



EMPLOYMENT TRIBUNALS

Claimant: Mr I Nzabahimana

Respondent: Tearfund

Heard at: London South Employment Tribunal (by remote video hearing)

On: 7-10 and 14-15 December 2020, and
6-7 January 2021 (in chambers)

Before: Employment Judge Ferguson

Members: Ms L Hanks
Mr E Maw

Representation

Claimant: Mr D Deeljur (counsel)

Respondent: Ms E Banton (counsel)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The complaint of victimisation is dismissed upon withdrawal.
2. The complaints of direct race discrimination fail and are dismissed.
3. The complaints of harassment related to race fail and are dismissed.
4. The complaint of unfair dismissal fails and is dismissed.

REASONS

INTRODUCTION

1. By a claim form presented on 11 June 2019, following a period of early conciliation that began and ended on 31 May 2019, the Claimant brought

complaints of race and age discrimination against the Respondent. At that time he remained employed by the Respondent. He was subsequently dismissed and submitted to the Tribunal “amended particulars of claim”, which included a complaint of unfair dismissal. There does not appear to have been any formal application for permission to amend, and nor was such permission expressly given, but the case has been managed, including at three separate case management hearings, on the understanding that the parties would agree a list of issues reflecting all of the complaints that were to be determined at the final hearing, including unfair dismissal. In the course of that process complaints of direct age discrimination, indirect discrimination (age and race) and detriment because of protected disclosures were withdrawn and dismissed. The Claimant withdrew a complaint of victimisation at the start of the final hearing.

2. An agreed list of issues was prepared in advance of the final hearing. The list was somewhat simplified, with the agreement of the parties, during the final hearing. The final version is as follows, and for the avoidance of doubt the Claimant has permission to amend his claim to include any complaints below not included in his original claim form.

The Claims

2.1. The Claimant brings the following claims:

- 2.1.1. Direct race discrimination pursuant to Sections 9 and 13 Equality Act 2010 (“EqA”);
- 2.1.2. Harassment related to race Section 26 EqA;
- 2.1.3. Unfair dismissal s98(2) or (4) of Employment Rights Act 1996 (“ERA”).

Direct Race Discrimination or Harassment

2.2. The alleged acts of direct race discrimination or harassment are as follows. In respect of direct discrimination the Claimant relies on hypothetical comparators only.

- 2.2.1. On 11 January 2018, Shelley Ruck sent the Claimant to the third floor of the office building and segregated him from the rest of the team. [Harassment only]
- 2.2.2. On 2 March 2018, Shelley Ruck stated in a conversation to a member of staff: **“Is Ildephonse around? He is becoming a bit of an issue”** [Harassment only]
- 2.2.3. On 9 July 2018, the Claimant was evaluated on a performance improvement form uniquely made for him and different to white colleagues. [Direct discrimination only]
- 2.2.4. On 9 July 2018 the Claimant’s evaluation was set on a 2 months target whilst his white colleagues were evaluated on a six months target. [Direct discrimination only]

2.2.5. On 9 July 2018, in breach of section 4 of the staff handbook, the Respondent did not allow the Claimant a discussion with his line manager before future tasks were set. [Direct discrimination only]

2.2.6. On 23 November 2018, Cathy Harris did not suspend the capability process for the Claimant's grievance and the Respondent unilaterally amended the formal capability procedure. [Direct discrimination only]

2.2.7. On 28 January 2019, Kyle Hanna pressured the Claimant to take a demoted junior role instead of providing the Claimant with support and resources to help him reach the expected level by the Respondent. [Harassment only]

2.2.8. On 8 May 2019, the Respondent created a senior role in the Claimant's department and advertised it with a preferential candidate who was white and attempted to discourage the Claimant from applying to the role. [Direct discrimination only]

Direct Race Discrimination

2.3. Was the Claimant treated less favourably on the grounds of race when compared to a comparator?

Harassment

2.4. Did the Respondent subject the Claimant to unwanted conduct which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

Time Limits

2.5. The alleged discriminatory acts are said to have taken place over the periods between 11 January 2018 and 8 May 2019.

2.6. Are they in time?

2.7. Are they part of a continuing act of discrimination?

2.8. Do any of the provisions of Section 123 of the Equality Act 2010 apply?

2.9. In the alternative, would it be just and equitable to extend time in respect of any act?

Unfair dismissal

2.10. Was the Claimant's dismissal fair within the meaning of s.98 ERA 1996?

2.11. Has the Respondent established that the reason for the Claimant's dismissal was a potentially fair reason under s.98(2)? The Respondent relies on capability.

- 2.12. Specifically, was the Respondent right to dismiss the Claimant for capability within the meaning of s.98(2)(a) ERA 1996?
- 2.13. Did the Respondent follow a fair procedure within the meaning of s.98(4) ERA 1996;
- 2.14. Has the Respondent identified the cause(s) of the under-performance as early as possible and where necessary, provided appropriate training or support?
- 2.15. Did the respondent hold that belief in the claimant's under performance on reasonable grounds and was the dismissal fair in all the circumstances?
- 2.16. Having worked for the respondent 12 years, was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
- 2.17. In dismissing the Claimant, has the Respondent followed its own contractual disciplinary policies?
- 2.18. The Claimant relies on the following acts:
- 2.18.1. On 28 February 2018 Ms. Catriona Dejean issued the Claimant, for the first time in 11 years of working with the Respondent, a first verbal warning for alleged underperformance.
- 2.18.2. Up until 5 September 2019, the Claimant had not been provided with any training support by the Respondent in order to meet any perceived or purported shortfall in performance.
- 2.18.3. On 10 April 2018, Ms. Catriona Dejean asked the Claimant to provide three names in relation to appraisals for the Claimant. Those names were provided and feedback from them was obtained. However, Ms. Catriona Dejean proceeded, without the Claimant's knowledge, to add five extra members of staff to provide feedback on the Claimant, which made a total of 8 referees (5+3) i.e. above the maximum suggested by the respondent's guidance.
- 2.18.4. The Claimant believes that there was no justification to surreptitiously ask other staff to provide information. The Claimant avers that this act shows that Catriona Dejean was on a fishing exercise to find some negative feedback against the Claimant during a period of tension between the staff and the line manager.
- 2.18.5. The Claimant had made a serious allegation of bullying against Ms Shelley Ruck. The Respondent was aware of that allegation but Ms Ruck was still asked to provide feedback on the Claimant. The Claimant avers that this act was improper practice and should not have been allowed in any performance analysis to avoid any bias or conflict of interest.

- 2.18.6. On 10 July 2018, Ms. Cathy Harris and Ms. Catriona Dejean notified the Claimant of a formal capability meeting and stated the content of the alleged underperformance. The notification amounted to a total of the following 17 words: "Taking initiative, Communicating clearly, Completing defined tasks to the required quality and standard, Effective collaboration with others." No examples were provided. Those 17 words were insufficient information to help the Claimant prepare his response and did not contain the kind of documents or information recommended by ACAS.
- 2.18.7. On 6 September 2018 the Respondent's investigation report revealed that before the review of the two-month objectives Catriona Dejean, one of the Respondent's managers, had already decided to move to the formal capability process. Deciding to move to a formal capability process before reviewing the set objectives is acting inconsistently, unfairly and in breach of the Respondent's Capability Procedure.
- 2.18.8. On 6 September 2018, the Respondent ignored the recommendations from its own investigator regarding fairness and possible retaliation against the Claimant going forward.
- 2.18.9. On 19 November 2018 when the Claimant raised a grievance in relation to Ms. Cathy Harris' practices, instead of suspending the capability meeting according to the grievance policy, the grievance was ignored until the capability meeting had been completed.
- 2.18.10. On 20 November 2018 when the Claimant's grievance was finally accepted Ms. Cathy Harris did not set up a hearing until 18th December 2018. However, the capability process in which this grievance was raised against went ahead and a sanction (first written warning) was imposed on the Claimant on 28th November 2018.
- 2.18.11. The Claimant avers that the First Written warning was decided before the raised grievance was heard.
- 2.18.12. On 5 September 2019, at the final capability meeting, the meeting's chair, Mr Nigel Gavin, read the dismissal decision and the message which they intended to communicate to Respondent's staff in the following terms: "I am writing to let you know that Ildephonse has left Tearfund this week..."
- 2.18.13. After the meeting, the Respondent informed the Claimant that he was dismissed with notice and had informed members of his team in the following terms "I am writing to let you know that Ildephonse will be leaving Tearfund on Monday 9th September."
- 2.18.14. Section 12 of the Staff handbook states:
- "12. Leaving Tearfund Section 12 forms part of your contract of employment. [...] Tearfund's decision to end your employment: Where Tearfund needs to end a fixed term contract of less than 12 months, notice must be given in writing to you. The length of notice

to be given will be stated in your terms and conditions of employment. If your contract is longer than 12 months or permanent, and your contract is ended (not for misconduct), then you will be treated in accordance with Tearfund's redundancy policy and procedures (see above - redundancy policy)".

Based on par 5.2.8.14 the Claimant is entitled to the Respondent's redundancy policy stated at Section 12 of Employee Handbook on the basis that he was not dismissed for misconduct.

2.18.15. The Claimant's terms of the contract (express or implied), have been breached and the dismissal was unfair on the basis of what the Respondent knew at the time.

2.18.16. Did the Respondent fail to follow the ACAS code of practice?

ACAS Uplift

2.19. Did the Respondent fail to comply with the Acas Code in relation to the Claimant raising his concerns regarding the treatment he was subjected to? The Claimant relies on the following?

