# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr K. Krabou**

**Respondent:** **Tower Hamlets Homes**

**Heard at:** **East London Hearing Centre**

**On:** **23 to 26 July, 1, 2 and 7 August 2019**
**27 to 28 August 2019 (in chambers)**

**Before:** **Employment Judge Massarella**
**Ms M. Long**
**Mrs A. Berry**

**Representation**
**Claimant:** **Ms N. Mallick (Counsel)**
**Respondent:** **Mr C. Milsom (Counsel)**

# JUDGMENT

**The Judgment of the Tribunal is that:-**

1. by a majority, the Claimant's claim of harassment related to race succeeds in part and in relation to allegations against Mr J. Quane only; all other allegations of harassment fail and are dismissed;

2. by a majority, the Claimant's claim of victimisation succeeds;

3. the claims of direct discrimination are dismissed.

# REASONS

## The Claims

1. By a Claim Form presented on 6 December 2018, after an ACAS early conciliation period between 7 October and 7 November 2018 the Claimant, Mr Khalid Krabou, complained of harassment related to race and/or religion, alternatively direct race and/or religious discrimination, and victimisation. As at the date of the hearing he remained an employee of the Respondent.

## The Hearing

2. This case was originally listed for an eight-day final hearing. At the Respondent's request, and with the agreement of the Claimant, the listing was reduced to six days by order of EJ Barrowclough, dated 7 June 2019. Given the reduced listing, the Tribunal's aim was to conclude evidence and submissions by the end of the sixth day. We are grateful to both Counsel for their efforts in meeting that timetable. In the event, owing to an unforeseen, urgent matter which arose for the Respondent's Counsel on the last scheduled day, we adjourned to a seventh day to hear the parties' closing submissions.

3. The Tribunal had an agreed bundle of documents, running to around 1000 pages, to which some further documents were added in the course of the hearing by both parties and with the Tribunal's permission.

4. There was an agreed list of issues. The original numbering of issues has been retained below. Issues 5(v) and (vii) were blank in that list, presumably as a result of a formatting problem.

5. We heard evidence from the Claimant and his trade union representative, Mr Zaheer Khan. We also had statements from the Claimant's wife, Mrs Khaddouj El Bounia and Mr Hamda Abdelwahed, although neither were called to give evidence. The circumstances of Mr Abdelwahed's absence are dealt with below.

6. For the Respondent we heard evidence from Mr Nicholas Spenceley, Mr Matus Holecko, Mr Adam Coates, Mr Gulam Hussain, Mr Stephen Phillpott and Mr Paul Davey.

## Preliminary matters

<u>The Respondent's application to amend to rely on the statutory defence</u>

7. On the morning of the first day of the hearing, the Respondent applied for permission to rely on the statutory defence: that it took all reasonable steps to prevent any discrimination to which the Claimant may have been subjected by the Claimant's line manager, Mr Jimmy Quane. This was raised for the first time in an email of 4 July 2019, which contained an application to amend the ET3. It came before EJ Prichard who, on 16 July 2019, granted the application insofar as it related to updating amendments in response to internal investigations, but left the decision about the statutory defence to the Tribunal hearing the case.

He observed that, if the Respondent were permitted to rely on the defence, Mr Quane would have to be added as a separate Respondent.

8. To the concern of the Tribunal, the Respondent then wrote to Mr Quane on 17 July 2019, informing him that the Tribunal had directed that he should be added as a separate Respondent. Its letter wrongly gave the impression that the Tribunal had already given its permission to rely on the defence. By letter dated 20 July 2019 Mr Quane wrote to the Tribunal stating that he had attended his GP on the previous Friday, who had advised him that he was not fit to attend the hearing.

9. In his oral submissions Mr Milsom accepted that the application was made late in the day, but argued nonetheless that it was prompted by the Respondent's discovery of images and other material sent by Mr Quane within a WhatsApp group. It was not a light step to take to advance the statutory defence in circumstances where Mr Quane remained a serving employee of the Respondent and would thereby be deprived of the current legal representation. He argued that it would have been improper to do so before investigations into Mr Quane's conduct had been concluded.

10. Ms Mallick submitted that the Respondent had been aware of the serious allegations against Mr Quane for some time. It should have raised the statutory defence in its original ET3 or by a much earlier application to amend. The Claimant would be prejudiced if the amendment were allowed, as this would inevitably lead to a postponement and additional cost to him. He is of limited means and instructs Ms Mallick on a public access basis.

11. The Tribunal refused the Respondent's application.

12. We first considered the nature of the amendment. It was substantial, since it would fundamentally change the basis of the Respondent's defence and lead to the addition of a new party.

13. As for the timing and manner of the application, it was made substantially outside the normal time limit for presenting a response. Even setting that aside, it was not made promptly. It ought to have been apparent from the outset, when the Claimant lodged his ET1, that he was relying on at least one of the images circulated by Mr Quane (the image of the four women with their faces veiled referred to below), which the Respondent now says was a factor in prompting it to seek to rely on this defence. The Respondent was aware of that image in October 2018 when the Claimant disclosed it. It took no action then. It then became aware on 31 May 2019 of further material of a similar character by Mr Quane (also referred to below). It took no action then. Mr Quane was not suspended until 1 July 2019 and the application to amend was not made until 4 July 2019.

14. We did not consider it would be just to join Mr Quane without formally serving him and allowing him the usual 28 days to present his response, having sought independent legal advice if he wished to do so. That would have required a postponement and, in all likelihood, the case would not have been relisted before mid-2020. Had the application been made in late May/early June it might still have been possible to join Mr Quane without jeopardising the trial dates.

15. As for the potential merits of the defence, insofar as we could form a very preliminary view before hearing the evidence, and based on the information provided by Mr Milsom, the matters which the Respondent would rely on in support of the statutory defence did not appear to us to be compelling. There was a generalised reference to Mr Quane being provided with training and generalised references to other employees being disciplined for similar matters. No details were provided, nor was any explanation given as to how they could satisfy the test that the Respondent took all reasonable steps to prevent the alleged discrimination occurring.

16. Turning to the balance of prejudice, the prejudice to the Respondent in not allowing the amendment was, self-evidently, that it would be deprived of the ability to rely on the defence. However, the prejudice to the Claimant was also very significant. He is not entirely without means but is not highly paid. He has already incurred the costs of representation for this hearing. An adjournment to next year would inevitably increase those costs as it would have required his Counsel to re-prepare the case. The delay in the case being heard to mid-2020 would have been highly undesirable from his point of view, given that the proceedings were issued in December 2018. In our view the prejudice to the Claimant outweighed the prejudice to the Respondent.

17. Weighing in balance all these factors, we did not consider that it was in the interests of justice to allow the amendment.

18. After we gave the parties our decision, Mr Milsom informed us that Mr Quane would not be attending to give evidence, nor would there be any witness statement from him. The Respondent did not make an application to postpone the hearing.

The Claimant's application to include a claim of victimisation

19. There was disagreement between Counsel at the outset of the hearing as to whether permission had been granted earlier in the proceedings to include a claim of victimisation, which had been particularised in the draft agreed list of issues submitted to the Tribunal. Although Mr Milsom initially objected on behalf of his client, having reviewed the position the Respondent withdrew its objection in the interests of saving time and ensuring that the case could be completed within the allotted listing.

The Claimant's application to adduce evidence from Mr Abdelwahed by phone

20. At the beginning of the third day of the hearing Ms Mallick made an application in relation to Mr Abdelwahed's evidence. Mr Abdelwahed is a current employee of the Respondent who in his statement described an environment in Mr Quane's team which was discriminatory and gave evidence regarding a black employee who he alleged could not tolerate working in the team. His evidence was supportive of the Claimant's case, albeit by way of background. Ms Mallick informed the Tribunal that Mr Abdelwahed was in Tunisia and was unable to attend the hearing. She only found out about this at the end of the first day of the hearing. Mr Abdelwahed had been contacted and he had agreed on the afternoon of the second day to give evidence by phone, if the Tribunal was prepared to accept it in that form.

21. Mr Milsom opposed the application. He pointed out that the statement had been signed on 12 July and exchanged on 15 July 2019. He asked when the Claimant's legal team first became aware of the fact that Mr Abdelwahed would not be available. He submitted that the evidence was problematic since it related to historic matters and, for practical reasons, would be even more problematic if it were adduced by phone.

22. In reply Ms Mallick said that Mr Khan, the Claimant's TU representative, did not know that Mr Abdelwahed was going on holiday. Neither knew when he had booked his holiday.

23. The Tribunal refused the application. It was made very late in the day. Although the Tribunal occasionally admits evidence by Skype, that would normally be in circumstances where an application had been made on reasonable notice, so that proper arrangements could be made to provide a secure line. Evidence by phone presents additional difficulties, partly in terms of verifying the identity of the witness and partly because the witness cannot be seen, which may affect the Tribunal's ability to assess demeanour. It inevitably makes efficient cross-examination more difficult. The explanation we were given as to why the witness was on holiday for the duration of the trial was unsatisfactory. We had no information as to whether he was aware of the trial dates when he booked his holiday. It is unclear what information he gave to the Claimant's legal team when he signed his statement. Finally, his evidence is not essential to the determination of the issues before us. If the Claimant still wishes to rely on the statement we indicated that we would approach it in the usual way: the absence of the witness, and the lack of a satisfactory explanation for that absence, would affect the weight which we would be prepared to give it.

24. Having given our decision, we explained to Ms Mallick that if she wished to provide more information about the circumstances of the booking of Mr Abdelwahed's holiday, which might go to the question of what weight ought to be given to it, she could do so in due course. No further information was provided about Mr Abdelwahed during the rest of the hearing and accordingly the Tribunal gave very little weight to his statement.

**The issues**

25. The Claimant defines his racial groups in his witness statement as North African/Moroccan and he relies on his colour (non-white). As for religion, the Claimant is a Muslim.

26. The Claimant brings claims for:

    26.1. harassment related to race and/or religion (s.26 Equality Act 2010 ('EqA'));

    26.2. alternatively, direct discrimination because of race or religion (s.13 EqA); and

    26.3. victimisation (s.27 EqA).

27. The individual allegations are incorporated into the body of the reasons below, underlined and in italics. The original issue number is given in square brackets,

although the allegations have been dealt with in the order which accords with the Tribunal's findings as to the chronology.

## Findings of fact

28. The Claimant commenced employment with the London Borough of Tower Hamlets on 11 September 1989 as a Caretaker. On 7 July 2008 his employment transferred to the Respondent, when his job title changed to Support Team Caretaker.

29. The Respondent is an Arms-Length Management Organisation. It manages around 21,000 homes on behalf of the London Borough of Tower Hamlets. It provides a caretaking service and is responsible for the maintenance of communal areas in blocks of flats. The activities include emergency cleaning in areas where antisocial behaviour, such as drug use and vandalism, occurs.

30. The Claimant was part of the Support Team, which consisted of nine operatives working across two shifts. Since 2011 the team has been managed by Mr Jimmy Quane (Caretaking Support Team Manager). Mr Quane reports to Mr. Nicholas Spenceley, who has been Head of Environmental Services since 2010.

<u>The period prior to September 2017</u>

31. In his long service before autumn 2017 we heard no evidence of any issues affecting the Claimant's employment. No previous disciplinary issues or significant sickness absence were recorded in the documents before us.

32. Up to October/November 2017 the Claimant worked predominantly on his own, doing jetting (removing graffiti etc.) and working out of a van which was assigned to him. He also participated in Emergency Call-out ('ECO') duties and worked overtime when appropriate.

<u>Equalities Training</u>

33. As an organisation, there was evidence before us that the Respondent is ethnically diverse, although it was anecdotal rather than statistical. Nonetheless our attention was drawn to the fact that its Chief Executive, Ms Sen, is South Asian and the entirety of its HR team has at all material times been BAME.

34. There is also evidence that the Respondent has initiated equality and diversity training. Mr Spenceley explained that on the first day of employment every new member of staff is given a copy of the Code of Conduct to sign, which highlights the Respondent's commitment to equality and diversity.

35. Our attention was drawn to steps taken by the Respondent to instil those values in Mr Quane. In April 2010 Mr Quane attended a three-hour training session on diversity. In 2016 he was provided with training on hate crime, equality and diversity and dignity at work, although no details of that training were provided beyond a single line entry in a training record.

36. We were also shown an email from Mr Spenceley from October 2011 which stated that 'I, Environmental Services and Tower Hamlets Homes will not tolerate bullying or victimisation in the workplace. If staff feel that they are being

bullied or victimised they should raise this with their team member, area managers, human resources … or myself'. He attached a copy of the Respondent's Dignity at Work policy and required Mr Quane to circulate it amongst his team, discuss it and confirm to Mr Spenceley that he had done so. We heard no evidence as to what might have prompted this intervention by Mr Spenceley. However laudable Mr Spenceley's efforts, we find they were not effective in instilling a culture of non-discrimination in Mr Quane and his team.

