Case Number: 2500852/2016

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr N Kumrai		**(1) Mr J Aitken** **(2) Mr H Howard** **(3) Ministry of Justice**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 10-13 December 2019; 17-18 December 2019 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Ms N Chavda, Mrs C Ihnatowicz**

On hearing Mr J Jupp, counsel, on behalf of the Claimant and Mr T Kirk, counsel, on behalf of the Respondents, the Tribunal unanimously adjudges that:

(1) The Claimant's complaints of direct racial discrimination, race-related harassment and victimisation are not well-founded.
(2) The Claimant's complaints set out as items (1), (2) but only in so far as it relates to the actions of the Second Respondent, (3) and (4) in the schedule of complaints appended to the agreed list of issues (Appendix 1 hereto) fail on the further ground that they were presented out of time and the Tribunal has no jurisdiction to consider them.
(3) Accordingly, the proceedings are dismissed.

REASONS

Introduction

1 The Claimant and the First and Second Respondents are judges. Purely for the sake of brevity, we will in these reasons refer to them as they are identified above, rather than by their judicial titles. We intend no discourtesy by so doing.

2 The Claimant, Mr Nawal Kumrai, describes himself as 'non-white' and of Indian ethnic origin. He practised as a solicitor from 1988 until 2011, when he took up a salaried appointment as a District Judge on the South Eastern Circuit, based at Willesden County Court. He also holds two fee-paid judicial appointments as a Tribunal Judge of the First-tier Tribunal, one, since 2000, in the Asylum & Immigration Chamber and the other, since 2011, in the Social Entitlement Chamber ('SEC').

3 The First Respondent, Mr John Aitken, is the President of the SEC, a position which he has held since 2014. He was called to the Bar in 1984 and was appointed a Recorder in 2000. His first salaried judicial appointment was as an Immigration Adjudicator, in 2003.

4 The Second Respondent, Mr Hugh Howard, is and at all material times was the Regional Tribunal Judge for the SEC's South-East Region, which was formed as a result of a reorganisation shortly before the events with which this case is concerned. He practised as a solicitor from 1976 until 2002, when he took up his first salaried judicial appointment, as a Chairman of the Social Security Appeals Tribunal.

5 The Third Respondent, the Ministry of Justice, is the Department through which the Courts and Tribunals Service is run.

6 The circumstances which led to this dispute will be explained in some detail in our narrative below but for present purposes this brief sketch will suffice. On 24 April 2015 Mr Kumrai, sitting with a medical member, heard an appeal against a decision of the Department for Work and Pensions (DWP) to refuse a claim for a particular social security benefit. The Tribunal allowed the appeal but, notwithstanding the successful outcome, the appellant made a complaint about the way in which Mr Kumrai had conducted the hearing, which was supported and/or corroborated by others who had been present, including the medical member. An investigation followed, conducted by Mr Howard pursuant to authority delegated to him by Mr Aitken. The case was ultimately referred by Mr Aitken to the Judicial Conduct Investigations Office (JCIO). That statutory body advised the Lord Chancellor and the Senior President of Tribunals that the complaint related to a judicial decision and/or case management and did not fall within the scope of the legislation governing complaints of judicial misconduct, and that accordingly it should be dismissed and Mr Kumrai given informal advice about the proper way to deal with vulnerable appellants. The Lord Chancellor and the Senior President of Tribunals took a different course. They decided, in light of procedural shortcomings in the course of the investigation (to which the JCIO had drawn attention), to refer the matter to Judge Peter Lane (as he then was), President of the General Regulatory Chamber of the First-tier Tribunal, for fresh consideration. In July 2015, Judge Lane issued a decision dismissing the complaint, essentially adopting the reasoning of the JCIO. At the same time he advised Mr Kumrai informally of the benefits to be gained from certain training courses which offer assistance on handling difficult situations in court.

7 By his claim form presented on 15 June 2016 Mr Kumrai claimed under the Equality Act 2010 that Mr Aitken and Mr Howard had racially discriminated against

him, subjected him to race-related harassment and victimised him in the way in which the complaint about the hearing of 24 April 2015 was handled. The claim against the Ministry of Justice was put on the basis that Mr Aitken and Mr Howard were at all relevant times acting as its agents.

8 In their joint response form the Respondents pleaded jurisdictional defences to the effect that the investigation into the complaint was covered by judicial immunity and that parts of the case were out of time, and, in any event, denied all allegations of unlawful treatment on their merits.

9 The long delay in bringing the matter to a final hearing is largely explained by the fact that the proceedings were stayed pending determination of points on judicial immunity in *P v Commissioner of Police for the Metropolis.* The Supreme Court gave judgment in that case in November 2017[1] and as a result the judicial immunity defence was abandoned.

10 The issues in the case were agreed between the parties in the form of a document which is attached to this judgment as Appendix 1.

11 A second agreed document, prepared at our request in the course of the hearing, 'The Parties' Position on Procedural Irregularities', is attached to this judgment as Appendix 2.

12 The dispute came before us on 10 December 2019 for a final hearing on liability only, with six days allowed. Mr Kumrai was represented by Mr Jeffrey Jupp, counsel, and the Respondents by Mr Tom Kirk, counsel. We are grateful to both for their considerable assistance. Keeping to an agreed timetable, they completed their submissions on day four, leaving us the balance of the allocation for our private deliberations.

The Legal Framework

The discrimination, harassment and victimisation claims

13 The Equality Act 2010 ('the 2010 Act') protects specified categories of persons from discrimination based on a number of 'protected characteristics', including race, and from victimisation.

14 Direct discrimination is defined by s13 in (so far as material) these terms:

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

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

[1] [2017] UKSC 65

15 In *Nagarajan* v *London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu v Akwiwu* [2014] ICR 571 CA, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.

16 Nowadays explicitly discriminatory language or conduct in the workplace is fortunately rare. Claimants generally rely on inference, rather than direct evidence. Many authorities on the subject of the drawing of inferences have built up over the years. Some are mentioned below in relation to the burden of proof provisions. Those which pre-dated that legislation began with *King v Great Britain-China Centre* [1991] IRLR 513 CA and ended with *Bahl v The Law Society* [2003] IRLR 640 CA. A common theme running through the case-law from *King* to date is that there must be an evidential foundation to support the theory that the relevant protected characteristic motivated (*ie* had at least a significant influence upon) the act impugned as discriminatory. It follows that a finding of unreasonable treatment cannot by itself justify an inference of discrimination: see *eg Zafar v Glasgow City Council* [1998] ICR 120 HL and *Chief Constable of Kent v Bowler* UKEAT/0214/16 EAT.

17 The 2010 Act defines harassment in s26, the material subsections being the following:

> **(1) A person (A) harasses another (B) if –**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of –**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
> **…**
>
> **(3) In deciding whether conduct has the effect referred to in sub-section (1)(b), each of the following must be taken into account –**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**

18 In *R (Equal Opportunities Commission) v Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the 'related to' wording (in the Sex Discrimination Act 1975) did not require a 'causative' nexus between the protected characteristic and the conduct under consideration: an 'associative' connection was sufficient. Burton J did not doubt or question the concession. The EHRC Code of Practice on Employment (2011) deals with the 'related to' link at paras 7.9 to 7.11. It states that the words bear a

broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic.

19 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are set by the other elements of the statutory definition. Two points in particular can be made. First, the conduct must be shown to have been unwanted. Some claims will fail on the Tribunal's finding that the claimant was a willing participant in the activity complained of or at least indifferent to it.

20 Secondly, the requirement for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect (subsection (4)(b) and (c)) connotes an objective approach, albeit entailing one subjective factor, the perception of the complainant (s26(4)(a)). Here the Tribunal is equipped with the means of weighing all relevant considerations to achieve a just solution.

21 Central to the objective test is the question of gravity. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry v Grant* [2011] ICR 1390 CA (para 47):

> **Furthermore, even if in fact the [conduct] was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' … is a distortion of language which brings discrimination law into disrepute.**

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

22 By the 2010 Act, s27, victimisation is defined (so far as material) thus:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because –**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act –**
> **…**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

23 When considering whether a claimant has been subjected to particular treatment 'because' he has done a protected act, the Tribunal must focus on "the real reason, the core reason" for the treatment; a 'but for' causal test is not appropriate: *Chief Constable of West Yorkshire v Khan* [2001] ICR 1065 HL, para 77 (*per* Lord Scott of Foscote). On the other hand, the fact of the protected act need not be the sole reason: it is enough if it contributed materially to the outcome (see *Nagarajan*, cited above).

24 By the 2010 Act, s50, a 'relevant person', is prohibited from discriminating against or victimising any holder of a public office by, among other things, subjecting him to a 'detriment' (subs (6)(d) and (9)(d)). By s52(6) a 'relevant person' in this context is "the person who has the power in relation to the matter to which the conduct relates". Parallel protection against harassment is enacted by s50(8). It is not in question that Mr Aitken and Mr Howard were, at all relevant times, 'relevant persons' for the purposes of Mr Kumrai and his claims.

25 The 2010 Act, ss109(2) and 110(1) have the combined effect of attaching liability for any conduct of an agent within the scope of his/her authority which contravenes the Act to the principal vicariously and the agent personally.

26 A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL.

27 2010 Act, by s136, provides:

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

28 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the 2010 Act to depart in any material way), including *Igen Ltd v Wong* [2005] IRLR 258 CA, *Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing v Manchester City Council* [2006] IRLR 748 EAT, *Madarassy v Nomura International plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In *Hewage*, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions, observing (judgment, para 32) that they have "nothing to offer" where the Tribunal is in a position to make positive findings on the evidence. But if and in so far as it is necessary to have recourse to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination.

