EMPLOYMENT TRIBUNALS

Claimant: **Mr Ernest Nii Larbi**

Respondents: **Thurrock Council**

Heard: **East London Hearing Centre (by Cloud Video Platform)**

On: **25, 26 & 27 August 2020 and 1 & 2 September 2020**

Before: **Employment Judge G Tobin**
Members: **Mr T Brown**
Mr P Quinn

Representation
Claimant: **In person**
Respondent: **Ms M Patel (solicitor)**

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that:

1. **The claimant was not discriminated against on the grounds of his race, in breach of s13 Equality Act 2010.**

2. **The claimant was not discriminated against on the grounds of his sex, in breach of s13 Equality Act 2010.**

3. **The claimant was not victimised, in breach of s27 Equality Act 2010.**

4. **The claimant did not suffer an unauthorised deduction from his wages, in breach of s13 Employment Right Act 1996, for the non-payment of overtime claimed for 1 March 2019.**

5. **The claimant was not harassed, in breach of s26 Equality Act 2010.**

6. **Of the claimant's 15 substantive complaints of multiple discrimination, 8 of these are out of time. The claimant's claims of direct race discrimination, direct sex discrimination, victimisation and harassment, as identified at**

issues 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 8.1 and 14.3 below are all out of time. If there was any merit in these claims, the Employment Tribunal would not have exercised its discretion to allow these complaints to proceed.

7. As a consequence of the above, all of the claimant's claims are dismissed.

REASONS

The case

1. The claimant was employed by the respondent as a Civil Enforcement Officer from 24 May 2016. His employment was ongoing at the time of this hearing. Proceedings were commenced for the 2 claims on 29 June 2019 and 25 December 2019 respectively. The claimant claimed race discrimination, sex discrimination, disability discrimination and non-payment of wages. The claim is appropriately summarised in the various Preliminary Hearings by Employment Judge Ross and Regional Employment Judge Taylor of 7 October 2019, 13 January 2020, 20 February 2020, 18 May 2020, 17 June 2020 and 22 June 2020. The claims were consolidated on 13 January 2020 and REJ Taylor determined on 20 February 2020 that the claimant was not a disabled person, pursuant to section 6 Equality Act 2010 ("EqA") on 20 February 2020 and, following the claimant's application for review, again on 17 June 2020.

2. Prior to this hearing, the Tribunal and the parties had agreed a finalised list of issues. The issues identified for determination by the Tribunal were reviewed by the parties and the Employment Judge at the outset of the hearing. The issues to be determined by the Tribunal were as follows:

I. CLAIM 3201623/2019 (THE FIRST CLAIM)

Jurisdiction: Time limits

1. Were all of the claimant's complaints presented within the time limits set out in s123(1)(a) to (b) EqA? Dealing with this issue may involve consideration of subsidiary issues, including: whether there was an act and/or conduct extending over a period.

2. If any complaints were not presented within time, whether they were presented within such time as was just and equitable.

Direct discrimination because of race and sex: s13 EqA

3. Has the respondent subjected the claimant to the following treatment?

3.1 On 12 September 2018 the respondent failed to provide protective clothing, such as a stab vest, provided to white colleagues.

3.2 On his return to work on 30 October 2018, the claimant's manager Phil Carver refused to allow the claimant to work in the Civic Office on appeals.

3.3 On 21 November 2018 and at a meeting in December 2018 Phil Carver refused to allow the claimant to work in the Civic Office on appeals from 21 November 2018 onwards. The claimant

relies on the fact that Shona, a white woman and a Civil Enforcement Officer, had begun working in the back office from August 2018.

3.4 In January 2019, Phil Carver failed to give the claimant the opportunity to take the role of a white female (known as Alex) when she resigned, nor give him an opportunity to apply for the new position of appeal and representation officer.

3.5 On or about 22 January 2019, failing to inform the claimant of the vacancy in the role of Senior Environmental Enforcement Officer. A white female employee, Kellee Buckthorpe-Evans, was appointed to the role.

3.6 On or about 15 February 2019, Phil Carver ignored the claimant's email request to work in the appeals office, due to the effect of the claimant's condition.

3.7 On 1 March 2019, failing to respond to the claimant's emails and calls in respect of an arrangement to pick up the claimant from outside the criminal court in Basildon. The claimant's case is that, instead of responding to him, Mr Carver contacted his white British colleague, Eileen Hubbard, who was also awaiting collection from court.

3.8 On 2 March 2019, and email was sent to Eileen Hubbard (copied to the claimant). Ms Hubbard was invited to a meeting relating to a court visit on 1 March 2019. Other colleagues (Environmental Enforcement Officers), who were white, Ron Clayden and Miles Orton, were invited to a meeting about the court visit. The claimant was not invited to a meeting about the court visit.

4. Was that treatment "less favourable treatment" i.e., did the respondent treat the claimant as alleged less favourably than it had treated, or would have treated others ("comparators"), in not materially different circumstances? Generally, in respect of the failure to provide appeal office duties, the claimant relies on a white female employee, Shona, who was absent sick but allowed to return to work in the appeal office. In respect of the incident on 1 March 2019, the claimant relies on Eileen Hubbard as a comparator.

5. If any of the above was less favourable treatment, was any of the alleged treatment because of the claimant's race? The claimant relies on his colour and ethnicity; he is black African of Ghanaian ethnicity.

6. If the incident on 15 February 2019 amounted to less favourable treatment, was such treatment because of the claimant's sex?

Victimisation: s27 EqA

7. Did the claimant do a protected act? The claimant relies upon the following:

7.1 In December 2017, the claimant made an email complaint to Human Resources about his manager, Marie Buckley, in which he complained of race and sex discrimination.

8. Did the respondent subject claimant to any detriment as follows:

8.1 By not offering the claimant the position of acting Civil Enforcement Supervisor, which was advertised in about July 2018.

9. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act.

Unauthorised deductions

10. Did the respondent make unauthorised deductions from the claimant's wages in accordance with s13 Employment Rights Act 1996 by failing to pay him 4 hours of overtime for 1 March 2019? The respondent denies that he was entitled to overtime; it is disputed that he was entitled to payment because he attended at the court voluntarily, to be shown the procedure if he were to become a witness, not because he was in fact a witness on that date.

Remedy

11. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

II. CLAIM 3203127/2019 (THE SECOND CLAIM)[1]

[1] I have renumbered these issues so that the issues to be determined are sequential

Jurisdiction: Time Limits

12. Were all of the claimant's complaints present within the time limit set out in s123(1)(a) to (b) EqA? Dealing with this issue may involve consideration of subsidiary issues, including: whether there was an act and/or conduct extending over a period. The claimant's case is that the complaints in his second claim were presented in time, because ACAS Early Conciliation certificate was provided on 26 November 2019 and the claim was issued on 25 December 2019. The respondent's case is that the Tribunal has no jurisdiction to consider any complaint of discrimination which took place before 25 August 2019.

13. If any complaints were not presented within time, whether they were presented within such time as was just and equitable.

Direct discrimination because of race and sex: s13 EqA

14. Has the respondent subjected the claimant to the following treatment?

    14.1 On 22 August 2019, at a team meeting, the claimant was harassed and humiliated by Lisa Preston, namely being called or labelled as a complainer or troublemaker in the presence of colleagues.

    14.2 On 22 August 2019, at the same team meeting, Lisa Preston shouted at the claimant stating "anything is a problem with you, nothing is positive," when he asked how the stab vests should be washed, which the claimant believed was bullying and discrimination.

    In respect of 14.1 and 14.2 above, the comparator was Eileen Hubbard, a white colleague, who asked questions, but he was not shouted at; she was given answers, unlike the treatment of the claimant.

