Case Number: 3304433/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr V Philbert	v	Secretary of State for Justice

Heard at: Watford **On**: 27-30 August and 2-4 September 2019

Before: Employment Judge Hyams **Members:** Mr D Bean
Mr D Sutton

Appearances:

For the claimant: Mr V Onuebgu, solicitor advocate
For the respondent: Mr T Kirk, of counsel

JUDGMENT

1 The claim of discrimination because of the claimant's race is not well-founded.

2. The claim of harassment within the meaning of section 26 of the Equality Act 2010 is not well-founded.

3. The claimant was not victimised by the respondent within the meaning of section 27 of that Act.

REASONS

Introduction the parties and the claim

1 The claimant is employed by the respondent as a Probation Service Officer. He has been so employed since 5 July 1993. In these proceedings he claims that he

was discriminated against because of his sex and race contrary to sections 13 and 39 of the Equality Act 2010 ("EqA 2010"), harassed within the meaning of section 26 of that Act, and victimised within the meaning of section 27 of that Act in a number of ways. The case was the subject of a case management hearing before Employment Judge McNeill QC on 19 November 2018, the record of which, and the orders made at which, were sent to the parties on 20 December 2018 (pages 37-43 of the hearing bundle; any reference below to a page is, unless otherwise stated, to a page of that bundle). The claim of sex discrimination was withdrawn at that hearing, as recorded in paragraph 3 on page 38. The issues in the case were listed at pages 38-40. We return to those issues below, having stated our findings of fact.

2 We heard oral evidence from the claimant and, on his behalf, Mr Tim Allwood, who is and has at all material times also been employed by the respondent as a Probation Service Officer.

3 On behalf of the respondent, we heard from

3.1 Mr Andrew Blight, who is currently employed as Interim Head of Operations for the National Probation Service ("NPS") London, and was at the material times employed as Head of Service for the respondent's Haringey, Redbridge and Waltham Forest local delivery unit (or cluster);

3.2 Mrs Kilvinder Vigurs, the Divisional Director for the NPS London;

3.3 Ms Kathryn Hunt, Head of Service for the NPS's Camden and Islington cluster;

3.4 Mr Antony Rose, Head of Service for the NPS's Ealing, Harrow and Hillingdon cluster;

3.5 Ms Pippa Beeston, a Senior Probation Officer who was at the material times employed in the NPS's Haringey, Redbridge and Waltham Forest cluster; and

3.6 Mr Matthew Wilson, Deputy Director for Business Strategy and Change of Her Majesty's Prison and Probation Service.

4 We had before us at the hearing a bundle of over 1271 numbered pages with a number of inserted additional pages. We read the documents in that bundle to which we were referred during the hearing and such additional pages as we could see were relevant when we were deliberating.

5 Having heard and seen those witnesses give evidence, and having read those documents, we made the following findings of fact.

Our findings of fact

6 The claimant was, before the events which led directly to these proceedings commenced, which was in December 2016, based at Wood Green Crown Court. As we say above, he was employed by the respondent as a Probation Service Officer ("PSO"). As such an officer, he was managed by a Senior Probation Officer ("SPO"). In December 2016, the claimant's SPO line manager was Ms Josie Fadlin. A PSO is junior in terms of qualification and status to a Probation Officer ("PO"), but both of them are managed in the NPS by a SPO. A SPO is managed by, and reports to, a Head of Service, such as (at the material time) Mr Blight.

The allegations made against the claimant in respect of his interactions with Mr Peter Fung

7 The claimant worked in an office in the Wood Green Crown Court building ("Wood Green") which was adjacent to that of a PO by the name of Mr Peter Fung. On (in all probability, bearing in mind the contents of the note of the interview of Ms Beeston with Mr Fung of 23 January 2017 at page 94 and the note of the same date of Ms Beeston's interview with Ms Fadlin at page 98) 2 December 2016, the claimant went into Mr Fung's office and complained that Mr Fung was speaking too loudly and treating the place as a social club. There was an exchange between them as a result. It was not necessary for us when determining whether or not the claimant's claims were well-founded to decide precisely what happened during that exchange, and we did not come to any conclusion in that regard. However, we record here that the claimant accepted that he had spoken to Mr Fung early in December 2016 (he alleged that it was 5 December and not 2 December) about Mr Fung speaking loudly and treating the place as a social club. The parties agreed that Ms Fadlin had several days later asked the claimant to go to her office and said that a number of staff had reported to her that he had shouted at Mr Fung. The claimant had admitted that his voice was raised, but in his witness statement made for these proceedings, he said that he had denied shouting at Mr Fung. He did, however, in that witness statement accept that he had apologised for raising his voice at Mr Fung.

8 There was then (the parties agreed) a further exchange between the claimant and Mr Fung on 9 December 2016. The claimant's own evidence was that Ms Fadlin had intervened in the exchange. The allegations that were made by Ms Fadlin and Mr Fung and others about the claimant's interactions with Mr Fung on those two occasions in December 2016 were material to a number of aspects of the claims made in these proceedings. However, whether or not they were true was, again, not material. What <u>was</u> material was how Mr Blight responded to them. Mr Blight's witness statement contained, in paragraph 18, this passage:

> "The Claimant complains that a formal disciplinary process was commenced rather than proceeding by an informal means, like mediation. I was advised by the Claimant's line manager who reported the incidents to me that Peter

> Fung had indicated that he would raise a formal grievance, which he subsequently did. Given this and that there were two incidents in quick succession, mediation was not deemed appropriate."

9 The claimant's line manager was, of course, Ms Fadlin. It was not clear what was meant by the assertion that because Mr Fung had indicated that he would raise a formal grievance and because "there were two incidents in quick succession, mediation was not deemed appropriate". Mr Blight was pressed on that when giving oral evidence, when he was asked whether he meant by saying those things that he gave in to Mr Fung's threat to put in a grievance, and in effect allowed his decision on the procedure followed to be determined by Mr Fung. Mr Blight's response was that his witness statement was not accurate in saying that because "there were two incidents in quick succession, mediation was not deemed appropriate", and that the truth was that the reason why he had concluded that mediation was not appropriate was that he had a discussion with Ms Fadlin after "the second incident", i.e. that of 9 December 2016, and that she had said that Mr Fung did not want to work with the claimant any more and therefore did not want mediation.

10 In itself, that was a questionable stance. It is true that for mediation to work, both parties must want to mediate, but sometimes an employee who is set against mediation and continuing to work with another employee can be persuaded to enter into a workplace mediation with a view to a reconciliation with the perceived offending employee. We therefore looked at the documentary evidence of what had been reported by Ms Fadlin to Mr Blight about the claimant's conduct. At pages 75-76 there was a document entitled "Staff Supervision Record" which purported to be a record of a meeting between Ms Fadlin and the claimant of 12 December 2016. On page 76, in box 6, for "Other areas for discussion", there was this entry:

> 'Discussed the most recent incident between Vivian and Peter. I expressed my concern that there had been a further incident between Vivian and Peter given our discussion on 06/12/2016 during which I had spoken to Vivian about his reported conduct and he had reassured me that, "It won't happen again." Vivian stated Peter is going out of his remit, feels there is a precedence when someone fails to attend an appointment, so felt it was inappropriate for Peter to offer a further appointment.
>
> I asked Vivian if there was some personal conflict going on between himself and Peter and asked if he would like some mediation. Vivian stated he has not got a problem with Peter and refused mediation as he said he did not feel it is necessary.'

11 On pages 77-78, there was a document headed "Case Export for Case Id: 9628". We were later given two similar documents, to which we return below. Those later documents were given to us on Friday 30 August 2019 and were put into the hearing bundle at the back, at pages 1266-1271. The latter two

documents were, we were told by Ms Beeston, who had procured them, records kept by the respondent's HR service of advice that had been given over the telephone to Ms Fadlin on 17 February 2017 and Mr Blight on 20 February 2017. We accepted Ms Beeston's evidence in that regard and took it into account when considering what factual conclusion (if any) we could draw from the content of the document at pages 77-78. We had to do so because the claimant denied that he had said to Ms Fadlin that what had happened between him and Mr Fung on (on the claimant's evidence) 5 December 2016 would not happen again. The claimant had subsequently, during the disciplinary proceedings to which we refer below (but not in his witness statement made for these proceedings, in which he made no mention of that record and said nothing about whether or not there had been a supervision meeting with Ms Fadlin on 12 December 2016) also claimed that Ms Fadlin had fabricated the document at pages 77-78, i.e. that it was not a true record of what it purported to record.

