EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr K Khan		Cabinet Office

Heard at: London Central **On**: 16, 17, 18, 19 November 2020 (and 20 November 2020 in chambers)

Before: Employment Judge Stout
Ms T Breslin
Mr D Shaw

Representations
For the claimant: In person
For the respondent: Mr T Kirk (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The Respondent did not contravene the Equality Act 2010 by discriminating against the Claimant because of his race or age;

(2) The Respondent did not contravene the Equality Act 2010 by victimising the Claimant.

REASONS

1. In these proceedings, Mr Khan (the Claimant) brings claims against the Cabinet Office (the Respondent) for race discrimination, age discrimination and victimisation in respect of his employment with the Respondent in its Fraud Error Debt and Grants Function (FEDG). The Claimant commenced employment on 23 September 2019, was suspended on 26 September 2019 and dismissed summarily on 12 November 2019. He appealed that decision and his appeal was dismissed on 30 March 2020.

The type of hearing

2. This was an in-person hearing, save that we permitted one of the Respondent's witnesses (Ms McDonald) to give evidence by video-link (using Kinly Cloud Video Platform) as she lives with someone who is clinically 'extremely vulnerable' to Covid-19.

The issues

3. The Claimant originally brought claims of direct discrimination (ss 13 and 39(2)(c)/(d) Equality Act 2010 (EA 2010)) because of age (he is 23) and race (Asian)/nationality (Bangladeshi)/ethnicity/colour. He also brings claims of victimisation (ss 27 and 39(2)(d) EA 2010).

4. The parties had at the outset agreed a list of issues to be determined on liability. This included a list of issues (5a-m on the parties' list) which were said to be acts of direct age and/or race discrimination. During the hearing (on 18 November 2020) the Claimant withdrew all those claims of age discrimination and effectively sought to amend that part of his claim to the single contention that the Respondent (specifically Mr Whitehouse-Hayes and/or Miss Eshelby) directly discriminated against him because of his age when they took 'no account of his age' when regarding the number of applications he had made to the Cabinet Office/Civil Services as a 'suspicious factor' indicating he may pose an 'insider threat' to the Respondent. There was no objection by the Respondent to the Claimant withdrawing/amending his claim in that way and we were content to permit that amendment given that we had already heard the evidence on which the Claimant relies by the time he sought to amend his case in that regard.

5. The issues on liability that remained for us to determine were therefore as follows:-

   <u>Direct race discrimination</u>

   (1) Did any of the following acts happen:

(a) It is agreed that whilst the Claimant applied for the job of an Executive Assistant, upon his commencement of employment on 23.09.19 the Claimant's role was altered to that of an HR Support Officer;

(b) The Position the Claimant was placed in does it match the job description shared with him by Olli Jokinen?

(c) Did Laura Eshelby (the decision maker in the Claimant's disciplinary case) make a "false statement" or "concoct a lie" in the letter purporting to dismiss the Claimant dated 12.11.19?

(d) Did David Whitehouse-Hayes fail to investigate the allegation as required or submit any false information?

(e) Did Lyn McDonald, David Whitehouse-Hayes, Steve Jones or anyone else withhold information from the Claimant relating to the USB stick?

(f) When dealing with the disciplinary case against the Claimant, did Laura Eshelby fail to take into account relevant mitigating circumstances relating to the Claimant, in particular (please refer to document titled mitigation Bundle B (Page 92-93))? If so, which specific points of mitigation should have been considered?

(g) Did the Respondent fail to adhere to disciplinary guidelines, namely:

a. The How-To Guides
b. Security Breach Policy
c. Dispute Resolution (previously grievance) How to Guides
d. Discipline Policy; and
e. Civil Service Code

when dealing with allegations of misconduct against the Claimant at both the disciplinary and appeal stage (including the grievance)?

If so, which specific parts of those policies have been breached and what steps should have been taken?

(h) Did the Respondent advertise the Claimant's role before his disciplinary came to a conclusion and withhold the Claimant's pay until December and relevant reports (K2 document) from the Claimant until the day before the Disciplinary Hearing?

(i) Did the Respondent withholding the Claimant's pay, submitting false evidence, as well as failing to share documents from the investigation until the day before his disciplinary hearing contribute to the Claimant handing in his one month's notice?

(j) Was the Claimant dismissed on 12.11.19 or did he in fact resign on 04.11.19 (the day before his disciplinary meeting)?

(k) Were any documents withheld from Selina Dundas by Laura Eshelby, David Whitehouse-Hayes or others while she was carrying out the investigation into the Claimant's Complaint?

(l) Did Selina Dundas pass on all the relevant documents during the Appeal stage to the Appeal Manager?

(m) Were any documents withheld from Elise Clarke by Laura Eshelby or others? (Namely the various versions of the Minutes from the initial disciplinary hearing.)

(2) In relation to each act, was it less favourable treatment because of the Claimant's race contrary to s 13 EA 2010? (The Claimant relies on Miss Eshelby, Mr Paterson, Ms McDonald and Mr Whitehouse-Hayes as comparators.)

Direct age discrimination

(3) Did Mr Whitehouse-Hayes and Miss Eshelby directly discriminate against the Claimant because of his age when they took no account of his age when regarding the number of applications he had made to the Cabinet Office/Civil Services as a 'suspicious factor' when considering whether he posed an 'insider threat' to the Respondent.

Victimisation

(4) Were any of the following protected acts within the meaning of s 27(2) EA 2010:

(a) Informing John Connolly by email at 9.30am on 25 September 2019 that he intended to raise a complaint about the bullying and harassment he was allegedly being subjected to;

(b) Raising a complaint on 27 November 2019;

(c) Seeking confirmation from Selina Dundas by email of 23 December 2019, 12:33 on whether any guidelines prevented him from sharing details of his disciplinary with his constituency MP;

(d) The Claimant presenting this claim under EA 2010? (The Respondent admits this was a protected act.)

(5) Was the Claimant subjected to any detriment because he made a protected act? The Claimant relies on the following alleged acts:

(a) Steve Jones withheld information and ignored requests for information. The Claimant is asked to clarify what information was withheld, what request was ignored and when.

(b) The Respondent starting making "incomprehensible changes to the Claimant's employment status";

(c) The Respondents did not pass the investigation report into the USB;

(d) The Respondent then lost the USB;

(e) Elise Clarke delayed the meeting to the point where the Claimant was at risk of being timed out;

(f) Elise Clarke withheld investigation report from grievance / dispute;

(g) Elise Clarke did not consider the acts of those stated to be in violation of the civil service code, or breach of any policy, or acts of bullying, or acts of discrimination;

(h) Elise Clarke did not provide any explanation of why *"the lies and policy breaches stated in the appeal are not lies and not breaches and considered the investigation fair and the penalty impartial"*.

Jurisdiction

(6) Were any of the Claimant's claims presented outside the three-month time limit under section 123 EA 2010? The Respondent will aver that any allegation pre-dating 16 November 2019 is prima facie out of time. Do the alleged acts of discrimination or victimisation amount to connected and/or continuing acts? If the claims are out of time, is it just and equitable to extend time?

6. We observe that although the parties had agreed the list of issues, it was not always apparent from that list precisely what the Claimant's complaints were or what documents he was referring to. This was clarified in the course of evidence and in the judgment below we identify in relation to each issue how the Claimant's case was put at the hearing.

Amendment application

7. By email of 3 November 2020 the Claimant applied to add a claim of automatically unfair dismissal on grounds of trade union membership/activities. An application to amend the claim to this effect was previously considered by EJ Snelson on 3 August 2020. He rejected the claim as being 'hopelessly speculative'. The Claimant raised it again at the start of the hearing, based on a document he said had emerged in disclosure.

8. We rejected that application for reasons that we gave orally at the hearing. In short (having regard to the principles in *Serco Ltd v Wells* [2016] ICR 768) we found that there had been no material change of circumstances since EJ Snelson made his order on 3 August 2020. At that time, the Claimant had in his possession an email exchange between himself and Mr John Connolly of 24/25 September 2019 (pp 186-188 of the bundle) in which Mr Connolly expresses surprise and disappointment that the Claimant had sought to discuss the change of role at the start of his employment formally with a union representative present rather than informally. The 'new' email that the Claimant sought to rely on from Ms McDonald of 25 September 2019 adds nothing of significance to that because it merely repeats or concurs with Mr Connolly's surprise/disappointment. It then goes on to make a point about about possible collusion between the Claimant and RP (about whose complaint we heard more later in proceedings), but the email does not suggest that Ms McDonald was linking this with any trade union issue, and even if she were, this email adds nothing of significance to the material that the Claimant already had when he made his application to EJ Snelson. The principle of finality in litigation means that we should not therefore re-open EJ Snelson's order on this point.

9. Even if we had not been so satisfied, however, we would have refused this application in any event applying the *Selkent* principles since it was a new claim, made substantially outside the normal time limit that applies for bringing a claim for unfair dismissal and which could (indeed, was) brought earlier before EJ Snelson so that it is unlikely that we would have extended time applying the 'not reasonably practicable' test in s 111 ERA 1996. Further, its potential impact on this trial would, we considered, have been significant as it would have opened up further avenues for enquiry, not dealt with in witness evidence. Given that we had 1000+ pages of bundle, a 100-page witness statement from the Claimant and 7 witnesses for the Respondent we were already going to be hard-pressed to complete the trial within the four days allotted. (As it was, we had to add a fifth day to the listing in order to deliberate on the Claimant's claims.)

Rule 50

10. During the hearing the Claimant relied to a significant extent on a complaint that had been made by another employee about Ms McDonald and some other employees of the Respondent. We were provided in the bundle with a copy of this complaint and the outcome letters. The parties had agreed that that this employee should be referred to as "RP". We questioned this at the outset of the hearing as there had been no order made under Rule 50. During the hearing this person was referred to by name, but no members of public were present and this was done on the understanding that if a member of the public sought to join the hearing, we would consider whether a Rule 50 order was required. In the end neither party made a Rule 50 application, but we remained concerned as to whether there should be an order in relation to this employee. The employee in question had left the Respondent and those representing the Respondent did not have instructions from her. The

Respondent was content to leave it to us to decide whether or not a Rule 50 order was required in her case, depending on how much detail we felt needed to be included in our judgment.

11. In the course of deliberations, we found that we needed to include in our judgment details of her complaint, including not only that it was among other things a complaint of discrimination but also that poor performance procedures were being followed in relation to this employee. We consider that publication of that information would interfere with her rights under Article 8 of the European Convention on Human Rights. We give full weight to principle of open justice and to the Convention right to freedom of expression, but we consider that these do not justify the publication of these details about this employee in this case. The principle of open justice and the Convention right to freedom of expression would not be significantly affected by the anonymisation of this employee in the judgment because her identity is immaterial to the matters we have to decide and will make no difference to the public interest in this case, whereas the potential impact on her of such details being published online for anybody, including any future employer to read, could be very significant indeed. So far as we know, she is unaware of the use that has been made of her personal data in these proceedings and we do not consider it reasonable or necessary to make enquiries as to whether she consents to publication of this information. In this case, the balancing exercise falls firmly in favour of anonymising her. We have therefore referred to her as "RP" throughout this judgment.