The culture in the Support Team

37. The Support Team was an all-male team, which was predominantly white. At the material time the only other minority ethnic team member was Mr Yamato, who is of mixed Japanese/British heritage.

38. The Claimant alleges in his witness statement that other minority ethnic team members had been driven out of the team by Mr Quane. He names a colleague called 'Emanuel' who he says was subjected to racist abuse and behaviour by Mr Quane. As for Mr Quane's treatment of the Claimant himself, the Claimant alleges that Mr Quane frequently referred to him as a 'stinking Arab'. He gives no details as to when this was alleged to have occurred. The Claimant also alleges that Mr Quane made other casual racist comments, for example linking the Claimant to terrorists because of his ethnicity. There is corroboration for that evidence in the statement of Mr Abdulwahed. However, for the reasons given above, we attached very little weight to his evidence.

39. These background allegations formed no part of the Claimant's pleaded claim, nor had they been previously alleged in the course of the internal grievance or disciplinary proceedings which we outline below. Whilst we understand why the Claimant might not have raised these issues at the time (he explained that he did not wish to put his head above the parapet), no good explanation was advanced by him as to why they were not raised by him once he had taken the decision to complain formally of discrimination in April 2018. Moreover, the allegations are wholly unparticularised. The Tribunal concludes that there is insufficient evidence for it to uphold them.

40. Notwithstanding this, there is extensive evidence, primarily in relation to the WhatsApp group (of which the Claimant was an active member) described below, of a culture of casual racism and sexism among some members of the Support Team. We find that Mr Quane did nothing to curb that culture; on the contrary, he appears to have fostered it.

The Groups

41. The WhatsApp group was set up in around 2015 by Mr Payne, a member of the Support Team, who played a significant role in the events which occurred later. So far as the Tribunal could see it included all members of the Support Team. Although its original purpose was work-related, by 2016 it was also a vehicle for personal messages, many of which consisted of highly offensive material, including images, videos and text of an explicitly racist, Islamophobic, sexist and pornographic character.

42. Dealing first with the racist and Islamophobic material, we were taken to the following. They are grouped here by reference to the dates on which the

Claimant brought them to the attention of the Respondent's senior management.

[Disclosed on 26 October 2018]

42.1. A still image of four Muslim schoolgirls wearing the burqa, sent by Mr Quane on 24 December 2016, with the text 'Khalid [i.e. the Claimant] school photo he's 4th from the right'.

[Disclosed on 31 May 2019]

42.2. On 11 November 2016 Mr Quane circulated a video showing Shia Muslims offering their prayers in mosque, in which they were running/jumping and walking in circles, which he captioned: 'Khalid wedding video'.

42.3. On 3 December 2016 Mr Quane sent round a short video showing two men of Arabic appearance trying to tie a camel up against a tree, with the camel resisting, captioned: 'Khalid on holiday'.

42.4. On 15 January 2017 Mr Quane circulated a video showing people from an Asian region trying to board a train, captioned: 'I hate a cold Indian'.

42.5. On 16 June 2017 Mr Quane posted a photo showing three young Asian girls with a facial hair condition, captioned: 'Khalid your daughters look so much like you, lucky man'.

42.6. On 4 August 2017, in response to a perfectly innocent picture which the Claimant sent round of him and his young son sitting on a beach, eating doughnuts, Mr Quane responded: 'PAKI'.

43. We were also shown pornographic images and a pornographic video, which were provided to the Respondent by Mr Quane in January 2019, which appear to have been sent from the Claimant's phone, using the Claimant's username ('Khalid Home'). We note in passing that, in his disclosure of May 2019, the Claimant disclosed further pornographic images, which he said had been distributed by Mr Quane and Mr Payne.

44. At a meeting on 12 July 2019 the Claimant was asked about the images which came from his account. He said he did not recall sending them. He questioned why it had taken so long to bring this matter to his attention. In the notes of the same meeting there was a dispute about whether the Claimant's trade union representative, Mr Khan, had conceded that the images were sent from the Claimant's phone. Mr Khan denied this and said: 'that it may well be someone else's phone number saved under Khalid's name'.

45. This is a difficult issue to determine and, moreover, it is a matter that at the time of the hearing was the subject of an internal investigation which the Respondent was conducting. We note that, although the Claimant denied sending this material, his denial was equivocal: when cross-examined by Mr Milsom on the subject, he said on several occasions that he 'did not recollect' sending it. On the evidence before us and on the balance of probabilities, the Tribunal finds that the Claimant did send those images and to that extent was an active contributor to the inappropriate culture which was prevalent in the WhatsApp group.

46. According to a report prepared later by Ms Claxton, the Claimant remained a member of the group throughout 2016 and 2017, but had no further interactions in it after October 2017.

*Issue 5(i): 'Doey Payne (DP) was appointed as deputy team leader' – harassment or direct discrimination*

47. Although no precise date could be established, we find that in around 2014 an informal arrangement grew up under which Mr Payne assumed the role of Mr Quane's deputy. He acted as a filter for instructions from Mr Quane and stepped up in his absence. He was not remunerated for these additional duties, except for a short period in 2017, when he was paid an honorarium for leading on some project work. Mr Milsom suggested in closing that it was the Claimant's resentment of these payments which caused the deterioration in his relationship with Mr Quane. That was not put to the Claimant in cross-examination and we find that it was not the reason for the deterioration in the relationship.

48. We find that this informal arrangement was accepted by workers in the Support Team and that the Claimant also accepted it until late 2017, when his working relationship with Mr Quane deteriorated. In an interview with Mr Hussain, for example, he accepted that it was normal for him to receive instructions from Mr Payne. Moreover, in a later interview with Ms Claxton, he told her that he had never sought career progression and wanted 'an easy life'.

49. The Tribunal finds the Claimant had no ambition to perform the role himself, did not object to it at the time and worked without difficulty for several years under this arrangement.

50. We reject the Claimant's assertion in evidence before us that he was not obliged to follow Mr Payne's instructions. All the evidence suggests that he did follow those instructions up to late 2017 and even thereafter. By way of example, there is a reference in the Claimant's own grievance to the fact that Mr Payne was 'in charge' during the 2017 Christmas period when the Claimant's van was stolen.

51. When relationships soured the Claimant appears to have taken the view that he was entitled to be selective as to which directions of Mr Payne he was required to follow. In that we find that he was misguided.

*Issue 5(vi): 'Mr Quane addressed the Claimant [sic] for using his work email for a personal matter' - harassment or direct discrimination.*

52. In around August 2017 the Claimant was spoken to about using his work email account for a private purpose: he had communicated with the housing department about his own tenancy. In his witness statement the Claimant said that he accepted that he was wrong to do this. It was an honest mistake and he had apologised for it. We find that there was nothing improper in Mr Quane reprimanding the Claimant for this.

*Issue 5(viii): 'in late 2017, Mr Quane shouted at the Claimant in front of colleagues' - harassment or direct discrimination.*

53. When subsequently the Respondent's work email system was down, and the Respondent asked if team members would be willing to receive emails through their private accounts, the Claimant declined. He thought it inconsistent of the Respondent to criticise him for using his personal account for work purposes and then to ask him to do so. He alleges that Mr Quane shouted at him in front of his colleagues when he refused.

54. The Respondent did not call any witnesses to give direct evidence about this allegation. However, a number of the Claimant's colleagues were asked about this incident in the course of an investigation by Mr Coates into the Claimant's grievance. None of them were able to recall Mr Quane's shouting at the Claimant. The only qualification to that was the evidence of Mr Resina who said that:

> 'JQ occasionally raises his voice at people when they haven't done the job correctly, but that this is not a regular thing. AR said he has sometimes been on the receiving end if he has forgotten to take pictures to demonstrate a job has been completed … AR stated that he did not remember JQ shouting at KK.'

55. The Claimant's evidence was that none of his colleagues wished to get involved in a dispute between him and Mr Quane.

56. On the balance of probabilities, and based on the contemporaneous statements of the other team members, we are satisfied that this incident did not happen in the way described by the Claimant: although Mr Quane may have expressed irritation at the Claimant's attitude on this issue, we find that he did not shout at him.

*Issue 5(ix): 'On 2 October 2017 … Mr Quane made enquiries from colleagues as to what time the Claimant arrived at work' – direct discrimination or harassment.*

*Issue 5(x): 'On 3 October 2017 giving the Claimant verbal warning' – direct discrimination and harassment.*

57. On 2 October 2017 the Claimant was on his way back to the office for his lunch break after finishing the morning shift at midday. He was stopped by a family friend with whom he chatted for around 10 minutes. He then parked his van and made his way to the office, arriving at around 12:25. He signed himself in at 12:00 and out at 13:00, when he resumed his shift.

58. Mr Quane issued the Claimant with a six-month verbal warning for this in writing. His explanation was as follows:

> 'All staff have to report back to their place of work at designated times as stipulated as they need to account for their whereabouts and also it's a health and safety requirement.'

59. That warning was later expunged by Mr Coates, on the ground that the term 'verbal warning' was used rather than 'oral warning' and that the letter should have been clearer in stating that the Claimant had the right to appeal. Although the second of these reasons is sound, we find that the first was a trivial explanation and was an attempt by Mr Coates to avoid dealing with the substantive issue of whether a warning should have been issued at all.

60. The Tribunal finds that the issuing of a warning was heavy-handed and out of all proportion to what the Claimant did. There is no evidence that Mr Quane had regard to the Claimant's explanation.

*Issue 5(ii): 'in November 2017 Jimmy Quane did not carry out the Claimant's PDR at a one-to-one meeting'*

*Issue 5(iii): 'Mr Quane instructed Mr Payne to approach the Claimant about his PDR'*

*Issue 5(iv): 'the Claimant's PDR stated that his colleagues did not want to work for him'*

*Issue 5(xii): 'on 22 November 2017 when Mr Quane said that he found the Claimant's body language poor' – harassment and direct discrimination.*

61. There was some dispute as to when this sequence of events took place. Initially, in evidence and in cross-examination, a case was advanced that it related to a performance review in around July 2017. It was later accepted by Ms Mallick in closing submissions that the relevant events occurred in November 2017.

62. Contrary to usual procedure, no discussion had taken place between the Claimant and Mr Quane before Mr Quane completed the PDR form.

63. The Claimant first learnt of the contents of the PDR when Mr Payne handed it to him. On the balance of probabilities, we find that Mr Quane instructed Mr Payne to do this. The Claimant found that objectionable in itself. He regarded his PDR as confidential between him and his manager; Mr Payne was not his manager and his authority as an informal deputy did not extend that far. In cross-examination Mr Spenceley agreed with that proposition. We find that the Claimant was entitled to feel aggrieved about this.

64. The offence was then compounded by the content of the PDR, in which Mr Quane wrote:

> 'I have managed Khalid for the last seven years and I find his work of a very good standard but at the same time in the last few months I have also found his attitude and body language very poor and in no way do I feel he is a team player or is good for team morale. I also find it very difficult to find any other team members willing to work overtime with him unless it's scheduled ECO.'

65. At a meeting on 22 November 2017 the Claimant asked for those comments to be removed. In his written grievance submitted in April 2018 the Claimant said that Mr Quane 'tore up the paper and then [did] another one without the baseless statement'. Whether or not that is right, and it is not an issue which we need to decide, in an email of 5 December 2017 to Mr Spenceley Mr Quane explained that the Claimant had asked for an opportunity to reply to his comments. Attached to that email was a copy of the PDR which still contained the comments to which the Claimant objected, thereby ensuring that Mr Spenceley saw them.

*Issue 5(xi): 'in October 2017, when Nicholas Spenceley allegedly responded, in a meeting with the Claimant, "don't worry" to the Claimant's complaints regarding Mr Quane's treatment of him – harassment and direct discrimination.*

*Issue 5(xiv): 'on 25 November 2017 the Claimant complained to Mr Spenceley and Mr Spenceley failed to act' – harassment and direct discrimination.*

66. The Claimant approached Mr Spenceley to raise concerns about Mr Quane. He did so on two occasions, in October 2017 and on 25 November 2017, the second of which occurred after the events in relation to the PDR.

67. Mr Spenceley's evidence was that the Claimant did not raise the matter of the PDR with him. Mr Spenceley does not have a note of the meeting, which the Tribunal finds surprising. The Claimant's own note of the meeting, which has a manuscript date on it of 25 November 2017, mentions the comments on the PDR to which he took exception and we find that he did raise that issue.

68. However, we accept that the Claimant did not mention discrimination of any sort at this meeting and said only that he wanted things to go back to the way they had previously been.