All relevant material, other than the employer's explanation relied upon at the hearing, must be considered.

29 Time limits are jurisdictional in the Employment Tribunal. For the purposes of the claims under the 2010 Act other than those for equal pay, the time limit expires three months less one day after the date of the event complained of plus, where applicable, any additional time to be added under the 'early conciliation' provisions (s123(1)(a)). In the case of 'conduct extending over a period' runs from the end of the period (s123(3)(a)). A case presented outside the primary three-month period may nonetheless be entertained if the Tribunal considers it 'just and equitable' to substitute a longer period. It is for a claimant to persuade the Tribunal to exercise the discretion to extend time. The 'just and equitable' discretion is a power to be used with restraint: its exercise is the exception, not the rule (see *Robertson v Bexley Community Centre* [2003] IRLR 434 CA).

The relevant judicial conduct legislation

30 The Judicial Conduct (Tribunals) Rules 2014 ('the Rules') contain detailed provisions governing complaints of misconduct against members of the tribunals judiciary. By rule 15, any complaint must be made to the relevant President (here, the President of the SEC). A President may delegate his/her functions to another judicial office holder with suitable experience (rule 8). It is not in question that Mr Aitken's delegation of his investigatory powers to Mr Howard in the instant case was lawful and in accordance with the Rules. To fall within the scope of the Rules, a complaint must contain an allegation of misconduct (rule 17).

31 Part 2 of the Rules is concerned with initial assessment by a relevant President. Where a complaint has been made he/she or (as here) his/her delegate "…must initially consider whether an allegation of misconduct has been made by the complainant" (rule 31). Rule 32 then provides:

> **If not, the relevant President may deal with the matter informally and may give such advice to the tribunal member concerned as the relevant President considers appropriate.**

Where rule 32 applies, the complainant must be told that the matter is being dealt with informally (rule 33). Rule 34 then states:

> **Otherwise, the relevant President must dismiss the complaint … if it falls into any of the following categories –**
>
> **…**
>
> **(b) it is about a judicial decision or judicial case management, and raises no question of misconduct …**

We find the drafting puzzling. It seems to mean that a President faced with a complaint not seen as raising an allegation of misconduct has the option of simply proceeding informally and offering advice (rue 32) but if he/she does not take that course dismissal of the complaint is mandated by rule 34.

32 Part 4 is directed to further consideration by the relevant President of cases not disposed of under Part 2 or under the summary procedure governed by Part 3.

Here he/she must determine the facts of the case, decide if they "amount to misconduct" and advise on disciplinary action (if any) (rule 51). Facts are established on a balance of probabilities (rule 52). He/she may make such inquiries, call for such documents and interview such persons as seem appropriate (rule 53). Rule 62 stipulates:

> **Before the relevant President can recommend that disciplinary action should be taken, the relevant President must –**
>
> **(a) provide the tribunal member concerned with –**
> **(i) details of the complaint;**
> **(ii) any supporting documents; and**
> **(iii) any other information that the relevant President has obtained when considering the complaint;**
> **(b) invite the tribunal member concerned to comment upon the complaint within 15 business days of the invitation to do so; and**
> **(c) consider any comments received from the tribunal member concerned.**

By rule 63, the relevant President may continue to recommend disciplinary action only if the tribunal member concerned has responded to the invitation under rule 62(b) or has failed to do so and time for such a response has elapsed. If (*inter alia*) he/she recommends disciplinary action, the relevant President must prepare a report (rule 64(b)). Where a report is prepared by a delegated office holder the report must be sent to the relevant President in draft and must be amended to incorporate any change required by the relevant President (rule 66). Where the relevant President has made a finding of misconduct and considers that disciplinary action other than suspension or removal from office should be taken, the report should recite the relevant findings of fact, the misconduct found, the disciplinary action recommended, with reasons, and the reason why further investigation is not considered necessary (rule 69). The report must be sent to the tribunal member concerned (rule 70). The tribunal member concerned is at liberty to respond to the report (rule 72) but may only do so within 15 business days of the date on which it was sent to him/her (rule73). By rule 74, the relevant President "must" send the report to the JCIO, together with any comments or representations received under rule 72.

Oral Evidence and Documents

33 We heard oral evidence from Mr Kumrai and, on behalf of the Respondents, Mr Aitken, Mr Howard and Mr Gerald Newman, a District Tribunal Judge.

34 We also read the documents to which we were referred in the two-volume bundle produced by the Respondents, which ran to more than 1,000 pages.

35 In addition, we had the benefit of loose documents handed up during the hearing: a chronology, the document which has now become Appendix 2 to this judgment, and the closing submissions on both sides.

The Facts

36 The evidence was extensive and wide-ranging. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history or to resolve

every evidential conflict. The facts which it is necessary to record, either agreed or proved on a balance of probabilities, we find as follows.

Setting the scene

37 The SEC is by far the largest of the First-tier Chambers. It is made up of over 2000 judicial office-holders (legal, medical and disability-qualified) and holds approximately 250,000 hearings annually. These generate about 500 complaints each year.

38 Structurally, the Chamber is divided into seven Regions, each led by a Regional Tribunal Judge (RTJ). Within each Region, there are a number of District Tribunal Judges (DTJs), who are charged with the pastoral care and oversight of specified judicial office-holders. We were told that in the South-East Region there are about a dozen DTJs. One of those, Mr Newman, a witness before us, has over 30 office-holders in his charge. DTJs report to the RTJ. The RTJs report to the Chamber President.

39 The structural organisation of the Chamber was revised in April 2015. A new South-East Region was created and a new office opened at High Wycombe. It was at that point that Mr Howard took up his appointment as RTJ of the new Region, transferring from an equivalent post in the old East Region (headquartered in Essex). He had held that post since 2013, prior to which he had been a salaried Chairman of The Appeals Tribunal (equivalent to a DTJ).

40 The Rules came into force on 18 August of that year. The legislation was drawn to the attention of leadership judges, who certainly included the SEC Chamber President and the RTJs, but no guidance was offered and no training given.

41 At the time of the events with which this case is concerned, Mr Howard was already experienced in dealing with complaints arising out of SEC litigation. But he had very little familiarity with the Rules. He told us, and we accept, that, at the material time, he was still “finding his way around them”.

42 Mr Aitken has been the Chamber President of the SEC since 2014 and has held leadership roles in the First-tier Tribunal since 2006. One of his responsibilities is the supervision of investigations into complaints arising out of SEC cases. Such investigations are generally carried out by RTJs or occasionally DTJs, under authority delegated by the Chamber President. Over the last three years Mr Aitken has undertaken training of RTJs on the operation of the Rules. It was not suggested that any such work was conducted prior to the events with which this case is concerned.

The main narrative

43 The hearing on 24 April 2015 was before Mr Kumrai sitting with a medical member to whom we will refer as Dr D. It was the appeal of an appellant, TS, against a decision of the DWP to reject her application for Employment Support Allowance (ESA). TS had a complex medical history involving a number of different

problems and symptoms. These included faecal incontinence. Mr Kumrai and Dr D agreed in advance of the hearing that they would focus initially at least on the question of incontinence. The reason was that, under the applicable legislation, there was a possibility that TS would satisfy the Tribunal that she met the appropriate threshold, based on incontinence, to qualify for ESA. If so, a more wide-ranging enquiry into the other conditions (including a mental health condition) would be avoided. By agreement, Dr D conducted the questioning initially. When she had done so, Mr Kumrai addressed further questions to TS on the same subject. At the end of the hearing, which was interrupted to allow TS a break when she became distressed, the Tribunal decided that she had established her entitlement to ESA and announced that the appeal was allowed accordingly.

44 By a letter dated 6 May 2015 and misdirected to the Employment Tribunal at Watford, the brother of TS, TLW, wrote to complain about the way in which the hearing on 24 April had been handled. The letter includes this:

> **The treatment my sister received from one member of the Tribunal reduced her to tears despite her having a history of mental illness and depression. After the hearing she appeared traumatised by the whole process. …**
>
> **She was interrogated persistently on extremely delicate matters, that were otherwise well documented.**
>
> **I do understand that Tribunal hearings must seek to obtain the facts, but one individual appeared to show little compassion or understanding of the problems my sister has. In fact it seemed a "guilty until proved innocent" scenario.**
>
> **Is this how Tribunals operate?**

45 The letter of TLW was referred to Mr Newman, whose office was located at Watford. He forwarded a copy to Mr Howard on 14 May.