2.19.1. On 10 July 2018, the Respondent notified the Claimant of a formal capability meeting in 17 words of the alleged underperformance. That statement amounted to a total of the following 17 words: "**Taking initiative, Communicating clearly, Completing defined tasks to the required quality and standard, Effective collaboration with others.**" No examples were given. The 17 words were insufficient information to help the Claimant prepare his response and did not contain the kind of documents or information recommended by ACAS. This action constitutes a breach of both the Respondent's own capability procedure and ACAS Code of Practice on Disciplinary and Grievance Procedures.

2.19.2. On 15 May 2019, the claimant proposed to the respondent a mediation process to be facilitated by ACAS, as an external body in order to avoid an unnecessary and costly legal process. The claimant believed they would arrive at a mutual agreement and perhaps reach a consensus. The claimant's suggestion was so far declined.

2.20. If so, is it just and equitable to award the Claimant up to 20% uplift on his compensation?

Other remedy issues

2.21. Should any award for unfair dismissal be reduced in respect of either *Polkey* or contributory fault?

3. We heard evidence from the Claimant. On behalf of the Respondent we heard evidence from Catriona Dejean, Shelley Ruck, Cathy Harris, Karen Brown, Nigel Harris, Nigel Gavin, Myles Harrison, Kyle Hanna and Andy Simpson. The Respondent also relied on a witness statement from Matt Gregora, but no

explanation was given for his non-attendance so we give it very little weight. The statement had very little relevance to the issues in dispute in any event.

FACTS

4. The Respondent is an international development charity based in the UK and working in over 50 countries worldwide. It employs between 450 and 500 people in the UK, mostly at its head office in Teddington.
5. The Claimant commenced employment with the Respondent on 12 November 2007. Prior to the role he occupied at the time of his dismissal he worked as a Grants Information Officer in the West and Central Africa team, based at the Teddington office.
6. In August 2016 the Claimant successfully applied for the newly-created and more senior role of Design Monitoring and Evaluation (“DME”) Officer, within the “Strategy and Impact” Directorate. At the relevant time there were six directorates within the Respondent. There were 13 people in the Strategy and Impact Directorate, four at the same grade as the Claimant, two who were more junior and seven more senior. It is not in dispute that the Claimant was the only black person in the Strategy and Impact Directorate.
7. Prior to the Claimant’s appointment as DME Officer the Respondent had decided to create and implement a system called “Track” to assist in the design and monitoring of projects being carried out across the organisation. The system was being built in-house by the Respondent’s IT developers. The Claimant was to be part of the “DME Data System Project Team”. He was the DME “subject matter expert”, assisting with the design of the new system and enabling its adoption across the organisation. The job profile described the “Duties and Key Responsibilities” as follows:

“1. Support the design and implementation of Tearfund’s Design, Monitoring and Evaluation Data system

- Acts as the ongoing DME lead for the DME data project team
- Assists in the requirements capture and design phase by gathering, clarifying and documenting requirements
- Supports the Business Lead in communicating and enabling the adoption of the DME data system across the organisation
- Work with the project steering group and pilot users to help prioritise requirements within the agile tool delivery plan and supports the users to write 'stories' of their requirements
- Act as facilitator between project steering group & IT development team
- Co-ordinates and helps facilitate super user and end user training
- Guides and supports the project steering group and pilot group in testing each drop of code during the agile project delivery
- Training and supporting staff in adopting and using the new system

2. Supporting data and insights analysis

- Supporting staff to undertake appropriate data analysis and interpretation to generate reports and insights for decision making, learning and reporting requirements

- Training and support to staff to undertake quantitative and qualitative data analysis and interpretation”
8. The role commenced on 15 August 2016. The salary was £34,000 a year. There was no probationary period.
 9. The Claimant reported directly to the Impact and Effectiveness Manager, Catriona Dejean. The Respondent also operated a “matrix management” structure, under which the Claimant had a “dotted line” to Pip Ramsay who was the Project Manager for the DME Data System Project Team. Ms Dejean and Ms Ramsay interviewed the Claimant for the post.
 10. There was very little evidence as to any training or induction process when the Claimant started the new role. The Claimant’s evidence in response to questions from the Tribunal was that there was a 15-day induction period but no formal training because no-one knew much about the system at that time.
 11. Section 4 of the Respondent’s staff handbook, which is said to form part of the contract of employment, contains the following section on appraisals:

“Appraisals

An appraisal conversation between your line manager and you should take place at least twice a year. Normally objectives are agreed in April/May and reviewed in September/October of each year. The emphasis is placed on a quality conversation, with the appraisal form being used to capture a summary of the conversation and is to be signed off by both you and your line manager. It is highly recommend that monthly catch ups take place to ensure that you are able to continually develop and thrive within your role.

For more information on the Appraisal process, click [here](#)

For the Appraisal Form, click [here](#).”

12. The Claimant’s first formal appraisal by Ms Dejean in December 2016 was positive. She said he “made a great start in his new role as DME Officer and has quickly become part of the team... He has handled the transition from a more routine and structured role to a new role which requires him to shape some of the activities and direction.”
13. By the time of the next appraisal in May 2017, however, Ms Dejean had identified some potential difficulties in the Claimant’s transition into the role. She accepted that it was a new role, the scope of which was not fully set when the Claimant started, but she said she had hoped he would take more initiative. The general tenor of the appraisal was that the Claimant performed well on tasks that were set for him, but there were concerns about his ability to work more independently and to communicate with Ms Dejean about what he was doing and where he might need help:

“Ildephonse has not been in the role yet for a year but I would have hoped to see him in this time taking more initiative. He is able to respond well and deliver tasks that are set for him. This has meant

Pip having to be more prescriptive than we had expected which may have taken more of her time and attention. I am working with Pip to look at how we can deliver what we need, through a more directional approach so that we can give Ildephonse clear tasks and deliverables.”

14. She noted at the end of the appraisal document, “Ildephonse does have the potential and I am keen to see him be successful in this role”.

15. Ms Dejean and the Claimant discussed objectives to include in the appraisal form and the Claimant was asked to put them in writing. In an email exchange on 12/13 July 2017 Ms Dejean told the Claimant she did not recognise the objectives he had included as what they had discussed, and that some of them were too vague. She suggested five new objectives. She also underlined that she needed him to be “taking initiative and an active lead on the work you are asked to do.” She asked him to commit his time to the DME project first and other areas were second priority. She noted they were under pressure to deliver the system. The Claimant responded, agreeing the suggested objectives. His email included the following apology:

“Secondly, I sincerely thank you for your honest feedback on how you see me. I am sorry for the pain I have caused but I know it is not too late to put my house in order, and this feedback will help me do so.

It is true I have been actually more silent towards you than towards Pip and the DME development team, probably because I engage with her/them on a daily basis. Below are the main areas I have been working on:

...

I will review the time I spend outside the DME system (support to other teams, study time) to focus on the DME system issues primarily.

So once again I am very sorry for the grief I have caused but I do believe more positive situations are on the way.”

16. In late 2017 the design phase of the Track project was nearing completion and the team was moving towards the testing and implementation phase. In early December 2017 Shelley Ruck took over the Project Manager role, with a period of handover from Pip Ramsay until January/February 2018.

17. Also around this time another appraisal of the Claimant took place. The appraisal document was finalised in January 2018 and Ms Dejean’s comments were as follows:

“Ildephonse has made good progress over the past 6 months. I have been really pleased to see him grow into the role and taking initiative and lead on key areas of work. He has worked well with Pip and the team, and has built good relationships with frontline users. It has been great to see him developing in the role. I am particularly impressed with the way he has taken on the MAXQ data analysis project and his enthusiasm for this.

I want to encourage him to continue to take the initiative as we move closer to the roll out and implementation phase of the system. Ildephonse's understanding of the system has increased, and I encourage him to continue to ask questions and develop his knowledge and understanding of it. The opportunity to visit Chad has been a great opportunity for him to see it in action and understand where we will face future implementation issues. We do need Ildephonse to be taking an active role in the roll out and business as usual aspects of the system. There are times when he has been reluctant to take action or to step in to guide the work. He works well under instruction but often is less confident in identifying areas that need to be addressed. To this end I would like to see him take a more proactive role in helping to shape this, and work with the rest of the team on the planning and implementation."

18. The Claimant described this feedback in his evidence as Ms Dejean having scored his performance as "outstanding". No such scoring system is used by the Respondent and we do not accept that it is a fair or accurate description of the appraisal. We read the appraisal document as Ms Dejean attempting to be positive and encouraging, but conveying much the same concerns that had been identified earlier in 2017, namely that the Claimant works well under instruction but he was falling short of expectations by not being more proactive.

19. The Claimant gave evidence of an incident on 11 January 2018 as follows:

"On 11th January 2018, the Respondent's newly appointed project manager, Ms Shelley Ruck, bullied me using an offensive and intimidating language and reallocating me to a different floor (3rd floor) in order to exclude me from communications with other teammates, and this ridiculing attitude was witnessed by some of his colleagues on the 1st floor."

20. The Claimant has not given any specific evidence of "offensive and intimidating language" and Ms Ruck denies having used such language. It is not in dispute that she asked him to sit with the developers on the third floor on that day. This was pursuant to an "action plan" emailed to the whole team by Pip Ramsay on 8 January 2018, in which it was suggested Ms Ramsay, Ms Ruck and the Claimant should sit with IT on certain days in order to help resolve questions quickly. The Claimant would normally sit on the first floor with the rest of the Impact and Effectiveness team. He was somewhat reluctant to move and needed reminding by Ms Ruck, but he did agree to do so on the days requested.