12 The document at pages 77-78 included a short record of what appeared to be advice given to Ms Fadlin on 12 December 2016. The record had a "Case open date" shown on page 77 of "12/12/2016 09:34" and the reason for it being opened was (the entry immediately above that one showed) "Violent, threatening or abusive behaviour". The "Date support [was] requested" was one second earlier, i.e. 09:33 on 12 December 2016. The employee in respect of whom the advice was sought was stated to be the claimant. The advice recorded (at the top of page 78) was this:

> "EE was agressive to a colleague on Wed last week, shouting at them to the extend other staff became concerned. LM dealt with matter informally and spoke to EE to confirm not acceptable - EE said it won't happen again. However, repeat of incident on Friday. Adv LM that a disc inv should be commissioned. LM is witness so adv she should not be involved and that a separate manager should act as commissioning manager and commission an investigation,
>
> Created by Telford, Sarah on 12/12/2016 09:35:55".
>
> (The textual error in the above extract, and all of those in the extracts set out below, were original. For the sake of simplicity and accuracy, we have not corrected them.)

13 The documents at pages 1266-1271 were in the same format, but contained more information about the claimant and the person who had requested the advice: the first one, dated 17 February 2017, named Ms Fadlin, and the second one, dated 20 February 2017, named Mr Blight as the person who had requested the advice. The first referred to the advice as having been given to "LM", and the second did not refer to the advice as having been given to the "LM". We concluded that those words meant "line manager", and that the person to whom the advice was given as recorded in the document at pages 77-78 was Ms Fadlin.

14 Mr Blight sent the document entitled "Terms of Reference" at pages 71-73 to Ms Beeston under cover of the email dated 22 December 2016 at page 73A. The Terms of Reference stated (on page 72) the "objective" in this way:

> "Your objective is to establish the facts and present any evidence in relation to the above incident, allegation or complaint in accordance with the Conduct & Discipline policy."

15 The "above incident, allegation or complaint" was described in the box straddling pages 71-72 as follows:

> "On Monday 06/12/2016 members of staff at Wood Green Crown Court reported to Acting SPO Josie Fadlin that they were alarmed and concerned about an incident which happened the previous day 5/12/2016. Vivan Philbert is reported to have been shouting very loudly at Peter Fung within the Probation Court Office. The level and nature of the shouting was such that staff members felt very uncomfortable with one staff member stating he was on the phone at the time and the person at the other end of the phone asking what was going on in the background due to the level of noise. Vivian was spoken to by his line manager Josie Fadlin on the 6/12/2016 about the incident and informed that his conduct was inappopriate, particularly as the Probation Office is within the Court building and could have easily been overheard by service users and Court personnel. Vivian assured his line manager that this would not happen again. Staff were particularly concerned as they reported there had been previous incidences prior to this which were also directed at Peter and they were concerned that it appeared to be personal.
>
> The same week on Friday 9/12/2016 Vivian was again heard challenging Peter Fung about a matter he felt Peter did not have the remit to deal with despite being informed by Peter that he had discussed the matter with Line Manager Josie Fadlin. Vivian would not accept this and continued to challenged Peter's authority. Josie Fadlin on this occassion felt compelled to intervene to avoid the situation escalating further."

16 The "Terms of Reference" document at pages 71-73 was dated 1 December 2016. The first Friday in December 2016 was 2 December. The Monday following was 5 December. Much was made by Mr Onuegbu about these inaccuracies, so we looked further at the reasonably contemporaneous documentation with a view to coming to a reliable conclusion about the sequence of events which had led to the commissioning by Mr Blight of the investigation and why he had not instead of doing that gone down a more informal route.

17 On 6 January 2017, Ms Beeston sent the claimant the letter of that date at pages 92-93. Its description of the events mirrored that of Mr Blight in the document at

pages 71-73. After giving that description of the events, it continued:

> "As part of my investigation, I would like to interview you so that I can get your view of things. I will be in touch shortly to arrange a date when we can meet. You may be accompanied by a trade union representative or work colleague, however, you'll need to let me know at least one day before if anyone is coming with you and who it is.
>
> I am required to complete my investigation within a 28 working day time frame which is the 6th February 2017. If for any reason this deadline cannot be met I will write to you informing you of the reasons for this and will provide you with a revised completion date.
>
> When I have finished my investigation, Andrew Blight will write to you, within two weeks, to let you know what happens next This could include:
>
> i. taking no further action
> ii. taking informal action e.g. providing you with extra coaching, training or support
> iii. the matter being dealt with through formal performance management procedures
> iv. holding a formal disciplinary hearing".

18 While we had no doubt that the latter paragraph was a standard paragraph, it was, we also found, reflective of the reality, which was that the mere fact that an investigation into what had happened had been commissioned by Mr Blight did not mean that there would subsequently be a disciplinary hearing, and that there was a possibility that in contrast, no further action would be taken.

19 Ms Beeston interviewed Mr Fung and Ms Fadlin on (her records of the interviews, at pages 94-97 and 98-99 respectively, showed) 23 January 2017. Ms Fadlin was recorded by Ms Beeston to have said this:

> "Regarding the first allegation about the incident on the first Friday in December 2016. Josie Fadlin (JF) attended the office on the following week and was approached by several staff Bonny Wambulu (BW), Sarah Kigenyi (SK) and Shamim Khan (SKN) who asked to speak to JF regarding the behaviour of Vivian Philbert (VP) towards Peter Fung (PF). The members of staff reported that VP was shouting very loudly at PF who was sitting at his desk whilst VP was standing in the doorway. The staff reported that they were shocked at the behaviour and level of shouting within a professional setting and the impact it could have not only on the Probation Staff but other people who use the office such as service users and legal professionals due to the location of the office within the Court building.
>
> JF after hearing from the concerned members of staff then spoke to all of the staff members in the building including Michael Williams (MW), Yvonne

Lindo (YL) Hilary Ives (HI) and Claire Rowley (CR). After speaking to all staff and Andrew Blight the ACO JF called VP into her office to discuss the matter. VP informed JF that PF was speaking to loudly and that VP spoke to him about the level of noise. JF reminded VP about professional behaviour including working in a Court setting and that there are other ways to speak to people or raise concerns about behaviour than shouting at them. VP apologised to JF regarding his behaviour and stated it would not happen again. JF informed VP that his behaviour had been noted and any further incidents would result in formal action. JF asked VP during the above discussion if there was anything personal between VP And PF that she should be aware of and VP said he doesn't have anything against PF and they can work together.

The 9th December 2016 JF walked past PF and VP having a conversation and went into her own office. JF could overhear the conversation and PF was repeating himself stating that he had already discussed the matter with JF and VP could ask her about it. VP continued to state that it wasn't PF's remit to send the email and arrange for a further report given the missed appointments. PF explained in a neutral tone it was a multihanded case and the co-defendant had already been interviewed so as it was only an Unpaid Work assessment he was trying to be efficient and save the Court and Probation time by avoiding a further adjournment. Due to the continued increase in volume of VP and repeated challenging of the email about it being outside of PF's remit and he (PF) should not be sending the email JF left her office and intervened to confirm with VP that she had authorised it with PF and VP should not continue to challenge PF in this manner. VP then walked away.

JF is concerned that the behaviour has not only impacted on the team but also on the professional reputation within the Court setting and that VP has acted in a verbally aggressive manner towards PF on more than one occasion within a week of apologising and saying it would not happen again. JF remains concerned that it will be difficult for them (PF & VP) to work together in the future and would not leave them alone in the building."

20 Mr Fung was recorded by Ms Beeston to have said this:

'Regarding the first allegation about the incident on the first Friday in December 2016 which was reported to Josie Fadlin (JF) on the following Monday. PF was sitting in his office with his colleague Sarah Kigenyi (SK) and Shamim Khan (SKN) who was in the visitors chair when Vivian Philbert (VP) approaches the door and shouts at PF that he (PF) is speaking too loud and treating the place like a social club. PF was stunned by this outburst and he looked at his colleague SKN due to the aggressive nature of VP. PF felt fearful of VP at this time and asked him to calm down several times before VP left PF's room. There was no further contact between PF and VP on that day but PF was asked by SK and SKN if he was okay. PF feels that VP was

being loud and aggressive and that other people heard the behaviour that the office is in the Court with offenders and other legal professionals such as judges, barristers can attend the building and may hear such behaviour.

PF felt that VP's tone was so aggressive and loud that for a few seconds he was speechless and utterly shocked but hid his shock and asked VP to calm down several times as did SKN. SK took a call on her mobile and left the office VP then left the scene and has never apologised for his actions. VP's verbal attack on PF was such that PF was left shaken and distressed although he calmed myself down and presented as unruffled. PF tried not to let it show to colleagues for the rest of the day.

Over the weekend PF was deeply concerned about VP's overall pattern of behaviour towards him and wondered if - given VP's outburst - felt VP might resort to physical aggression towards PF. PF was apprehensive about coming into work the following Monday 5th December 2016 but presented as professional and wished VP "Good morning" when PF arrived at the office. PF spoke to Josie Fadlin (JF) about this incident that Monday and expressed his concern about possible physical aggression from VP. JF was concerned and asked how PF how he was feeling and there was a mutual agreement that PF should be cautious in any dealings with VP, that JF would speak to VP shortly about the incident. JF informed PF later that day that VP had made a reassurance that such behaviour would not be repeated (but no apologies were offered) and that she would inform Andrew Blight about the incident.

