EMPLOYMENT TRIBUNALS

Claimant: **Mr. G. Steshov**
Respondent: **Ministry of Defence**

London Central **On: 22-25, 29-30 September and 1 October 2020**
Before: **Employment Judge Goodman**
Ms T. Breslin
Mr T. Harrington-Roberts

Representation
Claimant: **in person**
Respondent: **Mr. R. Moretto of counsel**

JUDGMENT

The claims of direct discrimination because of race, harassment related to race, and victimisation, do not succeed.

REASONS

1. The claimant is a former soldier in the British Army who brings claims of race discrimination and harassment because of his Russian national origin, and of victimisation for having complained of that.

2. There are two claims, the first presented on 29 May 2018, the second on 13 February 2019. There were preliminary hearings for management hearings in Hull on 19 July 2018 and 18 October 2019. The October 2019 list of issues listed discriminatory treatment reaching back to 2009. It was set down for a two day preliminary hearing in January 2019 in Hull to decide whether the claims were in time and covered by the service complaints. That hearing was postponed when the claimant indicated he was about to make a second claim, and proceedings were transferred to London Central as more convenient to the parties. There was a further case management hearing in November 2019, when the claimant was represented by counsel. At all other times he has acted in person.

3. At the hearing in November 2019 all treatment before July 2017 was dismissed on withdrawal.

4. In January 2020 the parties agreed a list of the remaining issues. The full list is appended to these reasons.

Evidence

5. To decide the issues in the case, we heard live evidence from:

    - **Gleb Steshov**, the claimant
    - **Ann Carlisle**, chief executive of the Institute of Linguists Education Trust (IOLET), a contractor assessing language capability for the respondent, on the 2017 language exam.
    - **Frances Hendra**, of the Army Personnel Centre (APC) in Glasgow, who handled the claimant's subject access request (SAR)
    - **Judith Anderson**, administrator at the Defence Requirements Authority for Culture and Languages (DRACL), Shrivenham, on the 2017 language exam
    - **Lt.Col. Simon Watkins**, Chief Instructor, Defence School of Transport (DST), who investigated and decided the claimant's first two service complaints
    - **Lt.Col. Steven Hook**, Establishment Support at DST, on the 2010 discharge paperwork
    - **Martin Solomon**, Head of Intelligence Corps Recruitment and Selection
    - **Lt.Col. Adam Wilson**, who signed the 2010 SNLR document

6. There was a joint hearing bundle of around 1500 pages. The claimant also filed a supplementary bundle of 268 pages; some of these duplicated the joint bundle. Some additions were made during the hearing by the respondent, notably the minutes of the external moderation meeting in October 2017, and a spreadsheet of marks from the Intelligence Corps selection board of July 2015.

Conduct of the Hearing

7. The claimant had had an exacerbation of ulcerative colitis the previous week, and the hearing start was postponed by one day to allow him time to see his doctor. It was agreed as an adjustment that he could ask for breaks as necessary.

8. The claimant was assisted by Ms M. Kyriakou, who located documents, discussed questions with the claimant, and sometimes asked them.

9. The first day of the postponed hearing was spent reading witness statements and documents. On the second day the claimant gave evidence. On the morning of the third day, towards the end of the cross examination, he made an application to recuse. The grounds were (1) that he had in May 2019 complained to the President of Employment Tribunals of a decision made by the hearing judge to allow the respondent an extension of time to serve the response to the second claim, and (2) that the hearing judge had on 17 September 2020 made an order that unless he served his witness statement by 21 September 2020, the first day of hearing, the claims were struck out, and in the reasons had expressed scepticism as to the claimant's reasons for a second, recent, application to postpone the hearing. The application was opposed by the respondent. There was a short adjournment for the judge to speak to the Regional Employment Judge to obtain copies of the complaint correspondence, which had not been copied to her, as the claimant did not produce them when making the application. They were read out in tribunal for the respondent's benefit. After consideration, the panel declined the application, for the reasons given and recorded at the time. Summarising them now: on ground (1), the

decision to allow time for the response was because the claim form had been sent to Horse Guards and in 2 weeks returned to the tribunal in the post, the tribunal had then in April emailed the claim to the Government Legal Department, which sought an extension to seek instructions. This was in the circumstances a routine and unremarkable exercise of case management discretion to extend time, especially where there an existing claim. As a general rule it is better justice for cases to be heard on the merits than to be struck out for breaches of the rules on time, though subject always to particular circumstances. On the claimant's complaint of this decision, the President had written to the claimant that his proper course was to seek reconsideration or appeal, and also said the judge would not be removed from hearing the case. It was not treated as judicial misconduct, and the hearing judge had been unaware of it until the claimant made the recusal application. A reasonable and fair-minded observer would not consider the judge was biased in allowing the application to extend, a decision not considered by the President of Employment Tribunals to be out of order, and when the judge was unaware of the correspondence. The file shows she had seen the complaint on arrival, and had instructed the staff to treat it as a complaint of misconduct and refer it as such, but many dissatisfied litigants complain of decisions, whether by appeal, reconsideration or complaints of judicial misconduct, and a judge would not be likely to hold it against a litigant; indeed if judges did so, there might be few judges left to hear some claims. On ground (2), the unless order, the background considered in that order was that claimant had been ordered to file a witness statement by the end of March 2020, though the parties had agreed to postpone exchange to July 2020. The claimant did not exchange. He then sought a postponement of hearing. In August 2020 this was refused by the Regional Employment Judge. The week before the start of the hearing, still not having served a witness statement, he applied again for postponement, now on grounds of a recent flare-up of ulcerative colitis, supported by a letter from a private gastroenterologist stating only that he had been given a seven day course of rescue steroids and would be reassessed on 21 September. The postponement was refused as it was not clear that he was unfit for the hearing, and as adjustments could be made to allow the hearing to proceed, but he could apply again if there was further medical evidence as to his fitness for the hearing. Next, an unless order for service of the witness statement was made on the respondent's application. The reasons commented, in the context of the July application to postpone, when no medical difficulties were mentioned, that making applications to postpone, and failing to serve a witness statement, might indicate "a reluctance to face a final hearing". The claimant argues this shows a prejudiced mindset that viewed him as dishonest in applying on the second occasion for a postponement of hearing. In the light of the facts, the tribunal held that a reasonable and fair-minded observer (the relevant test of bias) would not consider there was a real risk or actual or apparent bias. Many litigants are daunted by a final hearing, late applications to postpone are not unheard of, the medical letter did not suggest without more that he was unfit for the hearing, he had not served a witness statement, now 6 months overdue, and did not and had not stated that ill-health was the reason for this omission. It was a comment based on the facts, and would not be held to show that the claimant would not be believed. Postponement applications when a case has not been fully prepared are not unusual.