The Evidence and Hearing

12. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents which the parties agreed should be added to the bundle.

13. We explained our reasons for various case management decisions carefully as we went along.

14. We heard oral evidence from the Claimant and from the following witnesses for the Respondent:

    (1) Ms Lyn Macdonald (Director of FEDG);
    (2) Miss Kreepa Mehta (B2 Grade Executive Officer, FEDG);
    (3) Mr David Whitehouse-Hayes (FEDG Grade 7 officer at the material time);
    (4) Miss Laura Eshelby (FEDG, Acting Deputy Director at the material time);
    (5) Mr James Waller (Head of People and Physical Security, Cabinet Office);
    (6) Ms Selina Dundas (Deputy Director for Policy and Strategy / HR);

(7) Mrs Elise Clarke (Director of Civil Service Diversity and Inclusion, Cabinet Office).

The facts

15. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

Background

16. The Claimant commenced employment with the Respondent on 23 September 2019.

17. He had originally applied for an Executive Assistant to Deputy Director role (Grade B and B1) on 17 April 2019. He was provisionally offered and accepted the role in May 2019, subject to Pre-Employment Checks being carried out. These included Counter Terrorism Checks (CTC).

18. On 19 July 2019 the Claimant was informed that the original role was not available because of a change in business need and he was offered a role in policy instead as Grants Centre of Excellence Development Officer, with Olli Jokinen as his line manager. The Claimant responded that he would be happy to take up the new role.

19. On 6 September 2019 he was sent a statement of terms and conditions which did not refer to the policy role, but described the post as a "Grade Band B1" or "Executive Assistant to Deputy Director" (i.e the same job title as that for which he had originally applied). The Claimant accepted this contract and arrangements were made for him to meet with Olli Jokinen on his first day of work, which was agreed to be 23 September 2019.

The Claimant's role at the Respondent (Discrimination Issues (a) and (b))

20. The Claimant's contract provided for a probationary period of 6 months during which the Claimant could be terminated at any time if his service was unsatisfactory and it was clear he would not be able to reach the required standard by the end of the probationary period. Summary termination for gross misconduct was also permitted at any time. The contract contained a mobility clause, but nothing about flexibility in job roles (other than a provision for written notification within 28 days of any change in terms and conditions).

21. The Respondent's witnesses gave consistent evidence, which we accept, that a Grade B1 appointment in the Cabinet Office is to a flexible executive officer role and that employees are regularly moved between roles with little

or no notice, but this was not explained to the Claimant in advance of his joining the team. The Respondent's usual practice when a change of role is required is for the change to be discussed with the employee and usually they agree to it. If they do not, however, it is made clear to them that it is not a request but a requirement. Mr Whitehouse-Hayes gave evidence to this effect, both as to him being required to cover John Connolly's role without any notice shortly after the Claimant joined the Respondent, and as to his requiring Sean Pithouse (who joined after the Claimant on 14 October) to take over the Claimant's role while the Claimant was suspended (from 22 October). Mr Whitehouse-Hayes was clear that if Mr Pithouse had said he did not want to do the role, he would have been told that it was a requirement and he needed to do it.

22. The working day before the Claimant was due to start at the Respondent, i.e. Friday 20 September 2019, at a Senior Leadership Team (SLT) meeting, it was decided that there was a business need for the Claimant to start in an HR officer role. The SLT included Ms McDonald and Mr Connolly. The HR Officer role was to provide HR Support to FEDG, including workforce planning, recruitment, training, on-boarding of new entrants, as well as ensuring all relevant HR paperwork was completed in compliance with policies. This was the role that Miss Kreepa Mehta had been doing and it provided opportunities for exposure to senior employees and promotion as Miss Mehta had been promoted within 10 months of starting in post. It was decided by the SLT that the Claimant should be line managed by Miss Mehta. Miss Mehta gave unchallenged evidence, which we accept, that the reason the Claimant was moved into her role was because he was the first of the new joiners starting around this time in a similar role and level to her position.

23. Mr Jokinen was informed of the change at 7.38am on the morning of 23 September 2019 (p 185), i.e. only a couple of hours before the Claimant was due to start. Miss Mehta was due to greet the Claimant when he arrived and she was expecting Mr Connolly to meet with the Claimant and explain the role change, but in the event Mr Connolly was held up and it was left to Miss Mehta to first convey the news of the change to the Claimant as he was understandably asking to see Mr Jokinen as previously arranged. Although it is common for employees of the Respondent to be asked to change roles, it was exceptional for this to happen on an employee's first day and communication of the change to the Claimant was in our judgment not handled well.

24. A little later that day there was an opportunity for Mr Connolly to discuss the role in more detail with him. The Claimant was very unhappy about the change of role and Miss Mehta felt that he behaved strangely and in a very disinterested way for the rest of that day. This was an impression that the Claimant also gave to other employees of the Respondent. We return to Miss Mehta's first impressions of the Claimant further below. Miss Mehta let the Claimant go home early at 4.30pm on that first day as he was not yet set up on IT.

25. The next day, 24 September 2019, the Claimant emailed Mr Connolly asking for an appointment to discuss the role, saying it was not the role he applied for, had been offered or accepted. He asked for a discussion of his options going forward with a union representative present if possible. Mr Connolly's correspondence indicates he was disappointed that the Claimant had done this rather than approaching him informally. He immediately met with the Claimant with Miss Mehta to discuss the role again and urge him to deal with the matter informally because for business reasons the Claimant did need to do the HR role. Mr Connolly also told the Claimant, as he had told others in the department, that he had been diagnosed with cancer and would be taking time off for treatment. However, the Claimant pressed for a formal response to his email, which Mr Connolly provided later that day.

Alleged protected act (a)

26. The Claimant responded early in the morning of 25 September 2019. This email is relied on by the Claimant as his first protected act. In this email the Claimant said that he intended to *"challenge the decision to change my role with absolutely zero consultation"*. He stated: *"I question the legality of this switch and intend to use every means at my disposal to establish the facts"*. Referring to Mr Connolly's having informed him about his cancer, he said *"In one of our meetings, you shared very difficult personal details about yourselves – to which I'm sympathetic and wish you the best of lock in overcoming. However, I would appreciate if personal details were kept personal. It is unfair for employees to be weighted down by other employees' private life."* He suggested that Mr Connolly had *"conveyed to me in a belligerent manner that my option is to accept what I am given or pack my bags"*. Referring to Mr Connolly having mentioned to the Claimant that he looked as if he was not interested and did not want to be there, he stated, *"This fictitious narrative of an unprofessional demeanour seems to be an attempt to intimidate me into submission and possibly a means to kick me out in due time. I will not tolerate this the false narrative that is designed to create a hostile environment for me at the workplace. Due to your seniority and the seniority of the individual who concocted this vicious accusation* [he did not name the individual at the time but it is apparent from Complaint 1 that this is a reference to Tabitha Brufal]*, it can spread quickly and be perceived as an authoritative assessment. I will inform HR of this rumour which has been spread from that individual to yourself, and now Kreepa has been exposed to this information. I'm not sure who else that individuals have shared this malicious assessment with. I am adamant in taking the most decisive route to stem this damaging campaign and will not be intimidated from challenging problematic individuals regardless of their position."* (sic)

27. Mr Connolly forwarded the Claimant's email to Miss Mehta to seek her views on it before replying, and then sent the whole email chain on to Ms McDonald and Mr Whitehouse-Hayes. Miss Mehta's response indicated that in her view the Claimant's email was 'disproportionate' to the situation. She set out in her email a number of matters that in the first two days had *"shocked"* her about the Claimant's attitude to getting a role in the Civil Service, including: that he

had thought *"people in the Civil Service barely do any work"*; that *"his previous role involved drafting manifestos/papers for a Labour MP and he would like to continue doing this if possible"* (which Miss Mehta told him would not be possible because of the requirement for the Civil Service to be impartial); that he asked about having access to information that other people would not; that he had applied for 20-30 roles in the Civil Service and this was the 'most unlikely' for him to have got; and that he had asked her whether 'someone had put her up to selling the HR role to him'. She added that he *"has yawned in my face a number of times as well as smrking and rolling his eyes at a number of things I have said to him. I have tried to maintain a positive attitude and try to overlook these things but I was genuinely surprised at his attitude and to me it does seem that he doesn't really want to be here. I think that he also has a poor understanding of what Cabinet Office and Civil Service [do] which adds to this."*

28. Miss Mehta was away from the office on 25 September 2019 on a home study day. The Claimant attended IT induction that day.

Miss Mehta's attitude to the Claimant

29. The Claimant argued at this hearing that Miss Mehta held racist views towards Asian men and that, being of Asian origin herself, she had previously been used by the Respondent as a 'foil' or 'shield' to cover up discrimination by other employees. The Claimant made these arguments even though he has not brought a claim of discrimination against Miss Mehta herself. We have nonetheless considered them carefully lest they shed some light on the conduct of the Respondent's other witnesses toward the Claimant.

30. No evidence was produced by the Claimant to support his case that Miss Mehta was being used as a 'foil'. He did, however, produce evidence of tweets that Miss Mehta had made in 2012, 2013 and 2015. These tweets show that, several years before Miss Mehta joined the Respondent (which she did in 2018), she was willing to put into the public domain tweets that referred generically to "Asian men", "Asian people" and 'freshies' (which she said meant people who have recently come to this country), and to make derogatory comments about them. However, in each case Miss Mehta was able to give us some context or the context is apparent: the "freshie neighbours" comment was in response to her neighbours drilling next door in the small hours of the morning; the "Asian people" comment was in response to her experience of Asian people not respecting the concept of a queue and the "Asian men" comment was in response to a radio talkshow discussing behaviour of Asian men towards women in nightclubs. While this is material from which in principle an inference of discriminatory attitude could be drawn, we are not satisfied that it would be appropriate to do so in this case given the age of the tweets and their context, and the fact that we have seen no evidence that would lead us to find that (whatever her personal views) Miss Mehta dealt with the Claimant any differently than she would have dealt with any other new joiner.

31. Miss Mehta did feel uncomfortable with the Claimant and the Claimant suggested that this was because she felt uncomfortable with Asian men and that there was a further tweet by her (which he has not produced for the Tribunal) to that effect. The Claimant said that when asked why he made her feel uncomfortable, she replied only that he was fidgety and that this was not enough to explain her feeling and we should draw an inference of discriminatory attitude on the part of Miss Mehta from this. However, that was not our note of Miss Mehta's evidence. Our note is that when asked this question Ms Mehta said that the Claimant was "irritable, fidgety, mumbling under his breath … I noticed that he was smirking when he was talking". She continued "it made me feel on edge and the fact that he did not answer questions directly, I thought it was a bit strange – it is not a behaviour that I have come across before, I know that people can be different and I was trying to make him feel welcome but I found those behaviours uncomfortable". These are all behaviours by the Claimant which she noted as odd in her emails at the time. In her witness statement she also gave further examples, including that he had asked her to buy a deodorant for him when she was going to lunch. We witnessed the Claimant behaving in Tribunal in much the way that Miss Mehta described. Although we have cautioned ourselves about this and have not allowed his behaviours to affect in any way our approach to the Claimant's case, we accept that it was these behaviours that made Miss Mehta feel uncomfortable and in our judgment they provide an adequate explanation for why she felt like that.