VP's shouting and contempt for PF was unacceptable behaviour and could never be unjustified. As well the impact on PF, colleagues who were witnesses or had heard VP's shouting were deeply concerned about VP's behaviour and its impact on me. One colleague, Bonny Wambulu (BW) who was sitting in their office further down the corridor and told PF later he (BW) had heard the shouting, that he was intending to intervene to calm down VP such was his concern. In my view VP's shouting has created tension within the team, tension he has created by his animosity and actions towards PF. VP's shouting at PF was the most serious unprofessional action I have experienced and witnessed by a colleague during his time in probation (13. years). The office routinely receives offenders and their barristers and Friday is a our busiest day. The public waiting area is about 15-20 feet along the corridor from where VP was shouting at PF and in direct line-of-sight. There is also normally a partnership worker sitting in the office right next to us although was not present that day. There are also have ushers/clerks and barristers routinely visiting officers and admin colleagues so there was a genuine risk of offenders, members of the legal profession, court staff and a partnership witnessing VP's outburst which would have been detrimental to the image of NPS. Fortunately, there were no visitors/partnership workers present at the time although PF understands that an admin colleague was speaking to someone on the telephone and that person heard VP's shouting

and asked what was going on such was their concern.

PF has discussed the incident with SKN, SK and BW and we all remain shocked about VP's outburst towards PF and sheer lack of professionalism. For PF, the incident represents the peak of VP's personal animosity if not hatred towards PF, that he totally "lost it" on that day. PF remains anxious and apprehensive about current and future contact with VP were they to find themselves alone in the office together so PF tries to avoid this. In the thirteen years PF has worked for NPS he has never experienced anything close to this type of behaviour from colleagues. PF has certainly experienced this behaviour from offenders as recently as 2 - 3 months or so ago when an offender was shouting at a colleague (SK) in interview and PF intervened and the offender then shouted at me as PF as he tried to calm him down. But to some extent such rare incidents with offenders are not totally unexpected. PF pride's himself on being able to work out disagreements with colleagues and being able to work/co-operate with them and pride myself in being a supportive and helpful colleague and team-member. PF is confident that colleagues/current and ex-managers will back me up on this.

While PF accent's [presumably that should have been "accepts"] that he can speak loudly, in the court team they work in small adjoining offices and PF can sometimes hear VP and other colleagues speak loudly in their offices (even when their doors are closed) further on down but PF accepts the environment that he works in and tries to lower his voice; PF also closes his door if he thinks he his talking too loudly. VP's shouting at PF was unacceptable and cannot be justified'.

21 While we did not hear evidence from either Mr Fung or Ms Fadlin, we did hear oral evidence from Ms Beeston and we accepted her evidence that she had made those notes on the dates that they were stated to have been made. Even though those dates were some months after 23 January 2017 (5 May and 4 May 2017 respectively), we accepted Ms Beeston's evidence that the notes were an accurate record of what had been said to her on 23 January 2017 by Mr Fung and Ms Fadlin.

The evidence before us about the allegations made by Ms Claire Rowley about what the claimant had said to her and what Mr Blight did in response to those allegations

22 On 20 February 2017, Ms Claire Rowley, a PO whose line manager was Ms Fadlin and who shared an office with the claimant at Wood Green, sent Ms Fadlin the email at pages 132-133. It was in these terms:

"I spoke to you last Friday (17th February) about some concerns I had with regard to what Vivian Philbert had said to me on Thursday 16th February 2017.

I was sitting at my desk when Viv burst out laughing. I asked what he was laughing about and he said he was laughing at the case he was reading. I asked why, and he went on to explain that there is a rape case on trial at the moment, where the complainant had given consent to oral sex, and then gave consent for intercourse, but when it started to hurt her, she said no, but the man carried on having sex with her. Viv questioned how on earth was that rape. So I said that the minute a woman said no, you had to stop and if you carried on, then it was rape. Viv laughed at this and made a comment about the law in this country being a fucking joke. I said at the end of the day rape is rape, if you say no you have to stop. He did not agree. I then looked the case up, and it's obviously from the beginning that the woman also have learning difficulties and mental health problems, so she's even more vulnerable than usual.

I've brought this to your attention, because it is not the first time Viv has made inappropriate comments, and I have tried to challenge his views before, but it's not working.

On Monday 12th February 2017, Viv was discussing another rape case, where the victim had been 12 years old and the defendant was 15 years old when a sexual relationship started. Viv asked me how that was rape when the girl had given consent to have sex with the guy, and they had been in a relationship. He then started to make comments about how he could not understand it when 12 year olds lead men on and are promiscuous, how is this the man's fault if he does then have sex with them.

I had previously brought a concern to Jonathan/Fotini around September 2016, when Viv had laughed at a case and again questioned how it was on trial as it was about a man raping his wife, indicating that he did not believe rape could exist within marriage.

He also saw one of my cases in the cells, and I do not understand why he needed to. I interviewed a man in January 2016 about a DV [i.e. domestic violence] offence, and then interviewed him in January 2017 for raping his wife. Viv had been to see the man in the cells, and I don't know why. There was some concern with the case, in that it looked like there may have been some false allegations made by the wife, but at the end of the day, he was convicted for the offences, and we work on that basis. Viv appeared to kind of collude with that defendant, and I'm concerned as to why he visited him in the cells. I don't know when he did, if it was from January 2016 or this January, as he just mentioned having met the man in the cells."

23 That email was copied to Mr Blight. Ms Fadlin was subsequently (on 25 April 2017) interviewed by Ms Beeston about the matter (in the circumstances to which we refer below), and there was a note of the interview at page 190. So far

as relevant, it was to the effect that Ms Fadlin had first consulted Mr Blight about what she had been told by Ms Rowley and that he had advised that she asked Ms Rowley to put the allegations in writing and send them to Ms Fadlin and Mr Blight. The relevant passage in the note on page 190 was in these terms:

> "This is the second interview and relates to the added allegations regarding comments about sexual offences. JF become the acting SPO for the Wood Green Crown Court in November 2016. In February 2017 Claire Rowley (CR) spoke to JF about VP and the alleged comments made by VP regarding the victims of rape. JF sought advice from Andrew Blight the ACO and feedback to CR the advice to record it and forward to Andrew Blight. VP was then suspended on the basis of the allegations made."

24 However, the documents at pages 1266-1271 indicated that the sequence of events might not have been precisely as Ms Fadlin remembered them when she was interviewed by Ms Beeston on 25 April 2017. That is because at page 1268, this advice was recorded to have been given by Mr Paul Jones on 17 February 2017 at 11:58 to "LM", who was clearly (given the content of pages 1266-1267) Ms Fadlin:

> "LM explained a number of very serious allegations have been made about the ee; ADVISED - as there is an ongoing investigation we could either extend the TOR [i.e. terms of reference, i.e. in the circumstances the document at pages 72-73] if it is at an early stage making the ee aware or start a new investigation if things have progressed to far. Also discussed suspension due to how serious the allegations are."

25 On 20 February 2017, Mr Blight had sought advice from HR, according to the document at pages 1269-1271, and the advice recorded was at the top of page 1271. It was given (the document recorded) by Emma Canning at 15:01 and was in these terms (only):

> "discussed further allegation, very serious, suspend employee commission separate allegation into this misconduct".

26 Presumably the second word "allegation" in that sequence was meant to be "investigation".

27 Mr Blight's witness statement contained this passage about what happened next.

> "21. A second allegation came to light in February 2017 and was reported by an employee ('CR'), who put her concerns in writing to the Claimant's manager and copied this to me (132-133). This related to alleged inappropriate comments about rape cases made by the Claimant on two occasions on 12 and 16 February 2017, and also referenced some historic concerns of a similar nature.

22. I therefore took the decision to suspend the Claimant and sent a letter confirming my decision (134). The reason for my decision is set out in the letter (second paragraph).

23. This decision is in line with policy which allows for suspension where there is a particular business risk (1159, paragraph 6.3). In my view, this issue posed a reputational risk to the organisation because the Claimant as a matter of course in his work would potentially meet defendants who were either the perpetrators of sexual offending or potentially victims. Given the nature of the allegations, I deemed it inappropriate that the Claimant should come into contact with members of the public and I considered that his conduct potentially breached the Civil Service Code of conduct and values of the probation service.

24. Before suspending the Claimant, I also took advice from HR and it was agreed that suspension was appropriate given the seriousness of the allegations and the Claimant's work with service users. For these reasons, we considered that there was no suitable alternative to suspension."