    14.3 Receiving 2 warning letters around 27 June 2019 and 10 July 2019 about his sickness absence from Lisa Preston and Phil Carver when a colleague did not receive such letters, despite being absent on different occasions. The comparators relied upon are: Naz (British Indian Ethnicity); Edwin Ozoeokwo (black African ethnicity); and Shona (white British woman). The respondent denies that the claimant received a warning letter, alleging that the only letter issued to the claimant was a stage 2 sickness meeting outcome letter, which is standard process. In line with the respondent's Sickness Absence Policy. The claimant admits he received the stage 2 letter.

    14.4 From around September 2019 onwards, when his grievance was submitted, the respondent did not take claimant's grievance against Lisa Preston seriously. This grievance was sent to the HR department, who allocated a person to deal with. Tina was appointed by HR to deal with the grievance. The claimant had asked for an independent person to deal with the case, but the claimant was not informed about the progress of case, only been sent 1 letter after a period of weeks or months. The claimant's case is that not providing the claimant with an outcome to his grievance is evidenced it was not taken seriously; the claimant still has not received an outcome. The claimant relies upon a hypothetical comparator.

    14.5 In the first week of October 2019 and November 2019, the claimant was refused amended duties despite this being requested by his GP and the claimant. Reasonable adjustments were made for comparators, been other white colleagues, Ron and Shona.

15. Was that treatment "less favourable treatment", i.e., did the respondent treat the claimant as alleged less favourably than it had treated, or would have treated others ("comparators"), in not materially different circumstances?

16. If any of the above was less favourable treatment, was any of the alleged treatment because of the claimant's race? The claimant relies on his colour and ethnicity; he is black African of Ghanaian ethnicity.

17. If the treatment at 14.1, 14.2 or 14.5 was less favourable treatment, was such treatment because of the claimant's sex?

Harassment: s26 EqA

18. Was any of the conduct at paragraphs 14.1, 14.2 and 14.3 unwanted?

19. If so, did it relate to the protected characteristic of race?

20. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Victimisation: s27 EqA

21. Did the claimant do a protected act? The claimant relies upon the following:

    21.1 In December 2017, the claimant made an email complaint to Human Resources about his manager, Marie Buckley, in which he complained of race and sex discrimination.

    21.2 Bringing his first Employment Tribunal Claim, number 3201623/19.

22. Did the respondent subject claimant to any detriments as follows:

    22.1 The treatment at 14.1 to 14.5 above.

23. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act.

Remedy

24. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. The issues of remedy include:

    24.1 Whether the claimant suffered any personal injury because of the alleged discrimination. The claimant's case is that unlawful discrimination cause stress and depression.

    24.2 Whether the respondent unreasonably failed to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all of the circumstances to increase any award, and if so, by what percentage, up to a maximum of 25%, pursuant to s207A Trade Union & Labour Relations (Consolidation) Act 1992.

3. This was a remote hearing which had been consented to by the claimant and the respondent. The form of remote hearing was a video or cloud video platform hearing, and all participants were remote (i.e., no one was physically at the hearing centre). A face-to-face hearing was not held because it was not practical in the light of the coronavirus pandemic and the governments restrictions.

The relevant law

4. The relevant applicable law for the claims considered is as follows.

Protected characteristics

5. Under s4 EqA, a protected characteristic for a claimant includes race, which includes: (a) colour; (b) nationality; and (c) ethnic or national origin. S4 also provides that someone's sex is a protected characteristic.

Direct discrimination

6. S13(1) EqA precludes 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.*

7. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

Harassment

8. The test for harassment is set out in s26 of EqA:

> (1) A person (A) harasses another (B) if –
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of –
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…
>
> (4) In deciding whether contact has the effect referred to in subsection (1)(b), each of the following must be taken into account –
> (a) the perception of B;
> (b) the other circumstances of the case; and
> (c) whether it is reasonable for the conduct to have that effect.

9. For allegations of harassment, there is no necessity to look for a comparator. As described in *Rayment v MoD [2010] EWHC 218 (QB), [2010] IRLR* the standard for harassment is conduct that is "oppressive and unacceptable". The definition approaches the matter from the claimant's perspective. Therefore, if a victim had made it clear that he found the conduct unwelcome, the continuation of such conduct will constitute harassment. Only if it would be unreasonable to regard the conduct as harassment at all will there be a defence here, but the test for connections between the conduct and the effect have been loosened so that unwanted conduct no longer has to be *on the ground of* the victims protected characteristic to fall within the definition, but only *related* to it.

Victimisation

10. Victimisation under s27(1) EqA is defined as follows:

> *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.*

11. A "protected act" includes bringing proceedings under the EqA, as well as giving evidence or making allegations that a person has contravened the EqA. There is no need to find a comparator for victimisation as it is only the treatment of the victim that matters in establishing causation; it is possible to *infer* from the employer's conduct that there has been victimisation.

The burden of proof and the standard of proof

12. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

13. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence, this can be distilled into a 2-strage approach:

    a. Has the claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent had committed unlawful discrimination?

b. If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

14. The Court of Appeal in *Igen* emphasised the importance of *could* in (a). The claimant is nevertheless required to produce evidence from which the tribunal could conclude that discrimination has occurred. The tribunal must establish that there is prime facie evidence of a link between less favourable treatment and, say, the difference of race and that these are not merely two unrelated factors: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the employment tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

15. So, the burden is on the claimant to prove, on a balance of probabilities, a prima facie case of discrimination. The Court of Appeal, in *Madarassy v Nomura International plc [2007] EWCA Civ 33* at paragraph 56. The court in *Igen* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent *could have* committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal *could conclude* that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. It was confirmed that the claimant must establish more than a difference in status (e.g. race) and a difference in treatment before a Tribunal will be in a position where it *could conclude* that an act of discrimination had been committed.

16. Even if the Tribunal believes that the respondent's conduct requires explanation, before the burden of proof can shift there must be something to suggest that the treatment was due to the claimant's race. In *B and C v A [2010] IRLR 400 EAT* at paragraph 22:

> The crucial question is on what evidence or primary findings the tribunal based its conclusion that C would not have feared further violence from a female alleged aggressor (and so would have accorded her due process). As we have already noted (paragraph 19), the tribunal does not spell out its thinking on that point. There was no direct evidence on which such a conclusion could be based; no such situation had ever occurred, and the tribunal refers to no admission by C, or other evidence of his attitudes, that might have supported a view as to how he would have behaved if it had. It is of course true that the tribunal was in principle entitled to draw appropriate inferences from the nature of the behaviour complained of. C's behaviour was certainly sufficiently surprising to call for some explanation: in the public sector in particular, it is second nature to executives to follow appropriate procedures, and the explanation offered by C for his failure to do so in the present case – namely that he was seeking to avoid repeat violence (see paragraph 16 above) – is irrational since he could have mitigated the risk to precisely the same extent by suspending the claimant. But the fact that his behaviour calls for explanation does not automatically get the claimant past 'Igen stage 1'. There still has to be reason to believe that the explanation could be that that behaviour was attributable (at least to a significant extent) to the fact that the claimant was a man. On the face of it there is nothing in C's behaviour, all the surrounding circumstances, to give rise to that suspicion.

17. It is not sufficient to shift the burden onto the respondent, that the conduct is simply unfair or unreasonable if it is unconnected to a protected characteristic. In *St Christopher's Fellowship v Walters-Ellis [2010] EWCA Civ 921* at paragraph 44:

> The respondent's bad treatment of the claimant fully justified findings of constructive unfair dismissal, but it could not, in all the circumstances, lead to a finding, in the absence of an adequate explanation, of an act of discrimination. Non-racial considerations were accepted as the explanation for the respondent's similar treatment of the claimant in the other instances in which the claimant alleged race discrimination in relation to participation in recruitment. In the case of Ms Hayward, the respondent made a genuine mistake about the nature of the relationship, which they would not have made if they had properly investigated the nature of the relationship with the claimant and communicated with her, but their failure to do so was accepted to be the result of a genuine belief. The fact that it was mistaken could not, in the context of scrupulous attention to recruitment procedures, reasonably be held to have the effect of indicating the presence of racial grounds and so shifting the burden of proof to the respondent to prove that he had not committed an act of race discrimination.