46 By a letter dated 14 May 2015, which seems to have been misdirected to an address in Birmingham, TS made a complaint of her own. It included the following:

> **I have never in my life been so humiliated as to … how I was treated and the questions I was asked about my illness …**
>
> **It was Mr N K Kumrai that repeatedly asked the same questions about my bowel problem over and over again so that I was so upset at one point I was crying so much that I could not even speak.**
>
> **I had a very good friend and my husband sitting behind me and my dear friend had to [illegible] from the court room because she was so embarrassed for me and angry. My husband was appalled by the questions I was asked.**
>
> **… This whole experience made me very upset and anxious for days after. This is why I have only just put pen to paper. On the evening of 24 April 2015, after I got home I was exhausted, could not eat and had to go straight to bed where I stayed nearly the whole of that weekend.**
>
> **[Dr D] was more of a human being a female maybe she understood my feelings and bowel problems better.**
>
> **Hopefully I will never have to go through a horrendous experience like this ever again in the rest of my life.**

> **I was very upset, hurt and humiliated by the way Judge Mr N K Kumrai treated me …**

47 On 15 May 2015 Mr Newman sent an email to Mr Howard which referred to the complaint of TS and included this:

> **I am sitting today with [Dr D], who was the medical member on the Tribunal which heard the appeal of [TS] about which the complaint has been raised.**
>
> **Completely unprompted, she raised the question of Mr Kumrai's conduct of that appeal. I was very concerned to hear what she reported.**
>
> **It also emerged that there have been other concerns in relation to Mr Kumrai in relation to his dealings with clerks, members, and parties. Some matters had been referred to [a DTJ] so may be on file.**
>
> **I told her that, in the usual way, you would write to ask for her account of what happened in the case of [TS].**
>
> **But I think I/we may need to look at the file and consider whether … anything further is required.**

48 On the same day, Mr Newman made a file note of his conversation with Dr D which included the following:

> **Dr D asked me if she could tell me about Mr Kumrai. It turned out to be the case of [TS] who has made a complaint.**
>
> **In that case, the Appellant had faecal incontinence issues. At the start of the hearing, she recounted a particular episode. The judge just put her in her place.**
>
> **The Dr was questioning her about the incontinence. The judge butted in and asked her to repeat the account of the embarrassing episode.**
>
> **Dr passed him a note to say she felt [the applicable rule] was met. Judge wanted to ask her more questions. She burst into tears. Her friend was so upset she stormed out of the meeting.**
>
> **Dr D says she felt intimidated by him, and he bullied and humiliated the Appellant.**
>
> **He refused to shake the Appellant's hand at the end.**
>
> **She said it was one of the worst days of her professional life. She was in tears at the end of the day.**
>
> **Other background:**
>
> - **Of the clerks, only [name] is prepared to work with him**
> - **Her daughter … ended up in tears when he was demanding she use the old [Decision Notices]**
> - **He regularly complains about colleagues**
> - **Complaints were made to [a DTJ] about him**
> - **Dr D also said he seemed to have poor knowledge of Regs 29/35**

49 On 21 May 2015 Mr Howard wrote to TLW. He explained that complaints of judicial misconduct can be considered but complaints about judicial decisions or the reasoning leading to them cannot. He went on to say that further information

would be required before he could be in a position to take forward any investigation, including a full account of precisely what was said to have taken place at the hearing on 24 April. Mr Howard allowed 15 working days for TLW to reply.

50 Also on 21 May 2015 Mr Howard and Mr Newman spoke by telephone. Mr Newman made a note of the conversation, from which it is apparent that there had been some discussion of Mr Kumrai's personnel file. The note refers to "records of various disputes with DTJs and RTJ Adrian Rhead." Before us, Mr Kumrai objected to the reference to "disputes". It is common ground that the file documented issues to do with cancelled sitting dates, a clerking issue at Watford, a surprisingly protracted process to do with an annual appraisal for the year 2013/14 and a request by Mr Kumrai (not granted) for an email of November 2012 to be removed from the personnel file.

51 Mr Jupp made the point in evidence that Mr Howard's witness statement twice asserted that he did not look at Mr Kumrai's personnel file until September 2015. Mr Howard in cross-examination accepted that that evidence was wrong.

52 Mr Howard gave evidence, which we accept, that he also looked at Dr D's file in the course of the investigation.

53 Having received no reply from TLW, Mr Howard rejected his complaint in a letter of 23 June 2015.

54 In the meantime, on 29 May 2015[2] Mr Howard wrote to TS, acknowledging her letter of complaint dated 14 May. He explained the power to investigate allegations of judicial misconduct and stated that he was willing to pursue the matter. He requested permission to discuss the complaint with TLW and asked for evidence from other witnesses present at the hearing to be made available. He also said that he would be calling for comments from Dr D and the clerk of the Tribunal. He asked for TS's response within 15 working days.

55 TS did not respond within that timeframe. She did speak by telephone with Mr Howard's personal assistant on 23 June and explained that she had been having difficulty engaging with his letter.

56 On the same day Mr Howard wrote to TS expressing disappointment at not having heard from her but stating that he would investigate her complaint on the basis of the information so far provided. He also wrote to Dr D, the clerk of the Tribunal and a professional adviser who had attended the hearing with TS, inviting them to supply the accounts of what they had witnessed at the hearing on 24 April.

57 By further letters dated 23 June 2015 Mr Howard, through his secretary, invited comments upon TS's letter of complaint from Dr D, the representative of TS (who had attended with her on 24 April), the member of the Tribunal staff who had clerked the hearing and Mr Kumrai, allowing 20 working days for their replies.

[2] The letter is wrongly dated 27 May

58 It seems that no reply was received from the representative.

59 By a letter dated 23 June 2015 received by Mr Howard's office on 7 July 2015 the friend of TS who had accompanied her to the hearing, Ms M, offered her account, which included the following:

> **Judge [Kumrai] spoke to [TS] and asked her to explain her condition, [TS] then went on to describe what happens with her bowel movement after explaining to Judge [Kumrai] and Dr D he asked her again to go through the procedure again, he asked her to slow down and go over this again by this time ST was getting so distressed … I felt physically sick and embarrassed. I just stood up and said I have to leave as this was embarrassing to describe three times her condition.**

60 On 25 June 2015 TS replied to Mr Howard's letter of two days earlier. She apologised for the failure to respond to the letter of 27 May, explaining that she had been "unwell and anxious most days". She repeated that she had made her complaint about the judge asking her "so many times to repeat" her "embarrassing health problem" and about "his attitude." She went on:

> **Dr D was a perfectly normal lady doing her job and by what I remember I feel that she may have been shocked too unless she is used to** it.
>
> **…**
>
> **I do not want this Judge … to be struck off but I do think he needs to have some better people skills. Also a letter of apology from him to myself may make me feel better.**
>
> **I do have Bi-polar disorder too and suffer from Anxiety & Depression and the way I was treated by Judge [Kumrai] could have pushed me to becoming very unwell. …**

61 By a letter of 26 June 2015 the member of HMCTS staff who had acted as clerk to the Tribunal on 24 April responded to the letter to him of 23 June. He stated that he had no recollection of the hearing but also observed that he had been occupied with administrative tasks arising from the previous case and had had to leave the hearing in order to speak to the appellant in the case which was to follow. He added that he believed that it was in this case that the appellant had asked to shake the judge's hand at the end of the hearing and that he had refused, mentioning that he had to maintain impartiality, but that she could shake Dr D's hand if the doctor agreed.

62 By a letter dated 30 June 2015, Dr D responded to the letter to her of 23 June. She said that she was very sorry to hear how upset TS had been following the hearing of 24 April, but not at all surprised. She explained that, having asked some questions about the incontinence problem, she was soon satisfied that the relevant statutory criteria were met and saw no need to ask any further questions. She continued:

> **Mr Kumrai then proceeded with his questions. … he did repeat some of my questions, much to her embarrassment, and even asked her to repeat the account she had given us at the beginning of the sitting. [TS] burst into tears at this point but her representative was very supportive and encouraged her to go through the whole account again. I felt embarrassed on her behalf, so I pointed out [the applicable legislation] to Mr Kumrai and informed him that I thought we had all the evidence we**

> **needed. He informed me in no uncertain terms that if I wanted to consider [the applicable legislation] then I needed to ask her how many times she suffered from incontinence per week. At this point I was feeling embarrassed on [TS's] behalf and therefore asked him quietly if it was really necessary to ask that question, since we had already covered it in my previous questions, but he insisted. My heart sank and I just looked apologetically at [TS] and her representative, asking her to confirm the number of times, for the record. She was very tearful and looked at Mr Kumrai with disbelief. During this time her friend had been looking very uncomfortable and had walked out.**

Dr D also mentioned Mr Kumrai's reaction to TS's offer of a handshake. She said that she went home after the hearing feeling "very deflated". In addition she commented that she had felt "quite intimidated" by Mr Kumrai's manner in the past. Noting that her letter might need to be shared with him or TS, she asked for her address to be deleted.

63 On 8 July 2015 TS's husband wrote to Mr Howard. His letter included the following:

> **I was very upset and embarrassed by the way [Mr Kumrai] spoke and treated TS …**
>
> **TS was asked to repeat very embarrassing questions time after time. [Mr Kamrai] actually reduced TS to tears at one time so much that she could not speak. [Dr D] … did ask TS if she wanted a break to go out from the room to recover herself.**
>
> **TS carried on to answer his repeated awful questions. When we got home she was still very upset and anxious and went straight to bed.**
>
> **Please, I am asking you to make sure [Mr Kamrai] does not upset anyone further in these Tribunals. If you could send a letter of apologies, it could make TS feel better about that horrid day and time she suffered.**

64 On 10 July 2015 Mr Kumrai responded to the letter of 23 June written on behalf of Mr Howard. His letter included the following:

> **It is understandable that the [appellant] felt upset about discussing her incontinence problems as talking about such a topic (particularly to strangers) is not usually without embarrassment.**
>
> **The Tribunal must be entitled to ask questions without fear or favour, and for the purpose of furthering the overriding objective.**
>
> **The Tribunal was mindful at all times of the sensitivities involved, was empathetic, acted in good faith and necessarily steering a fine balance between the [appellant's] emotions and the interests of the fair administration of justice, and given the absence of representation at the hearing on behalf of the Respondent.**
>
> **It was not the Tribunal's intention to humiliate, embarrass, distress or otherwise upset the [appellant] or sport with her emotions.**
>
> **The Tribunal considered it necessary to enquire in more detail about the [appellant's] functional ability so as to enable it to make a fair and just assessment about the degree and extent of the incontinence.**
>
> **This was necessary to determine whether the [appellant] qualified for ESA at the higher rate. The outcome of such enquiries enabled the Tribunal to make closer objective scrutiny and reach findings which it felt it could justify, and as it transpired**