28 Mr Blight did not interview the claimant before suspending him, either to see what his initial reaction to the allegations of Ms Rowley was, or to explain to him why he was being suspended. The claimant was in fact on annual leave on 20 February 2017 and he returned from annual leave on 1 March 2017. On that day, Mr Blight simply gave the claimant the letter (wrongly dated 29 February 2017) at pages 134-135.

Ms Vigurs' first involvement in the relevant events

29 That letter among other things said that the claimant could "make representations" against Mr Blight's decision to suspend the claimant, to Ms Vigurs. The claimant did that, in the letter dated 1 March 2017 at page 138. Ms Vigurs responded in the letter dated 9 March 2017 at page 148. She wrote that she had considered the allegations concerning what the claimant had said to Ms Rowley and that given "the sensitive nature of the allegation", she was satisfied that "if proven it could constitute gross misconduct". She also wrote that as a result of "the potential risk to the organisation's reputation and the impact on victims" if the claimant remained in the workplace, she was "satisfied that temporary redeployment or alternative duties [were] not appropriate at [that] time."

Our conclusion about the sequence of events from 17 February to 1 March 2017 leading up to and including the claimant's suspension

30 We found the documents at pages 1266-1271 to be the most reliable

contemporaneous evidence of the sequence of events on 17 and 20 February 2017, taken together with the email of 20 February 2017 at pages 132-133 from Ms Rowley to Ms Fadlin, the text of which we have set out in paragraph 22 above. Ms Beeston's interview note at page 190 from which we have set out the material part in paragraph 23 above was also in our view in all probability accurate. We concluded that the first event in the sequence was that in the morning of 17 February 2017, Ms Rowley spoke to Ms Fadlin about things that the claimant had said to Ms Rowley on 12 and 16 February 2017. Ms Fadlin may have spoken to Mr Blight before speaking to Mr Jones as recorded in paragraph 24 above, or she may have spoken to Mr Blight after speaking to Mr Jones, but whichever it was, she spoke to both Mr Jones and Mr Blight on that day about the things that she had been told by Ms Rowley had been said to her by the claimant. Ms Fadlin, we concluded from the record at page 1268 set out in paragraph 24 above, saw the things alleged to have been said by the claimant to be so seriously wrong and incompatible with the claimant being at work if he had in fact said them, that she considered the possibility of suspending him.

31 Having, on Monday 20 February 2017, received Ms Rowley's email at pages 132-133, Mr Blight, who was aware of the allegations having been told about them by Ms Fadlin on 17 February and had discussed with Ms Fadlin the possibility of the claimant being suspended, sought advice from the respondent's HR service, and received advice which supported the proposition that the claimant should be suspended.

32 Mr Blight did not refer to, or use, the document of which there was a copy at pages 1144-1145. That document was entitled "Conduct and Discipline policy - Pre-Suspension Check Sheet". It had in it a list of 8 questions and a ninth section in which the "Final decision" was to be recorded. Questions 2-6 and 8 were as follows:

> "2. If the staff member remains in their current role and location, would this result in impacting operational, and safety including safety of other employees/offenders? **Yes/No**
>
> 3. Would training and guidance mitigate the risk if the member of staff remained at work, **Yes/No**
>
> 4. Have alternatives to suspension been considered, e.g. redeployment to another job in the same group, redeployment to another group, change in the way work is carried out, or detached duty? **Yes/No**
>
> 5. Was the member of staff given an opportunity to be accompanied by a Trade Union Representative or a work colleague? **Yes/No**
>
> 6. Has the appropriate area/national Trade Union representative been alerted? **Yes/ No**

...

8. Has the staff member given their statement of events (if so record below)?"

33 We noted the imprecision of the language of question number 2, but concluded that it was aimed at the question whether leaving the employee in position rather than suspending him or her would have a negative impact on the operations of the NPS or the safety of anyone, including any colleague or offender. What was most important was question 8.

34 It was Mr Blight's clear and repeated evidence that he was not aware of the existence of that pre-suspension checklist until it was brought to his attention in the course of these proceedings. We accepted that evidence (in part, but not only, because of the circumstances of Ms Rowley to which we refer in paragraph 36 below).

The subsequent events that led to the claimant's dismissal

35 Ms Beeston was asked by Mr Blight to add the allegation of the use of inappropriate words by the claimant when speaking to Ms Rowley to the matters that she (Ms Beeston) was investigating. Ms Beeston did so and wrote to the claimant the letter at pages 149-150 dated 13 March 2017, stating the allegations. The letter contained a transposition of the email at pages 132-133 from Ms Rowley to Ms Fadlin of 17 February 2017, in that it stated precisely the same things, but described the matter by reference to what "CR" had done rather than what "I" had done, and referred to the surnames of Jonathan and Fotini (Joels and Tsioupra respectively).

36 On 20 April 2017, Mr Blight suspended Ms Rowley after she had been charged with causing actual bodily harm. The letter stating that she was suspended was introduced at the beginning of the second day of the hearing before us (i.e. on 28 August 2019), and it was inserted into the bundle as pages 1260-1261. Mr Blight did not use the checklist at pages 1144-1145 before deciding that Ms Rowley should be suspended. Nor did he speak to her to hear what she had to say in response to the proposal that she be suspended before suspending her and giving her the letter at pages 1260-1261.

37 As indicated in paragraph 23 above, Ms Beeston interviewed Ms Fadlin about that allegation. Ms Beeston also interviewed Ms Rowley about it (the typed note of the interview being at page 180; the interview was stated in that note to have taken place on 24 April 2017 and the note was neither signed nor dated), Mr Jonathan Joels and Ms Fotini Tsioupra. The notes of the latter two interviews were said to have been of interviews on 25 April 2017 and were dated (digitally) 9 May 2017 and 5 May 2017.

38 On 24 April 2017, Mr Blight wrote the letter at 182 stating that he had reviewed the claimant's suspension and that since there was "no further relevant information" which changed the original decision to suspend the claimant, the suspension continued. That was the only time that Mr Blight reviewed the claimant's suspension.

39 On 2 May 2017, expressions of interest were invited to transfer to the post of a permanent Band 3 PSO role at Wood Green (page 196). It was Mr Blight's evidence that there was funding for 3.9 permanent PSOs at Wood Green, but that he had found that the job was being done effectively with three such PSOs (including the claimant) there. However, with the claimant not at work, he needed to recruit another person, and going slightly over budget by having 4 instead of 3.9 PSOs would not be problematic. There was at page 195 a copy of a document which supported that evidence of there being funding for 3.9 PSOs at Wood Green, but our attention was drawn to it only after the witnesses had given evidence.

40 On 9 May 2017 (the parties agreed: we did not have a copy of a covering letter or email showing this), the claimant submitted a grievance. There was a copy of it at pages 253-257. It alleged among other things that Ms Fadlin had falsified the supervision record to which we refer in paragraph 10 above, that the claimant had been victimised because of something in his file from 2014/15 in respect of which he had been exonerated, and this:

> "I have cited discrimination on grounds of gender and ethnicity as part of my grievance as I believe I have been treated differently and less favourably by the ACO, AB. I am aware of a PSO colleague in AB's cluster who has had a number of grievances/formal complaints raised against her conduct and was not taken through the same proceedings as I am being put through. That colleague is female and white. A second comparator, also white and female who was previously managed by AB until mid 2016, had a number of complaints made against her by staff whom she managed but AB failed to take any formal action against her until a collective anonymous complaint was made to the Deputy Director."

41 On 15 May 2017, Mr Blight sent the letter of that date at pages 206-208 to the claimant, inviting the claimant to a disciplinary hearing at which he, Mr Blight, would preside. In the letter, at page 206, Mr Blight stated about the allegations which were to be considered at the hearing:

> "If proven, these allegations would constitute gross misconduct."

42 At page 207, Mr Blight wrote that he could, at the end of the hearing:

> "decide to do one of the following:

i. take no further action.
ii. take informal action e.g. provide you with extra training, coaching or support
iii. take formal action up to and including ending your employment with the Service."

43 On 25 May 2017, Mr Allwood sent the email at pages 214-217 to Ms Vigurs, objecting among other things to Mr Blight hearing the disciplinary case against the claimant and saying that the claimant's grievance of 9 May 2017 should be considered before the disciplinary proceedings were determined. Ms Vigurs acknowledged receipt of the email on the same day (page 218), and then on 10 June 2017 (after a period of annual leave) she sent the letter to Mr Allwood by email at page 222. Her letter included this paragraph:

> "I understand a letter relating to the disciplinary was sent after the grievance came in. This was because I had not alerted Andrew, as I was going on leave and he separately sent his letter as part of the discipline process."

44 It was Mr Blight's evidence that he had not been made aware of the grievance at pages 253-257 before he sent his letter at pages 206-208. Ms Vigurs confirmed in oral evidence the accuracy of the words set out at the end of the preceding paragraph above. In those circumstances, having heard and seen those witnesses give evidence, and in the light of those words, we accepted Mr Blight's evidence that he was not aware when he sent his letter at pages 206-208 that the claimant had stated a grievance, alleging among other things that he (Mr Blight) was discriminating against the claimant because of the claimant's race and sex.