10. After that decision was given in tribunal, the cross-examination concluded. The claimant questioned the respondent's witnesses for two days, and then after a three day break over the weekend, the remaining witnesses on the next two days.

11. The respondent filed a written submission at the end of the evidence. The claimant asked for time to serve a written submission of his own, and was asked to do so by 8 a.m. next day. Each side had half an hour to add to their submission orally, the respondent needing to address evidence heard after preparing the submission. The tribunal then reserved judgment.

12. On the penultimate hearing day Ms Kyraikou asked the tribunal to order some witnesses to come to the hearing, though without naming any witnesses or saying how many. The witnesses were not identified by description. The tribunal's power to compel attendance was explained, but also the difficulties of doing so at this stage, and when it was not clear who they were or what they could say to assist the tribunal on the disputed issues, as there were no statements of their evidence. Neither Ms Kyriakou nor the claimant made an application for a witness order.

Background Facts

13. The treatment we are asked to find discriminatory or victimising began with an exam in July 2017. It is however necessary to set out the background history to understand the context and why the claimant believed that discrimination had occurred. We did not hear evidence on prior events, and we are not therefore able to make findings about all of them, but some had been investigated in the course of the five service complaints the claimant made between January and November 2018. There were many documents in the bundle, and we had some live evidence on earlier matters from Mr Solomon and Lt.Col. Wilson.

14. The claimant is of Russian national origin. He was born in Russia of Russian parents. In 2000, when the claimant was 13, the family came to live in the UK, having previously lived in South Africa. The tribunal does not know when he last lived in Russia or whether he had a Russian education. According to a news story in the Hartlepool Mail of 31 August 2001, the family had sought asylum in the UK after trouble with the KGB; the claimant's father had volunteered an interview with the paper after they had carried an earlier story about other asylum seekers being made to feel unwelcome. The claimant denied the truth of the story, without saying what was untrue, but also said that in the 2 years since he had seen it in the respondent's papers he had not discussed it with his father, so we cannot assess what is wrong or misleading about the newspaper story.

15. The claimant went to school in Hartlepool and did well, gaining 11 GCSEs at grades A to C. These included a grade A* for Russian and a grade C in English. He went on to do 2 A-levels, in Law and Theatre Studies, and got a grade C in each. He then spent a year at Teeside University studying law, before deciding to join the army. He related that the Army recruitment office had suggested he could be useful in Intelligence Corps with his Russian language skill.

16. In the event, he joined the Parachute Regiment training company, the attestation date being 3 May 2009. After 6 weeks training he was injured. After a spell in a rehabilitation platoon, he was transferred to Normandy platoon in October 2009 to complete his training. At the conclusion of this, at the end of January 2010, he moved to the infantry, to the Yorkshire Regiment, to complete his training.

17. The claimant's account of this move is contained in a 5 page handwritten letter he sent to Lt. Colonel Jackson on 28 January 2010, containing: "a complaint in regards of me being discharged with a SNLR under racially motivated reasons". In the letter he recounts how he was resented by the sergeant because he joined from a rehabilitation centre, and how he was made by a corporal to march like a Russian soldier and sing Russian military songs, otherwise he would be punished with a beasting. The claimant complied, and thereafter when on night duty had to sing other Russian songs. If the claimant asked a question, he said, he would be told he had an attitude problem, and was asked by another corporal why he did not join the Russian army. The claimant said that some of his poor reports were deserved, but others were manufactured. At week 5 he had failed the tranesium (an assault course at height) and was told by sergeant that he was to request a transfer. However, the transfer was refused, and he continued with the parachute regiment training course. At the end of the final exercise he was told he was to be back squadded (start the course again). The claimant felt low, and took his weapon and ammunition to the

sergeant saying he would transfer now to the other platoon. He was ordered into a vehicle and told that he was not wanted in the British Army. He was told to collect his kit in the morning and he would be transferred to Hook company (the administrative company where arrangements for his departure would be made). He concluded that this was unfair, he was being "forced out from the Army because I am a Russian in a birth certificate", and all he wanted was to serve his country.

18. His father also wrote briefly seeking to complain about his son's bullying and that discharge papers ("SNLR papers") had been signed without consulting him.

19. The claimant met Colonel Jackson to discuss his complaint. The conclusion of this was that he moved to the Yorkshire regiment, also at Catterick, and passed training as a combat infantryman, CIC standard, on 15 May 2010.

20. We have not been able to test the truth of this. The claimant volunteered in evidence that after the tranesium test in week 5 he recognised that he would find it very difficult to complete Parachute Regiment training because he was unable to manage heights.

21. Once in the Yorkshires the claimant did well. His annual assessments (JSARs) are complimentary. He excelled at boxing. Eventually he became a PT instructor in the Defence School of Transport. There are indications in the assessments that sometimes he argued with orders. He was once warned that the army was not a democracy. His disciplinary record however was unblemished. He was promoted.

22. In pursuit of a career, he hankered after joining Intelligence Corps where he could use his Russian language. He applied to transfer on 2 December 2010, but on 21 January 2011 was rejected on the basis that under Policy Directive no.3 he had to have 10 years British citizenship to qualify. At the time the claimant believed he had been granted citizenship in 2004 or 5, and he was only later informed by his mother that it was not until 2006. The claimant has taken us to the document from which this requirement is drawn. He argues that it means that a candidate must be a British citizen, for any length of time, and have been resident in the UK for 10 years, not that he must have been a citizen *and* resident for 10 years. We prefer the latter construction and believe he is mistaken. He did not challenge the refusal decision at the time.

23. On 12 November 2013 he applied again, drawing attention to his Russian language skill and that he had passed a Russian language test in March 2013. He now had over 10 years residence and seven years citizenship, although it seems he still believed he had 8 or 9 years citizenship. The application was supported by his unit. At the end of January 2014 a note was made on the file that "transfer will depend on assessment of likelihood of gaining enhanced vetting required for linguist employment", and another that he was supported for interview for the linguist role, but he should be aware "you may have difficulty obtaining DV status due to familial links. This may also negate the gaining of enhanced vetting required for employment as a linguist". Developed vetting (DV) is required for all government employees working on sensitive material. Enhanced vetting is a more searching investigation of background and personal life for those at risk of espionage with access to secrets.