32. Even standing back, and taking all the evidence in relation to Miss Mehta in the round, we draw no inference of racially discriminatory attitude on the part of Miss Mehta from any of the evidence presented.

Initial concerns and first suspension notice

33. The employees at the Respondent had recently received training on countering internal fraud, the 'yellow-hammer leak' and the need for increased vigilance in the lead-up to Brexit. The Claimant's behaviour in his first two days at work (as described in part above) 'rang multiple alarm bells', to use Mr Whitehouse-Hayes term.

34. At an SLT meeting on the morning of 26 September 2019, Mr Whitehouse-Hayes, Ms McDonald, Mr Connolly, and Mark Cheeseman (a Deputy Director in the Fraud and Policy team) discussed the 'red flags' regarding the Claimant, focussing on Miss Mehta's email of 25 September 2019, in particular the Claimant's attitude to Mr Connolly's cancer, his political activities and the number of applications he had made to the Civil Service (which Mr Whitehouse-Hayes said they had been told was a factor that, in conjunction with other factors, might indicate insider threat). It was decided that Mr Whitehouse-Hayes should start investigating the Claimant's job application and references. Later that day Mr Whitehouse-Hayes, Ms McDonald and the HR Business Partner Jonny Little met. They were already considering suspending the Claimant because of these concerns when Miss Mehta reported that he had inserted a USB stick into his computer, which is

against the Respondent's IT policy. At that point they decided that they definitely had grounds to suspend.

35. Ms Macdonald informed the Claimant that he was being suspended, together with Mr Paterson (who was chosen because he is an ex-police officer). The Claimant has complained that the way the suspension was carried out was intended to humiliate him as it was done publicly, but we find that there was nothing untoward about how it was done. It was an open plan office so people could see what was happening, but it was not inappropriately handled.

36. There were minor discrepancies between Ms McDonald's witness statement for this hearing and the record of the suspension that she made on the day itself (26 September 2019), but we do not find that anything turns on these. What is important about what happened during the suspension so far as the present case is concerned is that the Claimant said nothing to allay anyone's concerns about what he was doing with the USB. Quite the opposite in fact. As is apparently agreed, he did not protest that he had no idea he had done anything wrong, or seek to explain what he was doing, or apologise. This was something that Mr Paterson remarked on at the time, writing in his statement: *"He did not ask any questions or provide any explanation of his actions, and was half smiling throughout. After he left, I remarked to Lyn that I found his demeanour very strange and was surprised that he did not say anything else at any point, given the seriousness of what had just happened."* Although the Claimant has raised some minor points of dispute with the accounts of Mr Paterson and Ms McDonald, his account accords with the Respondent's on what we regard as the material aspects and there is absolutely nothing to suggest that either Mr Paterson or Ms McDonald were intending to mislead in their statements. The discrepancies are exactly the sort that one expects to find between contemporaneous witness accounts. The Claimant says, and Ms McDonald agrees, that as she was escorting him out of the building he asked about IT security policy. He says this was an indication that he did not know what he was doing was wrong. However, if it was such an indication, it was a very oblique one and did not make any material difference to the impression he had created for the reasons set out above.

37. The Claimant was issued with a formal notice of suspension the same day. The notice does not specify the nature of the alleged misconduct, but we find the Claimant understood that he was being suspended because of the USB.

<u>Second suspension notice and investigation (Discrimination Issue (d))</u>

38. Mr Whitehouse-Hayes then began carrying out an investigation, seeking statements from Ms McDonald, Ms Wyatt, Mr Connolly, Miss Mehta and Mr Paterson and also obtaining from Miss Mehta the Claimant's job application form and associated documents such as references.

39. On 1 October 2019 the Claimant was issued with a further notice of suspension which confirmed that his use of IT was being investigated, "and also concerns regarding his behaviours, as outlined in the civil service code,

and your stated previous employment". The Claimant responded (p 250) by email with the single line: *"Sounds interesting. Looking forward to reading the findings."* We observe that, as with the Claimant's behaviour when initially suspended, this very odd response did nothing at all to assuage the Respondent's concerns about his behaviour.

40. Mr Whitehouse-Hayes continued his investigation during the first half of October, keeping the Claimant up to date with progress. On or around 25 October 2019 he completed a Case Summary document that would stand as the investigation report to the appointed Decision Maker Miss Eshelby. He sent this on to the Claimant on 28 October 2019, attaching all the materials and statements relied on (save for the attachments to Mr Connolly's statement). Miss Eshelby invited him to a disciplinary meeting on 5 November 2019. The letter and Case Summary document identified the three allegations against the Claimant to be:

    (1) On 26 September 2019 the Claimant used an unauthorised data storage device (the USB);
    (2) On or about 24 September 2019 the Claimant misleadingly stated that Mr Connolly had told him to "accept what I am given or pack my bags"; and,
    (3) Concerns regarding his declared employment history on the job application (specifically a discrepancy in dates of work for 'Grynspan' as either June 2018 onwards or January to May 2019, the company not being registered on Companies House and a personal email address being provided as referee).

41. The day before the disciplinary meeting Mr Whitehouse-Hayes realised that he had not sent the Claimant the attachments to Mr Connolly's statement. He did so, offering the Claimant the option of postponing the meeting if he wished, but the Claimant said that he was ready to go ahead.

42. Mr Whitehouse-Hayes did not hold an investigation meeting with the Claimant, but the Respondent's policy does not require there to be a meeting. Indeed, the 'flowchart' in the policy document does not include such a meeting. Mr Whitehouse-Hayes thought this was odd as it was different to the approach in other organisations and in his considerable experience of conducting disciplinary investigations, but having taken HR advice he was satisfied that not having a meeting with the Claimant at the investigation stage was the Respondent's policy. We note that the Respondent's policy in this respect, although unusual, is not inconsistent with the ACAS Code of Practice on Discipline and Grievance Procedures. The Claimant referred repeatedly during the hearing to the 'Toolkit' document that is referred to in the "How to" guides which are themselves referred to in the Respondent's disciplinary policy. However, the 'Toolkit' only sets out what should be done if an investigation meeting is held with the person accused, it does not say that such a meeting must be held.

43. The Claimant has complained about the content of Mr Whitehouse-Hayes' Case Summary. We deal with this below when dealing with the substantive allegation in relation to the USB use.

Resignation 4 November 2019 (Discrimination Issue (i))

44. On 4 November 2019 the Claimant resigned, giving one month's notice with his employment due to terminate on 5 December 2019. He stated in his resignation email to Mr Whitehouse-Hayes that he had secured employment elsewhere. The Claimant also wrote in a subsequent email to Mr Whitehouse-Hayes on 28 November 2019 (p 532) that he had had to resign because the Respondent withheld his pay (an issue we deal with below). In these proceedings he contends he resigned because the Respondent had withheld his pay, submitted false evidence, and failed to share documents from the investigation until the day before his disciplinary hearing. The Claimant was not cross-examined on what his reasons for resigning were and, in the light of our conclusions on the other issues, we do not need to make any findings in this regard.

45. Miss Eshelby gave evidence that she took advice from HR at the time as to what to do about the disciplinary proceedings in the light of the Claimant's resignation, and we accept her evidence in this regard as it is reflected in the emails in the bundle around 8 November 2019. The advice was to continue with the disciplinary. This decision was in line with the Respondent's policy, which we understand from Ms McDonald and Mr Whitehouse-Hayes to have been consistently applied since at least 2017, that where an employee resigns when facing fraud or dishonesty allegations, the disciplinary procedure should be continued because if the allegations are upheld the employee's details are to be entered onto the Internal Fraud Database. (We do not find that Ms McDonald was involved in this decision at the time, as the Claimant suggested. We deal with the implications of her email of 6 December 2019 below.)

Disciplinary hearing and decision (Discrimination Issues (c), (f) and (j))

46. On 5 November 2019 the disciplinary meeting took place, chaired by Miss Eshelby. Miss Eshelby was selected by Ms McDonald, in consultation with Mr Whitehouse-Hayes, to conduct the disciplinary meeting. The Claimant attended the meeting with a trade union representative. Notes were taken of the meeting, which were shared with the Claimant afterwards and the Claimant returned the notes on 8 November 2019 with a number of detailed comments on them. Miss Eshelby considered the Claimant's annotations but saw no reason to change the virtually verbatim notes that had been prepared as she thought they reflected what the Claimant had actually said at the meeting.

47. Miss Eshelby upheld the allegations about the USB and the Claimant's employment history and decided that the Claimant should be dismissed for

gross misconduct. The allegation in relation to Mr Connolly was held not to amount to a disciplinary offence. The dismissal letter informed the Claimant that his last day in service would be 12 November 2019, the date of that letter. Accordingly we find that 12 November 2019 was the effective date of termination of the Claimant's employment. The dismissal letter also said that his details would be entered on the Internal Fraud Database because he had committed misconduct involving dishonesty. This meant that the Claimant's details would be placed on the Civil Service Internal Fraud database for five years and he would be prevented from seeking re-employment with the Civil Service during that period.

48. Our findings in relation to the specific allegations upheld by Miss Eshelby are set out later in this judgment.

49. So far as procedure is concerned, the Claimant has complained that Miss Eshelby did not follow the Respondent's policy with regard to taking account of mitigating factors because she failed to give him an opportunity after the meeting to submit evidence of mitigation. However, in this respect the Claimant had misread the Respondent's policy, which permits the Decision Maker to decide when to ask for mitigating evidence. In the Claimant's case, he had been asked in the letter inviting him to the disciplinary meeting to provide mitigation evidence. He was also given multiple opportunities in the course of the meeting itself to put forward his case and anything else he wanted to add. He also had, and took, the opportunity to advance further points when commenting on the notes of the meeting. One of the agreed issues for this hearing was that the Claimant contended Miss Eshelby had failed to take into account a mitigation document that appears at pp 740-742 of our bundle, but this document was not submitted by the Claimant until the appeal stage so Miss Eshelby could not have taken it into account. At the hearing the Claimant asserted that what Miss Eshelby had failed to take into account were his comments on the meeting notes, but we find as a fact she did take these into account. However, she did not consider that they accurately reflected the meeting, or that they should change her decision.