45 Mr Rose was asked by Ms Vigurs to deal with the claimant's grievance. Mr Rose held a grievance hearing on 27 June 2017. He did not deal with the question whether the claimant had been discriminated against because of his race and sex by being disciplined and suspended. There was a note of the meeting at pages 235-238. Appended to that note was the note at pages 239-242 which, it was recorded at page 238, was read out by the claimant at the hearing. The note contained allegations that

45.1 complaints made against two SPOs, to whom we refer by their initials as PC and KD, by persons whom they managed, which alleged serious misconduct by PC and KD in their roles as line managers, resulted in treatment of PC and KD which was far less harsh than that which the claimant had received in respect of the allegations which had led to his suspension;

45.2 that more harsh treatment of the claimant constituted discrimination against him because of his race and his sex; this was said both because

PC and KD are women and white but also because Ms Rowley is a white woman;

45.3 Ms Fadlin and Mr Blight:

> "being Probation Officers (notwithstanding their manager status) have sought to close ranks and support fellow Probation Officers (Peter & Claire) over a PSO and treated me differently";

45.4 Mr Blight should have dealt with the allegations made against the claimant by Mr Fung and Ms Rowley informally rather than by (respectively) commissioning an investigation and then suspending him;

45.5 Mr Blight should have given the claimant the reasons for his suspension at the time of his suspension;

45.6 Mr Blight should have investigated the allegations of Ms Rowley before he suspended the claimant;

45.7 Mr Blight should have given the claimant a statement made by Ms Rowley herself rather than stating the allegations in the document at pages 149-150;

45.8 Mr Blight's appointment of Ms Beeston was unfair as she reported to him and therefore could be regarded as being in danger of being biased;

45.9 Ms Fadlin had not kept the claimant informed since his suspension about relevant work-related developments; and

45.10 Mr Blight and Ms Fadlin had bullied and harassed the claimant in the manner in which they had treated him as stated in the preceding subparagraphs of this paragraph.

46 Also on 9 May 2017, Ms Beeston produced a report of her investigation; it was at pages 139-147. She concluded that all of the allegations except the final one set out in the email of Ms Rowley at pages 132-133 (set out in paragraph 22 above) should be the subject of a disciplinary hearing. In the latter regard, there was

> "not enough evidence to ascertain when it happened".

47 Mr Rose dismissed the claimant's grievance, stating his reasons for doing so in the letter dated 11 July 2017 at pages 250-252. The claimant appealed against that outcome on 20 July 2017 (the reasons for appealing being at pages 263-264). Ms Vigurs acknowledged the appeal in her letter dated 27 July 2017 at pages 278-279, and invited the claimant to an appeal hearing with her presiding on 15 August 2017. The claimant on 10 August 2017 raised a grievance about the decision that Ms Vigurs heard the appeal (pages 314-317). Ms Sonia

Crozier, Ms Vigurs' line manager and the NPS's Executive Director Probation and Women, in the letter dated 11 August 2017 at page 313 rejected that grievance. On 14 August 2017 the claimant appealed that decision (pages 314-317). That appeal was dismissed by Mr Michael Spurr, the Chief Executive of HMPPS, in his letter dated 16 August 2017 at page 329. Ms Vigurs then held the planned hearing of 15 August 2017. Notes were made of it, and they were at pages 337-344. Ms Vigurs asked (as noted in paragraph 13 on page 338) for "additional evidence in relation to the discrimination and bullying claims." The meeting was then adjourned until 14 September 2017. There were notes of the resumed hearing at pages 355-362.

48 Ms Vigurs wrote to the claimant with the outcome of the hearing in the letter dated 4 October 2017 at pages 392-394. In the letter, Ms Vigurs said that any complaint about the disciplinary process as such should be dealt with in the disciplinary process. However, she had considered the cases of PC and KD and compared them with that of the claimant. In the letter, at page 393, she gave the reasons why she regarded them as not being comparable. She told us that in doing so, she went beyond the formal requirements of the respondent's grievance procedure, and we accepted that. Overall, Ms Vigurs rejected the grievance. One aspect of the grievance that she expressly rejected was (see the penultimate paragraph of the letter, at page 393) the complaint that Mr Blight was going to hear the disciplinary case against the claimant. Nevertheless, Mr Blight declined to hear the case against the claimant and instead asked Ms Hunt to do so. Her evidence as to the manner in which she was asked to do so was in paragraph 7 of her witness statement, where she said that she could not remember "specifically" whether Mr Blight himself, or Mr Ed Damon, the Business Manager for Ms Vigurs' division, had asked her to do so. Ms Hunt recorded that it was "correct that the disciplinary was allocated to [her] as an extra safeguard against any potential bias".

49 The claimant's grievances having been considered and rejected, the disciplinary hearing was convened by Ms Hunt sending the letter dated 2 November 2017 at pages 409-410. That hearing occurred on 21 November 2017. It was both minuted and recorded.

50 The claimant was represented at the hearing by Mr Allwood, acting as his workplace representative (but not as a trade union representative). At the hearing, as before us, much was made of the fact that the claimant was originally alleged to have committed "professional misconduct" rather than "gross misconduct". We record here that we considered the terminology used in that regard to be immaterial, since in our view the important questions were what substance there was in the allegations and the gravity of the misconduct, if it was found to be such. Ms Hunt's witness statement evidence (in paragraph 16) and her oral evidence showed that she approached the matter on that basis. We noted, nevertheless, that Ms Hunt was recorded in the record of the hearing at pages 542 and 543 to have shut down some potentially valid questioning of Ms

Rowley by the claimant. (The hearing was recorded and the recording was subsequently transcribed. The transcript was at pages 487-704.)

51 During the hearing of 21 November 2017, it became clear that several documents, including the email at pages 132-133 from Ms Rowley to Ms Fadlin and Mr Blight, had not been given to the claimant. That hearing was adjourned to 4 December 2017 so that the claimant and Mr Allwood could be given a copy of that email and consider it before the hearing ended. The email was (as recorded by Mr Allwood in his written submission to the resumed hearing, at page 461) given to the claimant and Mr Allwood on 29 November 2017. Like the hearing of 21 November 2017, the resumed hearing was recorded and transcribed. The transcript of the resumed hearing was at pages 708-763.

52 During the hearing on 21 November 2017, Ms Fadlin's evidence included that she could see, even after working at Wood Green for only 3-4 weeks, that (pages 645-646):

> "people seemed to be on eggshells when you were [i.e. the claimant was] around ... particularly after the, the incident that had happened with, with Peter, people were saying, well ... people were going round closing doors, saying that, you know, they were more conscious of having to close doors because they didn't want an, an incident where that could blow up again, for instance."

53 Ms Hunt found against the claimant on both sets of allegations, and decided that he should be dismissed. She gave her reasons in her letter dated 8 December 2017 at pages 472-474. She gave oral evidence to us that she was at that time aware of the outcome of the determination by Ms Vigurs of the claimant's appeal against the dismissal of his grievance by Mr Rose, but she said that she simply noted that it indicated that the claimant's claim of discrimination by comparison with the cases of PC and KD had in fact been considered and determined. She was adamant that the fact that the claimant had made a complaint of discrimination because of his race and sex had nothing to do with her decision that he should be dismissed. We accepted that evidence of Ms Hunt, in the sense that we accepted that she did not consciously take it into account in any way except as she said. We could see no factual basis for drawing the inference that Ms Hunt's decision that the claimant should be dismissed was to any extent affected by the fact that the claimant had made a claim of sex and race discrimination. In addition, having heard and seen Ms Hunt give evidence, we concluded on the balance of probabilities that her decision was in no way tainted by the fact that the claimant had complained of sex and race discrimination by Mr Blight.

54 The claimant appealed Ms Hunt's decision that he should be dismissed, stating his reasons in the document at pages 478-483. One of the bases of the appeal was that new evidence had come to light, including this (on pages 478-479),

after referring to the invitation to apply for the post of PSO in May 2017 to which we refer in paragraph 39 above:

> "It clearly shows that a decision had already been made by AB to remove me from the Wood Green Crown Court office and the entire NPS and that it was never AB's intention to give me a fair and transparent hearing. I have every reason to believe that the motive behind this action is because I had raised the issue of management's disregard of the PO/PSO Role Boundary protocol in how certain high risk court reports were continually being allocated to PSOs who do not possess the relevant level of qualifications as POs. This is in addition to a health and safety issue I had raised concerning staff being encouraged to interview offenders in any available space, including the staff room where sharp objects which could potentially pose a risk to staff were readily available. AB's action totally deviates from the Conduct & Discipline policy that states "suspension is a neutral act ..... ". This action clearly demonstrates an abuse of process which was previously raised in these proceedings".

