related to race?

14.2. Did it have the purpose or effect set out in s26 Equality Act 2010?

14.3. Was the Claimant's claim submitted to the tribunal within time and if not, should time be extended (s123 Equality Act 2010)

14.4. Was the "I am not going to kill you" comment made by Mr Day to the Claimant on 3rd August 2017 related to race?

14.5. Did it have the purpose or effect set out in s26 Equality Act 2010?

14.6. Was the involvement of Mr Colclough, Mrs Frankham and Mrs Rich in the Claimant's complaint dated 14th Sept 2017, (such as it was, in circumstances where the Claimant had requested an external investigation), unwanted conduct related to race?

14.7. Did it have the purpose or effect set out in s26 Equality Act 2010?

14.8. Was Mr Newton's comment to the Claimant, "I will go ape shit" if someone called him prejudiced with his knowledge of what prejudice is, unwanted conduct related to race?

14.9. Did it have the purpose or effect set out in s26 Equality Act 2010?

14.10. Was the reason Mr Colclough threatened to and then on 28th December 2017 stopped the Claimant's contractual sick pay related to race?

14.11. Did it have the purpose or effect set out in s26 Equality Act 2010?

15. Direct race discrimination, contrary to s13 Equality Act 2010

15.1. Was the statement by Mr Brown, during his interview on 5th December 2017, that the Claimant "was not a good manager" made because of race?

15.2. Was the "sly dog" comment, made by Mr Brown, to the Claimant at a meeting with Mr John on 21st June 2017, made because of race?

15.3. Were the actions of Mr Brown "disrupting my staff and telling them not to work" because of race?

15.4. Were the actions of Mr Brown "being aggressive and confrontational when asked by the Claimant to work" because of race?

15.5. Were the actions of Mr Brown "undermining my work ethics" because of race?

15.6. Was the statement by Mr Day, during his interview on 5th December 2017, that the Claimant "was not a good manager" made because of race?

15.7. Was Mr Day aggressive and threatening when he said "I am not going to kill you" on 3rd August 2017

15.8. If so, was this because of race?

15.9. Were the actions of Mr Day "undermining the Claimant's work ethics" because of race?

15.10. In relation to each allegation, was the Claimant's claim submitted to the tribunal within time and if not, should time be extended (s123 Equality Act 2010)?

16. Direct religious discrimination, based on perceived religion, contrary to s13 Equality Act 2010:

16.1. On 3rd August 2017, did Mr Day aggressively tell the Claimant to "use the Muslim prayer room"?

16.2. If so, was this less favourably treatment because of religion?

17. Direct Disability discrimination by association

17.1. Did Mr John say to Mr Day "I will back you 100%" in relation to his challenge against the Claimant's use of "the quiet room"?

17.2. If so, was this less favourable treatment because of the Claimant's association with Z?

17.3. In the alternative, was this less favourable treatment because the Claimant co-authored Z's grievance of 7th September 2015?

18. Sex discrimination by association

18.1. Was there a decision by Ms Rich and two others to interfere in the Claimant's grievance, (in which he had requested an external investigation) to appoint someone internal, who was biased?

18.2. If there was, was this less favourable treatment because of the Claimant's association with Z and her being female?

The Hearing

19. The case was heard by an employment tribunal siting in Cardiff.

20. At the hearing, the Claimant, a litigant in person, was represented by his friend Mr Khan. After lunch on the third day, Mr Khan felt unwell. The tribunal (with the consent of the Respondent) offered to adjourn the hearing; the Claimant declined this offer and the hearing continued with the Claimant's friend Mr Addison representing the Claimant that afternoon. By the morning of the next day, Mr Khan was feeling better and he resumed his role as the Claimant's representative.

21. Mr Peacock, Solicitor, represented the Respondent throughout the hearing.

22. On the first day of the hearing we determined the Claimant's application to strike out the response and submission that it was not possible to have a fair hearing. The Claimant objected that documents had recently been added to the bundle. These documents were copies of the respondent's policies and a recent employment tribunal judgment in a case that included similar witnesses (but not the same Claimant). The employment judge explained this tribunal was not bound by findings of another employment tribunal as each tribunal has to make findings of fact based on the evidence in front of them. The tribunal had not read the judgment; Mr Peacock agreed that the judgment could be removed from the bundle. The Claimant still wished to pursue his application to have the response

struck out, citing non-compliance with the case management directions. Having heard submissions from both parties, it was agreed the tribunal should rise to read the 7 witness statements, List of Issues and Reframed List of Issues, the ET1 and ET3, and the policies that had been disclosed late, before determining the Claimant's application. Having read these documents and having considered the parties' submissions the tribunal concluded the Respondent had not acted unreasonably as they had complied with the original direction for disclosure and subsequently, when the Respondent realised further policy documents would be relevant, they disclosed them to the Claimant prior to exchange of witness statements. The Claimant had not appreciated the policy documents would be in the bundle, so had not discussed them in his witness statement. The tribunal concluded this could be remedied by the Claimant preparing a supplemental witness statement addressing these policies if he wished; there had not been any prejudice to the claimant's ability to prepare his case and it was still possible to have a fair hearing.

23. We then discussed the List of Issues and Reframed List of Issues, the order of evidence and the timetable for the hearing. The rest of the first day was devoted to reading the bundle of documents (of nearly 500 pages).

24. On Day 2 through to Day 5 we heard 6 witnesses' evidence. We heard:

24.1. the Claimant's evidence (on Day 2 & the morning of Day 3);

24.2. Mr Colclough, the Respondent's Production Control Manager, who was the Respondent's Late Shift Manager and had taken the decision to dismiss the Claimant (on Day 3 & the morning of Day 4);

24.3. Mrs Rich, the Respondent's Operational Lead for Attendance, who was Plant Manager of the Respondent's Cardiff Mail Centre (on the afternoon of Day 4);

24.4. Mr Newton, one of the Respondent's Work Area Managers, who investigated the Claimant's complaint about Mr Day and Mr Brown (on Day 5);

24.5. Mr John, one of the Respondent's Work Area Managers, who was the Claimant's immediate line manager (on Day 5); and

24.6. Mr Day, one of the Respondent's Operational Postal Grade ("OPG") that worked in the Claimant's team and was line managed by the Claimant (on Day 5).

25. Each of these witnesses gave evidence on oath. In relation to each witness, the procedure adopted was the same: the Tribunal had read each witness's statement, there was opportunity for supplemental questions,

before questions from the other side, questions from the tribunal and any re-examination.

26. In addition to the 6 witnesses that gave evidence on oath, the tribunal had a witness statement from Mr Brown, one of the Respondent's OPG that worked in the Claimant's team and was line managed by the Claimant. Mr Brown's statement explained he felt unable to attend the hearing due to his health. The tribunal have taken into account the contents of Mr Brown's statement, but also note his evidence has not been given on oath and is untested by cross-examination.

27. The case had a time estimate of 5 days; during these 5 days we were able to hear witness evidence and parties' closing submissions. The Tribunal subsequently met to consider its decision; our chambers discussion lasted for 2 days and this reserved judgment was drafted on the first available dates after that discussion. The employment judge apologises for the delay in promulgating this judgment, which has been as a result of the judge's ongoing workload.

Findings of Fact

28. We have confined our findings of fact to those that are necessary to determine the claims and issues in this case.

29. Since privatisation, the Respondent, Royal Mail Group Limited, is a privately-owned company that provides a service to the public. It has 139,000 employees in the UK. Approximately 450 people work out of the Respondent's Cardiff Mail Centre; this would increase by 120 to 150 people during the busy Christmas period. The tribunal notes the Cardiff Mail Centre has a very diverse workforce.

30. The Claimant commenced employment with the Respondent, at the Cardiff Mail Centre, on 1st August 2007 as an OPG. Since 13th May 2013 the Claimant has been a Work Area Manager working the late shift. (Employees at Cardiff Mail Centre are assigned to one of three shifts – the early, late or night shift.)

31. The Claimant describes himself as being of British Indian origin and a Hindu. He has actively supported the British South Indian Chamber of Commerce and has worked to enhance UK-India ties, such that he was selected to attend a national UK-India Young Leaders Forum in 2018.

32. For a period of time, the Claimant worked in "the bookroom" (the local HR department) at Cardiff Mail Centre, which meant he has experience of dealing with HR administration such as sickness absence, emergency leave and managing overtime. The Claimant also has some experience of health and safety work. The tribunal notes in 2010 the Claimant had taken part in the Safety Management Audit meeting (with 67 colleagues) and was one of 4 colleagues delivering a short presentation on risk assessment.

33. As a Work Area Manager, the Claimant was on the first tier of management within the Cardiff Mail Centre. The Claimant was responsible for managing a number of OPGs including Mr Day and Mr Brown. The Claimant was also the Stamp Cancellation Project lead for the Cardiff Mail Centre; in September 2017, Mr Mason, the national lead on the Stamp Cancellation Project attended Cardiff and praised the Claimant for the Cardiff Mail Centre's excellent performance in the project.

34. In the Claimant's "Half Year Indicative Appraisal 2017/18", the Claimant was assessed (by his line manager) as overall having "high" achievements in customer goals and financial goals, and overall having "good" achievements in people goals and efficiency goals. His manager comments [p128] *"I have never had any behavioural issues with [the Claimant] who always acts professionally and with the up most respect for himself and our team."* He also comments *"Overall a strong 6 months for [the Claimant] – working within his own role and that of the WSM (Covering Long Term Leave)…In the next 6 months [the Claimant] will be in a position to really push again for the marking he deserves. I believe that [the Claimant] will not sit back on this challenge and will strive for even further success. Looking forward to the next 6 months".*

35. The Claimant's immediate line manager was Mr John (Work Area Manager on the late shift) and immediately above Mr John was Mr Colclough (Late Shift Manager). Mr Colclough managed 200 people on site and reported directly to Ms Rich, the Plant Manager. Mr Colclough confirmed that any dismissal decision would need to be taken by Mr Colclough or a manager at his level within the plant.