21. There is some evidence of ongoing concerns amongst the management team about the Claimant's performance in early 2018. On 1 February 2018 Ms Dejean emailed Ms Ruck and Ms Ramsay as follows:

"Hi Shelley and Pip,

I have been thinking in light of our discussions about capacity and Ildephonse whether Lorien could play a part in the longer term picture? She has a brilliant mind, quick to learn, is developing her knowledge of

the system and has a good M&E knowledge, language skills, people skills and has practical project experience. As we have discussed, Shelley, I think we need to review Ildephonse's role to make sure we have the higher level coordination and support we need from both the technical M&E knowledge side and the confidence and ability to coordinate and take a lead on working with others, in particular linking in with Pip on the wider systems work.

...

With Ildephonse is there value in a lower grade role to support a higher level role? He has taken initiative on the data analysis project I gave him and responds to a certain extent on set tasks. But he still lacks comprehension on the system and I think he has not fulfilled all that has been asked of him. Mags also raised some red flags to me on quality of training he has been doing on IBIS in WCA.

Pip, Shelley and I are taking the JD and looking for evidence against th JD. We are meeting with Cathy next week to get advice on a process. We would like to give him the oportunity to show where he can show evidence against the JD and start a dialogue with him. We did meet last week and we both came away with concerns.

Some thoughts for us to consider.”

22. Later in February 2018 there was an exchange between the Claimant and Ms Dejean about “indicators” for the new DME system. The Claimant had sent Ms Dejean a paper with his thoughts about the issue. She responded saying that this was not the time for theoretical discussions, and that they needed to agree a list of the indicators to map into the DME system. She told the Claimant not to spend any more time on this, but to concentrate on testing the system. Ms Dejean said she would take on the indicators issue “as we are some way behind where we should be”.
23. On 28 February Ms Dejean and Ms Ruck held a catch-up meeting with the Claimant. During this meeting Ms Dejean outlined their concerns about the Claimant’s performance and issued him with a verbal warning. She emailed the Claimant the following day to confirm the conversation:

“As I stated at the start of the discussion we were keen to meet with you to discuss your role and responsibilities in light of the fact we are:

- in a very intense period of the project,
- increasing pressure and expectations on the team by Myles and the organisation as we move into the implementation phase
- and consideration of how the DME Officer role will take on BAU functions as the project team moves away later in the year.

We've also become more concerned about areas of your work and your confidence and knowledge of the system. Both confidence and strong knowledge of the system and DME are going to be required for

this coming phase and BAU. I do recognise that you have delivered some good pieces of work when you have been directed and guided; Pip and Shelley have been working very hard to be directive with you as we have seen this approach works best for you to deliver pieces of work. I note you have been actively working with Larry as I had asked and enjoying this work, though this is beyond the system work which is priority. However, the role does require more initiative and pro-activity to be taken, and I have talked about this in the past with you as I need to see you step up more. I have also noted a few technical areas where I think you have been struggling - (one critical one has been on the understanding of indicators). To this end we came back to the job description and wanted to reiterate what the role does expect of you.”

24. Ms Dejean went on to confirm two specific tasks she wanted the Claimant to complete. She said his priority was to get the pilots arranged and undertaken, with clear documentation produced within the next four weeks. She also gave him a document to complete with his assessment of his performance against the job description. There were to be weekly catch-up meetings with Ms Ruck, and Ms Dejean said she would attend on 12 March for an update. On 28 March they would review the pilots and the Claimant’s progress.

25. The Claimant claims another incident with Ms Ruck took place on 2 March 2018. He describes it as follows:

“...on 2nd March 2018, while Ms Shelley was working remotely; and as I was entering the meeting room, I overheard Ms Shelly asking a colleague on Google hangout “Is Ildephonse there? He is becoming a bit of an issue.” To make her aware of my presence, I responded to the question put to the colleague, by saying: “Hi Shelley, how are you?” She did not make any further comment.”

26. Ms Ruck denies saying the words alleged, and says she would not have done so. In her witness statement she speculates that the Claimant might have misinterpreted a discussion of the “issues” they were facing as a team as her saying that he was an issue.

27. For reasons explained below we do not consider it necessary to make a finding about what was said.

28. The Claimant reacted badly to receiving Ms Dejean’s email confirming the verbal warning and interpreted it as a written warning. Ms Dejean clarified that it was an informal, verbal warning. The Claimant then sent a lengthy response on 3 March 2018. He objected to the criticisms of his knowledge of and confidence in the DME system. In the course of the email he complained about Ms Ruck’s management style and referred to it as “coercive” and “counter-productive”. He said there were “at least two recent examples which were publicly witnessed by colleagues in the office, to their amusement”.

29. A further meeting took place between the Claimant and Ms Dejean on 7 March 2018. The Claimant says he gave details of the complaints about 11 January and 2 March at that meeting. Ms Dejean accepts that the Claimant mentioned two incidents, but says that he did not give details.

30. Ms Dejean updated Ms Ruck on the situation and shared her concerns that the Claimant did not appear to realise what was required of him and she was not sure whether he processed what was being said. Ms Ruck replied to Ms Dejean as follows:

“Thanks for the update, it is really helpful.

I am not sure if you want to talk before we meet on Monday, just so we are clear what the catchup looks like and the approach we take.

My main aim and ambition is Ildephonse to find a space where he can thrive and flourish

There are aspects around documentation and an understanding of the pilots is still lacking and causing confusion in team. I am trying to walk alongside and make suggestions but I am not sure he is understanding his role/JD. I am also making suggestions like sending the login details to DME officers off the back of the email you sent, but nothing is being done. He is not asking me any questions either which is worrying. I really want to work with him and support him.

I am also wondering if the Project Environment doesn't work for him either which is being perceived as directive/coercive, as we are at a stage in the project with hard deadlines and I am not sure he works well with this level of expectations around documentation and organisation. I am trying hard this week to explain how projects work and what we need to produce from that perspective so I am trying to take a big picture approach of contextualising the work with him, so he can understand what it means to sit between IT and frontline/users

It would also be great if he can help organise the UK training for LAC in May as well....

This is a hard process and I am definitely being driven to my knees”

31. Ms Dejean and Ms Ruck continued to share concerns about the Claimant's performance during March 2018, and by early April they had taken advice from HR about commencing a formal capability process.

32. Ms Dejean was promoted to Director of Strategy and Impact in April 2018. Kyle Hanna was appointed to the role of Impact and Effectiveness Manager, but it was decided that Ms Dejean would continue to line manage the Claimant.

33. On 16 April 2018 Ms Dejean sent Ms Ruck an email with the subject “quick thoughts”:

“Hi Shelley,

Thanks for the quick chat earlier and for inputting additional evidence for Ildephonse.

Dis-establishing the role and going down the redundancy route could be a possibility in light of the other group/team amendments I want to make. I will check a few matters with Cathy on this - we did talk about redundancy as an option yesterday.

What I am thinking is that I could make the role redundant and take out the data analysis elements and this would be taken up by a new Data Analyst I am planning. In terms of the DME system moving forward I could make a new role Digital Data Officer/Lead (title to be decided) with the remit to oversee the on-going implementation of the system, and also with a remit to shape wider digital data collection work (so the interface with the likes of Kobo) and developing a strategy around this. We have not been able to do this, so having the skill sets to do this would be great. I actually have a call with Andy Simpson next Tuesday, who was previous in Iraq who approached me today as he has just finished a masters in IT and M&E.....This made me think after your comment on the redundancy option.

For both the new roles Ildephonse would not be a suitable match. This would enable us to get what we need and also think a bit more into the future. We may be able to push this forward quicker than a capability process and also bring in temporary capacity.

We would have to work to consider support during this period - perhaps giving more work to Lorien and/or bringing in someone for a short period of time.

I am nervous about the capability route as I feel it will make it more messy than we need it to be at this time.”

34. The following day Ms Dejean asked Cathy Harris, Head of Global HR, about the possibility of restructuring the group and making the Claimant's role redundant:

“When looking at his JD and from an exercise that I asked him to do that he does not have the confidence to deliver the role as required. I am wanting to recruit a full time data analyst role as we have a lot of work in this area. This is part of his JD, but a part he has not focused much on or shown much initiative within. As you will see from his evidence he talks about supporting a data analyst role, and I think he would just continue to shadow someone rather than actively shaping the work. He doesn't have the skills set I really need on the data analysis side.

The other parts of his role around the maintenance and on-going support for the implementation of the DME system also are areas where he is not showing any future vision for and still relies on instruction from Shelley, Lorien and Pip. Once they have gone I do not see him confidently stepping into this. His evidence also talks about supporting them and although what he lists in the document seems coherent, the behaviours and practice are different. With the data systems we are also needing to look beyond the DME system and create a plan for

digital data collection, including new innovations and technologies. I do not see him being able to fulfill this brief.

So this is leading me to thinking of creating two new roles, as part of the refocusing of the S&I Group, and disestablishing the DME Officer Role. He would not be a suitable fit for either of these roles.

- Data Analyst
- Digital Data Officer/Lead (to edit and develop job titles and JDs)”

35. Ms Harris advised that the option of making the Claimant redundant depended on whether the redundancy was genuine, i.e. was there a cessation or reduction of the work the Claimant was doing, rather than asking others to do it. She explained the likely timescale.