55 The new evidence was also referred to on page 479 in the following terms:

> "I attach email dialogue between myself and AB (exhibit D) which relates to a veiled threat AB made following my request to him to intervene in situation where my line manager was blatantly disregarding Role Boundary protocol in relation to inappropriate allocation of work to PSOs. This further supports my assertion of the motive behind why AB would abuse his power and treat me unfairly by disregarding mandatory NPS Policies and procedures with impunity."

The claimant's appeal against his dismissal

56 Mr Wilson was asked to deal with the appeal. He heard from only the claimant and Mr Allwood. He did so in a hearing on 18 January 2018. There was a transcript of the hearing at pages 834-915. Mr Wilson allowed the appeal, giving his reasons in a letter dated 24 January 2018 of which there was a copy at pages 805-806. Mr Wilson allowed the appeal in regard to the allegations of Ms Rowley, but not in regard to the allegations concerning the conduct of the claimant towards Mr Fung. The latter was referred to by Mr Wilson as "the first allegation", and the former as "the second allegation". His conclusions on those two allegations were stated at pages 805-806 as follows:

> "With regards to the first allegation, I uphold the decision of the first hearing and con confirm that the weight of evidence is strong enough to support this original decision.
>
> With regards to the second allegation, no new evidence was brought to the hearing that invalidates the process that was followed or would suggest that

the conclusion of the first hearing was unduly severe or unfair. However, it is my view that there is insufficient weight of evidence to conclusively prove allegation number two."

57 Mr Wilson's letter continued:

"In light of my findings, I have decided to reduce the severity of the decision made at the original hearing. I can confirm that I am upholding the first allegations and that this behaviour is inappropriate and contrary to HMPPS' code of conduct. I am therefore issuing you a final written warning in relation to this behaviour. This written warning will be in effect for 12 months. I must also warn you that further misconduct during the following 12 months may result in additional disciplinary proceedings being taken against you.

I am also proposing the following recommendations following this appeal process:

1. I am of the view that your position in your current team in untenable so I am recommending that you are moved to a new team.
2. Although the weight of evidence for allegation number two wasn't enough to uphold the decision, in order to mitigate risk to the business of this type of behaviour happening, I am recommending that you are enrolled on diversity and equality training and that you are supported through the necessary OAsys training in order to fulfil all the duties commensurate to your role.
3 Finally, I am recommending that the line managers involved in this case are provided training on the recording and management of inappropriate behaviour in the workplace.

There is no further right of appeal and this is the final internal consideration of this matter."

58 Mr Wilson told us that he expected his recommendation (which he regarded as one concerning the team and not the cluster in which the claimant was to work) to be implemented and that if it had been thought right not to implement it, then he would have had a discussion with whoever was proposing not to implement it, and there would have to be "a strong case put as to why" it should not be implemented. We accepted that evidence of Mr Wilson. Mr Wilson also said that the fact that the claimant had made a claim that he had been discriminated against contrary to the EqA 2010 had played no part at all in his conclusions: he said that he had very little knowledge of the "discrimination allegation". We could see no factual basis for drawing the inference that Mr Wilson's decision that the claimant be given a final written warning instead of being dismissed and his recommendation that the claimant be moved from the Wood Green team were to any extent affected by the fact that the claimant had made a claim of sex and race discrimination. In addition, having heard and seen Mr Wilson give evidence, we concluded on the balance of probabilities that that decision and that

recommendation of his were in no way tainted by the fact that the claimant had complained of sex and race discrimination by Mr Blight.

59 On 26 January 2018, Mr Blight sent the email at page 809 to the claimant, merely stating that he would be in contact with the claimant "very soon" once he (Mr Blight) had "a suitable posting." On 29 January 2018, in the email at page 810, the claimant wrote to "HR", in the following terms:

> 'I write to express my concern with regards to the attached correspondence from Andrew Blight.
>
> As you are aware, I have raised discrimination claims both in my recent grievance and lately during the disciplinary process. The Appeals Manager, Matthew Wilson, advised at the appeal hearing, he would be looking into this and other matters and come back to me, to date, this has not been the case. I therefore, consider this matter still unresolved and under these circumstances, would have expected communication via HR, to ensure a fair and transparent process and avoid heightening my anxiety.
>
> Secondly, as I read the appeal outcome letter, it is only a "recommendation" that I move to another team- It does not form part of the sanction. I would prefer to remain at Wood Green Crown Court.'

60 Mr Blight responded to that email in the letter dated 5 February 2018 at pages 812-813. It included this passage on page 812:

> "Regarding your return to work, it is ultimately my decision as your current senior manager to decide whether I think it is appropriate for you to return to Wood Green Crown Court. I completely agree with the recommendation in the appeal outcome letter that it is not an appropriate place for you to work now, given that Peter Fung remains at that office and that part of the appeal was upheld.
>
> Your email also mentions the grievance that was dismissed by Kilvinder Vigurs at the appeal hearing. You have clearly raised this again at the disciplinary appeal hearing and as I've said this needs to be addressed with the hearing authority. However, given this I also think that it is not in your or the cluster's best interest that you remain in a post in Haringey, Redbridge and Waltham Forest. As such enclosed are a list of current Band 3 vacancies. I'd ask you to look at these and decide which post you would like to be moved too and I will then ensure that further correspondence about your return to work is between you and the ACO/your new line manager in the relevant cluster.
>
> Please respond to me with your nominated posting by 16th February 2018 by either email or post."

Subsequent events

61 The claimant did not respond as requested with a "nominated posting". Instead, after starting an absence from work because of sickness on 12 February 2018, on 26 February 2018 he stated a grievance about the decision of Mr Blight to accept Mr Wilson's recommendation that he (the claimant) be required to work elsewhere than at Wood Green, and the decision of Mr Blight that the claimant be moved to a job outside the cluster in which Wood Green was situated. That grievance was in the bundle at pages 925-929. The grievance was considered by Ms C Baker after a grievance hearing held on 25 May 2018. Her decision was recorded at page 932. She referred in it to a letter from the claimant dated 12 March 2018, but she clearly meant to refer to the letter dated 12 February 2018 at pages 815-816, in which the claimant informed Mr Blight that he had been signed off work by his GP, and in which he wrote this:

> "Whilst I appreciate that SSCL is a transactional service and you are the senior manager for Haringey, Red bridge and Waltham Forest Cluster, I do not believe it is appropriate for you to be further involved in matters concerning me and my return to work at this stage whilst the case I raised against you i.e victimisation, race and gender discrimination, bullying and harassment which formed part of the basis of my appeal, remains outstanding."

62 Ms Baker's decision was to dismiss the grievance, and her reasons were stated on page 932. One of those reasons was that "Mr Philbert in his letter dated 12/03/18 expresses his discontent with Mr Blight's involvement which would be unavoidable if he stayed in the cluster."

63 The claimant appealed that decision, and the appeal was heard by a panel chaired by Ms L Pickering on 1 August 2018. That panel's conclusion (communicated on 28 August 2018) was that the grievance should not be upheld. The panel's reasoning included these things (pages 977-978):

> "The panel were informed that you have been provided with a list of all the Band 3 vacancies (not just in Cluster) for consideration. Your submissions to the panel were that you felt you were being excluded from the cluster and this had been pre determined by Mr Blight and thus was further evidence of discriminatory behaviour towards you as there was a recommendation from the disciplinary appeal that you should be moved to a new team when you returned to work. During the Appeal hearing and your submissions, it is clear that you continue to express dissatisfaction at Mr Blight being involved in your management, albeit indirectly. Therefore, it is reasonable for there to be a move out of cluster, not just team, given the strength of feeling and discontent directed towards Mr Blight's involvement in any decisions affecting you- including your perceptions about direct line managers in the

> cluster not being impartial and still providing opportunity for Mr Blight to be involved indirectly. The panel found that the evidence supplied does not constitute "continuous victimisation" but rather a way forward in supporting any return to work in a fair and reasonable way and that a suitable move out of cluster could be beneficial. Whilst I appreciate that you raised concerns that mediation was not offered, this was addressed in the Stage 1 grievance outcome report and Mr Blight has clarified that the aggrieved did not wish consider mediation and therefore it is not considered a viable option in this case.
>
> ...
>
> It is clear that you have been unhappy with the sequence of events prior to your suspension and that you attribute this to Mr Blight, although it needs to be acknowledged that there were various other independent managers involved. The panel did not consider that the strong representation against Mr Blight's behaviour within your submissions provided evidence to show Mr Blight was treating you unfairly. However, they did acknowledge that your information did provide a reflection of the depth of feeling that you have towards Mr Blight that would prevent a conducive working relationship between you in the future."

