THE EMPLOYMENT TRIBUNALS

Claimant: **Mr H Bouheniche**

Respondent: **Commissioners for Her Majesty's Revenue & Customs**

Heard at: **North Shields Hearing Centre** **On:** **9, 12, 13 & 14 August 2019**
Deliberations in Chambers 1 October 2019

Before: **Employment Judge Shore**

Lay Members: **Mrs L Jackson**
Mr P Curtis

Representation:

Claimant: **In Person**
Respondent: **Mr A Crammond (Counsel)**

RESERVED JUDGMENT

1. The claimant's claim of direct disability discrimination contrary to section 13 Equality Act 2010 ("EqA") fails.

2. The claimant's claim of discrimination arising from disability contrary to section 15 EqA fails.

3. The claimant's claim of direct race discrimination contrary to section 13 EqA fails.

4. The claimant's claim of victimisation contrary to section 27 EqA fails.

5. The claimant's claim of harassment related to the protected characteristic of disability fails.

6. The claimant's claim of unlawful deduction from wages contrary to section 13 Employment Rights Act 1996 ("ERA") is dismissed upon withdrawal.

7. The claimant's claim of failure to pay holiday pay contrary to regulation 13 of the Working Time Regulations 1998 fails as the claim was not brought within the

relevant time limit and the claimant did not show that it was not reasonably practicable to have brought the claim in time.

REASONS

1. At all material times the claimant was and remains employed by the respondent. By a claim presented to the tribunal on 9 November 2018 the claimant brought claims of disability discrimination, race discrimination, unauthorised deduction of wages and failure to pay holiday pay as set out in more detail below. For his disability discrimination claims, the claimant stated that his physical impairment was cancer. It was accepted by the respondent that the claimant was a disabled person as defined by section 6 EqA at all material times.

2. The claims were the subject of a private preliminary hearing before Employment Judge Shepherd on 30 January 2019 at which the claimant was ordered to provide further information about his claim. That information was provided and a further private preliminary hearing was heard before Employment Judge Johnson on 9 April 2019.

3. At the end of the fourth day of the trial on 14 August 2019, I converted the hearing into a private preliminary hearing at which orders were made for the provision of written closing submissions by both parties.

4. Shortly after submitting his closing submissions, the claimant made application for the evidence to be reopened and/or for the tribunal to consider four documents which had not been produced at the hearing. I heard the application on 4 September 2019 in a telephone preliminary hearing. I refused the application to reopen the evidence, but agreed that the panel would consider the four documents and allocate weight to them as was appropriate in all the circumstances.

5. The panel met on 1 October 2019 to consider its decision.

CLAIMS

6. The claimant's claim of direct disability discrimination was that he was treated less favourably when the respondent refused his request for flexible working.

7. His claim of discrimination arising from disability also arose from the respondent's rejection of this flexible working request.

8. The claimant's allegation of direct race discrimination was that because of his race (being of Berber origin), the respondent denied the claimant the opportunity to work on its complaints team.

9. The claimant's claims of victimisation were that he did a protected act on 16 July 2018 and, as a result, was subjected to the following detriments:

    9.1 He was subjected to disciplinary proceedings and received a first written warning on 20 June 2018 for sickness absence;

9.2 He was subjected to a separate disciplinary process on 28 September 2018 for misconduct;

9.3 He was removed from the missing documents team and assigned to unprocessed circumstances team in or around first week of June 2018;

9.4 The claimant's line manager was reluctant to allow the claimant to take disability adjustment leave on 30 May 2018; 26 June 2018; 13 July 2018; 14 August 2018; 15 August 2018; 16 August 2018;

9.5 The claimant's line manager refused to contact human resources regarding the claimant's concerns of pay discrepancy on 3 May 2018; 21 May 2018 and 5 June 2018;

9.6 The claimant's grievance of 1 October 2018 was ignored by the respondent.

10. The claimant's claim of harassment related to the protected characteristic of disability were:

10.1 The claimant's line manager held daily meetings with him on 21 May 2018;

10.2 The claimant's line manager compelled the claimant to undertake an IT training course on 12 July 2018 when he was not fit enough to do so.;

10.3 The claimant's line manager responded sarcastically to the claimant on 12 July 2018 asking him what he thought would happen if his manager asked him to do a task and he had said what the claimant had just said to the line manager;

10.4 The respondent unfairly assessed the claimant's work without taking into account his disability or the fact that it was impossible to achieve a good target of productivity on the task that he was assigned to.

11. The claimant's unlawful deduction of wages claim related to an alleged deduction by reducing his pay to half pay on 31 October 201 and nil pay on 13 April 2018 when he was on sick leave.

12. The claimant's holiday pay claim related to holiday pay that he had accrued whilst on sick leave which was then lost under the respondent's holiday pay policy.

ISSUES

13. The respondent had produced a draft list of issues for the private preliminary hearing before Employment Judge Johnson on 9 April 2019. The issues were not finalised at that hearing and a revised draft list of issues was produced on the first day that the parties attended the hearing (12 August 2019). We spent some time going through the issues after explaining to the claimant that 'issues' are questions to which the tribunal has to find answers and form the framework upon

which the tribunal conducted the hearing. After discussion with the parties, it was agreed that the issues in this case were:-

13.1 Did the respondent ("R") treat the claimant ("C") less favourably because of his disability? Specifically, did R refuse C's request for flexible working because he suffers from cancer?

13.2 Was this less favourable than the manner in which R treated other members of C's team and/or a hypothetical comparator?

13.3 Did R's rejection of C's flexible working request constitute unfavourable treatment? If so, was C treated in this way because of something arising from his disability?

13.4 Has R shown that the above treatment was a proportionate means of achieving a legitimate aim?

13.4 Has R shown that its legitimate aim was to ensure operational effectiveness and efficiency of its operation, ensuring its ability to meet customer demands and ensuring a practicable working environment?

13.5 Was it proportionate using the following aims:-

13.5.1 It sought to apply its policies to C in a fair manner taking into account his representations;

13.5.2 It provided C with the option of changing his start and finish time so he could take a bus home;

13.5.3 It provided C with the option of flexible working as soon as this became available, when he moved teams.

13.6 Did R treat C less favourably because of his race, being "non-white and non-British"? Specifically did R deny C the opportunity to work on the complaints team in or around the second week of June 2018 because he was "non-white and non-British"?

13.7 Was this less favourable than the manner in which R treated other members of C's team and/or a hypothetical comparator?

13.8 Was C subjected to the following detriments following his informal complaint of 16 July 2018 (the protected act):

13.8.1 being subjected to disciplinary proceedings and receiving a first written warning on 20 June 2018 for sickness absence;

13.8.2 being subjected to a separate disciplinary process on 28 September 2018 for misconduct;

13.8.3 being removed from the missing documents team and assigned to the unprocessed circumstances team in or around the first week of June 2018;

13.8.4 C's line manager being reluctant to allow C to take disability adjustment leave (DAL) on the following dates:-

30 May 2018;
26 June 2018;
13 July 2018;
14 August 2018;
15 August 2015, and;
16 August 2018.

13.8.5 C's line manager refusing to contact HR regarding C's concerns over a pay discrepancy on 3 May 2018, 21 May 2018 and 5 June 2018, and;

13.8.6 C's grievance of 1 October 2018 was ignored by R.

13.9 Did R subject C to the following unwanted conduct:

13.9.1 Did C's line manager hold daily meetings with him that started on or around 21 May 2018?

13.9.2 Did C's line manager compel C to undertake an IT training course on 12 July 2018 when C was not fit enough to do so?

13.9.3 Did C explain that he was not fit enough to undertake the task above and did C's line manager respond in a sarcastic manner, saying "what do you think would happen if my manager asked me to do a task and I said what you just said to me"?

13.9.4 Did R unfairly assess C's work without taking into account his disability or the fact that it was impossible to achieve a good target of productivity on the task he was working on?

13.10 Did the conduct relate to C's disability?

13.11 Did the above conduct have the purpose or effect of violating C's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for C? Does it amount to harassment when applying the test in section 26(4) EqA?

13.12 Has R made an unauthorised deduction from C's wages by reducing his pay to half pay on 31 October 2017 and nil pay on 13 April 2018 whilst C was on sick leave?

13.13 If so, did C signify his agreement in writing to such deduction by signing his employment contract and agreeing to be bound by R's sick pay policy?

13.14 Does the tribunal have jurisdiction to hear the claimant's claim for holiday pay or was it presented out of time?

13.15 If so, was it reasonably practicable for the claim to be presented in time?

13.16 What was C's entitlement to holiday pay?

13.17 Is there a balance of untaken holiday due to the claimant?

13.18 Was all approved holiday not taken by the claimant by 1 October 2018 lost?

13.19 What injury to feelings award (if any) is C entitled to by reason of any discriminatory treatment?

13.20 Is C entitled to a declaration, and (if so) in what terms?

HOUSEKEEPING AND CASE MANAGEMENT

14. At all times, the panel was mindful of the fact that the claimant is a litigant in person who has cancer. We also kept in our minds the overriding objective to achieve a just and fair hearing and the requirement to ensure that the parties were on an equal footing, that matters were dealt with proportionately, that we dealt with matters informally wherever possible and that we avoided waste of time and costs.

15. I went through the overriding objective and the five factors to be considered with the claimant, who said that he understood them.

16. At a number of times in the hearing, we made allowances for the fact that the claimant is a litigant in person. He was encouraged to raise questions if he didn't understand any issues of law or procedure that were being discussed or any action taken by the panel. He was not afraid to raise questions or to challenge the decisions of the panel and the conduct of Mr Crammond for the respondent. We made a number of allowances in terms of procedure for the claimant which may not have been made for a qualified representative. These included giving him time to produce documents which were not before the tribunal, allowing him to resume cross examination of Mr Barratt, after he had closed his cross examination and had thought about matters overnight, and allowing him to make written final closing submissions rather than requiring him to make oral submissions at the end of the evidence on the fourth day of the hearing.

17. Whilst we did make allowances for the claimant's status, we also kept in mind that there is extensive guidance available on tribunal process and procedure on the tribunal's website, on the ACAS website and by using search engines to source information and materials. We also noted that the claimant had been a member

of the PCS union and had not told us that he had ended his union membership. He referred to having conversations with and seeking advice from his trade union representative during the periods he was pursuing grievances with the respondent and was the subject of disciplinary proceedings.

18. After we had introduced ourselves to the parties, we discussed the claimant's claims and he confirmed that he wished to withdraw his claim for unauthorised deduction from wages. I indicated that we would mark that claim as having been dismissed upon withdrawal. The claimant confirmed that he still had a claim for holiday pay. Mr Crammond correctly pointed out that as the claimant was still employed by the respondent, could not make a breach of contract claim. He also submitted that the claimant had accrued holiday pay whilst he had been off sick for a year between 2017 and 2018 and that his accrued holiday pay should have been taken by 1 October 2018. It was therefore submitted that the claimant's claim for holiday pay was out of time. Mr Bouheniche submitted that there was a European case that said that holiday pay was still due.

19. We then entered into a long discussion which was revisited on a number of occasions during the hearing and subsequently. The claimant said that some of the documents that were in the bundle were irrelevant and requested that they be removed. He also handed up a letter dated 7 August 2019 that said that he had completely forgotten to include the loss of his annual leave in his witness statement. The letter also confirmed that he didn't wish to pursue his claim for non-payment of sick pay (unauthorised deduction of wages.

20. The letter also mentioned another letter that he was supposed to have received in 2017.

21. His basic submission on the documents that he wanted to be removed was that they pre-dated the facts he relied on in his claim and were therefore irrelevant.

22. On the basis that the claimant had not made application for the removal of any documents prior to the first day that he had attended the hearing and that we could not see that removing the documents would assist the tribunal making a just and fair decision, we refused the application. I indicated to the claimant that he would be allowed to give evidence about holiday pay verbally. I asked the claimant if he required any adjustments to be made because of his disability and he indicated that he got tired in the afternoon. I indicated that we would accommodate the claimant if he said he was too tired to continue. I and my colleagues all made notes of the discussions, submissions and evidence given in the hearing. I have not reproduced verbatim notes of the hearing in his decision. I have only included those matters that directly relate to our task in making findings of fact and applying the facts to the law and agreed issues.

23. The claimant's evidence in chief was contained in a witness statement consisting of four pages and ten paragraphs. The relevant parts of his witness evidence were that he is a naturalised British citizen, originally of Berber ethnicity. He has worked for the respondent as an administrative officer since September 2011, the first four years of which were worked under a temporary contract on twilight hours

(16:00 to 21:00). His position became permanent in 2016 and his working hours increased to 13:00 to 21:00.

24. He has had blood cancer since 2014, and at the end of April 2017 fell ill with a cancer of the colon. He said that he was discriminated against because of his disability and he was denied the opportunity to work flexible hours that most of the rest of his team and most of the respondent's staff had been granted. He was subjected to racial discrimination when he was denied the opportunity to work on the complaints task, which had been agreed prior to him joining Michael Barratt's team. His witness statement said he suffered victimisation and harassment and both resulted from complaining of disability discrimination.

25. The claimant said that he was absent from work due to colon cancer for exactly a year from 3 May 2017 to 3 May 2018. In his absence the identity of his manager had changed and, on his return, he had met Michael Barratt, his new manager, who had also managed his sickness absence.

26. The claimant said that on the morning of 3 May 2018, Mr Barratt asked him which shift pattern he wanted to work. The claimant said that he replied that he wanted to work 11:00 to 19:00. He wanted those hours because the buses are not reliable and he did not want to be late and get himself into trouble. It was confirmed that he would return to work on a phased return. Mr Barratt told him that he would be starting on the missing documents team before moving on to a complaints task. The claimant said that he mentioned that he hadn't been paid for his last two weeks of SSP in April and said that Mr Barratt said that he would look into that for him. Mr Barratt told him that he was entitled to work flexible hours. Mr Barratt then went on paternity leave.

27. The claimant said that about two weeks after his return from paternity leave, he mentioned flexible working to Mr Barratt, who said that he did not qualify and that he had to earn it first. The claimant approached his union representative, who said that he would look into the issue.

28. He said that a meeting on 5 June 2018 he brought up the issue of flexible working and said that as a direct result of that meeting, he received a first written improvement warning, which he described as a formal disciplinary action for being on sick leave with cancer. He said that Mr Barratt justified his actions by saying that the claimant had not provided any evidence of appointments and no treatment plans during his absence and had not adhered to the keeping in touch process.

29. The claimant said that on 8 June 2018, he was removed from the missing documents team without any notice and was told that it was because he did not get on with two other staff working on the same task. He was told that he would move to a team that processed change of circumstances details for customers.

30. He said he felt isolated by being removed from missing documents. His statement said that he was victimised by Mr Barratt, who was reluctant to allow him paid leave to attend medical appointments linked to a disability (known as

'DAL') and to attend medical appointments generally. No details of dates or any detail of any conversations were given by the claimant in his statement.