18. In the case of *Nagarajan v London Regional Transport [2000] 1 AC 501*, Lord Nicholls stated at 512-513:

> Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds, even though it is not the sole ground for the decision. A variety of phases, with different shades of meaning, have been used to explain how to legislation applies in such cases: discrimination requires that racial grounds were a cause, the aggravating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phases, as well as subtle distinctions, are better avoided. So far as possible. If racial grounds or protected acts has a significant influence on the outcome, discrimination is made out.

19. Employment Tribunal's adopt the civil standard of proof, which is on the balance of probabilities, i.e. more likely than not.

Time limits for discrimination proceedings

20. Claims of discrimination in the Employment Tribunal must be presented within 3 months of the act complained of, pursuant to s123 EqA. Acts of discrimination often extend over a period of time, so s123(3)(a) EqA goes on to say that "conduct extending over a period is to be treated as done at the end of the period". In addition, Employment Tribunals have a discretion to extend the 3-month period if they think it *just and equitable* to do so, under s123(1)(b) EqA.

Wages

21. Under s13 ("ERA") a worker (which is a wider definition than employee) has the right not to suffer an unauthorised deduction from his pay:

> (1) An employer shall not make a deduction from wages of a worker employed by him unless –
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

22. The non-payment of wages, or the non-payment of "properly payable" overtime pay (in full or in part), could amount to an unauthorised or unlawful deduction of wages.

23. A deduction is defined in s13(3) ERA as follows:

> Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion… the amount of the deficiency shall be treated… as a deduction…

The evidence

24. After a short case management conference and a review of the list of issues, we (i.e. the Tribunal) retired to read the witness statements and the documents that had

been identified for preliminary reading. We were presented with a bundle of documents and additional documents, in respect of the claimant's grievance, of around 1,000 pages. The Employment Judge advised the parties at the commencement of the hearing that, as a matter of course, Employment Tribunals do not read the entire hearing bundle. If a document is important and relevant then that document needed to be referred to us, either in a witness statement or being specifically referred to the Tribunal at the hearing.

25. We heard evidence from the claimant and 2 witnesses, Mrs Eileen Hubbard and Mr Andreas Eremionkhale. The claimant also provided witness statements from Mr Ernest Donkor and Mr Nazir Sheikh. The claimant's 4 witnesses were all Civil Enforcement Officers and colleagues of the claimant at the relevant times. We attached less weight to the statements of Mr Donkor and Mr Sheikh and there was some discussion as to the relevance of these witnesses to the issues identified as being in dispute.

26. Having heard the totality of the evidence, upon reflection, we did not find that the claimant was a reliable witness. A common theme in this case was the hostility that the claimant displayed to his managers and some colleagues. Seemingly most management instruction or human resources request or any slip or omission was regarded by the claimant as a deliberate and coordinated response by his employers to discriminate against him on any ground for which a comparator might possibly be conceivable, e.g., race, sex or disability. This is reflected in the number and far-reaching claims brought against the respondent and the number of people that the claimant had disputes with. This, and the claimant's unwillingness to ascribe more legitimate motives in the action of others, undermined the veracity of the claimant's evidence. The claimant wanted to work in the back-office, he was fixated with this and rejected alternative roles or adjustments; he went to great lengths to proffer health reasons as the way to achieve this objective. The claimant was offended that the respondent did not create work opportunities for him were no such work vacancies existed. We were particularly concerned with the claimant's untruthful account about his court attendance on 1 March 2019.

27. We determined that we could not rely upon the evidence of Mrs Hubbard. Mrs Hubbard was a friend of the claimant and was with him when he effectively skived off work after misleading Mr Carver as to the purpose of his court visit on 1 March 2019. Mrs Hubbard was complicit in this deceit. We were also concerned in respect of her behaviour on that key day in attempting to orchestrate a lift back to the office. Further, Mrs Hubbard was inaccurate with her recollections of the seminal disputed team meeting of 22 August 2019 as she incorrectly stated that "Big Earnest" sat to her right and Mr Ozoeokwo was not at the meeting when the investigation notes showed that this was not correct. She was also inaccurate, and changed her evidence, as to who paid for lunch and beverages during the court visit. These issues undermine her evidence as both a credible and accurate witness.

28. Mr Eremionkhale's evidence was extraordinary. He may have been nervous by participating in such a hearing, although probably less so as he did not attend the hearing centre. in any event, Mr Eremionkhale's evidence consisted of a shouting rant at the respondent. He was not able to answer any questions coherently or to really control himself. Under the circumstances, we could not solicit any useful evidence from Mr Eremionkhale.

29. Mr Carver (Strategic Lead of Enforcement) and Ms Preston (Enforcement Operations Manager) were the pivotal witness for the respondent. Although both had an interest in clearing their names, because they were accused of discriminatory conduct, we determined that both gave clear and credible accounts of the event under scrutiny. Neither put a gloss on their evidence; they regarded the claimant as being potentially difficult to manage, and it was clear from their evidence, and the contemporaneous documentation, that neither bore any apparent grudge towards him. Mr Carver was pressed for specific details by the Tribunal, for example, in respect of times that his meetings ended on 1 March 2019 and whether he had his mobile phone turned on or off. Mr Carver was consistent and where he could not remember particular details, he said so. He was quite forthcoming, particularly when he said that he was "miffed" when he discovered that Mrs Hubbard had countermanded his instructions to arrange transport back to the office. Ms Preston's evidence also had a ring of truth when she acknowledged that the claimant was being negative and difficult at the team meeting arranged to issue the stab-proof vests but she said that she wanted to win over her staff as they felt they had not been managed particularly well previously and she went out of her way to avoid alienating the claimant. We do not believe either gave inaccurate evidence or embellished their version of events.

30. Ms Daly (Human Resources Business Partner) was particularly honest in her evidence. She readily admitted her error in not providing to the claimant the outcome of his grievance against Ms Preston in a timely manner. She explained her default, as documented below. It was clear from her witness evidence and the contemporaneous documents that Ms Daly was patient and supportive in dealing with the claimant and went to some considerable effort to facilitate his return to work, particularly in the period after 15 July 2020, which was, after he issued his second Employment Tribunal claim.

31. All of the respondent witnesses' accounts were consistent with the contemporaneous documents and also consistent with the evidence of each other. Where the claimant's evidence conflicted with that of the respondent's witnesses, we preferred the evidence of the respondent's witnesses. We were reluctant to accept the claimant's evidence unless this was corroborated by contemporaneous documents.

Our findings of fact

32. We set out the following findings of fact, which we determined were relevant to finding whether or not the claims and issues identified above have been established. We have not determined all of the points of dispute between the parties, merely those that we regard as relevant to determining the issues of this case as identified above. When determining certain findings of fact, where we consider this appropriate, we have set out why we have made these findings.

33. In assessing the evidence and making findings of fact, we placed particular reliance upon contemporaneous documents as an accurate version of events. We also place some emphasis on the absence of documents that we expect to stand as a contemporaneous record. Witness statements are, of course, important. However, these stand as a version of events that was completed sometime after the events in question and are drafted through the prism of either advancing or defending the

claims in question. So, we regard them with a degree of circumspection as both memories fade and the accounts may reflect a degree of re-interpretation.

34. The claimant commenced work with the respondent on the 24 May 2016 as a Civil Enforcement Officer ("CEO"), a role which is sometimes referred to as a traffic warden. We have not been provided with any contract of employment for the claimant.