64 Mr Blight's witness statement contained this paragraph (number 39) about the reason why he had concluded that the claimant should no longer work in the cluster of which he, Mr Blight, was the manager:

> "In addition, given the Claimant's continuous complaints about my treatment of him, despite his complaints not being upheld, I did not consider that we could continue to work in the same cluster. Nor did I consider that he could continue to work with his former line manager who took the complaints about him forward."

65 Mr Blight was cross-examined on this paragraph, and on the letter at pages 812-813, and we asked him questions about it. Our notes on what he said differed. Employment Judge Hyams had a note that Mr Blight had said in answer to the question whether paragraph 39 of his witness statement showed that he thought that he could not work in the same cluster as the claimant because of the claimant's complaints: "Given the reason we are here today, it would not be good for Vivian or me to work in the same cluster" and that he was surprised that the claimant wanted to go back to work in the same cluster as him. However, nobody else had a note to that effect, and we were unable to conclude that that note was accurate. In addition, Mr Blight was noted by Judge Hyams to have said immediately afterwards, in answer to the question (asked also by Mr Onuegbu) "So you moved him because of the complaint he made?":

> "No: I moved him because it was the outcome of the hearing. And it was out

of a duty of care to Vivian as he had complained about me. I did not move him because he took out a grievance against me."

66 In addition, however, he said that normally an employee who complains about a manager wants to be moved away from that person's management, and that the situation was unusual in that the claimant wanted not to be managed by him, Mr Blight, but did not want to be moved so that another person was managing him (the claimant). In re-examination, Mr Blight was adamant that the fact that the claimant had alleged that he (Mr Blight) had discriminated against him because of his race and sex had played no part in his (Mr Blight's) decision that the claimant should not return to the cluster in which Wood Green was situated. Given those factors, we stepped back and looked carefully at the relevant documentary evidence when considering Mr Blight's reasons for deciding that the claimant should cease to work in the cluster which he (Mr Blight) managed. We state our conclusions in that regard below, when stating our conclusions on all of the elements of the claim.

Other relevant facts

67 Ms Fadlin is (we were told by Mr Blight, in passing, at the end of his oral evidence) black.

68 The claimant relied on the circumstances of KD and PC as showing that he was treated less favourably than he would have been if he had been white. As noted above, each of those comparators was an SPO, and the complaints made about them were of mistreatment of one or more persons whom they managed. The claimant's claim was that Mr Blight had responded to the complaints made against those comparators far less harshly than he had responded to the complaints made against the claimant, for the following reasons:

68.1 neither KD nor PC was suspended when the allegations were first made known to Mr Blight;

68.2 KD was not even the subject of any disciplinary investigation, and was permitted to remain in her post as the manager of the complainant who remained in her employment with the respondent and continued to be managed by KD, because the two of them participated in mediation, which was successful;

68.3 PC was not dismissed at any stage.

69 PC was, however, demoted and given a final written warning (as recorded in the document at pages 1235A-1235D). Ms Vigurs had sought evidence from Mr Blight about the two comparators, and he had responded in the email dated 15 September 2019 at pages 1255-1256. Among other things, he wrote that "[i]t was not necessary to suspend PC as I moved her out of the office and she very

quickly went off sick", and (in relation to KD) that "[t]he complainant was very clear that she wanted to continue to work with KD and resolve the issue. Both agreed to mediation (which took place in March 2016) and although the complainant wanted an acknowledgement she had been bullied and harassed by [KD] this was not forthcoming but the ... mediation worked in the sense that they agreed to disagree and they both have continued to work together without incident since".

70 Mr Blight had only ever suspended two employees: the claimant and (as recorded in paragraph 36 above, and co-incidentally) Ms Rowley, who is a white woman.

The relevant law

71 Section 23(1) of the EqA 2010 provides this:

> "On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

72 Section 136 of the EqA 2010 provides this:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

73 Mr Kirk, in his helpful skeleton argument, referred us to a number of authorities concerning the law of discrimination (including *R (E) v Governing Body of JFS* [2010] 2 AC 728, *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, and *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010) and harassment within the meaning of section 26 of the EqA 2010 (including *GMB v Henderson* [2017] IRLR 340), and we (as we indicated to him during the course of oral submissions) took into account some others, including *Igen v Wong* [2005] ICR 931.

74 As for victimisation, we referred ourselves in addition to the words of section 27 of the EqA 2010 to the passage in *Harvey on Industrial Relations and Employment Law* in paragraphs L[488]-[491.01]. One relevant part of that passage was this:

> "In *Re York Truck Equipment Ltd* EAT/109/88 (20 October 1989, unreported), EAT, a woman complained to her employers of a sexual assault which she alleged had taken place at her work. Following a series of incidents arising out of what the woman saw as her employer's failure to investigate the complaint properly, she was dismissed. The finding of the employment tribunal was that her eventual dismissal was because of the disruption she caused and not because of the allegations she was making— and the EAT confirmed that in such circumstances her complaint of victimisation failed. The key issue in such situations will be the tribunal's understanding of the motivation (conscious or unconscious) behind the act by the employer which is said to amount to victimisation."

Our conclusions on the claims as stated in the case management discussion note of EJ McNeill QC

Direct discrimination because of race

Allegation 4.3(a)

75 The claimant claimed that the implementation of the formal disciplinary process on 6 January 2017 against him "rather than proceeding by mediation or some other more informal process" was discrimination against him because of his race. We did not agree. We could not see any evidence from which we could draw the inference that the claimant was treated less favourably because of his race in that regard, in part because we regarded the cases of PC and KD as not being sufficiently similar to justify the drawing of any such inference, but also because we could see from the evidence to which we refer in paragraphs 7-21 and 52 above (which we accepted in that we accepted that it was what it purported to be) that the claimant's conduct was genuinely of serious concern to Ms Fadlin, and because it was clear from what is recorded in paragraph 12 above that she had been advised by HR to act in the manner about which the claimant now complained.

76 In any event, we concluded, having seen and heard Mr Blight give evidence, that his commissioning of the disciplinary investigation which led to the letter of 6 January 2017 from Ms Beeston about which complaint was made in allegation 4.3(a) (the letter is referred to by us in paragraph 17 above) was in no way tainted by the claimant's race.

Allegation 4.3(b): Not giving the claimant details of the disciplinary allegations made against him

77 We rejected also allegation 4.3(b) on the facts. The claimant was given the details of the disciplinary allegations against him, albeit that he was not given the details at the first stages. If and in so far as there was any delay, we were completely satisfied by the evidence of Mr Blight and Ms Beeston that it had

nothing whatsoever to do with the claimant's race.

Allegation 4.3(c): Not giving the claimant a reasonable opportunity to respond to the disciplinary allegations made against him

78 In so far as there was a failure by Ms Hunt to permit the claimant to ask some relevant questions of Ms Rowley (as we record in paragraph 50 above), we concluded that that was not because of the claimant's race. It was, rather, because Ms Hunt was particularly sympathetic to Ms Rowley and inclined to believe her for somewhat tenuous reasons, which had nothing whatsoever to do with the fact that Ms Rowley is white and the claimant is black.

Allegation 4.3(d): Not providing the claimant with the statements or written copies of the complaints made by individuals whose complaints led to the disciplinary allegations

79 Allegation 4.3(d) was (given what we say in paragraph 51 above) not made out in so far as it related to the email at pages 132-133, but it was true that the document was not given to the claimant until 29 November 2017. We explored with the parties on 4 September 2019 before finalising our decision and reasons the question whether the complaint was in part that the written grievance of Mr Fung at pages 100-116 was not given to the claimant before it was disclosed in these proceedings. The parties agreed that that grievance was given to the claimant only during the course of these proceedings, and the claim in paragraph 4.3(d) on page 39 was clarified by Mr Onuegbu to be one of an example of unreasonable conduct by the respondent in the procedures followed in disciplining the claimant, which, taken collectively, showed discrimination because of the claimant's race. However, no person who made a decision that those documents should not be given to the claimant before they were was identified, and no questions about that decision (or those decisions) were asked in cross-examination. In addition, we were unable to identify any evidence from which we could find facts which could justify the drawing of the inference that the failure to give the claimant those documents was to any extent because of his race. Accordingly, we concluded that the matter which was the subject of allegation 4.3(d) was not direct race discrimination.

Allegation 4.3(e): Not following proper procedures in suspending the claimant on 1 March 2017, in particular by not complying with the suspensions check list"

80 We were of the view that Mr Blight (whose failure it was to apply the checklist at pages 1144-1145) acted (unfortunately somewhat typically of many employers, large and small) without proper consideration for the impact on the claimant of being suspended. We regarded the checklist as being helpful as a reminder of the need to consider the circumstances in the round rather than simply to suspend an employee in a knee-jerk response to an allegation regarded by the

employer as one of gross misconduct, but even it failed to emphasise the fact that suspension is decidedly not a neutral act, and that its impact on an employee can be considerably detrimental.