36. A review following the Claimant’s verbal warning took place on 18 April 2018. Ms Dejean told the Claimant she still had “concerns and disappointments with performance”, and said that these related to the following four areas:

- 1) Following instructions
- 2) Comprehension and Understanding of the work
- 3) Quality and Quantity of work
- 4) Taking initiative

37. The discussion continued at a further meeting on 25 April 2018. Ms Dejean decided not to commence the formal capacity process, to allow the Claimant a further chance to improve.

38. The Claimant’s annual review meeting took place on 2 May 2018. The Respondent has a system of “360 feedback” pursuant to which it normally obtains feedback from three colleagues in advance of the annual review meeting. In advance of this meeting on 2 May Ms Dejean sought feedback on the Claimant from a larger number of colleagues, including Ms Ruck, because of her concerns about his performance. The feedback that had been received by 2 May was shared with the Claimant.

39. On 8 May Ms Dejean emailed the Claimant the completed feedback document and a document which included six objectives for the following two months. She said a further review would take place in July, and that there would be bi-monthly catch-ups in the meantime “for us to touch base and give you the opportunity to keep me up to date and ask for clarification as you go and get support from me.”

40. The feedback from the Claimant’s peers was largely positive, but some colleagues noted minor criticisms including taking a little too long over tasks and focus on older systems (“GPS” and “IBIS”) holding him back in embracing new ways of working. Ms Ramsay noted the problems in the “indicators” work. Ms Dejean gave lengthy feedback, along the same lines as her previous observations. She noted that the Claimant worked well when he had a limited number of key tasks that are straightforward and set out for him, but said that in other respects he has struggled. She also said she had noticed in meetings

the Claimant was sometimes “slow to pick up on discussions and keep up with the pace of the discussion”, and he had asked some fundamental questions about the system that she would have expected him to know.

41. As part of this process Ms Dejean also asked the Claimant for feedback on Ms Ruck. He gave a very positive assessment, including the following:

“I could have talked about human relationship, balance between process and people but I have noticed that things have greatly improved these past weeks/months. So, the initial assessment is no longer valid/relevant as she is doing the right thing, in my view. I am objectively putting the past behind, and I can only see a lot of positives about the future of the project she is managing, judging by the energy and enthusiasm I notice across the team.”

42. A concern about the quality of training delivered by the Claimant was identified in mid-May and led to Ms Dejean asking for further advice from Ms Harris about the capability process. Ms Harris had apparently advised Ms Dejean that the process may take until the end of the year to complete. Ms Dejean was worried about the timescale and asked whether she could “kick start” the formal process, or whether she needed to wait until the end of the 2-month period. She gave the following description of the problem with the training:

“It became evident yesterday that he had not prepared or followed the same directions as all the other presenters have done. There was clear instructions given and opportunity for him to ask questions. Shelley is working through feedback with him today and I am going to sit in the sessions to observed what he is doing. I need first hand evidence. I had feedback from two other people all pointing to the fact that he had not followed instructions and concerns over the clarity of the message.”

43. Ms Harris replied with a likely timescale if the formal process were started straight away. If there was no improvement she envisaged a final formal meeting on 20 August 2018 giving notice of dismissal. The Claimant’s three-month notice period would end on 9 November 2018.

44. For reasons unknown, the formal capability process was not commenced straight away. There is evidence, however, that Ms Dejean and others were frustrated by the Claimant’s lack of improvement during this period. On 8 June 2018 Ms Dejean emailed Ms Harris expressing concerns about the “amount of time we are all spending on supporting him, and amending his work”.

45. In preparation for the review meeting on 9 July Ms Dejean prepared feedback on the objectives she had set after the meeting on 2 May. Specific concerns included the quality of the training delivered and failure to develop a set of “FAQs”. The Claimant also produced his own document assessing his performance against the objectives. It is not in dispute that Ms Dejean did not give the Claimant a copy of her written feedback in advance of the meeting, or ask for his comments on her feedback. She confirmed in her evidence that she did, however, read the Claimant’s document before the meeting and discussed her concerns with him during the meeting. She told the Claimant at the meeting that she was commencing the formal capability process.

46. The Claimant was invited to a stage one formal capability meeting on 23 July 2018. The invitation letter, dated 11 July 2018, stated that Ms Dejean was “concerned that both she and others have lost confidence in your ability to fulfil your role to the required standard”. It said,

“The main concerns are in the following areas:

- Taking initiative
- Communicating clearly
- Completing defined tasks to the required quality and standard
- Effective collaboration with others”

47. The meeting took place, conducted by Ms Dejean. At the start of the meeting the Claimant said he wanted to raise a grievance. As a result the process was suspended pending the resolution of the grievance.

48. The Respondent’s grievance procedure and capability procedure were inconsistent as to whether such a suspension was necessary. The grievance procedure stated:

“Where a formal Grievance is raised during the course of a Disciplinary or Capability process that process will be suspended until the Grievance process has been completed.”

49. The capability procedure, on the other hand, stated:

“If a member of staff alleges discrimination or raises a formal Grievance, the Capability Procedure may be suspended pending investigation. No decisions will be made about the outcome of the Capability Process and no sanction will be imposed until all the facts have been considered and the Grievance Procedure has been completed.” (emphasis added)

50. There is no controversy about the suspension of the capability process in July 2018, but these extracts are noted because of the dispute about the capability process not being further suspended in November 2018.

51. It is unnecessary for us to make detailed findings about the grievance process, other than to note how it affected the timetable for the capability process. The grievance outcome was given on 18 September 2018. The Claimant appealed the outcome and the appeal was dismissed on 6 November 2018.

52. In the meantime Ms Dejean had formulated a list of tasks for the Claimant, referred to as a work plan. Although the tasks were not framed as objectives for a formal capability procedure, the Claimant’s performance was monitored over a two-month period commencing after the grievance outcome had been given in September. Ms Dejean also asked the Claimant to record his approximate time spent on different tasks. The completed version shows that the Claimant was usually spending more than 50% of his time on “Track support”, i.e. responding to user queries.

53. In late October 2018 Andy Simpson, whom Ms Dejean had mentioned in her discussions with Ms Ruck and Ms Harris in April 2018 about restructuring the team, replaced Ms Ruck as project manager. Mr Simpson had met Ms Dejean, Ms Ramsay and Mr Hanna in June 2018, having previously worked for the Respondent in a number of different roles and recently completed a masters in ICT for Development. He was due to start a three-month role with the Respondent in Bangladesh over the summer of 2018. In or around September 2018 Ms Ruck planned to move to another project and the Respondent identified a need for a project manager to continue her role while users were being trained on Track. Mr Simpson was appointed to the role on a three-month temporary contract.
54. On or around 8 November 2018 Ms Dejean created a document entitled "Capability Review" in which she assessed the Claimant's performance against the tasks in the work plan. It included concerns that the Claimant had not "taken ownership" of some tasks and had required a large amount of guidance to complete others. It was also noted that the Claimant had been testing IBIS, which was work he did not need to do. The document was given to the Claimant for his comments.
55. The stage one formal capability meeting resumed on 19 November 2018. It appears that the Claimant had provided his own assessment or response to Ms Dejean's document in advance of the meeting, but this document was not in the bundle. At the start of the meeting the Claimant said he wished to raise another grievance. This was noted, but Ms Harris advised that, to prevent further delay, the meeting should continue and the grievance would be considered afterwards. The Claimant noted that according to the Respondent's capability procedure the meeting can be adjourned. He said he did not object to the meeting continuing, but wanted it noted that he had raised a grievance at the start and that it had been said the grievance would be examined after the meeting.
56. There was a detailed discussion of the Claimant's performance and Ms Dejean's concerns. The meeting was adjourned until 28 November.
57. In the interim period the capability procedure was amended as follows:
- "If a member of staff alleges discrimination or raises a formal grievance, the Capability Procedure ~~process~~ may be suspended pending ~~investigation~~ the outcome of the Grievance Process. ~~In the event that we decide to suspend the Capability Process, no decisions will be made about the outcome of the Capability Process and no sanction will be imposed until all the facts have been considered and the Grievance Procedure ~~process~~ has been completed.~~"
58. The grievance procedure was also amended to align with the capability procedure and remove the requirement to suspend the capability process in the event of a grievance being raised.
59. The stage one meeting resumed on 28 November and the Claimant was given a first written warning. He was also informed that Kyle Hanna would be taking over as his line manager. The letter confirming the outcome stated:

“We explained that this formal process is intended to be a positive process with the aim of bringing your performance to the required level and restoring confidence in your ability in your role of DME Officer (Systems). We confirmed that you will now be line managed by Kyle Hanna, who will review your performance against the current work plan. Kyle will also work with you to create a written improvement plan and there will now be a review period, effective immediately, during which time he will be supporting you and giving you regular feedback.

Kyle will agree the end date of the review period with you and he will meet with you at the end of the period to discuss your performance, before deciding whether or not there needs to be a further formal meeting.”

60. The Claimant and Mr Hanna met on 7 January 2019 to discuss the objectives for the capability process. It appears that Mr Hanna updated the “work plan” based on their discussions at that meeting. It was not clear whether this work plan was to form the basis of the formal assessment of the Claimant’s performance. The Claimant was not given a “written improvement plan” as such. It was agreed that a review would take place in one month.

61. The Claimant gave evidence about a discussion with Mr Hanna towards the end of January 2019:

“On 28th January 2019, Mr Kyle Hanna, appointed as my new line manager, suggested demotion to me, which I refused as there was no formal reason as to why my contract was to be suddenly changed.”