35. The claimant raised a grievance against Ms Marie Buckley, the respondent's previous Enforcement Operation Manager, on 14 December 2017. We did not see the claimant's grievance letter; however, the respondent conceded that this was a *protected act* as, the respondent accepted, the claimant raised a complaint of sex and race discrimination in his grievance. The claimant's grievance against Ms Buckley was concluded on 20 May 2018, which was over 5 months from submitting his complaint.

36. The Enforcement Team consisted of CEOs and EEOs ("Environment Enforcement Officers"). We were informed by Ms Daly, which we accept, that 12 members of staff worked for the respondent in parking from around 2018 and the period under scrutiny. Of these 12:

- 6 were male and of black or African origin, all CEOs;
- 3 male Indian/South Asian, 2 CEOs and 1 working on appeals;
- 2 females who were of white British/European origin, 1 CEO and 1 manager;
- 1 female black African female, who worked on appeals.
- In respect of the EEOs, 2 officers both female and of white of British/European origin completed the team.

Therefore over 70% of the staff came from a black and minority ethnic background. Over 35% of the staff were female. So women were underrepresented, although this might be attributable to a manual (and perhaps confrontational) job that are likely to be less attractive to women. So far as the claimant's working environment is concerned, we regard this as a diverse workplace.

37. On 4 July 2018 Mr Carver sent the claimant plus other members of the parking services team, a copy of the advert for a Temporary Civil Enforcement Supervisor. The advert stated that the position was expected to commence immediately for a period of up to 3 months. The advert set out the relevant duties and attached a relevant Expression of Interest ("EoI") form. The claimant completed his EoI form on 10 July 2018. 3 applicants were interviewed: the claimant, Mr Nazir Sheikh (who was identified as being oof British Indian ethnicity) and Mr Edwin Ozoekwo (of Black African ethnicity) The candidates scored as follows:

Candidate	**EoI score**	**Interview score**	**Total score**
Claimant	2/18	3.5/4	5.5/22
Nazir Sheikh	1/18	3/4	4/22
Edwin Ozoekwo	13.5/18	2.5/4	16/22

38. Mr Ozoekwo was successful and offered the role of Temporary Civil Enforcement Supervisor. The claimant did the best in his interview and was second best with the marks for his EoI. Mr Ozoekwo scored significantly higher with his EoI and therefore

his overall score was much hight than the claimant and Mr Sheikh. Consequently, Mr Ozoekwo was appointed to the temporary vacancy.

39. The respondent originally issued stab-proof vests in 2013 or 2014. Officers assigned to the early shift and the day shift complained that the stab proof vests were too hot to wear during the summer, so the erstwhile managers agreed that staff could sign an agreed waiver and remove this protective equipment for their shifts provided they accepted full liability for not wearing the stab vests. There was no reason for officers on the twilight shift not to wear the stab vests, so this was made compulsory to wear for that shift.

40. Around September 2018 Ms Buckley attempted to reintroduce the stab-proof vest across the Enforcement Team. However, she abandoned this initiative because of staff resistance.

41. On 12 September 2018, the claimant was assaulted at work by a member of the public. The claimant was signed off sick with “chest pains post trauma” from 12 September 2018 through to 16 October 2018 and “Chest pain – msk pain. Anxious/ stress/flashback” from 16 October 2018 to 29 October 2018.

42. On 3 October 2018 the claimant asked to undertake office duties to facilitate his return to work and he chased this on 12 October 2018. Mr Carver reverted to the claimant on 16 October 2018 and explained that 1 officer was working on a project with 3 and 1 back-office staff so there were no other projects or vacancies available.

43. The 1 officer who was working on the project was Ms Shona Abbott, a white British female CEO. Ms Abbott was allowed to work in the office when she returned to work following a work-related injury she sustained in August 2018. Ms Abbott returned to work on 19 September 2018 as Mr Calver was able to re-assign her to an HGV purge, which was project to address persistent HGV penalty charges evaders. This was about 2 weeks before the claimant’s initial enquiry about office duties. In contrast to the claimant, Ms Abbott had extensive relevant experience, gained from 2009, so as to be able to undertake that assignment without any additional training on the ICPS parking system, the Toranto upgrade and the penalty charge notice process for HGV vehicles.

44. The claimant returned to work on 30 October 2018, which was about 6 weeks after Ms Abbott. Mr Carver met the claimant and explained to him that there were no additional vacancies in the back office and that, in contrast to the claimant, Ms Abbott did not require any training for the HGV purge. Mr Carver said in evidence, which we accept, that such was the difference in experience, the claimant would have required at least 1-month’s training to be at the same point that Ms Abbott was when she commenced the HGV Purge.

45. Mr Carver implemented a phase return to work for the claimant for 1 week which included reduced hours, restricted duties and support by being paired with another colleague and working away from the area with the assault occurred.

46. On 9 November 2018 Mr Carver referred the claimant for an occupational health assessment and on 21 November 2018 the claimant visited his GP regarding groin pain. The outcome of the occupational health referral was that the claimant was fit to

continue with his work as a CEO. The Occupational Health ("OH") Adviser reported on 14 December 2018 that the claimant no longer took the medication referred to in his referral note and consequently he no longer experienced the side-effects that he had reported. The OH Adviser said that the matter was resolved and there was no need for any further review. The OH Adviser referred to the claimant wanting to discuss workplace matters with management, which the claimant *perceived* to impact on his well-being.

47. The member of staff identified as Alex resigned in December 2018. There was no recruitment to her role in January 2019 as contended by the claimant. We accept Mr Carver's evidence that the parking back-office staff were absorbed into the performance support team and that he did not manage the performance support team. A recruitment round next took place in July 2019 and the vacancy went through the respondent's standard recruitment policy and procedure with vacancies advertised for 1 week to a redeployment pool and then 2 weeks for all other internal candidates to apply. Consequently, there were no significant restrictions applied to this recruitment round and Mr Carver played no role in filling this vacancy. The claimant did not pursue this vacancy.

48. On 1 March 2019 the claimant attended Basildon Magistrates Court with Mrs Hubbard. The claimant had previously informed Mr Carver that his attendance at court was necessary on this day as he was a witness for a work-related prosecution. Mrs Hubbard's attendance on this day was similarly work-related and necessary. The information that the claimant told Mr Carver was not true. He did not need to be at court that day.

49. A couple of days before the visit, Mrs Hubbard asked Mr Carver for a lift for her and the claimant. The original court visit was intended to be ½-day, according to Mrs Hubbard's email. Early on the morning of the visit, Mr Carver sent an email to Mrs Hubbard saying that because of staff unavailability he could not arrange a return lift from court and that Mrs Hubbard (and by implication the claimant) would need to make their own way back and that their travel would be refunded. Mrs Hubbard disputed receiving this email although she had her Blackberry Work mobile phone with her and sent another email on this later that day. We determine that she read the email at the latest before being dropped off (because she discussed this with the driver) and that she attempted to make arrangement with the driver for collection. This was a deliberate attempt to over-ride Mr Carver's clear instruction to the contrary.