69. We find that Mr Spenceley was not dismissive of the Claimant's concerns, nor did he brush them aside: the Claimant accepted in cross-examination that Mr Spenceley suggested he consider raising a grievance and that he did not do so.

*Issue 5(xiii): 'on 23 November 2017 Mr Quane sent an email to Mr Spenceley about the Claimant's long-term sickness' – harassment and direct discrimination.*

*Issue 5(xv): 'November 2017 Mr Quane encouraged Mr Spenceley to deal with the Claimant under the sickness management process for one day's absence' – harassment and direct discrimination.*

70. On 23 November 2017 the Claimant took sick leave. Mr Quane recorded this in an email to Mr Spenceley of that date. Mr Quane said in the email that this was because 'Khalid… was not happy with his MAPS [i.e. his PDR] and refused to sign'. In the same email Mr Quane gave information about another employee who was on long-term sick leave, who we understand was suffering from long-term mental health problems. We find that there was nothing untoward in Mr Quane's email: he was simply updating his manager about two employees. He was not encouraging Mr Spenceley in any particular course of action.

71. Mr Spenceley replied on 27 November 2017. The first paragraph of his email responds in relation to the other employee. The second paragraph reads: 'we'll deal with Khalid by the sickness process too.' Mr Spenceley says that this simply meant that the same policy would be applied to the Claimant as to the other employee. The Claimant's interpretation that Mr Spenceley was saying that the sickness absence policy should be used as an additional way of dealing with, or targeting, him. The Tribunal finds Mr Spenceley's explanation more natural and we reject the Claimant's interpretation.

72. We note that the Respondent could legitimately have taken action under the attendance management policy. The Claimant had already had a period of sick leave earlier in the year, between 19 January and 2 February 2017, which was itself sufficient to trigger action. The policy provided that an employee reached a

trigger level when s/he incurred (amongst other criteria) 'a total of five working days of absence in a 12-month rolling period'. The Tribunal is satisfied that this accounts for the raising the possibility of action under the policy.

73. In the event the Claimant's absence only lasted one day and no action was taken.

*Issue 5(xvi): 'on 27 November 2017 Mr Quane breached the Claimant's confidentiality and Nicholas Payne reference regarding Claimant and sickness management'* [sic] *– harassment and direct discrimination.*

74. This allegation was not pursued by Ms Mallick in her closing submissions.

*Issue 5(xvii): 'on 24 December 2017 Mr Quane's response to the Claimant upon reporting the stolen van' – harassment and direct discrimination.*

*Issue 5(xviii): 'on 9 January 2018 Mr Quane's treatment of the Claimant over the completion of insurance forms' – harassment and direct discrimination*

75. On the evening of 22 December 2017 the Claimant parked his work van outside his home. When he woke up the next morning the van had been stolen. The Claimant reported the theft to Mr Payne at 07:53 a.m. Given that Mr Payne was deputising for Mr Quane, who was on leave, this was a reasonable thing to do. Mr Quane had sent an email to all staff on 14 December 2017, formally notifying them that Mr Payne and Mr Keady would be dividing his management role between them whilst he was away.

76. Mr Payne instructed the Claimant to report the matter to the police and then to provide a report to him, including the crime reference number.

77. The Claimant called his colleague, Mr Barry Negus, and asked him to go to the locker, locate the registration number of the van and bring it to him, which Mr Negus did. Mr Payne confirmed in a later email to Mr Quane that, when he called the Claimant at 08:22, the Claimant told him that Mr Negus was already on the phone to the police. It is striking that Mr Payne at that point did not appear to have seen anything wrong with the fact that it was Mr Negus speaking to the police, rather than the Claimant.

78. In the same phone call Mr Payne asked the Claimant to send him an email containing details of the incident. At 14:28 the Claimant sent him three WhatsApp messages, which showed the crime reference number, the name of the street and the name of the block. The Claimant then phoned him at 14:57 to confirm that he had received these messages. Mr Payne said that he had, but that he needed the information in email form with confirmation of when the Claimant had last seen the vehicle 'and a few more details.' At 15:13 he believes he called the Claimant again to say that he needed the email as soon as possible so that he could let management and central garage know. The Claimant provided an email at 21:52. The Tribunal finds that there was nothing lacking in that email, other than the fact that it was sent somewhat later than Mr Payne had requested. Most of the information had already been provided earlier on.

79. Mr Payne did not attend the Tribunal to give evidence on this or any other issue.

80. On 24 December 2017 there was a heated discussion by email between the Claimant, Mr Payne and Mr Quane about the Claimant's handling of the matter. Early that morning Mr Quane wrote angrily to the Claimant:

> 'why has it taken 13 hours to inform management that a vehicle has been stolen considering I saw Barry that morning. I will inform senior management this morning he will ask the same questions.'

81. Mr Quane went on to ask Mr Payne to find out what time the incident was reported to the police. Mr Payne did so in an email to the Claimant, in which he wrote:

> 'Can you confirm what time this incident was reported to the police and why it took you so long to send an email to report this incident.'

82. He already knew when the incident had been reported to the police because he was on the phone to the Claimant while Mr Negus was doing so and was then sent a crime reference number. He did not mention this in the email he sent to the Claimant, which he copied to Mr Quane.

83. The Claimant replied:

> 'I reported the incident to Doey straight away then reported to the police, called Doey back and reported the crime number, I thought I had done the correct procedure by reporting the incident and information to Doey.'

Mr Quane then intervened:

> 'Reporting verbally that a van has been stolen would never be adequate in this situation so I am surprised by your response and I am also sure Doey asked for a written response. Please respond to Doey's email in full.'

Mr Payne replied:

> 'I got a call from Khalid report[ing] the incident. I asked him for a written report by email so I could inform the senior management and central garage the vehicle had been stolen. All I got was WhatsApp pictures. I then informed Khalid that he had to send me an email stating all the information.'

84. There was then a dispute about whether Mr Payne had asked for an email, which Mr Quane concluded by writing: 'thanks for clearing this matter Doey.'

85. The Tribunal finds that the Claimant had done nothing to justify the level of anger which Mr Quane directed at him. He had notified Mr Payne, who was deputising for Mr Quane. The police had been notified in a manner which Mr Payne did not query at the time and he had been given the information that he needed, including a crime reference number (verbally and by way of the WhatsApp messages), by mid-afternoon. It is clear from Mr Payne's email quoted above that he, not the Claimant, was going to notify senior management and central garage that the vehicle had been stolen.

86. Mr Payne informed the administration officer of the transport service (Nasima Khatun) of the theft on 26 December 2017, Boxing Day. He did not receive a

reply from her until 8 January 2018. The Tribunal finds that this supports the Claimant's evidence that the office was closed over the holiday period. She observes that she thought that it was another van that had been stolen (the one the Claimant's colleague, Mr Resina, had been driving) but simply asks that, if both vans had been stolen, both drivers should go to the Blackwall depot and fill out an insurance claim form for these incidents. There is no indication that Ms Khatun was concerned by any delay in notifying her, which in the case of Mr Resina's vehicle was nearly a month earlier. However, the only criticism raised by Mr Payne and Mr Quane is of delay by the Claimant.

87. On 9 January 2018 Mr Quane wrote to Mr Payne, copying in Mr Spenceley and Mr Negus, complaining that the Claimant had not been to central garage to fill out an insurance claim form. Mr Quane wrote: 'I thought this was done while I was on leave if not why. This has been very unprofessional from day one. 13 hours to report to management the van stolen now Central garage saying the form has not been completed.'

88. The Claimant's evidence was that this was the first time he had been involved in an incident of this sort and he knew nothing about the correct process for dealing with it. There is no evidence that the Claimant had been instructed to complete an insurance form and we find that he had not been.

89. On 10 January 2018 Mr Payne sent an email to Mr Quane complaining about alleged abusive behaviour by the Claimant towards him over the Christmas period. Mr Quane responded to Mr Payne: 'Doey excellent email please send the incident where he mentioned your wife', to which Mr Payne responds in a further email alleging that 'Khalid said something to me I wasn't too sure what he said it was something about my missus sexually'. In the event, Mr Payne did not pursue either of these allegations, the basis of which is wholly unclear to the Tribunal.

*Issue 5(xix): 'on 24 January 2018 Mr Quane accused the Claimant of parking in a bay without a resident's permit and initiated with Mr Spenceley a disciplinary process' – harassment and direct discrimination.*

*Issue 5(xxiii): 'Between 5 February to 23 February 2018, an investigation was commenced by Matus Holecko with a presumption of guilt … events were engendered [sic], evidence was manipulated, facts were changed in order to fulfil the agenda of management that the Claimant was the culprit in this case' – harassment and direct discrimination.*

90. On 12 January 2018 Mr Quane sent Mr Spenceley a photograph of the Claimant's private car under cover of an email in which he suggested that the Claimant was using an expired estate permit from one of the Respondent's vans to park on the estate.

91. On 15 January 2018 Mr Quane contacted Philip Le of customer services asking if an estate permit had been issued for the Claimant's vehicle. Mr Le asked Mr Quane where the vehicle was so that he could make enquiries of NSL. Mr Quane told him what area it was in and Mr Le contacted NSL immediately to ask them to enforce a parking ticket against the vehicle, telling them where to find it. Mr Spenceley was copied into this correspondence.

92. Mr Holecko confirmed in cross-examination that Mr Le would not have instructed NSL to enforce the parking ticket without an instruction from someone else. Mr Holecko expressed the view that it might have been Mr Quane who gave that instruction. We find, on the balance of probabilities, that it was.

93. Mr Quane then tasked Mr Payne with monitoring the Claimant's vehicle on a regular basis to discover other possible infringements.

94. The Tribunal had before it a photograph of the Claimant's car, with the permit showing on the dashboard. The metadata on the documents suggest that it was taken on 16 January 2018. Mr Holecko told the Tribunal that he did not know who took it, but thought it likely that Mr Quane or Mr Payne had given it to him.

95. On 17 January Mr Spenceley emailed Sandip Barth of HR, stating that they had a caretaker who was using an invalid permit to park on estate land and had currently been issued with four parking tickets. Mr Spenceley pointed out that, given that there was a problem on the estates with illegal parking, this warranted an investigation and possible disciplinary action. He asked for Ms Barth's view. Ms Barth asked whether it was impacting on the Respondent 'as a brand'. Mr Spenceley replied:

> 'it is possibly not impacting on THH as a brand other than residents seeing a THH member of staff either using the vehicle when it has parking tickets physically on it, or if they know him as a staff member and are aware he has not got a permit'.

96. Ms Barth replied:

> 'as this is issued for the caretaking fleet this would be viewed as theft/misuse of company property for personal gain as this member of staff is using the permit on his personal vehicle. It does also impact on THH's reputation… This does need investigating. Can I have the employee's name please?'

97. On 18 January 2018 Mr Spenceley emailed Mr Quane: 'do you have a picture that clearly shows the expired permit on display in Khalid's car?'. Mr Quane replied on the same day: 'the permit is definitely one of our THH van permits but I think the details are obscured by the windscreen. So the ticket wardens cannot read it.'

<u>The appointment of Mr Holecko</u>

98. On 23 January 2018 Mr Spenceley emailed Mr Holecko, Environmental Sciences Area Manager, forwarding the earlier emails and asking him to lead an investigation. Mr Holecko agreed the next day and asked for further details: dates, pictures, who highlighted the issue and whether there were any witnesses or statements from NSL. Mr Spenceley replied providing some of that information and adding: 'we have also apparently had complaints from residents but may not be able to prove this. I will forward you the email from Jimmy about this'.

99. On 24 January 2018 Mr Holecko wrote to the Claimant, setting out the potential disciplinary charges, which were as follows:

99.1. misuse of the Respondent's property for personal gain by using an expired caretaking fleet parking permit in the Claimant's private vehicle without authorisation;

99.2. deliberate attempt by the Claimant to mislead authorities;

99.3. bringing the Respondent into disrepute;

99.4. breach of the Code of Conduct.

100. On 25 January 2018 Mr Quane sent Mr Holecko a series of photographs of the Claimant's car in which the expired parking permit was displayed on the dashboard. For some reason he then sent the same set of photographs to Mr Holecko again on 6 February 2018.

101. On 26 January 2018 Mr Quane emailed Mr Spenceley again, complaining that the Claimant had received the letter about the investigation meeting 'and then blatantly parked his car in a residence Bay this morning for work'. He also complained about other conduct by the Claimant and added:

> 'I feel this man is having a detrimental effect on the rest of the team. I am not sure how serious his charges are but I hope it's enough to be moved from the Support Team'.