62. Mr Hanna’s evidence was as follows:

“Ildephonse has alleged that I offered him a lower grade role. By January 2019, I recognised that the day-to-day basic parts of the role, Ildephonse could do reasonably well. I was forming the opinion that if the role consisted predominantly of these more basic tasks, he might be better able to flourish. I gave this opinion to Ildephonse around the end of January 2019. It was only my opinion and was never a formal proposal and nothing was ever put into motion. I was sounding him out in an informal conversation. I had only been managing Ildephonse for a few weeks at that stage but it was already my observation that a more junior role might be more suitable and less stressful for him.”

63. The Claimant did not challenge Mr Hanna’s evidence as to this incident and we accept that it is an accurate summary of the conversation.

64. A review meeting took place on 7 February 2019. Mr Hanna had produced an assessment document based on the four broad areas of concern as defined by Ms Dejean and set out in the original invitation to the stage one meeting (what the Claimant refers to as “the 17 words” in the list of issues). The concerns were, Mr Hanna accepted, cut and pasted from an earlier document created by Ms Dejean. The “Evidence” section of the document, however, did refer to the tasks in the work plan and was Mr Hanna’s own assessment.

Some problems were identified. Mr Hanna gave the following evidence about this period:

“During this review period it became clear to me that it was going to be very difficult to turn this situation around given the fact that Ildephonse was pushing back against every critical feedback that I provided about his performance. When I brought up an area for improvement in discussion, he wouldn’t accept that there was a need for improvement at all. I found his approach to be confrontational rather than collaborative.”

65. The Claimant also created a document assessing his performance, both against the “17 words” and against the work plan.

66. Following the meeting on 7 February Mr Hanna decided to convene a second formal capability meeting. This took place on 6 March 2019. During the meeting the Claimant complained that he had not been given a performance improvement plan. The Claimant had also raised another grievance complaining about the process.

67. Mr Hanna said the following about the meeting on 6 March:

“15. Following the end of the review period a formal review meeting was held on 6 March 2019. I went into this meeting with an open mind to listen and understand the issues from Ildephonse’s perspective. Although the feedback I was giving him was still showing areas of concern, I could see that I could have been more specific about how the 4 areas of underperformance would be used as a framework to help assess performance and provide support. Despite the obvious underperformance, I asked myself whether I, as a line manager, had done everything I could to help him. I therefore decided to extend the review period until 12 April in order to make it very clear how each of those 4 areas of concern related to the tasks on his work plan. The advice I got from HR was that I didn’t need to extend this review period as there was sufficient evidence of underperformance. However, I wanted to be able to look myself in the mirror and know I had done the best possible job to help Ildephonse.

16. From March 2019 a new work plan was created and agreed with Ildephonse that again showed the main tasks and now how these related to the specific 4 areas of concern. Again, the work plan was detailed about the outputs expected, who to work with and additionally what success would look like. The work plan also made explicit the steps involved for each task in order to provide as much support and direction as possible. From March to 12th April 2019 it was made very clear to Ildephonse what was expected and how his performance would be assessed. The extension to this review period now meant that the total length of this extended second review period was 14 weeks, i.e. from 7th January to 12th April.”

68. The revised work plan set out five tasks:

68.1. Support end users by managing Track support emails

- 68.2. Support Track trainers who are running planned training sessions
 - 68.3. Test new developments to the system at the end of each sprint release
 - 68.4. Keep the hub updated
 - 68.5. Induction Training Plan
69. Against each task Mr Hanna specified what was involved and who the Claimant needed to work with.
70. As explained in Mr Hanna's evidence, the review period was extended to 12 April 2019.
71. A review meeting took place on 16 April 2019. By this stage Mr Hanna had created a more detailed table that set out, for each task, the expected output, the link with the four areas of concern (the "17 words") and examples of success. It then included space for comments as to progress at regular intervals. It appears that the Claimant completed the "progress" columns and then Mr Hanna noted issues for discussion. At the meeting Mr Hanna advised the Claimant that further formal action was being considered.
72. A further formal capability meeting took place on 2 May 2019. In preparation for this meeting Mr Hanna produced a document entitled "General assessment against areas of work". This included an "overall assessment" followed by a table with feedback on the Claimant's work as against the four "areas of concern", i.e. not against the five tasks in the work plan. Concerns relating to the work plan were included in the feedback, however, such as the information on the hub not always being up to date, the Claimant failing to create a suitable mechanism for capturing feedback about the hub, and not taking initiative in relation to the induction process notes.
73. The "Overall Assessment" section states as follows:
- "Ildephonse's work ethic and determination is admirable and is not in question. He has made some good suggestions on system improvements and overall he is very 'customer-focused' and strives to give a timely response to issues raised in the field. I know he invests time in learning the system. Over the review period I have observed he is able to satisfactorily manage many day to day tasks such as responding to Track support emails and providing support via chat groups to trainers and users. However, there are times when he isn't always clear on process or system requirements, which has unfortunately and unintentionally caused confusion for users. While these examples of causing confusion are outweighed by the number of times Ildephonse satisfactorily resolves inquiries there is nevertheless a concerning pattern. Furthermore the larger more significant tasks such as the induction process notes are still not being progressed at a sufficient pace and to the required quality. Ildephonse does tackle these larger significant tasks with much energy and willingness but progress in these areas, particularly the induction notes, remain behind what is expected and required of the role."

74. The Claimant added his own comments on Mr Hanna's assessment, including a complaint that he had not been assessed against the five tasks in the work plan. The Claimant also complained about that during the meeting. The meeting was adjourned for Mr Hanna to consider the outcome.
75. On 8 May 2019 the Respondent advertised a new permanent role of "Track System Manager". It was made clear to staff, when notifying them of the role, that it was the role Andy Simpson had been carrying out on an interim basis for the last six months.
76. The Claimant emailed Mr Hanna on 9 May complaining that by referring to Andy Simpson the impression was given that the role was "pre-destined to Andy" and it would deter others from applying. Mr Hanna replied saying he disagreed, and that the reference to Mr Simpson was to help the team to understand it was not a totally new role. He said, "Everyone is welcome and encouraged to apply."
77. In the event Mr Simpson was the only applicant for the role and he was appointed.
78. The capability meeting was reconvened on 23 May 2019 and the Claimant was issued with a "second and final" written warning. A further review period was set until 28 June 2019, following a meeting to agree the objectives.
79. On 5 or 6 June 2019 Mr Hanna and the Claimant met to agree the objectives. The five tasks remained identical and, apart from one small addition, the "what is involved" column also remained unchanged.
80. The review period was ultimately extended to 15 July 2019 because Mr Hanna was abroad for a time.
81. The "objectives" table appears to have been updated by the Claimant on a weekly basis. On 19 July 2019 Mr Hanna and the Claimant met to review the Claimant's performance during June and early July. Mr Hanna produced a document with a detailed assessment against each of the tasks in the table. Mr Hanna summarises his concerns at this time in his witness statement:

"Specifically I highlighted my concerns related to his inability to consistently spot common issues with the system and take quick action to flag urgent problems with the developers, his inability to consistently solve non-urgent issues as the first line of support and a lack of proactive actions as appropriate to the problems being raised with him by users of the system. Furthermore, Ildephonse had still not been able to make the necessary improvements required to improve the quality and usefulness of the hub website and finally despite working on the induction process notes for over 9 months he was still unable to bring them to a successful conclusion."

82. On the issue of Track support, Mr Hanna's report states:

"Ildephonse is very customer focused and his commitment to resolving user issues is one of his biggest strengths. We have received positive

feedback from users that demonstrates Ildephonse's strong customer focused approach.

However, I have not seen sufficient evidence of him improving his ability to take initiative, collaborate effectively and ensure clear communication in this work task. Specifically my concerns are related to his ability to (1) consistently spot common issues & trends and take quick action to flag urgent problems with the developers, (2) solve non-urgent issues as the first line, (3) ensure developer time is not spent on issues that could be resolved by first line response and (4) make proactive actions as appropriate to the situation.

As raised with Ildephonse during this review period I am concerned about the lack of analysis and interpretation of the issues coming into the Track Support inbox. If we have a better understanding of the common issues and trends we can be more proactive to head off these issues and prevent them reoccurring by improving our FAQs, bi-weekly communication and other user resources.

...

Ildephonse has stated that up to 90% of his time is taken up testing user issues, responding to user emails in Track support and providing follow up support leaving him little time for other tasks such as the analysis, improving the resources and creating the induction process. From looking at the volume of emails and chats in Track Support over this review period I estimate there are approximately 6 to 7 'threads' (or separate issues) per day. I fully appreciate that some of these threads get quite long, sometimes up to 12 emails and some days will be busier than others, however it is my opinion that responding to these issues should not constitute 90% of Ildephonse's time."

83. The Tribunal asked Mr Hanna in his oral evidence whether there might have been a "catch 22" situation, in that the time the Claimant spent on Track support meant he did not have time to analyse the queries, spot common trends and create more efficient methods of providing support unless he stopped responding to individual queries. Mr Hanna explained that the number of individual queries was not problematic in itself; when others covered the helpdesk they dealt with the queries much more quickly. The problem was that the Claimant would spend an inordinate amount of time investigating the right response, doing his own research, testing and recreating the issue. He should have either known the answers (such as a user using the wrong browser) or if he did not know he should have asked for help more quickly from the developers.