50. The claimant and Mrs Hubbard remained at court the whole day until the court's closure past 5pm. The claimant contended at the hearing that he had an appointment with the court staff to be shown around to familiarise himself with the layout in advance of a later magistrates-trial in which he was due to give evidence. When pressed, it became clear to the Tribunal that either the appointment (if there was any) or the purpose for the claimant's visit was concluded by around 10:30am, at the latest. It was not clear to the Tribunal why Mrs Hubbard's attendance at court was necessary until 5pm. Hearings with work-related witnesses are normally given priority and it is very unusual for a witness (particularly a witness such as a local authority enforcement officer) to be required to wait at court past the lunch break. Nevertheless, the claimant chose to remain at the court the whole day with Mrs Hubbard until past the normal court closure. Towards the end of the day the claimant

made a number of telephone calls to respondent staff to arrange a lift back to the civic office. There was no one available to collect him and Mrs Hubbard, as had been predicted by Mr Carver. The claimant emailed Mr Carver at 4:42pm. He said that he and Mrs Hubbard were stranded in Basildon. Mr Culver said that he was in the meeting late on that Friday and he did not read the email until there was a break which was after he received a second email at 5:26pm. This email read as follows:

> Hi Phil,
> Our life could be in danger we outside the court criminal court without assistance as the building is closed.
> Regards
> Nii

51. Mr Carver then organised another CEO, Mr Obrien Wamunyima, to collect the claimant and to ring them to tell that he was coming. Mr Wamunyima arrived outside the court between 6pm to 6:30pm and after 5 telephone calls and a search of the block reported that there were no signs of the claimant or Mrs Hubbard.

52. On 2 March 2019 Mr Carver sent an email to Mrs Hubbard, and the drivers, Mr Ron Clayden and Mr Miles Orton as follows:

> Hi Team
>
> Late afternoon yesterday a number of managers were interrupted several times, including myself, regarding officers constantly requesting to be collected from outside Basildon mags.
> It is clear that my instructions yesterday morning were changed without my knowledge after I had provided them and confirmed them in my email below at 08.21hrs.
> The fact is that there were basic failings that resulted in a simple matter being turned into a cluster of confusion and resulted in other colleagues from other directorates, such as the contact centre along with the CEO twilight shift being interrupted.
>
> You have all been made aware from the start, that reasonable management instructions must be followed. I have continually given instructions to other officers to check emails at the start and end of duty and as a result of this not happening yesterday, the above occurred. It is essential that these instructions are followed as circumstances do change.
> This email is to provide a final timely word that emails must be fully read at start and end of duty, this includes breaks without fail.
> Regards

53. Mr Carver also spoke to Mrs Hubbard, Mr Clayton and Mr Orton to give them an oral and informal warning about their behaviour, i.e. as Mr Carver said in evidence, he gave them a "telling off". Mr Carver was annoyed that Mrs Hubbard went behind his back with 2 drivers to organise a return lift to the civic office when there was not staff available. Mr Carver did not see the claimant as challenging his authority; he saw the claimant's involvement as peripheral, which is why the claimant was not included in the email or the meeting.

54. The claimant raised grievances on 5 March 2019, 12 March 2019 and 18 March 2019 against Mr Carver. These complaints were concluded in September or October 2019, which was 6½ to 7½ months later.

55. The claimant contacted ACAS on 14 May 2019 and early conciliation formally commenced. Early conciliation ended on 29 May 2019, with ACAS issuing an appropriate early conciliation certificate. On 29 June 2019 the claimant issued his first claim (case number 3201623/2019). He claimed sex, race and disability discrimination. This was clearly a protected act in respect of his second claim of victimisation.

56. The claimant attended a sickness review meeting on 27 June 2019 with Ms Lisa Preston, Enforcement Operations Manager. This was a formal meeting in line with stage 2 of the respondent's Managing Sickness Absence Policy. At this meeting, Ms Preston agreed the claimant's dates of absence that had counted towards the sickness procedure and she noted the adjustments which the claimant said were required to facilitate his return to work. Ms Preston explained the triggers for the application of the various stages of the process, notwithstanding that the claimant sickness absence levels were due to work-related incidents. The claimant requested the meeting be adjourned so that he could bring a trade union representative to a reconvened meeting and Ms Preston agreed to this.

57. The adjourned meeting was reconvened on 10 July 2019 and Ms Preston provide a comprehensive note of the matters discussed at this meeting. The outcome of the meeting was that the claimant would meet again with Ms Preston and that if his attendance had not improved to the required level it could be determined necessary to progress to the next formal stage of the sickness absence procedure. This was a consistent application of the respondent's Managing Sickness Absence Procedure and, indeed, Ms Preston's letter was in line with the wording of the relevant policy.

58. The claimant's identify comparators: Mr Sheikh, Mr Ozoeokwo and Ms Abbott did not trigger stage 2 of the Managing Sickness Absence Policy.

59. On 22 August 2019 an enforcement team meeting took place organised by Ms Preston. The main purpose of this meeting was to issue the stab-proof vests. Ms Preston had not been long in her appointment as the team manager and she set about addressing the matter of the unissued stab vests. Ms Preston saw this as a way to make an early good impression with her team and her managers. Ms Preston told the hearing that there was a pile of unissued stab vests which required altering and some further adjustments for practicality such as enlarged pockets and additional provision for equipment belts, which she organised and referred us to the appropriate orders and invoices.

60. Ms Preston contended that the claimant displayed a negative attitude at this meeting, judging from his demeanour and the comments that he made. The claimant said that the stab vests were the same as the respondent sought to previously introduce and that they were not fit for purpose. He proceeded to say that the respondent did not care about the health and safety of CEOs which caused Ms Preston to interven at that point to say that it was because the respondent cared about the team's health and safety that the stab vests were being issued. We prefer Ms Preston's evidence to that of the claimant and Mrs Hubbard because she gave a more credible account, and this was more consistent with the respondent's near-contemporaneous documented investigation.

61. During the course of the meeting, the claimant challenged Ms Preston about how the stab vests were to be washed and Ms Preston initially indicated that she would find out about their information and revert to him. However, when the claimant persisted Ms Preston went to an adjacent office to find out that information from another colleague. She then returned and told the claimant and others present. Ms Preston denied saying to the claimant that "anything is a problem with you, nothing his positive", although she said that she made a corrective comment aimed at defusing the claimant's awkwardness which she could not recall. Even if Ms Preston did make

some comment, the Tribunal does not accept this was an undeserved criticism of the claimant. The claimant was negative, challenging and badly behaved at this meeting and Ms Preston corrected him softly. The claimant had a history of making complaints when things did not go the way he wanted so Ms Preston was no doubt motivated by the desire to avoid escalating any hostility. Such was the claimant's petulant behaviour that Ms Preston sought out the claimant after the meeting in an attempt to engage him positively.

62. The claimant raised a grievance against Ms Preston on 9 September 2019. This grievance was acknowledged by the respondent's HR officer the following day and was referred to Mr Darren Spring, Assistant Director, on 11 September 2019. The claimant objected to Mr Spring dealing with his grievance that same day and Ms Tina Mitchell was appointed as the investigating officer on 27 September 2019. There was some exchange surrounding the complaints that the claimant had made and the parameters of the respondent's grievance investigation and on 15 October 2019 Ms Mitchell met with the claimant for a grievance investigation meeting. The claimant was thereafter asked for further information (which he did not provide) and then sent a record of the investigating meeting and invited to make any amendments. Ms Mitchell interviewed 4 witnesses on 29 October 2019 and 5 witnesses on 1 November 2019. The claimant and the witnesses returned signed interview notes between 5 November 2019 and 20 November 2019. On 28 November 2019 Ms Mitchell wrote to the claimant to explain the delay in her investigation.

63. On 4 November 2019 the claimant was signed off from work for 1 month for "foot pain under investigation". His statement for fitness for work suggested he might benefit from avoiding wearing any equipment around his waist when he returned to work. On 28 November 2019 the claimant attended occupational health, which identified various maladies, including problems with the claimant's left foot and right knee, widespread itchiness in his body and stress. The OH Adviser recommended a temporary redeployment for the period of medical investigations and treatment for the claimant's foot, knee problem and that his hours be phased for 2 weeks. The claimant did not return to work until 15 July 2020 (which was almost 7 months after he issued his second claim).