36. Mr Newton was a Work Area Manager working the night shift and was on the same tier of management as the Claimant.

Relevant terms in the Claimant's written contract of employment

37. The Claimant's contract of 13th May 2013, when he became a work area manager, included the following clauses:

"15.2….If you have a grievance relating to your employment you may invoke the Grievance Policy or the Stop Bullying and Harassment Policy."

The Respondent's policies

Equality Policies

38. The Tribunal had sight of the Respondent's "Our Business Standards; an employee's guide" [p48.10 to 48.20]. These are expressed to apply *"wherever you work and in whatever job you do".* In the Equality and Fairness section of this document it provides *"We must not discriminate for any reason. This means not discriminating because of race, colour, ethnic or national origin, nationality, disability, marital or civil partner status, sexual orientation, pregnancy or maternity, age, religion or belief…sex or*

gender reassignment….You must not use inappropriate behaviour or intimidate other employees, customers or suppliers for any reason."

39. The Respondent's "Stop Bullying and Harassment Policy" [p55 – 63] provides [at p56] *"This Policy applies to all employees of Royal Mail Group Ltd…".* In the section headed *"Check first: Which policy to use?"* it provides *"For cases relating to bullying harassment e.g. unwanted behaviours that make someone feel intimidated degraded humiliated or offended use this policy"*

40. [At p58] it provides *"It is the manager's responsibility to:*

- *…challenge unacceptable behaviour at the earliest possible opportunity;*
- *Take any issues raised relating to bullying and harassment seriously and take measures to protect the individual and take appropriate corrective action"*

Sick Pay Policy

41. This provides [p48.22]

"During absence from work due to sickness…employees…will receive:

- *after twelve months' service, full rate sick pay for the first six months of any spell of absence, followed by half rate sick pay."*

42. *"Conditions on which sick pay is payable"* [p48.23] states, "*Entitlement to sick pay is always subject to strict observance of the following conditions:*

- *Self-certificates or medical certificates, including 'fit notes' must be received by the business for all sick absences*
- *The business must be satisfied that an employee's absence is necessary and due to genuine illness."*

Absence notification and maintaining contact policy

43. This provides [p50 & 51]

"Where the employee's absence is going to be longer than a few days, the manager and employee should agree how they will maintain contact during the period of the absence, both the level of contact – how often and the method, e.g. email, telephone conversation."

"Contact should be made by telephone or in person where practical to support ongoing discussions. The manager should remind the employee of the need to submit medical certificates at appropriate times during the absence."

"It is important that the manager and employee are both proactive in maintaining contact during period of absence due to illness. Contact should be used to discuss:

- *How the employee is feeling*
- *The employee's health including any updates from medical appointments*
- *Any developments from work about which the employee should be made aware*
- *Any help or support the manager can provide*
- *Whether referral to occupational health service is appropriate*

…Managers should show sensitivity and empathy when maintaining contact with the employee."

44. In the *"Failure to maintain contact"* section of this policy [p52], it provides

"Where an employee is absent and has not made contact with the manager, the manager should attempt to contact the employee. This should include several attempts before recording the absence as unauthorised. If contact is still not made then the manager should record the employee's absence as unauthorised….the manager will then be prompted to produce a No Contact Letter which should be sent to the employee by Special Delivery and by First Class post. The manager should then follow the process within the Unauthorised Absence Guide."

"If an employee on long term sickness absence fails to maintain contact or fails to provide a further medical certificate, the manager should again make all reasonable efforts to make contact including sending contact letters by Special Delivery and by First Class post ….if the employee does not make contact or fails to provide a further medical certificate following written notification giving the employee two days' notice any sick pay they may be entitled to from Royal Mail Group may be stopped."

Events in 2015

45. On 7th September 2015, the Claimant helped his colleague Z to compose her letter to Ms Rich [p113 & 114]. This letter referred to Z finding it difficult to discuss the reasonable adjustments she required with her *"male dominated managers"*. In her letter Z explained the reasonable adjustment that would most assist her was changing her role.

46. Ms Rich passed this letter [p113 & 114] to Mr Richards, the Respondent's Night Shift Manager and he confirmed by letter of 1st October 2015 [p115], that the reasonable adjustments requested would be made. Subsequently, Z's role changed and she performed the role that she had requested.

47. The Claimant felt that managers at Royal Mail knew he had helped Z to draft her letter of 7th September 2015; he was concerned he was considered to be a trouble maker. The tribunal found no evidence to

support this assertion. The documents [p113 to 115] don't make any reference to the Claimant; there is no evidence to suggest that any of his managers or Mr Richards were aware the Claimant was involved in composing Z's letter. Further, the Respondent didn't have any objection to making the reasonable adjustment requested – they just dealt with it, suggesting this was not really an issue for the Respondent or its managers.

Mr Brown's comment at the 21st June 2017 meeting

48. There is evidence that historically the Claimant has found it difficult to manage Mr Brown and has raised this regularly with various managers. Other witnesses agree that Mr Brown can be a challenging team member to line manage.

49. By June 2017, the Claimant's relationship with Mr Brown was not a good one. Mr Brown was absent due to illness for 6 weeks and the Claimant's evidence was that he didn't know this. Mr John had dealt with Mr Brown's absence rather than the Claimant.

50. On the day Mr Brown returned to work there was an incident between the Claimant and Mr Brown. Mr Brown refused to undertake the tasks the Claimant had instructed him to do; Mr Brown subsequently reported this was because he had returned after 6 weeks' absence and the Claimant had given him orders without first welcoming him back.

51. On 21st June 2017 a meeting was called to "clear the air" between the Claimant and Mr Brown. The meeting was chaired by Mr John. Mr De-Castro-Pugh, OPG accompanied Mr Brown. It is accepted that during this meeting Mr Brown called the Claimant a "sly dog". The Claimant was clearly offended by this comment. Mr John tried to calm the Claimant but the Claimant was so upset he left the meeting. Mr John said to Mr Brown "looks like you've really offended him" and Mr Brown agreed to find the Claimant to apologise.

52. Mr Brown's account was that he had called the Claimant a "sly dog" because the Claimant had raised a private issue and Mr Brown felt the Claimant was trying to make Mr Brown look bad in front of Mr John. The Claimant explained he finds the phrase deeply offensive. Shortly after the meeting, Mr Brown realised his comment had upset the Claimant and found him to apologise. The Claimant was so upset he refused to accept Mr Brown's apology.

The Quiet Room and Book Exchange

53. As a Work Area Manager, the Claimant was required to deliver a 30-minute Work Time Listening and Learning session ("WTLL") to his team of employees each week. During WTLL time the Claimant would deliver training, identify forthcoming events, share good practice and plan the team's week.

54. Historically the Claimant had held WTLL sessions in the emptiest room in his area. One of the Claimant's team members has a hearing impairment and told the Claimant he was finding it difficult to hear the WTLL session as the room had heating, ventilation and air conditioning pipes running across the room which were making a lot of noise.

55. To assist his team member, the Claimant decided to hold WTLL sessions in the Respondent's Quiet Room and Book Exchange.

56. There is a dispute as to the nature and purpose of the room known as the Quiet Room and Book Exchange ("the Quiet Room"). The Tribunal have seen photos of this room [p192 & 193], which contains seating and tables for at least 12, set out in class room style, with a large whiteboard for making notes/ delivering presentations on one wall. At the other end of the room are cupboards and book shelves laden with books. There are coat-stands with coats and protective jackets hanging on them.

57. This room has a notice on the door [p191] which states *"Quiet Room and Book Exchange"* and underneath in smaller typeface *"Dear User this room is provided for prayer contemplation and reading, please respect this facility for that purpose. You are respectfully requested not to bring food into this room and please note that there is a smoke alarm fitted within."*

58. Witnesses agree there is a designated "Prayer Room" on a different floor, which has a code operated lock on the door, to avoid people being disturbed whilst praying. The Prayer Room is used by Muslim employees, and most of the witnesses referred to it as "the Muslim Prayer Room", but Ms Rich believed it was a multifaith prayer room or that there was another multifaith prayer room near to the Prayer Room.

59. Mr Day's evidence was that he used the Quiet Room room for prayer and he disagreed with the Claimant using this room for WTLL meetings.

60. There was only very limited evidence of anyone actually using the Quiet Room for prayer – none of the other witnesses had witnessed people praying in the Quiet Room. In addition, the Claimant had not noticed the smaller typeface on the notice [p191].

61. During the course of their evidence, the respondent's other witnesses gave a variety of reasons why the Claimant should not have used the Quiet Room for WTLL meetings, ranging from *"there may not be enough seating for the Claimant's team"* and *"the rooms upstairs have better facilities"* to *"it belongs to the postmen and shouldn't be used as it might disturb their break".*

62. The tribunal find that the "Quiet Room" was in fact a multi-use room, used by some staff as a place to relax during a rest break. It obviously had been used as a training room, on occasions, as suggested by the classroom style layout. Mr Day (and possibly others) used it as a quiet room to pray.