84. Mr Hanna's summary of the Claimant's difficulties is set out in his witness statement as follows:

"My view is that the wrong appointment was made when Ildephonse was first recruited into the role. The softer skills such as collaboration, using initiative and communicating clearly are really important. Ildephonse was in a role where he needed to understand people's concerns and win them round, he needed to own tasks and drive them forward himself. It was about showing initiative and positively

influencing people. However, he unfortunately struggled with many of these softer skills. When you specifically say – ‘this is what I would like you to do, please follow these steps’ there were few problems. However, when he had to use initiative, collaborate with others and take ownership of work tasks he struggled. A good example of this is the Track hub. I’d find him researching how to code or write the scripts for Google hubs. He was researching unnecessary technical instructions and spending a disproportionate amount of time on something that was not urgent. The things he focused his energy on were not always the right things. Ildephonse can deal with the basic routine requests, which makes up around 30% of the role. With the other 70% of the role, he sadly really struggled.”

85. On 25 July the Claimant was invited to final formal capability hearing. The hearing was originally arranged in August, with Mr Hanna due to chair it, but for various reasons the hearing was postponed. In the meantime the Claimant raised another grievance. Nigel Gavin, Finance and IT Director, was appointed to hear the grievance and as the Claimant’s grievance related in part to Mr Hanna it was decided that Mr Gavin should also chair the final capability hearing. The two meetings took place on the same day, 4 September 2019.

86. Mr Gavin was given a copy of the “objectives” table, with both the Claimant’s and Mr Hanna’s comments. He also had Mr Hanna’s assessment document. Mr Gavin described the process he adopted and his decision-making as follows:

“17. At 12:00pm on 5 September 2019, Ildephonse submitted a written response to Kyle’s assessment of his performance (as presented in the meeting on 4 September 2019). This was presented in 2 documents titled ‘Kyle’s assessment and Ildephonse’s response 05.09.2019’ and ‘final capability meeting – Ildephonse’s response’. I cleared my diary between 1:00pm and 4:30pm to make sure I had enough time to read thoroughly the documents provided. I was open to the possibility that these might provide new information which could have a bearing on my decision. I was quite clear that we could cancel the capability meeting if there was something new in that information or if I needed more time. As it happened, there was nothing new in the information Ildephonse provided to me. Some of the documentation had been provided previously and where there were new documents provided, they did not add anything substantially different.

18. The meeting re-convened at 4:30pm on 5 September 2019, where I communicated my decision to Ildephonse to dismiss him. This was followed up by a letter to Ildephonse, sent by Cathy Harris, confirming my decision.

...

20. All the decisions I took were entirely my own... I considered each point in depth and considered the views of those involved, as can be seen from my ‘dismissing officers justification report’.

21. With regards to the capability dismissal, I saw sufficient evidence to be persuaded that Ildephonse's performance was below the level required of him for his role. One document demonstrating this was 'Ildephonse's work plan', which demonstrated how Ildephonse's progress was monitored against 5 work tasks. This showed that Kyle had given Ildephonse every opportunity to demonstrate improved performance. What I saw was that Ildephonse often missed the point of the analytical role he was being asked to fulfil and the initiative he needed to show. The responses I saw from him were rarely focussed on recognising where Kyle had issues with his performance and seeing where he could address them.

22. Ildephonse was getting some favourable feedback and was using it as a way of saying that people were happy with what he was doing. He used this feedback and missed Kyle's points of what needed addressing. Kyle wasn't asking Ildephonse to perform his help-desk part of the role at the expense of being able to meet the main responsibilities of the role.

23. From my review of the documentation, Kyle's approach looked reasonable and I believe he was genuinely trying to give Ildephonse a chance to improve his performance.

24. My view is that Ildephonse was given all the feedback he needed to be clear on what he was required to achieve. I think he understood the issues but often seized on things that seemed important to him but were in fact peripheral.

...

25. My view from the correspondence I saw was that as time went on, he became more focused on building his defensive case rather than addressing his performance issues.

26. I believe Ildephonse received an appropriate level of support from Kyle. At one point he asked for specific training on building websites... He thought it was extremely important that he do this. However, his Line Manager didn't think so. ...

27. It seemed to be that Ildephonse did not realise the disconnect between his opinion that he was performing well in spending most of his time responding to user demands and the role that was required of him. In this role, he was being asked to perform at a higher level and demonstrate that he could carry out his responsibilities in a relatively autonomous way. I think he found it hard to move away from a role he had been playing at a particular level previously into the more analytical role he was being asked to perform.

...

29. Whilst conducting the grievance hearing I spoke to [Ms Dejean] about alternative work for Ildephonse. She told me that there had been a time earlier in the year where a conversation had been had with

Ildephonse about changing his role to do something more suitable and he had refused. He would have also had the same opportunity to see if there were other roles available, during his notice period.”

87. After the final capability hearing Mr Gavin put all of Mr Hanna’s assessments and the Claimant’s responses into a single table and added his own conclusions as to whether the Claimant had met the required standards (the document he refers to as his ‘dismissing officers justification report’). In respect of one issue he noted that the Claimant had “responded fully and satisfactorily”. On another work task Mr Gavin stated “As there was no concern, I did not consider this area in making my decision”. For another he noted it was not possible for him to judge the issue. In respect of many of the issues Mr Gavin noted that the Claimant had missed the point and/or that he reacted unreasonably to Mr Hanna’s legitimate concerns. He found many of Mr Hanna’s concerns to be substantiated. He concluded as follows:

“This final paragraph summarises some of the key outcomes of the capability review, in particular that IN has not been able to adapt his working priorities and practices, and use of time in line with the requirements of his role.

I find that on the balance of probabilities the right decision is to proceed with dismissal.

Nevertheless, I would add that I find it very sad that this is the outcome of the capability process. KH on many occasions praises IN for his hard work and other accomplishments, as also set out in IN’s final response. These should not be forgotten.”

88. The Claimant was dismissed with notice on 5 September 2019. He was told he was not required to work during his notice period. The Claimant appealed against his dismissal. The appeal was dismissed on 4 November 2019.

89. Cathy Harris gave evidence that she was looking for possible alternative roles for the Claimant throughout the formal capability process and that the recruitment team were aware of the situation. The only documentary evidence of consideration being given to alternative roles is a note dated 25 July 2019 about a “Systems Analyst” role being considered for the Claimant. The note says that the job description was reviewed by Mr Hanna, but he considered it not suitable because the Claimant did not meet the requirement to have a “Good understanding of finance and finance processes” and there were concerns about other requirements in light of the capability process. It was also noted that the salary was lower than the Claimant’s existing role.

LAW

Unfair dismissal

90. Pursuant to section 98 ERA it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons, or “some other substantial reason”. One such reason is where the dismissal “relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do”. Capability is defined in

section 98(3)(a) as “capability assessed by reference to skill, aptitude, health or any other physical or mental quality”.

91. According to section 98(4) the determination of the question whether the dismissal is fair or unfair “depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee” and “shall be determined in accordance with equity and the substantial merits of the case.”

92. In deciding whether in all the circumstances of the case it is reasonable to dismiss a particular employee, the Tribunal must not substitute its own view for that of the employer. The “range of reasonable responses” test must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed (see, e.g., Post Office v Foley and HSBC Bank v Madden [2000] IRLR 827).

93. It is long established (Alidair Ltd v Taylor 1978 ICR 445, CA) that it is not necessary in a capability case for the employer to prove that the employee is in fact incapable or incompetent. The Tribunal must consider:

93.1. Does the employer honestly believe the employee is incompetent or unsuitable for the job?

93.2. Are the grounds for that belief reasonable?

94. The Tribunal must also consider whether a fair procedure was followed. In general, an employer should be slow to dismiss an employee for incapability “without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity of improving his performance” (James v Waltham Holy Cross UDC 1973 ICR 398, NIRC). Providing the employee with an opportunity to improve was identified by Lord Bridge in Polkey v AE Dayton Services Ltd 1988 ICR 142, HL as being necessary in the great majority of cases if the employer is to act reasonably by dismissing for capability. The ACAS Code (paragraph 21) states that a warning should set out what improvement in performance is required, together with a timescale.

95. It is also likely to be relevant whether adequate training and support were given to the employee.

96. There is no obligation upon the employer to offer employment in a subsidiary position to an employee whose lacks capability for their role. Even where the employee has reached his or her position through promotion, that employee has no automatic right to return to his or her old job (unless there is provision to that effect in the contract). The employer’s duty to consider redeploying the employee will depend on the circumstances of each particular case, although the size and administrative resources of the business will be especially important (Bevan Harris Ltd (t/a The Clyde Leather Co) v Gair 1981 IRLR 520; Awojobi v London Borough of Lewisham EAT 0243/16).

Direct race discrimination/ harassment related to race

97. The EqA provides, so far as relevant:

13 Direct discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

...

26 Harassment

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

98. Race is a protected characteristic under the EqA.

CONCLUSIONS

Unfair dismissal

99. We consider first whether the Respondent has established that capability was the reason for the Claimant's dismissal. The Claimant asserted in his claim form that the real reason was his race (although he does not pursue a complaint that his dismissal was an act of direct race discrimination), or alternatively the fact that he had raised grievances. Neither reason was pursued during the hearing or put to the Respondent's witnesses. Nor was any alternative reason put forward by the Claimant. The Claimant's submissions were focused on whether there were reasonable grounds for the Respondent's belief in lack of capability. The highest the case was put was that the Respondent prejudged the issue and decided in April 2018 that the Claimant had to go. That does not call into question the reason for the dismissal. We accept that the Respondent has established that the reason given at the time, following a lengthy capability process, was that the Claimant's performance was not to the required standards and quality.