64. On 12 December 2019 Ms Julie Nelder (Assistant Director, Highways, Fleet & Logistics) completed her outcome letter to the claimant in respect of his grievance against Ms Preston. This grievance was broken down to 8 allegations, all of which were "not upheld". In the conclusion and recommendations section, Ms Nelder referred to Ms Mitchell's investigatory report in which she said that she had fully investigated all aspects of this grievance and found there was no case to answer. She continued that such was the lack of substance or evidence that this grievance was vexatious, and the impact of the spurious allegations caused stress and strain on the department and low morale. Ms Mitchell opined that Ms Preston was keen to repair relationships, but that the claimant was not willing to do so. Ms Nelder said that she would refer to HR management to consider further disciplinary action against the claimant. There is no evidence that a HR manager addressed this referral.

65. The claimant issued his second claim on 25 December 2019. The claimant was not sent the outcome of his grievance against Ms Preston until June 2020. Ms Daly explained the circumstances of this and said it was due to her oversight as she was

dealing with various grievances from the claimant, attempting to facilitate his return to work and dealing with the response to his proceedings, as well as undertaking her other duties. Whilst Mrs Daly did not contend that the claimant had a responsibility to chase the respondent to ensure that it dealt with her grievance properly, she did say that if the claimant had brought this mistake to her attention earlier then she would have ensured that the grievance outcome of 12 December 2019 was sent to him without further delay.

Our determination

66. Notwithstanding we dealt with our findings of fact in chronological order, so far as determining the various discrimination and wages claims, for clarity our written reasons shall address these in the sequence set out in the list of issues.

Time limits

67. Proceedings in the first claim (case no: 3201623/2019) were issued on 29 June 2019. Under s123 EqA anything occurring before 30 March 2019 was prima facie out of time. The Acas conciliation period will extend time limits for the parties to attempt to resolve their differences without the need for Employment Tribunal proceedings: s18A and s18B Employment Tribunals Act 1996 and the Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014. When determining whether a time limit has been complied with, the period beginning the day after the early conciliation request is received by Acas up to and including the day when the early conciliation certificate is received or deemed to have been received by the perspective claimant is not counted. So, the clock starts to run again the day after the prospective claimant receives the certificate.

68. The first Acas Early Conciliation Certificate notes that early conciliation was commenced on 14 May 2019 and the certificate was issued by ACAS on 29 May 2019. The claimant will qualify for the most favourable method (of 2) for calculating the early conciliation time limit extension, as the limitation clock was due to restart on 30 May 2019 and the claimant issued proceedings within 1 month, on 29 June 2019. Therefore, any allegation occurring before the expiry of 3 months less a day from the early conciliation start date, i.e. 15 May 2019, will be within the s123 EqA time limit as amended by the early conciliation provisions. Therefore, we calculate that any act or omission occurring *before 16 February 2019*, is out of time unless it forms part of a continuous act of discrimination or unless we exercise our discretion under s123(1)(b) EqA to allow this to proceed.

69. In respect of the second claim (case no: 3203127/2019), proceedings were received by the Employment Tribunal on 25 December 2019. The Early Conciliation Certificate refers to notification of early conciliation on 16 November 2019 and the certificate was issued on 26 November 2019. Again, proceedings were issued within 1 month from receipt of the Acas Early Conciliation Certificate. Therefore, we calculate that any allegation *prior to 17 August 2019* (and not 25 August 2019 as the respondent contends) was prime facie time out of time, the correct cut-off date being 3 months or more before early conciliation was commenced,

70. None of the claimant's allegations form part of a continuous act of discrimination because, for the reasons we state below, we do not accept that the allegations of

discrimination were well-founded. As we make no findings of fact capable of supporting any determination of discrimination, logic follows that there can be no continuous act of discrimination.

71. The claimant did not address why we should exercise our discretion in his favour in his witness statement and only addressed this point when asked questions by the Tribunal. The claimant referred to his periods of sickness as precluding him issuing proceedings sooner and asked that we exercise our discretion upon that basis. Our starting point was that time limits should be observed. There is no presumption that an Employment Tribunal should extend time, the claimant must persuade the Tribunal that it is just and equitable to do so: see *Robertson v Bexley Community Centre [2003] IRLR 434*. The claimant did not adduce any medical evidence which specifically dealt with why he could not issue proceedings within the statutory time limit. He said that his medication makes him forget things, yet he made complaints, addressed correspondence surrounding his grievances, attended meetings and went to occupational health reviews throughout this period. There was no evidence of a memory problem in the contemporaneous documents. The claimant adduced no further reasons as to why the Tribunal should apply a just and equitable extension. Surprising for a party who had issued proceedings 6 months earlier, the claimant failed to observe the statutory time limit in respect of a significant part of his second proceedings.

72. We note that throughout the relevant periods the claimant had raised various complaints and grievances to his employer, so his sickness absence did not represent a substantial incapacity. We did not believe him when he complained of substantial memory loss. We also took into account the merits of his claim. Notwithstanding, the claimant did not succeed with his allegations, even if there was merit to some of his complaints and if he did succeed, we determine, it would not be just inequitable to allow such complaints to proceed to a positive determination and remedy as there was no credible basis upon which to exercise our discretion. Consequently, in respect of the first complaint, the allegations identified at 3.1, 3.2, 3.3, 3.4, 3.5, 3.6 and 8.1 are time-barred, as is issue 14.3 of the second proceedings also.

<u>Allegations/issue 6.1 (the stab-proof vest)</u>

73. We accepted Mr Carver's evidence that the respondent sought to introduce stab-proof vests as far back as 2013 or 2014 and that this had been resisted by some members of staff. Ms Buckley purchased some stab-proof vests and sought to introduce these around September 2018, which was also around the time the claimant was assaulted. Ms Buckley's initiative met with staff resistance again and she abandoned her proposal to make the wearing of such protective equipment compulsory. Ms Preston said when she arrived at the Enforcement Team, the stab vests had been left in a storeroom and that any member of staff could take one, but staff were resistant. This is why Ms Preston sorted out the modifications to the stab-proof vests already purchased and unused.

74. There is no evidence to support any contention that issuing the stab-proof vest would have deterred the claimant's assailant on 12 September 2018, or that his injuries would have been different because the claimant was not attacked with a knife or

stabbed. In any event, we are satisfied that if the claimant wanted such protective equipment from September 2018, then there was one available for him.

75. Surprisingly for such a specific allegation, there was no evidence proffered from the claimant to support his allegation that white colleagues have been provided with such protective clothing in contrast to black and minority ethnic employees. Such a disparity would be shocking, particularly in such a diverse workplace, where 70% of staff come from a BAME background. When asked, Mrs Hubbard whom the claimant called as a witness and was white British, said that she had not been provided with a stab vest.

76. There is no merit in this allegation. The claimant has not produced any cogent evidence of a detriment. There is nothing which the Tribunal could make sufficient findings of fact, which might shift the burden of proof under the *Igen* analysis.

Issues 3.2, 3.3, 3.4, 3.5 and 3.6 (identified in the list of issues as the appeal office duties)

77. The claimant was employed as a CEO and he sought to modify his duties to undertake appeal work upon his return to work from sick leave on 30 October 2018. Mr Carver's clear evidence was that there was not enough work on appeals to justify redeploying the claimant, even temporarily, and the claimant has not adduced any evidence to substantiate a finding to the contrary. Therefore, the premise of the allegation at 3.2 is incorrect: there was no work available in the Civic Office on appeals on or around 30 October 2018.

78. Ms Abbott had returned to work 6 weeks before the claimant. Ms Abbott was allocated work on a purge project. This was work for which she was well suited because of her experience. The claimant did not have to same experience or suitability for the HGV purge work as Ms Abbott and when he returned to work 6 weeks later there was no additional work available on the purge nor was there any vacancy on appeals.