24. The second attempt was also unsuccessful. On 14 March 2014 his unit was sent a letter saying that the intelligence corps declined the application to transfer.:

> "The above-named soldier has applied to transfer to the intelligence corps into the OPMI (L) CEG. Private Steshov has recorded an MLAT score of 30 to 59% which is below the recommended 80-89%, he is also untested in Russian on JPA and does not currently hold developed vetting (DV). Having scrutinised all relevant documentation and taken advice from JSSO SO2 security who has liaised with Pers Sy (A) we have been advised that although Private Steshov might possibly attain DV, it is highly unlikely that the soldier

might possibly attain the enhanced security clearances that are a prerequisite of the OPMI (L) CEG."

A further note that month said: "security advice states that Private Steshov is unlikely to attain the enhanced betting required for employment in the OPM I (L) CEG."

25. The MLAT test is designed to find out whether someone who does not know a foreign language has the skill necessary to learn one in a classroom setting. Martin Solomon explained that the army's needs for languages vary from time to time. Even someone recruited because they already possessed a language skill might have to learn another language. For example, at the time he needed linguists with capability in Arabic, Pashto and Farsi, and those with a high MLAT score would be put through an 18 months intensive course in the required language.

26. Mr Solomon said that on the whole a candidate would sit an MLAT test once only, because the test material was something could be learned, when it was designed to test aptitude and potential, not acquired knowledge.

27. On 22 October 2014 the claimant applied a third time. He had now passed the SLP3 Russian language test administered by the University of Westminster. Again the application was supported by his unit. This unit was informed on 27 November 2014 that the application for transfer had been provisionally been accepted for consideration as an operational military intelligence (linguist). He would have to attend a selection board. He was then invited to and underwent an Intelligence Corps selection from 20 - 23 July 2015. His application was eventually rejected on 17 April 2016. The reason given was: "subject was found unsuitable at Intelligence Corps selection 21/23 July 2015. Unlikely to gain enhanced DV clearance".

28. What happened at that board was obscure when investigated as part of the claimant's later service complaint. The claimant recalled (in October 2017, after his disappointment in the Russian language assessment which is party of this claim), that he had had oral feedback at the time, in 2015, that his English was not up to standard. He had left it there. When he followed this up in October 2017, he was told by a warrant officer, who was not in post in 2015, that they did not keep test papers. The service complaint investigator was told in 2018 that the screen with results had been corrupted, and the data was lost.

29. When Mr Solomon learned in the tribunal hearing that records were said to be missing, he asked his staff to have another look, and then attended the hearing with a partial screenshot of the selection board summary of results. This was all that was left. These showed that the MLAT score for the claimant was 89, and for another candidate 84, and that both candidates had eventually failed. The MLAT pass mark was 115. The claimant had sat the test in or around 2013 or 2014, when stationed in Cyprus, and he explained his poor result to the tribunal as being that he was hot and tired at the time, and had received no feedback.

30. The partial screenshot for the July 2015 board results showed there was a psychometric test and an IQ test which he had passed. He got 25 on a link analysis test of pattern recognition, the pass mark being 57. Two other candidates had failed this failed, but they were much closer to the pass mark. All candidates passed the Maths tests. There were three English tests, but only one appears on the screen, and in that the claimant got 76 on a pass mark of 70. The other two English tests were said to be an essay, and then an exercise on information extraction. The English 2 and 3 results and the results for other tests– team tasks, plane crash, salami, briefing others, and random object briefing – were not recorded for any candidate and seem to be missing.

31. Looking at those marks we do have, there must have been some kind of total pass mark, because some who failed on individual tests then passed the selection board.

This is at odds with the warrant officer's email replying to investigation of the service complaint that "all candidates must meet a minimum standard across 12 assessments set, failure in any of these can result in a candidate being deemed unsuitable", but the point was not picked up with Mr Solomon. It is of course possible that some tests had a secondary pass rate for the overall assessment. It is certainly true that Mr Solomon insisted he wanted a good result in the language learning aptitude test for his recruitment of linguists. His evidence, which we accepted, was that because operational requirements for particular languages change from tine to time, even if he recruited someone with a foreign language skill, he needed to know they could learn another if needed.

The July 2017 Examination

32. The claimant accepted the selection board outcome, but hoped that by demonstrating Russian language competence he could still be employed as a linguist. With this in mind, in July 2017 he attended DRACL at the Defence Academy in Shrivenham for a course on Russian language. He then sat a language assessment test, set and marked by an independent contractor.

33. The test was in four parts: listening, speaking, reading and writing. Each skill is marked at a level between 0-5. No competence is 0. Survival level - ability to ask directions and order food for example – is 1. Functional competence is 2, professional is 3, and expert is 4.

34. When the claimant learned in October 2017 that he had been rated 2222, he refused to accept that this was an accurate result. The setting, marking and moderating of this examination is the first issue on the list for this hearing.

35. The examination is administered by an external body called IOLET (Institute of Linguists), under a four-year contract to administer examinations and assess competence in a wide range of languages for the Armed Forces. The contract ran from 2016. Assessment by was done by reference to a set of standards agreed between NATO countries called STANAG. These break down what is expected at each level for each skill.

36. The claimant was prepared for the exam by Miss Huston (who is not an IOLET employee). Her students were assessed on their performance in the past paper, dating from April 2017. The claimant calls this a mock. Ms Huston marked it 4324. This paper included an exercise called back brief, where in the listening examination a candidate had to make notes of what he was being told in the foreign language, and then give an oral brief in English summarising relevant information. The specific exercise involved a farmer complaining that troops had damaged his gate and wanting compensation, and the summary was a report back to his commanding officer.

37. In the exam waiting area the claimant conversed with other candidates and became concerned that others with similar language skills to his had already been given interpreting roles in their units. He went across to DRACL and saw Judith Anderson to ask why he had not been used more when he had level 3 Russian. He asked to see her manager, who was Major Gibb. He was briefly told that DRACL did not deal with job opportunities, only language training.

38. After this, he sat the tests. Listening and reading were tested by multiple choice exams, which give little scope for interpretation, and these results are not challenged. The claimant was marked as 1 for listening and 2 for reading. The writing and speaking tasks were double blind marked, meaning neither marker knew what marks the other had given. The speaking test was recorded for the second marker. In the claimant's speaking test, the first marker, in the room with him at the time, awarded a 2. The second marker gave him a 4.