31. He said that from the middle of May 2018 to the middle of July 2018, he was approached by Mr Barratt almost daily for "a little chat". During the meetings he said he was asked to "repeat over and over" things that he had already told his manager. He also said that his work was unfairly assessed by his manager, who would not tell him the grade of the assessor who was critical of his work. He was also pressured to taking up training when he did not feel well enough or capable of doing so. When he told his manager this, he said that Mr Barratt dismissively smirked sarcastically and said "what do you think my manager would say or do if he asked me to do a task and I said what you just said to me?"

32. The claimant said that almost all of the HMRC staff were on flexible working hours except himself and the other part-time recruits who were working twilight hours.

33. The claimant was cross-examined carefully and thoroughly by Mr Crammond who, in our opinion, did not go anywhere near crossing the line into what could be called unreasonable or oppressive conduct at any time. Mr Crammond's first question related to the further details of his claim that the claimant had given a response to the order of Employment Judge Shepherd.

34. In paragraph 4.8 of his response to the order to provide further details of his claim [39] he had said that "the unwanted harassment was not always related to my disability but it does often relate to my disability and does affect directly my poor health condition." Mr Crammond asked if it was just general harassment and not a complaint of disability discrimination. The claimant replied "yes".

35. Mr Crammond went from that starting point to try and go through the list of issues with the claimant to establish which of his claims were of general harassment but were not related to disability. The claimant did not understand what he was being asked to do, so I gave a long explanation as to what Mr Crammond was asking and what information he was seeking to obtain. Whilst the claimant said he understood the nature and purpose of the questions, he said that he would not agree that the allegation that Mr Barratt held daily meetings was not an allegation solely related to disability, because he couldn't remember when the meetings had started. As a general point, he said that most of the allegations related to disability and the rest were to do with the work. He said that the allegation that Mr Barratt compelled the claimant to undertake an IT training course on 12 July 2018, when he was not fit enough to do so, was absolutely not an allegation of general harassment. He also said that the allegations that Mr Barratt responded to him in a sarcastic manner when he said he wasn't able to undertake an IT training course and that the respondent unfairly assessed his work without taking into account his disability were both related to his disability. The claimant was asked about the seeming inconsistency between what he had just said and the information he had produced at page 39 of the bundle. He gave no response.

36. The claimant confirmed that the basis of his victimisation complaint was his e-mail of 16 July 2018 to Gary Forster [290]. It was put to him that in the list of issues, there were six dates that were put as occasions when Mr Barratt had been

reluctant to allow the claimant to take DAL. First of these was on 13 May 2018, which pre-dated the e-mail 16 July 2018. It was therefore suggested to the claimant that he couldn't make out a case of victimisation when the act of victimisation was before the protected act. When Mr Crammond put the point in those terms to the claimant, his response was that it was "improbable".

37. The claimant accepted that he was removed from the missing documents team on 1 June 2018 and accepted that it looked like that could not be an allegation of victimisation either because of the timing. It was also put to him that allegations of Mr Barratt being reluctant to allow him to take disability adjustment leave (DAL) on 26 June and 13 July also could not be victimisation because of the timing of the protected act. The claimant accepted that view.

38. It was then put him that his allegations that Mr Barratt had refused to contact HR regarding his concerns over a pay discrepancy on 3 May 2018, 21 May 2018 and 5 June 2018 also could not be victimisation. He agreed.

39. The claimant also said that whilst he had submitted a formal grievance on 1 October 2018, his three-line e-mail of 16 July 2018 was ignored.

40. The claimant was asked if he accepted that victimisation was not made out and that he wasn't pushing them. His response was "Yes, I don't see why I can proceed".

41. We then had a long exchange regarding the claimant's contract of employment. We found the claimant's evidence to be evasive. The best example of this was that he accepted that it was his signature on the document [58x], but he didn't accept he'd received the document.

42. Mr Crammond then started to ask the claimant about the history of his sickness absence between May 2017 and May 2018. He was unhappy about the documents that were in the bundle and said he'd complained to the respondent's representative that if they were going to use e-mails, he wanted his to be included. Mr Crammond said that it was accepted that the claimant had complained about the contents of the bundle, but that the respondent had included all the documents that the claimant had requested in the agreed bundle for the hearing. In response, the claimant said that he had complained to the employment tribunal about the issue of the bundle, but had been ignored. I looked at the tribunal file to see if I could find the correspondence that was being referred to. After a few minutes, the claimant backtracked from his stated position after I had gone through the employment tribunal file and had been unable to find any e-mails from him complaining about the contents of the bundle.

43. At that point, the claimant said that he hadn't written to the employment tribunal about the issue. After more discussion, the claimant again referred to e-mails he had sent. I asked him where they were. He said that he had not brought them because they pre-dated his claim. We took a break to enable the claimant to have a rest and to consider whether he wished to withdraw any parts of his claim. He indicated that he wished to withdraw the allegations of victimisation on the basis that he had been subjected to disciplinary proceedings and received a first

written warning on 20 June for sickness absence, that he was removed from the missing documents team on 1 June 2018 and that Mr Barratt been reluctant to allow him to take DAL on 13 May 2018 and 26 June 2018. He also confirmed again that he wished to withdraw the claim of unauthorised deduction of wages.

44. The claimant was then taken to a series of e-mails he had written to Mr Barratt [81], [149] and [181] in which he had denied using unprofessional and rude language towards Mr Barratt.

45. The claimant was then taken to the return to work interview dated 3 May 2018 that took place with Jill Baker. The notes recorded that the claimant was unsure about his phased return, what had been agreed, and what tasks he would be doing. He said that this note was not true. He hadn't said he was 'unsure'. He didn't say that he would continue to do complaints.

46. He accepted that he hadn't previously worked on the complaints team. He accepted that the respondent could place him wherever it liked, but that it had been implicitly agreed that he would join the complaints team.

47. He did not accept that complaints was difficult work, but did agree that you needed to have a good grasp of tax to do the work, but that that fact that he had no knowledge or experience would not make the task difficult for him.

48. The claimant said that he didn't know that Michael Barratt managed the missing documents team to which he was allocated on his return, as well as the complaints team.

49. He was then taken to the meeting on 5 June 2018 with Michael Barratt where he was represented by his union representative, Tim Coxon. The meeting was a formal unsatisfactory attendance meeting. It was put to him that the record of the meeting showed that the claimant had said that he was currently improving his knowledge of the task and would be able to work independently going forward. The claimant accepted that he would have to be flexible on the type of tasks worked going forward and that he was happy. However, he said his agreement to 'be flexible' was only his agreement to be flexible on hours. I did not feel that the claimant's oral evidence was consistent with what had been recorded in the minutes, so I read out the following extract from the minutes: "MB said that HB may have to flexible on the type of tasks worked going forward and HB accepted this." The claimant did not agree with my suggestion that the minutes of the meeting were inconsistent with what he had just said, and said that the quotation I had just read was only about flexible hours and not about the type of work.

50. The claimant was then taken to page 263, which was the discussion between him and Mr Barratt on 8 June 2018 about the claimant's behaviours with the two colleagues who were training him. The notes record that two colleagues, LT and SM, were training the claimant on missing documents and that LT had indicated to Mr Barratt that SM was feeling stressed by training the claimant. A decision was made by Mr Barratt and his line manager, Sophie Storey, that they would take the claimant off the missing documents task. It was put the claimant that the notes

record that he wasn't taking feedback. He denied this. He denied that he wasn't performing very well and demanded to see proof on both allegations.

51. The claimant said that he had had no conversation with Mr Barratt at all. He had just come in and was told he was no longer in the missing documents team because they didn't on with him. He had never seen the note at page 262 previously and disputed that there was any discussion about performance and denied that it was reasonable to have such a discussion.

52. We then turned to the issue of flexible working. The claimant accepted that he made two informal verbal requests for flexible working. He said that he had seen the flexible working policy and, specifically, had seen page 520 of the bundle that set out details of how to apply, which included a requirement to apply in writing and details of the six specific issues that had to be covered in the written application. It was suggested to the claimant that he had not complied with any of the procedural requirements of the policy, but despite that, when he had raised it informally, Mr Barratt had raised the matter with management. The claimant said that that was not correct. He said that he was on a twilight contract. When it was put to him that there were sixty people on such contracts at his place of work, he said he did not know. He did say, however, that it was not true that twilight workers were not allowed flexi and that it was rubbish to suggest that all twilight workers could not be accommodated if flexi was given. It was a lie.

53. It was put to the claimant that Mr Barratt had denied all flexi requests for the twilight team and that two colleagues were happily working that pattern. The claimant said that it was agreed that he would work 11:00 to 7:00 and that the change had been made to assist him to get a bus home. It was put to him that he couldn't start earlier than 11:00, but responded that buses were not always reliable. He did accept that he wanted to finish at 7:00 so he could get a bus. He was asked if there were any other hours he could have worked and said there were, but gave no details of what those hours might be.

54. It was put to the claimant that when the accommodation situation eased at the office he was granted flexi. The claimant said that there was never any pressure on accommodation. It was put to the claimant that there was nothing about his flexi requests that was to do with his disability or his race. His response was that it was to do with health and that it was obvious that that was the case. He asserted that he had been told by Mr Barratt that he had to earn flexi time. He linked the refusal of his request for flexi time to his cancer, because he needed flexi because he had very bad health. When it got very, very bad he needed to go home. People with no health issues were allowed flexi but he was denied. I asked the claimant what it was that he wanted. His response was that he wanted to be able to go home when he was too ill to work. It was put to him by Mr Crammond that if that was the case, he would be unfit to work and would be able to leave anyway. His claim was that it was refused because he is a cancer sufferer and/or that the refusal arose from his disability. The claimant said that it was connected because he wanted it and couldn't have it. I asked the claimant if he could give me the name of anyone on the twilight team who was given flexi. He said that Julie Connolly was given flexi and added that "hundreds" were given

it. He then changed the number to "dozens" who worked one to nine. He accepted that Julie Connolly was the first person he had named as a comparator.

55. In answer to another question from Mr Crammond, the claimant said that colleagues changed to daytime shifts from twilight shifts and got flexi hours. It was put to him that that was what happened to him. He denied this at first, but then agreed that this was correct. He was challenged on the question of whether Julie Connolly had been given flexi, but maintained his position.

56. Mr Crammond then moved on to DAL and suggested that this had been requested on a couple of occasions. The claimant agreed and said he couldn't remember all the dates. It was put to the claimant that his complaint was that he was not granted DAL without proof of appointments. DAL had never been refused. The claimant said that they were the same matter and that he had to show evidence of appointments. There were times when he had been refused for not providing proof but once he had provided proof he had got DAL. He was referred to pages 280 to 282 of the notes, which was a record of a discussion between the claimant and Mr Barratt on 6 July 2018. DAL was discussed at some length. The claimant said that he had never seen these notes and didn't recall this conversation at all. He disputed how these notes could now be produced.

57. It was put to him that the notes showed that he had asked for DAL and Mr Barratt had asked for proof of appointments. The claimant's response was "no". As a finding of fact, the notes clearly indicate that Mr Barratt talked to the claimant about the requirement to show letters confirming where appointments are before DAL is granted.

58. The claimant then engaged me in a discussion about the documents in the bundle. He said that some of the e-mails produced by the respondent in its bundle pre-date his claim and that I hadn't explained this. He said that the note at page at 280 was concocted and why was the tribunal accepting that the note existed.

59. I tried to explain to the claimant that I had already explained why I was allowing e-mails which pre-dated his claim to be included in the bundle. I also explained why we could not just ignore the document, just because he said that we should.

60. Returning to cross-examination, the claimant said that he had had three discussions about DAL with Mr Barratt and that one of them would have been on 6 July 2018. However, he disagreed that the note at page 280 was accurate. He did not recall becoming angry at the meeting and denied that he lent in towards Mr Barratt shaking his head and hand at him. He accepted that he was sent an e-mail on 13 July 2018 by Mr Barratt [284] that attached the DAL policy with the words "Hocine, as discussed the other day, please see the attached guidance with regard to DAL." The claimant said that the problem that Mr Crammond was missing was that, at that time, he couldn't provide the proof for an appointment. He had to go to A&E where they didn't give you an appointment. He was asked if the appointment they were discussing was pre-planned to which the claimant said "sometimes".

61. It was put to the claimant that Mr Barratt was only asking him to follow procedure. The claimant's response was that he was not aware of it. He said that he had had DAL after his cancer in 2014 and had never had to apply for it. His manager just let him go when he told them. When he moved to this team, there were times when he couldn't provide proof. I was then taken to page 277 which was a note of a meeting between him and Sophie Storey, Jill Baker and him on 27 June 2018. The note of the meeting recorded that the claimant was still annoyed that he was "entitled" to DAL. The claimant said that he didn't recall this and that the note wasn't accurate. It was put to him that Sophie Storey had given him a copy of the DAL guidance. The response of the claimant was that "she might have". He said that this meeting was after he had met with Mr Barratt. I should note that there was a matter of fact 27 June 2016 (the date of the meeting with Sophie Storey and Jill Baker) pre-dated 8 July 2018 (the date of the meeting with Mr Barratt). It was put to the claimant that he was asking for the day before an appointment off as DAL and that he had never provided the letter covering the day before the appointment. His response was that there was nothing to provide.

62. Mr Crammond then moved to the issue following at the meeting on 12 July 2018, which was listed as an act of harassment. It was put to him that he was never compelled or required to take an IT course and that he hadn't taken the course in any event. Eventually, the claimant said that he had not been compelled. I asked the claimant what his complaint was and he said that Mr Barratt had pressured him to take an IT course when he was not well enough or fit enough and that he hadn't done the course.

63. He was taken to page 281 of the bundle which was Mr Barratt's note of his meeting with the claimant on 12 July 2018. He was asked if he accepted that there was a discussion about a performance improvement plan (PIP) on 12 July 2018 about the claimant's performance and IT skills. His response was "probably". He was asked if he had agreed that if a manager sees a skills deficiency, they can suggest a PIP. The claimant's response was that in HMRC, PIP was used for punishment. He didn't accept he'd been making numerous quality errors and that his IT skills were a concern to managers. He absolutely did not accept that PIP was trying to help him. I note that the notes of the meeting record that Mr Barratt had introduced the idea of a PIP and referred back to a conversation they had had a few weeks ago where Mr Barratt had wanted to introduce PIP to help the claimant with his IT skills. That went on to record that the claimant appeared to acknowledge this and they began to talk through the sections of the PIP starting with Windows 10. There was a discussion before the claimant became irritable and started waving his hands.

64. That exchange ended the case on first day. On the resumption on 13 August 2019 the claimant again asked for documentation that was of no relevance at all because it pre-dated his claim to be removed. He also said documents in the bundle deal with disciplinary actions which were ongoing. I had indicated that I was not going to return to the matter of documents, which was not a satisfactory answer for the claimant. I explained that I had given the claimant the reasoning for refusing to remove documents on the previous day. The documents had been provided to the claimant by the respondent as documents to be included in the bundle. He had not made any complaint to the employment tribunal about

inclusion of any documents prior to the start of this hearing. I therefore found that to make such a complaint at the start of a hearing was not appropriate and was against the overriding objective of the tribunal. I had explained all this to him yesterday. I didn't accept that I hadn't explained the decision to him on the previous day.