<u>The investigation hearing on 1 February 2018</u>

102. The Claimant attended a disciplinary investigation meeting on 1 February 2018, with Mr Holecko. At that hearing the Claimant said that he found the expired permit on the ground, that he intended to dispose of it, but had left it unintentionally on the dashboard of his car. He admitted he had parked on the estate without a valid permit and said that he had done so rather than be late for work. He mentioned, but refused to identify, other employees who parked on the estate.

103. The permit was displayed so that the date was obscured. The Claimant maintained that this was accidental and that he had simply thrown the permit into the car when he discovered it on the ground. We find, on the balance of probabilities, that he had deliberately obscured it. Other employees had purchased permits whereas the Claimant had not, even when given a further opportunity to do so by Mr Quane.

104. On 8 February 2018 Mr Holecko emailed the Claimant with some follow-up questions, to which the Claimant replied. He denied parking his car on an estate and attached a letter which he said showed that he had the permission to park in bays owned by Limehouse Child Care. In that letter the managing director of Limehouse, Mr Richard Roberts, wrote:

> 'We have a number of parking bays on the St Vincent estate that, when they are not in use by myself or my staff, I have no problems with Mr Khalid parking his vehicle on any of them. As your parking control is to say the least haphazard I prefer him there rather than the assortment of people who don't care they are blocking our bays and appear not to care about parking ticket or are considerate of other people … If you require any further confirmation or information, please do not hesitate in contacting me'.

105. Mr Holecko forwarded the information to Ms Barth, who replied that it did not change the fact that the Claimant had used a THH parking permit in his private vehicle without authority. Mr Holecko accepted in evidence that he did not contact Limehouse. We cannot say whether this information would have provided the Claimant with a defence to the charge because there was no proper investigation into it.

106. On 9 February 2018 Mr Holecko emailed Mr Quane with some follow-up questions to which Mr Quane provided an almost immediate response. One of the questions was whether he knew of any complaints from residents regarding the Claimant's parking. Mr Quane replied: 'yes one resident and a lady who works at the local school who rents Bay 7. Doey instructed him not to park in both locations'. Mr Holecko did not take steps to identify or contact these individuals.

107. On 13 February 2018 Mr Quane emailed Mr Holecko again, stating that Mr Payne had been going through his photos and had come across the Claimant's car 'with all the details you require, i.e. date and time'.

108. On 22 February 2018 Mr Holecko sought information from Mr Sandhu of the Respondent's customer services team. He said that he had information that the permit had been displayed so that the details were obscured and asked NSL if they had pictures of the vehicle with the permit when the PCNs were issued. Mr Sandhu made enquiries of NSL and provided details of the PCNs but no photos. Mr Holecko replied that photos were 'crucial in my investigation'. Mr Holecko chased on 2 March 2018 saying that he couldn't understand why NSL were unable to provide the photo evidence he required.

109. On 5 March 2018 Mr Osemwengie of NSL replied to Mr Holecko:

> 'the issues surrounding this vehicle has nothing to do with pictures or number of tickets issued, because tickets were issued to this vehicle based on our client instruction (THH) that "we should disregard whatever permit that is displayed on the windscreen and issue PCN", due to misuse of permit.'

110. On 7 March 2018 Mr Quane wrote to Mr Payne: 'can you please send an email to Matus [Holecko] confirming that you had told Khalid on several occasions about parking in and around the portacabin especially residents bays?' Mr Payne duly did so.

111. In response to a follow-up question from Mr Holecko, Mr Payne provided further information on 12 March 2018. He asserted that the information about complaints came from the Claimant himself. Mr Holecko did not ask the Claimant whether this was true. Ms Mallick submits that this demonstrates that Mr Holecko did not investigate independently, but unquestioningly accepted information fed to him by Mr Quane and Mr Payne. We consider that a valid criticism.

112. On 13 March 2018 Mr Quane sent Mr Holecko another photograph of the Claimant's car. On 14 March Mr Holecko forwarded it to Ms Barth, writing: 'if it's not too late I will add this to the report'.

*Issue 5(xx): 'on 8 February 2018 or soon thereafter Mr Quane intentionally failed to follow the Respondent's procedures to support the Claimant as recommended by Occupational Health' – harassment and direct discrimination.*

113. The Claimant attended an appointment with Occupational Health on 8 February 2018 as he had reported symptoms of stress. In its report OH made a number of recommendations: a stress risk assessment; a management meeting with the Claimant to review ways of removing or reducing the cause of stress through joint discussion; continued demonstration of management support via regular meetings; specific action points to support the employee; and the setting of a review date.

114. Mr Quane offered the Claimant a referral to MIND Counselling soon after receipt of the OH report, which the Claimant did not take up.

115. On 13 March 2018, Mr Quane met the Claimant for a one-to-one meeting. In the record of the meeting Mr Quane made a number of comments about the quality of the Claimant's work which, with the exception of one matter, were supportive.

116. However, there was no stress risk assessment; the one-to-one meeting was brief and did not address the recommendations of OH; there were no regular meetings; no specific action points were agreed; and no review date was set.

*Issue 5(xxi) and (xxii): 'On 9 [March] 2018 the Claimant was instructed to carry out rubbish clearance as a single officer, when the job required two for health and safety' – harassment and direct discrimination.*

117. On 9 March 2018 both Mr Quane and Mr Payne were on leave. Early that morning Mr Payne gave instructions for work to be assigned to members of the Support Team in two emails.

    117.1. In an email at 06:39 Mr Payne wrote to seven members of the team, giving them their instructions for the day. To the Claimant he wrote: 'Meet Danny Tyler at Richard Neal for clearance request tonne bag required'.

    117.2. In an email at 07:33 Mr Payne wrote to Mr Yamato, Mr Placinta and the Claimant: 'can you please drop Khalid off this morning. Force entry on the door and then pick him up when he's finished'.

118. The explanation advanced on Mr Payne's behalf was that he intended that the late shift would collect the bulk refuse. We find that these emails were neither sufficiently detailed nor particularly clear. The first email did not tell the Claimant how to get to the job; the second did not make clear what would happen to the bulk refuse. However, we reject Ms Mallick's suggestion that they were deliberately confusing and that Mr Payne was setting the Claimant up to fail.

119. Nor do we accept the Claimant's allegation that he was deliberately sent alone because it was a particularly onerous job in an area prone to antisocial behaviour. In an interview with Mr Coates on 16 August 2018 Mr Tyler said that the extent of the rubbish that was to be cleared was not known in advance because the underground area had been locked for some time, hence the need to force entry. Mr Tyler explained that, when he had requested the assistance of

the Support Team he had not specified that it would be either a one- or a two-person job.

120. We have some sympathy for Ms Mallick's submission that the Claimant used his initiative and took a tipper van to get there and to carry out the job which he thought would be heavy-duty. However, the fact remains that he did not have authorisation to take the tipper van and did not fill out a log. Mr Keady later required the tipper but was unable to use it because the Claimant had taken it. The Claimant apologised to Mr Keady later in the day.

121. On the morning of 9 March Mr Payne sent Mr Quane an email describing the incident. Mr Quane replied: 'Doey fine just check your spelling in the first paragraph'. Mr Payne then re-sent the draft email, now correctly spelt, to Mr Quane around 10 minutes later, to which Mr Quane replied, copying in Mr Keady, Mr Spenceley and Mr Holecko, as well as the Claimant himself:

> 'Morning Doey
>
> thanks for the update, this seems to be a problem with Khalid following email instructions, I will speak to Nick on my return to work on Monday to see what actions can be taken.'

Mr Quane's response to the second draft did not disclose that he had had any involvement in the sending or drafting of this email and was coordinating the gathering of evidence behind the scenes.

122. On 12 March 2018 Mr Quane reported the incident to Junal Kadir of HR, copying in Mr Keady, Mr Spencely and Mr Holecko, observing: 'he is also under investigation concerning parking his private car on our estates using one of our fleet permits, I have attached all the emails in two previous warning letters … is there any further action that I can take?'

123. The Judge and Mrs Berry find, on the basis of his emails with Mr Payne and Ms Kadir, that Mr Quane again took advantage of this opportunity to make the situation as serious as possible for the Claimant. Ms Long disagrees: she finds that there was no manipulation of the process; that Mr Quane was merely passing on information to HR; and that his email exchange with Mr Payne simply reflected the established, close relationship between them.

*Issue 5(xxiv): 'Between 23 and 26 February 2018, HR officers made changes to Mr Holecko's investigation report' – harassment and direct discrimination.*

*Issue 5(xxv): 'On 12 March 2018, HR officers made changes to the allegations against the Claimant in Mr Holecko's draft report' – harassment or direct discrimination.*

124. On 23 February 2018 Mr Holecko sent a draft of his report to Sandip Barth of HR. Ms Barth replied on 26 February 2018, suggesting changes to the draft. There was a further exchange on 7 and 8 March 2018.

125. We find that the suggested amendments were a mixture of proof-reading and more substantive changes, although none were such as to alter Mr Holecko's central recommendation. We reject Ms Mallick's submission that Ms Barth's amendments were as a result of manipulation by Mr Quane.

126. The only member of HR who proposed amendments to the reports was Ms Barth, who the Respondent asserts is Sikh and the Claimant accepts is BAME. In cross-examination, the Claimant was asked whether he was saying that, by making these changes, Ms Barth was discriminating against him because of his race or religion. The Claimant replied that he was not.

*Issue 5(xxvi): 'An inadequate investigation report was completed by Mr Holecko: new allegations were raised but never put to the Claimant; new material was added to the report after it was concluded; witnesses were allowed to collude; the improprieties arose in order to secure the Claimant's dismissal' – harassment or direct discrimination.*

127. On 16 March 2018 Mr Holecko produced his report. We find that in some respects Mr Holecko approached his task seriously and with some care. However, there were failings in his investigation: he was insufficiently critical in his approach to the information provided to him by Mr Quane; he did not contact Limehouse in order fully to explore the Claimant's explanation as to why he parked where he did; and he did not contact either the resident or the woman who, according to Mr Payne, allegedly complained about the Claimant's parking in order to take a witness statement.

128. Further, after Mr Holecko's investigation was concluded, the Claimant provided him with photographic evidence of parking infringements by other employees. So far as the witnesses were aware, no disciplinary action was taken against them. Mr Holecko was asked about 'Jack', a white employee, who was parking on a permit which was his own but expired. Mr Holecko accepted that this was a disciplinary offence, albeit one which he regarded as less serious than parking on someone else's permit. He did not take any action himself and was not aware of anyone else taking action. On 26 April 2018 Mr Holecko forwarded this material to Mr Quane. He accepted in cross-examination that this was not appropriate.

129. Mr Philpott was aware of only one other incident in which an employee had been disciplined for an issue relating to parking. When we saw the disciplinary letter in question, it revealed that the individual had indeed breached parking rules, but had also behaved inappropriately and threatened a member of the public. It was not a true comparison.

130. In cross-examination the Claimant was asked whether he was still alleging that Mr Holecko discriminated against him because of race or religion. He replied that he could not answer that question.

*Issue 5(xxvii): 'On 11 April 2018 the Claimant was notified of disciplinary proceedings for gross misconduct' – harassment or direct discrimination.*

131. On 11 April 2018 Mr Spenceley wrote to the Claimant, informing him that the incident when he took the tipper van on 9 March 2018 was to be investigated as a disciplinary matter, potentially gross misconduct, which could lead to his dismissal. Mr Gulam Hussain, a Muslim manager within the Respondent, was appointed as the investigating officer. The charges were as follows: taking a THH vehicle without authorisation; failing to follow a management instruction; and failing to complete a log sheet.

*Issue 5(xxviii): 'On 12 April 2018 Mr Quane suggested that the Claimant made RTA claim for compensation' – harassment or direct discrimination.*

132. On 27 March 2018 the Claimant and other members of staff were involved in a road traffic accident. The bus driver who was taking them to attend a course failed to apply the handbrake and the bus rolled into a wall.

133. The Claimant's initial report of the incident on 5 April 2018, in an insurance form which was completed the day after the accident, records that: 'no one suffered any injuries and no one was affected'. On 11 April 2018 the Claimant completed a second form in which he wrote that 'one of the passengers has suffered whiplash and pain to the left shoulder and arm'. The Claimant explained to the Tribunal that, although he initially thought he had not been injured, he later experienced stiffness, which he ascribed to the accident. His unchallenged evidence was that all four members of the team made compensation claims. We accept that evidence.

134. On 12 April 2018 Mr Quane sent an email to Junal Kadir of HR, pointing out that the Claimant had provided what he describes as 'contradictory reports'. In the same email he mentions that Mr Placinta suffered a minor leg injury, which required him to go to the hospital. Ms Kadir responded that he should treat this 'as any incident'. Mr Quane replied that the Claimant had taken no time off work and that the 'change of health is due to him claiming compensation from the accident'. We find that the clear implication of M Quane's emails was that the Claimant was being dishonest.