39. There followed an internal moderation process, involving only IOLET staff. They flagged up all the marks where the two assessors did not agree, and discussed what mark to recommend to the external board. In the claimant's case, they decided to upgrade the 1 on the listening test to 2, on the basis that his performance in the other three tests showed that this was not a proper reflection of his ability. In the speaking test, they recommended a 3. Contrary to the witness statement, we were told there was no third assessor. The moderators were looking at marks over 12 different languages.

40. The marks then went to an external moderating board. This was chaired by Anne Carlisle of IOLET, with 3 other IOLET staff on the panel. DRACL was represented by Major Gibb and Warrant Officer Wright, and Judith Anderson clerked the meeting. Two members of the DCLC, an Army body, attended to understand feedback, but did not have a vote, Captain Crick and Ms Addy Holmes. The marks summary for the day shows 103 candidates in 12 languages. Overall, discrepancies in assessor marks for the speaking test were not unusual. Differences of 1 occur quite often. Differences of 2 occurred in the speaking test in 7 cases of the 103. There were also many changes between initial and final moderation scores. For example, in the Arabic group, they differed in 16 candidates out of 33, in French in 7 candidates out of 24. There were 11 candidates in the Russian group. Of these, 3 candidates had marks changed between initial and final moderation. The claimant went from 1322 to 2222. The other two went from 2211 to 2221 and from 4333 to 3333.

41. The external moderators did not review papers or hear recordings to make their decisions. Instead they reviewed the assessors' comments on the candidate on the scoresheets against the description of what was required for the STANAG level to decide whether each assessor had properly assessed the level. Looking at the assessors' sheets for the claimant, we were struck by the consistency of their critical comment, even though they reached a different assessment level in the light of those criticisms. Assessor one placed him at the high end of 2, saying this was because he was borderline and used many anglicisms, and she gave examples. His fluency and interaction were good, but he was uncomfortable with complex structures, and mispronounced some verbs. The second assessor also praised his interaction and fluency, and said his vocabulary covered a variety of topics but he avoided abstract vocabulary. He or she also criticised a tendency to insert English words when speaking Russian. She assessed his command of grammar at level 3, but noted grammatical lapses in cases, prepositions for verbs, and in declining numerals, and that he avoided complex structures (subordinate clauses) or used them inaccurately. He or she gave a 3 for the level of discourse, because of hesitancy, lack of flexibility in conveying nuance and "noticeable use of non-idiomatic (English) syntax". Overall she placed him at the low point of level 4. The claimant's speech was said by both to have included English words where the Russian word eluded him, that his syntax also sometimes followed an English pattern, there were occasional grammatical lapses, and he avoided complex syntax. The internal moderation score of 3 must have reflected the placement at borderline 3/4, and low 4.

42. The external moderation compared the assessors' comments to the STANAG descriptions of what was required at each level. The Army representatives were concerned that their interpreters should meet NATO standards, as they would have to rely on these interpreters when in the field with NATO colleagues or in handling intelligence. STANAG level 2 – functional – for speaking is about ability to communicate in everyday social and routine workplace situations. "Simple structures and basic grammatical relations are typically controlled, while more complex structures are used inaccurately or avoided. Vocabulary uses appropriate the high-frequency utterances but unusual imprecise at other times". At level 3, the speaker is "able to participate effectively in most formal and informal conversations on practical, social and professional topics". It includes: "use of structural devices is flexible and elaborate… Without searching for words or phrases, can use the language

effectively and relatively naturally to elaborate on concepts freely". At this level "errors may occur in low frequency or highly complex structures characteristic of the formal style of speech". At level 4, the speaker must use the language "with great precision, accuracy and fluency for professional purposes including representation of an official policy or point of view". Both markers had noted the gaps in his vocabulary and the lack of sophisticated grammar and syntax. Placing the claimant's performance at STANAG level 2 was not irrational.

43. We were told 2222 is the minimum standard required for an army linguist. The claimant received a one-off payment for achieving the result. The amount is proportionate to the grade obtained. Had his listening score been left at 1 he would not have got this payment.

44. When the claimant got the grade score he wrote to DRACL on 16 October 2017 to say that he wanted to complain that the Russian language examination grades did not represent his level of Russian language. He believed they should be checked over. (In this hearing he complains only of his speaking grade, and does not challenge the other 2s). Ms Anderson replied that she would investigate/discuss and get back to him. She referred it to IOLET who checked there were no errors in the paperwork. The claimant became frustrated by delays and at the beginning of November wrote to say that his treatment was unacceptable, there must be an appeal system, he had failed once before on poor English, but was offended that he was now failed on his Russian. The army was wasting money using contractors as Russian linguists rather than their own soldiers. DRACL was failing the country, and he was being discriminated against. DRACL got his unit commander to speak to him about writing to her in this tone.

45. On 6 November Ms Anderson told him about the marking process, and that IOLET were being asked to confirm results and provide feedback on speaking assessment. Then : "once IOLET check the results and provided feedback, you may, if you wish (and bearing in mind the level of attention and review that your assessment will by then have received), appeal formally to IOLET, but you should be aware that there would be a cost of this, which would be refunded by IOLET if the appeal were to be upheld". The claimant objects that the parenthesis was a threat to discourage him from appealing.

46. He was told that candidate anonymity was preserved in the assessment process, although as the claimant has pointed out, as his candidate number was his army number, someone with a good memory for numbers who had come across him before would be able to identify him from the list. The claimant believes Major Gibb who he had spoken to in July would have remembered which number was the claimant at the October external assessment.

47. In November IOLET provided formal candidate feedback on speaking and writing. It is a summary of the markers' comments. The claimant was also provided with a link to the NATO levels.

48. He replied that he still disagreed, and wanted a copy of his audio for the speaking test. He believed he was being failed intentionally. IOLET was asked by DRACL to release the recording, but they refused on grounds that exam scripts and recordings are an exception to the Data Protection Act duty to allow subject access. The next year the claimant obtained a tribunal order for its disclosure to him, and IOLET still refused on the same ground, whereupon the government legal department wrote to IOLET saying that a court or tribunal order was not subject to the Act, and it was then released. The tribunal notes that no transcript of the recording been provided, nor a trasnlation; as it in Russian we could gain nothing from listening to it.

49. The claimant did not lodge an appeal with IOLET. Had he done so there would have been remarking by a different assessor.