81 Nevertheless, having accepted the evidence of Mr Blight that he was not aware of the checklist (as we record in paragraph 34 above) until after these proceedings had commenced, we had to reject the claim stated in paragraph 4.3(e).

Paragraph 4.3(f): dismissing the claimant on 4 December 2017

82 We could not see any evidence on the basis of which we could draw the inference that the claimant was dismissed by reason of the decision of Ms Hunt made on 4 December 2017 as a result of the fact that he had stated the grievance of 9 May 2017 at pages 253-257. In any event, we were satisfied on the balance of probabilities, having heard Ms Hunt give evidence and having taken into account the evidence which was before her, that Ms Hunt's decision that the claimant should be dismissed had nothing to do with the claimant's race.

Paragraph 4.3(g): Giving the claimant a final written warning on 24 January 2018

83 Having heard and seen Mr Wilson give evidence, and having taken into account the evidence referred to in paragraphs 7-21, 52, 56 and 57 above, we could see nothing on the basis of which we could draw the inference that the claimant had been treated less favourably because of his race by being given a final written warning. If we had come to the conclusion that the claimant had proved facts from which we could conclude that his final written warning was the result of discrimination because of his race, we would have concluded that Mr Wilson had satisfied us on the balance of probabilities that he had not decided that the claimant should be given a final written warning because of his race. Indeed, we were satisfied that Mr Wilson's conclusions were in all respects in no way influenced by the claimant's (or anyone else's) race.

Paragraph 4.3(h): Relocating the claimant on 24 January 2018 from Wood Green Crown Court to Barkingside Magistrates Court. The claimant relies on all of the above matters, both individually and as part of what is alleged to be an unjustified disciplinary process

84 Having rejected the preceding claims, we considered the allegation that relocating the claimant to Barkingside Magistrates' Court was itself an act of discrimination because of the claimant's race. The relocation (as such) was the result of a decision made by Mr Blight on the recommendation of Mr Wilson. Mr Wilson's conclusions were (as indicated in the preceding paragraph above) in our view wholly untainted by the protected characteristic of race. To the extent that Mr Blight's decision that the claimant should not be employed in the cluster

which he (Mr Blight) managed was a separate decision, we were satisfied on the balance of probabilities that that decision was untainted by the claimant's (or anyone else's) race.

Paragraph 4.3(i): Advertising the claimant's job on 2 May 2017 and employing somebody in the claimant's job

85 We concluded that Mr Blight appointed someone to do the claimant's work because he needed to have it done. It might be thought to have indicated predetermination by Mr Blight, however. While we bore in mind the ruling in *Igen v Wong* (to which we drew the parties' attention during submissions) that unreasonable conduct can, on its own, justify the drawing of the inference that the conduct was because of race, we concluded here on the facts that Mr Blight did not discriminate against the claimant because of race by advertising the vacancy of PSO and filling it.

Paragraph 4.3(j): Failing to investigate a complaint of race discrimination, victimisation, bullying and unfair and unjust management made by the claimant on 9 May 2017

86 We were unable to see on what basis it could properly be said that the respondent had failed to investigate the claimant's grievance of 9 May 2017 in the circumstances that (1) the substance of the allegations made against the claimant was considered thoroughly in the course of the disciplinary hearing conducted by Ms Hunt and the appeal conducted by Mr Wilson, and (2) the allegation that the claimant had been treated less favourably because of his race by comparison with PC and KD was considered thoroughly by Ms Vigurs.

Hypothetical comparator

87 In all of our above determinations, we considered the circumstances carefully by reference not only to the claimed comparators but also by reference to a hypothetical comparator.

Our conclusion on the claim of discrimination because of the claimant's race

88 As a result of our above conclusions, we had to dismiss the claimant's claim of discrimination against him because of his race.

Harassment related to race

89 Having concluded that the respondent did not engage in the conduct as set out in paragraph 4.3 of the case management record at pages 38-39, we had to dismiss the claimant's claim of harassment within the meaning of section 26 of the EqA 2010.

The claim of victimisation

90 Given our conclusion in paragraph 53 above about Ms Hunt's decision that the claimant should be dismissed not being in any way affected by the fact that the claimant had stated a grievance on 9 May 2017, the claim made in paragraph 4.11(a) on page 39 had to be dismissed.

91 Given our conclusion in the second part of paragraph 58 above about the impact on Mr Wilson of the fact that the claimant had made a complaint of discrimination, namely that it had had no impact on Mr Wilson's decision that the claimant should be given a written warning, we were bound to reject the allegation in paragraph 4.11(b) on page 39.

92 Given our conclusion in paragraph 86 above to the effect that the claimant's grievance of 9 May 2017 was investigated properly, we were bound to reject the allegation made in paragraph 4.11(d) on page 40.

93 The one claim of the claimant which to our mind was substantial was the claim, stated in paragraph 4.11(c) on page 39, that the relocation of the claimant on 24 January 2018 was victimisation. However, as pleaded, given our conclusion stated in the second part of paragraph 58 above, the claim had to fail.

94 Nevertheless, we considered that we should regard the claim as one of victimisation by reason of Mr Blight's decision that the claimant should not return to Wood Green, or any other part of the cluster which included Wood Green.

95 It was submitted to us by Mr Onuegbu that the fact that Mr Wilson had made only a recommendation meant that it was open to Mr Blight to disregard it, or regard it as being of guidance only and not binding on him. We did not agree: we took into account Mr Wilson's evidence recorded by us in the first part of paragraph 58 above, and concluded that Mr Blight was not in practice free to ignore the recommendation. Nevertheless, we accepted that Mr Blight was not bound by that recommendation, and that he had a part to play in the question of where the claimant was to work after Mr Wilson allowed the claimant's appeal against his dismissal.

96 In that regard, we noted that Mr Wilson had recommended only that the claimant be moved to a different team. We therefore concluded that Mr Blight had made a decision which was to a significant extent independent of that of Mr Wilson. We therefore asked ourselves why Mr Blight had made that decision, and we also asked ourselves whether there was evidence from which we could draw the inference that it was because the claimant had claimed that Mr Blight had discriminated against him.

97 In that regard, we considered the claimant's words on page 810, which we have set out in paragraph 59 above, very carefully, before then turning to the words of

Mr Blight at page 812, which we have set out in paragraph 60 above. Having done so, we came to the clear conclusion that there was indeed evidence from which we could draw the inference that the claimant had been required to move away from the cluster of which Mr Blight was the manager because the claimant had complained of discrimination contrary to the EqA 2010 by Mr Blight.

98 We concluded, however, that Mr Blight's decision that the claimant should be moved to a different cluster and not just a different team was at least for the most part the fact that (as he said in his witness statement, in paragraph 39, which we have set out in paragraph 64 above) the claimant had made continuous complaints about him, including the grievance which Ms Vigurs had dismissed on appeal, in the circumstance that the claimant had (in the email at page 810, which we have set out in paragraph 59 above) refused to accept that that grievance had been determined finally. Furthermore, we took into account the complaints of the claimant to which we refer in paragraphs 45.3, 45.10, 54 and 55 above. In addition, the claimant was showing, by the fact that he was complaining in his email at page 810 to HR about Mr Blight continuing to have any say in what happened to him (the claimant), an unwillingness to accept Mr Blight as his manager.

99 We saw too that in the ET1 claim form (filed on 4 March 2018), the claimant had said words to the same effect as those set out in paragraph 54 above: on page 12, there were these words:

> "In May 2017, whilst I was on suspension and the investigations as well as grievance proceedings were still on-going, my position was advertised and was filled within a very short period of time. This happened even before the grievance and disciplinary were complete and the outcomes known. I have every reason to believe that the motive behind this action is because I had raised the issue of management's disregard of the PO/PSO Role Boundary protocol in how certain high risk court reports were continually being allocated to PSOs who do not possess the relevant level of qualifications as POs. This is, in addition to a health and safety issue I had raised concerning staff being encouraged to interview offenders in any available space, including the staff room where sharp objects which could potentially pose a risk to staff were readily available."

100 That paragraph indicated how strongly the claimant felt in March 2018 about the manner in which Mr Blight had managed him, and about continuing to be managed (even indirectly) by Mr Blight. That in our view lent weight to the evidence of Mr Blight that his sole reason for concluding that the claimant should work in another cluster was the claimant's continuing hostile attitude towards him and not the fact that the claimant had complained of sex and race discrimination. In those circumstances, we concluded on the balance of probabilities that Mr Blight's decision was in no way made because the claimant had alleged that he (Mr Blight) had discriminated against the claimant because of the claimant's race

and sex.

101 Accordingly, the claimant's claim of victimisation could not succeed.

In conclusion

102 In the circumstances, none of the claimant's claims succeeded.

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Employment Judge Hyams

Date: 9 September 2019

JUDGMENT SENT TO THE PARTIES ON

24 September 2019

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FOR THE TRIBUNAL OFFICE