> **the [appellant] achieved possibly a more favourable outcome than might have been anticipated. …**
>
> **Upon the conclusion of the process, the Tribunal did explain to the [appellant] the reasons and necessity for the nature of the questioning. The Tribunal remained empathetic and sensitive. It recognised that the process in the circumstances of the [appellant's] condition had not been pleasant.**
>
> **It is regrettable that the [appellant] has formed an unfortunate perception about the process.**

65 On 31 July 2015 Mr Howard replied to Mr Kumrai's letter of 10 July. It is necessary to quote most of it.

> **I am disappointed that your letter does not address the specific allegations made about the conduct of the hearing but merely recites, in general terms, the role of the Tribunal and the Judge.**
>
> **In general terms, never mind those of [TS], the role of the Tribunal is to enable appellants to give of their best. They cannot do so if they are humiliated or unnecessarily upset. Appellants who appear before us are often vulnerable, inarticulate and have a range of physical and mental health problems. A good Tribunal recognises that and adjusts its style without compromising its independence.**
>
> **I now turn to the specific allegations, which you have failed to address. I have received a detailed account from [Dr D] who confirms in full the account given by [TS]. The other people present also confirm that. Dr D was personally upset by your conduct during the hearing. She tells me that you have cut off her questioning in the past and have made comments to her … complaining about other panel members who disagree with you. She has felt intimidated by you in the past. That is hardly conducive to a good working relationship. It is worrying that there can be such a breakdown in the professional relationship I expect there to be among panel members.**
>
> **It is clear to me that you quite unnecessarily prolonged the proceedings by covering evidence that [Dr D] had elicited that had already established that the appellant satisfied the criteria to qualify for the support group. I accept that Tribunals have to [ask] questions about sensitive and embarrassing matters but Tribunals do not and should not pursue matters unnecessarily particularly when to do so causes harm to parties. As professionals we go home at night, [having] probably forgotten what has taken place during the day … For appellants what we say and do can live with them for weeks, months or even longer.**
>
> **At this stage I am in two minds as to whether to uphold the complaint, not helped by your failure to address the specific allegations.**
>
> **One of the options open to me is to deal with the matter informally and to give you advice pursuant to rule 32 of the Judicial Conduct (Tribunals) Rules 2014. Were I to pursue that course then I would want to meet with you and your DTJ Gerald Newman, where we can discuss the issues and, I hope, give advice that you would find helpful. We would explore what took place during the hearing, whether things could have been dealt with differently and how you might repair your relationship with [Dr D].**
>
> **In that event I could conclude my investigation by resolving the matter on an informal basis. If that is not acceptable to you I will consider whether to uphold the complaint. I would hope that I will receive a positive response from you to this proposal.**

66 Mr Kumrai replied on 5 August 2015 stating that he was about to go on leave and would respond fully in due course. He continued:

> **In the meantime, please would you send me all of the evidence on which you rely …**
>
> **For the avoidance of doubt, I reserve my position on the contents of my letter of 10 July 2015. I do not understand why or how you have arrived at your conclusion nor do I accept it.**

67 On 7 August 2015 Mr Howard wrote again to Mr Kumrai, largely repeating his remarks of 31 July and attaching a full set of the Tribunal's papers together with a copy of Dr D's letter of 30 June.

68 On 8 September 2015 Mr Howard sent an email to Mr Aitken. It referred to a telephone conversation between the two the previous week and continued:

> **… The allegation is that [Mr Kumrai] sent the medical member home in tears and humiliated the appellant. I am told that he has upset the clerks at Watford where he sits. Today, whilst not a matter of judicial misconduct, his DTJ has had to correct 3 of his decisions despite being given advice on the point in question in the past.**
>
> **You suggest that we ask JCIO to take over the investigation at this stage. I have had a long and helpful conversation with their head of casework … She says that we must keep it in-house and proceed as normal. So it looks as though we are stuck with it. She did say that there are no current complaints against him although he has crossed their path.**

69 Having been permitted more time, Mr Kumrai wrote a five-page letter to Mr Howard dated 30 September 2015. In it, he repeated and amplified many of the points in his letter of 10 July. He challenged directly the "conclusion" in the letter of 31 July that he had unnecessarily prolonged hearing. He strongly denied that it was his practice to extend hearings unnecessarily. He questioned whether the complaint had originated from TS and mentioned her psychiatric problems, apparently as casting doubt on the genuineness or reliability of the complaint. He disputed the suggestion that he had lacked empathy at the hearing, claiming that the appellant had "demonstrated an expression of appreciation and pleasure by wishing to shake hands with me at the end of the hearing". Addressing the substance of the allegation that he had asked unnecessary questions and had asked questions at unnecessary length he denied simply repeating the doctor's questions, pointing out that she had said only that he had repeated *some* of her questions. As to his reason for thinking it necessary to explore further the evidence elicited by Dr D, he stated:

> **There was very little medical evidence post decision[3] on the [incontinence] issue. It was only after careful scrutiny that I decided to give her the benefit of the doubt which I would not have been able to do without asking some further questions. There was very little medical evidence post decision on the issue.**

Mr Kumrai also challenged Dr D's remarks about her prior experience of sitting with him and stated that he had always felt that he had a satisfactory working relationship with her. At the end of his letter he summed up his position thus:

[3] That is to say after the DWP decision of 17 December 2014 under challenge in the appeal.

> **1. I do not consider the complaint to contain any allegation of misconduct.**
> **2. I did not repeatedly ask the same questions.**
> **3. I do not accept I asked unnecessary questions.**
> **4. I do not accept that I prolonged the hearing unnecessarily.**
> **5. I do not accept that I caused harm.**
> **6. I did not and have not "intimidated" the doctor.**
> **7. I did not and have not "cut off" the doctor.**
>
> **In all the circumstances, I submit that the complaint be dismissed.**

70 On 9 October 2015 Mr Howard wrote to Mr Aitken. His email included the following:

> **I think there is enough … to uphold the complaint but it will be contested by Judge Kumrai whose eventual and belated response gives no quarter. The weight of the evidence would be supportive of upholding the complaint on the basis of his harsh approach …**
>
> **I had hoped to have resolved this matter by having a meeting with Judge Kumrai and DTJ Newman and deal with it as a training issue and give advice. …**
>
> **If I took the … course of not upholding the complaint and instead gave informal advice under rule 32 I think it would be water off a duck's back and we would have no change of behaviour. Interestingly the appellant has since written saying very generously "I do not want this Judge Mr Kumrai to be struck off but I do think he needs some better people skills." I think she hits the nail on the head.**
>
> **Any thoughts? Might this be a situation for you to have a meeting with him as he seems to be brushing me aside?**

71 Mr Aitken replied at once:

> **If there is enough to uphold the complaint, that is what you must do. We cannot fail to act where the evidence exists, it sounds like a warning case, but we must press on.**

72 Mr Howard completed his report on 26 October 2015 and submitted it to Mr Aitken. There was some confusion before us because two versions of the document were included in the bundle. It seems that the only difference was in the final paragraph, one version recommending "formal advice" and the other a formal written warning.

73 The report placed on record (paras 3-8) the fact that Mr Kumrai had not been the subject of any prior formal complaint but included references to four matters extracted from his personnel file: an issue in 2012 to do with cancelled sittings which had resulted in a letter to Mr Kumrai from the then RTJ; a note of a conversation between DTJ Ward and Mr Kumrai also in 2012 resulting from the fact that some clerks at Watford were not prepared to clerk for him because of his attitude towards them; a record of Mr Kumrai's unusually protracted appraisal process for the year 2012/2013, commenced in April 2013 and not completed until 2014; and a disagreement between Mr Kumrai and the then RTJ about whether DTJ Ward's note of 2012 should be removed from the file.

74 The report then summarised the appeal in TS's case (paras 9-15) and set out a chronology of the complaint and the investigation (paras 16-35). Dealing with the substance of the complaint, the report noted (para 38) that the 'Record of Proceedings' was deficient in that, in so far as it noted the evidence, it did not record the identity of the speaker or the question to which he or she was responding. The report went on:

> **43. It appears to be common ground that Judge Kumrai continued with the questioning. His position is that he wanted more detail. The perception of the others was that he was unnecessarily covering the same ground to the obvious distress of [TS].**
>
> **44. It appears that [Dr D] tried to suggest that the Tribunal had sufficient evidence but that Judge Kumrai pressed on.**
>
> **45. Dr D supports [TS's] account – see attached letter.**
>
> **46. I accept that asking questions about bowel incontinence of the appellant with a mental health disorder is fraught with difficulty.**
>
> **47. Whilst I accept Judge Kumrai's position that the procedure to be followed is for the Judge alone and that he has a wide discretion within the concept of judicial independence, Judges nevertheless have to display tact and sensitivity when people appear before them. I do not find Judge Kumrai's observation that the representative did not object to be persuasive. I do not know the reason why the representative did not object. Sometimes representatives can be ineffectual or may be intimidated.**
>
> **48. Dr D has made it clear that she was upset and embarrassed by Judge Kumrai's conduct. She also says that she has felt intimidated by his manner in the past.**
>
> **49. I am concerned that Judge Kumrai, in his robust letter of response dated 30.09.15, shows little, if any empathy or regret for what has happened. He rejects entirely the complaint and [Dr D's] comments.**
>
> **50. When weighing the evidence I have regard to the past comments in the file. Judge Kumrai does not enjoy a good working relationship with the clerks at the venue. He was resistant to advice given by [DTJ] Ward. He took several months to finalise the appraisal report by [DTJ] Sellar. He was in dispute with [RTJ] Rhead concerning the note on his file.**
>
> **51. I also observe that at an early stage in my investigation, and before Judge Kumrai gave me his full version of events, I speculated that an option, subject to his response and the outcome of the investigation, might be to deal with the matter by way of advice. I observed that we would also need to address how he could repair his relationship with [Dr D].**
>
> **52. Judge Kumrai's response to me, in common with his responses to DTJs Ward [and] Sellar and [RTJ] Rhead has been, in terms, that there is nothing he has done that needs to be addressed.**
>
> **53. Judge Kumrai's alleged conduct on this occasion chimes with the difficulties that there have been in the past.**
>
> **54. The balance of the evidence supports TS's complaint that Judge Kumrai's conduct of the hearing fell short of the high standards we expect of Judges when dealing with vulnerable appellants. I conclude that he conducted the**