50. In July 2018 the claimant sat a language exam at the Russian Centre in London which was set by the Institute of Higher Education at St Petersburg University. He was graded 4 in speaking. He was told this was the equivalent to a European level 4. At that stage the recording of his IOLET exam was not available, but when it was, he asked his Russian language teacher at the Russian Centre in London to assess the recording. We do not have any email or letter explaining what he wanted to be done, and the assessment itself, of December 208, is in the form of an email from the business development manager of the Centre incorporating some brief comments by Larissa (no surname given), who tested Russian as a foreign language. The comments are not related to any STANAG criteria. It does not look as if Larissa was provided with the IOLET feedback the claimant had received. It is not therefore helpful to the tribunal when trying to decide whether the 2 mark awarded at external assessment against NATO criteria was so far off that there must be another reason for it.

51. Between March and May 2018 the claimant also raised the fact that he had been expecting a back brief exercise during the examination, but did not get it. He said that when he asked in the test if he was going to have it, he was told he was doing well and they would skip it. The respondent's evidence (which we can see it in emails in November 2017 before he raised this point with them) was that the examination had been modified after April2017 to delete the back brief exercise, and the candidate instructions for July 2017 would not have mentioned it. We do not have any candidate instructions in the bundle. We note only that we do not have a transcription and translation of the speaking test to confirm what the claimant says, and he did not raise this point until much later, despite conducting email correspondence about the exams with DRACL at the same time as going back to the Intelligence Corps to query his 2014 selection board. The claimant points to a November 2018 email to him from another candidate, Alec Rose, as evidence there was a back brief, but in the email Mr Rose says he did not have a 100% recollection of the exam; in addition it is written in reply to an exchange of emails from the claimant, which we do not have, as the email begins "apologies that was indeed the April 17 paper", and so it looks as if he was being prompted by the claimant, and is not clear evidence that others besides the claimant expected a back brief, or that they did or did not get a back brief.. On the basis of the evidence, our finding is that there was indeed a change in the exam format, for all candidates, and he was not being deliberately trapped by the examiner skipping that part so as to reduce his marks, as he suggests.

52. The claimant's belief is that is Russian language was at level 3 at least, if not level 4. His case is that when he questioned Judith Anderson and Major Gibb just before the exam about why the army was not using his language skills, that was "basically goodbye to me". Major Gibb was present at the external moderation; the claimant believes he will have recognised the claimant's army number and marked him down because he complained of not being used.

53. Major Gibb had explained to those investigating the claimant's subsequent service complaint about this that native speakers of the language may only be at functional level because they only used it in social, and domestic contexts and might have no experience of using language as an expert or professional level. The tribunal also observes from its own experience that command of a language can deteriorate over time with lack of use, and command of vocabulary and more sophisticated grammar can become more limited. The claimant regularly converses by telephone with his grandmother in Russia, and we would assume that he speaks to his parents in Russian. We do not know what formal education he had in Russian. Lack of regular use *could* explain that he could demonstrate functional skill levels, but not professional or expert. We note in this context that he did not seek to challenge the scores for listening, reading or writing, all scored at functional level. It would have been hard to challenge the multiple choice marking on listening and reading, and

even from Ms Huston his writing level was only 2. Thus it is not obviously demonstrated to us that in July 2018 he ought to have been given a 3, let alone a 4 in speaking. It is obviously a blow to be told one's native language is not good enough, but there are many people whose only language is English who might not achieve more than functional in a language test. The fact that he is a native speaker does not of itself show that he must have been deliberately and unfairly marked down.

54. In conclusion, we do not find that the claimant was given an incorrect score at the external moderation, nor that he was prevented from completing part of the speaking examination the day, nor that he was given incorrect feedback in relation to his appeal, the three acts alleged as discriminatory treatment.

Claim One – Relevant Law

55. Section 13 of the Equality Act defines direct discrimination:

> "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."

56. Section 23 provides that

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

57. In all Equality Act claims there is a reverse burden of proof, because in present times, most employers are careful not to give discriminatory reasons, even if the real reasons are discriminatory, and sometimes employers do not even recognise that they are discriminating. Section 136, in summary, requires a tribunal to consider what facts the claimant has proved and whether it can be inferred from those facts that discrimination occurred, before turning to the respondent for an explanation demonstrating that discrimination was in no way involved in the decision.

58. In our finding, on the facts he was not treated less favourably than others with his level of Russian language ability, in the score, the format of the test, or the feedback he was given about his mark. On this last, we note he could have appealed and had a re-mark, but did not, and we do not accept that the discouraging words made him decide not to appeal. He did not state that was why he did not appeal. He did argue at the hearing was that his request for the marks to be checked *was* an appeal, but he was clearly told he had to pay for a formal appeal, and he did not take this step. As we have not found the treatment less favourable than that given to others, we do not need to go on to decide whether it was because of his Russian ethnicity. In any case, we had no evidence of the ethnicity of the other candidates, and would have had to construct a hypothetical comparator. At most the claimant has hinted that he was failed on his 2015 Intelligence Corps selection because he was Russian, and for that reason would not have passed developed vetting or enhanced vetting, and was for the same reason was marked down on his 2017 language assessment. If this was the case, we do not understand why he was allowed to go forward for selection at all. He is likely to have had difficulty with vetting because he still had family living in the Russian Federation, not because he was of Russian national origin. That would have been an indirect discrimination claim, and it is not, and so justification has not been pleaded by the respondent. In any case, there was no evidence that if he had had a better score he would have been allowed to join the Intelligence Corps, and at the time there was no outstanding application. Nor is there evidence that this score barred him using his language skill if it became relevant.

Victimisation

59. By section 27:

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

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

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

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

60. In relation to the first act alleged as victimisation, namely, being denied access to the audiotape of his examination, the history indicates that the army did not have the recording, and the contractor which did have it relied on the statutory exemption and policy not to disclose test papers to candidates, and maintained this position even in the face of an employment tribunal order. This an entirely plausible approach given the statutory exemption for exam materials. Handing over the recording without a court order would have been exceptional. The claimant has not shown why his case was exceptional. In any case there is no reason to believe IOLET did not hand over the recording because the claimant had complained of discrimination, or that they thought he was going to, or that the Army told them not to hand it over because he complained on 6 November of discrimination.

61. The second part of the victimisation claim concerns the handling of his service complaints: that the delay was excessive and communication about them was inadequate.

Service Complaints

62. Section 120 (1) of the Equality Act provides that there is no jurisdiction in an employment tribunal in

"a complaint relating to an act done when the complainant was serving as a member of the armed forces unless—

(a)the complainant has made a service complaint about the matter, and

(b)the complaint has not been withdrawn".