65. I advised the claimant that the respondent is free to put its claim in whatever way it wishes to do so and that the tribunal will decide what evidence it will use to determine the issues in the case. We had heard a day's evidence and none of my colleagues or I had found any of the documents produced by the respondent to be either inappropriate or irrelevant to the claim the that claimant had made, which the respondent is required to defend. I told the claimant that I regarded that as the end of the matter.

66. The claimant said that he had written to the respondent's solicitors. I noted that he had said that on the first day of the hearing and that he had said that he had written to the tribunal. I asked for date of the letters. The claimant said that he hadn't written them. I then asked the claimant for the letter he had written to the respondent. He had said that he didn't have them with him on the first day. I asked if he brought the letter with him today. The claimant said that he hadn't.

67. At this point, Mr Crammond intervened and said that there was correspondence in which the claimant had alleged that the relevant documents had not been included. I said to Mr Crammond that such documents should appear in the bundle. Mr Crammond indicated that the disciplinary process that the claimant said was ongoing had in fact concluded and that there was a letter from the respondent to the claimant giving a decision in the disciplinary process dated 24 June 2019 [397L].

68. I advised the parties that I regarded the scope of the hearing as being defined by the two preliminary hearings before Judges Shepherd and Johnson and the further particulars of his claim submitted by the claimant. The claimant then alleged that Mr Crammond had harassed him. I regarded this as a serious allegation to be made. Although he is a lay person, the claimant was aware of the meaning of the word "harassment" in the context of an employment tribunal and to suggest that Counsel had harassed a witness in cross-examination or otherwise during proceedings was serious. Nothing that I or my colleagues had seen in the hearing could possibly be regarded as harassment. The claimant then withdrew the allegation.

69. We then returned to the cross examination of the claimant. Mr Crammond asked a series of questions regarding the claimant's allegation that he had been made the subject of an unfair assessment a process that was known as "inflight checking". The claimant said that inflight checking was new and should only be done by someone who was on a higher grade than the person being assessed. It was put to the claimant that inflight checking is almost a peer review, but he did not accept this. He was asked what he meant by 'unfair assessment' and he said that his work was badly assessed because they didn't take any consideration of his disability and didn't take any consideration of his work. His target had not been reduced. I commented to the claimant that I thought he had accepted that

his target had been reduced on the papers that I had read. He said that it hadn't. It had been ignored. A person who is ill should not have the same amount of productivity as an ordinary person. His justification for this was where there was medical evidence to show that you had an illness then that your target should be lower. You don't need evidence; the manager should just have known. His manager knew he was not well enough.

70. In response to Mr Crammond, the claimant said that his unfair assessment was about two weeks after he had started the task in May 2018.

71. There was then an exchange of questions and answers about the claimant's non-attendance at various occupational health appointments. He accepted that the first appointment he attended was in late August 2018. Mr Crammond returned to the issue of targets. The claimant accepted that his target was reduced once he had an OH report and claimed that he had a GP letter regarding reducing his target that he had provided to the respondent's solicitor. She was in court and advised that everything that the claimant had provided was put in the bundle.

72. The claimant accepted that he had had a reduced target because of Polycythaemia and that he had not let his new manager know that he had a reduced target when he returned from sick leave. He said that this was because it was in the file.

73. The claimant admitted that Mr Barratt had concerns about his performance in June 2018, but didn't agree with Mr Barratt's note of the meeting on 8 June 2018 that said he had become aggressive. That was a false allegation with no justification. The claimant said that Mr Barratt's notes were made out of spite because of a dispute they had had in a meeting on 5 June 2018. He confirmed that was the discussion that he had referred to at paragraph 5 of his witness statement and that the allegation that he had got angry was concocted because of the meeting on 5 June 2018.

74. The claimant was then taken to Amanda Brown's e-mail to Michael Barratt of 13 June 2018 [266] in which she had advised Mr Barratt about the allegation that the claimant had been aggressive towards a colleague at a bus stop on 11 June 2018. The claimant confirmed that there was no suggestion that Ms Brown had concocted the allegation. He was then taken to page 268 which was a minute of a meeting between Mr Barratt and the claimant regarding the incident with his colleague on 11 June 2018. At this point, the claimant turned to me said that my task was to ensure things were correct and fair but this was wrong. Mr Crammond was taking an opportunity to delay his case. The claimant became agitated and made a number of emotional comments that appeared to undermine his entire case. On the resumption, Mr Crammond brought the panel's attention to the comments and wondered if the claimant had considered his own case given that his comments had substantially or entirely undermined the claim that he was pursuing.

75. I advised the claimant that, before the break, he had said a number of things, including that his case was not about disability, but was about race. His response was that it was nothing to do with disciplinary action; it was to do with a claim for

racial discrimination and disability discrimination. There is a case for denial of flexi. Everyone was entitled to flexi. His claim is set out in his application. He wished to continue with his claim as set out in his application.

76. Mr Crammond then returned to page 268 of the bundle and the claimant confirmed that he recalled the discussion. He was asked if he had told Mr Barratt that a colleague was smoking. His response was that he had seen the note. It was put to him that he was asked to e-mail his version of the event at the meeting (which is contained in the note at page 268). The claimant denied this and had not said that he wanted to get advice. Mr Barratt had not advised him that no complaint was being made at this stage. He was challenged on this, but disagreed with the challenge. He said that Mr Barratt had failed to deal with the matter impartially and it was not right for Mr Barratt to be concerned in that case. He denied that he behaved aggressively or in an intimidatory way. He denied that he had been aggressive, rude and uncooperative as Mr Barratt's note had recorded. He denied becoming aggressive as Mr Barrett had set out in his witness statement. He denied that any of his conduct could be described as unprofessional or intimidatory.

77. The claimant was taken to page 216, which was his e-mail to Ms Storey of 3 August 2018, in which he had said he didn't want to have any further informal meetings "where a lot of things were said and then later easily and simply retracted included things like blackmail and threat." The claimant said that he considered that his manager had blackmailed and threatened him. He was taken to page 321, which is a note of his meeting with Sophie Storey on 9 August 2018, but said that he had never had a copy of the notes. He totally rejected the note.

78. Mr Crammond asked the claimant if, notwithstanding the fact that he hadn't agreed with the content, did he agree that he had had a meeting with Sophie Storey and Simone Davis (his union representative) on 9 August 2018. The claimant repeated that he hadn't read the note, so I gave him sufficient time to read it in full. His response was that some of the first paragraph was ok and some was not. The second paragraph was more or less ok. He agreed that on 20 July 2018, there had been another incident at the bus stop with the same individual as on 11 June 2018. It was put to him that the complaint was that he had called a colleague a liar and used offensive language. The claimant's response was that the individual was not his colleague. The man had said something nasty and rude that he could not hear. It was put to the claimant that it was alleged that he had called the man a liar and that he'd used offensive language. The claimant said that Ms Storey had only said that he had called the man a liar, which he admitted. He denied that he'd had a verbal tussle with the man and it was not how the notes read. He said that Sophie Storey was desperate to use the matter for her own purposes. He wouldn't speak to her, so that's why she brought it back. He had laughed when it was put to him that it was a matter of concern and said that the whole matter was laughable.

79. Mr Crammond then turned to the issue of the grievance that the claimant had alleged had been ignored. He confirmed that that was part of his discrimination claim. He also confirmed that his e-mail of 16 July 2018 to Mr Forster [288] was

not a formal grievance. His complaint was about the formal grievance he had filed on 1 October 2018 [344]. He repeatedly said that he was misled.

80. Mr Crammond took the claimant to page 288, which was Mr Forster's acknowledgement of the claimant's e-mail of even date. The claimant accepted that Mr Forster had not ignored his e-mail. The claimant was then taken to page 289, which was Gary Forster's e-mail to Sophie Storey, and was asked if this was an example of his grievance being ignored. The claimant's response was that Mr Forster had ignored it as a whole, but he did not ignore it on 16 July.

81. The claimant accepted that on 18 July 2018, Sophie Storey had asked him about him about mediation. He didn't recall a discussion with Sophie Storey on 18 July 2018, the note of which was produced at page 298. I put to him that a meeting two days after his complaint did not appear to be ignoring his complaint, but the claimant's response was that he didn't recall that the meeting had taken place. He was then taken to page 311, which was a discussion between the claimant and Sophie Storey on 30 July 2018. The note included a comment that Ms Storey had asked the claimant if he had made a decision about the complaint he had made against Michael [Barratt] and that the claimant had advised that he would be willing to try mediation, but he wanted to speak to his union rep. The claimant said he didn't remember and didn't think it was fair to ask to ask about meetings about which he had no recollection and where notes were not sent to him. He suggested to Mr Crammond that he was trying to prove that he said stuff that he probably hadn't.

82. The claimant was then taken to page 315, which was a note of discussion between Sophie Storey and the claimant on 3 August 2018. In the note, it indicated that the claimant had refused to speak to Sophie Storey. He asked to be given time to read the note which I gave him and he said he couldn't remember. He thought that he must have said previously that he didn't want one-to-one contact.

83. It was put to the claimant that this wasn't the respondent ignoring any complaint, it was the claimant failing to engage. The claimant disagreed and said that if Sophie Storey had really cared she would have contacted him or his union rep for a discussion. He denied that that wasn't exactly what she was doing.

84. The claimant was taken to page 339, which was an e-mail from Gary Forster to the claimant of 5 September 2018, asking for any evidence to support his complaint to be produced within ten working days. The claimant agreed that the contents of the e-mail were true, but asked the question why he had not been asked for the evidence before. It should have been asked for straightaway. Mr Crammond put to him that the respondent had tried to deal with the matter informally when it was raised and that when that was not possible, he had been asked for his evidence. The claimant's response was that there was a delay between 16 July and September 2018. The claimant said that his union representative had not advised him to raise a formal grievance. He had not had a union representative for a considerable while. He couldn't recall when Simone Davis started to assist him.

85. The claimant was taken to page 340, which was an e-mail between the claimant and Gary Forster of 14 September 2018 in which the claimant had said that he had been unable to provide the supporting evidence that had been requested on time. He said he'd been unwell and would make sure that Mr Forster received the information on Monday without fail. It was put to the claimant that this was indicative the delay at that point was not the fault of the respondent. The claimant's response was that Mr Forster should not have waited for that amount of time.

86. The claimant was taken to page 341, which was an e-mail from Gary Forster confirming the meeting he had with the claimant on that date. The e-mail said that it had been agreed to take his evidence on the claimant's return from two weeks annual leave and set a deadline of close of business on Wednesday 3 October 2018. It was put to the claimant that Mr Forster was being supportive and the claimant agreed that that's what he found at the time.

87. The claimant's grievance of 1 October 2018 was at pages 344–345. The claimant was asked if the grievance of 1 October 2018 was the first time he had used words such as disability discrimination, victimisation and harassment. His answer was that it was the first time he had set it all out. He accepted he didn't say what resolution he was looking for and that he had tried to resolve the complaint informally with ACAS.

88. It was put to the claimant that Gary Forster's reply of 2 October 2018 [346] was not ignoring his complaint. The claimant's response was that for him, he had. The claimant said that he ought to have had a formal letter straightaway. Why should he have to wait? Also, while he was waiting, the respondent made another complaint against him. That proceeded immediately, but his complaint went nowhere.

89. The claimant agreed that he had been asked what his desired outcome was in Mr Forster's e-mail of 2 October 2018 and that a meeting had been arranged for 9 October 2018, which did not happen. The meeting was postponed to 15 October 2018. It was put to the claimant again that Mr Forster was not ignoring his complaint and said that he couldn't understand the circumstances and wasn't following it. In a lengthy discussion about the e-mail trail, the claimant said that he hadn't responded to the suggestion of mediation because Mr Forster had not committed himself to discussions. It was put to him that he had not replied to Mr Forster's e-mail of 29 October 2018 [368] in which Mr Forster had asked what resolution the claimant was looking for from mediation and his complaint. The claimant said that he didn't reply because Mr Forster had told him that he was not going to be involved and some people from Belfast were going to be dealing with it. The claimant's evidence continued and he eventually accepted that he had not attended meetings that had been suggested/requested by a member of management from Belfast. In summary, on this point, Mr Crammond put to the claimant that the respondent wasn't ignoring him: it was that the claimant simply didn't engage. The claimant didn't accept this. He said that the respondent ignored him and that when the case was before the employment tribunal, he didn't have any more use for the grievance procedure.

90. After a break for lunch, Mr Crammond asked the claimant about his holiday pay claim. He was taken to the HMRC policy document at page 559a and said that he had never seen it before but didn't dispute it. He accepted that his leave year was from 1 October to 30 September and that he had been absent due to ill health from 2 May 2017 to 2 May 2018. He therefore had not been able to take leave between 2 May 2017 and 30 September 2017 in one leave year and from 1 October 2017 to 2 May 2018 in the next year.

91. The claimant accepted that he'd accrued annual leave in the holiday leave year 2016/2017 and 2017/2018. He also disagreed with Mr Crammond's suggestion that he had not lost any annual leave because all annual leave had carried forward. The claimant disagreed with this proposition because "if you don't take your holidays, you lose them."

92. We had a long exchange about holiday pay, in which the claimant's position was explained as being that he had lost annual leave for 2016/2017. If he hadn't used the holiday pay for that year he'd lost it. He disputed that the respondent's policy and the actuality of his situation was that he had carried annual leave from 2016/2017 over to 2017/2018.

93. Mr Curtis asked the claimant to look at paragraph 11 in Jill Baker's witness statement that said that he had fifty-four days of leave accrued when he returned from sick leave on 2 May 2018. The claimant's response was that she had said that you can't take leave if you are sick. In answer to the question of what annual leave the claimant said he had lost, he said he had lost one year, which he then explained meant that he had lost a year's annual entitlement. The claimant would not be moved on his assertion that he was owed twenty-six days' holiday pay.

94. He was taken to page 259, which were the minutes of the meeting on 22 May 2018 in which it was recorded that he was advised that he had more than two-hundred hours of annual leave to take before the end of October. He denied ever having that discussion. He was taken to the minutes of a meeting with Jill Baker on 27 June 2018 [275] in which it was recorded that he had said he was sick of people telling him he had lots of leave. He was recorded as having said that he was entitled to the leave because he had been off on the sick and he may need to take this if he is ill and didn't want to get into trouble with his sick. He said that he did not say this and that Jill Baker had made that up. He was then taken to a note of a meeting with Sophie Storey and Jill Baker on 27 June 2018 [277] and denied that Ms Storey had said that he had a lot of leave, which had already been mentioned to him, but he hadn't asked for any time off yet. The note said that Ms Storey had said she was concerned that the claimant would lose leave if he had too much left before the end of the leave year. The claimant was reported as saying that he had to keep his leave in case he was ill. Sophie recorded that she had said that if he was ill, then he was sick and didn't have to take leave. The claimant denied that he had said this. He also denied that Sophie had said that she was concerned that he had fifty days leave to take before October or had explained that she didn't want him to lose this. In answer to a question from Mr Curtis, the claimant said that he didn't go on the intranet to look up the holiday policy and he didn't ask his union representative about it.