Sickness absence/invitation to disciplinary hearing

135. The Claimant was absent with stress from 23 April to 6 July 2018. On 24 April 2018 the Claimant was invited to a disciplinary investigation meeting concerning the tipper van incident, to be conducted by Mr Hussain.

The Claimant's grievance

136. On 27 April 2018 the Claimant lodged a complaint of bullying and harassment. In it he alleged that Mr Quane had set out to target him. In the course of the four-page document he raised many of the issues which now feature in his Tribunal claim: the handling of the PDR; the disagreements about the use of work/personal email accounts and Mr Quane's shouting at him; the October warning about timekeeping; the incident with the stolen van; the tipper van incident; the failure to implement OH recommendations; and the raising of fresh disciplinary proceedings.

137. The grievance explicitly uses the language of direct race and religious discrimination and harassment. It also contains references to the Equality Act 2010. It is accepted by the Respondent that this was a protected act within the meaning of the victimisation provisions. We find that this was the first occasion on which the Claimant suggested that he was being discriminated against.

138. In an email of 27 April 2018 Mr Philpott wrote to Mr Spenceley, saying that they may wish to give consideration either to changing the Claimant's reporting line so that the Claimant reported to someone other than Mr Quane or to suspending Mr Quane. Mr Spenceley replied the same day. He suggested that Mr Quane should not be suspended 'at this point'. He proposed that when the

Claimant returned from sickness absence he should be assigned to another team and should report to a different manager. He flagged up that overtime might be an issue but postponed a decision on it.

*Issue 5(xxix): 'On 8 May 2018 Mr Spenceley invited the Claimant to discuss his various grievances but then presented the Claimant with a PCN' – harassment or direct discrimination.*

139. On 26 April 2018 Mr Spenceley learnt that a PCN had been applied to one of the Respondent's vehicles, assigned to the Claimant and driven by him in a bus lane in Dagenham in March. Mr Spenceley stated that on the information available to him the Claimant appeared to be using the vehicle for personal purposes. He asked that the matter be added to the ongoing disciplinary investigation.

140. Earlier the same day Mr Quane had written to Mr Spenceley raising his 'real concerns over Khalid and his failure to follow any managerial instructions concerning the use of our fleet'. He then went on to make a broader complaint about the Claimant's conduct over the previous six months, concluding: 'I really do believe he thinks he can do whatever he feels is right for him whether that means obeying the rules and regulations laid out by THH or not, I also have concerns about the effect this is having on morale within this team'.

141. On 30 April 2018 the Claimant Mr Hussain issued a revised invitation to an investigation hearing on 22 May 2018 at which two additional charges would be considered:

    141.1. inappropriate use of a Respondent-owned vehicle for personal use on 2 March 2018; and

    141.2. attracting a PCN through failure to observe the Highway Code.

142. On 16 May 2018 the Claimant was invited to a meeting with Mr Spenceley, at which he was told that it was to be a protected conversation. At that meeting Mr Spenceley showed the Claimant the PCN briefly but did not give him a copy of it, nor did he give him the number of the PCN. The Claimant had no means of establishing whether it was valid for the purposes of any disciplinary hearing, nor of challenging it with the relevant authorities.

143. It was put to Mr Spenceley in cross-examination that he assumed that the Claimant's denial that he was driving the vehicle on the relevant date was dishonest. Mr Spenceley freely agreed. The Tribunal finds that his assumption was to some extent understandable, given the documentary evidence before him and the background of the other vehicle-related allegations.

144. In an email of 26 July 2018 Mr Khan, the Claimant's TU representative, wrote to Mr Spenceley asking that he be provided with a copy of the PCN and the vehicle signing in sheet. We find that Mr Spenceley ought to have provided the Claimant with a copy of the PCN so that he could make his own enquiries. No satisfactory explanation has been provided as to why that did not happen. In fact, the Claimant was not provided with a copy of the PCN until the meeting with Mr Hussain on 22 November 2018. When he received it, his son investigated it and quickly established that this related to a cloned vehicle. In an email of 28 November 2018 from Mr Khan to Mr Hussain the Claimant provided

evidence that the vehicle which had been issued with a PCN was a different vehicle from the one signed out to him.

Stay of the disciplinary proceedings

145. On 24 May 2018 the Claimant was invited to a disciplinary hearing in relation to the parking matters, scheduled to take place on 7 June 2018. By letter dated 24 May 2018 the Claimant's TU representative asked that the disciplinary proceedings be stayed pending the investigation of the Claimant's grievance. The Respondent agreed on 29 May 2018.

Grievance investigation

146. On 29 May 2018 the Claimant was notified that his grievance would be investigated by Mr Adam Coates, Head of Finance.

147. Mr Coates initially proposed to deal with the matter under the grievance procedure; after an objection from Mr Khan, he dealt with it under the Dignity at Work policy. The Tribunal finds that, given the nature of the allegations, it ought to have been obvious that this matter fell under the Dignity at Work policy.

148. Mr Coates wrote to the Claimant on 1 June 2018 inviting him to a meeting on 12 June 2018. In that letter he wrote: 'if you wish to call any witnesses or produce documents, you need to let us know five days in advance so that we can make arrangements for the meeting'. Mr Khan objected to this approach and the Tribunal agreed that the wording adopted by Mr Coates was more appropriate to a disciplinary process, in that it put the onus on the complainant to identify witnesses. An employee would not ordinarily be expected to call witnesses, or produce documents, at an initial investigatory meeting with him into his own grievance. He might be asked to identify any relevant witnesses at that meeting, whom the investigator would then contact independently. As for documents, again these might be identified at the same time and a timeframe set for the complainant to submit them. Mr Coates was charged with investigating the Claimant's complaints; there was an independent obligation on him to identify those witnesses who might be able to give relevant evidence. In the event, he spoke only to witnesses whom Mr Quane identified and the focus of his questions was primarily on the incident when Mr Quane was alleged to have shouted at the Claimant.

149. Also on 1 June 2018, before meeting the Claimant, Mr Coates wrote to Mr Quane inviting him to a meeting on 5 June 2018, advising him of the same right to call witnesses and produce documents. Mr Coates explained in cross-examination that: 'I met Mr Quane earlier because he was keen to meet to discuss.' The Tribunal finds that Mr Coates should have seen the Claimant first, in order properly to explore his allegations, before seeing Mr Quane.

150. Mr Quane had previously written to HR on 31 May 2018, asking Ms Kadir of HR to forward the Claimant's allegations to him. Ms Kadir replied that it would not be appropriate to do that but that Mr Coates would talk to him about the incidents which related to him. However, on 1 June 2018 Mr Coates emailed Mr Quane attaching a complete copy of the complaint writing: 'I believe that you need to see the entire document, as my reading of this is that you are being accused throughout, so I don't feel it appropriate to "redact" any of the complaint'.

151. The Tribunal finds that that was the wrong approach. Mr Coates should have summarised the allegations in a formal letter. We accept Ms Mallick's submission that, together with the decision to see Mr Quane before meeting with the Claimant, the effect was to give Mr Quane an inappropriate advantage in terms of preparing and marshalling his defence. We find that Mr Coates prioritised Mr Quane's wishes over considerations of fairness to the Claimant.

152. In preparation for the meeting with Mr Quane, Mr Coates prepared a series of questions in a pre-meeting agenda. It contains no reference to race or religion. Mr Coates took notes at the meeting, which are wholly unsatisfactory. They record Mr Quane's answers only in the most abbreviated fashion and only to a very limited number of the issues. According to the notes, there was no reference to questions of race or religion at the meeting. Given the serious nature of the grievance, Mr Coates should have been accompanied by a note-taker (as he was at his meetings with the Claimant). The position was even less satisfactory when it came to Mr Spenceley. Mr Coates met him as part of his investigation and took no notes at all. Mr Coates took a laissez-faire approach to his documentation of management witnesses, by contrast to his more rigorous documentation of his interactions with the Claimant. The Tribunal finds that this suggests partiality.

153. The Claimant attended an investigatory meeting on 12 June 2018 and a second meeting on 11 July 2018. At that meeting the Claimant specifically raised the fact that he had been singled out in relation to the parking issue. He produced photographs of others committing similar offences. He complained of being followed. The notes record Mr Coates observing: 'management need to demonstrate if action has been taken with other people as well'. In cross-examination he suggested that he followed up on this by interviewing Mr Holecko. Taken to the notes of that meeting he agreed he had not raised the issue with him. He volunteered that in retrospect he ought to have made enquiries of Mr Spenceley.

154. Nor is there any evidence that Mr Coates enquired as to whether any other team member had been disciplined for not signing in at the start of their break (in relation to the incident in October 2017). Although in dealing with the stolen van matter, he met Mr Resina to ask him about the shouting incident, he did not explore with him whether he was treated more favourably than the Claimant in relation to the fact that they had both had vehicles stolen, even though the Claimant had identified him as a comparator. He relied instead exclusively on Mr Quane's account.

155. With regard to the tipper truck incident, he accepted that he made no enquiries with anyone other than Mr Quane as to how clearances were usually conducted or whether anyone had ever been sent to conduct a clearance alone.

156. In short, Mr Coates made little or no attempt to establish, independently of Mr Quane, whether the Claimant had been treated less favourably than others and, if so, why. He did not raise questions of race or religion with anyone.

*Issue 5(xxx): 'On 8 July 2018 the Claimant was informed that he could not do overtime and ECO duties' – harassment and direct discrimination.*

157. On 6 July 2018 the Claimant returned to work. He was assigned to a caretaking team, rather than to the Support Team.

158. On 25 July 2018 Mr Keady informed the Claimant that he would not be entitled to participate in Overtime or Emergency Call-Out ('ECO') work pending the conclusion of the disciplinary investigation. Mr Spenceley took this decision. In a letter of 30 July 2018 he informed the Claimant that, if the Dagenham PCN matter was not upheld, the Claimant would be compensated for loss of earnings consequent on this decision.

*Issues 5(xxxi) and 9: 'On 14 September 2018 an inadequate grievance investigation report by Mr Coates in respect of the Claimant's Combatting Harassment and Discrimination complaint dated 27 April 2018' – harassment or direct discrimination and victimisation.*

159. Mr Coates provided the outcome of his investigation on 14 September 2018. It consists of a letter to the Claimant, summarising the outcome, with a report attached which provides a certain amount of further detail.

160. The letter is headed: 'Bullying and harassment grievance – (Formal Meeting)'. It is striking that, even in the title, there is no mention of discrimination, race or religion. Nor is there anywhere in the letter, although there is reference to 'different treatment' at points. The first and only mention is in the attached report where, at para 3.2 Mr Coates writes that the Claimant's grievance alleged 'bullying and harassment, citing that this was due to his age, colour, race and religion'. There is no mention of these factors in Mr Coates's 'Key Findings' at para 6 or his 'Conclusion' at para 7.

161. Mr Coates upheld two aspects of the complaint.

    161.1. He found that Mr Quane had not followed HR procedure when issuing the Claimant with a warning on 3 October 2017: he should have described it as an 'oral warning' rather than a 'verbal warning'; and he should have mentioned the right of appeal. He directed that the warning be disregarded and removed from the Claimant's file.

    161.2. He found that Mr Quane failed to follow OH advice when the Claimant had a period of sickness absence. This allegation was partially upheld.

162. Despite heading one paragraph of his summary: 'that you are being victimised for parking on estates when other staff members do the same', Mr Coates ignored the question of whether other staff members did the same, both here and in the attached report at paras 5.26 to 5.29.

163. It was put to Mr Coates that he had investigated and concluded as he did because he did not want to make findings of discrimination against Mr Quane. Mr Coates replied that, while he accepted that there were flaws in his approach, he had approached it with the best intent.

*Issue 5(xxxii): 'JQ sent the photograph of Muslim Females covered in full traditional Islamic dress' – harassment or direct discrimination.*

164. On or around 28 September 0218 the Claimant appealed against the grievance outcome. He was invited to a hearing on 26 October 2018 which was conducted by Mr Davey.

165. At that hearing the Claimant disclosed the image of the Muslim schoolgirls, which Mr Quane had circulated through the WhatsApp group on 24 December 2016. The Claimant maintains that he did not see it at the time and only discovered it on 23 October 2018, three days before that hearing. The Tribunal does not accept that. We find that it is more likely than not that he saw the image when it was originally sent. Accordingly, if there was a detriment to him, it crystallised in 2016, not in 2018.

166. Mr Khan disclosed the image at the end of the appeal meeting. We reject the Respondent's case that he deliberately withheld it in order to ambush Mr Davey with it. On the contrary, we find that he tried to disclose it earlier in the meeting, along with other documents, but that Mr Davey did not permit him to do so. We accept Mr Davey's account that he not realise what the documents consisted of until a colleague who had been present at the meeting told him.