79. The claimant did not put to Mr Carver that he could have moved Ms Abbott to another role to create a vacancy for him nor did he put to Mr Carver that he could have redistribute the work in the appeals office so that he could be accommodated in addition to the 2 appeals officers. This is not a disability discrimination case, so we do not approach this from the perspective of examining possible reasonable adjustments. So, the claimant comparator for less favourable treatment, as identified at issue 4, is a white female employee who returned to work sometime before the claimant and was able to undertake alternative duties for which the claimant was not suited and which were not available at that time. In this regard, Ms Abbott is not an appropriate comparator under s23(1) EqA. In any event, the claimant was not subject to less favourable treatment either at all or connected with his protected characteristic.

80. So far as allegation 3.3, so far as we could detect the 21 November 2018 date only related to the claimant's visit to his GP regarding a groin strain. The claimant was keen to undertake a role in appeals following his return to work and the December 2018 OH report seemingly noted this. Again, Mr Carver was very clear in evidence that there was no vacancy on appeals throughout this period. Ms Abbott had been redeployed into a specific project. We note that as time progressed, Ms Abbott

provided a limited amount of assistance to the 2 appeals officers on an ad hoc basis. We are satisfied that Ms Abbott did not undertake any significant amount of appeals work because Mr Carver would have known about this and there would have been more contemporaneous evidence available than 2 apparent emails which seem to deal with appeal matters. Therefore, our conclusion in respect of allegation 3.3 is substantially the same as the previous allegation, i.e. the claimant was not subject to less favourable treatment at all, or connected with his protected characteristic.

81. By the time that the appeals officer Alex resigned, Mr Carver was no longer managing the back-office staff, as they had been absorbed into the performance support team. The vacant appeals officer recruitment round took place in July 2019 (and not in January 2019 as contended by the claimant). The standard local authority recruitment policy was followed, whereby the vacancy was advertised internally. There is no basis to criticise Mr Carver or the respondent in this regard and consequently the claimant was not treated less favourably in respect of any actual or hypothetical comparator. Mr Carver had no role or authority to redeploy staff into Alex's role on an interim basis and the claimant had the opportunity to apply for this vacancy, either as an interim measure if such a gap existed or in the substantive recruitment round. Therefore, we dismiss allegation 3.4 as the factual basis is not made out.

82. There was no contemporaneous evidence available to support the claimant's allegation at 3.5. Ms Abbott, the claimant's identified comparator did not apply and was not appointed to the role of Senior Environmental Enforcement Officer. The claimant could not explain the basis of his expectation that Mr Carver, or another respondent official, would inform him of the Senior EEO vacancy. The claimant did not ask Mr Carver to inform him of this upcoming vacancy and Mr Carver disputed that he was obliged to do so. This allegation is not made out because we are not satisfied that such an obligation arose; so therefore, there could be no less favourable treatment at all, or on the basis of the claimant's protected characteristic.

83. Allegation 3.6 arises from the claimant sending an email to Mr Carver stating that he had problems walking and that this arose from his assault the previous September. The claimant was back at work at this time and was undertaking modified duties which took into account his walking difficulties. In any event, by this time, as stated above, Mr Carver had no authority over redeployment to the appeals office. This complaint is more appropriate as a disability reasonable adjustments complaint, and a previous judge has determined twice that the claimant was not a disabled person at this relevant time. According to issue 6, this allegation is advanced on sex discrimination grounds. The only actual comparator identified was Ms Abbott who circumstances were materially different to the claimant, as determined above, so she is not an appropriate comparator. There is no basis to believe that a hypothetical female (or even non-black African) comparator, would be redeployed to the appeal office at this time due to their ongoing difficulty in walking, particularly when adjustments to their duties have already been made. Again, this allegation is not made out.

Issue 3.7 and 3.8 (the court visit)

84. There was a significant dispute over the events of 1 March 2019. In coming to our findings of fact as set out above, we preferred the evidence of Mr Carver, which was more consistent with the contemporaneous documents.

85. The allegation at 3.7 relates to Mr Carver failing to respond directly to the claimant's and emails and telephone calls about the return lift from Basildon Magistrates Court and, instead dealing with Mrs Hubbard, his white British colleague.

86. Mr Carver had dealt with Mrs Hubbard in organising the transport to the magistrates' court. Mr Carver had emailed Mrs Hubbard that morning with instructions that she and the claimant make their own way back to the civic office that day. Mr Carver said that he was at a meeting with his phone turned off during the late afternoon. When he checked during the coffee break, he had received some missed calls from the claimant, and the claimant's 2 emails. The first email said that the claimant and Mrs Hubbard were stranded at the magistrates court (near the town centre) and the second email said that their lives were in danger by leaving the court on that late afternoon in spring. Mr Carver's did not revert to the claimant instead, he organised a driver from the twilight shift to collect the claimant and Mrs Hubbard.

87. Mr Carver said that he thought he had a missed call from Mrs Hubbard also, but he said he could not be sure of this because he only had a few minutes to deal with this and other matters during his coffee break. As Mrs Hubbard had organised the lift, it is understandable that Mr Carver responded to her. Furthermore, given the grandiose (and nonsensical) claim that their lives were in danger by standing outside the magistrates court in the vicinity of the police station, it was a wise decision by Mr Carver to avoid speaking with the claimant in case tempers flared. Notwithstanding this claim is astonishing in its triviality, (*you spoke to my friend instead of me*) there is no merit to this allegation. There is no detriment in speaking to the person who organised the transport about arranging additional collection.

88. The allegation at 3.8 is ludicrous. The claimant complains that he was not invited to a meeting where his colleagues were given a rollicking by Mr Carver for ignoring his very clear instructions about the non-availability of return transport. Mr Carver's annoyance was understandable, and this frustration was directed at Mrs Hubbard and the drivers, Mr Clayton and Mr Orton. He gave an informal oral warning to the individuals that he regarded as the culprits. The claimant was not told off for his behaviour because he was not an active participant in this display of bad behaviour. The claimant was not subject to any less favourable treatment in this regard.

Issue 7 and 8 (the position of acting Civil Enforcement Supervisor).

89. The claimant complained about Ms Buckley 7 months before he applied for the role of acting Civil Enforcement Supervisor. This was accepted by the respondent as capable of amounting to protected act, pursuant to 27(2)(d) EqA, although the respondent dispute causation, i.e. that the claimant's complaint about Ms Buckley resulted in him not being offered the temporary position.

90. Mr Carver sent the claimant, a copy of the advert for the acting Civil Enforcement Supervisor, which demonstrates that, during July 2018 at least, Mr Carver welcomed

the claimant applying for this role. We have assessed the selection process and the marking sheets for this temporary role and conclude that Mr Ozoekwo was appointed because he performed significantly better than the other 2 candidates (which included claimant) on the basis of his high mark for the EoI application form.

91. Mr Ozoekwo's ethnic origin is black African, which is, we presume, why the claimant did not claim direct race and sex discrimination. Ms Buckley was not involved in the acting supervisor's selection and Mr Carver said that he did not speak to her about this process. There is no evidence to suggest otherwise. Mr Carver's evidence in respect of selection was clear, rational and supported by interview notes and scoring sheets. There is no basis to conclude that the claimant did not get this job because of his complaint against Ms Buckley.

Issue 10 (unauthorised deduction of wages)

92. The claimant claimed over time in respect of his spurious attendance at court on 1 March 2019. Overtime was available for staff if this was authorised by a senior manager in advance. The claimant sought no authorisation for overtime prior to his attendance at Basildon Magistrates Court on 1 March 2019 and he was not entitled to overtime on the basis of his misrepresentation to Mr Carver. The claimant's attendance at court was to familiarise himself with the building's layout and this activity might have formed part of his normal course of employment had he not misled Mr Carver about the purpose of his visit. In any event, it is difficult to see how the claimant could have possibly incurred 4 hours of overtime because a court visit would normally be concluded well within 1 or 2 hours. This claim is rejected.