> **hearing in an insensitive and oppressive manner and unnecessarily prolonged matters to the distress of [TS].**
>
> **55. I conclude that the matter should be found proved.**
>
> **56. [TS] has generously said in her last letter that "I do not want this Judge Mr Kumrai to be struck off but I do think that he needs to have better people skills." I think she hits the nail on the head.**
>
> **57. On the basis that Judge Kumrai has been resistant to advice in the past and does not feel that he [has] done anything wrong and in the light of my findings it is now inappropriate to consider the option of giving informal advice.**

75 On or about 2 November 2015 Mr Aitken approved Mr Howard's report. The same day Mr Howard forwarded to him copies of most of the documents referred to, including documents from the personnel file. These did not include Dr D's letter, which had been sent with the draft report.

76 By a letter of 7 January 2016 Mr Aitken wrote to Mr Kumrai attaching a copy of Mr Howard's report and an annex of supporting documents. It included (para 2) what is agreed to be an inappropriate reference to the 2014 Rules, rule 115. Mr Aitken explained that he had delegated to Mr Howard authority to investigate TS's complaint. He also referred to the documents extracted from Mr Kumrai's file (part of the annex) adding (para 6):

> **I have included these as they have a bearing on whether I should consider taking action under Rule 32. In light of the previous correspondence I have concluded that dealing with the complaint under Rule 32 would not be appropriate.**

Mr Aitken drew attention to Mr Howard's conclusions and continued (para 8):

> **Before I make a report to the Lord Chief Justice and Lord Chancellor … I am writing to invite you to make any comments … (Rule 70). I would be glad if you would do so within 15 business days …**

77 Mr Kumrai responded promptly, stating that he was experiencing considerable stress and harm to his health and asking for more time to respond. His request was immediately granted and time extended to 11 February 2016.

78 By a 24-page letter of 10 February 2016 to Mr Aitken, Bindmans LLP solicitors ('Bindmans') drew attention to what they described as "significant shortcomings … procedural and substantive" in the process of investigating and dealing with TS's complaint. They stated in terms that their letter was not intended to provide a response to the letter of 7 January under rule 70 of the Rules. They also made subject access and freedom of information requests, explaining that these were intended to elicit information in order to determine whether a pattern of racial discrimination could be identified and stating that accordingly they amounted to protected acts under the 2010 Act, s27(2)(c).

79 On 26 February 2016, having taken advice, Mr Aitken wrote to Bindmans as follows:

> **I note that you have indicated that [your letter] is specifically not to be considered as a response to the report … under Rule 70. Since the time for a response under Rule 73 has now passed I am obliged to pass on the report to the [JCIO] who may consider the matter further.**
>
> **If Judge Kumrai wishes to inspect his file I invite him to contact Regional Tribunal Judge Howard or his office, who hold that information, and they will make the necessary arrangements.**
>
> **Your other requests will also be dealt with by the [JCIO].**

80 By a letter of 2 March 2016 Mr Aitken referred the case to JCIO and recommended that Judge Kumrai be given a formal written warning. This was subsequently acknowledged to be an error and Mr Aitken varied his recommendation to one for Judge Kumrai to receive formal advice.

81 The case was entrusted to Mrs Clare Farren, the JCIO's Joint Head of Casework. In a report issued on 4 May 2016 and addressed to the Lord Chancellor and the Senior President of Tribunals[4], she concluded that the complaint did not fall within the scope of the Rules because it raised matters of case management rather than judicial conduct. Her recommendation was that the complaint be dismissed and Mr Kumrai receive informal advice about dealing with vulnerable appellants.

82 The Senior President of Tribunals did not agree with Mrs Farren's assessment. He took the view that the complaint was about "behavioural matters" rather than case management and so fell within the reach of the Rules. He also judged that, in view of "significant shortcomings" in the investigation, its "outcome" (presumably, Mr Aitken's acceptance of Mr Howard's report, upholding of the complaint and recommendation of formal advice) was not safe. He therefore proposed that the matter be reinvestigated under rule 13. The Lord Chancellor agreed and the decision was taken to refer the matter to Judge Lane. The Senior President of Tribunals wrote to Mr Kumrai on 27 May 2016 to inform him accordingly.

83 By a short decision dated 15 July 2016 Judge Lane dismissed the complaint against Mr Kumrai, holding that it did not raise a case of misconduct within the Rules. It is evident that the only materials before him were TS's letters of 4 May and 25 June 2015 (decision, para 3). He added that it might be some comfort to TS to know that all judges can benefit from training in "judge craft" and that Mr Kumrai would be offered some "informal advice" in that regard. In a covering letter Judge Lane encouraged Mr Kumrai to seek a place on an appropriate judicial training course dealing with, among other things, the handling of potentially difficult situations in court.

84 Efforts were subsequently made to enrol Mr Kumrai on a suitable training course. He devotes a sizeable part of his witness statement to complaining that these efforts and Judge Lane's advice were detrimental, improper and even unlawful acts.

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[4] This being a case to do with a statutory tribunal, the Lord Chief Justice had delegated his responsibilities under the Rules to the Senior President of Tribunals.

Appendix 2 points

85 Although mostly covered at least in part in our narrative above, it is convenient to arrange our findings on the eight alleged irregularities here.

86 First, we reject as unfounded the allegation that Mr Howard did not "at any time initially" consider whether TS had made an allegation of misconduct. We find that he began with the view that the complaint was potentially within the scope of the Rules and ended satisfied that a case of misconduct was disclosed.

87 Second, it is common ground that Mr Howard's suggestion in his letter of 31 July 2015 of an informal resolution of the complaint under rule 32 was wrong: that was not possible in circumstances where the complaint was treated as raising an allegation of judicial misconduct.

88 Third, the parties of course agree that Mr Howard and Mr Aitken did not dismiss the case on the footing that it concerned case management rather than judicial misconduct. That was the consequence of Mr Howard taking the opposite view and Mr Aitken agreeing with him.

89 Fourth, we reject the assertion that Mr Howard did not determine the facts of the case. He accepted the substance of the complaint, concluding (report, para 54) that Mr Kumrai had conducted the hearing in an insensitive and oppressive manner and had unnecessarily prolonged matters to the distress of TS.

90 Fifth, it is an agreed fact that Mr Howard failed to forward Dr D's statement of 7 July 2015 to Mr Kumrai until 7 August 2015.[5]

91 Sixth, it is not in dispute that copies of the documents from the personnel file referred to in Mr Howard's report were not sent to Mr Kumrai and he did not have the opportunity to comment on them before the recommendation for disciplinary action was made.

92 Seventh, it is also common ground that other materials considered by Mr Howard before completing his report[6] were not shown to Mr Kumrai before the report was completed and accepted.

93 Eighth, the parties agree that Mr Aitken's reference in his letter of 7 January 2016 to rule 115 was inappropriate because that rule did not apply.

Miscellaneous matters

94 Mr Howard told us without challenge, and we accept, that as an RTJ, he has upheld complaints of judicial misconduct in two cases other than Mr Kumrai's. One, that of 'Judge E', believed (from his name, presumably) to be white, concerned a

[5] The significance lies in the fact that, during that period of one month, Mr Howard wrote his letter to Mr Kumrai of 31 July 2015, in circumstances where the latter had not been shown Dr D's evidence. Whether or not this amounted to an infringement of rule 62, it was admitted to be an irregularity.
[6] Seven categories of document are listed in Appendix 2.

failure to write judgments. Mr Howard recommended removal from office but the sanction applied was a reprimand. The other case, that of 'Judge M', who declared himself in his defence to be of dual heritage and a practising Moslem, arose out of a private exchange with Tribunal staff in which he had shared risqué jokes, two of which Mr Howard regarded as racist. His recommendation of a formal warning was approved by the Senior President of Tribunals and the Lord Chancellor.

95 In his witness statement, paras 6-27, Mr Howard sets out in considerable detail a long history of working, in private practice and after his appointment as a judge, to support diversity (including racial diversity) and combat discrimination (including racial diversity). That evidence was not challenged and we accept it as true.

96 Mr Howard and Mr Aitken did not know Mr Kumrai or Dr D, or anything about them, prior to the complaint about the hearing of 24 April 2015.

97 Mr Howard and Mr Aitken have clearly and repeatedly acknowledged the deficiencies in the procedural handling of the complaint against Mr Kumrai and apologised for their part in them.

98 By contrast, so far as we are aware, Mr Kumrai has never acknowledged even the possibility that his conduct of the hearing on 24 April 2015 might have merited some criticism. Neither directly nor indirectly has TS has received from him anything that could be termed an apology.

99 Mr Kumrai has been critical of the decision of the Senior President of Tribunals and the Lord Chancellor and has even found fault with Judge Lane (on the basis that, although he arrived at a favourable decision, he failed to adhere to the principles of natural justice). But he has made no allegation of discrimination against any of them.