167. Once Mr Davey saw the image, he concluded that it should be referred to an external investigator. The decision was taken to instruct a company called ForestHR to carry out that investigation. The quality of that report was very poor but there are no separate allegations in respect of that process.

168. Mr Davey eventually produced his decision on the grievance appeal, which he rejected, by letter dated 1 March 2019. Again, there are no separate allegations before us in respect of his decision.

*Issue 5(xxxiii): 'R continuing with a factually false disciplinary until after 22 November 2018 when C discovered that the van that centred around the allegations did not belong to R' – harassment or direct discrimination.*

169. Mr Hussain is a Muslim. It was he who recommended disciplinary action in relation to the Dagenham PCN. The Claimant agreed in cross-examination that he was not alleging discrimination against Mr Hussain. His view was that the disciplinary action had been orchestrated by Mr Quane. We reject that contention.

170. The Tribunal has already found that there was material on the basis of which it was reasonable for the Respondent to treat this as a disciplinary matter. As soon as the Claimant produced evidence that the vehicle in question was cloned, the matter was dropped. The Tribunal finds that at no point did any of the Respondent's managers persist in an allegation which they knew to be false.

**The law**

Time limits

171. S.123(1)(a) EqA provides that a claim for race discrimination must be brought within three months, starting with the date of the act to which the complaint relates.

172. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

173. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances. They will usually include: the reason for the delay; whether the Claimant was aware of his rights to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

174. The fact that the Claimant was pursuing internal resolution by way of a grievance is a factor which may be taken into account, although it is not determinative (*Apelogun-Gabriels v London Borough of Lambeth* [2002] IRLR 116 at para 16).

175. Failure to provide a good excuse for the delay in bringing the relevant claim will not inevitably result in an extension of time being refused (*Rathakrishnan v Pizza Express (Restaurants) Ltd* [2016] IRLR 278 at para 16). There is no requirement for exceptional circumstances to justify an extension (*Pathan v South London Islamic Centre,* UKEAT/0312/13/DM at para 17).

<u>The burden of proof</u>

176. In a discrimination case the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 (at paras 2, 9 and 11) held that the Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts. Those primary facts may include not only the acts which form the subject matter of the complaint but also other acts alleged by the applicant to constitute evidence pointing to a prohibited ground for the alleged discriminatory act or decision. The function of the Tribunal is twofold: first, to establish what the facts were on the various incidents alleged by the Claimant; and, secondly, to decide whether the Tribunal might legitimately infer from all those facts, as well as from all the other circumstances of the case, that there was a prohibited ground for the acts of discrimination complained of. In order to give effect to the legislation, the Tribunal should consider indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by unlawful factors.

177. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(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.**

178. In *Igen v Wong* [2005] ICR 931 the Court of Appeal provided the following guidance which, although it refers to the Sex Discrimination Act 1975, applies equally to the EqA:

> **'(1) Pursuant to section 63A of the 1975 Act, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the Claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the Claimant. These are referred to below as "such facts".**
>
> **(2) If the Claimant does not prove such facts he or she will fail.**
>
> **(3) It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".**
>
> **(4) In deciding whether the Claimant has proved such facts, it is important to 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.**
>
> **(5) It is important to note the word "could" in section 63A(2). 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.**
>
> **(6) In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.**
>
> **(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.**
>
> **(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 pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.**
>
> **(9) Where the Claimant has proved facts from which conclusions could be drawn that the employer has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the employer.**

> **(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.**
>
> **(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.**
>
> **(12) That requires a Tribunal to assess not merely whether the employer 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 sex was not a ground for the treatment in question.**
>
> **(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.'**

179. In *Madarassy v Nomura International plc* [2007] IRLR 246 Mummery LJ held (at para 57) that 'could conclude' [The EqA uses the words "could decide", but the meaning is the same] meant:

> **'[…] that "a reasonable Tribunal could properly conclude" from all the evidence before it'.**

180. Mummery LJ went on to say:

> **'This would include evidence adduced by the complainant in support of the allegations of [in that case] sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the Respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the Tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.'**

181. A mere difference of treatment is not enough to shift the burden of proof, something more is required: *Madarassy* per Mummery LJ at para 56:

> **'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.'**

182. However, as Sedley LJ observed in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279 (at para 19):

> **'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'**

<u>Harassment related to race</u>

183. Harassment related to race is defined by s.26 EqA, which provides, so far as relevant:

> **(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;**
> > **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5)The relevant protected characteristics are—**
> **…**
> **race**
> **…**
> **religion**
> **...**

184. The use of the wording 'unwanted conduct *related to* a relevant protected characteristic' was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it. It is a broader test than that which applies in a claim of direct discrimination (*Unite the Union v Nailard* [2018] IRLR 730).

185. The test for whether conduct achieved the requisite degree of seriousness to amount to harassment was considered by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 (at para 22):

> **'We accept that 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.'**

186. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 (at para 47) held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'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.'**

187. He further held (at para 13):

> **'When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.'**

The relationship between harassment and other forms of discrimination

188. S.212(1) EqA provides that the concept of 'detriment' does not include conduct that amounts to harassment. Thus, a Claimant cannot succeed in a claim of both harassment and direct discrimination in respect of the same conduct. Nor can a claimant succeed in a claim of both harassment and victimisation in respect of the same conduct: a finding of victimisation under s.27 EqA necessarily involves a finding of detriment. However, there is nothing in the statutory language to prevent him from advancing claims in respect of the same conduct by reference to these causes of action in the alternative.

Direct discrimination because of race

189. S.13(1) EqA provides:

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

190. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

191. More recently, the EAT has encouraged Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at para 30.

192. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010, the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic (para 36).

193. The Court of Appeal in *Coyne v Home Office* [2000] ICR 1443 makes clear that the employer will not be guilty of discrimination if an inadequate response to a grievance was demonstrably unrelated to the relevant protected characteristic of the Claimant.

194. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment': see per Lord Hope of Craighead in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 (at para 35). An unjustified sense of grievance does not fall into that category.

Victimisation

195. S.27 Equality Act 2010 ('EqA') provides as follows:

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

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

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

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

**…**

196. The test of causation in a victimisation complaint is whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

## Submissions

197. Both representatives provided helpful skeleton arguments and supplemented them with oral submissions. We have had regard to those submissions in reaching our conclusions and have referred to them in context, both above and below. For reasons of space we do not summarise them here.

## Conclusion: Mr Quane

Allegations relating to Mr Quane rejected by the Tribunal

198. The Tribunal did not approach the allegations against Mr Quane uncritically merely because he did not attend to give evidence. We unanimously reject a number of them on the facts, because we have been persuaded on the balance of probabilities, either by indirect evidence or because we have rejected the Claimant's evidence, that the events did not occur as described and/or did not occur for a proscribed reason.

198.1. Issue 5(i), paras 47-51 above: the appointment of Doey Payne as deputy team leader. On our findings we conclude that, although the appointment occurred, the treatment was not unwanted, alternatively the Claimant was not subjected to a detriment because of it. Moreover, there is no evidence that the decision was related to/because of race or religion. Insofar as there was any lack of transparency in the appointment, the white British, non-Muslim team members were equally disadvantaged.

198.2. Issue 5(vi), para 52 above: Mr Quane reprimanding the Claimant for using his work email for a personal purpose. Insofar as this was an allegation of discrimination, it was barely pursued in closing submissions by Ms Mallick. In any event, we have found that there was a straightforward, non-discriminatory reason for the treatment.

198.3. Issue 5(viii), paras 53-56 above: the allegation that Mr Quane shouted at the Claimant in front of colleagues in April 2017. We have found that this incident did not occur as alleged.

198.4. Issue 5(xiii) and (xv), paras 70-73 above: Mr Quane's response to the Claimant's sickness absence in November 2017. These were entirely innocent letters, written for administrative, non-discriminatory purposes.

198.5. Issue 5(xvi), para 74 above: the allegation that Mr Quane breached the Claimant's confidentiality was not pursued.

198.6. Issue 5(xix), paras 90-97 above: we have found that there was a sound, non-discriminatory basis for Mr Quane's original allegation that the Claimant had parked in a bay without a valid permit.

198.7. Issues 5(xxi) and (xxii), paras 117-123: instructing the Claimant to carry out rubbish clearance as a single officer. We have found that there was nothing improper in that original instruction.

199. These allegations will play no further part in the Tribunal's Judgment.

<u>The circulation of the image of Muslim schoolgirls by Mr Quane in December 2016</u>

200. We first considered Mr Quane's circulating the photograph of Muslim women in full traditional Islamic dress with the message 'Khalid school photo he's 4th from the right' in December 2016 (Issue 5(xxxii), paras 164-168 above).

201. We unanimously conclude that the image/text was explicitly 'related to' the Claimant's religion for the purposes of the Claimant's harassment claim.

202. The Judge and Mrs Berry find that this was unwanted conduct and accept that, having regard to the Claimant's perception, it had the effect of creating a hostile and offensive environment for him. We further find that it was objectively reasonable for the conduct to be regarded as having that effect. It was Islamophobic and explicitly targeted at him. We do not consider the fact that the Claimant circulated pornographic images within the WhatsApp group rendered it unreasonable for the circulation of the Islamophobic image to be regarded by him as offensive. Although by doing so he contributed to a culture which others (including the Tribunal) would find offensive, there was no evidence before us that anyone within the WhatsApp group found the pornographic material offensive. The fact that pornographic material appeared to be generally tolerated, including by the Claimant, did not lead us to the conclusion that he ought reasonably to have tolerated racist material. We are not surprised that the Claimant did not complain about the message at the time. We accept the Claimant's explanation that he feared that a challenge to Mr Quane's conduct might provoke retaliation and put his job at risk.

203. Ms Long disagrees. Dealing first with the question of whether the material crosses the high threshold required for harassment, and having regard to the guidance in *Land Registry v Grant* referred to above, she considers that the context in which the image/text was sent is crucial. That context was one in which discriminatory material which others (including the Tribunal) would regard as highly offensive was regarded as humorous by the willing participants in the group, of whom the Claimant was one. In her view, the fact that he continued to participate in the group long after the image was sent fatally undermines his assertion that he was subjectively offended by it at the time; she thinks it more likely that he deployed it tactically when he thought it might assist him in

resisting the disciplinary charges against him. If she is wrong about that, she finds that it was not objectively reasonable for the Claimant to be offended by this image when he so willingly contributed to a discriminatory environment by his own conduct.

Other unwanted conduct by Mr Quane

204. We turn then to the allegations against Mr Quane in respect of other matters where we have made findings adverse to him. The Tribunal is mindful of the danger of adopting a fragmentary approach to a series of individual allegations over an extended period. Accordingly, we considered the adverse conduct to which we have found Mr Quane subjected the Claimant as a whole.

    204.1. Enquiring into the Claimant's timekeeping on 2 October 2017 and issuing a warning (Issue 5(ix) and Issue 5(x), paras 57-60 above).

    204.2. Not carrying out the Claimant's PDR at a one-to-one meeting in November 2017; and

    204.3. instructing Mr Payne to approach the Claimant about his PDR; and

    204.4. stating in the Claimant's PDR that his colleagues did not want to work with him; and

    204.5. stating in the PDR that he found the Claimant's body language was poor (Issues 5(ii), (iii), (iv) and (xii), paras 61-65 above).

    204.6. Mr Quane's highly critical response to the Claimant's reporting of the stolen van; and

    204.7. his highly critical treatment of the Claimant over the completion of insurance forms in relation to the stolen van in January 2018 (Issue 5(xvii) and (xviii), paras 75-89 above).

    204.8. Mr Quane's actions after his initial discovery of the Claimant's alleged misuse of a parking permit: telling Mr Le to instruct NSL to enforce a parking ticket; tasking Mr Payne with monitoring the Claimant's parking of his vehicle; putting pressure on management to remove the Claimant from his team; and instructing Mr Payne to provide further evidence against the Claimant (Issue 5(xxiii), paras 90-112 above).

    204.9. Failing to carry out the OH recommendations in February 2018 (Issue 5(xx), paras 113-116 above).

    204.10. Challenging the Claimant's honesty with regard to a claim for personal injury (Issue 5(xxviii), paras 132-134 above).

205. We unanimously find that each of these matters amounted to unwanted conduct which, cumulatively, amounted to a course of unwanted conduct. We further accept the Claimant's evidence that the conduct was unwelcome to him.

Was the unwanted conduct done with the purpose of creating a hostile working environment for the Claimant; alternatively did it have that effect?

206. The majority concludes that the conduct was done with the purpose of creating a hostile working environment for the Claimant. We consider that there is ample evidence that Mr Quane's purpose was to secure the removal of the Claimant from his team and, in the meantime, to create an environment for him, in which he felt marginalised, unsupported, singled out for criticism and undermined in the eyes of senior management.