100. We consider the issue of reasonableness under four headings:

100.1. Did the Respondent hold an honest belief that the Claimant lacked capability?

100.2. Was that belief held on reasonable grounds?

100.3. Did the Respondent follow a fair procedure?

100.4. Was dismissal within the range of reasonable responses?

Did the Respondent hold an honest belief that the Claimant lacked capability?

101. The ultimate decision-maker was Mr Gavin. The question is whether he genuinely believed that the Claimant lacked capability to perform his role. Again, the Claimant did not directly challenge the genuineness or honesty of Mr Gavin's belief during the hearing. It was, however, alleged that Mr Gavin went along with a process that had already started – he “got in the boat and kept rowing” – i.e. his involvement was a mere rubber stamping exercise. We do not accept that. There was no evidence, or even suggestion, of any malice on Mr Gavin's part or prejudice towards the Claimant. He had a relatively short time to read all the relevant material and come to a decision, but he demonstrated a thorough and balanced approach. He acknowledged for example that there were some areas where the Claimant had fully answered the concerns of his manager. It was put to Mr Gavin in cross-examination that he would be “strongly minded to follow the conclusions of your managers”, and he responded that it was “part of the picture”. We consider it inevitable, and indeed reasonable, that Mr Gavin would give considerable weight to the views of Mr Hanna. We nevertheless conclude that he approached the matter with an open mind and formed the genuine view that the Claimant was not performing to an acceptable level.

Was that belief held on reasonable grounds?

102. The contemporaneous emails and appraisal documentation show that there had been genuine concerns about the Claimant's performance for a considerable time, from approximately 9 months after he started in the role.

103. As to whether Mr Gavin had reasonable grounds for his belief, it is not for us to decide what was an acceptable standard of performance or improvement. This is not least because our understanding of the requirements of the role is necessarily limited. It was a role that involved a high degree of technical and industry-specific knowledge. Further, we note that the skills and qualities required for the role are inherently difficult to measure, i.e. it was not a role in which “success” could be measured very easily or mathematically, but rather involved supporting other colleagues, analysing the system and suggesting improvements. The objectives of the role also changed as the project progressed. A consistent theme of the feedback given to the Claimant was that he failed to show initiative. We accept that it was in the nature of the role, and that the Claimant would have been aware of this since at least the annual appraisal in May 2017, that he was required to be analytical and proactive. Crucially, he had to be capable of working independently, contributing to the project development, without close managerial direction. It was a considerable step up in this respect from his

previous role. However, it was also the case that the Claimant was encouraged to ask questions and seek clarification on areas of work. Taking initiative did not preclude asking questions to ensure he was delivering what was required.

104. It is not in dispute that there were some aspects of the job the Claimant excelled at. It is also clear that he was well-liked and respected by his peers.

105. The Claimant accepts that the table showing Mr Hanna's assessment against the objectives, together with the Claimant's comments (what became known during the hearing as "document 274"), is the most relevant document for assessing the evidence before Mr Gavin. We are satisfied that it provided reasonable grounds to conclude there were at least the following significant performance issues:

105.1. Spending excessive time on Track user support, in part because of a reluctance to refer issues or ask for support (as compared to other employees when they covered this role);

105.2. Failing to analyse the user support issues to identify common themes and streamline the support process;

105.3. Failing to engage in the task of coming up with ideas for updating/improving the hub;

105.4. Failure/ inability to progress the preparation for the induction process without significant managerial direction;

105.5. Poor quality of induction materials.

106. Mr Gavin found that the Claimant "missed the point" of these issues in the Claimant's responses, and he accepted that Mr Hanna's concerns were substantiated. Mr Hanna's assessment was itself evidence of the Claimant's poor performance, on which Mr Gavin was entitled to rely. In the context of a lengthy capability process, in which the concerns had been explained to the Claimant throughout and Mr Hanna concluded that there were still significant problems, we accept that Mr Gavin's belief that the Claimant lacked capability for the role was based on reasonable grounds.

Did the Respondent follow a fair procedure?

107. The Claimant's principal argument was that the Respondent did not enter into the capability process in good faith. He believes that the Respondent was not interested in improvement; they were simply looking for a way of removing him from the organisation. He relies heavily on the "quick thoughts" email from Ms Dejean to Ms Ruck on 16 April 2018.

108. We accept that this email suggests that Ms Dejean and Ms Ruck had discussed removing the Claimant from the organisation, and that they were exploring options for doing so in a lawful way. We can see why the Claimant would be alarmed by Ms Dejean saying, "For both new roles [the Claimant] would not be a suitable match. This would enable us to get what we need". Having said that, we do not consider it particularly surprising that these

conversations would be taking place, in circumstances where genuine and significant concerns about performance had already been identified. It appears that things came to a head soon after Ms Ruck took over the project management role, either because of her more robust management style, perhaps coupled with expectations of higher standards, and/or because the period of the Claimant settling into the new role had now passed, and/or because the nature of the project was changing and there was greater pressure on delivery. Whatever the reason, there is plenty of evidence in correspondence between managers and with HR in early 2018 to show that Ms Dejean and Ms Ruck genuinely believed that the Claimant was not performing to an acceptable level. We accept that that was the reason they were discussing his removal, and there was no ulterior motive.

109. There is also evidence that they wanted the Claimant to improve. Ms Dejean had recruited him to the role, so it would be surprising if she did not want him to succeed in it. Indeed the appraisal documentation shows that she was encouraging him, praising him where appropriate, and trying to help him with tasks he found difficult. Ms Ruck expressly said in an email in March 2018 that her aim was for the Claimant to thrive and flourish. We do not consider that email was written with litigation in mind; we accept it was her genuine wish.

110. There is a difference, however, between hoping for improvement and expecting it. At the time of the “quick thoughts” email, Ms Dejean and Ms Ruck perhaps considered it unlikely that a capability process would result in the level of improvement they believed necessary. There is nothing particularly surprising or concerning about the fact that they were exploring options, having identified genuine concerns that would, at best, take a long time to resolve. This is not in itself evidence of prejudging the subsequent capability process. We must look at what actually happened.

111. We note that many of the Claimant’s complaints relate to the informal stage of the process, prior to July 2018. We consider that these complaints have very limited relevance to the fairness of the Claimant’s dismissal more than a year later. What is worth noting, however, is that from the moment the Claimant was given a verbal warning on 28 February 2018, he became defensive and was reluctant to admit that there were any performance problems. That made it harder for him to engage in the formal process when it commenced. In Mr Deeljur’s words, he “fought tooth and nail”, using every weapon he could, including the raising of multiple grievances. That made the prospect of a cooperative and successful capability process less likely.

112. We do accept that there were some aspects of the capability process that were somewhat confused. Partly this was because of the initial delays caused by the Claimant raising a grievance. It was not entirely clear, for example, what the status was of the two-month review period before the stage one capability meeting in November 2018. It appears to have been intended as a continuation of the informal process whilst the grievance was being addressed. Further, Mr Hanna’s approach to the process, after he took over responsibility for it, was not as clear as it should have been. Had the Claimant been given a document entitled “written improvement plan”, as envisaged in the capability procedure and in the letter confirming the first written warning, the subsequent process would have been easier for the

Claimant to understand. What happened instead was that Mr Hanna updated the task list, but then on more than one occasion assessed the Claimant's performance against the broad areas of concern (the "17 words").

113. In the end, however, Mr Hanna created the table (what became "document 274"), which had clear tasks, with expected outcomes, and the Claimant was assessed against those. It was in effect a "written improvement plan".
114. The overarching question is whether the Claimant was given sufficient opportunity to improve, with clear objectives. We find that he was. We note that the Claimant never said that he did not understand what he was being asked to do. His complaints were about the method of assessment. Those complaints, some of which we accept were valid, resulted in a much longer process than was strictly necessary, but looking at the procedure overall we find it was not unfair. The Claimant knew what was required of him and had ample opportunity to meet the objectives that were set.
115. We did have some concerns about whether there was a "catch 22" situation, in that the Claimant was spending too much time on Track support, which meant he had no time to tackle the strategic issues that would have made the process more efficient, i.e. he needed more time in the short term in order to free up time in the longer term. But it was clear from Mr Hanna's evidence that this was not, in fact, the root of the problem. The Claimant was simply too slow in dealing with user queries and was not changing his approach, for example by referring more queries onto developers or asking others for the answer where he did not know it. Responding to user queries was something the Claimant enjoyed doing and he received good feedback from it. Largely because of that, we find, the Claimant never properly addressed the criticism that he was spending far too much time on it.
116. We consider the Claimant's specific criticisms of the process below.
117. *Ms Dejean issuing a verbal warning.* We do not consider this relevant to the fairness of the Claimant's dismissal, and in any event there nothing to suggest it was done for any reason other than her genuine concerns. It is consistent with the two previous appraisals.
118. *Failure to provide training support.* The Claimant has not identified what training or support he should have received. It is not in dispute that he did receive various types of training after his appointment to the role. During the final stage of the capability process the Claimant argued he should have had web design training in order to complete the "keeping the hub updated" task. Mr Hanna rejected this on the basis that the Claimant was not being asked to do web design, just to come up with ideas for improvement. We consider that was a reasonable response.
119. *Obtaining feedback from 8 people for the Claimant's appraisal in May 2018, when the Respondent's guidance says feedback should be obtained from three people.* We do not consider this relevant to the fairness of the Claimant's dismissal. None of the statements obtained were relied upon during the formal capability process.