<u>USB storage device use (Discrimination Issue (e) and Victimisation Issues (c) and (d))</u>

50. So far as the facts concerning this USB incident are concerned, we find as follows:-

51. It is not in dispute that the Claimant attached a USB to his laptop with the intention of taking a headcount document (or, at least, part of it) home. Nor is it in dispute that this document was, in its complete form, a sensitive confidential document containing personal and financial data of the Respondent's employees. It is also not in dispute that as a matter of fact the Respondent has a policy prohibiting the use of non-encrypted storage devices (such as USB sticks) and that in the Security Breach policy *"Installing/use of unapproved software or peripherals on corporate IT*

platforms" is listed as something that can constitute gross misconduct. What is in dispute is whether the Claimant knew it was wrong to connect a USB with the intention of downloading material to take home, and whether (in broad terms) in the disciplinary proceedings that followed, the Respondent's failure to accept that the Claimant had made an innocent mistake and/or that he did not intend to take sensitive data home and/or to regard these as mitigating features was unlawful discrimination or victimisation.

52. In the letter of 12 November 2019 notifying the Claimant of his dismissal, Miss Eshelby relied on witness evidence from Ceri Wyatt and Miss Mehta as showing that the Claimant knew, or ought to have known, what was right and wrong regarding IT use. She also relied on his own statement that he had intended to remove the sensitive elements from the document before downloading it onto the USB as evidence that he understood the need for data security.

53. Ms Wyatt's statement, given by email and in typed-up form on 27 September 2019, was that on 25 September 2019 she was working close to the Claimant. She stated: *"During the day he asked me about what were the rules regarding conflict of interest? I replied that he would need to check as I had not had cause to know and was unaware of the policy details. He also asked did I know what were the rules were regarding the use of memory sticks? I replied that I wasn't sure but he should check as I doubted that their use would be appropriate."* At the disciplinary hearing on 5 November 2019 the Claimant disputed Ms Wyatt's account. The Respondent's notes of this and the Claimant's corrections are not entirely consistent, but the essence of the Claimant's case was that he had not asked Ms Wyatt about use of a USB. He said that he had asked her about whether he could take the headcount sheet home and that she had said that she was not sure, from which he took that he may be permitted to take some documents home, but not others – it was "conditional" as he put it. The Claimant then went ahead and connected the USB. He said (both in the Respondent's version of the notes, and more emphatically in his corrections to the Respondent's minutes) that he was intending to delete information from the document so that he had just the headlines (which he regarded as non-sensitive) and which he could then take home to use on his laptop at home (which, he told us at Tribunal, though not the Respondent at the time) had more up-to-date software with which he could better create a 'pivot table'. He also said, and his trade union representative at the disciplinary meeting emphasised, that he had inserted the USB stick openly in full view of the office and so could not have been intending to hide anything. He also referred (at appeal stage, but not before Miss Eshelby) to having seen employees taking their laptops home and to one other employee using something that looked like a USB (but was not) on their laptop. He gave this evidence by way of explanation for why it had not occurred to him that merely inserting a USB was against the Respondent's policy.

54. In her decision letter, and in further detail in her evidence to this Tribunal, Miss Eshelby explained that she had accepted Ms Wyatt's version of her conversation with the Claimant in preference to that of the Claimant. In any

event, what she had considered crucial was that the Claimant, despite agreeing that Ms Wyatt had said that she didn't think it would be appropriate to take a headcount chart out of the office and that he should ask someone, had gone ahead without checking further and connected the USB with the intention of downloading the document (or part of it) onto it. Miss Eshelby set that out in the decision letter as follows: *"When we spoke you did not advise me that your [sic] had sought permission after being advised that it was unlikely to be appropriate."*

55. Miss Eshelby further noted in the letter the Claimant's case that he had intended to delete the sensitive personal data from the document before removing it from the building but she did not accept this as there was no proof of this.

56. This is not an unfair dismissal claim, but we have considered whether Miss Eshelby's conclusions with regard to the USB stick incident were reasonable, since if they were unreasonable this might be evidence from which we should infer discrimination. However, we consider that Miss Eshelby's conclusions were reasonable. The Claimant at the time and in this hearing has been overly focused on points such as whether he ought to have known that the mere act of inserting the USB stick was against the Respondent's policy. This was not, however, what was of principal concern to the Respondent. As a matter of fact, the mere insertion of the USB stick was against the Respondent's policy, but what Miss Eshelby reasonably considered made the Claimant's conduct culpable was that that he had proceeded with attempting to download onto a USB stick a sensitive document having been advised that it was probably inappropriate and he ought to ask someone before doing so.

57. We also consider that it was reasonable for Miss Eshelby not to accept the Claimant's assertions that he had intended to delete the sensitive data. If that were really the case, one would expect him to have done that before downloading the headcount chart onto his desktop (that alone also being a breach of the Respondent's standard IT operating procedures in which everything is to be stored in the cloud) or before inserting the USB stick. However, the Claimant did not suggest to Miss Eshelby at any point that he had done or even started doing this. It is right to note that when appealing he did say that he had started deleting data from the headcount document on the desktop, but that is not what he told Miss Eshelby. Based on the material before her it was reasonable for her to reach the conclusion she did.

58. The Claimant has made other complaints about the Respondent's investigation and decision-making process regarding the USB incident, which we also deal with here.

59. Mr Whitehouse-Hayes' Case Summary, which the Claimant was sent before the disciplinary hearing, stated *"Use of USB and other portable storage devices is set out at the IT induction"*. The Claimant alleged that Mr Whitehouse-Hayes was being dishonest when he made that statement, in breach of the Civil Service Code of Conduct. However, Mr Whitehouse-

Hayes explained to us that he included this based on his own recollection and experience of undertaking at least two IT inductions with the Respondent. His recollection was that the inductions had been *"stringent on IT data storage devices"* and it was therefore an assumption on his part that this would have been covered at induction. We found Mr Whitehouse-Hayes to be a frank and genuine witness, who gave clear, straightforward answers to questions and readily accepted where he had made mistakes. He also told us that as someone who is very experienced in dealing with disciplinary investigations, he was always conscious that cases could end up in employment tribunals and that everything he wrote would be disclosable and that his every action may later be scrutinised by a Tribunal. We therefore accept what he said about why he included the point about IT induction in his Case Summary and that he was not being dishonest.

60. At the disciplinary meeting the Claimant disputed that use of USBs had been covered in induction. As a result, as already noted, Miss Eshelby did not rely on what was said at induction in her decision. The Claimant requested that Miss Eshelby should provide him with details as to what was covered at IT induction and she passed that request on to Mr Whitehouse-Hayes. Mr Whitehouse-Hayes, aware that Miss Eshelby had decided not to rely on it, suggested to the HR advisor Mr Pickering on 26 November 2019 that this was a request that did not need to be responded to. The Claimant argued that this was further evidence of Mr Whitehouse-Hayes knowing that he had lied on the Case Summary and trying to cover it up. Mr Whitehouse-Hayes denied that. He said he genuinely did not think that it needed to be investigated given that it had not been relied on, but when the Claimant appealed HR advice was that he needed to investigate. We again accept his evidence on this issue. In addition to the reasons given above for accepting Ms Whitehouse-Hayes' evidence, on this particular point we find what he said entirely plausible and consistent with his other evidence. He was not trying to hide anything. Further, he did subsequently investigate and, after much to-ing and fro-ing with those responsible for IT induction, he established that there was no consistent approach by them to covering this point in induction and therefore it could not be relied on as a reason why the Claimant ought to have known not to use a USB stick. That this should be covered in future inductions was one of the learning points that Mr Whitehouse-Hayes relayed to Ms McDonald on 25 November 2019. He also conveyed this to the Claimant on 4 December 2019, attaching a list of what was covered at IT induction. Mr Whitehouse-Hayes had added to this list as supplied to him by IT that "IT Policy" was covered at IT induction. This reflects his email exchanges with IT personnel and we do not see that this adds anything material at this point. When conveying this to the Claimant Mr Whitehouse-Hayes made absolutely clear that IT induction had not been relied on in dismissing the Claimant, but the Claimant has nonetheless maintained to this hearing and throughout the hearing complaints about Mr Whitehouse-Hayes' handling of this issue.

61. Finally, the Claimant has asserted that there was another respect in which Mr Whitehouse-Hayes lied in his Case Summary, which is where he stated that when the Claimant attempted to use the USB *"This caused him to be*

locked out of his laptop automatically". This was Mr Whitehouse-Hayes' understanding based on what Miss Mehta had said at the time when she first told them about the USB and we accept that evidence as it is plain he could easily have got that impression from what Miss Mehta said. Her statement at the time refers to her having found the Claimant locked out from his laptop with the USB plugged into it. Mr Whitehouse-Hayes was not lying about this. The Claimant suggested that this 'lie' by Mr Whitehouse-Hayes had made the incident seem more serious to Miss Eshelby, but we see nothing to suggest she placed any weight on it at all.

Concerns about the Claimant's application documents

62. No concerns with the Claimant's application documents or previous employment history were picked up during the application process. However, as noted above, shortly after starting in the office, he made some remarks to Miss Mehta, which she reported to Mr Whitehouse-Hayes and Ms McDonald which gave cause for concern. He mentioned that he had previously been working drafting manifestos/papers for a Labour MP and he would like to continue doing this if possible. He had also questioned what information he would have access to that other people did not. He said that he had applied for around 20-30 roles and, following a meeting with Miss Eshelby in which she had asked about his previous employment, he asked Miss Mehta how he could be as vague as possible about the role that he used to do and where he previously used to work. As set out above, this led to Mr Whitehouse-Hayes reviewing the information that the Claimant had provided at the time of his application. He found, and reported in his Case Summary that he had on his application listed his current employer as 'Grynspan' and said he had been a researcher from June 2018 onwards and that references supplied for clearance gave differing employment dates for Grynspan of January to May 2019 and as a voluntary reference. Grynspan could not be found on Companies House.

63. We have been provided with the relevant documents in the bundle. The Claimant confirmed that the reference from Mohamud Mahdi (on a personal email address), given in June 2019, stated that the Claimant had worked with Grynspan from January until May 2019 and that he continued to provide some technical support managing their website. The Claimant's application form states that his 'current' employment since July 2018 was as a researcher at Grynspan. The Claimant in his application form did not disclose that this work was political in nature, although it is accepted by the Claimant that that was the nature of the company's business was 'political activities' (and is what is currently stated on Companies House). On another form in the bundle the Claimant states that he was a 'volunteer' at Grynspan between January and June 2019 and that he has not left.

64. When challenged about this by Miss Eshelby at the disciplinary meeting, the Claimant said (for the first time) that he owned the company and that it was registered under a different name. This very significant point was not mentioned in his application form at all. He did not at the disciplinary meeting

say what the registered name was, but he did in the notes he provided after the meeting identify it as Workers' Alliance. He said that the name had changed in January 2019 when someone else took over and that someone else had been instructed to change the name but had not done so. He maintained that he was working as a volunteer as someone else had taken over the company.