95. It was put to the claimant that he was wrong about his entitlement and that at the end of the 2017/2018 holiday year, he had accrued twenty-six days plus ten days that had been rolled forward from the previous year plus his accrued entitlement for the 2018/2019 holiday year. It was put to him that he had five months to take his accrued holiday between his return to work on 2 May 2018 and the end of the holiday year on 30 September 2018. The claimant said he wasn't aware of it. It was put to the claimant that he has now lost all but ten days of his accrued leave which was the most that could be rolled forward. The claimant's response was that Jill had told him that he couldn't take it. He admitted he was never refused annual leave between 2 May 2018 and 30 September 2018 and that he actually took some.

96. At the end of the claimant's evidence, I asked him if there was anything about his evidence that he wanted to clarify arising from the questions he'd been asked in cross examination. His response was that he wasn't prepared because the e-mails that pre-dated his claim were not relevant. He had looked at them. They were false, inaccurate and made up. He didn't study them. That was why he was so nervous.

97. Michael Barratt gave evidence from a witness statement dated 26 July 2019. His evidence in chief was that he is an executive officer and manages the respondent's complaints team. He had been the claimant's line manager from 2 May 2018 until week commencing 10 September 2018. Prior to that, he had managed the claimant's sickness absence from 2 May 2017 to 2 May 2018 at the request of the claimant's union.

98. The claimant had been off work on sick leave for exactly one year between 2 May 2017 and 2 May 2018. Initially the claimant had not informed the respondent that she he was off work due to ill health and attempts were made to contact him by phone. The claimant did not answer. The claimant was sent a letter 8 May 2017 expressing concern at the lack of contact. On 9 May 2017 the claimant's higher officer decided to make a home visit and deliver a letter to the claimant. On 11 May 2017 the claimant visited his union at work and notified them that he had bowel cancer. The union advised the claimant of his need to comply with the respondent's sickness guidance policy and Mr Barratt was asked to oversee the claimant's absence, at his request. The claimant submitted a fit note dated 9 May 2017 stating that the reason for absence was a "stress-related problem".

99. Mr Barratt wrote to the claimant on 26 May 2017 [63] requesting a meeting. That meeting didn't take place because the claimant said he was too unwell to attend. Further attempts to meet the claimant were made but met no success. The claimant advised Mr Barratt that he had cancer on 24 June 2017. The claimant's responses were intermittent.

100. A meeting was held on 5 October 2017 with the claimant's union representative in which it was agreed that an OH referral should be made. The claimant was about to commence chemotherapy and agreed to keep in touch when there was a break in his treatment schedule. The claimant would contact Mr Barratt when he felt able to do so, but that may be difficult for the following three months. A further meeting was held on 23 February 2018 [201-204] in which the claimant advised

Mr Barratt that his chemotherapy treatment had been finalised and that he intended to return to work on 4 April 2018 when his current fit note expired. The claimant failed to attend OH appointments made for him. The claimant's attitude towards managing his own sickness absence caused Mr Barratt to write to him on 14 March 2018 [213], advising him that he would be referring his absence to a manager to consider whether the business would continue to support the claimant's absence. The claimant didn't return to work on 4 April 2018 on the expiry of his fit note, but did return on 2 May 2018. Mr Barratt left on paternity leave on 3 May 2018 so Jill Baker carried out the claimant's return to work meeting. Mr Barratt's manager confirmed on 16 May 2018 [245-256] that she would be taking no further action arising from the claimant's management of his absence and that the claimant's attendance would be monitored under the managing poor attendance guidance.

101. A meeting was held with the claimant on 5 June 2018 at which he was given a first written improvement warning because of the way he had engaged with the absence management process. He had continually challenged the sickness absence procedures, stating that he felt it should not apply to him as a cancer suffer. He had failed to keep in touch adequately throughout his absence and had consistently declined to attend formal absence meetings with Mr Barratt. He had failed to provide return to work date until 23 February 2018 and then had failed to return to work on the date given (4 April 2018).

102. Mr Barratt's notes that it was difficult to engage properly with the claimant during his absence as he would frequently fail to answer calls and e-mails. The claimant provided no medical evidence throughout his absence other than fit notes.

103. The claimant had made two informal verbal requests for flexible working but made no formal statutory request. On both occasions the claimant had made an informal request, Mr Barratt had referred this to higher management (Sophie Storey and Gary Forster), who had declined the request. The business was unable to offer flexible working to the claimant or other colleagues working on twilight contracts due to the accommodation pressures on the building. There was not enough desk space. Mr Barratt had also refused other requests made by members of his team on twilight contracts.

104. It had been agreed that the claimant could work 11.00am to 7.00pm so that he could use the bus to get home at the end of his shift.

105. When the claimant moved to a new team, he had been granted his flexible hours request because senior management had decided to revisit the granting of flexible working to the whole department; the accommodation pressures had been relieved, and; all the individuals who'd previously requested flexible working were granted it.

106. Mr Barratt discussed with the claimant about his returning to work as part of Mr Barratt's team in a keep-in-touch meeting on 23 February 2018 [201-204]. The complaints work was difficult and required a good knowledge of overpayments. Mr Barratt said he told the claimant that it may be better to ease him in on the digital COC team and that this would be discussed further on his return. Mr

Barratt didn't feel that the claimant had the necessary skills and knowledge to carry out complaints work as he found it difficult to handle straightforward tasks.

107. On his return to work, the claimant asked Gary Forster if he could do complaints work. Mr Barratt understands that Mr Forster agreed to this, but members of the complaints team approached Mr Forster to raise concerns and Mr Forster changed his mind and allocated the claimant to work on missing documents rather than complaints.

108. The claimant had asked for disability adjustment leave (DAL) on a number of occasions. Mr Barratt was happy to grant it, but required evidence of the appointment [280]. The claimant had refused to provide this information stating that he should not have to provide it and that it had not been asked for in the past. Mr Barratt said that the proof was a requirement of the DAL guidance [500-506]. The claimant was granted DAL but did not provide the requested evidence.

109. Mr Barratt denies that he was asked to contact human resources on the claimant's behalf with regard to his pay concerns.

110. Mr Barratt said that he held a number of one-to-one meetings with the claimant and always took notes of the meetings, which were provided in the bundle.

111. On 12 July 2018, Mr Barratt held a one-to-one meeting with the claimant [281-282] and attempted to implement a performance improvement plan (PIP). The claimant was making numerous quality errors and his IT skills were of concern. He found it difficult to send e-mails and save documents. He did not pressurise the claimant to carry out IT training, but suggested it as a solution to improve his skills. The claimant became aggressive towards Mr Barratt lent in closely to his face and clenched his fists. The claimant did not agree to enter a PIP.

112. After the claimant returned to work in May 2018 and was allocated to the missing documents team, he was trained in that area by Sara Morris and Lisa Trueman. Mr Barratt's desk was next to the claimant's and he observed the claimant raising his voice to both colleagues and using intimidating hand gestures. Sara Morris said to Mr Barratt that she was worried that Lisa Trueman would go off work with a stress-related illness because of the claimant's behaviour.

113. Work in that area was almost complete and Mr Barratt had decided to take the claimant off missing documents and move him somewhere else. He had a one-to-one meeting with the claimant on 8 June 2018 [263] to inform him of the decision. He revised the idea of a PIP and said that he would be moving the claimant to change of circumstances. The claimant said that Sara and Lisa had talked to him in a negative way. Mr Barratt said that he would speak to him about this. The claimant then became angry and Mr Barratt informed him that his behaviour was concerning and not what he expected.

114. The claimant had a history of performance-related issues and would not take up the offer of an OH referral to see what adjustments could be made to take into account the claimant's illness. Targets could not be reduced arbitrarily without guidance from occupational health.

115. Mr Barratt completed a disciplinary managers review checklist on 9 August 2018 [327-336] because of a number of incidents of misconduct by the claimant:-

115.1 the claimant was reluctant to listen and learn when being trained by colleagues which Mr Barratt had discussed with the claimant on 29 May 2018 [259];

115.2 in a meeting held on 8 June 2018 [263] concerns from colleagues that were training the claimant were relayed to him. The claimant became uptight, stern and angry with Mr Barratt;

115.3 Mr Barratt had been informed by his colleague Amanda Brown on 12 June 2018 [266] that a member of her team had reported that the claimant had shouted in his face at the bus stop after work.

115.4 on 27 June 2018 Ms Baker had had a conversation with the claimant who had become angry towards her;

115.5 on 27 June 2018 [276] the claimant had become angry at managers;

115.6 on 27 June 2018 a further meeting was held at which the claimant was again angry;

115.7 a meeting was held with the claimant on 6 July 2018 [280] at which the claimant was rude towards Mr Barratt;

115.8 a meeting was held with the claimant on 12 July 2018 [281-282] to provide an update on performance. The claimant was obstructive and aggressive;

115.9 on 16 July 2018 the claimant advised Mr Barratt that he was not prepared to have any further one-to-one meetings with him [287], and;

115.10 on 3 August 2018 the claimant met with Ms Storey and advised her that he would no longer attend one-to-one meetings with her [315]. He followed up this meeting with an e-mail accusing Ms Storey of blackmail and threats.

116. On 9 August 2018, Ms Storey had held a meeting with the claimant and his trade union representative regarding an allegation that the claimant had again been aggressive towards the same colleague at the bus stop.

117. Mr Barratt said that he had always given the claimant the benefit of the doubt and always followed informal action rather than formal action with regards conduct and performance. In answer to cross-examination questions, Mr Barratt said that he had not told the claimant that he had not earned flexi when they met on 2 May 2018. When the claimant had asked him about flexi, he had had to ask his own manager. He couldn't recall the claimant asking him about flexi on 2 May 2018. Mr Barratt couldn't recall being asked about two weeks of SSP for April on the

claimant's first day back. He said that he was walking out of the building to start his paternity leave when the claimant walked in. Mr Barratt was surprised to see him. They had spoken for a few minutes and Mr Barratt had introduced the claimant to some people on the team and logged him into the computer system. He had then left the claimant with Jill Baker. Mr Barratt denied that he said that the claimant was not going to do complaints. He told the claimant that he would be on missing documents on 2 May 2018. Mr Barratt had gone on paternity leave on the following day. He'd left work at approximately 1.00pm on 2 May 2018. He didn't work on 3 May 2018 as his daughter was born at 8.40am. In answer to questions from Mr Curtis, Mr Barratt said that he thought he had met the claimant just after 1.00pm. He'd started work at about 6.00am and was aware that his employer required him to take a break if he worked more than six hours. Mr Barratt said that when he referred the claimant's informal request for flexible working, their response was that the business could not accommodate it. He confirmed that he acted on the claimant's request, even though it was not a formal one. He could not recall the exact dates of conversations he had had regarding the two requests. Mr Barratt disputed that the claimant had asked him about flexible working on his first day back in May 2018. The first request had been later.

118. Mr Barratt said that a flexi request was not something that a manager at his level could give. They have to escalate it. He was told that no flexi could be granted to twilight contract workers, but it was under review. It could only be approved by agreement with the union and the senior leadership team (SLT). On Mr Barratt's team, the claimant and at least two others in his team of twelve had been refused flexible working. Out of the team, which the claimant said numbered ten people, four were not on flexi; the claimant and three others. That answer was challenged by the claimant, who said that the only people not on flexi were him and another two people and a further person who had left (which I calculate to be four people).

119. We then had a further dispute about documents when the claimant produced two documents that the solicitor for the respondent said that she had never seen. As this was now becoming a recurring theme of the hearing, I made some further enquiries of the respondent's solicitor. She said that the claimant sent two lists of documents. She had asked the claimant to send copies of the documents on his lists. She asked the respondent for its documents, which they provided and which she added to the draft bundle. The claimant returned some copies but some were never received. The two documents that the claimant had just produced were not included in any list or e-mail. I gave the solicitor time to check the lists in her file. Neither document was listed on either list. The claimant did not have a copy of any list or any e-mail that included the documents the claimant had produced. I advised the claimant that the respondent's solicitor is an officer of the court and I found it impossible to accept that she would lie to the court about two documents that were now in dispute in the circumstances of the case.

120. The claimant then asked Mr Barratt about an allegation that he had witnessed the claimant shouting at Sara and Lisa. Mr Barratt confirmed the evidence that he had given previously.

121. There was then the exchange of questions and answers about the flexi working policy, which did not assist us in making our decision. Mr Barratt was asked about the claimant's request for an occupational health appointment. Mr Barratt said that he felt that he was considerate to the claimant's illness and did everything he could to support him with the information he had. Mr Barratt had to justify supporting the claimant's absence and did so despite knowing little about his illness. Mr Barratt believed he was sympathetic and considerate and didn't think he'd acted inappropriately at all. The claimant's absence had been discussed in team meetings every month. HMRC guidance was that after twenty-eight days absence, someone's case would go to a decision maker.

122. From a personal point of view, Mr Barratt said that his perspective was influenced by the fact that his own father was going through cancer at the time and it was difficult. The claimant asked Mr Barratt why he thought that a year off was not a reasonable time. Mr Barratt said that he didn't have any medical qualifications but the fact was that the claimant had taken a year off. There were three or four months where the claimant had no treatment at all and he didn't know what the claimant was doing at that time. He came to his own conclusion.

123. The claimant then moved to the claim of race discrimination. He put it to Mr Barratt that on 2 May 2018 he had taken the claimant to Lisa and Sara and told them that he was to join them on missing documents. Mr Barratt said he couldn't have done that because he wasn't there when that decision was made. Mr Barratt had not made a decision at that time and had not introduced the claimant to Sara and Lisa on 2 May. Mr Barratt said that the claimant had found himself on missing documents because of his absence on paternity leave. He wasn't at work when the decision to move the claimant to missing documents had been made.

124. The claimant then challenged Mr Barratt on his assertion that the claimant didn't have relevant skills or knowledge to enable him to carry out complaints work. It was put to him that he had initially said that the reason he wasn't put on complaints was because he didn't get on with Lisa and Sara. Mr Barratt's response was that Lisa and Sara weren't on complaints. So far as the claimant was concerned, Mr Barratt is part of the same group as him but from a management point of view Mr Barratt knew that the claimant had numerous performance issues in the team he was on. The claimant made no phone calls. The quality of the claimant's work was not great on a straightforward task. Mr Barratt had also heard the claimant talking to his former manager, Conrad. He'd heard heated discussions about performance and quality, in which the claimant always challenged his manager. He had sat behind the claimant for a year.