100 We were referred to the Guide to Judicial Conduct 2013, which includes (section 4.2):

> **A judge's conduct in court should uphold the status of judicial office, the commitment made in the judicial oath and the confidence of litigants in particular and the public in general. The judge should seek to be courteous, patient, tolerant and punctual and should respect the dignity of all.**

Secondary Findings and Conclusions

Harassment/detrimental treatment

101 Before embarking on our analysis, we return to the agreed list of issues (Appendix 1) and the 'procedural irregularities' document (Appendix 2). We note that, as one would expect, the content of the latter largely corresponds in one way or another with items in the schedule of complaints attached to the list of issues. The entries referring to rule 32 and rule 115 do not, and they are rightly not relied upon as instances of harassment or detrimental treatment. But they are admitted further instances of erroneous reading of the Rules. Likewise, the defects identified by reference to rule 62(iii) do not seem to us to correspond directly with any of the

allegations in the agreed list of issues. But they too are admitted defects in the process.

102 It is convenient to start with the question of harassment. Mr Jupp did not contend that the treatment of Mr Kumrai on which the claims rest was designed or intended to harass. By reference to the harassment provisions, this was an 'effect' rather than a 'purpose' case (submissions, para 87). So put, the harassment claims are, in our view, misplaced.[7] We accept that Mr Kumrai was and is offended and upset by what he regards as wrongful and unjust behaviour towards him. But we do not accept that these sentiments bring the case within the strong language in which the protection against harassment is framed. So to hold would be to cheapen and devalue the statutory language. The required 'effect' is not objectively demonstrated. Nor, we find, was it in fact subjectively perceived by Mr Kumrai, and, if it had been, we would have held that his perception was unreasonable.

103 Is detrimental treatment shown? Here, the test is less demanding, as the case-law demonstrates. As to items (1), (2) and (4), we proceed on the footing, to which no real challenge was raised by Mr Kirk, that arguable detriments are established.[8] We will address item (3) in a moment.

104 By contrast, in item (5) we can identify no arguable instance of detrimental treatment. Mr Aitken's letter to Bindmans of 26 February 2016 did three things. First, it made the point that the letter of 10 February was explicitly stated not to be a response under rule 70 and that in the circumstances the report was being sent to the JCIO as the Rules required. All of that was wholly unobjectionable (see above). Second, it invited Mr Kumrai to approach Mr Howard, his RTJ, "or his office" to follow up the request to inspect his file. That too was entirely reasonable. If Mr Kumrai was loth to deal directly with Mr Howard for that limited purpose (a brief exchange of emails would have sufficed), the alternative course of communicating with his office was expressly volunteered. Third, the letter explained that the other matters raised in the latter of 10 February would be dealt with by the JCIO. Again, no possible detriment arises.

105 As to item (6), here also we agree with Mr Kirk that the complaint, however put, is misconceived. There is no theoretically tenable basis for the challenge to Mr Aitken's act of referring the case to JCIO. Under rule 74 he had no choice, given that the Bindmans letter of 10 February 2016 was explicitly stated not to be a response under rule 70 and time for delivery of such a response had run out. On Mr Kumrai's best case there is nothing to complain about.

106 That brings us to the alleged detriments said to consist in deficiencies in Mr Howard's report and the investigation which led to it (item (3)(a)-(h)). We will consider them in turn. We find no substance in (a). There was no 'refusal' to consider Mr Kumrai's explanation. Mr Howard considered it and stated why he

[7] This is not to imply that, had a 'purpose' case been pursued, it would have fared any better. It would not.

[8] Item (1) (initiating the investigation) has given us pause: in one sense it might be said that initiation of an investigation was a natural and inevitable consequence of the complaints having been received. But, in favour of Mr Kumrai, we read (1) as referring to the decision to initiate an investigation into behaviour treated as capable of constituting judicial misconduct.

found it unimpressive. In contrast with his pleaded case (Grounds of Claim, para (31)) and his evidence before us, Mr Kumrai did not advance the contention in his letters of 10 July and 30 September 2015 that his questions had been necessary because Dr D had mistakenly concentrated on the appellant's symptoms at the time of the hearing rather than four months earlier, when the DWP decision was taken. In the former he just said that "more detail" was required. Mr Jupp pointed to a passage in the latter (cited above) referring to a dirth of evidence "post-decision" but it did not put forward the justification now relied upon, and if (which we respectfully doubt) it was really intended to, we are satisfied in any event that Mr Howard did not understand his case in that way and cannot reasonably be criticised on that account. The point about a supposed need for evidence about the condition "post-decision" did not seem to go anywhere since Dr D's questions were understood to have been directed to TS's condition at the time of the hearing, and so post-decision. Moreover, Mr Kumrai did not say or suggest in the letter of 30 September (or at any other stage) that there was anything pointing to a possibility of any significant change in the condition having occurred between the DWP decision and the hearing four months later, or that his questions had been directed to such a possibility, much less that he had explained at the hearing (to TS or to Dr D) that it was this possibility that had made his questions necessary. (No doubt had his correspondence opened up these points there would have been more for Mr Howard to inquire into. For example, he might then have wanted to know from Mr Kumrai why, on the basis of the rationale put forward, more than one or two questions were needed in order to establish whether there had been any significant change in TS's symptoms over the four-month period; or from TS or Dr D whether either might have failed to grasp that Mr Kumrai's questions had been, or might have been, directed to a different date or period from those of Dr D.)

107 Nor can Mr Howard be faulted for his 'refusal' to interview TS. There is no evidence that that would have been the usual way to proceed in the ordinary case. Moreover, this was no ordinary case. TS was a deeply vulnerable individual and Mr Howard believed, not without justification, that her experience of the SEC to date had already caused her much distress and that it would be wrong to risk inflicting any more upon her. Besides, her account was clear and had the compelling support not only of her brother (TLW), her friend (Ms M) and her husband but also, crucially, of the independent, detailed, corroborative evidence of Dr D.

108 As to (b), here again we find no detriment. It was entirely reasonable for Mr Howard to include in his report the remark that Mr Kumrai's 'Record of Proceedings' (in effect, his note) was unsatisfactory. The document was exceedingly brief and, in important exchanges, did not identify the person speaking. We accept Mr Howard's evidence that it did not comply with what is regarded as good practice. If Mr Kumrai is aggrieved about the comment, he has no reasonable ground to be. Nor was the Record of Proceedings 'excluded' from consideration. The point was simply made that it was unhelpful.

109 We also find no actionable detriment in (c). In his report Mr Howard explicitly referred to the fact that TS's representative raised no objection to Mr Kumrai's behaviour, and went on to explain why he found the point unimpressive. His remark was unobjectionable. Direct challenges to judges at hearings are rare. We accept that Mr Howard judged that Mr Kumrai's point carried little weight and had

good reason for doing so. Moreover, complaint (c) is simply wrong in asserting that there was no challenge: there was a direct (if quietly delivered) challenge from the second member of the Tribunal, Dr D. Mr Howard was entitled to regard that as much more significant than the silence of the representative.[9]

110 Turning to (d), we find for the first time a complaint that raises an arguable detriment. It is quite understandable that Mr Kumrai should feel that Mr Howard, in his letter of 31 July 2015, expressed 'premature' conclusions.[10] At that stage, he had assembled the important evidence of most of those present at the hearing of 24 April 2015 but Mr Kumrai had not had the chance to see and comment on it. In those circumstances it is most regrettable that Mr Howard expressed himself in such trenchant and unqualified terms, particularly in the fourth of the quoted paragraphs above, beginning, "It is clear to me". In his witness statement (para 79), he says that it was not unreasonable to "form a preliminary view", but he did not suggest in his letter that there was anything preliminary about his assessment of the facts. It is true that, later in the same letter, he said that he was in two minds as to whether to uphold the complaint, but that could not undo the prior damage. It did not suggest an open mind on the facts, but only on whether the facts substantiated a case of judicial misconduct. And no further comment was invited even on that subject since the closing paragraphs of the letter were largely given to promoting the misguided idea of an informal resolution (which was not possible under the Rules). Here we think that Mr Kumrai is entitled to feel that he was unfairly treated and denied natural justice.[11]

111 The further assertion that Mr Howard's conclusions (in the letter of 31 July 2015, the report or anywhere else) were "unsupported" is obviously unsustainable. There was ample evidence for them. It is also not the case that the conclusions were expressed before evidence had been taken from Mr Kumrai. Evidence had been taken in writing in the form of his letter of 10 July and we see no arguable ground of complaint (if any was intended) about the fact that the evidence was gathered in writing. The problem, as explained in our last paragraph, was that fairness and natural justice required that Mr Kumrai be given sight of the key evidence and a chance to respond to it before findings were made and conclusions reached. That did not happen until well after the letter of 31 July was sent.

112 Complaint (e) has no substance, save to the extent that it covers the same ground as (d). In his letter of 31 July and in his report (para 27) Mr Howard criticised Mr Kamrai's dismissive letter of 10 July but he had good reason to do so. He was certainly entitled to make the point that it did not engage with the nub of TS's complaint, namely that she had been subjected to needless, repeated and distressing questioning. In the letter of 10 July Mr Kumrai gave no detail as to the number of questions asked by Dr D and him, whether his questions covered the same ground, the time taken up with the questions, the impact on the appellant and any consideration given to her feelings. Nor, as we have observed, did he

[9] Or the fact that the Tribunal clerk, two months after the hearing, had little or no useful evidence to offer.

[10] We note that the schedule of complaints (Appendix 1), item (3) is on its face directed to the "content of the report", but, in favour of Mr Kumrai, we read it as extending to wider criticisms of Mr Howard's investigation.