65. In light of the Claimant's evidence at the disciplinary meeting, Miss Eshelby referred in the dismissal letter not only to the discrepancy in dates but also to the information about the Claimant being a director of the company and concluded in the dismissal letter that: *"The discrepancy between the information you provided and that provided by the individual you proposed in your application have led me to doubt the clarity and honesty in your initial application. I read witness evidence from Kreepa Mehta where you advised her that you were being as vague as possible about the role you had previously undertaken and indeed where you had previously worked. As honesty, integrity, impartially and objectivity are expected of all Civil Servants, I have to question whether by breaching the IT Policy and providing seemingly inaccurate information in the recruitment process, your actions reflect a position that you did not and do not intend to be bound by your contract of employment I have reached that conclusion and reflect that the relationship between yourself and the organisation has broken down irrevocably."*

66. The dismissal letter does not specifically indicate that in addition to the discrepancy on dates Miss Eshelby was concerned about what the Claimant had said about the nature of Grynspan's work (which in the disciplinary meeting he had said *"was doing research on MP's policy and passing that to relevant constituencies to help tem with their voting"*) or about how he could 'volunteer' at a company he actually owned, although we accept her witness evidence in these proceedings that she was also concerned about this.

67. Further documents were obtained subsequent to dismissal, and are included in our bundle, which show that the Claimant was in fact the sole director of a company called Workers Alliance Limited which was incorporated on 20 August 2018. Subsequent to the Claimant's dismissal, on 6 February 2020 notice was given to Companies House of a change of name of Workers Alliance Limited to Grynspan Limited, accompanied by a Special Resolution on Change of Name Form that was dated 1 January 2019. At this hearing, the Claimant said that he had remained the sole director of that company, although someone else had been supposed to make themselves director and then he was going to resign.

68. The Claimant in these proceedings has argued that it should have been accepted by Miss Eshelby that he had made a genuine and accidental mistake about dates in his application and this should not have been regarded as evidence of dishonesty or lack of integrity in the application process. We find, however, that Miss Eshelby genuinely (and reasonably), regarded the Claimant as having not been clear and honest in his application and that she reasonably concluded that the discrepancy on dates, coupled

with the Claimant's enquiries of Miss Mehta as to how he could be as *"vague as possible"* about his previous employment, demonstrated a lack of honesty, integrity, impartiality and objectivity on the Claimant's part in relation to the application process.

69. In the context of a discrimination claim (where we must consider the conscious or unconscious motivations of the Respondent's witnesses), it is relevant in this respect that Miss Eshelby's dismissal letter really understates the concerns that the she had about the information that the Claimant provided as part of his application process. In our judgment, the Claimant's failure to declare in the application form that the organisation was a political one, and that he was (and remained) the sole director of it and not a mere 'volunteer', or to give its name as registered at Companies House when as sole director he ought to have known that the name change had not been registered was misleading in the context of an application to the Cabinet Office. Against that fuller background, Miss Eshelby's conclusion that the Claimant had breached the Civil Service Code becomes even more reasonable.

70. We add in this respect that we do not accept the Claimant's complaint that Miss Eshelby made a false statement in the dismissal letter when she stated: *"I read witness evidence from Kreepa Mehta where you advised her that you were being as vague as possible about the role you had previously undertaken and indeed, where you had previously worked"*. The Claimant argues that this is not what Miss Mehta says because she only reports his having asked how he could (in the future) be as vague as possible about his previous employment, whereas the decision letter suggests that the Claimant had been admitting that he was trying to be vague in the application process. However, given that the Claimant accepts he asked Miss Mehta the question, in our judgment this is splitting hairs. The decision letter uses the continuous perfect tense *"were being"* and thus refers to an ongoing state of affairs. It does this because what Miss Eshelby considered to be important and relevant to her decision was that the Claimant's question to Miss Mehta demonstrated an ongoing wish and intention to be as vague as possible. She was not by expressing her point thus 'concocting a lie' as the Claimant has claimed.

71. Finally on this issue, the Claimant now says that Miss Eshelby should not have been appointed as Decision Maker because of a conversation that he had with her in which he regarded her as having asked intrusive questions about his previous work, which provided the context (he said) for his having asked Miss Mehta whether he could be 'vague' about this previous employment. The Claimant did not object to Miss Eshelby being the Decision Maker at the time. He first raised the point in his grounds of appeal on 19 November 2019. However, we do not in any event accept that Miss Eshelby's prior questioning of him about his employment history provides any relevant context for him wanting to be 'vague' about it. We accept the evidence of Miss Eshelby and Miss Mehta that these were perfectly ordinary introductory questions and the Claimant has provided us with no evidence of any inappropriate question asked by her.

Parallel investigation and return of the USB (Victimisation Issue (a))

72. Mr Waller (Head of Security) was called to the meeting on 26 September 2019 after Miss Mehta had reported that the Claimant had inserted a USB stick into his computer and prior to the Claimant being suspended. Following that meeting he produced a report, which he sent to the counter-terrorism unit of the Metropolitan Police (SO15) on 27 September 2019 setting out his initial concerns. This summarises the concerns as he perceived them to be at that point.

73. Following the Claimant's dismissal, Mr Whitehouse-Hayes provided Mr Waller with an update by email on 12 November 2019, enclosing the dismissal letter and answers to follow-up questions. On 14 November Mr Waller provided an update to SO15 stating: *"The specific area of concern that we have is that during the interviews for his hearing, he has admitted to obtaining CTC level security clearance through use of a false company and fake details, in order to get into the Civil Service. He has further admitted working for a political think tank and that he was trying to infiltrate himself into the Civil Service to acquire data on civil servants. He has confirmed that he was in the process of downloading sensitive civil service staff data to the USB stick for use by his organisation when challenged."* The Claimant suggested to both Mr Whitehouse-Hayes and Mr Waller that this was not accurate because he had not admitted to all those things. We find that Mr Waller in this email did over-state the position with regard to what the Claimant had admitted, but there is no discrimination claim against Mr Waller with regard to this. The Claimant relied on this as evidence that Mr Whitehouse-Hayes had been overstating the case against him to Mr Waller. We find, however, that this was not the case. Mr Whitehouse-Hayes was clear that this was not what he had said to Mr Waller, and that this was Mr Waller's interpretation, and we accept that evidence. Overall Mr Whitehouse-Hayes struck us (despite the errors in the Case Summary identified by the Claimant) as being very careful about how he expressed himself regarding the Claimant, whereas Mr Waller's emails in the bundle consistently state the case against the Claimant more strongly. We accept the evidence of Mr Whitehouse-Hayes that the words in this email were Mr Waller's and not his. Indeed, Mr Whitehouse-Hayes seemed genuinely somewhat embarrassed about Mr Waller's over-statements, readily accepted that the Claimant had not admitted to all the points set out (although he did admit to some) and referred the Claimant to Mr Waller for answers as to where he got that information from. Mr Waller, in contrast, was unclear where he had got the information from and we find he was setting out his own personal impressions but wrongly describing them as 'admissions' by the Claimant.

74. SO15 responded to Mr Waller's email the same day instructing Mr Waller to retain the USB stick. Mr Waller notified Mr Whitehouse-Hayes that the Met Police were taking the case seriously and were potentially considering a formal investigation.

75. After the disciplinary meeting, the Claimant sought return of the USB stick and Miss Eshelby promptly informed him on 12 November that the Respondent's security team were holding the USB. The Claimant took up his enquiries again on 21 November 2019 with Steve Jones (Data Protection Officer). His requests were ignored for a period by Mr Jones, with Mr Waller's approval, as the Respondent did not wish the Claimant to be aware of the police involvement.

76. On 7 December 2019 SO15 informed Mr Waller that the USB stick could be returned to the Claimant. Mr Waller arranged for what he thought was the USB stick to be returned to the Claimant, who received it on 8 January 2020. The Claimant then wrote on 18 January 2020 asserting that it was the wrong USB stick. On 27 January 2020 he was asked to return the USB to the Respondent, which he did around 11 or 12 February 2020.

77. At this point, Mr Waller had a discussion with Joanne Birch of HR as a result of which he realised (what we consider to be the obvious point) that he should not have returned the USB to the Claimant without checking its contents. He passed the USB stick to the IT team to do this, but the IT team had other priorities at that point, then the Covid-19 pandemic set in and staff began working from home. As a result, Mr Waller's evidence is that the USB stick remains in a secure place on site and it was not considered important enough to retrieve it given pandemic arrangements. We accept Mr Waller's evidence on this point. At least, we accept that the retention of the USB has nothing to do with the Claimant having complained or having brought these proceedings (which is the relevant point for us). The Respondent's explanation of what has happened is adequate. In any event, we find that it is not credible that anyone at the Respondent vindictively sought to retain the Claimant's USB stick. The fact that the Respondent initially sought to return it makes this clear and it makes no sense for the Respondent to seek to penalise the Claimant by withholding it.

78. In December 2019/January 2020 the Claimant on a number of occasions requested that he be provided with a copy of the investigation undertaken by security into the USB stick. There was no such investigation or report and so none was provided.

79. We record here that Mr Waller told us that he had dealt with six potential 'insider threat' cases where there has been police involvement including the Claimant. Of these, two were individuals of Asian origin, one was central European, three were white European, three were male and three were female. This is not a large enough sample for us to draw any particular conclusions about how different races/ethnic origins are treated by the Respondent, but given the mix of races/ethnic origins within the six, there is also nothing in these figures to suggest that there is an equalities issue that needs to be investigated or addressed or from which we might draw any inference of discrimination.

Appeal and the Claimant's grievances/complaints (Discrimination issues (k), (l) and (m); Protected acts (b), (c); Victimisation Issues (a), (e), (f), (g), (h))

80. The Claimant appealed against his dismissal on 19 November 2019. He set out a number of grounds of appeal, including that Miss Eshelby was not independent and was a relevant witness because of her discussion with the Claimant prior to the "vague" conversation with Miss Mehta (referred to above). He also complained about Miss Eshelby's failure to consider his mitigation. He raised the same complaints about the decision letter and Case Summary that he has raised in these proceedings and he asserted that there was evidence of his wanting to delete the data from the headcount chart before downloading as he said that he had started to do this on the desktop before being suspended. He further set out his case on his previous employment history and accused the following people of lying in breach of the Civil Service Code: Mr Jokinen, Mr Whitehouse-Hayes, Mr Paterson, and Miss Eshelby. He complained that the fact that he was disciplined when those individuals were not was discriminatory.

81. By letter of 25 November 2019 the Claimant was invited by Steve Coppard (Deputy Director for Debt) to an appeal meeting which was scheduled for 3 December 2019. However, that date was then not possible because of the NATO Summit and a requirement for staff to work from home. A new date of 6 December 2019 was set, but the Claimant then raised further complaints, and also asked for the disciplinary to be dealt with by someone independent of the FEDG hierarchy. By email of 5 December 2019 the Claimant wrote that he did not want any further engagement with FEDG management and was unable to attend the meeting. The meeting was accordingly cancelled. The Claimant was told at the time by Joanne Birch (email of 5 December 2019) that his complaints were going to be separately investigated.

82. The Claimant's case was then passed to Ms Dundas, an HR Business Partner working for the Respondent, but independent of FEDG. She began the process again, seeking an independent appeals manager. The first person she approached could not do it because of a personal conflict of interest. On 22 January 2020, she identified Mrs Clarke (Director of Diversity and Inclusion for the Respondent but also separate to FEDG) and passed her the papers.