63. The Equality Act gives servicemen twice the time to present complaints to other workers. It is:

(a)the period of 6 months starting with the date of the act to which the proceedings relate, or

(b)such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P does an act inconsistent with doing it, or

(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

64. The claimant made five service complaints, although the third was withdrawn soon after being lodged.
65. When a complaint is made, it is first scrutinised to decide what the complaint is about, setting out "heads of complaint", whether the content is admissible as a complaint, which means it is made within three months, and has not been the subject of a complaint already, and then, if admissible, an investigator is appointed, and a an assisting officer is assigned to the complainant. At the conclusion, a written outcome is given, with a note of the time it took to deal with it.

66. The victimising treatment alleged in the list of issue is excessive delay dealing with his service complaints, and failure to communicate adequately about them. There is no complaint that they were wrongly decided. The claim form identifies also that the restriction of admissibility of head 2 to DRACL (or DCLC) rather than the wider MOD, was also victimising treatment. We do not hold it safe to assume that this was withdrawn just because it does not appear on the agreed list of issues, and will consider this too.

67. The first service complaint is dated 12 December 2017 and was sent to the respondent on 4 January 2018. He said: "I genuinely believe that there is a presence of racial discrimination towards me by DRACL and/or MoD following my results my Russian language and exams… I feel that I have been failed on purpose due to my native Russian background, since the results do not reflect my love speaking Russian, considering I use my native tongue on a daily basis, when I visit my Russian speaking family here in UK, ring my grandmother over in Russia every night and engaging with Russian speaking friends". He referred to his previous exam results, and the conversation with Judith Anderson immediately before the exam. He concluded "I feel that I'm not trusted because I was born in Russia (a country seen as a threat by NATO) and therefore will never be used while in the British army, where the Russian language is concerned. That makes me feel like a second-class soldier. As a result of this I applied for early termination and will leave the army by 2019".

68. He was interviewed about the complaint on 17 January 2018. On 7 February 2018 Col Kennedy issued the admissibility letter saying that his 3 heads of complaint (accuracy of exam result, criticism of the DRACL, and not being trusted as a Russian speaker) were all admissible and would go forward. On 8 March the claimant emailed hiss assisting officer, Capt O'Hagan, about the admissibility decision, complaining that in the 2nd complaint, he was not just complaining about DRACL, but about the wider MOD. It is not clear that this was passed on to the investigator. The claimant said later in the year that Capt O'Hagan had told him it was legal interpretation, but we could not find any email in either bundle on this, nor is it covered in the claimant's witness statement. We can see that when the claimant emailed Capt O'Hagan, he replied that he did not have the admissibility letter, as it had only gone to the claimant.

69. On 26 March Lt. Col Watkins interviewed the claimant. The 14 page interview record does not record a specific complaint by the claimant about the restriction of admissibility to DRACL, rather than the MOD, but it does record material under the heading "why does Cpl Steshov think that he has suffered racial discrimination by DRACL and the MoD following receipt of his language results?", which suggests that the investigation was not being confined to DRACL but did explore the claimant's beliefs about discrimination within the MoD at large. He was sent the record, and amended it, then amended it again. The revised amendments were sent to Lt.Col Watkins on 11 May and at the same time the claimant asked whether the

admissibility letter had been amended. He said he had already informed him that parts of the admissibility letter did not reflect what he had said. We do not have a reply.

70. Meanwhile copies of the complaints were sent to the DRACL on 9 March. The investigator, Lt-Colonel Watkins, interviewed four others about what had happened and read much related email correspondence. There was some interchange between him and the claimant about the transcript of the interview. He then produced a 32 page draft investigation report, which was left in draft because on 28 May 2018 the claimant submitted a second service complaint.

71. The second complaint concerned (1) the feedback decision of 4 December 2017 about his language exam, (2) that the back brief had been omitted from language exam – he said he discovered this in March 2018 – and (3) that he was being discriminated against by the Ministry of Defence in its employment of Russian speakers, and being victimised because he alleged that the Ministry of Defence had contravened the Equality Act. The discriminatory conduct included events at Catterick in 2009-2010, his rejections from the intelligence corps, and the lack of feedback in 2017 on his lack of success in 2015.

72. Next day, 29 May 2018, the claimant presented his first tribunal claim, 1805748/2018. The claim form specifies the victimisation being that the admissibility letter of 7 February 2018 misstated that the race discrimination was by DRACL, rather than by MOD. He had lodged a grievance about that, been and told that it could not be amended. He said that was the reason he had raised his second service complaint, "in a manner that renders it impossible to misrepresent in the admissibility letter". They had "unduly delayed my service complaint investigation to the eve of the limitation period in respect of the latest clear incident of direct racial discrimination" (the tribunal understands this is a reference to the feedback decision on his exam result).

73. Lt Col Watkins then set about interviewing further witnesses about the 1st and 2nd service complaints. There was some correspondence with the existing officer, in which, Watkins confirmed he would widen the scope of the 2nd service complaint to include the wider MOD and DRACL as well as the Defence Centre of Language and Culture (DCLC) the final investigation report on both complaints, 44 pages long, was produced on the 20 November 2018.

74. On 3rd June the claimant made an Application for Investigation of Undue Delay to the Service Complaints Ombudsman for the Armed Forces. He complained that he had not been told whether the admissibility letter would be amended, and that he had not heard from the investigating officer since 26 March. On 14 June Capt O'Hagan wrote to the claimant saying that although he had asked the claimant for the admissibility letter, the claimant had still not sent it to him. On 26 June Lt-Col. Watkins wrote to Capt O'Hagan asking him to notify the claimant that he was content to broaden his complaint to encompass the DCLC, DRC and the wider MOD.

Service Complaint Victimisation - Discussion and Conclusion.

75. We did not consider the delay handling his service complaint was excessive. By the date of presenting the claim making this complaint, two months had elapsed since the claimant was interviewed. The complaint covered a large area. The investigation was commendably thorough on both the specifics and the more general complaints made at interview. It was near completion, in draft, by the time of the second complaint, which was then integrated into it, so prolonging the outcome while the second complaint was investigated, though that delay occurred after the claim we are deciding. The claimant amended and reamended his version of the interview transcript (and in July he was allowed to listen to the recording of the March interview to satisfy himself what was said then) which will have taken up additional time. We

know that in August 2018 the claimant asked for 6 weeks, rather than the normal 2, to review the draft report because it was complex. The evidence of Lt Col Watkins was that investigation work had to be fitted round his day job, and that the interviewees were at different bases, so it could not be concluded briskly. At best it can be said that the claimant did not get prompt feedback on his successive amendments to the interview transcript (the 'failure to communicate adequately' allegation). We could understand how this may not have had priority when other interviews were being carried out at the time. We could not find without more that the reason for that was that the complaint alleged discrimination; it could equally well have occurred if the complaint had not been about discrimination, but was complex, and involved several iterations of amendment to a long document.