207. We find support for our conclusion that this was Mr Quane's purpose in the following:

    207.1. he encouraged Mr Payne to complain about the Claimant on 10 January 2018 (para 89 above);

    207.2. he sought to have the Claimant removed from his team on 26 January 2018 by alleging that he was having a detrimental effect on the team (para 101 above);

    207.3. he encouraged Mr Payne to complain about the Claimant, while seeking to give management the impression that Mr Payne was acting independently of him (para 121 above);

    207.4. he copied the Claimant into an email in which he writes scathingly about him to the senior management team (also para 121 above);

    207.5. he offered to help HR link together different disciplinary concerns about the Claimant and asked if there was any further action he could take (para 122 above);

    207.6. he sought to exploit the opportunity that the parking incident presented, with a view to having the Claimant removed from his team (para 90 onwards).

208. Alternatively, the majority finds that Mr Quane's conduct had the effect of creating a hostile working environment for the Claimant. We conclude that, subjectively, he perceived the environment to be hostile. Viewed objectively, we consider that it was reasonable for the conduct to be regarded as having that effect. It is unsurprising that the Claimant felt vulnerable within the team, having regard to the way that Mr Quane was treating him.

209. Ms Long disagrees. On the balance of probabilities, she does not conclude that Mr Quane deliberately targeted the Claimant. Rather she considers that his approach to managing the Claimant was clumsy, heavy-handed and misguided.

<u>The application of the burden of proof: was there evidence from which the Tribunal could reasonably conclude that the conduct was related to race or religion?</u>

210. The Tribunal went on to consider whether there was evidence from which it could reasonably conclude that Mr Quane's conduct was related to race and/or religion. We unanimously found that there was such evidence, by reference to the first two factors set out below, which in themselves are sufficient to shift the burden of proof. In addition, the majority had regard to the third and fourth factors set out below.

    <u>Race</u>

210.1. Mr Quane's WhatsApp message 'PAKI'; his circulation of the image and caption 'I hate a cold Indian'; the image of men of Arabic appearance tying up a camel with the caption 'Khalid on holiday'; and the image of young Asian girls with facial hair with the caption saying that the Claimant's daughters resemble him. All are racially offensive and/or derogatory about non-white people and/or play on stereotypical images; one specifically relates to men of Arab origin.

Religion

210.2. Mr Quane's circulation of the images of veiled Muslim women with the caption relating it to the Claimant; and the image of Muslims offering prayers with the caption associating it with the Claimant's wedding. Both are both offensive and/or mocking images and comments, expressly referring to the Claimant's Muslim faith. We note that these images/messages were circulated by Mr Quane in late-2016 and mid-2017, i.e. in the period leading up to main group of allegations of unwanted conduct which we have found to have occurred.

Both race and religion

210.3. If an evasive answer in dealing with an allegation of discrimination can amount to the 'something more' which shifts the burden of proof, it follows that failing to provide an answer at all to allegations of discrimination must also be capable of shifting the burden. The best evidence as to why Mr Quane acted as he did would have been his own. The Respondent did not call him. Although we saw a letter from Mr Quane in which he asserted that he was not fit to attend the Tribunal hearing, the Respondent produced no medical evidence to support that assertion. Nor was a statement prepared on his behalf. There was no suggestion by the Respondent that he had not been fit to give instructions to the Respondent's legal representatives. There was no application by the Respondent to postpone the hearing to a date on which he might be fit to attend. The majority infers that the Respondent elected not to call him because it took the view that his evidence would not have assisted it in resisting these claims.

210.4. Nor did the Respondent call Mr Payne to give evidence. There was no suggestion that he was suffering from ill-health. The only explanation offered for his absence was that no specific allegations of discrimination were made against him. That did not prevent the Respondent from calling Mr Philpott or Mr Davey, against whom no allegations of discrimination were made. Mr Payne played a central role in a number of the disputed matters and it is likely that he would have been a valuable witness of fact, especially in the absence of Mr Quane. The majority infers again that the Respondent elected not to call Mr Payne because his evidence about Mr Quane would not have assisted it in resisting these claims.

211. With regard to the course of unwanted conduct by Mr Quane, which the Tribunal have found to be well-founded, we unanimously conclude that the

burden of proof shifts to the Respondent to show that it was in no sense whatsoever related to race or religion.

The majority conclusion: has the Respondent discharged the burden on it to show that Mr Quane's actions were not related to race or religion?

212. The majority takes the view that, the only person who can provide an adequate explanation for his own actions is Mr Quane. He did not attend to give evidence, nor did he provide a witness statement. Nor did the Respondent call Mr Payne, who worked closely with Mr Quane and might have been able to provide some insight into his motivation for acting as he did.

213. This leaves the Respondent in a difficult position. In the interests of justice, the Tribunal has considered such contemporaneous documents as were available. These were unsatisfactory and/or limited in scope. There is a short interview between Mr Hussain and Mr Quane regarding the tipper van incident but questions of race and religion were not touched on in that context. We have already found that there exist only bullet-point notes of Mr Quane's meeting with Mr Coates, in which the questions of race and religion were not raised. Mr Davey, who conducted the grievance appeal, did not meet Mr Quane at all. There was a later external investigation by Denise Claxton, prompted by the disclosure of the WhatsApp material, who reached her conclusions without meeting Mr Quane. The majority finds that the contemporaneous notes provide little assistance to Mr Quane.

214. In the absence of direct and convincing evidence from Mr Quane himself, the majority considers that the Respondent has not discharged the burden on it to show that his actions were in no sense whatsoever influenced by considerations of race or religion. Accordingly we conclude that these claims must succeed, subject to limitation issues.

215. If either of those conclusions are wrong, the majority has gone on to consider such explanation as has been advanced by the Respondent on Mr Quane's behalf, considering in particular Mr Milsom's clear and detailed closing submissions, which helpfully marshalled such evidence as was available to him. However, in each instance we find the explanation advanced to be unsatisfactory.

    215.1. With regard to the issuing of the verbal warning in October 2017 (*Issues 5(ix) and 5(x)*) the majority finds that there was no direct evidence before us of a requirement to sign in at the beginning of a break. Although we accept Mr Milsom's submission that there had been previous timekeeping issues in relation to the Claimant, these were different in kind and related to his starting work late or finishing early. On this occasion the Claimant was not late for work; at worst, he was late in recording the start time of his break. There was no evidence that any other member of the team had ever been disciplined for an offence of this sort, nor that Mr Quane acted as he did out of a concern for health and safety. Indeed, there was no evidence that Mr Quane took such matters at all seriously. On the contrary, Mr Hussain was critical of Mr Quane's attention to health and safety both at the time and in cross-examination before us. On

the balance of probabilities, we were not satisfied it was Mr Quane's true reason.

215.2. With regard to the PDR (*Issues 5(ii), (iii), (iv) and (xii)* we find that Mr Quane's comments in the PDR were critical in a highly personal way of the Claimant. There was no explanation as to why he did not conduct a meeting with the Claimant or why he instructed Mr Payne to hand the document to the Claimant. Such evidence of conduct matters which had arisen prior to the PDR, and which Mr Milsom drew our attention to in closing, were minor. They were not sufficient to justify comments such as these. In particular, we heard no evidence that his co-workers did not wish to work with him or that his body-language was poor. We are not satisfied that there was a non-discriminatory basis for these criticisms of the Claimant.

215.3. As for Mr Quane's emails concerning the stolen van (Issues 5(xvii) and (xviii)), we find that the Mr Quane's criticisms of the Claimant were wholly disproportionate and that he seized on the opportunity to seek to show the Claimant in a bad light. We reject Mr Milsom's submission that Mr Quane was 'entitled to express frustration in response' in response to the Claimant's conduct.

215.4. With regard to Mr Quane's involvement in the investigation into the parking permit issue (Issues 5(xix) and (xxiii), Mr Milsom deals only with the initial raising of the concern by Mr Quane; he could provide no explanation for Mr Quane's subsequent actions, including his part in the original PCN being issued by NSL and the zeal with which he then pursued the matter. We are not satisfied that Mr Quane's actions were in no sense whatsoever because of the Claimant's race or religion.

215.5. As for Mr Quane's failure to follow OH recommendations in February 2018 (Issue 5(xx)), Mr Milsom accepts that Mr Quane failed to approach the OHS report with any rigour but observes that the failure was not wholesale. Mr Coates suggested in evidence that the OH advice overlooked the fact that the source of the Claimant's stress was Mr Quane himself, which presented a unique difficulty. The majority disagrees. That is not sufficient explanation as to why Mr Quane did not act on the recommendations or, if he considered it inappropriate to do so himself, arrange for someone else to act on them on his behalf.

215.6. As for Mr Quane's raising with HR the Claimant's personal injury claim (Issue 5(xxviii)), Mr Milsom pointed to the inconsistency between the reports and the fact that the Claimant continued to work. This does not explain why Mr Quane presumed that there was dishonesty in play; nor does it explain why he raised those suspicions directly with HR, rather than first seeking clarification from the Claimant himself. Had he done so, the Claimant would have provided the explanation which we have accepted.

216. Accordingly, the majority concludes that the Respondent has not discharged the burden on it to show that the course of unwanted conduct by Mr Quane was in no sense whatsoever related to race or religion.

217. The majority goes further and finds, on the balance of probabilities, that such evidence as there was about Mr Quane's attitudes to matters of race and religion, as demonstrated by the images and texts which he circulated, are consistent with an adverse view of the Claimant which was related to his race and religion and we make a positive finding, on the balance of probabilities, that race and religion played a material part in Mr Quane's treatment of the Claimant in these respects.

<u>The minority conclusion: has the Respondent discharged the burden on it to show that Mr Quane's actions were not related to race or religion?</u>

218. With regard to these allegations, Ms Long concludes that the Respondent has provided a satisfactory explanation for Mr Quane's conduct.

219. In each instance, she is satisfied with the explanations advanced for Mr Quane's conduct by Mr Milsom in his written and oral closing submissions. In particular she finds considerable force in his argument that, in the seven years prior to the relevant period, the Claimant and Mr Quane appear to have had no difficulty working with each other. Yet, as Mr Milsom points out, during that time the Claimant's protected characteristics of race and religion were immutable.

220. She concludes that something must have changed around the time the material events began. Insofar as she has found that Mr Quane subjected the Claimant to unwanted conduct, she thinks it more likely than not that he did so solely because he resented the fact that the Claimant had challenged his authority over the PDR in November 2017. From then on, the Claimant was in his line of sight.

221. In particular, she notes the Claimant's own account at the meeting of 12 June 2018, in which he said:

> 'I challenged [Mr Quane] over the appraisal, he since then took it personally and has victimised me as a result. People are scared of Jimmy. Nobody will challenge him.'

222. She notes that, in the Claimant's own witness statement he identifies this incident as the 'starting point' of Mr Quane's alleged targeting of him (albeit wrongly dating the incident to July/August 2017) and that in the passage quoted above he himself provides a non-discriminatory reason for Mr Quane's treatment of him. She is also struck by the fact that he did not allege at the time of the incidents themselves that race or religion played any part in Mr Quane's treatment of him. In her view, the permit issue in particular was a serious offence and fully warranted the management action taken.

223. Accordingly, Ms Long is satisfied, on the balance of probabilities, that Mr Quane's actions were in no sense whatsoever related to/because of race or religion and she concludes that the Claimant's claims against Mr Quane of harassment and direct discrimination must fail at this stage.

**Conclusion: Mr Spenceley**

224. The Tribunal's conclusions with regard to Mr Spenceley are unanimous. We have already rejected a number of allegations against him on their facts.

224.1. Issue 5(xi) and (xiv), paras 66-69 above: Mr Spenceley's response to the Claimant raising concerns about Mr Quane with him in October and November 2017. The meetings did not occur as described by the Claimant: Mr Spenceley was not dismissive; he encouraged the Claimant to raise a grievance if he wished to.

224.2. Issue 5(xiii) and (xv): Mr Spenceley's response to the Claimant's sickness absence in November 2017 (paras 70-73 above). These were innocent letters which the Tribunal has found were for purely administrative, non-discriminatory purposes.

225. Three allegations remain.

225.1. Issue 5(xix): Mr Spenceley's decision to initiate a disciplinary in relation to the parking permit matter. The Tribunal finds that Mr Spenceley, on the basis of the information available to him at the time, was entitled to initiate an investigatory process. The Tribunal does not find that that Mr Spenceley shared Mr Quane's purpose (as found by the majority). He received the information which Mr Quane passed to him, took advice from HR as to whether the matter merited investigation and acted on that advice by instructing Mr Holecko to investigate. His approach was consistent with the view taken by Ms Barth of HR, who the Claimant accepted in cross-examination did not discriminate against him because of race or religion.