The Claimant's relationship with Mr Day

63. The Claimant agrees that up until 2016 he had a good relationship with Mr Day and had nominated him for two thank you cards as a sign of appreciation for what Mr Day did in their team. However, by August 2017 this relationship had deteriorated, and Mr Day was deliberately not attending the Claimant's WTLL sessions.

Events on 3rd August 2017

64. The Claimant arranged a WTLL session in the Quiet Room for 3rd August 2017. Mr Day knew the meeting was scheduled to take place in this room and spoke to Mr John shortly before the meeting, to complain. Mr John agreed with Mr Day, that the Claimant should not be conducting WTLL in the Quiet Room and said he would speak to the Claimant.

65. Mr John did speak to the Claimant immediately before the WTLL session on 3rd August 2017. As the WTLL session was just about to begin, (the Claimant's team were already in the Quiet Room), Mr John told him "please don't use the Quiet Room for WTLL in future" but allowed this particular WTLL session to continue in the Quiet Room.

66. Unfortunately, Mr John didn't have chance to speak to Mr Day ahead of that WTLL session.

67. Mr Day was furious the WTLL session was going ahead in the Quiet Room. Having chosen not to attend some WTLL sessions previously, he chose to attend this one, to confront the Claimant. His conversation with Mr John, earlier that day, had led him to believe the Claimant was acting unreasonably in continuing to hold the WTLL session in the Quiet Room.

68. An anonymous independent witness (that was interviewed by Mr Martin as part of his investigation) reported that, at that WTLL session, Mr Day was *"stressed out"* and remained standing, rather than taking a seat, and was *"aggressive and shouting"* and *"having a go"* at the Claimant [p207 & 208]. Mr Day questioned why the WTLL session was taking place in this room. He asked the Claimant to come outside to discuss this. The Claimant asked a colleague to come outside with them, to act as his witness. Mr Day responded *"what for, I am not going to kill you",* which the Claimant perceived to be a threat. The Claimant felt "*frightened for my health and safety"* [p133] and described it as *"a very frightening experience"* [p135].

69. Mr Day and the Claimant continued their discussion outside the Quiet Room. The Claimant's friend, who is a Muslim, was with them as the Claimant had asked her to be a witness. The Claimant alleges Mr Day continued to adopt an aggressive tone and demanded *"Let's use the Muslim Prayer Room"* for the WTLL session. Mr Day denies this; he explains he was assertive and put his point across. In his account during the investigation [p197 & 198], Mr Day was reported as saying he had *"asked if [the Claimant] thought it was not disrespectful [to use the Quiet*

Room], would he use the prayer room downstairs for a WTLL session". The Tribunal notes that in this account [p198] Mr Day said there was *"no name calling, no swearing and no aggression during the incident*". This is not wholly accurate; the independent witness reported he was aggressive during this incident and should not have talked to the Claimant in that way. The independent witness reported that subsequently, Mr Day felt bad about the way he had spoken to the Claimant. In his investigation, Mr Newton concluded the allegation of disrupting WTLL and being aggressive to a Manager was partly upheld and Mr Day was to receive counselling on the correct process for resolving disagreements [p256-4 & 256-5].

70. Mr Day states he didn't use the word "Muslim" when referring to the prayer room on the other floor. In cross examination, the Claimant accepted Mr Day might not have used the word Muslim but was clearly referring to the Prayer Room used by Muslim colleagues. In cross examination Mr Day said he used the Quiet Room to pray as he had believed the Prayer Room downstairs was for Muslims. The Tribunal accept that even if Mr Day didn't use the word "Muslim" in his remark, he did mean "the Muslim Prayer Room" and he was understood to be referring to the Muslim Prayer Room.

71. The Tribunal accept the Claimant's account of this incident as being more accurate, as Mr Day was clearly aggressive in the Quiet Room in front of other witnesses and subsequently he denied there being any aggression. The Claimant's account of this incident has been consistent throughout the documents. We accept that Mr Day continued to speak in an aggressive tone and was being caustic when he said *"Let's go use the [Muslim] Prayer Room*".

72. Mr Day then went to see Mr John rather than attend the WTLL session. (The Claimant returned to deliver the WTLL session in the Quiet Room). At some point in their conversation, Mr John told Mr Day *"I'll back you 100%".* Mr John explained he meant he supported Mr Day in his objection to the Claimant using the Quiet Room for WTLL sessions, as Mr John believed it was not appropriate to use this room for WTLL sessions.

73. Whilst Mr Day was with Mr John, they phoned Ms Rich to seek clarification as to what the Quiet Room was to be used for. Ms Rich didn't know so they spoke to Ms Jones who confirmed it was used as a Christian prayer room. Ms Rich stated the Prayer Room on the other floor was a multifaith prayer room, not a dedicated Muslim prayer room, as Mr Day had believed until that point. The tribunal note that Mr Day and Mr John had to check whether the Quiet Room was, in fact, a prayer room, as it wasn't clearly designated as a prayer room.

The Claimant's letter of 7th August 2017

74. The Claimant was very upset by the incident on 3rd August 2017; Mr John noted, later that evening (3rd August), he was contacted by Mr Colclough (who was not on site) who reported the Claimant had been in touch with

him and "was really upset" [p204]. Mr Colclough had advised the Claimant to "put it in an email" and he would deal with it when he returned to work.

75. On 7th August 2017, the Claimant wrote to Mr Press, who he believed was covering Ms Rich's role whilst she was on annual leave. His letter [p135] provided an account of the events of 3rd August 2017 and a complaint that Mr Day's behaviour breached the Respondent's dignity, respect and diversity policies. Mr Press spoke to Mr Colclough, who spoke to Mr John and between them they thought the matter had been resolved. Mr Colclough understood the Claimant was bringing this matter to their attention rather than making a formal complaint.

The Claimant's Grievance of 14th September 2017

76. As the Claimant had not received a response to his letter of 7th August 2017, he wrote to Royal Mail HR in Sheffield on 14th September 2017 [p132]. This letter alleged the Claimant was being harassed and bullied on account of his race and referred to the incidents on 21st June 2017 and 3rd August 2017 among other allegations. The Respondent accepts this letter is a protected act for the purposes of s27 Equality Act 2010. The letter requested an external investigation, as the Claimant was concerned that a Cardiff Mail Centre based investigator would not be impartial.

77. By letters of 15th September and 18th September 2017, the Respondent's Employee Relations Case Management Team and the Respondent's Chief Executive acknowledged receipt of the Claimant's grievance and asked the Claimant to contact them to discuss an appropriate route. They did not receive a response to these letters.

78. In early October 2017, the Claimant told Mr Colclough he had sent a grievance to HR. Mr Colclough sent an email to Ms Francomb, copying in the Claimant, to enquire what had happened with the Claimant's grievance and asking Ms Francomb to let the Claimant know directly.

79. Ms Rich was subsequently copied in to Mr Colclough's email enquiring about the Claimant's grievance so she could refer this enquiry to the Respondent's Employee Relations Case Management Team [p148]. They replied to Ms Rich explaining the Claimant had sent a bullying and harassment complaint to them, that they had replied but had received no further response from the Claimant.

80. Ms Rich forwarded this response to the Claimant asking him to contact the Respondent's Employee Relations Case Management Team [p147].

81. On 11th October 2017 the Claimant contacted ACAS.

82. On 25th October 2017, the Respondent's Employee Relations Case Management Team wrote to the Claimant explaining that the Respondent did not normally accept bullying and harassment complaints from managers against OPGs, rather the issues alleged by the Claimant should be dealt with formally by a manager under the conduct code [p152].

83. On 26th October 2017, a different customer services adviser in the Respondent's Employee Relations Case Management Team wrote to the Claimant acknowledging receipt of the ACAS notification and explaining that the Claimant's bullying and harassment complaint had been returned to him as the complaint should have been dealt with under the Respondent's conduct processes as the complaint was about an OPG [p154].

84. As an aside, the Tribunal asks the Respondent to consider the wisdom of this approach – managers can be subjected to discriminatory bullying and harassment from those they manage. If a manager is subjected to discrimination, they need the support that is available in the Respondent's "Stop Bullying and Harassment Policy", just as much as any other employee would. For instance, the tribunal notes that the bullying and harassment policy provides the complainant can object to a particular person conducting the investigation, whereas the Conduct procedure did not. Witnesses agree that, in any event, the Claimant could not instigate the conduct procedure himself as the conduct in question was directed at him; instead he would have to refer the conduct to Mr John for Mr John to instigate the Conduct procedure.

85. On 9th November 2017, the Claimant presented an ET1 claim form alleging discrimination on the grounds of race, religion, disability and sex and asserting he had been subjected to a detriment following a protected disclosure.

Mr Newton's investigation

86. Ms Rich appointed Mr Newton to investigate the claimant's bullying and harassment complaint under the Respondent's conduct code. Ms Rich had chosen Mr Newton to undertake the investigation, as he would be investigating the conduct of two OPGs within the Claimant's team. Mr Newton was on exactly the same level of management as the Claimant.

87. By letter of 17th November 2017, Mr Newton wrote to the Claimant to invite him to a fact-finding meeting [p156 – 158].

88. It is unfortunate that the invitation to fact finding meeting that was sent to the Claimant appears to be a template letter that is used to invite someone facing conduct allegations to interview. The letter includes phrases like *"I recognise that being faced with conduct action can be a stressful time"* and *"The purpose of this meeting is to establish the facts and to determine if any formal action under the conduct policy is required."* The "Fact finding meeting guide for employees" that was enclosed with the invitation letter included the statement *"Your manager may also consider whether precautionary suspension is appropriate or if you are already suspended they should review whether you are able to return to work".*

89. On 21st November 2017, the Claimant attended the fact-finding meeting with Mr Newton; he was accompanied by Mr Addison, an OPG.