[11] As we will explain, the treatment also infringed the Rules.

state why further questions from him were needed, besides the bald assertion that her "functional ability" needed to be investigated in "more detail."

113 Complaint (f) has substance to the extent that it concerns Mr Howard relying on Dr D's evidence without giving Mr Kumrai the chance to comment on it. On that we do not need to add to what we have said above, in relation to (d) and (e).

114 We are uncertain whether the allegation in the Grounds of Claim, para (38) that Mr Howard in his letter of 7 August 2015 made a "deliberately false" statement "concocted from nothing" was pursued. In case it was, we place on record that we do not accept that Mr Howard did any such thing. In her letter of 30 June 2015 Dr D had said that she had felt intimidated by Mr Kumrai in the past and had explicitly requested that her home address be removed if her correspondence was to be shared with him or TS. The request for her contact details to be withheld from a party was unremarkable. Mr Howard was entitled to encourage Mr Kumrai to reflect on the fact that a fellow judicial office holder had made the same request in relation to him.

115 As to complaint (g), we do not accept that Mr Howard acted inappropriately or unfairly in looking at Mr Kumrai's personnel file. He was quite new to the South-East Region and did not know Mr Kumrai, personally or by reputation. As RTJ he was entitled to view the file. We accept that he wanted to know more about him in order to decide how best to deal with TS's complaint. It might, no doubt, have been a detriment to Mr Kumrai to interrogate his file in order to seek out material to use against him, but we reject the surprising assertion, for which there was not a shred of evidence, that he had such an aim. We think that if he rationalised his purpose at all, he is likely to have had two objectives in mind: first, to ascertain whether there was any relevant history of complaints or issues to do with Mr Kumrai and in particular his interpersonal skills; second, to establish whether there was any material which might suggest the best way of resolving the complaint, including information that might argue for or against an informal outcome.[12] We accept Mr Howard's entirely plausible and unchallenged evidence (witness statement, para 61) that he had looked at the files of other judges on receiving complaints about them. And we further accept his evidence (again unchallenged) that he also looked at Dr D's file as part of his investigation.

116 Although we acquit Mr Howard of the nefarious purpose imputed to him, we agree with so much of Mr Kumrai's case as complains of detrimental treatment in the *use* of the material from the personnel file in the report. Some of the information, such as the alleged difficulties with clerks, was plainly irrelevant and only served to cast him in a negative light. Some, which suggested a difficult person resistant to authority or guidance, was arguably of some relevance to possible outcomes, but the report did not state that reliance was placed on it for that purpose only (see in particular paras 50 and 53). The result was an unfair report that incorporated irrelevant material to Mr Kumrai's disadvantage.

[12] It is clear from the contemporary documents that Mr Howard's aim throughout was to achieve an informal resolution, until made aware that that was not possible under the Rules, so long as a case of judicial misconduct was advanced.

117 Turning to (h), we note that it is common ground that the report was deficient for the further reason that it did not include the 'attachments'. That was to Mr Kumrai's disadvantage as well as being a breach of rule 62(a)(ii).

'Because of race' or 'related to race'?

118 It may assist if, before turning to the critical question, we recapitulate. The claims which raise arguable allegations of detrimental treatment rest on the following matters:

(1) Initiation of the investigation as an allegation of judicial misconduct;
(2) Upholding the complaint;
(3) Defects in the investigation, specifically:
    (i) premature conclusions in the letter of 31 July and not allowing Mr Kumrai sight of key evidence first;
    (ii) including irrelevant material in the report and/or failing to specify the limits of its relevance;
    (iii) omitting relevant documents (attachments);
(4) Acceptance of the report.

Items (1) and (3) stand against Mr Howard only; item (4) stands against Mr Aitken only; item (2) stands against Mr Howard and Mr Aitken.

119 In addition, although these do not found legal claims, we have noted four further procedural flaws relied on by Mr Kumrai as evidential support:

    (iv) Mr Howard's erroneous reading of rule 32;
    (v) Mr Howard's delay in supplying Dr D's statement to Mr Kumrai;
    (vi) Mr Howard's failure to show Mr Kumrai documents which he had considered but not mentioned in his report;
    (vii) Mr Aitken's erroneous reference to rule 115.

120 We are mindful of the observations of Lord Hope in the *Hewage* case (cited above). This is in the normal run of cases and we are able to reach our findings on the evidence. The burden of proof provisions have nothing to offer. Was the detrimental treatment 'because of' Mr Kumrai's race? In other words, were the actions of Mr Howard and/or Mr Aitken materially influenced by the fact that he was of Asian descent? Mr Jupp argued that, as Mr Howard and, we think, Mr Aitken agreed, it was evident from the name that the judge under consideration was of Asian origin, that the flaws in the process were such that there must be an explanation other than simple error and that the only sensible explanation was that race had been a factor. Mr Jupp based his case firmly on the proposition that the discrimination at work here was subconscious. Moreover, he did not develop an argument, or put a case, based on the notion that Mr Howard and/or Mr Aitken were influenced by stereotypical assumptions (which may be conscious or subconscious) about people (or judges) of Asian descent, or anything of the sort. No evidence was presented to us of any pattern of behaviour by Mr Howard or Mr Aitken in comparable cases involving other judges. Sensibly, no doubt, Mr Jupp did not seek to make anything of the fact that Mr Howard had upheld a complaint against one other judge with an ethnic minority background.

121 Nor was there any wider, more general evidence suggestive of any form of racial bias on the part of Mr Howard or Mr Aitken in the performance of their duties or in the operation of any of the functions of the SEC locally or nationally. (We have noted the statistic cited in the Bindmans letter of 10 February 2016 appearing to show within the SEC a somewhat lower percentage of BAME judges than in the Tribunals system as a whole. That information plainly does not offer any help in this case and Mr Jupp rightly did not pray it in aid.)

122 Stepping back and reviewing all the evidence before us we are unable to identify anything suggestive of any element of racial bias underlying the behaviour of Mr Howard or Mr Aitken. There is nothing pointing to their treatment of Mr Kumrai having been different to the treatment that would have been accorded to any other judge of different race in like circumstances.

123 Faced with the difficulty of identifying anything that pointed to a racial motivation on the part of Mr Howard or Mr Aitken, Mr Jupp was driven to arguing that race *must* be the explanation, or at least a material part of it, because the procedural flaws and the unfairness to Mr Kumrai were so exceptional and egregious that no other inference can sensibly be drawn. The submission was persuasively presented but we cannot accept it. Coldly analysed, it simply embodies the commonplace error, identified in *Zafar* (cited above) and many other authorities, of equating unreasonableness with discrimination. We would go further: in our judgment it is plain that, in any other case on the same facts, Mr Howard and Mr Aitken would have proceeded as they did here, making the same mistakes as they made here.

124 Taking Mr Howard first, we are satisfied that, in a comparable case of a judge with a name suggesting a white Caucasian heritage, he would have proceeded exactly as he did in Mr Kumrai's case. It is plain to us that he genuinely judged that TS's complaint was a complaint of judicial misconduct. Mr Jupp did his best to persuade us that that view was untenable and, if genuinely held, must have been tainted by discrimination, but the argument was over-ambitious and we unhesitatingly reject it. On any view, there was, to put the matter at its lowest, a respectable basis for Mr Howard's assessment which, as we have stated, was shared by the Senior President of Tribunals. The fact that another senior member of the judiciary, Judge Lane, saw the matter differently only goes to show that the case was not straightforward and two quite different outcomes were possible. In the imaginary comparator's case, Mr Howard would have initiated the investigation just as he did in Mr Kumrai's case and he would not at any point have dismissed the complaint under rule 34(b). He would have called for the judge's file and that of the medical member. On reading the judge's file he would have formed the view that the individual concerned appeared resistant to authority and inclined to be difficult. He would have looked to an informal solution based on discussion and advice and, when that was met with recalcitrance, sought to pass the problem upward to the Chamber President. Met with guidance from the President that if a case of judicial misconduct was disclosed it must be followed through, he would have taken precisely the path actually taken. He would not have formed a different view from that which he formed about the complaint against Mr Kumrai. He would have judged, exactly as he did in Mr Kumrai's case, that a case of judicial

misconduct was made out, because the powerful evidence of those present appeared to establish that he had engaged in sustained, repetitious, needless and humiliating questioning of a conspicuously vulnerable appellant on a deeply sensitive subject and had thereby gratuitously subjected her to a most distressing experience. He would not have been swayed by the argument advanced at length and in detail in Mr Kumrai's pleaded case and in his evidence before us, that the judge's questions were made necessary by the fact that the medical member had failed to focus on the relevant condition at the time of the DWP's decision. As we have pointed out, that argument was not made, or if it was, not sufficiently clearly made, in Mr Kumrai's correspondence in answer to the complaint and would not have been made, or would have been no better made, in the case of his imaginary comparator.[13] In all the circumstances, we are satisfied that Mr Howard would have taken the course actually taken of preparing a report upholding the complaint. There is no evidential basis for any other conclusion.

125 In our view, the core logic of Mr Kumrai's case on discrimination does not withstand scrutiny. The central thesis that Mr Howard wanted in some way to punish Mr Kumrai (and race was something to do with that motivation) is belied by the narrative above. If so determined, why, we wonder rhetorically, was he consistent in seeking to avoid unpleasantness and formality and deal with the case quietly and informally? And why did he dismiss TLW's complaint on a technical ground (instead of, for example, pressing for a reply to his correspondence)? And why did he (with Mr Aitken) explore the possibility of referring the case (prematurely) to the JCIO in September 2015? And why, when all else had failed, did he try to persuade Mr Aitken to take it on, on the ground that Mr Kumrai would perhaps engage with him rather than brushing him aside? We cannot reconcile these facts with the theory of a motivation (conscious or subconscious) to subject Mr Kumrai to a disciplinary process.