83. In the meantime, on 23 December 2019 the Claimant contacted Ms Dundas about whether he could speak to his constituency MP. The Claimant relies on this as protected act (c). Ms Dundas responded on 3 January 2020 indicating that the process was confidential so he should not contact his MP, but could share material with a companion or trade union representative.

84. The Claimant also by email of 27 December 2019 asked that Ms Dundas not arrange the appeal meeting until after 6 January 2020 because of the availability of his trade union representative.

85. In total, the Claimant submitted three complaints in addition to his grounds of appeal. These included:

(1) A complaint of 27 November 2019 (Complaint 1), which he relies on as a protected act (Protected act (b)). In this he complained about the change of role and the way he was treated in relation to that, and what he described as the 'hostility', 'hostile environment', 'bullying' and 'discrimination' he experienced in particular from Mr Connolly, Ms Brufal, Ms McDonald and Mr Whitehouse-Hayes. He said that Miss Eshelby was 'a close associate of the individuals who tried to bully me';
(2) A complaint of 28 January 2020 (Complaint 2), in which he raised further points about the USB stick and complained about the failure to return it;
(3) An undated complaint (Complaint 3) in which he complained about the disciplinary process and Miss Eshelby's 'dishonest' statement on the dismissal letter.

86. In addition, as part of the appeal process, the Claimant submitted to Mrs Clarke on 19 March 2020 a document setting out mitigation factors (pp 740-742), detailed notes for the appeal meeting (pp 679-706) and the Claimant's trade union representative also made by email a point about whether the dismissal decision breached the Respondent's "How to" guidance on setting a disciplinary penalty, specifically the section on "More serious minor misconduct" (which may result in formal action, but does not constitute gross misconduct). The representative quoted the relevant part of the policy: *"Some breaches of information security that are accidental, genuine errors where reasonable care was taken and where there is no criminal act, no harm or distress caused and no reputational damage or significant financial cost to the Department"*.

87. Mrs Clarke wrote to the Claimant on 27 February 2020 informing him that she would be considering his appeal and that this would encompass consideration of all his grounds of appeal and complaints. This was in accordance with the Respondent's disciplinary procedure which states that *"Where an employee raises a formal dispute during another procedure, such as poor performance, attendance or discipline, the ongoing process will continue. Where the ongoing process and the dispute are related, it may be appropriate to deal with both issues at the same time. Wherever possible, the dispute should be dealt with at the appeal stage of the relevant process. This would include complaints of bullying, harassment and discrimination."*

88. The Claimant has complained that Ms Dundas did not pass on all relevant documentation to Mrs Clarke, but in fact Ms Dundas did pass on everything relevant. The only thing she did not forward was the Claimant's payment timeline which she (reasonably in our judgment) did not regard as relevant to the appeal process. Mrs Clarke explained this to the Claimant by email of 2 March 2020. Mrs Clarke also confirmed that she received the version of the notes of the disciplinary meeting with the Claimant's annotations.

89. The Claimant requested that the appeal meeting be delayed from the date originally suggested by Mrs Clarke because of the availability of his trade

union representative. The representative was able to view Mrs Clarke's diary and initially suggested a date where she appeared in her work diary to be available, but in fact she was not as she had personal issues that meant that day was not convenient (her father was very unwell and she has care of two small children). 19 March 2020 was agreed on and they met on that day. Mrs Clarke found the appeal meeting to be a difficult conversation and she found a number of Claimant's comments to be inappropriate. For example, he was noted to have said about Mr Connolly *"The first time I met him, he was being very manipulative … he treated me as if my senses have taken leave and I'm stupid enough for him to manipulate"* and suggested that Ms McDonald *"seems to be under the belief that I should adopt a fawning, sycophantic attitude towards the director"*.

90. After the meeting, on 24 March 2020 the Claimant informed Mrs Clarke that he had submitted a claim to the employment tribunal and said that he needed the appeal outcome in order to finalise his claim. He had submitted the claim on 20 February 2020, having previously contacted ACAS on 15 February 2020. He wrote to Mrs Clarke: *"If I do not receive the document from the appeal and make further submissions before the 30th, there is potential for notable loss"*. Mrs Clarke's evidence was that this was the first time she was aware that the Claimant had commenced tribunal proceedings. We accept that evidence as there is no reason to disbelieve her. It is credible that news of the Claimant's legal proceedings had not been passed onto her at that point.

91. Mrs Clarke wrote to the Claimant on 27 March 2020 (before his deadline) informing him that she had decided not to uphold his appeal. Mrs Clarke's letter gives little by way of reasons. She writes that she has considered all the materials, found the process to be followed correctly and that the penalty did not exceed the level of misconduct because *"Your role involved having access to data within the Fraud and Error team in the Cabinet Office, and your behaviour in trying to download data on to a personal USB stick and take it home was unacceptable."* She added *"I found no evidence that the dismissal decision was taken on basis of discrimination … you did not present any evidence during the appeal hearing to support your contention that your age and race played a part in the decision"*.

92. The Appeal Policy says (p 807) that *"the Appeal manager should examine the decision-making process and the penalty given and decide whether these were reasonable. They should not rehear the case in detail. If new evidence is made available the Appeal Manager should consider any impact this may have on the final decision."* Mrs Clarke focused very much on the process and what she understood to be a high-level role of assessing the overall reasonableness of the decision. However, we find that as a result she failed to give proper consideration to most of the points raised by the Claimant. In particular, we are not satisfied that she looked into his new evidence about his having started deleting the sensitive data from the headcount chart on the desktop (or give any reasons for why she had not investigated that); nor did she give any reasons why she had dismissed his complaints of bullying; she does not appear to have properly considered whether any of the people the

Claimant had accused of lying were lying; and she did not give any reasons at all for why she dismissed his appeal in relation to the employment history aspect. Further, when we asked her about whether the Claimant's trade union representative was right that Miss Eshelby's decision was not consistent with what the Respondent's policy said about "minor breaches", it was clear she had not considered it and she almost appeared to say that it did not matter because she was satisfied that the overall process was reasonable. Yet if the Respondent's policy had not been complied with, that was a fundamental point and it required to be addressed, as did the Claimant's other points. So far as the policy was concerned, Mrs Clarke needed to consider whether Miss Eshelby had reasonably concluded that the Claimant's use of the USB was not an 'accidental, genuine error where reasonable care was taken'.

93. It is not, save in some very straightforward cases (and this is not a straightforward case), possible to reach a conclusion about whether an overall result is reasonable without considering the possible grounds on which the employee alleges there were procedural failings, or failure to take account of evidence, both that which was before the original decision-maker and any new evidence advanced on appeal. Mrs Clarke simply did not engage with most of the Claimant's points and gave nothing but the most bland reasons in her decision letter for dismissing his appeal.

94. We must emphasise that we are not saying that if Mrs Clarke had properly considered the Claimant's points there would have been a different outcome. We very much doubt it. Some of the Claimant's points he has raised again in these proceedings and we set out elsewhere in this judgment (for example) our findings on the question of whether Mr Whitehouse-Hayes or Miss Eshelby lied and why we reject his arguments in that respect. Further, with regard to the "minor breach" policy point, we accept the Respondent's argument that Miss Eshelby's decision was consistent with that policy because she evidently did not consider that the Claimant had taken reasonable care. We are also not saying that Mrs Clarke was bound to give reasons to the standard to which we as a Tribunal are held. But we do find that she did not properly carry out her role as appeal manager.

95. However, we do not consider that in this case this provides a basis for any inference that Mrs Clarke was victimising the Claimant. This was the first appeal she had ever dealt with. She was very inexperienced. She followed HR advice. We have no reason to believe she would have dealt with any differently with any other complex appeal, whether or not it included a complaint of discrimination. Further, we accept her evidence that she did not know about the Claimant's tribunal claim until he informed her about it himself on 24 March 2020. That was after the appeal meeting and far too late in the process for this to have affected in any way her approach to the appeal.

Ms McDonald and the Claimant's allegations of hostile environment

96. Part-way through Day 3, while cross-examining Mr Whitehouse-Hayes, in response to the Judge reminding the Claimant that he needed to put his case on discrimination to Mr Whitehouse-Hayes, the Claimant said that he was not specifically accusing Mr Whitehouse-Hayes of discrimination. He said: *"I am alleging that it was something to do with my race because the most senior person in the department [Ms McDonald] had created an atmosphere of targeting certain employees and the understanding that they could do it with impunity because the most senior person in the department was okay with it and Ms McDonald would condone it"*. This was not how the Claimant put his case in the agreed list of issues and, although the point is foreshadowed in paragraph 211 of the Claimant's witness statement, the Respondent did not come prepared to answer that particular allegation. On the basis that this point was now being advanced not as a specific separate claim (which would have required formal amendment) but as an evidential argument, we permitted the Claimant to put the point to Mr Whitehouse-Hayes. It was not, however, put to Ms McDonald as she had already given her evidence by this time. Mr Whitehouse-Hayes responded robustly and with passion that he absolutely did not regard Ms McDonald as condoning discriminatory conduct. He gave two specific examples of Ms McDonald having recently (within the last year) spoken eloquently on matters of diversity, in particular with regard to the right of people to self-identify on matters of sexual orientation, and about Black Lives Matter and how the Senior Civil Service is not representative at the moment of wider society and he said that she spoke *"genuinely and passionately"* about the real importance of addressing that. We accept his unchallenged evidence in this regard.

97. As we understand the Claimant's case, a significant part of the reason why the Claimant makes this allegation against Ms McDonald is because he believed, as a result of discussing the matter during the short time he was in the office, that RP, another employee, had made a complaint about Ms McDonald which he understood to be a complaint of race discrimination. The Claimant did not, however, see a complete statement of RP's complaint until recent disclosure in these proceedings. We have seen the complaint and can see that it included in general terms a complaint of *"bullying, harassment and/or discrimination"* (although it does not say on what ground discrimination is alleged), and it also dealt with a number of other matters. The Claimant referred to certain parts of the outcome documents from this complaint, but he had misread some of those. So far as we can see, the parts that seem to be of potential relevance to these proceedings are as follows: following investigation, RP's complaint was not regarded by the Respondent as a complaint of race discrimination and Ms McDonald did not believe that a discrimination complaint had ever been made against her; the complaint was partly upheld on the grounds that performance management procedures in relation to RP had been poorly handled; it was also found that Ms McDonald's strong personality means that she has a powerful influence on her staff. It does not follow, however, from the finding that she had a powerful influence on her staff that she was encouraging or condoning a culture of discrimination

and the outcome documents from RP's complaint provide no support whatsoever for that case now advanced by the Claimant.