225.2. Issue 5(xxvii): Mr Spenceley's decision to notify the Claimant that a disciplinary investigation was to be initiated in relation to the tipper van incident. Again, we find that the reason why he did so was a non-discriminatory reason: he had been provided with information by Mr Quane which, on its face, suggested that there was a disciplinary matter which required investigation and which, if proven, could constitute gross misconduct. He duly appointed Mr Hussain to conduct that investigation. We are satisfied that neither race nor religion played any part in his decision.

225.3. Issue 5(xxix): Mr Spenceley's presenting the Claimant with a PCN at the meeting of 8 May 2018. We reject Ms Mallick's submission that the documentary material before Mr Spenceley was obviously flawed. On the contrary, we find that on its face it suggested that the Claimant might be guilty of misconduct. We agree with Mr Milsom that vehicle cloning would not immediately have suggested itself as a possible explanation. The Tribunal concludes that the existence of that material provides a non-discriminatory explanation as to why Mr Spenceley decided to raise the matter with the Claimant at the meeting. Although we have been critical of his failure to provide the Claimant with a copy of the PCN, that was not the way that this allegation was framed.

225.4. Issue 5(xxx): taking the Claimant off overtime and ECO duties. Mr Spenceley explained that he considered this appropriate as the Claimant was under investigation in relation to the suspected misuse

> of a company vehicle (the Dagenham PCN). Overtime and ECO required that the worker have access to a company vehicle to attend call-outs with another colleague. We find that the usual system was that both operatives took their vehicle home and both drove separately to the incident. It was not efficient for one to have to pick up the other. Until this matter was resolved he did not consider it appropriate to allow the Claimant to take a company vehicle home. Nor did he consider it appropriate to allow Claimant to use his private vehicle because it would not be properly insured. The Tribunal accepts that these were his reasons, that they were well-founded and that he took reasonable steps to mitigate the losses to the Claimant if the allegation was not upheld. His decision had nothing to do with race or religion.

226. For these reasons we reject the allegations of discrimination against Mr Spenceley.

**Conclusion: Mr Holecko**

227. The Tribunal has been critical in a number of respects of Mr Holecko's conduct of the investigation into the parking issues (Issues 5(xxiii) and (xxvi), above at para 90 onwards). In respect of the failure to investigate the material which the Claimant drew to his attention about parking infringements by other team members, Ms Mallick was able to point to a difference of race/religion and a difference of treatment, although there was arguably a material difference in circumstances in that Mr Holecko had been specifically tasked with investigating the Claimant, rather than conducting a general enquiry into parking infringements by employees more generally. In any event, the authorities are clear that a difference of race and treatment is not in itself sufficient to shift the burden of proof.

228. We asked ourselves whether there was 'something more' on the basis of which we could reasonably conclude that Mr Holecko's failings were related to/because of the Claimant's race or religion. We unanimously concluded that there was no such evidence. We find support for that conclusion in the fact that the Claimant himself declined to repeat the allegations of discrimination against Mr Holecko when given an opportunity to do so in cross-examination. We also remind ourselves that, at the point when Mr Holecko was investigating, the Claimant had not raised the possibility that considerations of race or religion were in play.

229. For these reasons we reject the allegations of discrimination against Mr Holecko.

**Conclusion: Ms Barth**

230. With regard to Issues 5(xxiv) and (xxv) at para 124-126 onwards (Ms Barth of HR making amendments to Mr Holecko's draft reports) the Claimant himself no longer suggests that she was influenced by considerations of race or religion. We reject these claims.

**Conclusion on victimisation: Mr Coates**

231. The protected act relied on by the Claimant was the making of his grievance on 27 April 2018. The claim of victimisation arising from that act is particularised at length in the agreed list of issues Issue 5(xxxi) and 9. We accept Mr Milsom's submission that some of the individual points identified in that list, and pursued in Ms Mallick's closing submissions, were not put to Mr Coates in cross-examination and we do not propose to deal with each of them here.

232. The substance of the allegation, as it was put in cross-examination, was that Mr Coates conducted an inadequate investigation, and then fashioned his findings, so as to avoid making findings of discrimination against Mr Quane, which he did not wish to make.

233. The Tribunal unanimously concludes that Mr Coates conducted an inadequate investigation, and one in which he did not investigate the discrimination aspect of the complaint properly or at all: he spoke only to witnesses identified by Mr Quane; he structured his investigation in such a way that Mr Quane was advantaged in dealing with the complaints against him; he did not investigate possible areas of comparison with the way others had/had not been treated; he did not question relevant witnesses as to whether their decisions were influenced by the Claimant's race or religion; he ignored that question altogether.

234. We further conclude that Mr Coates produced an inadequate report, in which he failed to deal with the Claimant's allegation that he had been subjected to unlawful discrimination.

235. We conclude that the inadequacy of the investigation and the avoidance in the outcome of a proper consideration of questions of discrimination subjected the Claimant to a detriment. He had raised serious complaints of discrimination to which his employer, in the person of Mr Coates, had given scant regard. He was entitled to feel (as he expresses in his witness statement at para 95) that 'no matter what I do to seek justice the management are not interested to offer me unbiased and fair process' [original format retained]. The grievance was, in the view of the majority, not unjustified, as will be apparent from our findings above.

<u>Majority conclusion on victimisation</u>

236. The majority applied the burden of proof provisions and asked itself whether there was evidence from which it could conclude that Mr Coates acted as he did because the Claimant had complained of discrimination. We concluded that there was.

    236.1. Mr Coates accepted in cross-examination that, having read the grievance, he was in no doubt that the Claimant was complaining about being discriminated against by Mr Quane because of his race and religion.

    236.2. He confirmed that he was familiar with the definitions of harassment and direct discrimination within the Respondent's policies.

    236.3. There is no evidence that he raised the question of discrimination with any of the employees he interviewed.

236.4. When the Claimant had identified an actual comparator (Mr Resina) in respect of the stolen van incident, Mr Coates interviewed him but did not raise that issue with him at all, focussing on other issues and relying on the explanation advanced by Mr Quane.

236.5. Mr Coates omitted any mention of discrimination, race or religion from the outcome letter and made only a single reference to it in passing in his report.

236.6. He was prepared to make findings adverse to Mr Quane, which were not findings of discrimination.

237. We have considered whether, as Mr Coates suggested in re-examination, his actions can be explained by lack of experience on his part. The majority finds that they cannot and we reject that explanation. His failure to engage with the Claimant's allegations of discrimination was so wholesale, his avoidance in his outcome of the language of discrimination or the key concepts with which he was familiar, so consistent, that we conclude that it must have been deliberate. We accept Ms Mallick's submission that he wished to avoid upholding allegations of discrimination against Mr Quane, although he was willing to uphold allegations on other bases.

238. Consequently, the majority concludes that the claim of victimisation is well-founded.

Minority conclusion on victimisation

239. Ms Long disagrees. While she shares the majority's view as to the inadequacy of Mr Coates's approach to the grievance, she is persuaded that the sole reason for his failure to deal with the grievance competently was his lack of experience and competence in dealing with grievances. She is satisfied that this is the 'reason why' he acted as he did. She accepts Mr Milsom's submission that Mr Coates would have dealt with any serious grievance, absent reference to a contravention under the Equality Act, in exactly the same way as he did. Because she is able to reach these positive conclusions, the burden of proof provisions do not come into play.

**Mr Coates: harassment and direct discrimination**

Majority conclusion on harassment and direct discrimination

240. As the majority has upheld the claim of victimisation, we do not go on to consider the Claimant's claims of harassment in relation to the same matters, as s.212(A) EqA provides that such claims are mutually exclusive.

241. As for the claim of direct discrimination, although it is right that the Claimant would not have complained of race or religious discrimination but for the fact that he was Moroccan and Muslim, the 'because of' test in direct discrimination is not a 'but for' test, it is a 'reason why' test. The majority has concluded that the reason why Mr Coates acted as he did was because the Claimant complained of race/religious discrimination and Mr Coates did not want to uphold those complaints (which we have already found amounted to victimisation), not because the Claimant was Moroccan or Muslim.

Minority conclusion on harassment and direct discrimination

242. Having not upheld the victimisation claim, Ms Long went on to consider whether Mr Coates's failure to conduct an adequate investigation and to produce an adequate report were acts of harassment or direct discrimination.

243. She rejects those claims. Although she acknowledges that Ms Mallick identified some arguable differences in treatment, for example the fact that Mr Coates disclosed the Claimant's grievance to Mr Quane on request, whereas the Claimant was not provided with the Dagenham PCN when he requested it, she concludes that there are material differences in circumstance, most obviously the fact that Mr Coates had no involvement in the PCN matter.

244. Moreover, she considers there is no evidence from which she could reasonably conclude that Mr Coates conduct was because of or related to the Claimant's race or religion and accordingly the Claimant has not discharged the burden on him to make out a *prima facie* case of discrimination.

**Conclusion: time limits**

245. The allegations in relation to events after 8 July 2018, including those relating to Mr Coates' investigation and report, are in time.

246. The allegations against Mr Quane which we have upheld, the last of which (the email to HR about the road traffic accident) occurred on 12 April 2018, are all out of time.

247. The majority finds that all the matters in respect of which we have found unwanted conduct by Mr Quane, amounted to 'conduct extending over a period'. The 'ongoing state of affairs' (to use the language of *Hendricks*) was Mr Quane's treatment of the Claimant, whether influenced by his adverse view of the Claimant's race and religion (as the majority finds) or by his resentment of the Claimant's challenging his authority (as the minority finds).

248. The Tribunal then considered whether it was just and equitable to extend time to deal with the Claimant's complaints from the end-point of that conduct and unanimously concluded that it was.

249. In support of that conclusion we have regard to the fact that the Claimant sought to resolve matters internally. He lodged a grievance on 27 April 2018. Mr Coates was not appointed to investigate until a month later and his outcome not provided until 14 September 2018. Although an attempt to resolve matters internally does not automatically provide grounds for an extension of time, it is a factor to which we may have regard. In this case we find that it is a compelling factor, given the very considerable delay of some five months in the Respondent's handling of the grievance.

250. On the other hand, we have taken into account the fact that the Claimant had trade union representation throughout and, consequently, must be taken to have known about the applicable time limits.

251. We have also had regard to the fact that there were a number of emails between management during the period, including emails from Mr Quane and in particular the email of 12 April 2018 referred to above, which were only disclosed to the Claimant after a Subject Access Request made on 21 June 2018. Although we were not given a precise date on which the disclosure was

made, we infer that it was after 8 July 2018. It was not until he saw that material that the Claimant's suspicions as to how Mr Quane was conducting himself behind the scenes could be evidenced.

252. Turning to the balance of prejudice, we conclude that the prejudice to the Claimant of his claims not being heard by the Tribunal would be very substantial indeed, especially having regard to the fact that the majority regard them as meritorious. As for prejudice to the Respondent, no submissions were made identifying specific prejudice arising out of the Claimant's delay in issuing proceedings. The delay (of just under three months) was significant but not so substantial as to give rise to a risk of the evidence deteriorating. The difficulties which the Respondent has encountered in defending these proceedings are largely as a result of its own approach: it elected not to raise the statutory defence until the eleventh hour; it elected not call Mr Quane (or Mr Payne) to give evidence; no reliance was placed by the Respondent on Mr Quane's ill-health as a reason for his absence; and there was no application for a postponement on those grounds.

253. In all the circumstances, and weighing in balance all these factors, the Tribunal unanimously concludes that it is just and equitable to extend time and we accept jurisdiction in respect of all the Claimant's claims.

**The Claimant's credibility**

254. In reaching our different conclusions on a number of issues, the majority and minority have been influenced in part by their different views as to the Claimant's credibility.

255. The Tribunal unanimously finds that the Claimant has lied about a number of matters, both at the time and before the Tribunal: about accidentally throwing the permit into the van; about not sending pornography in the WhatsApp group; and as to when he discovered the image of the Muslim schoolgirls.

256. For Ms Long these lies have fundamentally undermined the Claimant's credibility in her eyes. She has concluded that she can have little or no confidence in the way he has chosen to advance his case.

257. Despite their reservations, the Judge and Mrs Berry have concluded that the Claimant was truthful in the majority of his evidence and do not consider that these matters fundamentally undermine his credibility.

**Remedy**

258. There will be a remedy hearing to determine the amount of compensation to which the Claimant should be entitled. By no later than 9 December 2019, the parties shall provide their dates to avoid from February 2020 onwards, for a one-day remedies hearing. The hearing will then be listed and directions given. If the parties consider that one day (to include deliberation, but not judgment) is not sufficient, they must state their reasons.

_____
Employment Judge Massarella
Date: 2 December 2019