125. The claimant put to Mr Barrett paragraph 45 of his statement about the claimant lacking the necessary skills and knowledge and was asked how he made this assessment. Mr Barratt said that HMRC operated a performance management recognition framework. Managers marked boxes at the end of the year. Those who had overachieved attained the status of high performers. The claimant wasn't a high performer.

126. The difficulty was that he would have been dealing with customers who were unsatisfied with the level of service. It usually concerned overpayments and what

HMRC were doing about them. Responses had to be given over the phone with explanations either by phone, letter or e-mail. It was put to Mr Barratt this work was simple and he said it was definitely not. He did not want to see the claimant struggle by attempting the work. He didn't have the skills at the time but he may have developed them or improved. Improvement was possible, but it would have been wrong to put him on complaints. Mr Barratt denied that the claimant would have been able to do the work.

127. The claimant then moved on to disability adjustment leave (DAL). He asked Mr Barratt when he had asked for DAL. Mr Barratt said that the problem was that nothing was put in writing, he could only ever refer to conversations that were not recorded. The claimant would come into work and announce that he was leaving without any notice and without any evidence. Despite this, Mr Barratt never stopped him leaving. There were a couple of occasions where the claimant had sprung DAL on Mr Barratt that had led to concerns about DAL guidance and referral to the policy. Mr Barratt said that he wasn't aware of every guidance note on DAL, but did have to refer to the guidance because it changed. He couldn't remember specific dates when the claimant had asked for DAL.

128. The claimant said that the first time he asked for DAL was when he was going into work and felt ill at Washington bus station. He went to the nearest Asda where they took his blood pressure and sent him to the clinic. He said that he rang Mr Barratt and told him about it. The clinic had told him to go to hospital. He then went back to Mr Barratt who asked for evidence.

129. Mr Barratt said that his recollection wasn't the same as the claimant's. Mr Barratt was concerned when the claimant came back he didn't ask for the evidence straightaway. The claimant then said that he'd been asked for the evidence the following day. Mr Barratt said that he needed to ask for the evidence under the guidance in the policy. He couldn't remember how long after the incident he'd asked for the evidence.

130. The claimant said he didn't expect to be asked for any evidence, but Mr Barratt said that he would have asked any other member of staff in the same circumstances. It was put to Mr Barratt that he had told the claimant that if he needed to see a GP he couldn't use DAL. Mr Barratt asked when he was alleged to have said that and said that he wouldn't be able to confirm whether that was correct without checking the guidance. He would have been happy for the claimant to attend a GP appointment. The claimant returned to the Washington bus station incident and said that the clinic had told him to go to his GP. Mr Crammond interrupted to say that that had never been put in evidence, which was a correct point. Mr Crammond also noted that no dates were being given and that half the DAL allegations were now withdrawn.

131. I asked the claimant what dates Mr Barratt had refused him DAL to see his GP. The claimant said 15 August 2018. Mr Barratt said he didn't recall that occasion. In answer to questions from Ms Jackson, Mr Barratt said he first became aware that the claimant had bowel cancer when he was told by the union. The claimant had asked for Mr Barratt to manage his sickness absence because he was concerned about the confidentiality of other managers. He said that the claimant

was “paranoid” about people knowing his business. He didn’t want any manager to deal with him except himself because Mr Barratt had had no previous dealings with the claimant.

132. The claimant asked to be able to ask some further cross examination questions which I allowed. The first of these was whether he had consulted his supervisors about flexi. Mr Barratt confirmed that he had and that is was declined. Tim Coxon from the claimant’s union had made out that he had agreed to flexi but that there was nothing to show that agreement had been made. All Mr Barratt had done was say that he had to go to his managers. He denied that he had committed himself.

133. I asked Mr Bouheniche if he had finished cross-examining Mr Barratt and he said he had one final question but then said he realised he had only dealt with flexi and disability and not dealt with the rest of his complaint. It was now 5.45pm. My colleagues and I had agreed to sit late on the basis that the claimant had indicated that he would be finishing his cross examination that evening.

134. On the following morning the claimant handed in a letter requesting that he be allowed to continue to cross examine Mr Barratt. That application had already been granted and he continued his cross examination for another one hour and fifteen minutes. Mr Barratt was challenged about his assertion that he’d always been concerned about the claimant’s welfare he was asked why he had not acted on a medical report in the OH report of 13 August 2018 [336a]. Mr Barratt asked the claimant to recall that he had declined many OH meetings and when he had finally attended one, he would not give permission for Mr Barratt to see the report before he had signed it off. That took a further two weeks, and by the time Mr Barratt saw it, the claimant was on a new team. As far as Mr Barratt was concerned, there was no report for him to see. The claimant challenged Mr Barratt again about the report at page 336a. Mr Barratt pointed out that that report dated 13 August 2018 was addressed to Connor, who was the claimant’s line manager after he had moved teams.

135. The claimant asked the witness about three colleagues - Julie, Arlene and Lesley. Mr Barratt said that Julie is classed as a high performer and can deal with tax credits and handle phone calls. Lesley and Arlene were used to back-fill staff losses when people moved jobs. They were able to use the telephone, had empathy and could understand payments. Mr Barratt had made the decision to bring them into his team.

136. It was put to Mr Barratt that the three named colleagues never had any knowledge of skills for the task and had no training. In that regard, they had the same skills as him.

137. I pointed out to the claimant that there is no evidence of what he had just said in his witness statement, and which appeared to be a new allegation.

138. Mr Barratt explained that the three had been moved into his team when the claimant had been absent. He had lost a lot of his staff from his team and needed to back-fill. As he’d already said, Julie was a high performer. Arlene and Lesley

were on part-time hours and fitted nicely because of that. There were no concerns about their performance. They could deal with phone calls, understood overpayments and had empathy with the clients. They were given in-house training and it was a smooth transition.

139. The claimant put it to Mr Barratt that it was because they were white. He said Mr Barratt had lied and that he was not off sick. He said that he had started working with them when he joined HMRC and worked with them till February or March 2017 then they moved in March or April 2017.

140. Mr Barratt said that they weren't in his team in 2017. He had just said what he'd remembered. He agreed that he had allocated them on management judgment and staff reports and looking at past performance he thought they could handle cases. It wasn't just Mr Barratt who was selecting, his manager said who moved and Mr Barratt basically just agreed.

141. In answer to Mr Curtis' questions, Mr Barratt said that he had been given an indication of who was moving to his team and the jobs that they were going to do. However, when the claimant joined his team, he wasn't told the job that he was to do. In his case, it was because he was returning to work after a year off ill. Mr Barratt wasn't even aware that the claimant was coming back when he did. He could say what job the claimant ended up in because it was his decision. It was put to Mr Barratt that that answer contradicted his earlier answer about Julie, Arlene and Lesley that said a higher officer had made the decision and that he had had some input before the decision was reached. Mr Barratt agreed that, even though they were high performers, they needed training. If they hadn't been able to do the job, he would have had to manage their performance.

142. The claimant then tried to ask Mr Barratt why he had decided that the claimant had no skills. I reminded the claimant that that question had been put more than once the previous day and had been answered. The claimant said he needed to know Mr Barratt's answer and I advised him that the panel didn't because we made a full note of the evidence the previous day. The claimant said that he felt that he was being denied the chance to put his claim and accused Mr Crammond of harassing him. Mr Crammond took exception to this and requested Mr Bouheniche to withdraw the allegation, which he did.

143. We went back to the evidence. Mr Barratt said he would have kept an eye on someone after training for about twelve months and that, potentially, a high performer might end up not being suitable. The claimant asked Mr Barratt why he had done nothing earlier about the list of misconduct issues listed at paragraph 60-64 of his witness statement. Mr Barratt said that in those scenarios, he was having conversations and documenting incidents. He didn't want to go down the disciplinary route. He wanted to give the claimant the benefit of the doubt. There was too much happening, however, and he had to make a decision. It was put to Mr Barratt that he'd only raised a complaint because the claimant had been to ACAS. Mr Barratt rebutted this suggestion and said the only mistake he had made was delaying a disciplinary checklist. The timing was co-incidental. The claimant said that there was nothing between May and the end of September. Mr Barratt disagreed. He said that he had had conversations with the claimant and

asked him to e-mail him with his view. The claimant had never given him any details of the matters he asked about for example the incident at the bus stop. The claimant said that Mr Barratt had told him that he didn't believe the person who'd accused him of the bus stop incident. Mr Barratt couldn't agree with the claimant. If he could turn back time, he would have started the disciplinary checklist earlier. He had tried to protect the claimant.

144. Mr Curtis then asked a number of questions of Mr Barratt. At page 336a was the occupational health report of 13 August 2018. Mr Barratt said that he had not seen or discussed the report with the claimant. He also said that the claimant had always been given work that Mr Barratt's team did whilst he was with the team. He had started to manage Mr Bouheniche when he went off sick and at that time, he had not been in Mr Barratt's team. He was told that Mr Bouheniche would be joining his team when he returned from ill-health absence quite near the time when a date for him returning had been suggested. He had a conversation with the claimant in February 2018, when they had talked about the claimant returning in April or May 2018. Mr Barratt said that despite having heard loud discussions between the claimant and his previous manager, he was fine with taking on management responsibility for the claimant.

145. Mr Barratt was asked what he meant in paragraph 34 of his witness statement about the claimant failing to provide a return to work date: wasn't his fit note a return to work date? Mr Barratt said that the date of the fit note was an assumption that a member of staff would return on the expiry of the fit note, but they could return earlier. Whether or not he had a fit note, he still had to ask the question as to the return date. The claimant hadn't returned on 4 April 2018 as planned because he was ill and had a fit note. He accepted the fit note is medical evidence. It wasn't unreasonable to ask about appointments and other matters because he had to explain to the business every week where it was with regard to the claimant's ill-health absence. At meetings, Mr Barratt was asked about the claimant's plans and appointments. Mr Barratt made enquiries of the claimant on the guidance of managers and HR service co-ordinators. It was not just Mr Barratt asking random questions. The business needed information to manage absence.

146. Mr Curtis put to Mr Barratt that the claimant was off for a year and that he had got the picture that Mr Bouheniche was not co-operating with the keep-in-touch process. Mr Barratt replied that the claimant was sent meeting invitations but declined them. All he could do with the claimant was talk over the phone. He put the claimant through process that led to a written warning. He would have appreciated an OH report before he made his decision, but there was none. When he made the decision to issue the written warning, he knew that the claimant had an appeal route. If he had been over-ruled, Mr Barratt would have been ok with that. He'd made a decision on the information he had. That information was four or five fit notes and notes of meetings and e-mails. He again said the occupational health report would have helped.

147. He was asked to comment on the conclusion [261] that he didn't feel that the claimant's absence was reasonable time off and wouldn't improve future absences. Mr Barratt said that he was acting to protect the business and didn't

want the claimant's behaviours to impact on another manager. He considered the impact on future absences because of the claimant's past history, which tended to suggest that there was a likelihood of future absences. Mr Curtis asked the claimant about what concerns were linked to the claimant's disability. Mr Barratt said that he was aware that the claimant had cancer but for him he thought that the way he carried himself through his absence was not appropriate. He considered the cancer but if he was wrong, an appeal could overturn it.

148. The next witness to give evidence was Lesley Baker, who gave evidence from a statement dated 18 July 2019. Her evidence in chief was that she is a team leader and worked in the benefits and credit area of the respondent's business and had worked for the respondent since 1 October 1997. She had acted as the claimant's line manager whilst Michael Barratt was on paternity leave for two weeks between 3 May 2018 and 18 May 2018 and when Mr Barratt was on annual leave between 15 June 2018 and 3 July 2018.

149. Ms Baker had conducted the claimant's return to work meeting on 3 May 2018 [238-239]. He had started this meeting saying that he was returning to the complaints team. Mr Barratt was the manager of the complaints team but his team also covered work such as missing documents, unprocessed change of circumstances and physical changes. She said that the claimant stated that he wanted to be on Mr Barratt's team and that this had been agreed. Ms Baker said that she explained that it had been agreed the claimant would return to Mr Barratt's team but that she didn't think he should start on complaints. She told the claimant that she thought it may be best to start on physical changes tasks first but would speak to Sophie Storey (her direct line manager) because complaints was a complicated task requiring an in-depth knowledge of tax credits.

150. The task also required the use of the telephone and the claimant had advised her that he had never had to log in to a phone. She didn't think it was fair to place the claimant on the task, as he'd been absent for a year and had not previously worked on the task. She felt that she would be setting him up to fail if she put the claimant on complaints. She spoke to members of Mr Barratt's team to arrange individuals who would assist him if Mr Storey agreed that he should go onto complaints. The team suggested he may be best placed to start on missing documents, which is one of the other tasks worked on by the team. This would be a good introduction to the work of the complaints team. The work involved investigating where customers missing documents were and using a system by which customers were reimbursed for documents that the respondent had misplaced. Ms Baker spoke to Gary Forster, as Ms Storey was on leave, and he agreed to place the claimant on the missing documents task. She said that the claimant agreed to work on the missing documents and she agreed for him to be trained by Sara Morris and Lisa Trueman.

151. In the return to work meeting, Ms Baker discussed the claimant's phased return to work which had already been agreed and told him that during his phased return to work, the hours he was not present at work would be counted as sickness in line with the respondent's policy.

152. She said the claimant insisted that he should be paid for the phased return to work as he was unwell. It was explained to him that he had used up his allowance for sick pay and had been on a nil pay rate from 13 April 2018. The claimant disagreed with this and said that as he had gone on leave at the start of May 2017 he should have been paid until the end of April 2018. She explained that the claimant wasn't paid a full year because the entitlement was fifty-two weeks over a rolling four-year period and there had been earlier absences.

153. Within the return to work meeting she had explained to the claimant that during his phased return, he could use his annual leave to ensure that he was paid fully during the time of the phased return. She informed the claimant that he around two-hundred and ninety-six hours of annual leave to use up by October 2018 (approximately fifty-four days) as his annual leave allowance whilst on sick leave had been carried over. He had one-hundred and ninety-six point one hours for the new leave year that had started on 1 October 2017 and two-hundred point six five hours carried over due to his sickness absence. The claimant continually stated that he should not have to use his annual leave for his phased return.

154. On or around 10 May 2018, Ms Baker had another discussion with the claimant in which he raised the issue about sick pay. Again, she said the claimant continued to behave in an angry manner. His tone of voice changed and he was physically shaking. He insisted that he had not been sick in the four years prior to his return.

155. On 25 June 2018, Ms Baker asked the claimant how he was and he replied he would be off work on 28 and 29 June 2018 as he had a hospital appointment. She asked the claimant to bring in the letter to confirm the appointment and he brought in the letter of 27 June 2018 at page 275, which she reviewed. The letter said that the claimant had an appointment on 29 June 2018 only. Ms Baker checked with Ms Storey, who was happy to agree credit for the day of the hospital appointment, but not the day before. However, it was stated that the claimant could take annual leave on the day before if he wanted. Ms Baker tried to discuss the matter with the claimant who became angry and agitated. The meeting then ended because the claimant had another meeting with his trade union representative.