120. *Obtaining feedback from Ms Ruck when the Claimant had made an allegation of bullying against her.* We do not accept it was unfair to seek feedback from Ms Ruck when she was the person working most closely with the Claimant. In any event the Claimant's own feedback on Ms Ruck at this time was that the relationship had improved and there were no problems.

121. *The "17 words" gave the Claimant insufficient information to prepare his response. This was contrary to the ACAS Code of Practice.* We have addressed this above. The Claimant was never assessed solely by reference to those words, and ultimately he was assessed by reference to the table of objectives created by Mr Hanna. The table explained how the objectives related to the four broad areas of concern. The complaint about the ACAS Code is misplaced. Paragraph 9 states:

"If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."

By the time the Claimant was invited to the final capability hearing he had enough information about the alleged poor performance and its possible consequences to enable him to prepare to answer the case.

122. *Ms Dejean decided to move to the formal process before reviewing the two-month objectives.* This complaint is not accurate. What the Claimant really complains about is Ms Dejean's failure to share her assessment with him and consider his comments before deciding to move to the formal process (see 560). The Claimant has not established that this was contrary to the Respondent's procedures. There is reference in the capability procedure to a "review" following an informal warning, but there is no express requirement to hold a meeting or discussion about the manager's assessment before moving to the formal process. In any event Ms Dejean's evidence to the Tribunal was that she did consider the Claimant's own review document before the meeting on 9 July and they discussed it. The stage one meeting did not take place until 23 July. The Claimant certainly knew what the concerns were by then.

123. *Ignoring the recommendations of the grievance investigator in September 2018.* The recommendation referred to, in the grievance investigation report by Gemma Donovan, is that the formal capability proceedings should be "closely monitored by the HR Advisor to ensure a fair process and help to safeguard IN against any potential negative actions towards him as a result of the grievance that has been raised." The Claimant has not identified in what respect he alleges the Respondent failed to do that.

124. *Failure to suspend the capability process on 19 November 2018 and imposing a sanction before the grievance hearing.* The Respondent accepts that its grievance and capability procedures were not consistent. We consider it was not unreasonable for the Respondent to decide to continue with the capability process given the delays that had already occurred as a result of

the Claimant's first grievance. We note that the Claimant did not object to that course of action at the time, provided his grievance was dealt with. Given that the grievance was not upheld we do not consider that the decision not to suspend the capability process had any impact on the fairness of the procedure overall.

125. The complaint about the communication to staff of the Claimant's departure has not been properly explained, and in any event is not relevant to the claim. If the argument is that it prejudged the appeal, or was inaccurate because the Claimant was in fact on gardening leave during his notice period, neither of these points is relevant to the fairness of the decision to dismiss.
126. The complaint about section 12 of the staff handbook relating to the redundancy procedure is not relevant to the claim. The Claimant has made no claim for a redundancy payment or for breach of contract. The Respondent says there was a drafting error in this part of the handbook and it was never intended to apply to employees dismissed on capability grounds. Whether or not the clause should have been applied has no bearing on the fairness of the Claimant's dismissal.

Was dismissal within the range of reasonable responses?

127. The question here is whether it was reasonable for the Respondent to conclude, having found on reasonable grounds that the Claimant lacked capability to perform his role, that he should be dismissed.
128. It is of course relevant that the Claimant had been employed, at the time of his dismissal, for 12 years. He was a good and committed employee. We note that he was appointed to the DME role following a selection and interview process. It is also relevant that it was a newly created role with some uncertainty as to its scope.
129. We note Mr Hanna's assessment that the Claimant was, from the outset, the wrong person for the role. That cuts both ways because it was the Respondent's decision to appoint him. The Claimant of course does not accept that he was the wrong person for the role. He simply refuses to accept that he was under-performing.
130. It seems to us that there were a number of reasons for the Claimant's under-performance, including time management issues and a failure to understand the proactive and analytical nature of the role. Arguably the mismatch between the Claimant's approach and the requirements of the role should have been addressed much earlier after he was appointed. Significant performance issues became evident as the project reached the testing and implementation stage. It was made clear to the Claimant what was required of him and he never said that he was being asked to do anything outside the scope of the role. We have accepted that the managerial concerns in 2018 were genuine, and note that Ms Dejean was particularly anxious about the amount of time others were having to spend supporting the Claimant.

131. In those circumstances we consider it was reasonable to commence the formal capability process. We have found that the process was, overall,

fair. At the end of it there were still significant problems. It is difficult to see what else the Respondent could have done.

132. It is clear from the case-law that there is no obligation to offer demotion to a lower role in these circumstances, even where the employee was promoted to the more senior role. The Respondent's evidence on the issue of alternative employment was rather thin, but given that the Claimant had dismissed the idea of a lower level role, and he has not identified any suitable vacancy, we do not consider the Respondent's approach was unreasonable.

133. For all those reasons we find it was within the range of reasonable responses to dismiss. The unfair dismissal complaint therefore fails and is dismissed.

Direct race discrimination / harassment

Jurisdiction

134. We find that the two allegations of harassment against Ms Ruck are clearly out of time and the Tribunal has no jurisdiction to hear them. We do not accept they form part of a continuing act extending over time. The other allegations are different in nature and relate either to Ms Dejean, Ms Harris and Mr Hanna's conduct of the capability process, or to the appointment of Mr Simpson. There is one other harassment allegation, but that relates to Mr Hanna's conduct a year later. The complaints against Ms Ruck are discrete incidents long before the formal capability process commenced. The Claimant has not put forward any reasons why time should be extended on just and equitable grounds.

135. Further and for completeness, even on the Claimant's own case, there was no "segregation" on 11 January 2018. This is a misnomer. His work straddled two teams and on certain days he was being asked to sit with one, not the other. We find it was entirely reasonable to ask him to sit with the developers on the third floor for efficiency reasons. It was a direction from Ms Ramsay. Ms Ruck was not targeting the Claimant. We would not accept that her conduct had the proscribed purpose or effect, or that it was related to race. She was simply enacting a reasonable and agreed way of working.

136. As noted above, we make no factual finding about what was said on 2 March 2018, but we note that the Claimant has not put forward any evidence that could support a finding that Ms Ruck's conduct was related to race. It was suggested in cross-examination of Ms Ruck that her background as a white South African growing up in Apartheid might have been a factor in her treatment of the Claimant. We consider that is in itself prejudicial and certainly not evidence that her treatment of him was related to race.

137. We will address the remainder of the complaints on the assumption that they could form part of a continuing act, and are therefore in time, but since we do not uphold any of them it is unnecessary for us to determine the point.

138. Mr Deeljur confirmed in his closing submissions that the Claimant relies on hypothetical comparators only. In those circumstances, where the

Claimant can make out the allegation on the facts, we must determine the reason why the Respondent acted as it did and whether race was a factor.

Evaluating the Claimant on a “unique” form in July 2018

139. This complaint is premised on the contention that the Claimant has a contractual right to be appraised on the standard appraisal form, with a six-month review period. We do not accept that premise. The only contractual right that is arguably clear enough to be enforceable is the right to two appraisal meetings a year. The link to the form does not provide a separate contractual right for it to be used in every appraisal. In this case there was a good reason for adopting a different approach; the Claimant was under an informal capability process, and it made sense for Ms Dejean to use the appraisal meeting to set objectives for that process. We accept that was the only reason she adopted a different approach, and there would be no basis for us to find that she would have treated a white employee in the same circumstances any differently.

In July 2018, evaluating the Claimant over a two-month period

140. For the same reasons, we accept that Ms Dejean adjusted the normal appraisal process because the Claimant was under the informal capability process. Race was not a factor.

In July 2018, in breach of section 4 of the handbook, not allowing the Claimant a discussion with his line manager before future tasks were set

141. Again, this allegation is based on the incorrect premise that the Respondent acted in breach of the contractual obligations relating to appraisals. The review in July was pursuant to the informal capability process, not the standard appraisal process. The Claimant has not identified any entitlement to a discussion before future tasks are set, and there would be no basis for us to find that a white employee in the same circumstances would have been treated differently.

Failure to suspend the capability process in November 2018 and unilaterally amending the capability procedure

142. We have dealt with this allegation in the context of the unfair dismissal complaint above. The Respondent has given a reason for not suspending the process, which we have accepted, namely to avoid further delay. It was nothing to do with the Claimant’s race. As for amending the procedure, we accept that the Respondent did so to remove the inconsistency and make it clearer in future cases. Again, that had nothing to do with the Claimant’s race.

Mr Hanna pressuring the Claimant to take a demoted role

143. The Claimant did not pursue the allegation that Mr Hanna “pressured” him. There is no dispute that Mr Hanna raised the possibility that the Claimant would be suited to a less demanding role. When the Claimant said he was not interested, the idea was not pursued. Mr Hanna’s conduct was consistent with his concerns about the Claimant’s capability for the role, and there is nothing

to indicate his conduct was related to the Claimant's race. Nor do we accept that his conduct had the proscribed purpose or effect.

Creating Track System Manager role and advertising it with a preferential candidate

144. The essence of this complaint is that Mr Hanna discouraged the Claimant from applying by mentioning Mr Simpson in the email informing the team of the vacancy. This complaint is not made out on the facts. The Claimant was expressly told that he could apply, and was encouraged to do so. The Claimant has not established that there was anything unfair about the process by which Mr Simpson was appointed to the permanent role.

Conclusion

145. All of the Claimant's complaints under the EqA fail and are dismissed.

Remedy issues

146. In light of our conclusions above it is unnecessary for us to determine the remedy issues.

Employment Judge Ferguson

Date: 19 January 2021