98. The Claimant also complained about Ms McDonald's conduct when she suspended him (which we have dealt with above) and suggested that she was the driving force behind the investigation and disciplinary because she appointed Miss Eshelby as the decision-maker, and played some role in deciding not to accept his resignation but to proceed with the disciplinary. So far as the appointment of Miss Eshelby is concerned, we find that she was an appropriate appointment given her limited interaction with the Claimant for the reasons set out above. So far as the decision to proceed with disciplinary is concerned, we do not accept that Ms McDonald was directly involved at the time since (as set out above) Miss Eshelby referred only to taking advice from HR at the time. Ms McDonald's much later email of 6 December 2019 in which she refers to this appears to us merely to be recounting what happened rather than indicating that she had a personal involvement at the time with that decision. In any event, that decision is one which was in line with the Respondent's policy, for the reasons we have set out above. It does not indicate any particular malevolent intent on the part of Ms McDonald or any predetermination of the Claimant's disciplinary.

99. In the circumstances, we find no evidence to support the Claimant's contention that there was a culture of mistreating Asians, or that any such culture was endorsed by Ms McDonald.

Advertisement of the Claimant's role (Discrimination Issue (h))

100. The Claimant claimed that his role had been re-advertised before the disciplinary had been concluded, but he has not produced a copy of the advertisement. The Respondent has likewise not produced copies of any advertisement, but its witnesses maintain that what was advertised was a generic advertisement for B1 positions. The Claimant says that it must have been his role because there were only four members in his team and the roles were advertised by Mr Whitehouse-Hayes. However, we prefer the Respondent's evidence on this point. The Claimant does not say that he saw an advertisement for 'HR officer', and we would not expect there to be any such advertisement given that the Respondent's policy is to engage generic grade officers who can be deployed to various roles. The advertisement must therefore have been generic. Further, the Claimant had no knowledge of the Respondent's recruitment requirements, so his assumption that an advertisement was for a replacement for him is entirely speculative.

Pay (Discrimination Issue (h) and Victimisation Issue (b))

101. The Claimant was suspended before his bank details had been entered on the Respondent's system. Miss Mehta had tried to do this early on, but was unable to as Mr Jokinen was still listed on the Respondent's system as the

line manager. Mr Whitehouse-Hayes explained that the system is that the line manager needs to instruct the IT system to send a request to the employee to input their bank details. On 18 October 2019 HR identified the Claimant as not having bank details on the system and contacted Miss Mehta. She said that she was not allowed to contact him on suspension and so passed information onto Mr Whitehouse-Hayes asking him to contact the Claimant. This was on 21 December 2019.

102. Mr Whitehouse-Hayes did nothing about this. He said he was very busy, and that he gets 150-200 emails per day. We have considered very carefully whether Mr Whitehouse-Hayes genuinely forgot or overlooked this email, and we accept that he did. This is because of his later emails on this topic in November 2019 where it is plain that he has started afresh making enquiries about how to arrange pay for the Claimant, which indicates he had genuinely forgotten or missed Miss Mehta's email. In the end it was not until 28 November 2019 that he passed onto the Claimant the information that Miss Mehta had actually given him on 21 October 2019 (having obtained that information himself from a separate source).

103. The Claimant was then paid in the pay run on 5 December 2019. He was also paid again up to the end of December 2019 even though he had been dismissed with immediate effect from 12 November 2019. This was a mistake but the Respondent has not sought to recover the monies. The Claimant queried this with Ms Dundas in January 2020 and she explained that her understanding was that if he was suspended on pay pending the decision then he remains on payroll until the appeal is determined. The Claimant suggested that this was Ms Dundas changing his employment status. Although Ms Dundas' email is a bit odd, it is clearly on its face not changing his employment status. Further, Ms Dundas explained in evidence that she meant only that the Claimant remained 'on the payroll', not that he should continue being paid, which does make sense.

Conclusions

Race discrimination

<u>The law</u>

104. Under ss 13(1) and 39(2)(c)/(d) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, in dismissing the Claimant or subjecting him to any other detriment, discriminated against the Claimant by treating him less favourably than it treats or would treat others because of a protected characteristic. The protected characteristics relied on by the Claimant are his race and/or age.

105. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if

there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at paras 34-35 *per* Lord Hope and at paras 104-105 *per* Lord Scott. (Lord Nicholls (para 15), Lord Hutton (para 91) and Lord Rodger (para 123) agreed with Lord Hope.)

106. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same circumstances (s 23(1) EA 2010). The Claimant relies on a number of comparators. However, if we consider that their circumstances are not materially the same, he invites us to consider how a hypothetical comparator would have been treated. We bear in mind in this regard that evidence about an alleged comparator may still be of important evidential value even if their circumstances are not materially the same so as to bring them within s 23(1) EA 2010.

107. The fact that someone is treated unreasonably does not mean that they have been discriminated against, they must have been treated less favourably: *Glasgow City Council v Zafar* [1998] ICR 120. The Respondent has also referred in this regard to *Bahl v Law Society* [2003] IRLR 640, in which Gibson LJ provided helpful guidance on the approach to unreasonableness in a discrimination context as follows:

> 98.. Accordingly, to the extent that the tribunal found discriminatory treatment from unreasonable treatment alone, their reasoning would be flawed and the finding of discrimination could not stand. That is the clear ratio of Zafar and that decision remains unaffected by Anya.
>
> The relevance of unreasonable treatment
>
> 99.. That is not to say that the fact that an employer has acted unreasonably is of no relevance whatsoever. The fundamental question is why the alleged discriminator acted as he did. If what he does is reasonable then the reason is likely to be non-discriminatory. In general a person has good non-discriminatory reasons for doing what is reasonable. This is not inevitably so since sometimes there is a choice between a range of reasonable conduct and it is of course logically possible the discriminator might take the less favourable option for someone who is say black or a female and the more favourable for someone who is white or male. But the tribunal would need to have very cogent evidence before inferring that someone who has acted in a reasonable way is guilty of unlawful discrimination.
>
> 100.. By contrast, where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups.

> 101.. The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination But it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself.

108. However, we also bear in mind that where the evidence shows that the complainant is the only employee who has been subject to unreasonable treatment, the Tribunal must *"consider carefully and with particular scrutiny"* whether discrimination has played a part in the treatment: *Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust* UKEAT/0269/15/JOJ at para 48 *per* Langstaff J.

109. Further, we accept the Claimant's points that:

    (1) stereotypical assumptions may amount to, or lead to, direct discrimination;
    (2) breaches of a Code of Practice may be evidence from which discrimination can be inferred;
    (3) an evasive reply to questions or lack of veracity on the part of a witness may be evidence from which discrimination can be inferred;
    (4) a failure to provide information about recruitment criteria (or any other like matter) may be evidence from which discrimination can be inferred;
    (5) it is no defence to a claim of direct discrimination that the alleged discriminator shares the protected characteristics of the victim;
    (6) the alleged discriminator's motive (in the sense of conscious intention) is not relevant: discrimination for benign motives is unlawful;
    (7) conversely a person acting for malevolent motives that have nothing to do with the protected characteristic is also not discriminating.

110. The Tribunal must determine *"what, consciously or unconsciously, was the reason"* for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at para 29 *per* Lord Nicholls). The protected characteristic must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at paras 78-82).

111. If a decision-maker's reason for treatment of an employee is not influenced by a protected characteristic, but the decision-maker relies on the views or actions of another employee which are tainted by discrimination, it does not

follow (without more) that the decision-maker discriminated against the individual: *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010 especially at paragraph 33 *per* Underhill LJ. What matters is what was in the mind of the individual taking the decision. It is also important to remember that only an individual natural person can discriminate under the EA 2010; the employer will be liable for that individual's actions, but the legislation does not create liability for the employer organisation unless there is an individual who has discriminated. As Underhill LJ explained in that case at para 36:

> 36. … I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation. If it were otherwise very unfair consequences would follow. I can see the attraction, even if it is rather rough-and-ready, of putting X's act and Y's motivation together for the purpose of rendering E liable: after all, he is the employer of both. But the trouble is that, because of the way [what is now the EA 2010 works], rendering E liable would make X liable too …. To spell it out: (a) E would be liable for X's act of dismissing C because X did the act in the course of his employment and—assuming we are applying the composite approach—that act was influenced by Y's discriminatorily-motivated report. (b) X would be an employee for whose discriminatory act E was liable under [EA 2010, s 109] and would accordingly be deemed by [EA 2010, s 110] to have aided the doing of that act and would be personally liable. It would be quite unjust for X to be liable to C where he personally was innocent of any discriminatory motivation.

112. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at paragraph 56). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931.

113. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at para 32 *per* Lord Hope. In all cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at paragraph 32), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 *per* Mummery J at 874C-H and 875C-H.

Findings in relation to the acts of alleged race discrimination

114. We find as follows in relation to each of the alleged acts of race discrimination relied on by the Claimant. In relation to each allegation we have considered the evidence on each issue separately, but we have also borne in mind at all times all the evidence we have heard and considered carefully whether there is anything from which an inference of discrimination should be drawn:-

Issues (a) and (b): change in the Claimant's role

115. Our findings of fact in relation to these issues are set out at paragraphs 16-25 above. The change in the Claimant's role, of which he was informed when he started at the Respondent on 23 September 2019, was a detriment to the Claimant, but it was not less favourable treatment because of the Claimant's race. Although it was exceptional for somebody to be informed of a role change on the day that they start employment, we were provided with examples of others (Mr Whitehouse-Hayes, Sean Pithouse in particular) who had been required to change role with little notice. Although the change was discussed with the employee first, if the employee did not agree they would be required to change roles in any event. The treatment of others of which we heard was thus essentially the same as that of the Claimant, since the change in role was discussed with him when he arrived and it was only when he began to protest that it was made clear by Mr Connolly that it was a business decision and not one that would be changed. The Claimant was selected for the role because he was the first of the new joiners around that time starting in the right grade. His race played no part in this decision.

Issues (c) and (f): Did Laura Eshelby make a "false statement" or "concoct a lie" in the letter purporting to dismiss the Claimant dated 12.11.19? Did she fail to take any mitigating circumstances into account?

116. Miss Eshelby did not make a false statement or concoct a lie in the dismissal letter. She properly reflected Miss Mehta's evidence in the way that was relevant to her decision, i.e. as being evidence of the Claimant's general ongoing intent or wish to be "vague" about his previous employment. Miss Eshelby properly took account of the evidence that the Claimant submitted to her. The particular mitigation document that the Claimant relied on this allegation was not submitted to Miss Eshelby but to Mrs Clarke at the appeal stage. In any event, there is no evidence from which we might infer that Miss Eshelby was discriminating against the Claimant. We have rejected his case about Ms McDonald condoning race discrimination (see above paragraphs 96-98), and we found that Miss Eshelby acted reasonably in her approach to the Claimant's dismissal and the two acts of misconduct she found proved (see above paragraphs 0-71).

Issue (d): Did David Whitehouse-Hayes fail to investigate the allegation as required or submit any false information?

117. There was some incorrect information in Mr Whitehouse-Hayes' Case Summary but for the reasons we have set out at paragraphs 59-61 above

there are adequate and reasonable explanations for why Mr Whitehouse-Hayes got these things wrong. He did not deliberately submit any false information. He did not hold an investigation meeting with the Claimant because he understood (correctly) that was not the Respondent's policy. There is nothing from which we could draw an inference that the Claimant's race played any part in Mr Whitehouse-Hayes' approach to the investigation.