156. After his return from his meeting with the trade union representative, the claimant mentioned DAL and said that he did not normally have this problem with appointments under DAL. Ms Baker agreed to go back to Ms Storey if he wished to request DAL as it was a different process than granting a credit for a hospital appointment. She asked the claimant to put his request for DAL in writing as per the guidance. He became angry and frustrated that she'd asked him to put things in writing and argued that he had not had to do this before. He walked away in mid conversation.

157. Later the same day, Ms Baker spoke to the claimant again [277] and said she had spoken to Ms Storey in the interim, and they had discussed the claimant's request for DAL on both days. She advised the claimant that his request for DAL on both days had been granted, but he was still angry at the situation. He eventually submitted a written request for DAL [279].

158. Ms Baker noted that the claimant can be a very unpleasant person to work with. He had demonstrated this through his anger and refusal to accept reasonable management explanations and refusal to comply with reasonable management requests. He can be very rude and aggressive. These behaviours are inappropriate in the workplace and not in line with the principles of good conduct. On the issue of annual leave, Ms Baker said that she had told the claimant that he could not be paid for both sick leave and annual leave (for the same day). He had never been denied the opportunity to take annual leave and he had been encouraged to book annual leave and been warned that if he did not take it before 1 October 2018, he would only be able to carry over two weeks (10 days) into the following holiday year. The claimant, in response, had said that he would be saving his annual leave in case he was unwell. Ms Baker explained to him that he could not use annual leave to cover sickness absence and denied that she had said this with "hostility or unnecessary sarcasm" as the claimant had alleged.

159. In answer to cross examination questions, Ms Baker said that the first time she had met the claimant was on 3 May 2018 for his return to work interview. She denied she had looked the claimant up and down and given him a forced smile before she had introduced herself. There was then a series of questions about the return to work interview, of which most are not relevant to the issues in this case. Ms Baker denied that the claimant had had a discussion with Mr Barratt the day before and that he had discussed matters with him. The claimant suggested that the record of the return to work meeting was not a full record everything that was said so was not true. This was also denied. We then had a series of questions about the tasks in Mr Barratt's team, which didn't add anything to the previous questions that had been asked of Mr Barratt himself.

160. The final witness, Sophie Storey, gave evidence from her witness statement dated 31 July 2019. Her evidence in chief was that she is a higher officer and manages the child benefit and tax credit complaint teams along with telephony teams receiving inbound calls from the tax credit helpline. She had worked for the respondent since June 2015 and took up her current post in March 2018. She has been Michael Barratt's line manager since March 2018.

161. The claimant had been absent from work from 2 May 2017 to 2 May 2018. He had been due to return to work on 4 April 2018, when his treatment finished, but his treatment finished earlier than the anticipated date, on 7 March 2018, but he did not return to work sooner.

162. He had been referred to an independent decision manager to make a decision as to whether his absence could be supported any longer. The decision manager appointed was Claire Pizzey who investigated the matter.

163. Through his trade union, the claimant indicated that he would be returning to work on 1 May 2018 [229-229a], so Ms Pizzey decided to take no further action.

164. Separately, the claimant was given a first written improvement warning by Mr Barratt for his conduct whilst on sick leave between May 2017 and May 2018 [264].

165. The claimant had verbally asked Mr Barratt for flexible working. Ms Storey had not seen a written request and didn't think that one had been made as required by internal procedures [519-522]. Mr Barratt had discussed the request with Ms Storey and Gary Forster, but they were unable to grant the request because the claimant was a twilight staff member and at the time of his request, no twilight staff members were granted flexible working as it could not be accommodated by the respondent. The reason for this was that there were not enough desks to twilight members to come in when they wanted to. All members of the twilight staff who had requested flexible working had been declined at that time.

166. As part of supporting the claimant's return to work, he was given the option of choosing the work hours that worked best for him and advised that his original shift pattern of 1.00pm to 9.00pm did not work well for him, as he often could not get a bus home. He advised that a shift of 11.00am to 7.00pm would work better for him as he could then get a bus home. He advised that he could not start work sooner than 11.00am and could not finish later than 7.00pm due to public transport services. Ms Storey commented that it did not appear that the claimant would have been able to use flexible working even if it had been agreed on that basis.

167. Subsequently, the claimant moved teams and joined a team of daytime members with full flexible working so was offered flexible working, as otherwise, he would have been the only person in that team who didn't have it. It would not have had a big impact on accommodation pressure to allow one person to work flexibly whereas previously there were five members of the team who had asked for flexible working which could not be accommodated. Accommodation pressures had also been relieved.

168. On the claimant's return to work on 2 May 2018, Jill Baker was acting as interim manager because Mr Barratt was on paternity leave. Ms Baker had a return to work meeting at which the claimant stated that he understood he was returning to the complaints team. Ms Baker discussed this with Ms Storey as she had concerns about the claimant's knowledge not being of the requisite level to carry out this type of work. The claimant had only undertaken one task out of the twenty that were required on the complaints job, and had no experience in using a telephone. The claimant had stated to Ms Baker on 2 May 2018 that he had never had to log into a phone and never would. She therefore thought it would have been too much for the respondent to train the claimant on all twenty tasks to enable him to work on complaints. Ms Storey discussed this with Mr Forster and decided that it would be better for him to return to work on the missing documents task, which was much less complicated.

169. Ms Storey gave evidence about DAL which mirrored that of Ms Baker. Ms Storey had told the claimant that in order to grant DAL, she needed to see evidence of the appointment. He was reluctant to do so. When he had requested two days DAL for a single day appointment, he produced a handwritten note on the letter saying that he needed the previous day. The claimant never provided evidence of why he needed the day off work prior to the appointment but Ms Storey looked at the NHS website at the procedure he was having and decided to grant both days of DAL anyway.

170. Ms Storey's desk was based near Mr Barratt's and the claimant's desks. The claimant was working on Mr Barratt's team. She did not witness Mr Barratt conducting daily meetings with the claimant, as alleged, but Mr Barratt did meet with the claimant to discuss his wellbeing following his return to work after a long period of absence and to discuss training performance issues. These meetings were not held on a daily basis.

171. The claimant was being trained on missing documents by Sarah Morris and Lisa Trueman. Ms Morris and Ms Trueman both raised concerns over providing training to the claimant. The claimant was not getting to grips with the procedures and could not repeat back actions he'd been taught by the two trainers. The claimant got frustrated with the trainers as he did not fully understand the process. When he failed to perform the actions properly the trainers explained this to him and he would become aggressive towards them and told them they were wrong in what they were telling him. They repeated processes on several occasions and the claimant got angry and vocal that they were repeating themselves and they were having to interfere when the claimant was working. His behaviour was wholly inappropriate and against the respondent's behaviour and conduct policies.

172. A decision was made to take the claimant off this task to ensure a safe working environment for Ms Morris and Ms Trueman; as they were the only ones working on the task, there was not anyone else to train the claimant to allow him to continue.

173. On the allegation of unfair assessment, Ms Storey's evidence was that the respondent operates a practice referred to as "in-flight checking" whereby an individual who is new to a task of work has their work checked by a colleague at the same grade who is familiar with the task. The claimant was moved from missing documents to unprocessed change of circumstances, so in-flight checking was requested for his work. Individuals working on unprocessed change of circumstances have a target of forty-five change of circumstances entries onto the system per day. It is well-known that it was difficult to achieve this target if you are telephoning customers, as often customers will hang up on the caller without providing details of their change of circumstances. Most individuals working on the task achieve a target of around thirty-five entries per day.

174. The second method of obtaining details is to send a letter to the customer and await their reply. The claimant was not placed on the telephone area and was tasked with inserting information once details had been posted back. He was not tasked with sending out letters therefore he would not be subjected to the well-known difficulty around telephone contact. He was achieving a target of eleven entries per day which was well below what was required. He did not attend OH appointments until August 2018, despite Mr Barratt arranging multiple appointments for him. His target could not be reduced until the assessment had been carried out. The report recommended that the target be reduced by fifty percent. His productivity of eleven entries per day was therefore still not meeting his reduced target which would have been twenty-two point five.

175. In or around July 2018, Ms Storey spoke to Mr Barratt regarding the claimant's behaviour. He had displayed unprofessional behaviours between May and August 2018 and these were getting worse. She repeated the list that Mr Barratt had previously given and which is set out above in these reasons. She and Mr Barratt decided that he would complete a manager's checklist as the first step in potential disciplinary proceedings.

176. The claimant raised a complaint about Mr Barratt on 16 July 2018 in an e-mail to Mr Forster [288]. Mr Forster suggested that the claimant might wish to enter into informal or formal mediation. Ms Storey e-mailed the claimant on 18 July 2018 [296] to ask him if he would be willing to have an informal mediation with Mr Barratt. She attached mediation guidance. On the same day, the claimant asked to have a word with Ms Storey [298] as he had made a complaint and thought he had been mistaken in his complaint by also complaining about her. He said he would consider informal mediation.

177. On 20 July 2018, Ms Storey asked the claimant for a chat [308]. She explained that arrangements had been made for him to move teams because of the relationship breakdown between him and Mr Barratt. The claimant asked why Mr Barratt could not be moved to another team and it was explained that Mr Barratt had a good knowledge of the complaints task and therefore it would not be reasonable for the business to move Mr Barratt to another area. She asked the claimant to advise if he was willing to move teams, willing to mediate with Mr Barratt or willing to withdraw his complaint. The claimant advised that he would inform Ms Storey of his decision on his return from leave on 30 July 2018.

178. She spoke to the claimant on 30 July 2018 [311] and asked him for his decision. He said that he wished to discuss the matter with his trade union representative, but he would be willing to mediate. Ms Storey spoke again to the claimant again on 31 July 2018 [312] and he confirmed that he still needed to speak to his union representative before making a decision on mediation. He said he didn't want to move teams and that he would speak to his union representative. He said it wasn't urgent. Ms Storey said it was urgent due to the relationship breakdown between him and Mr Barratt and the fact that the claimant was refusing to meet with Mr Barratt in management conversations. The claimant again asked why Mr Barratt could not move teams and Ms Storey again explained that she did not have the time or resources to train a new manager on the complaints task. On 3 August 2018, the claimant said he'd spoken to his union representative and would no longer have face to face meetings with Ms Storey. He never provided Ms Storey with his decision on mediation. The claimant was moved to Connor Snaith's team in September 2018. Ms Storey was on annual leave at the time so Mr Forster arranged the move. The claimant did agree to move teams; however, he was unhappy as he believed that Mr Barratt should have been the one to move.

179. On 5 September 2018 [339] Mr Forster mailed the claimant asking for supporting evidence to be provided so he could look into his complaint against Mr Barratt. The claimant replied on 14 September 2018 [340] stating that he had been unwell and would send it by Monday. Mr Forster e-mailed the claimant on 17 September

2018 [341] saying that an extension to provide evidence had been given until 3 October 2018.

180. On 1 October 2018, the claimant submitted a formal grievance with supporting information to Mr Forster [344-345]. Mr Forster replied on 2 October 2010 [346] saying that he would be in touch with next steps. Mr Forster sent a second e-mail to the claimant on 2 October 2018 [349] asking the claimant what his desired outcome from the grievance was, as ACAS was now involved.

181. A meeting was arranged for 9 October 2018, but was postponed. ACAS advised that it was trying to arrange a meeting with the claimant regarding further action [361]. The claimant e-mailed Mr Forster on 15 October 2018, stating that his union representative was unavailable for the next meeting [363]. However, the claimant had got his dates mixed up and the meeting he was referring to was supposed to have taken place the previous week on 9 October 2018, when he had not attended. Mr Forster replied the same day asking for an alternative date [363].

182. In answer to cross-examination questions, it was put to the witness that Mr Barratt had no proof to justify his claim of a disciplinary offence during his sickness absence. Ms Storey disagreed with this and said that Mr Barratt had the KIT documents and formal meetings.

183. She was challenged on the granting of flexi to twilight staff. Ms Storey said that she managed sixty to seventy twilight staff and it was not fair to grant the claimant's flexi and not grant anyone else. A new policy had been introduced three months earlier that allowed twilight staff now to be granted flexi. Ms Storey named the five members of Mr Barratt's team who did not have flexi. She was not aware of what happened in the team before March 2018, as he had not been in post then. Ms Storey was challenged on the assertion that there was pressure on the accommodation and said that all the teams ran on a ratio of eight desks to ten people. Accommodation was tight and there was not enough space if sixty to eighty people on twilight contracts were granted flexi.

184. Ms Storey was asked about the claimant's skillset to do the complaints task and said that he had done two of the tasks out of the twenty tasks that were required. She was asked what the tasks were and began to list them when she was interrupted by the claimant. She could not comment on the lack of experience of the three female colleagues that had been referred to in previous evidence. She didn't know them. She had not thought it right for the claimant to do work in a complex area after a long period off work. It was also not right to expect him to go into an intense training period. On DAL, Ms Storey accepted that she'd granted the two days' DAL that he'd requested, as had been dealt with in her witness statement. She was asked why she'd granted it and said that he was going for an operation at the hospital and produced evidence of the appointment. There was a handwritten note on the letter. Ms Storey said it would have been fair to have denied DAL for the previous day because she didn't know who had written the note, but she had eventually allowed the DAL anyway. She had asked the claimant for evidence, but he had not provided it. It was put to Ms Storey that all the hassle could have been avoided by her allowing the DAL or checking the

website earlier or Ms Baker could have done it. Ms Storey said that she was the one having the conversation with the claimant face to face.

185. The claimant then moved to the issue of missing documents. She couldn't recall the date of the complaint that led to his removal. She didn't have any reason not to believe the complaint that had been filed by Lisa and Sarah. It was put to her that Lisa had made the complaint and had reported that Sarah was also unhappy so she shouldn't have counted it as a proper complaint. Ms Storey rejected this, saying that they had both expressed concerns. Ms Storey said that she'd discussed the situation with Michael Barratt, the claimant's manager, and had made a decision with him. Mr Barratt had a conversation with the claimant and Ms Storey had accepted what Mr Barratt had told her.

186. On the issue of the targets, the claimant put to Ms Storey that no-one ever used the phone. Everyone he worked with never used the phone. Ms Storey disagreed and referred him to paragraph 17 of her witness statement.

187. The claimant then put it to Ms Storey that no-one ever achieves forty-five COCs per day. They don't use the phone and the only people that use the phone are people who work late. The phone was redundant. Ms Storey disagreed. Mr Bouheniche then moved on to the occupational health report. Ms Storey pointed out that it wasn't sent to Mr Barratt. It was in the occupational health portal and could not be accessed without the claimant's authorisation.

188. In answers to a question from Mr Curtis, Ms Storey said that she had never received a written formal request from the claimant for flexi and that he had never asked directly or through Michael Barratt that flexi should be considered as a way of managing his disability because that was what sickness leave was there for.