90. The Claimant objected to Mr Newton conducting the investigation, as he considered any manager within Cardiff Mail Centre would not be impartial. The Claimant was very concerned that the Respondent was in breach of equality duties at the Cardiff Mail Centre. This stemmed from the Respondent's decision to remove a ground floor disabled toilet facility. The Respondent had consulted the trade union about this change and was satisfied that it was safe and appropriate to have a disabled toilet facility available on the fourth floor. The Claimant disagreed with the Respondent (and the Trade Union)'s assessment of the situation and had spoken out about his concerns previously. This is why he did not have confidence that an internal investigation would be impartial.

91. In the fact-finding meeting chaired by Mr Newton, both the Claimant and Mr Addison talked at length about the situation with the disabled toilet. Mr Newton was genuinely trying to find out about and understand the Claimant's complaint about the OPGs that the Claimant perceived were bullying him. Both the Claimant and Mr Addison were more concerned with the disabled toilet situation and the Claimant said there was no point continuing the meeting as it was "contaminated", implying that Mr Newton was not able to consider the investigation impartially. In response to this, Mr Newton replied [per p310 – the transcript of the covertly recorded conversation].

> *"I have been allocated to do the fact finding yeah that is what I have been asked to do if you don't believe that I would do that fairly yeah and that is what you're probably saying because I hope you're not saying I'm prejudice because that would be the biggest insult that you ever give to me right but if you were saying that you think that I would do it wrong and you have not got confidence in what I'm doing that's an opinion that you've got okay right, what I'm saying is that believe me I have got no prejudice against anybody right and* ***if anybody ever told me that I was prejudice I would go ape shit okay seriously because seriously it's the biggest insult that anybody could give me no matter what race, no matter what religion, no matter what sexual orientation okay so it really is the biggest thing****" [tribunal emphasis to highlight the words complained about; see para 14.8 of this judgment].*

92. On 22nd November 2017, Mr Newton wrote to the Claimant, providing him with a copy of the minutes of the investigation meeting on 21st November 2017 [p161-2].

93. By letter of 26th November 2017, the Claimant explained to Mr Newton his concern that his grievance should not be considered internally. This letter again discussed the situation with the disabled toilets [p163-4].

94. On 27th November 2017, whilst at work, the Claimant became unwell with neck pain and started sick leave; he did not return to work prior to his dismissal.

95. Mr Newton continued to investigate the Claimant's grievance. He invited Mr Day and Mr Brown to individual fact-finding interviews, investigating the incidents on 21st June 2017 and 3rd August 2017 amongst others. On 5th December 2017, Mr Newton interviewed Mr Day, Mr Brown, Mr John and an anonymous independent witness.

96. By letter of 21st December 2017, Mr Newton wrote to the Claimant inviting him to attend a further interview, to clarify points raised by other witnesses. As the Claimant was on sick leave, Mr Newton offered to meet at an offsite location. Mr Newton set out the questions he needed to ask and invited the Claimant to provide a written response rather than attend an interview, if the Claimant would find that easier. The Tribunal are satisfied Mr Newton was trying to undertake a full and fair investigation.

97. As the Claimant didn't respond to his letter of 21st December 2017, Mr Newton subsequently determined the investigation on the information that was available to him. On 17th January 2018 Mr Newton wrote to Mr Day and Mr Brown confirming his conclusions. He also wrote to the Claimant confirming the allegations had been fully investigated and *"appropriate actions have been taken".*

The Claimant's sickness absence

98. On 27th November 2017, whilst he was in work, the Claimant became unwell with neck pain such that Mr Colclough had to arrange transport for the Claimant to his local hospital. This was the start of the Claimant's sick leave. On 28th November, the Respondent sent a standard "absence from work" letter to the Claimant explaining the sick absence procedures.

99. On Friday 1st December 2017, the Claimant was examined by his GP and was advised he was not fit for work due to *"stress at work"*. His fit note signed him off work for *"1 month"* and was dated 1st December 2017. The Claimant sent this fit note to his employer in accordance with the sick absence procedures.

100. On Monday 4th December 2017, Mr Colclough wrote to the Claimant inviting him to attend a meeting on Thursday 7th December 2017, to discuss his absence.

101. By letter of 5th December 2017 [p210], the Claimant responded to Mr Colclough and explained *"due to the nature of my illness (depression, causation work related stress)"* he would prefer to meet at his home address. He commented *"I am under the care of my physician who is presently doing all that is necessary ie tablets and counselling to aid my speedy recovery".* The final comment in his letter (*"Please find enclosed documents for your sighting"*) referred to two newspaper articles that the Claimant had enclosed with his letter. These newspaper articles [p211 to 218] had been printed on 9th March 2017 and referred to a Royal Mail employee who had committed suicide following racial abuse at work (at the Birmingham sorting office).

102. Upon receipt of this letter and attachments, Mr Colclough was extremely concerned about the Claimant's health. He tried to phone the Claimant and left a voicemail message. He sent a text message to the Claimant and explained (in oral evidence) that he was on the verge of contacting the police, he was so concerned about the Claimant's welfare.

103. By letter of 7th December 2017, Mr Colclough wrote to the Claimant inviting him to attend a meeting on Wednesday 13th December 2017, at either Costa Coffee (Leckwith Retail Park) or the Cardiff West delivery office. In his letter he stated *"Due to the content of your letter and the attachments provided I am really concerned about your health and wellbeing. I have tried to contact you by phone and left a voice mail and text message to understand your current situation, to which you have not responded…..If you have not already done so, I would strongly recommend you contact the Feeling First Class Helpline…..if you feel that you require support*."

104. On 13th December 2017, Mr Colclough and Mr John met the Claimant and his friend Mr Khan at Costa Coffee. The Claimant covertly recorded this meeting; the Tribunal see no reason why the Claimant could not have asked to record this meeting (and the other meetings that have been covertly recorded). However, the Respondent does not object to the Tribunal having regard to the transcript of this recording [p322 to 327] (or any other transcript following covert recording) and does not raise any issues as to the accuracy of these transcripts.

105. The Tribunal note from the transcript, that during the meeting, Mr Colclough checked the reason for the Claimant's absence (*"Could you please explain to me how neck pain is gone into a workplace stress?"*) to which the Claimant explained *"I have been going through this for years and I am on medication for long time…for my depression and anxiety".* The Claimant goes on to refer to *"its just gone over because I couldn't sleep it's gone beyond my control…..Even though I was in treatment I came to my work…you know….I am that kind of person like…but just as a human you can take certain limits not more than that….and my neck is just an affect of what's going on inside myself…might be it's part of stress…part of something…I am not medically qualified that's what my doctor says."*

106. Mr Colclough asked *"you said you suffered with depression and anxiety for a while, not just this incidence, and you said you had medication in the past what medication would you have taken in the past?"* The Claimant responds "*It's prescribed by my doctor. I think I don't want to declare my medication to anyone under the data protection act."* When Mr Colclough pressed the Claimant to tell him the medication he was taking, the Claimant replied *"without medication and all doctor won't give you a sick note like that so she knows what's going on and all and also I asked her to get some more powerful"* Mr Colclough asked *"So you taking medication now?"* to which the Claimant replied *"Yeah".*

107. When Mr Colclough asked which parts of the workplace were causing the Claimant stress, the Claimant responded *"It's not just [the workplace] it's overall things happening around myself you know as a human being I can take little bit but it's gone beyond lot of things it's gone beyond...Whereas when I cries for help instead of helping things are going on wrong way."*

108. Mr Colclough explained how worried he had been when he had received the newspaper articles; *"I didn't know whether this sick had suicidal tendencies or and I was on the verge of actually calling the police to actually go out and check and see yourself. So are you saying at the moment you have got suicidal tendencies?"* The Claimant tried to explain why he sent Mr Colclough the newspaper articles *"the reason I sent this documents to you is… I don't want to go into my grievance case….but that is the form of root cause for you know as a normal person I couldn't have day to day normal life and you know that's all affects me this one is telling Royal Mail already previous experience…So that's what I think I have highlighted in somewhere you know I just want to know I am the only one suffering or…."*

109. Mr Khan tried to explain "*I think the point is and the rational is that if you can see where the part of where [the Claimant]'s stress and depression emanates from is similar to this case here…its mentioned there with the bullying and harassment thing…I believe its highlighted in this article that how the senior management were kept away from certain things. As you are aware [the Claimant] has asked for his grievance to be heard by certain people at certain level, not within….the rational is…look this is what the possibility is of people when they manipulate grievance procedures and all that when people are crying out saying look it's my grievance, my complaint, my harassment and bullying, my concerns that needs to be addressed I don't feel that it can be addressed at this level it needs to be addressed outside of here and that's why he is trying to bring it to you, the seriousness of it."*

110. The Claimant goes on to explain *"…I have been seeking help for a long time I have been asking right where as you been telling me the buck stops with me…I can't see certain things it affects my own health, my line manager is telling me that buck stops with me, I am just human, I am just human…to avoid prejudice and bias please handle this case, you know, with an external manager and when I seek for help instead of helping me…you know…you know, exasperating my anxiety and depression is happening.*"

111. The Claimant went on to refer to the incident on 21st June 2017; *"We all there and [Mr John] was chairing that meeting and one of the colleagues is calling me a dog. I can't take it and nobody took any action for that and [Mr John] he said that [a colleague] said something to you and he got two years of serious warning, what is the difference between you and me [Mr Colclough]…I am just saying that, it affects me"* to which Mr Colclough responded *"when that…when [that colleague] did that yeah, I took him personally down on the conduct code, yeah, when you got a subordinate"*

at which point the Claimant said *"[Mr Colclough] you are my line manager, [Mr John] is my line manager as well, right, what can I expect, what can I expect".*

112. It is clear to the Tribunal that at this meeting, the Claimant was explaining part of the reason he was ill with work related stress, was he felt his employer had not responded appropriately to his allegations of bullying. He was clearly upset that when an employee was disrespectful to Mr Colclough, that employee had been disciplined and yet when someone had been disrespectful to the Claimant, nothing had happened, despite the Claimant's immediate line manager being a witness to this incident; the Claimant's managers had expected him to deal with the matter himself. The Claimant was trying to explain that he had not been able to resolve the matter by himself and the situation was affecting his mental health and making him ill. He had lost confidence in internal managers and was asking for an external investigation. He felt this request for an external investigation had been ignored and he could no longer cope with the situation in his workplace.