Issue (e): Did Lyn McDonald, David Whitehouse-Hayes, Steve Jones or anyone else withhold information from the Claimant relating to the USB stick?

118. Our findings of fact in this respect are set out at paragraphs 72-79 above. The only point at which it could be said that information was withheld from the Claimant regarding the USB stick is where, on police instructions, the USB stick was not returned to the Claimant while the police investigation is ongoing and because of this Mr Jones and Mr Waller agree not to respond to the Claimant as they do not wish to alert him to the police investigation. The Claimant believed that there must have been a report from the Respondent's IT following investigation of his USB, but in fact there was none as no investigation was carried out before the wrong USB was returned to the Claimant. There is no evidence from which we could infer that any of that has anything to do with the Claimant's race.

Issue (g): Did the Respondent fail to adhere to any of its policies

119. We have considered and addressed each of the alleged breaches of the How-To Guides, the Security Breach Policy, the Dispute Resolution How to Guide and the Disciplinary Policy in our findings of fact above. We found none of them to be made out. The only aspect of this issue we have not already addressed is the Claimant's contention that there were breaches of the Civil Service Code whenever an employee misstated something or got something wrong. This was his argument with regard to the individuals that he has named as his comparators for his race discrimination claims. He cites what he says are the incorrect statements in Mr Whitehouse-Hayes' Case Summary and Miss Eshelby's decision, and in Ms McDonald's and Mr Paterson's statements, but these are hopeless contentions in the light of our findings of fact above (see in particular paragraphs 36, 59-61 and 70). It is not a breach of the Civil Service Code to make a mistake or to give your own version of a particular event.

Issue (h): Did the Respondent advertise the Claimant's role before his disciplinary came to a conclusion and withhold the Claimant's pay until December and relevant reports (K2 document) from the Claimant until the day before the Disciplinary Hearing?

120. The Respondent did not advertise the Claimant's role before his disciplinary came to a conclusion: see paragraph 0 above.

121. The issue of the Claimant's pay we have dealt with at paragraphs 0-103. The Respondent did fail to pay the Claimant until December 2019. This was initially because the Claimant was suspended before he had put his bank

details into the Respondent's system. Subsequently, Mr Whitehouse-Hayes genuinely forgot or overlooked an email from Miss Mehta of 21 October 2019 telling him to give the Claimant information about how to claim his pay. Ultimately, the Claimant was overpaid to the end of December. There is nothing from which we could infer the delay in payment had anything to do with the Claimant's race.

122. Mr Whitehouse-Hayes' failure to send the Claimant the attachments to Mr Connolly's statement until the day before the hearing was obviously a mistake. The Claimant was given an opportunity to ask for a postponement if he wished, but chose to continue. The claim that this is race discrimination is without foundation.

Issues (i) and (j): the Claimant's resignation

123. The Claimant's resignation was on notice which had not expired by the time he was summarily dismissed. At the hearing we did not understand the Claimant to dispute that it was the summary dismissal on 12 November 2019 that brought about the termination of his employment. The reasons for the Claimant's resignation are thus immaterial. Even if this were a constructive dismissal claim, it follows from our conclusion that the matters that the Claimant says caused him to resign did not constitute race discrimination that any claim arising out of his resignation would not constitute discrimination either.

Issues (k), (l) and (m): Were any documents wrongly withheld at the appeal stage

124. No documents were improperly withheld for the reasons we set out at paragraphs 81-87.

Age discrimination

125. His claim as amended in the course of the hearing was that Mr Whitehouse-Hayes and Miss Eshelby directly discriminated against him because of his age when they took no account of his age when regarding the number of applications he had made to the Cabinet Office/Civil Services as a 'suspicious factor' when considering whether he posed an 'insider threat' to the Respondent.

126. In reality, this allegation ought to have been levelled at Mr Whitehouse-Hayes and Mr Waller, since Miss Eshelby does not appear to have formed any independent view on this. In any event, we find that the reason this was regarded by the Respondent's witnesses as suspicious was because they had been trained to regard this as an indicator of insider threat: see paragraph 33 above. It is not used as an indicator on its own so there is no specific disadvantage to young people who may be more likely to make more applications (although we have received no evidence to that effect). We have seen no evidence to suggest that anyone of a different age would have been treated differently to the Claimant if they had conducted themselves in materialy the same way.

Conclusion on discrimination claims

127. It follows that the Claimant's discrimination claims are dismissed.

Victimisation

The law

128. Under ss 27(1) and s 39(2)(c)/(d) EA 2010 and s 39(2)(c)/(d), the Tribunal must determine whether the Respondent has treated the Claimant unfavourably by subjecting her to a detriment because she did, or the Respondent believed she had done, or may do, a protected act.

129. A protected act includes (so far as relevant in this case) bringing proceedings under this Act or making an allegation (whether or not express) that a person has contravened this Act (ss 27(2)(a) and (c)). In considering whether an act is a protected act, we must remember that merely referring to 'discrimination' in a complaint is not necessarily sufficient to constitute a protected act as defined. The EA 2010 does not prohibit all discrimination, it only prohibits discrimination on the basis of a proscribed list of protected characteristics. The Tribunal must determine whether, objectively, the employee has done enough to convey, by implication if not expressly, an allegation that the Act has been contravened. In *Durrani*, that was not the case where the employee, when questioned, explained that the 'discrimination' complaint was really a complaint of unfair treatment, not of less favourable treatment on grounds of race or ethnicity. The EAT, the then President, Langstaff P, observed as follows at paragraph 27:

> 27. This case should not be taken as any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act . All is likely to depend on the circumstances, which may make it plain that although he does not use the word "race" or identify any other relevant protected characteristic, he has not made a complaint in respect of which he can be victimised. It may, and perhaps usually will, be a complaint made on such a ground. However, here, the Tribunal was entitled to reach the decision it did, since the Claimant on unchallenged evidence had been invited to say that he was alleging discrimination on the ground of race. Instead of accepting that invitation he had stated, in effect, that his complaint was rather of unfair treatment generally.

130. In deciding whether the reason for the treatment was the protected act, we apply the same approach as for discrimination set out above.

131. However, a claim of victimisation cannot succeed unless the alleged victimiser is at least either aware of the protected act, or believes that a protected act has been done (or may be done). In *South London Healthcare NHS Trust v Dr Bial-Rubeyi* (UKEAT/0269/09/SM), the EAT found that there was no evidence from which the Tribunal could have concluded that the alleged victimiser was aware that the claimant had made a complaint of discrimination. In those circumstances, the EAT (McMullen J) substituted a finding that the Respondent did not victimise the Claimant.

Findings on victimisation

132. So far as the matters that the Claimant relies on as protected acts are concerned, we find as follows:-

(1) We find that the email to Mr Connolly of 25 September 2019 is not a protected act. There is absolutely nothing in this email to suggest, either explicitly or implicitly, that the Claimant was alleging that Mr Connolly had contravened the EA 2010 rather than just treated him badly. The reference to *"hostile environment"* in the absence of any suggestion of less favourable treatment because of a protected characteristic is not sufficient.

(2) The Claimant's Complaint 1 of 26 November 2019 mentions discrimination and also refers to less favourable treatment of the Claimant in comparison with the *"people involved in the investigation"* who have not been subject to investigation for the *"multiple lies"* the Claimant alleges they have told. This is also a reference back to the list of individuals in his grounds of appeal, all of whom are of a different racial origin to the Claimant. We therefore accept that this was a protected act.

(3) The Claimant seeking confirmation from Selina Dundas by email as to whether any guidelines prevent him from sharing details of his disciplinary with his constituency MP is not an allegation of contravention of the EA 2010 and not a protected act;

(4) The Respondent accepts that the presentation of this claim by the Claimant on 20 February 2020 was a protected act.

133. So far as the alleged acts of victimisation are concerned, we find as follows:-

Issue (a): Steven Jones withholding information and requests for information

134. This relates to the USB stick. For the reasons already set out above, Mr Jones withheld information from the Claimant because, as agreed with Mr Waller, the police had instructed that the USB stick was not returned and they did not wish to alert the Claimant to the police investigation. There is nothing to link this to the Claimant's Complaint 1.

Issue (b): the Respondent making "incomprehensible changes to the Claimant's employment status"

135. This relates to the Claimant's pay and his email exchange with Ms Dundas where she refers to him remaining on the payroll. See paragraphs 99-103 above. No one made any change to his employment status. All that happened is that there was a delay in paying him, then he was overpaid by mistake and Ms Dundas said something slightly confusing about remaining on the payroll. This has nothing to do with Complaint 1.

Issues (c) and (d): the Respondents did not pass the investigation report into the USB and lost the USB

136. Our findings in this regard are at paragraphs 72-79 above. There was no investigation report into the USB as no investigation has been carried out by the Respondent's IT department. The Respondent has not lost the USB. In any event, nothing that the Respondent has done with the USB appears to us have anything to do with either Complaint 1 or the Claimant bringing these proceedings.

Issues (e)-(h): delay and handling of the appeal by Mrs Clarke

137. Our findings in relation to the appeal are set out at paragraphs 79-95. For the reasons set out there, although we have found that Mrs Clarke did not deal properly with the Claimant's appeal, we do not find that that had anything to do with the Claimant having made Complaint 1 or having commenced employment tribunal proceedings. The reason why Mrs Clarke dealt with the Claimant's appeal as she did was because she was inexperienced, was following HR advice, and had not appreciated the need to carry out a more thorough exercise. She would have approached any appeal of similar complexity in the same way. Further, so far as delay is concerned, we find that the initial period of delay in dealing with the Claimant's appeal was because he objected to it being heard by Mr Coppard, refused to attend the appeal meeting scheduled for 5 December 2019 and asked for it to be no earlier than 6 January 2019. After that, Ms Dundas and Mrs Clarke could between them have moved more swiftly, but there was a lot of material for them to assimilate. Mrs Clarke's personal circumstances were also difficult at that time. There is nothing here from which we could infer victimisation. Indeed, quite the contrary. When the Claimant does tell Mrs Clarke about his tribunal claim on 24 March 2020 and says that he needs an appeal response by 30 March 2020, Mrs Clarke sends him the outcome well within that deadline on 27 March 2020.

Time limits

138. The Respondent alleges that anything that happened before 16 November 2019 is *prima facie* out of time. Since we have not found any of the Claimant's claims to be made out, we do not need to consider the question of time limits.

Overall conclusion

139. The unanimous judgment of the Tribunal is:

(1) The Respondent did not contravene the EA 2010 by discriminating against the Claimant because of his race or age;
(2) The Respondent did not contravene the EA 2010 by victimising the Claimant.

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Employment Judge Stout
25/11/2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

26/11/2020.

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FOR THE TRIBUNAL OFFICE

Where reasons were given orally at the hearing for any case management issue, written reasons will not be provided unless they are asked for by a request in writing presented by any party under Rule 62(3) within 14 days of the sending of this judgment.