Issues 14.1 and 14.2 (the team meeting of 22 August 2019)

93. Issues 14.1 and 14.2 are 2 aspects of the same allegation. We went through the respondent's signed statements for its investigation in response to the claimant's allegations surrounding this team meeting. Of the 8 or 9 members of the enforcement team interviewed only Mrs Hubbard supported the claimant's allegation. The statements record that Mr Ozoekwo reported that the claimant queried with him at the time whether Ms Preston had raised her voice; although Mr Ozoekwo said that he did not regard Ms Preston as raising her voice.

94. Mr Patrick Ojewole said Ms Preston said to the claimant: *why do you have a problem with everything*? Although she was smiling and did not raise her voice. Mr Ojewole said that the claimant may have taken this the wrong way, so he regarded it as inappropriate. This may have occurred prior to Ms Preston going off to find out about the washing requirement for the stab vests and following the claimant's earlier outburst about the respondent disregard to staff health and safety. The other witnesses did not hear anything untoward. Most reported that Ms Preston being helpful and answering queries.

95. There is not much difference between Mr Ojewole reported comment and the first part of the claimant's alleged comment. Although we have not heard from Mr Ojewole, we prefer to believe his written account because this reflects the likelihood of a more innocuous comment and if the claimant had said something aggressive or demeaning, then this would have been picked up by others around the table. Ms Preston did not believe that she said anything offensive to the claimant and the

meeting stayed positive throughout. We accept that the comment reported by Mr Ojewole was a reasonably mild correction of the claimant's petulant behaviour at this meeting. We do not believe Ms Preston said "nothing is positive" to the claimant. The claimant was looking for confrontation at this meeting and he tried to involve others, like Mr Ozoekwo. Ms Preston was keen to navigate the meeting away from confrontation and, in this, she succeeded.

96. We do not regard any comments being made by Ms Preston as untoward. We reject the claimant's allegation that he was harassed or humiliated. The claimant was looking for an argument at that meeting and he did not get one. His conduct was unreasonable. Ms Preston did not create or contribute to a harassing environment. The claimant's claims of direct sex and race discrimination have no foundation and his claim of harassment is rejected also. There is no possible foundation to the victimisation claim. This rests on the premise that because the claimant: complained around 1½ years before about a former manager who had left the workplace by that time; and/or, that because the claimant had issued proceedings largely against Mr Carver in respect of matters that occurred before she started work with the respondent or which she was not involved in that Ms Preston treated him badly at this meeting. There is not a single strand of evidence that could support such a contention, which was indicative of the half-hearted way that the victimisation complaints were pursued at the hearing by the claimant.

Issue 14.3 (The sickness warning letters)

97. Ms Daly reported a high degree of sickness absence in her statement, which by June and July 2019 was as follows:

    - 24 June 2017 to 28 August 2017
    - 14 December 2017 to 15 December 2017
    - 12 September 2018 to 29 October 2018
    - 8 May 2019 to 28 May 2019.

    The claimant did not dispute the accuracy of this evidence.

98. The claimant had triggered stage 2 of the sickness absence process. The claimant's comparators of Mr Sharif, Mr Ozoekwo and Ms Abbott had not triggered the stage 2 process because their absence was not as frequent, long-lasting and persistent as that of the claimant.

99. The claimant contended that he received 2 warning letters. This is, again, an example of the claimant's misrepresentation of the situation. The claimant had requested trade union representation during the meeting of 27 June 2019, which caused the meeting to be adjourned. So, the 2 letters relate to a single application of the respondent's sickness absence policy at the stage 2 level. They are not 2 separate warning letters as asserted by the claimant in this evidence.

100. The respondent denies that the stage to outcome letter was a "warning" letter. The letters were not disciplinary and the respondent's contended the outcome letters merely advised the claimant of a possible consequence of his continued sickness absence. We accept that the stage 2 outcome letter is a "warning" letter; however, as it is not disciplinary in nature it does not represent any less favourable treatment. The letters were entirely consistent with the Managing Sickness Absence Policy and

merely reminded the claimant where he was in respect of that process and advised him (for his benefit) of what might happen should his attendance not improve.

101. It is impossible to see how, in this instance, the response to the claimant reaching a trigger point in the sickness procedure together with the appropriate documentation and confirmation could possibly amount to less favourable treatment on the grounds of the claimant's race and sex and harassment and victimisation.

Issue 14.4 (the investigation of the claimant's September 2019 grievance)

102. The claimant's grievance against Ms Preston was sent to the respondent on 9 September 2019 and concluded a little over 3 months later on 12 December 2019, just before the claimant issued his second claim. The outcome letter was not sent to the claimant because of an oversight and we accepted Ms Daly's evidence in this regard. Ms Daly made a mistake, and she was frank and forthcoming about this. The claimant was sent the outcome of this grievance in June 2020, which was around 6 months after the grievance was concluded and approximately 9 months from when the grievance had been raised.

103. Although the claimant asked for "an independent person" to deal with the case, it was appropriate for Ms Mitchell to investigate the claimant's grievance and Ms Nelder to review the investigation and report on this. Neither had been involved with the claimant in some manner so as to suggest some negative influence or predisposition towards him. The respondent's outcome letter is consistent with the investigation material which is both expansive and detailed. We went through the steps undertaken by the respondent at the hearing and made findings of fact in respect of the main steps undertaken. We are satisfied that the respondent's undertook a thorough investigation and dealt with this within a reasonably timely manner. Therefore, we find that the respondent took the claimant's grievance seriously. It is no doubt regrettable to the respondent that Ms Daly did not send the outcome letter to the claimant promptly, but we note that the claimant did not raise any concerns about the delay other than issuing proceedings during the Christmas holidays.

104. We note that the claimant had previously raised other grievances (which are not the subject of these proceedings) and that the grievance against Ms Preston was dealt with in a timeframe consistent with the claimant's other grievances.

105. So, the allegation is not made out, except for the delay in providing the outcome letter. It is implausible that the respondent would finalise the grievance outcome and, then deliberately withhold this from the claimant. As we accept Ms Daly's explanation that this was an oversight in sending the claimant his grievance outcome, we find that this was in no way connected to his race or sex. We cannot see how an error in providing the claimant with the outcome to a grievance, which was not accepted, could amount to violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment so the harassment complaint is not made out. Similarly, we cannot see how there could possibly be any merit in the victimisation complaint.

Issue 14.5 (amended duties in October and November 2019)

106. There is no reference in the claimant's statement to him asking for amended duties in the autumn of 2019. According to Ms Daly, whose evidence on this point was not disputed, the claimant was on protracted sick leave from 6 November 2019 to 15 July 2020 when he returned on a succession of different adjusted roles.

107. It is not clear what adjustments the claimant sought in October or November 2019 (if indeed he sought any adjusted duties at all). This is not an allegation of disability discrimination, so we only consider this in respect of direct discrimination and harassment on the grounds of his sex and race and victimisation.

108. The claimant merely asserted that 2 white colleagues have been afforded reasonable adjustments, whereas he had not. There was no information provided to go beyond our findings of fact above, which do not identify any less favourable treatment. Consequently, this allegation is rejected.

Summary

109. We reject all of the claimant's discrimination complaints because in all instances, save as to the delay in providing the grievance outcome (part of allegation 14.4) he has not established any less favourable or detrimental treatment. We are satisfied that the 14.4 detriment, such as it was, in failing to provide the claimant with an outcome to his grievance was in no sense related to his sex or race or his protected act. The claim for the non-payment of his overtime has no merit whatsoever. In any event, a substantial part of the claimant's allegations, as identified above, are out of time and, even if there had any merit, there is no basis on which those claims should proceed.

Employment Judge Tobin
Date: 23 November 2020