113. During the course of his evidence, the Claimant alleged that at the end of this meeting, Mr Colclough said he would phone the Claimant each Friday, as a means of keeping in touch during his absence. During cross examination, Mr Colclough confirmed that he had said this to the Claimant at the end of their meeting on 13th December 2017.

114. On 15th December 2017, Mr Colclough wrote to the Claimant,

"Further to our meeting on 13th December, I note from our conversation that you are not attending work due to work related stress brought on by a current conduct case which is taking place, whereby you believe this should be heard outside of the Cardiff Plant. The case is currently being heard by Mr Newton …and should be concluded shortly, and so this will remove one of the causes of your work place stress.

You also mentioned that you believe that within Cardiff Mail Centre we are not treating our employees well by not providing disabled toilet provision on the ground floor…..We have not taken this lightly and have spoken to our employees who use disabled facilities and they have advised they do not have an issue with the disabled toilet arrangements…We have also looked at the legal requirement and can confirm there is no legal requirement for Royal Mail to have disabled toilets on the ground floor….So please be assured we are and do treat our employees with the greatest of respect. As this has also been resolved, we have removed all causes of your workplace stress.

So upon reflection on both of these issues that you have raised and that they have both now been resolved, I do not see why you are now unable to return to work. I would like to meet you to discuss your current absence and agree a return to work date.

If you do not attend or fail to provide a reasonable explanation for your continued work related stress sick absence, I will not give authorisation for ongoing Royal Mail Sick Pay to be paid to you, and I expect you to discuss this situation with me further. If you do not do so, your Royal Mail Sick pay will be stopped with effect from Wednesday 20th December 2017.

Therefore I need you to attend a meeting with myself on Tuesday 19th December 2017…in the Shift Manager's Office at Cardiff Mail Centre."

115. Whilst the Tribunal accepts that Mr Colclough was under pressure, given that this was December, a busy period of work for the Respondent, the Tribunal finds it was totally inappropriate to write to an employee that was off work with work-related stress in these terms, particularly as,
    115.1. the Claimant had not been referred to Occupational Health;
    115.2. the Claimant's GP had certified he would not be fit for work for the month of December;
    115.3. the Claimant had attended an absence review meeting with Mr Colclough two days earlier;
    115.4. two days earlier, Mr Colclough had said he would phone each Friday as a means of keeping in touch;
    115.5. one week before this, Mr Colclough had been concerned the Claimant may be suicidal;
    115.6. the threat of stopping sick pay was being made immediately before Christmas; and
    115.7. the Claimant (signed off with work related stress) was being told he had to attend a meeting in the workplace.

116. This letter was a considerable change in tone and placed the Claimant under immense pressure at a time when he was already mentally unwell.

117. In oral evidence, when asked to explain this sudden change in tone, Mr Colclough said, following his meeting with the Claimant on 13th December, he reflected on the points that had been mentioned by the Claimant and decided they were being dealt with and didn't justify him being on sick leave. Mr Colclough said under the Sick Pay policy a manager has to believe that absence is warranted, and he didn't believe this to be the case. When it was pointed out that the GP believed absence was warranted, Mr Colclough stated the GP didn't explain this in the sick note (despite the Claimant's GP having put a cross in the box next to *"you are not fit for work"*). When it was pointed out that, whilst Mr Colclough might not have seen it personally, there was a second GP fit note (of 22nd December 2017 which certified the Claimant to be unfit for work for a further 28 days) Mr Colclough stated he still didn't believe the Claimant's illness was genuine, yet admitted he had not made any referral to occupational health or undertaken any further enquiries to challenge the GPs earlier assessment of the Claimant's condition, which he had seen.

118. The Tribunal found Mr Colclough's explanation of his decision-making to be wholly unsatisfactory. All the evidence in front of Mr Colclough pointed to the Claimant's illness being genuine and the Claimant being

mentally unwell; Mr Colclough was not able to point to anything to substantiate his assertion that the Claimant's absence was not necessary. Mr Colclough had witnessed the Claimant being taken ill in the workplace; the Claimant had provided a GP fit note and had attended the absence meeting on 13th December; the Claimant had worked with Mr Colclough for many years and had a good attendance record and was regarded as "high" achieving, yet Mr Colclough felt it was appropriate to send the 15th December letter without further investigation.

119. By letter of 16th December 2017 [p227 & 228], the Claimant replied to Mr Colclough (and copied in the Respondent's Chief Executive Officer, the Respondent's solicitor, the Respondent's HR department and Ms Rich, also providing them with a copy of Mr Colclough's letter of 15th December 2017). In this letter, the Claimant repeated his request for his grievance to be considered externally and again repeated his concerns about the disabled toilet provision, pointing out that one colleague with a disability could not use the stairs and explaining his concern about the fire risk assessment. He ends his letter *"My doctor has prescribed medication and recommendations for my wellbeing. Please be cooperative in the spirit and interests of natural justice, fairness and equality. I am only human."*

120. By letter of 20th December 2017, Mr Colclough responded *"Further to our meeting on 13th December, I invited you in to attend a meeting…on 19th December 2017 to discuss further your work place related stress, as it is not clear as to why you are unable to attend work as all of the issues raised have been correctly dealt with under our policies and procedures. Therefore I am now giving you a further and final opportunity to meet with me to discuss your current absence and agree a return to work date. I would like you to meet with me on Wednesday 27th December 2017 …in the Shift Manager's Office. If you do not attend or fail to provide a reasonable explanation for your continued work related stress sick absence I will not give authorisation for ongoing Royal Mail Sick Pay to be paid to you therefore your Royal Mail sick pay will be stopped with effect from Thursday 28th December 2017.*

121. On 22nd December 2017, the Claimant saw his GP and was certified not fit for work with "stress at work" for a further 28 days. The Tribunal have seen a duplicate copy of this Fit Note which is dated 22nd December 2017 [p242]. The Claimant's evidence was that he had enclosed the original Fit Note (of 22nd December 2017) with his letter of 28th December 2017 addressed to Ms Rich. Copies of this letter were also sent to the CEO of Royal Mail, Ms Higgins at the Respondent's solicitors and Mr Colclough.

122. The Claimant's letter of 28th December 2017 [p243] made further allegations of discrimination including a complaint about Mr Colclough's letter of 15th December 2017 and conduct of the meeting on 13th December 2017, a separate complaint about Ms Rich, as well as referring to the disabled toilet issue and ended "*You have left me with no option but to exercise my legal right to protect myself and others ….I am exercising*

my legal right in pursuant of the Employment Rights Act 1996 section 100 and section 44 respectively".

123. Mrs Rich's evidence was that whilst she accepted she had received the letter of 28th December 2017, she had not received the sick note dated 22nd December 2017. None of the respondent's witnesses could recall having seen the original sick note of 22nd December 2017.

124. On 4th January 2018, Mr Colclough wrote to the Claimant listing the contact during the Claimant's sick leave and stating that the Claimant's Royal Mail sick pay had been stopped on 28th December and inviting the Claimant to attend an interview on 8th January 2017 in the Shift Manager' Office; *"The present position is untenable and in the circumstances we are not confident that you will return to work to your contractual role. Therefore I am giving consideration to your continued employment on the basis that the business is not satisfied that you intend to return to your employment in the foreseeable future."* The tribunal notes that in this letter [p246-248] Mr Colclough states:

124.1. *"On 13th December 2017 I met with yourself where I believed you were non cooperative in letting me know your true reason for your absence, quoting that we put profits before people and we should have disabled toilet access for people on the ground floor and that your current case against Mr Brown and Mr Day should be held outside of Cardiff Mail Centre and through the B/H procedure and not that of the conduct policy*".

124.2. *"On 15th December I wrote to you again inviting you in again to clarify a number of points as I don't believe that the absence is related to work related stress and is more of internal issues which are being dealt with under our normal processes."*

124.3. *"On 17th December I received a letter from yourself stating all the issues you highlighted in your meeting…however again this should not stop you attending work due to all of the issues been dealt with correctly under our policies."*

124.4. *"On 27th December You didn't attend the meeting nor provide me any information as to why you would not attend".* The tribunal note that in his letter of 4th January 2018, Mr Colclough has completely omitted to mention the Claimant's letter of 28th December 2017, which did explain why the Claimant was staying away from work. In cross examination, Mr Colclough admitted he had received a copy of the Claimant's letter of 28th December 2017.