76. Nor did we conclude that the restriction of admissibility of the head of complaint concerning his criticism of lack of use of Russian speakers to DRACL rather than the MoD was because he had complained of discrimination. The decision caused him concern, and rightly, because it was not about DRACL, but the reason his complaint about the restriction was not heeded was because he made it to the assisting officer but did not send him the admissibility decision he was complaining about, as is clear from the 11 May emails. The assisting officer was thus unable to answer it or pass it on. Only by 11 May does it seem the investigator was aware of it. This was only 2 weeks before the claimant complained to the employment tribunal. Nonetheless, the investigator did devote time on 26 March to hearing a complaint about discrimination by the MoD, not limited to DRACL, and when the Army grasped the claimant's point after he went to the Ombudsman, the investigator readily agreed to extend the scope. We are not able to prove the reason for the original restriction, which could plausibly have been a misreading or misunderstanding as much as a deliberate attempt to remove a valid head of complaint. But when the claimant's point got through, it was conceded, and in any case, it had been investigated whatever the narrow admissibility point. Taken in the round, we do not conclude that any detriment to the claimant was because the complaint alleged discrimination. The delay getting the point across was mostly because he did not send the admissibility letter to his assisting officer.

Claim Two – SNLR documents

77. The second claim concerns the paperwork on his January 2010 move from the Parachute Regiment to the Yorkshires. Eleven types of treatment are recorded. We analyse these one by one, and whether they were less favourable treatment because of his Russian national origin (the discrimination claim), or unfavourable treatment (the victimisation claim). Then we discuss the victimisation claim about the fourth service complaint.

78. When he made this subject access request in 3 June 2018, the section dealing with requests at APC (Army Personnel Centre) Glasgow disclosed data from his personnel file. The claimant then queried that this did not cover the scope of this request, and so Mrs Hendra, handling the matter, after discussing this with him, made specific enquiries at the Infantry Training Centre- ITC- in Catterick (where his 2010 training took place, both for the Parachute Regiment and the Yorkshire Regiments)and from the Defence School of Transport – DST - Leconfield, where he was then based. From DST she received a two-page form "notice of the discharge of a regular recruit", which the claimant calls SNLR. From ITC Catterick she received a computerised training record. These were sent to the claimant in August 2018.

79. The notification of the discharge of a regular recruit form, under "case history" states that the claimant "joined with 731 Normandy platoon on 18 October 2009 and informed his platoon commander that he was refusing to soldier on 19 January 2010". Under "performance" it was said: "has been a below average standard throughout. The Army values and standards have no meaning to him and has shown

this on a number of occasions with his integrity, discipline, moral and physical courage all come into question". Under "reason for discharge and future plans", it says "Private Steshov has refused to soldier and has wasted the Army's time, finances and training effort. He has quite clearly stated that he has no wish to continue with the Parachute Regiment!". It concluded with the recommendation: "SNLR in order to prevent Private Steshov wasting any more valuable training places. He is not suitable for service within the infantry". SNLR means "services no longer required" This form was signed by Major Wilson, with a typed date of 20 January 2010. Major Wison said he had no particular recollection of it, and the content was likely to have been prepared by platoon commander and that he relied on his information when signing it. He did not speak to the claimant before signing it. On the form there are boxes to tick to show cause and analysis of discharge. Of 14 causes, "service no longer required", was chosen. Of Army factors, external factors and personal factors, "none of the above" was chosen in each case.

80. There is also a medical information form, FMED 133, is entitled "medical history on release from HM forces". It is signed by a medical officer on 25 January 2010. We are not sure if this was given to the claimant at the time (as is stated in a document attached to his service complaint on 17 October 2018) or whether it was disclosed by the standards colleague who dealt with medical records.

81. The training record shows the date and outcome of his training as a combat infantryman (CIC Para) and then as combat infantryman (CIC standard). He is recorded as failing CIC Para in June 2009 because of injury, and then as failing again on 20 January 2010 because "inadequate on-course performance". The action on leaving is shown as "reallocated". He is then shown passing CIC standard in May 2010. There are no further entries. In particular, in the section marked **"**discharged**"** with spaces for date, categories, interview dates and so on, there are no entries at all.

82. The claimant argued that he was not *transferred* from the Parachute Regiment to the Yorkshires in January 2010, but was discharged from the Army, and then, presumably, signed on again, though he gave no evidence of how this occurred. He understood he was being discharged, because at the same time s making his complaint he had applied for rehousing, anticipating he would soon be a civilian again. He also argues that it was agreed that he would recorded as transferred, rather than subject to an SNLR discharge, an agreement he says was reached with Col Kennedy in the discussion after his January 2010 complaint. The claimant argues that an SNLR discharge is a dishonourable discharge, and in particular, that civilian employers assume a serviceman whose services are no longer required has been discharged drugtaking. (Taking drugs is one of the causes that can be ticked on the form, and was *not* ticked in the claimant's case, nevertheless the tribunal accepts that civilian employers may not read the paperwork closely, and anecdotally many recruits are discharged for that reason).

83. Taking the documents together, and after hearing the claimant's evidence, our conclusion was that his platoon commander did indeed plan that he should be discharged as services no longer required after the exchange of words at the conclusion of his training, and prepared the paperwork accordingly, including asking the medical officer for an FMed133, as a necessary preliminary to discharge. However, because of the conversation with Col Kennedy, it was agreed that he was not to be discharged, but would instead transfer to the Yorkshire Regiment, which is what happened. There are no documents indicating that the claimant was discharged, and then signed on again; to the contrary his attestation date on later records is recorded as the May 2009 date. The absence of an APB130 (the completed discharge form of which SNLR are parts) is explained by the process being halted before it concluded. What has happened is that the documents prepared for discharge were not destroyed.

84. Why this is the case is not clear because it happened so long ago and we do not have contemporary evidence. The evidence of Army procedures is that the annual assessments and records of discipline are held at APC Glasgow. There is also usually a paper file kept at the unit. It is very unusual for a commanding officer to need to refer to the unit file. On proposals for transfer and promotion, it is only the annual assessments and disciplinary record, if any, that are disclosed. There was some evidence that it is against Queen's regulations and Army policy to destroy Army records. We can also accept that no positive decision may have been made either to keep or destroy them. They were simply left on a file.