126 The contemporary emails written by Mr Howard, from which we have quoted above, strongly reinforce our view that the theory at the heart of Mr Kumrai's case is misplaced. What shines out from his correspondence is that he was worried about Mr Kumrai and wished to find a means, through informal measures of advice and support, to engender in him improved self-awareness and greater skill and empathy in dealing with vulnerable litigants. Having formed an early view from perusal of the personnel file that he was dealing with someone who was inclined to be difficult and resistant to authority, he clearly judged that formal action would be unlikely to improve Mr Kumrai's judicial behaviour.[14] We would be surprised if Mr Howard did not also reflect that formal action would be likely to result in problematical relations between Mr Kumrai and those above him in the judicial hierarchy, namely Mr Newman and him.

127 For all of these reasons we are satisfied to a high standard that this is not a story of a zealous pursuit of disciplinary action by Mr Howard. Quite the contrary.

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[13] As we have noted, the 2010 Act, s23(1) requires a 'like-for-like' comparison between the circumstances of the claimant and his or her hypothetical comparator.

[14] See, for example, his comment quoted above about "water off a duck's back" in his email to Mr Aitken of 9 October 2015.

128 If our reasoning thus far is right, or at least open to us, where does the logic of Mr Kumrai's case tend from here? Presumably, it argues that, even if not bent on a disciplinary outcome until all other possibilities had been eliminated, Mr Howard nonetheless subjected Mr Kumrai to discriminatory treatment in relation to the detriments listed under item (3) of the schedule of complaints.

129 As to items (1) and (2), we have already explained our view that, in any comparable case involving a judge of different race, Mr Howard would have acted as he did. Turning to item (3), we are likewise satisfied that Mr Howard would have made the same errors in the course of his hypothetical investigation as he made in Mr Kumrai's case. We see nothing in those errors that points to a different conclusion. In part they were neutral or even leaned in Mr Kumrai's favour, such as the suggestion, obviously the product of error rather than artifice, that rule 32 permitted an informal advice-based solution (which, had he accepted it, would, no doubt, have been followed through to the advantage of all concerned). To the extent that errors caused prejudice to Mr Kumrai, we are satisfied that they are explained by ignorance and inexperience of the Rules. The explanation of simple error is, in the circumstances of this case, plausible and, we find, true. Mr Howard had no training in, and little or no relevant experience of, the Rules and in so far as he got guidance from Mr Aitken, he was not helped by it. He did regard it as relevant to have regard to Mr Kumrai's personnel file (and, as we have noted, he also had regard to that of Dr D). We can understand why he thought it was appropriate to do so (although we regret that he lost sight of the need to have regard to principles of natural justice in making use of the information so gathered). The errors do not reflect well on Mr Howard (or Mr Aitken) but, viewed together, they do not point to a malign purpose. Our conclusion on the central planks of Mr Kumrai's case (items (1) and (2)) undermines his arguments on the procedural points. A finding that the key detriments were not motivated by any adverse *animus* (let alone discrimination) but that Mr Howard was so motivated in some aspects of the process followed (and not others) would make little sense.

130 In any event, we are satisfied that the flaws relied on under item (3) were not to any extent influenced by the fact of Mr Kumrai being of Asian descent. There is no evidence supporting any such link and strong evidence which argues to the contrary. Mr Jupp did not challenge Mr Howard's evidence of his long record of working to combat discrimination but based his case on the theory that, despite his commitment to diversity, he nonetheless fell prey on this occasion to subconscious bias. It is sufficient to say that we think it unlikely that that theory is soundly based.

131 As we have explained, the only race-based complaints against Mr Aitken which has survived our reasoning to date are the claims for direct discrimination relating to the decision to accept Mr Howard's report and the later decision to uphold the complaint. We find no substance in these claims. Although the report was flawed in several respects, the decision to accept it rested on the fundamental fact that, as we find, Mr Aitken agreed with Mr Howard that TS's complaint raised at least an arguable allegation of judicial misconduct. The decision to uphold the complaint, which we treat as taken on 2 March 2016 (when the report and recommendation were sent to the JCIO) was based, we find, on Mr Aitken's genuine view that the complaint was made out. There was nothing odd or unsatisfactory about either decision. We think it unlikely that Mr Aitken would have

given thought to whether the report betrayed flaws or errors in its preparation and/or presentation. He is a very busy senior judge with numerous responsibilities. In any event, the key question for him was whether the report should be accepted, and, certainly in Mr Aitken's eyes, that did not depend on whether there were imperfections in it but on whether he agreed with its substance.

132 As in the case of Mr Howard, we see nothing in the history to suggest an *animus* on the part of Mr Aitken against Mr Kumrai.

133 In any event, there is simply nothing pointing to race having played any part in Mr Aitken's unremarkable decision to accept the report and, absent any response under rule 70, uphold the complaint..

134 The considerations summarised above have led us to the clear conclusion that race played no part in the conduct of Mr Howard and Mr Aitken.

135 It follows that, had we found treatment by Mr Howard or Mr Aitken capable of constituting harassment, any complaint based on it would have failed on the ground that the act or omission was not 'related to race'

136 Had we applied the burden of proof provisions, we would have reached the same result. In our view Mr Jupp fails to make out a *prima facie* case. He makes telling criticisms of the procedural errors but he does not get a complaint of race-based less favourable treatment off the ground. As the authorities show, even where less favourable treatment *and* a difference in status are demonstrated that by itself is not enough to shift the burden. Here there is no difference in status because no comparison is set up except a theoretical comparison based on an imaginary comparator. There is no wider evidence whatsoever to support a theory of race discrimination on the part of either of the two actors.

137 Even if we had found that the burden was upon the Respondents the claim would have failed. We would have held that the weight of the evidence marshalled before us, the most important parts of which we have mentioned above, argues against discrimination having played a part in any of the detriments complained of.

138 The harassment claims have already fallen away but, had they not, they would have failed on the ground that no act relied upon was 'related to' Mr Kumrai's (or anyone's) race. Our reasoning in relation to discrimination is repeated.

Victimisation

139 The victimisation claim is directed against Mr Aitken and the Ministry of Justice, but not Mr Howard. The protected act is the Bindmans letter of 10 February 2016 ('the Bindmans letter'), which is agreed to fall within the 2010 Act, s27(2)(c).

140 It is right to say that in his closing address to us, Mr Jupp said little or nothing on the subject of victimisation. But since no part of the victimisation claim was withdrawn, we must deal with it.

141 The only detriments relied on under this head of claim which survive our analysis above are the (separate) decisions to accept Mr Howard's report and to uphold the complaint. The claim based on the first is obviously untenable since the acceptance of the report predated the Bindmans letter. The claim based on the second is, we find, unsubstantiated. In our view Mr Aitken's direction of travel well before 10 February 2016 was towards accepting the content and conclusions of the report. He had approved the document on 2 November 2015. We see no possible basis for supposing that receipt of the Bindmans letter influenced in any way his consistent and unremarkable decision to uphold the complaint.

142 For completeness, we should add that in any event the matters relied on as items (5) and (6) of the schedule of complaint were not influenced at all by the protected act.

Result on the substantive merits

143 For the reasons given, all claims fail on their merits.

Time

144 Mr Kirk submitted that items (1), (3) and (4) in the schedule of complaints were out of time and should fail on that jurisdictional grounds (see his closing submissions, paras 24-25). We agree. Further, we are satisfied that the same reasoning must apply to item (2) in so far as it stands as an allegation against Mr Howard: he 'upheld' the complaint, at the latest, on 26 October 2015, when he completed his report and submitted it to Mr Aitken. By contrast, as we have stated, we treat Mr Aitken as having upheld the complaint on 2 March 2016, when he referred the case to the JCIO and recommended a formal warning. In circumstances where, as we have found, there was no unlawful treatment, no question of relevant 'conduct extending over a period' (under the 2010 Act, s123(3)(a)) can arise. Nor will the Tribunal consider exercising its discretion to substitute a longer time limit than the standard three months, since it would be idle to do so in circumstances where the claims in question have been found to be without merit. Accordingly, we dismiss these elements of the case on the further ground that the Tribunal has no jurisdiction to entertain them.

Outcome and Postscript

145. For the reasons stated, the proceedings are dismissed.

146. We would not wish to leave this dispute without observing that all parties would do well to learn lessons from it. The litigation has no doubt been a chastening experience for Mr Howard and Mr Aitken. We hope that in all future cases they will be especially mindful of the need for scrupulous care to ensure that any investigation is strictly compliant with the Rules and with the principles of natural justice.

147. We were told that during the long life of this litigation steps have been taken (at least within the SEC) to improve awareness and understanding of the Rules. We greatly hope that the startling errors uncovered in this case will not be

repeated. There are here lessons for the Ministry of Justice. It is alarming to learn of important legislation bearing on the constitutionally delicate question of judicial misconduct being brought into effect without even the most rudimentary of measures to educate potential decision-makers as to its effect. We sincerely hope that such an elementary mistake will not be made in future.

148. Finally, we cannot avoid the thought that Mr Kumrai might benefit from reflecting on his part in this unhappy story, which raises uncomfortable questions (for all concerned, including this Tribunal) not only about the scope of judicial misconduct rules and the management of judges by superior judges, but also about how judges engage with those who come before them, many of whom are exceedingly vulnerable and at risk of suffering further damage through the litigation process.

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EMPLOYMENT JUDGE SNELSON
10 January 2020

Judgment entered in the Register and copies sent to the parties on 10 Jan. 20

..... for Office of the Tribunals