189. That was the close of the evidence and the hearing was then converted to a private preliminary hearing at which orders were made for closing submissions to be made in writing.

CLOSING SUBMISSIONS – RESPONDENT

190. Mr Crammond submitted a document using headings that I will reproduce.

The claim

191. It was submitted that the claims pursued did not reflect the evidence or the position presented by the claimant in his evidence. It was submitted further that on the basis the evidence given by the claimant that his claims have no or no reasonable prospect of success at all. The claimant's own evidence directly undermined his claim. He made a number of concessions in evidence with respect to the same. It was difficult to see how the claimant maintained any of his claims at all in view of the concessions he made in evidence.

192. Further or alternatively, the claims which remain pursued by the claimant are not reflected by his evidence. For example, his case as to victimisation was entirely

undermined on his own evidence. He relied on a protected act of 16 July 2018, but said that that unfavourable treatment happened on 5 June 2018.

193. The panel was invited not to consider any points that the claimant did not put in cross examination to the respondent's witnesses.

Evidence and response

194. Where there was a dispute, the tribunal was invited to prefer the evidence of the respondent's witnesses. Where the respondent's witnesses gave explanations for any of the matters put to them or claimed, it was submitted that the same were entirely credible, reliable and ought to be believed and preferred.

195. It was submitted that the claimant was inconsistent, evasive and persistently failed to answer straightforward questions put to him. The tribunal gave the claimant's substantial leeway, assistance and guidance through the hearing. Mr Crammond also submitted that he endeavoured to ensure that the claimant had breaks where appropriate and that the questions he asked the claimant were measured, straightforward and methodical. Despite this, the claimant failed to properly answer a question without the question being asked several times. The tribunal was also invited to consider the demeanour and manner in which the claimant conducted himself during the hearing, especially in view of some of the concerns held by management as to his behaviours and conduct at work.

196. By way of a general submission applicable to all claims, once the evidence and explanations of the respondent are accepted, the claimant's case must fail in all respects. Further that the evidence supports the pleaded position of the respondent in its entirety.

TIME BAR – DISCRIMINATION

197. The tribunal was referred to sections 123 and 140B of the EQA. The relevant dates for time bar purposes in relation to the claims of discrimination were:-

197.1 Day A – 19 August 2018;
197.2 Day B – 19 September 2018 and;
197.3 ET1 presented – 9 November 2018.

198. Accordingly, any acts or omissions that occurred before 10 July 2018 are out of time.

199. Notwithstanding the breadth of the discretion to extend time, time limits were exercised strictly in employment cases. There is no presumption that the tribunal should extend its discretion to extend time on just and equitable grounds unless it can justify failure to exercise the discretion. The onus is always on the claimant to convince the tribunal that it is just and equitable to extend time. It remains the exception rather than the rule (see **Robertson v Bexley Community Centre [2003] IRLR 434** at paragraph 25).

200. It was submitted that there was no conduct extending over a period of time and/or continuing state of discriminatory affairs. There is no or no necessary connection between the alleged act and omissions complained of which would or could bring the matters within this doctrine.

201. Further or alternatively, it is averred that it is not just and equitable to extend time. The claimant had union assistance. He has provided no explanation for not presenting his claim earlier than he did. There is no good basis for the claimant proving that the just and equitable extension should apply, which is the exception rather than the rule.

BURDEN OF PROOF

202. Section 136 of the EQA defines the burden of proof. Importantly, the claimant is required to prove facts from which the tribunal could conclude discrimination. If and once the claimant has established sufficient facts which point to a breach having occurred, in the absence of any other explanation, only then does the burden shift to the respondent to show that he or she did not breach the provisions of the act. In **Greater Manchester Police v Bailey [2017] EWCA Civ 425**, the Court of Appeal held that it is trite law that the burden of proof is not shifted simply by showing that the claimant suffered a detriment and that he has a protected characteristic or has done a protected act (**Madarassy [2007] ICR 867** per Mummery LJ at paragraphs 55 to 56).

203. The case of **Bahl v The Law Society and Others [2004] EWCA Civ 1070** reminds tribunals that they are not to confuse unreasonable behaviour with discriminatory behaviour. In that case, in short, the tribunal had no evidence before it from which to infer discrimination. However, there was evidence before it that the reasons were non-discriminatory and so findings of discrimination were overturned. In respect of this case, the respondent asserts that the claimant has not provided such evidence to support such facts from which discrimination could be found. The hurdle has not been surpassed and the burden does not pass to the respondent. In any event, it is submitted that the respondent has provided more than sufficient explanation and evidence to overcome any burden upon it.

204. We were reminded of the statutory definitions of the protection afforded to employees in sections 39 and/or 40 of the EQA and the definitions of direct discrimination, unfavourable treatment arising in consequence of disability in sections 13 and 15 of the EQA.

205. We were referred to the case of **Pnaiser v NHS England [2016] IRLR 170**, in which the EAT provided guidance on the application of section 15 of the EQA. The “something” that causes the unfavourable treatment must have at least a significant (i.e. more than trivial) influence on the unfavourable treatment and so amount to an effective reason for or cause of it. The tribunal must determine whether the reasons/cause is “something arising in consequence of the claimant’s disability”. It is a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of a disability. This stage of the causation test requires an objective question and does not depend on the thought processes of the alleged discriminator.

206. The Court of Appeal decision in the case **City of York Council v Grosset [2018] EWCA Civ 1105** confirms that on its proper construction, section 15(1)(a) of the EQA requires an investigation of two distinct causative issues: did A treat B unfavourably because of an "identified" something? and; did that "something" arise in consequence of B's disability?

207. We were reminded of the definition of harassment in section 26 of the EQA and the considerations at section 26(4) in determining whether matters fall within the prescribed effect. Mr Crammond reminded us of the methodology in dealing with harassment claims as set out in **Richmond Pharmacology v Dhalrwal [2009] IRLR 336**. We were reminded that even if the conduct has the prescribed effect, it must be reasonable that it did so. Mr Crammond also reminded us of the guidance in **Nazir and Aslam v Asim and Nottingham Black Partnership [2010] ICR 1225**.

208. We were reminded of the definition of victimisation in section 27 of the EQA and the definition of detriment as set out in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** and the subsequent case law. The detriment must be because of the protected act. Knowledge is required of the protected act and once the existence of the protected act and detriment have been established, examining the reason for that treatment, the issue of the respondent state of mind is therefore likely to be critical. In assessing this it is necessary to consider the judgment in the House of Lords in the cases of **Nagarajan v London Regional Transport [1999] IRLR 572**, **The Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830** and the Court of Appeal decision in **Cornelius v University College of Swansea [1987] IRLR 141**.

SUBMISSIONS ON THE ALLEGATIONS

209. Mr Crammond only referred in general terms to submissions. No specific references were made to evidence.

210. On the direct disability claim, the respondent submits that there was no comparator material in similar circumstances and the indicators and evidence are that others on twilight shifts were not given flexi-time. The evidence is clear that the reasons for not allowing flexi-leave were genuine and reasonable business-related reasons. This is supported by all of the respondent's evidence.

211. On the section 15 claim of unfavourable treatment arising from disability, the respondent submits that there was no unfavourable treatment. If we are not with Mr Crammond on this, then any unfavourable treatment did not arise because of something in consequence of a disability. There was no evidence whatsoever that the rejection of flexi-time working was because of something arising in consequence of disability. The evidence clearly indicates genuine and reasonable business-related reasons. There is no or no sufficient evidence at all that the claimant needed flexi-time for disability related reasons and, in any event, this would be to misunderstand the appropriate test.

212. In any event, the respondent pursued a legitimate aim proportionately. The legitimate aims are set out in the list of issues.

213. In the allegation of direct race discrimination, the respondent submits that there was no "opportunity" to work on the complaints teams as alleged. It is submitted that there was no less favourable treatment because there was no comparator actual or hypothetical against whom it could be said that the claimant has been directly discriminated on the basis of his race. In any event, any alleged or less favourable treatment was not because of race. The reasons are obvious and genuine as described in the respondent's evidence: the claimant was not suitably skilled or experienced to work on the complaints team, which is more complicated and difficult work.

214. On the victimisation claim, it was submitted that the protected act relied upon took place on 16 July 2018. The claimant's own evidence does not support that even he believes in discrimination on this basis. He refers in evidence to matters occurring on 5 June 2018 at a meeting and, in one other instance, ACAS early conciliation. This is not the claimant's case and his evidence doesn't support this claim.

215. Of the remaining allegations, the tribunal was referred to the respondent's evidence on the issue of being subjected to separate disciplinary proceedings for misconduct. On the issue of reluctance to allow DAL, the evidence of the claimant was vague and non-specific; there was no reluctance on the part of the respondent to allow DAL at all, and certainly no refusal. The claimant was reasonably and properly asked to follow proper procedures in seeking to claim DAL. There was no detriment to him. He could not possibly have seen this in any reasonable sense as causing him a disadvantage.

216. The claimant's grievance was not ignored. The claimant raised it informally and formerly at a later date. The claimant did not reasonably engage with the requests of him or the process relating to the same, including the issue of informally dealing with it and mediation. There was no detriment to the claimant.

217. On the issue of causation as to whether the alleged detriment was because of the protected act, Mr Crammond made the following submissions:

    217.1 This was not even the case of the claimant in evidence;

    217.2 Further or alternatively, insofar as any acts complained of predate the protected act, the same must fail on causation;

    217.3 As to the disciplinary referral, there was no cause or link. The tribunal is invited to prefer the evidence of the respondent as to the mental processes followed in referring the claimant. This evidence of the respondent's witnesses is clear and was not in or in any substantive way undermined in cross examination. The reasons were, put shortly, concerns about the behaviours and conducts of the claimant. An informal approach was tried and when it failed, the respondent went to a formal process;

217.4 As to the DAL, there is no connection whatsoever. On the claimant's own case, he would say that he was refused DAL both before and after the alleged protected act. In any event, the evidence of the claimant was so vague as to be meaningless on this issue;

217.5 As to the grievance, there was no evidence of a connection at all. The documents indicate that the progression of the grievance was hindered by the claimant. In any event there is no evidence to connect the progression of the grievance of the alleged protected act.

218. On the issue of harassment, the respondent submits that:-

218.1 There were no daily meetings. Any discussions were part of proper management;

218.2 The claimant was not compelled to undertake an IT training course on 12 July 2018. It was reasonably requested to take steps to improve his performance;

218.3 The evidence of the claimant on an alleged unfair assessment of his work was vague and unspecific. It remains unclear when and how there was an unfair assessment of his work.

219. Any alleged unwanted conduct was not related to disability.

220. There was no prescribed purpose or effect because the alleged unwanted conduct did not have the effects at all, the claimant did not perceive such affects, the context of the case was important when the claimant was returning to work in an area that he was not familiar with, it was not reasonable in the circumstances to find that the conduct would have the effect in any event.

221. On the issue of annual leave, the respondent's case is that the claim was misconceived, the legal basis of the claim was unspecified and that there is no jurisdiction to entertain or allow the complaint.

222. The claim is time barred if the claimant was looking for an amendment to allow his claim, the Selkent test was not satisfied in his favour.

223. The date in any application to amend would be well outside the three-month time limit. There was no or insufficient evidence as to why it wasn't practicable to bring the claim in time. There is no legal basis in any event and it cannot be a breach of contract claim because the claimant is still employed.

224. There have been no refusals to allow the claimant to exercise his rights to annual leave. He accrued holiday leave appropriately, including accrual whilst on sick leave. On his return to work in 2018, he had available to him the appropriate annual leave including that which he had accrued his sickness absence and ten days which he had carried over from the previous leave year that had ended on 30 September 2017.

225. The claimant had more than reasonable and proper opportunity to take all the leave he was entitled to between 2 May 2018 (his return to work) and the end of the leave year on 30 September 2018.

CLOSING SUBMISSIONS – CLAIMANT

226. Mr Bouheniche submitted that the disability discrimination claim came about on his return from sick leave when his manager denied him the right to work flexible hours and the rest of his team and, indeed, like all the staff working for the respondent.

227. The racial discrimination also came about on his return from sick leave when the same manager denied him the opportunity to work on a complaint task as it was implicitly agreed prior to joining his team.

228. The victimisation and harassment were the direct result of his above complaint and he has an additional claim of unpaid accrued holiday pay.

229. Mr Bouheniche submits that his claim was so straightforward that he strongly believes that it could not be possibly defended and that if he was to lose, it would be due to his ignorance of employment law and its practicable process, his inadequacy to articulate precisely as well as his lack of conducting a good cross-examination. He did not think that he would need any of those skills when he made his claim.

230. Mr Bouheniche also submitted that he may have been unintentionally clumsy and had thereby alienated me (I did not feel that Mr Bouheniche had alienated me). He went on to comment I had initially assisted him with points of law and by demonstrating kindness to him on a number of occasions.

231. Mr Bouheniche returned to the subject that most of the documents in the bundle were irrelevant. He also commented that the respondent also used meeting notes which he was not even aware existed until they appeared in the bundle. His understanding of a valid document to be allowed as evidence was that it must not only be relevant to the case but also available to the other party before any hearing to consider its admissibility. He also submits that the notes should be agreed and signed by the employee to be admissible.

232. It was submitted that the defence to the disability discrimination claim was inconsistent and varied between assertions that the claimant had never applied for flexi or hadn't made a formal application or wasn't entitled to it or that there wasn't enough seating available. The final excuse given was that his restricted start and finish times would mean that flexi would not be of benefit to him anyway. We were referred to pages 411a – 411f of the bundle as to how his flexible hours easily accumulated daily after being allowed by another manager.

233. It was submitted that flexible working hours are a statutory right open to every employee apart from a small minority of staff on temporary contract working twilight shifts between 4.00pm and 9.00pm. The latter would be considered

flexible working hours once they'd worked for HMRC for a period of twenty-six weeks. The evidence was that staff within the team on which Mr Bouheniche worked were on flexible working hours and therefore these staff could be considered as direct comparators.

234. It was submitted that Mr Barratt could not justify his action when cross-examined by the claimant and when asked questions by Mr Curtis. Mr Barratt's initial justification was that he decided to move Mr Bouheniche from the missing document team because he was not getting on with the two staff who he worked with. It then transpired there is only one of them who'd complained to the other one and the other one subsequently reported the matter to Mr Barratt. He then decided then to remove the claimant swiftly without any prior investigation. A given reason was that Mr Bouheniche was not up to the standard work requirement.

235. Mr Bouheniche said that when he cross examined Mr Barratt about his three colleagues who worked on the complaints desk who had worked with him prior to joining Mr Barratt's team, no adequate reasonable or valid reason was given for treating Mr Bouheniche in the way that he was. The three members of staff he used as direct comparators for the purpose of his claim for racial discrimination would have been happy to assist the tribunal if there were no risks of victimisation and no personal loss of wages. He submitted that they had signed a declaration but that I had declined to look at it (I should note here that the tribunal agreed to the claimant's request after the hearing to look at the statements and give them appropriate weight). Mr Bouheniche submitted that the declarations were not in the bundle because the respondent's solicitor conveniently omitted them from the bundle. He again said that he had tangible proof of this and was happy to produce it. No proof was actually produced with the closing submissions.