124.5. *"I also require a further sick note to maintain statutory sick pay as your last sick note ran out on 1st January 2018.*

125. The Claimant didn't respond to Mr Colclough's letter of 4th January as he believed Ms Rich had received the 22nd December 2016 sick note. Mr Colclough wrote a further letter of 15th January explaining that SSP had been stopped from 9th January 2017 and he was considering terminating the Claimant's employment *"on the grounds 1. The business has no reasonable prospect of knowing when you will be fit to return to work and in what capacity; and 2. The business is not satisfied that you intend to*

return to your employment..in the foreseeable future". Mr Colclough invited the claimant to attend at interview on 22nd January at which he would consider terminating the Claimant's employment.

126. By letter of 23rd January 2018 [p257], Mr Colclough confirmed his decision to dismiss the Claimant. He noted the Claimant had not attended meetings (on 19th and 27th December and 8th and 22nd January) [which the tribunal notes were all at the Claimant's workplace] and stated *"You have provided no explanation for your non-attendance at all meetings."* In providing reasons for his decision to dismiss the Claimant, Mr Colclough notes *"Failure to comply with requests to keep in regular contact with the management team. We have had no verbal or written contact with you since 28th December 2017 despite management sending 5 letters to your home. Failure to attend management meetings. I invited you to informal meetings on 19th and 27th December which you did not attend, nor have you attended the recent formal interviews on 8th and 22nd January. Failure to submit regular fit notes. You have not been covered by a note since 1st January 2018. You have now been absent from work for 57 days and over this time your compliance with sick absence procedures has deteriorated. It has now reached a point where I have no confidence that you have any intention to cooperate with the management team or support us to effectively manage your absence from work. This situation is unacceptable to the business. I have therefore taken the decision to dismiss you with notice."*

127. Mr Colclough's letter of 23rd January 2018 explained the Claimant had a right to appeal this decision. The Claimant did not take steps to appeal this decision.

128. The Claimant having already presented an ET1 claim (on 9th November 2017) on 22nd February 2018, the Respondent filed an ET3 response.

Closing submissions

129. Both parties provided detailed written submissions which were supplemented by oral submissions at the hearing. The Tribunal will not attempt to summarise those submissions but incorporates them by reference.

130. As the Claimant was a litigant-in-person supported by a friend with no legal qualifications, it was agreed the Respondent's solicitor would give oral submissions first. Once both parties had made their oral submissions, the Employment Judge checked that both parties had made all the submissions they wished to be considered. The Employment Judge took a detailed note of each party's oral submissions.

Relevant law

131. The provisions of the Equality Act 2010 ("EqA") apply to these claims. EqA protects employees from discrimination based on a number of

"protected characteristics". These include race (see Section 9 EqA), religion (see Section 10), disability (see Section 6) and sex (see Section 11).

132. Chapter 2, EqA lists a number of forms of "prohibited conduct". In this claim, the Claimant alleges three types of prohibited conduct: direct discrimination, harassment and victimisation.

The claims of direct discrimination

133. S 39(2) EqA provides an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment.

134. Direct discrimination is defined by S13 EqA (so far as is material) in these terms:

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

135. Direct discrimination is comparatively simple: It is treating one person less favourably than you would treat another person, because of a particular protected characteristic. The Claimant does not need to have the particular protected characteristic themselves – the definition is wide enough to cover someone who associates with someone who has a protected characteristic (known as discrimination by association) and it is also wide enough to cover someone who is perceived to have a protected characteristic but does not (known as discrimination based on perception). The protected characteristic has to be the reason for the treatment. Sometimes this will be obvious, as when the characteristic is the criterion employed for the less favourable treatment. At other times, it will not be obvious, and the Tribunal will need to consider the matters the decision maker had in mind, including any conscious or sub-conscious bias. No hostile or malicious motive is required. However, direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic.

136. The Claimant has to demonstrate less favourable treatment: it is not enough to show he has been treated differently.

137. S 23(1) EqA provides there should be no material difference in circumstances between the claimant and any comparator or hypothetical comparator (save for the protected characteristic).

The claim of Harassment

138. S40 EqA provides an employer must not harass an employee.

139. Harassment is defined in S26 EqA, which provides:

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
I whether it is reasonable for the conduct to have that effect.

140. The effect of s26 is that a claimant needs to demonstrate 3 essential features: unwanted conduct; that has the proscribed purpose or effect; and that relates to his race. There is no need for a comparator.

141. The EHRC Employment Code explains that unwanted conduct can include "a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour".

142. "Unwanted" is the same as "unwelcome" or "uninvited."

143. When considering whether the conduct had the proscribed effect, the tribunal undertakes a subjective/objective test: the subjective element involves looking at the effect the conduct had on the claimant (their perception); the objective element then considers whether it was reasonable for the claimant to say it had this effect on her (see *Richmond Pharmacology v Dhaliwal [2009] ICR 724).* The EHRC Employment Code notes that relevant circumstances can include those of the claimant, including his/her health, mental health, mental capacity, cultural norms and previous experience of harassment; it can also include the environment in which the conduct takes place.

144. In *Weeks -v- Newham College of Further Education UK EAT 0630/11* Mr Justice Langstaff said that ultimately findings of fact in harassment cases had to be sensitive to all the circumstances; context was all important.

145. It was pointed out by Elias LJ in the case of *Grant v HM Land Registry [2011] EWCA Civ 769* that the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words. As he said:

"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

146. Exactly the same point was made by Underhill P in *Richmond Pharmacology*

"..not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

147. "Violating" is a strong word. Offending against dignity, hurting it, is insufficient. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

148. In *Warby v Wunda Group plc, UKEAT 0434/11, 27 January 2012,* context was again emphasised

"…we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context;"

149. The Tribunal should consider the circumstances shown by the facts it found as a whole. In *Read and Bull Information Systems Ltd v Stedman [1999] IRLR 299* , Morison J noted:

"It is particularly important in cases of alleged sexual harassment that the fact-finding tribunal should not carve up the case into a series of specific incidents and try and measure the harm or detriment in relation to each. As it has been put in a USA federal appeal court decision (eighth circuit) [USA v Gail Knapp (1992) 955 Federal Reporter , 2nd series at page 564]:
'Under the totality of the circumstances analysis, the district court [the fact finding tribunal] should not carve the work environment into a series of incidents and then measure the harm occurring in each episode. Instead, the trier of fact must keep in mind that "each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes." '"

The claim of Victimisation

150. S39 (3) and (4) EqA sets out the circumstances in which victimisation is prohibited in the employment field. These include dismissing an employee (s39 (4)I and subjecting an employee to any other detriment (s39(4)(d)).

151. S27 EqA provides,

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

152. Essentially, to succeed with a victimisation claim, a claimant must establish two matters: that they have been subjected to a detriment (see next paragraph) and that this was because s/he had done a protected act or the employer believed s/he had done or might do a protected act.

153. In discrimination law, a "detriment" occurs when, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment. (see Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL).

154. In relation to s27(2)d EqA, it is not necessary for the claimant to use the words "Equality Act", however the asserted facts must be capable of amounting to a breach of the Equality Act.

155. A person claiming victimisation does not need to show the detrimental treatment was received solely because of the protected act. Per Nagarajan v London Regional Transport 1999 ICR 877, if the protected act has a *"significant influence"* on the employer's decision-making, discrimination has been proved. It was later confirmed in Igen Ltd v Wong 2005 ICR 931, that for an influence to be *"significant*" it has to be *"an influence which is more than trivial".*

An Employer's liability?

156. S109 EqA provides that anything done by an employee in the course of his employment must be treated as being also done by the employer. It does not matter whether that thing is done with the employer's knowledge or approval. However, it is a defence for the employer to show that it took all reasonable steps to prevent that employee from doing that thing, or from doing anything of that description.

The burden of proof in discrimination claims

157. S136 Equality Act 2010 establishes a "shifting burden of proof" in a discrimination claim. If the claimant establishes facts, from which the tribunal could properly conclude, in the absence of an adequate explanation, that there has been discrimination, the tribunal is to find that discrimination has occurred, unless the employer is able to prove that it did not. In the well-known cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332 and Igen Ltd & others v Wong & others [2005] IRLR 258*, the Court of Appeal gave the following guidance on how the shifting burden of proof should be applied:

157.1. It is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant that is unlawful. These are referred to below as "such facts".

157.2. If the claimant does not prove such facts their discrimination claim will fail.

157.3. 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.

157.4. In deciding whether the claimant has proved such facts, remember that the outcome at 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.

157.5. 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 an act of 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.

157.6. 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.

157.7. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a questionnaire….

157.8. 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 means that inferences may also be drawn from any failure to comply with any relevant code of practice.

157.9. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of [eg race], then the burden of proof moves to the respondent.

157.10. It is then for the respondent to prove that he did not commit that act.

157.11. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

157.12. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that race was not a ground for the treatment in question.

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

158. In *Madarassy v Nomura International plc [2007] IRLR 246*, the Court of Appeal warned against allowing the burden to pass to the employer where all that has been shown is a difference in treatment between the claimant and a comparator. For the burden to shift there needs to be evidence that the reason for the difference in treatment was discriminatory. It is also well established that treatment that is merely unreasonable does not, of itself, give rise to an inference that the treatment is discriminatory.

159. It is also established law that if the tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then it is not improper for a tribunal to find that even if the burden of proof has shifted, the employer has given a fully adequate explanation of why they behaved as they did and it had nothing to do with a protected characteristic (see *Laing v Manchester City Council 2006 ICR 1519)*.