85. What is important is that we could see no connection between the existence of this paperwork and the claimant's army career, or that these documents had ever been seen by anyone from 2010 until the SAR in 2018. The ITC computer training record, had it been consulted at any stage, said nothing about discharge, or any proposal to discharge. The reason why there was no AFB130A, a five-part record of which the 2 documents would form a part, is that it was never completed. When the claimant applied for promotion or transfer, all his applications, including to the intelligence Corps, were supported by his unit stating he was an able and suitable candidate. His annual assessment records are generally complimentary, and nothing there can be detected as in any way related to the exasperated and negative assessment of his performance in the SNLR form. APC knew nothing about them, as shown by the specific enquiries that had to be made after discussion with the claimant about his subject access request. There is every reason to think that the SNLR and FMED133 lay on the unit file unread and unnoticed from 2010 to 2018. Of course it was unpleasant for the claimant to be reminded in 2018 of the confrontation with the commander of Normandy platoon in January 2010 which could have led to his discharge had he not complained, but we can see no evidence on which we could find that the claimant suffered detriment or unfavourable treatment in respect of (i) to (ix) until the documents were found, at his request, in August 2018. It is possible that Normandy platoon's commander was prejudiced against the claimant on account of his Russian origin, and that this informed the decision to recommend discharge rather than backsquad him, but there are other explanations, because on the claimant's admission he was not always successful in training, and he was not going to pass the tranesium because of he lacked a head for heights, and his account of saying he was to go straight to Hook company can readily be interpreted as a refusal to serve. That decision, rescinded in January 2010, is out of time, and we do not have to find whether it was tainted by discrimination. Claim 2 is about the retention (or in the case of AFB130a, hiding) of documents. In respect of (i) to (ix), we do not conclude that there was less favourable treatment or unfavourable treatment because these documents had been created, retained and not destroyed. For completeness, we had no evidence that Col Kennedy agreed the documents should be destroyed. What he agreed was that the claimant could in effect start again in the infantry. This is what happened. The episode was closed, and it did not affect his subsequent career.

86. In (ix) there is a claim of unfavourable treatment because these documents continued to be kept on file after he raised concerns about them. We note that by this time the claimant had decided to leave the Army (the evidence in his service complaint dated December 2017). In the bundle we have his FMED 133 (medical history on release from the Armed forces) dated 26 October 2018, so we assume he left around that time, and we know he is now employed in the Prison Service. Given this timing, and the making of a fourth service complaint two months after being sent the documents, we cannot conclude that leaving the records on file after he complained about their retention was detrimental, or that they were left there because he complained of discrimination. If he was in the Army, policy precluded the destruction of records. Once a complaint was made, the file had to be kept for investigation purposes. In any case, if he was leaving, the only detriment that could arise was if they influenced any reference or other document provided on discharge

in 2018. The claimant has not suggested that his discharge paperwork in 2018 was unsatisfactory or influenced by the 2010 documents.

87. On 17 October 2018 the claimant lodged a fourth service complaint, which over a page of A4 complains of the way he was treated during Parachute Regiment training and that he had been forced out of the Army because of his Russian national origin. In a covering section he said that although this had occurred more than 3 months before the date of his service complaint, it was within time because it was only on or after 15 August 2018 that he discovered "the illegal SNLR notification and related documentation (which contains negative criticisms of my performance based on racism) are currently (and have since their production in 2009/2010 always been) sitting on my record and tarnishing it".

88. On 10 December 2018 the complaint was ruled inadmissible, because it was out of time. On 22 December claimant the claimant applied to the Service Complaints Ombudsman asking for a review of this decision. On 31 January 2019 the Ombudsman ruled that this part inadmissibility decision was incorrect because it was just and equitable to allow it as he only became aware of it on 15 August 2018. This was the complaint that the document had tarnished his career in the army. Other inadmissibility decisions were not overruled, because in essence they had already been adjudicated on in earlier service complaints. The army complaints secretary then directed that the claimant was to be told this complaint about the records was now to be investigated. In December 2019 Lt Col Hook prepared his investigation report, delayed by extensive correspondence by email with the claimant, rather than interview, he having left the Army by now, and by a period of ill health of the claimant. He concluded that there was no evidence at all that the claimant's career been damaged by the retention of the documents, that they had been retained under defence policy for the retention of records; there was no evidence that AFB 130 had ever been completed, and no evidence that he had actually been discharged, rather than transferred. Meanwhile on 13 February 2019 the claimant had presented his second employment tribunal claim about the 2009-10 documents.

89. We have to decide whether the initial admissibility decision not to investigate documents issue was because he had complained of discrimination. We did not find that the claimant has proved facts from which we could conclude that this was the reason. A great many other matters were ruled inadmissible, and the ombudsman did not overturn these. It is possible that the decision-maker read the statement about the documents, which only discusses 2009 - 2010, and concluded that it was all out of time without considering the covering message that he complained out of time because he did not know about them until recently, and this was relevant to making a just and equitable to the time rule. Such a mistake could have been made when there were so many other matters under consideration, this being the fourth complaint. There is no reason to believe that this decision among many admissibility decisions, not challenged as victimising, was on grounds of a discrimination complaint when others, also adverse to the claimant, were not.

Second Claim - Harassment

90. The last part of the second claim is an allegation that the treatment was harassment. The only conduct that could have harassed the claimant was the August 2018 disclosure of the old documents, the turning down of the service complaint on admissibility, and retaining the documents. Section 26 defines harassment as conduct related to a protected characteristic:

> which has the purpose or effect of—
>
> (i)violating B's dignity, or
>
> (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

And by section 28(4) that must be decided by taking account of
l/////////

(a) the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

91. In the circumstances of a SAR request, and having regard to the tone of the correspondence, we concluded that although it was unpleasant for the claimant to read the very negative commentary about him on the SNLR form, it was not harassment to disclose these documents then, and even if it was, his national origin had nothing to do with their disclosure to him. They were disclosed because he had asked to see them.

Employment Judge - Goodman

Date 28th OCT 2020

JUDGMENT SENT TO THE PARTIES ON

29/10/2020

.....
FOR THE TRIBUNAL OFFICE

Note

Reasons for the decision having been given orally at the hearing, written reasons will not be provided unless requested within 14 days of this written record of the decision being sent to the parties.