236. The respondent's defence to the victimisation and harassment claims was a blanket denial. Mr Barratt said he was just doing his duty when he had called the claimant to daily meetings to enquire about his welfare. It was submitted that this evidence was nonsense because Mr Barratt was never concerned about the claimant's health. In fact, Mr Barratt clearly resented that the claimant had had the time off to recover from his illness evidenced in pages 260 – 261 of the bundle.

237. Insofar as his claim for accrued unpaid holiday was concerned, it was submitted by the respondent that the claimant had been warned that he may use his annual leave if he didn't use the holidays. Whilst this might sound and appear reasonable, it was never mentioned how much accrued leave the claimant was entitled to. The fact was that from the start of his return to work, he was told he could not be on sick and get holidays. He therefore believed he was misled in believing he could have accrued any holidays other than the holidays he had banked before he fell ill and the period between his return to work and up to the end of August 2018.

238. In conclusion, Mr Bouheniche submitted that he had been subjected to racial and disability discrimination and also unreasonable victimisation and harassment. As a result, he had suffered a great deal physically and mentally as evidence by his

medical reports. Mr Bouheniche reminded the panel that English is not his first language.

FINDINGS OF FACT

239. I should firstly say that, although English is not Mr Bouheniche's first language, there was no point in the proceedings at which he ever indicated that he had not understood what was being said to him and none of his answers to questions gave an indication that he had not understood those questions. There were occasions where he failed to answer the question asked, but our unanimous finding is that this was because of the claimant's attempt to avoid the question, rather than his inability to understand it.

240. The claimant demonstrated use of complicated sentence structures and technical legal language in English throughout the hearing. He did not request an interpreter at any time and at no time did the panel consider that an interpreter was required in order to achieve a fair and just hearing.

241. As submitted by Mr Crammond, there were a number of occasions where the claimant appeared to lose his temper and say things that completely undermined his claim. The most notable of these was when he said that his case had nothing to do with disability. However, he always retracted these statements and we have judged this case on the basis that the substance of his claims is the evidence he gave that was supportive of his claims, rather than the evidence that undermined the very existence of those claims.

242. In assessing the weight to be given to the evidence, we find that the claimant was not credible in much of his evidence on the balance of probabilities. His written evidence was brief and vague. It lacked detail and failed to address much of the factual matrix of his claim. His written evidence was inconsistent with his oral evidence and with the documents that were produced. His answers to cross-examination questions and questions from the panel were, at times, vague, evasive and overly aggressive. We appreciate that he is a litigant in person and not a trained lawyer, but he exhibited an ability to engage with the legal concepts involved in the case. His oft-repeated objections to the inclusion of documents in the bundle by the respondent were ill-founded. The panel found no document that was referred to by the respondent as irrelevant or unfair. The document bundle had been sent to the claimant well in advance of the hearing. He had time to prepare his response or apply to have documents removed. He did neither until the start of the hearing.

243. We found the respondent's witnesses to be credible on the vast majority of their evidence. Their witness statements were comprehensive and addressed all the issues raised by the claimant. Their oral evidence was consistent with their written evidence and with the evidence of each other. The documents such as notes of meetings, emails and so on appeared to be contemporaneous. The claimant produced no notes or minutes of meetings himself, so, on the basis that we found the respondent's three witnesses to be credible, we find that they can rely on he notes and minutes of meetings produced. Where there is a conflict of evidence

between the claimant and the respondent, we prefer the evidence of the respondent.

HOLIDAY PAY

244. I will deal with the claimant's holiday pay claim first, as it does not really turn on evidence as such. We find that the terms of the claimant's contract of employment allowed him to carry forward up to ten days' annual leave from one holiday year to the next. We find that the claimant's holiday year ran from 1 October to 30 September. We find that during his period of ill-health absence from 2 May 2017 to 2 May 2018, the claimant continued to accrue holiday. We find that on his return to work on 2 May 2018, the claimant had accrued fifty-six days' annual leave, which included ten days brought forward from the holiday year 2016/2017, his accrued holiday entitlement for the holiday year 2016/2017, and his accrued leave for the current holiday year 2017/2018 on return. We find that the claimant was made aware of the number of days holiday that he had accrued because it is evidenced in the minutes of the meetings that he attended. We also find that the claimant was at no time told that he could not take holiday to cover sick leave. There is no documentary evidence of his assertion and we prefer the respondent's evidence on the point to that of the claimant.

245. We find that the claimant was reminded of his need to take holiday before the holiday year ended on 30th September 2018 and, with the exception of a few days' holiday that he took, he completely failed to take most of the leave to which he was entitled.

246. We find that as at 1 October 2018, the claimant had lost all holiday leave accrued save for the ten days that he could carry forward to the holiday year 2018/2019.

247. We find that as a matter of law, the claimant cannot present a claim for lost holiday leave as a breach of contract claim, as at the date of the hearing, he remained employed by the respondent.

248. We find that the time to bring a claim started on 1 November 2018, as the claimant's last date of payment for holiday pay accrued up to the end of the holiday year that finished on 30 September 2018 would have been 31 October 2018.

249. The claimant made application for early conciliation to ACAS on 19 August 2018.

250. The simple truth of this claim is that the respondent operated its holiday leave policy, to which the claimant had agreed, in a completely fair and open manner. We find that the claimant was aware about the holiday leave he had accrued. He was aware that he would lose all but ten days of the holiday leave that had accrued if it wasn't taken by 30 September 2018, and he failed to take it. He has suffered no unlawful loss and this claim fails.

DIRECT DISABILITY DISCRIMINATION AND DISCRIMINATION ARISING FROM DISABILITY

251. The claimant's claim of direct disability discrimination was that he was treated less favourably when the respondent refused his request for flexible working. His claim of discrimination arising from disability also arose from the respondent's rejection of this flexible working request. We have therefore dealt with both claims together. We preferred the respondent's evidence. We find that evidence shows that others on twilight shifts were not given flexi-time. There was no evidence produced as to whether any of the other workers who were denied flexi-time were (or were not) disabled. The claimant produced no evidence of a comparator in relation to this claim. Even if we were to be generous and assume that the claimant relied on a hypothetical comparator (although no such evidence was produced) and that he had switched the burden of proof onto the respondent, we find that the respondent has shown on the balance of probabilities that flexi-time was not offered to any twilight workers for the reason that they could not be accommodated in the office. Once a decision was made to reverse the policy, when the accommodation issues had eased, the claimant was immediately offered flexi-working. The respondent showed on the balance of probabilities that its reasons were genuine and reasonable business-related reasons.

252. In answer to the specific issues identified above, we find that:

    252.1 The respondent did not treat the claimant less favourably because of his disability. Specifically, the respondent did not refuse the claimant's request for flexible working because he suffers from cancer.

    252.2 The refusal was not less favourable than the manner in which the respondent treated other members of C's team and/or a hypothetical comparator.

    252.3 The respondent's rejection of the claimant's flexible working request did not constitute unfavourable treatment. If it was, the claimant was not treated in this way because of something arising from his disability.

    252.4 The respondent has shown that the refusal of a flexi-work request was a proportionate means of achieving a legitimate aim.

    252.4 The respondent has shown that its legitimate aim was to ensure operational effectiveness and efficiency of its operation, ensuring its ability to meet customer demands and ensuring a practicable working environment.

    252.5 The respondent's actions were proportionate to achieving the following aims:-

        252.5.1 Seeking to apply its policies to the claimant in a fair manner, taking into account his representations;

252.5.2 Providing the claimant with the option of changing his start and finish time so he could take a bus home, and;

252.5.3 Providing the claimant with the option of flexible working as soon as this became available, when he moved teams.

DIRECT RACE DISCRIMINATION

253. The claimant's allegation of direct race discrimination was that because of his race (being of Berber origin), the respondent denied him the opportunity to work on its complaints team. We preferred the respondent's evidence to that from the claimant. He gave no evidence about any comparator, actual or hypothetical. The height of his case was a mere assertion. He produced no evidence whatsoever that he had been the victim of race discrimination.

254. In respect of the issues listed above, we make the following findings:

254.1. The respondent did not treat the claimant less favourably because of his race, being "non-white and non-British"/of Berber origin. The claimant did not produce any evidence, other than an assertion, from which we could have concluded, without any explanation, that the respondent had denied the claimant the opportunity to work on the complaints team in or around the second week of June 2018 because of his race. He did not switch the burden of proof to the respondent.

254.2. The respondent provided a reasoned and reasonable explanation for the claimant being refused the chance to work in the complaints team; he had been off work for a year; his work was not of a high-enough standard, and; he only had experience of a tiny proportion of the work involved, which we find was complex and required specialist knowledge. The treatment of the claimant was not less favourable than the manner in which the respondent treated other members of the claimant's team and/or a hypothetical comparator.

VICTIMISATION

255. The claimant's claims of victimisation were that he did a protected act on 16 July 2018 and, as a result, was subjected to the following detriments:

255.1 He was subjected to disciplinary proceedings and received a first written warning on 20 June 2018 for sickness absence;

255.2 He was subjected to a separate disciplinary process on 28 September 2018 for misconduct;

255.3 He was removed from the missing documents team and assigned to unprocessed circumstances team in or around first week of June 2018;

255.4 The claimant's line manager was reluctant to allow the claimant to take disability adjustment leave on 30 May 2018; 26 June 2018; 13 July 2018; 14 August 2018; 15 August 2018; 16 August 2018;

255.5 The claimant's line manager refused to contact human resources regarding the claimant's concerns of pay discrepancy on 3 May 2018; 21 May 2018 and 5 June 2018;

255.6 The claimant's grievance of 1 October 2018 was ignored by the respondent.

256. It was accepted by the respondent that the claimant did a protected act on 16 July 2018. The claimant himself accepted that the act of victimisation has to post-date the protected act. We make the following findings on the issues listed above:

256.1. The allegation that he was subjected to disciplinary proceedings and receiving a first written warning on 20 June 2018 for sickness absence pre-dated the protected act, so that claim must fail;

256.2. We find that the claimant had conducted himself in a way that would have attracted disciplinary proceedings much earlier than they were actually instituted if he had worked for many other employers. He was difficult, aggressive, obstructive, and verbally abused a colleague on two occasions. We find that the institution of disciplinary proceedings was in the band of reasonable responses and not at all related to the protected act;

256.3 We find that the reason that the claimant was removed from the missing documents team and assigned to the unprocessed circumstances team in or around the first week of June 2018 was because his two colleagues did not want to continue training him because of his attitude, but the alleged act of victimisation predated the protected act, so that claim must fail;

256.4. We find that the claims that the claimant's line manager was reluctant to allow him to take disability adjustment leave (DAL) on 30 May 2018 and 26 June 2018 predate the protected act, so those claims must fail. We find that the evidence showed that on 13 July 2018; 14 August 2018; 15 August 2015, and; 16 August 2018, the claimant did not show on the balance of probabilities that his line manager did or said anything that could have been interpreted as reluctance to allow DAL. On the contrary, the evidence showed that the claimant always failed to provide the required evidence needed to show that he was entitled to DAL, but the respondent still granted him the leave. Its requirement that the claimant produce letters showing that he needed DAL was no more than was required by its policies and procedures;

256.5. We find that the claim that the claimant's line manager refused to contact HR regarding the claimant's concerns over a pay discrepancy on 3 May 2018, 21 May 2018 and 5 June 2018 was not made out on the evidence and, in any event, the alleged acts of victimisation all predated the protected act, so those claims must fail, and;

256.6. We fund that the claimant's grievance of 1 October 2018 was not ignored by the respondent. His initial grievance was responded to within two days. On many instances, the respondent had to wait for the claimant to respond to requests for information. This claim was almost completely unfounded.

HARASSMENT

257. The claimant's claim of harassment related to the protected characteristic of disability were:

257.1 The claimant's line manager held daily meetings with him from 21 May 2018;

257.2 The claimant's line manager compelled the claimant to undertake an IT training course on 12 July 2018 when he was not fit enough to do so.;

257.3 The claimant's line manager responded sarcastically to the claimant on 12 July 2018 asking him what he thought would happen if his manager asked him to do a task and he had said what the claimant had just said to the line manager;

257.4 The respondent unfairly assessed the claimant's work without taking into account his disability or the fact that it was impossible to achieve a good target of productivity on the task that he was assigned to.

258. We find that the claimant did not show on the balance of probabilities that Mr Barratt held daily meetings with him from 21 May 2018. The evidence was that Mr Barratt had regular, but perfectly reasonable and necessary management meetings with the claimant. The claimant did not show that those meetings related to his disability. We find that the meetings did not have the purpose or effect of violating C's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

259. We find that the claimant did not show on the balance of probabilities that Mr Barratt compelled him to undertake an IT training course on 12 July 2018 when he was not fit enough to do so. The claimant's evidence at its height did not meet the allegation he had made. He admitted that he was never required to undertake the IT course. The claimant did not show that the request to attend the IT course related to his disability. When he refused, the matter was dropped. We find that there was no compulsion to take the course, so there was no conduct that could have had the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

260. On the claimant's third allegation of harassment, it was a simple issue of deciding whether the claimant's evidence met the standard of proof. We find that we prefer Mr Barratt's evidence that he did not respond to the claimant in a sarcastic manner, saying "what do you think would happen if my manager asked me to do a task and I said what you just said to me"? We found Mr Barratt to be sympathetic to the claimant's illness and that he often went well beyond what he could reasonably have been expected to do in order to support the claimant. We find that there was no conduct that could have had the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

261. We find that the respondent did not unfairly assess the claimant's work without taking into account his disability or the fact that it was impossible to achieve a good target of productivity on the task he was working on. To the contrary, the evidence showed that Mr Barratt in particular and the respondent generally attempted to be as supportive as possible insofar as the assessment of the claimant's work was concerned. He seemed to fixate on the grade of the person who was assessing his work, rather than the quality of the work itself. The respondent's unchallenged evidence was that the claimant's performance was well below half the usual target. There was no evidence of unfair or inaccurate assessment. We find that there was no conduct that could have had the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

UNAUTHORISED DEDUCTION FROM PAY

262. The claimant's unlawful deduction of wages claim related to an alleged deduction by reducing his pay to half pay on 31 October 201 and nil pay on 13 April 2018 when he was on sick leave, but was withdrawn.

SUMMARY

263. We have some empathy for the claimant, who has had a long history of serious ill health. However, he did not lose these claims because of his lack of legal knowledge or representation: many litigants in person successfully pursue complex cases. He lost because he did not bring evidence that showed to the required standard of proof that his claims should succeed.

EMPLOYMENT JUDGE SHORE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
9 December 2019

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