160. Very little direct discrimination is overt or even deliberate. The tribunal should look for indicators from the time before or after the decision, which may demonstrate that an ostensibly fair-minded decision was, or equally was not affected by racial bias. (see *Anya v University of Oxford [2001] ICR).*

161. Having reminded ourselves of the authorities on the burden of proof, our principle guide must be the straightforward language of S136 EqA itself.

Time Limits

162. S123 EqA prescribes time limits for presenting a claim:

> *(1) …Proceedings…may not be brought after the end of-*
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the tribunal thinks just and equitable*
> *…*
> *(4) For the purposes of this section-*
> *(a) conduct extending over a period is to be treated as done at the end of the period;*

163. The leading authority on determining whether "conduct extends over a period of time", or not, is the Court of Appeal decision in the *Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530*. This established that the employment tribunal should consider whether there was an "ongoing situation" or "continuing state of affairs" (which would establish conduct extending over a period of time) or whether there were a succession of unconnected specific acts (in which case there is no conduct extending over a period of time, thus time runs from each specific act). As Lord Justice Jackson indicated in *Aziz v First Division Association [2010] EWCA Civ 304*, in considering whether there has been conduct extending over a period, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents.

Detrimental Treatment / Dismissal following a Protected Disclosure

164. The Employment Rights Act 1996 ("ERA") as amended by the Public Interest Disclosure Act 1998, protects a worker from detrimental treatment / dismissal because they have made a protected disclosure.

165. The starting point for our enquiry is whether the Claimant has made a "protected disclosure" as defined by S43A ERA. A protected disclosure is a disclosure of information which is a "qualifying disclosure" (as defined in section 43B ERA) which is made in one of the protected manners (set out in section 43C to 43H ERA) .

166. Once the Claimant has established that he has made a protected disclosure we must go on to consider whether the reason (or principal reason) for his dismissal (and/or any detrimental treatment) was because he had made a protected disclosure.

Automatically Unfair Dismissal (s100(1)e ERA)

167. S100(1)e ERA provides protection from dismissal for any employee who, in circumstances of danger that they reasonably belief to be serious and imminent, took (or proposed to take) appropriate steps to protect themselves or other persons from the danger. The tribunal has to have reference to all the circumstances including the Claimant's

knowledge and the facilities and advice that was available to him at the time (see S100(2) ERA).

168. Once the Claimant has established that he took appropriate steps in circumstances of danger that he reasonably believed to be serious and imminent, the Tribunal should go on to consider whether this was the reason (or principal reason) for his dismissal – if it was, the Claimant's dismissal would automatically be an unfair dismissal.

Conclusions

169. Turning to consider each of the issues, we found as follows:

Unfair dismissal / detrimental treatment following a protected disclosure

170. The allegations that the Claimant made in this part of his claim were too vague for us to find that there had been a disclosure of information that could amount to a qualifying disclosure. The Claimant's claim made reference to disabled parking facilities, social media, derogatory stickers, but this part of the Claimant's claim did not identify which particular communication(s) (to whom and when) were relied upon as being qualifying disclosures. There was also no evidence addressing why the Claimant believed any particular disclosure was in the public interest. In the absence of a protected disclosure, these particular claims are not well founded and are dismissed.

Automatically Unfair dismissal, contrary to s100(1)e Employment Rights Act 1996:

171. Were the circumstances which led to the Claimant staying away from work between 27th November 2017 and his dismissal on 23rd January 2018 "circumstances of danger" and did the Claimant reasonably believe these to be serious or imminent? We were very careful to understand the circumstances of danger the Claimant was referring to – in both evidence and closing submissions, the Claimant explained he was referring to the lack of a toilet on the ground floor for a disabled person; he was not referring to his own wellbeing. The Claimant believed the building was unsafe as he was aware of a colleague with mobility difficulties that worked on the ground floor and had to use the disabled toilet on the fourth floor after the Respondent removed the ground floor disabled toilet. Whilst there was a lift the colleague could use, the Claimant believed this was an unsafe practice as the colleague would not be able to use the lift during a fire.

172. We heard evidence that the ground floor toilet had been removed in January 2017 and that the Claimant did not really have a close working relationship with the colleague that had mobility difficulties. The Claimant, quite rightly, was genuinely concerned about health and safety matters and had expressed this to his managers. However, by November 2017, the Claimant had been told the colleague with mobility difficulties had a

buddy assigned to him in the event of a fire [p308] indicating the Respondent had taken steps to consider that colleague's safety. The Claimant might still have had concerns about that colleague's safety, but by December 2017, the Tribunal cannot say these were circumstances of danger that the Claimant reasonably considered to be serious or imminent.

173. Further and in the alternative, the tribunal did not understand how, the Claimant staying away from work, could be regarded as being appropriate steps to protect that particular colleague from the danger. The danger the Claimant was concerned about was that colleague being trapped on the fourth floor of the building in the event of a fire– the Claimant staying away from work did not offer any protection against that danger. The automatic unfair dismissal claim is not well founded.

Victimisation contrary to s27 Equality Act 2010:

174. We started by considering whether any of the letters identified amounted to a protected act. Our findings were as follows:

174.1. The Claimant's letters of 22nd Jan 2014 [p334 & 336] and 23rd Jan 2014 [p338]– whilst these made complaints of bullying, there was no reference to the Equality Act or to any protected characteristic, so these could not be said to make an allegation that a person has contravened the Equality Act. These particular letters are not protected acts.

174.2. The Claimant co-authoring Z's letter of 7th September 2015 [p113] – this was a request for reasonable adjustments. In this letter there was no allegation or suggestion that there had been a failure to provide reasonable adjustments, as such, this is not an allegation that a person has contravened the Equality Act and is not a protected act.

174.3. The Claimant's letter of 7th August 2017 [p135] again does not go as far as to allege that a person has contravened the Equality Act. The comment *"this behaviour I find not in line with Royal Mail Business policy and procedure concerning dignity and respect and diversity"* does not go far enough to be said to be an allegation that a person has contravened the Equality Act – it is possible for conduct to be "not in line" with diversity, dignity and respect policies without actually breaching the Equality Act. This was not a protected act.

174.4. The Claimant's grievance – the letter of 14th September 2017 [p132] – the Respondent accepts, and the Tribunal finds this was a protected act, as in this letter the Claimant has clearly made reference to being of Indian origin and has linked this to the allegations of bullying. This letter does include allegations that a person has contravened the Equality Act.

175. We have found that the Respondent did, through Mr Colclough's letters, threaten to and subsequently on 28th December 2017 actually stop the Claimant's contractual sick pay. We also find that the threat of having contractual sick pay stopped is an act of detriment, particularly in the run up to Christmas. A reasonable worker would take the view that he has been disadvantaged. We find that actually having your contractual sick pay stopped is also an act of detriment.

176. Did Mr Colclough undertake this act of detriment (threaten to and actually stop the Claimant's contractual sick pay) because the Claimant had presented the grievance? We find that the fact the Claimant had presented the grievance had a significant influence on Mr Colclough's decision making. In paragraphs 98 to 126 of this judgment we explained in detail Mr Colclough's approach towards the Claimant during his sick leave. In particular we were alarmed at Mr Colclough's sudden change of tone between the meeting on 13th December, which had ended with Mr Colclough saying he would phone the Claimant each Friday as a means of keeping in touch during the Claimant's sick leave, to the letter he sent two days later which threatened to stop the Claimant's contractual sick pay. As explained in paragraph 117, Mr Colclough had difficulty explaining the change of tone during oral evidence. He also had difficulty explaining why he adopted the manner he did in the letter of 15th December 2017, particularly as he had a GP sick note stating the Claimant was unfit to work until the end of December and as Mr Colclough hadn't made a referral to occupational health or obtained any evidence suggesting the Claimant wasn't genuinely ill. The first paragraph of Mr Colclough's letter of 15th December refers to the Claimant's grievance ("the current conduct case") and the fact the Claimant had objected to it being heard internally. We are satisfied that Claimant's grievance (the protected act) had a significant influence on Mr Colclough's decision to write the letter threatening to withdraw sick pay and his subsequent decision to actually withhold sick pay.

177. Did the Respondent dismiss the Claimant because the Claimant had presented the grievance? As explained in paragraph 115.7 the Claimant who was signed off with work related stress was told he had to attend a meeting in the workplace. Despite the Claimant's response, which requested compassion *"I am only human"*, Mr Colclough's subsequent letters to the Claimant were also written in the same dismissive manner each requiring him to attend a meeting at the workplace, which was wholly inappropriate given Mr Colclough knew that the Claimant had been signed unfit for work with work-related stress.

178. In cross examination Mr Colclough asserted that the reason for the decision to dismiss the Claimant was his failure to maintain contact with the Respondent. However, Mr Colclough's letter of 4th January 2018 was already considering whether the Claimant's employment could be continued, when the Claimant had written to Mr Colclough only 7 days previously. Mr Colclough's letter of 4th January made reference to the Claimant's grievance (the protected act) and the Claimant's assertion that

it should be considered externally and via the bullying and harassment policy rather than the conduct policy.

179. The tribunal find that Mr Colclough's opening paragraph to his letter of 15th December 2017 heralded a change of tone and manner towards the Claimant that ultimately led to an employee of 10 years, who had recently been praised for excellent performance, being dismissed after 56 days sick leave, in circumstances in which his employer had a GP fit note diagnosing work-related stress for at least half of that time. The first paragraph in Mr Colclough's letter of 15th December referred to the grievance and the grievance was on Mr Colclough's mind from that point onwards. We find that the grievance did have a significant influence on Mr Colclough's decision to dismiss the Claimant. The Claimant succeeds with his victimisation claim, in that both the threat and the stopping of contractual sick pay and ultimately the decision to dismiss him, were significantly influenced by the protected act.

Harassment related to race

180. Was the "sly dog" comment that was made by Mr Brown to the Claimant at a meeting with Mr John on 21st June 2017 unwanted conduct related to race? The tribunal accept this comment was unwanted conduct.

181. The Claimant explained that he perceived being called a "dog" as a highly offensive insult related to his race. The Tribunal accept that the term "dog" and the phrase "sly dog" would be perceived as an insult in many cultures and could have connotations of race.

182. Did it have the purpose or effect set out in s26 Equality Act 2010? Given the phrase "sly dog" can be a throwaway remark or even said in an admiring manner, and on this occasion was being said in a formal setting in the presence of his managers, the tribunal accept that it is unlikely that Mr Brown had intended to cause the significant offence that he did cause. We do not find that it was said with the purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

183. However, we find that Mr Brown's "sly dog" comment had the effect of violating the Claimant's dignity and creating a humiliating and offensive environment for the Claimant, such that the Claimant left the meeting. The Claimant was clearly very upset by the remark as witnessed by Mr John and Mr Brown. Mr John noticed the Claimant was "really offended" and Mr Brown went after the Claimant to apologise. The Claimant was so offended he refused to accept the apology. The tribunal find it was reasonable for the Claimant to be so offended, given that the term is regarded as being highly offensive in many cultures. The Claimant succeeds with his harassment related to race claim in respect of this allegation.

184. Was this claim submitted to the tribunal within time and if not, should time be extended (s123 Equality Act 2010)? We did not find that this was part of a conduct extending over a period of time, as this was the only allegation of discrimination that we have upheld against Mr Brown. However, considering the factors set out in S33 Limitation Act 1980 (as modified by the EAT in British Coal v Keeble 1997 IRLR) we do consider that it is just and equitable to extend time in relation to this allegation. This claim should have been issued by 20th September 2017; it was issued on 9th November 2017. We have weighed the prejudice that will be caused to the Claimant by us not allowing him to pursue a claim that had merit with the prejudice caused to the Respondent by allowing him to do so when the claim was submitted 7 weeks late. The Respondent was fully aware of the incident and that the Claimant had been really offended on 21st June 2017 and was aware the Claimant perceived this to be racial discrimination on 14th September 2017, so had every opportunity to investigate this matter at an early stage. The fact that there was an ongoing internal grievance is one of the matters that the tribunal can take into account. Ultimately we found that the prejudice caused to the Claimant outweighed the prejudice caused to the Respondent and determined it was just and equitable to extend the time limit.

185. Was the “I am not going to kill you” comment made by Mr Day to the Claimant on 3rd August 2017 related to race? Whilst we accept this comment was said in a way that made the Claimant anxious, we did not find that this comment was in any way related to race, so this particular allegation of racial harassment is not well founded.

186. Was the involvement of Mr Colclough, Mrs Frankham and Mrs Rich in the Claimant’s complaint dated 14th Sept 2017, (such as it was, in circumstances where the Claimant had requested an external investigation), unwanted conduct related to race? Whilst we accept that the Claimant did not want Mr Colclough, Mrs Frankham and Mrs Rich to become involved in this complaint, we find that their actions were in no way related to the Claimant’s race, so this particular allegation of racial harassment is not well founded.

187. Was Mr Newton’s comment to the Claimant, “I will go ape shit” if someone called him prejudiced with his knowledge of what prejudice is, unwanted conduct related to race? We accept that Mr Newton was trying to conduct a full and fair investigation into the Claimant’s grievance. In this remark, he was explaining how offended he would be if anyone accused him of being prejudiced. In this context, we accept that this was not unwanted conduct and we also accept that it in no way related to race, so this particular allegation of racial harassment is not well founded.

188. Was the reason Mr Colclough threatened to and then on 28th December 2017 stopped the Claimant’s contractual sick pay related to race? Again, whilst we accept this was unwanted conduct, we do not find that this decision was related to race. We find this decision was significantly

influenced by the fact the Claimant had raised a grievance and was continuing to object to the investigation being conducted internally and under the Conduct policy, but we accept that this decision was not related to race. This particular allegation of racial harassment is not well founded.

Direct race discrimination, contrary to s13 Equality Act 2010

189. Was the statement by Mr Brown, during his interview on 5th December 2017, that the Claimant "was not a good manager" made because of race? We have already found that Mr Brown was a difficult person to manage and did not have a good relationship with the Claimant. We are satisfied that Mr Brown would have made the same remark about the Claimant if the Claimant had been a different race or the same race as Mr Brown; this comment was not made because of race – it was made because of the poor relationship between the Claimant and Mr Brown.

190. Was the "sly dog" comment, made by Mr Brown, to the Claimant at a meeting with Mr John on 21st June 2017, made because of race? We accept this comment was made because the Claimant had just disclosed something that Mr Brown had previously said – Mr Brown had just been caught out in the meeting by the Claimant. We accept Mr Brown would have made this comment to the Claimant regardless of the Claimant's race. This comment wsa not made because of race.

191. Were the actions of Mr Brown "disrupting my staff and telling them not to work" "being aggressive and confrontational when asked by the Claimant to work" and "undermining my work ethics" because of race? Again these are further examples of Mr Brown's poor behaviour caused by him having a difficult relationship with the Claimant and being a difficult person to manage. We accept that he was likely to behave like this regardless of race and that this behaviour was not related to race.

192. Was the statement by Mr Day, during his interview on 5th December 2017, that the Claimant "was not a good manager" made because of race? By 5th December 2017, Mr Day did not have a good relationship with the Claimant as a result of the row over the use of the Quiet Room. We accept that it was this relationship difficulty that caused Mr Day to make this comment and that this had nothing to do with race.

193. Was Mr Day aggressive and threatening when he said "I am not going to kill you" on 3rd August 2017. If so, was this because of race? We accept that Mr Day was aggressive during the incident on 3rd August 2017, however we are satisfied this had nothing to do with race. Mr Day was upset that the Claimant was using the Quiet Room for a training session.

194. Were the actions of Mr Day "undermining the Claimant's work ethics" because of race? We accept that if Mr Day was undermining the Claimant's work ethic this had nothing whatsoever to do with race.

195. We find that the allegations of direct race discrimination are not well founded.

Direct religious discrimination, based on perceived religion

196. On 3rd August 2017, did Mr Day aggressively tell the Claimant to "use the Muslim prayer room"? We accept that even if Mr Day didn't use the word "Muslim" in his remark, he did mean "the Muslim Prayer Room" and he was understood to be referring to the Muslim Prayer Room. We also accept that he spoke in an aggressive tone and was being caustic when he said *"Let's go use the [Muslim] Prayer Room*".

197. Was this less favourably treatment because of religion? The context in which this was said is important – Mr Day was wound up and upset that the Claimant was using the Quiet Room, which Mr Day personally used for prayers. There had been a breakdown in communication as Mr John had not told Mr Day that he was allowing this session to go ahead in the Quiet Room. In the heat of the moment Mr Day made this comment without thinking. It was a retort that came out that he wouldn't have said to someone of the same religion as himself. We are satisfied that in the heat of the moment and in those words he was blurring together the Claimant's religion and the Claimant's friend (who is a Muslim)'s religion and was trying to say "you respect the Muslim religion – why not respect mine". However, Mr Day did not express it like this or in this manner – instead he said caustically and aggressively *"Let's go use the [Muslim] Prayer Room*". We accept that being spoken to aggressively is less favourable treatment. We are satisfied that this was treating the Claimant less favourably and the reason for this less favourable treatment was the Claimant's perceived religion, as in that instant Mr Day had confused the Claimant's religion with the Claimant's friend's religion. The Claimant succeeds with his claim of direct religious discrimination based on his perceived religion.

Direct Disability discrimination by association

198. Did Mr John say to Mr Day "I will back you 100%" in relation to his challenge against the Claimant's use of "the quiet room"? We have already accepted that Mr John did say this to Mr Day.

199. Was this less favourable treatment because of the Claimant's association with Z? We accept that Mr John said this because he was trying to support Mr Day's use of the Quiet Room for prayer. We are satisfied that this was not in any way related to the Claimant's associaton with Z or the Claimant co-authoring Z's grievance of 7th September 2015, particularly as Mr John was not aware that the Claimant had co-authored this grievance. The Claimant's claim for direct disability discrimination by association is not well founded.

Sex discrimination by association

200. Was there a decision by Ms Rich and two others to interfere in the Claimant's grievance, (in which he had requested an external

investigation) to appoint someone internal, who was biased? We accept that Ms Rich appointed Mr Newton, an internal manager, to investigate the Claimant's grievance. However we have found that Mr Newton was not biased and endeavoured to undertake a full and fair investigation.

201. Was this less favourable treatment because of the Claimant's association with Z and her being female? We do not accept that the appointment of Mr Newton was less favourable treatment and we certainly cannot see any link between this decision and the Claimant's association with Z and Z being female. The claim of sex discrimination by association is not well founded.

202. The employment judge will set out directions to prepare the case for a remedy hearing in a separate Order.

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Employment Judge L Howden-Evans

Dated: 8th September 2019

JUDGMENT SENT TO THE PARTIES ON
10 September 2019

………………………………………………

FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS