Case Numbers 2202424/2019, 2202507/2019, 2203483/2019 & 2203499/2019

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr I Akpogheneta	v	1. Notting Hill Genesis 2. Caroline James-Ford 3. Emily Thomson 4. Jill Cook

Heard at: Central London Employment Tribunal

On: 12 – 16, 19 October 2020

Before: Employment Judge Brown
Members: Mr G W Bishop
Mr D Clay

Appearances

For the Claimant: Ms F Babalola, Solicitor

For the Respondents: Mr A Oringher, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:

1. **The Respondents did not subject the Claimant to race harassment or race discrimination;**
2. **The Respondents did not victimise the Claimant;**
3. **The Respondents did not subject the Claimant to protected disclosure detriment, whether during his employment or afterwards;**
4. **The Claimant was not a disabled person at the relevant times;**
5. **The First Respondent did not dismiss the Claimant unfairly, whether automatically unfairly or otherwise.**

REASONS

Preliminary

1. The Claimant presented four claims on 25.06.19, 28.06.19, 15.09.19 and 16.09.19. In them, he brought complaints of automatic unfair dismissal (on the grounds of protected disclosure and/or union activities), protected disclosure detriment, post termination detriment, ordinary unfair dismissal, direct race discrimination, race harassment, victimisation (race), discrimination arising from disability and a failure to make reasonable adjustments.

2. The List of Issues had been agreed as follows:

Alleged protected disclosures

1. The alleged disclosure relied upon by the Claimant is paragraph 22a of his grievance dated 1 March 2019, in relation to the allegation of R2 neglecting the wellbeing of a tenant who was assaulted in her home and blaming it on Z.

2. Was the alleged disclosure in paragraph 1 a qualifying disclosure in that it was a disclosure of information which, in the reasonable belief of the Claimant, was made in the public interest and tended to show one of more of the relevant failures set out in paragraphs (a), (b), (d) and (f) of s.43B(1) ERA as follows:

(a) that a criminal offence had been, was being or was likely to be committed; or

(b) that a person had failed, was failing or was likely to fail to comply with a legal obligation;

(d) that the health and safety of any individual had been, was being or was likely to be endangered;

(f) that information tending to show any matter falling within any one of the preceding paragraphs had been, was being or was likely to be deliberately concealed.

3. If so, is the disclosure protected within the meaning of s.43A ERA in that it was made by the Claimant to R1 in accordance with s.43C ERA?

Automatic Unfair Dismissal for whistleblowing under section 103A ERA– R1

4. Was the reason (or, if more than one, the principal reason) for the Claimant's dismissal on 18 June 2019 that he made the protected disclosure?

Automatic unfair dismissal for participation in trade union activities and/or being a member of an independent trade union under s.152 of TULRCA – R1

5. Was the reason (or, if more than one, the principal reason) for the Claimant's dismissal on 18 June 2019 that he was a member, or took part in the activities, of an independent trade union?

Unfair dismissal under s.98 ERA

6. Was the Claimant dismissed for a potentially fair reason pursuant to s.98(1) ERA? The Respondent relies on a reason relating to the Claimant's conduct.

7. If so, having regard to that reason, did the First Respondent act reasonably in the circumstances (including the size and administrative resources of the Respondent's undertaking) in treating it as a sufficient reason for dismissing the Claimant and was the dismissal fair in accordance with the equity and the substantial merits of the case, pursuant to s.98(4) ERA? In particular:

7.1. Did the First Respondent believe the Claimant to be guilty of misconduct?

7.2. Did the First Respondent have reasonable grounds for its belief that the Claimant was guilty of that misconduct?

7.3. At the time the First Respondent held that belief, had it carried out as much investigation as was reasonable in the circumstances?

7.4. Was the decision to dismiss the Claimant within the range of reasonable responses?

Whistleblowing detriment under s.47B ERA– R1 and R3

8. Did R1 or R3 subject the Claimant to a detriment pursuant to s.47B ERA, by not dealing with his data subject access request in a timely manner.

9. If so, was that on the ground that the Claimant made a protected disclosure?

Post-termination detriment under s.47B ERA – R1

10. Did R1 subject the Claimant to a detriment pursuant to s.47B ERA, by not properly addressing his grievances sent on 17 June 2019, 18 June 2019 and 23 June 2019?

11. If so, was that on the ground that the Claimant made a protected disclosure?

Direct race discrimination – Respondents as set out below

12. The Claimant's race is black African and he relies on the following alleged treatment:

12.1. R2 sanctioned the Claimant with an informal warning for being aggressive in a meeting on 14 February2018, without following a disciplinary process (R2 only);

12.2. R2 failed to support the Claimant's application and/or recommend the Claimant for progression in September 2017, February 2018 and July 2018 (R2 only);

12.3. R1 and R2 failed to notify the Claimant of the alleged disciplinary investigation which commenced on 18December 2018 (R1 and R2);

12.4. The conclusion of the disciplinary investigation, without interviewing the Claimant on all the allegations (R1, R2 and R4);

12.5. R1 and R2 sent the Claimant an invitation to a disciplinary hearing on 1 February 2019 which included additional allegations that were not matters for which the Claimant was suspended (R1, R2 and R4);

12.6.R2 made false allegations about the Claimant during the disciplinary process by (i) labelling the Claimant as aggressive; (ii) stating the Claimant was 'fighting' the performance management process; and (iii) stating the Claimant was under performance management (R1 and R2);

12.7. All Respondents relied on the use of performance management information during the disciplinary process, which was not produced in accordance with the policy provided by R2 (All Respondents);

12.8. All Respondents allowed and relied on the use of unsigned statements during the disciplinary process in relation to the allegation of gross misconduct concerning a colleague, X, and R3 relying on verbal assurances given by R2 around their validity (All Respondents);

12.9.The Claimant was not provided with information relied upon by R2 and R3 from other sources pertaining to the validity of the unsigned witness statements, contrary to the Respondent's disciplinary policy (All Respondents);

12.10. R2 used untrue support plans on the Claimant's employment record during the disciplinary process (R1 and R2);

12.11. R2 falsified and/or fabricated and/or made alterations to the Claimant's electronic records and/or diaries relied upon during the disciplinary process (R1, R2 and R3); and

12.12. R1 operated recruitment processes that made it extremely likely that black males were deemed not suitable candidates for housing officer roles and/or regional housing officer roles, limiting their progression in the organisation (R1 only).

13. In the case of the treatment in paragraphs 12.1to 12.12:

13.1. Did the treatment occur?

13.2.If so, did the Respondent(s) treat the Claimant less favourably that it/they treat or would treat others? In respect of allegation 12.2, the Claimant relies upon Owen Wiggins and Stephen Golden as comparators.

In respect of all other allegations, the Claimant relies upon a hypothetical comparator.

13.3. If so, was that treatment because of the Claimant's race?

Harassment related to race- Respondents as set out above

14. In the case of the treatment in paragraphs 12.1 to 12.12, was the conduct unwanted?

15. If so, was the conduct related to race?

16. If so, did the conduct have the purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant pursuant to s.26 EqA?

17. If the treatment did not have that purpose, did it have that effect and was it is reasonable for the conduct to have that effect?

Victimisation

18. The alleged protected act relied upon by the Claimant is the first complaint in his grievance dated 1 March 2019, headed "Indirect racial discrimination".

19. The acts of victimisation alleged by the Claimant are as follows:

19.1.The Respondent(s) failed to properly address matters in the Claimant's grievance dated 1 March 2019 in that

(i) the Claimant provided additional information on 11 April 2019 and this was not properly considered by R3;

(ii) there was no reference to the whistleblowing allegations as to what next steps should be taken or under what policy it should be addressed; and

(iii) the Claimant provided names of those to be interviewed in relation to investigating his grievance that were not interviewed, being Benedict, Sonia Grant, Siobhan Minter, Daniel Ogun, Debi Gardner, Peter Beale, Jerome Otto, Idris Razaq and Laura Moss(R1 and R3);

19.2. R1 appointed R3 to chair the Claimant's grievance meeting but she was the subject matter of complaints in his grievance (complaint 6D in the grievance) (R1 and R4);

19.3. R1 appointed R3 to chair the Claimant's grievance meeting when she was also chairing his disciplinary hearing (R1 and R4);

19.4. R3 was not impartial in relation to matters concerning the Claimant's disciplinary (R1 and R3);

19.5. Failed to properly deal with the matters raised in the Claimant's appeal, being (i) the alleged neglect of the duty of care owed by R1 towards the Claimant, given its knowledge that he had a mental breakdown;

(ii) the failure to review the Claimant's alleged performance management in line with the evidence provided by the Claimant and R1's Performance Policy;

(iii) the decision for R3 to preside over the grievance given she was subject to complaint 6D in the grievance complaint she was investigating;

(iv) the Claimant's comments that he was being discriminated against in relation to comments on his On-Track and this being ignored by HR; and

(v) that the Claimant was informed on 3 June 2019 that a formal grievance meeting would be held in relation to his grievance against Rob Manning but it was decided that this would not go ahead (R1 and R3); and

19.6.The Claimant was not provided with reasonable time in which to gather evidence during his disciplinary proceedings (R1, R3 and R4).

20. In respect of each alleged act of victimisation in paragraph 19.1 to 19.6:

20.1.Did the act occur and did it amount to a detriment for the purposes of s.27 EqA?

20.2. If so, was the Claimant subjected to that detriment because he had done the protected act at paragraph 18?

Disability

21. Was the Claimant disabled within the meaning of s.6 of the EqAat the relevant time? The Claimant relies upon the following:

21.1. Depression; and

21.2. Anxiety.

Knowledge

22. If the Claimant was disabled, did the Respondent(s) know or could the Respondent(s) reasonably have been expected to know about the Claimant's disability?

If so, at what date did the Respondent(s) have that knowledge?

The Claimant contends that the Respondent(s) had actual or constructive knowledge on the basis that it was mentioned on numerous occasions from February 2018 to December 2018 and throughout the disciplinary process in 2019 (including the appeal) and was documented by R2 in various On-Track reviews.

Discrimination arising from disability – R1 and R3

23. The Claimant relies on his dismissal as unfavourable treatment. 24. Did the Claimant's conduct towards his colleague, X, on 21 January 2019 arise in consequence of his alleged disability?

25. If so, was the unfavourable treatment a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments - all Respondents

26. Did the Respondent(s) apply provision, criterion or practice ("PCP") as follows:

26.1. a requirement for the Claimant to be resilient in performance of his substantive duties;

26.2. a requirement for the Claimant to work his substantive hours;

26.3. a requirement for the Claimant to manage his substantive caseload/workload;

26.4. a requirement for the Claimant to be managed by R2;

26.5.a practice of failing to carry out risk assessments in a timely manner;

26.6.a practice of failing to refer employees to Occupational health in a timely manner or at all.

27. If so, did the PCP(s) put the Claimant at a substantial disadvantage?

The Claimant relies upon an exacerbation of his condition and the impact on his mental health and wellbeing.

28. If so, did the Respondent(s) know or ought they have known that the Claimant was likely to be at a substantial disadvantage compared with persons who were not disabled?

29. If so, did the Respondent(s), from February 2018, fail to make reasonable adjustments needed to avoid such substantial disadvantage pursuant to s.20 EqA by not providing the Claimant with adequate support, despite the Claimant complaining of stress, being signed off work for stress and having a mental breakdown, by:

29.1.failing to alter the Claimant's working hours;

29.2.failing to alter the Claimant's workload;

29.3.failing to assign the Claimant to be managed by a different manager;

29.4.failing to assign Claimant to a different department / team in R1;

29.5.failing to carry out an individual stress risk assessment; and

29.6. failing to make a referral to Occupational Health at all or in a timely manner assessment?

Jurisdiction

30. In respect of his discrimination claims, did the Claimant present such claims to the Tribunal before the end of the period of three months starting with the date of the alleged act or omission or, for conduct extending over a period for the purposes of s.123(3)(a), the date on which that period ended (allowing for the ACAS Early Conciliation process)?

31. If not, is it just and equitable to extend time for submission of the claims under s.123(1)(b) EqA?

32. In respect of his claim for detriment under s.47B ERA, did the Claimant present such claim to the Tribunal before the end of the period of three months starting with the date of the alleged act or failure to act or, if there was a series of similar acts or failures under s.48(3)(a) ERA, the date of the last of those acts or failures (allowing for the ACAS Early Conciliation process)?

33. If not, was it reasonably practicable for the Claimant to have presented the claim to the Tribunal within that time limit?

34. If not, has the Claimant presented his claim within a time period that the Tribunal considers reasonable?

Remedy

35. If the Claimant is successful, what award should be made to the Claimant in respect of the above claims, having regard to the below questions:

35.1 .What loss has the Claimant suffered?

35.2. What steps has the Claimant taken to mitigate his loss?

35.3. In the event there is a finding of unfair dismissal, could R1 have dismissed the claimant fairly in any event?

35.4.Should any award be increased, and if so by what amount, on account of an unreasonable failure by the Respondent(s) to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

35.5. Should any award be decreased, and if so by what amount, on account of an unreasonable failure by the Claimant to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

35.6. Did the Claimant contribute to his dismissal by his own blameworthy conduct and if so should his award be reduced and by what amount?

35.7. Was the alleged protected disclosure made in good faith, and if not, would it be equitable in all the circumstances to reduce any award for unfair dismissal or detriment for whistleblowing?

4. The Tribunal heard evidence from the Claimant. It read the evidence of Kombo Chikoti, a Housing Officer employed by the First Respondent August 2017 – April 2018. It read paragraph [17], only, of the witness statement of Shazia Asghar, a tenant of the First Respondent. The Tribunal also heard evidence from Caroline James-Ford, the Claimant's line manager, and the Second Respondent in the claims; Emily Thomson, Regional Head of Housing and grievance and dismissing officer, and who was also Ms James-Ford's line manager and the Third Respondent in the case; Jill Cook, HR Director and the Fourth Respondent in the case; Sue Sergeant, Director of Housing Management and grievance appeal officer; Andrew Nankivell, Director of Governance, who dealt with the Claimant's whistleblowing matter and the Claimant's later grievances; and Jake Brodetsky, Joint Venture Partnership Director and dismissal appeal officer.

5. There was a 5 volume Bundle of documents. The fifth Bundle was added during the hearing; it comprised the documents which the Claimant sent to Emily Thomson after his grievance meeting with her.

6. The Tribunal made various case management decisions during the hearing, for which it gave oral reasons at the time. Both parties made submissions. The Tribunal reserved its judgment.

Findings of Fact

7. The Claimant started work for the First Respondent as a housing officer at its Sussex Place office on 17 February 2015. The First Respondent is a Housing Association, formed in 2018 following the statutory amalgamation of Notting Hill Housing Trust and Genesis Housing Association.

8. The Claimant told the Tribunal that, in 2014, he applied twice to work in Notting Hill Housing Trust, but was unable to secure an interview. The rejections of these applications were not included in the List of Issues as alleged acts of race discrimination/harassment. There were no documents in the bundle relevant to these applications and the Claimant gave no evidence about the dates of the applications, or the jobs he applied for, or the requirements of the posts and how he might have been suitable for them, or how he compared with other candidates. The Respondents' witnesses gave no evidence in chief about these applications and were not cross examined about them. The Tribunal was not able to make findings of fact about these applications.

9. The Claimant was successfully appointed as a housing officer at the First Respondent on his third application for a role.

10. While the Claimant alleged that the First Respondent operated recruitment processes which made it extremely unlikely that black males would be deemed suitable candidates for housing officer roles and/or regional housing officer roles, the Claimant did not apply for any regional housing officer roles.

11. Given that the Claimant was not alleging that the First Respondent discriminated against him in relation to his own applications for housing officer, or regional housing officer roles, the Tribunal did not consider it appropriate to embark on an examination of whether the First Respondent might have discriminated against other people who applied for these roles. It was not appropriate for the Tribunal to conduct a review of the First Respondent's application processes to discover whether there might have been discriminatory practices towards other individuals.

12. The Claimant's alleged that Ms James-Ford failed to support / recommend the Claimant for pay progression in his housing officer role in September 2017, February 2018 and July 2018. There was no evidence that, under the Respondent's written procedures, it was necessary to move through the pay scale in one role before applying for a different role. When asked in cross examination whether this was the case, Ms James-Ford said that it was not.

13. The First Respondent has a 5 - level housing officer salary progression scale. It has a policy document which sets out the process for moving up the scale. The policy provides that all housing officers are expected to reach the market median salary (level 3) after 12 months. It seems that the Claimant did reach level 3 after 12 months in post, p269 - 270.

14. The Claimant was keen to progress to level 4. The First Respondent's policy provides that officers who are operating at level 3 can move to level 4 and should discuss their progression with their manager as part of the normal supervision and appraisal process. The policy states that managers need to support progression and, if an application for progression is not supported by the manager, the manager must set out why the criteria have not been met and discuss how the officer can improve to be successful in the future, p 1734.

15. The policy sets out the criteria managers will use to assess candidates for progression, p1736. The criteria include "Clearly demonstrating the competencies required in the role as part of their day to day work", as well as the ability to resolve complex situations and working with minimum supervision, including covering for the manager during a period of absence . The criteria also mention working on a project, or having been involved in business improvement, or supporting the delivery of ad hoc training.

16. In September 2017 Ms James-Ford told the Claimant that she would not support his application for progression on that occasion. In the notes of a 1-2-1 meeting on 8 September 2017, Ms James-Ford recommended that the Claimant should put together a customer service project and that he should consider mentoring. She noted that progression would be considered "next time". On 11 October 2017, at a further 1-2-1 meeting, Ms James-Ford set out agreed actions for the Claimant under several headings. Under the headings, "Competencies – Personal Responsibility – Customer Focus", Ms James-Ford, recorded that the Claimant's agreed actions were, "understands that responsibility always comes back to the housing officer ... to manage customer expectations. Not over promising. Re-evaluate approach and soften communication with customers and colleagues. To ask Caroline for support

when needed, for example proofing letters or emails when unsure of tone..." page 687.

17. Mr James-Ford told the Tribunal that, typically, leading on a project was required to progress to level 4. She told the Tribunal that, while the Claimant had jointly run a Moneywise project in 2017, the other member of staff who had shared the project was outstanding in her performance in this regard and had also led on resolving a very complicated case. Ms James-Ford said that sharing this project, therefore, was not sufficient for the Claimant to demonstrate that he met the requirement for progression.

18. The other member of staff with whom the Claimant worked on this project was Pia Attard Brown, page 1754. Ms Attard Brown is mixed race, white and black Caribbean.

19. Ms James-Ford supported Ms Attard Brown's application for progression in about September 2017.

20. Ms James-Ford told the Tribunal that she had supported the following members of the First Respondent's staff for progression: Pia Attard Brown, whose race is mixed race, white and black Caribbean; Mariam Adamson, who is black - black British African; Keira Curtis-Howard, who is mixed race, multi ethnic group and white.

21. She told the Tribunal that she had supported Debi Gardiner, who is mixed race, white and black Caribbean, to progress within the First Respondent. Ms Gardiner is now a Housing Delivery Manager. Ms James-Ford also said that she had mentored and supported Siobhan Minter, who is black - black British African, to apply for numerous roles, including Housing Operations Manager.

22. By contrast, Ms James-Ford told the Tribunal that she had turned down Alex Green, a housing officer who is white, for progression when he initially requested it.

23. The Claimant told the Tribunal that Ms James-Ford had supported Stephen Golden's progression and promotion to a higher role. Mr Golden is white. Ms James-Ford told the Tribunal that Mr Golden passed his probation as a housing officer, but applied for other roles in other teams, which he was entitled to do. He left Ms James-Ford's team before progression was considered.

24. On 16 November 2017 Ms James-Ford assessed the Claimant as performing well in his On-Track appraisal on 16 November 2017.

25. In 2017, the Claimant's Key Performance indicators were good or very good, p1749. His KPIs were some of the best amongst the housing officer cohort in the Sussex Place office. Owen Wiggins', who was a white male housing officer, were better. Ms Attard-Brown's were worse than the Claimant's.

26. Ms James-Ford supported Mr Wiggins for progression around September 2017.

27. Ms James-Ford told the Tribunal that, while KPIs were a good indicator of performance, meeting the core competencies of the job, like communication, were more important for progression. She also explained that, while a KPI such as "repairs and maintenance" might be good, if a housing officer had a poor relationship with the contractors as a result of pushing for repairs, their core competencies would not be good.

28. Ms James-Ford did not support the Claimant for progression in February 2018. She also told the Tribunal that she started to produce action plans at this stage for the Claimant – pages 1331 – 1357.

29. The Claimant disputed that Ms James-Ford had produced these documents from February 2018, or had discussed them with him in 1-2-1 meetings thereafter. The Claimant did accept, however, that they were provided to him with a number of other documents in response to his DSAR request in summer 2018.

30. The Tribunal concluded that Ms James-Ford had indeed created these documents by Spring 2018. The 3 action plan documents, 3a – 3c, appeared to be different iterations of the action plan, dealing with different areas for development, with relevant expectations and targets discussed, at different times. The documents appeared to have been produced at different times as 2018 progressed, because, for example, the first document recorded issues arising out of the meeting of 14 February 2018. Action plans 3b and 3c dealt with the Claimant's relationship with his team and how this could be improved. They also recorded that, in April 2018, the Claimant had twice been warned about not mixing his housing officer role with his own personal situation as a tenant of the First Respondent.

31. On 14 February 2018 Caroline James-Ford met with the Claimant to discuss his progression to a higher salary band. The Claimant had been disappointed by Ms James-Ford's decision not to support his progression. There was a dispute of fact about what the Claimant said to the Ms James-Ford in the meeting. The Claimant contended that he had said, in response to her question about what he was thinking, "You don't want to know what I am thinking right now". Ms James-Ford told the Tribunal that the Claimant had said, "I can't even tell you what I am thinking **of you** right now" (emphasis supplied).

32. There was also a dispute of fact about whether the Claimant was aggressive in the way he said these words. The Claimant told the Tribunal that he was assertive in his manner and that Ms James for had stereotyped him as a black man by later describing him as "aggressive", when he had merely been assertive.

33. Ms James-Ford was asked to describe the Claimant's manner at the time he used the words. She told the Tribunal that the meeting was held in a very small meeting room and that the Claimant's body language was intense, and he was breathing very loudly over the table. She said that the Claimant was gesticulating and saying, "You don't want to know what I am thinking about you at the moment". She said that, to her, as the recipient of that behaviour, it felt aggressive.

34. The Tribunal accepted Ms James-Ford's evidence that she had felt that the Claimant's behaviour was aggressive towards her, based on the way in which he was behaving in that particular meeting.

35. The Respondent's disciplinary policy, page 1642, provides, "Informal discussions. Where there are initial issues of misconduct a manager will usually discuss this informally with you on the first occasion, to give you the opportunity to improve. You should fully engage with your manager and clearly demonstrate immediate improvement."

36. Ms James-Ford met the Claimant again on 19 February 2018, when they discussed the issue of the Claimant's pay progression once more. Ms James-Ford told the Claimant that his comment in the meeting on 14 February 2018 was unprofessional and not the behaviour of a high performing housing officer. On 20 February 2018, Ms James-Ford emailed the Claimant, page 311, attaching an action plan for the Claimant's work. She also said, "We also discussed the importance of behaving professionally at all times even when disappointed with a management decision, and that aggressive behaviour towards any members of staff is unacceptable and may result in disciplinary action. You dispute the wording of what you said when we met last week, and were unable to provide an exact quote. Regardless of the wording your manner was aggressive and therefore must not be repeated, please consider our conversation yesterday as an informal warning." Page 312.

37. The Claimant told the Tribunal that he had subsequently made a Subject Access Request to establish whether that warning had been recorded on his personnel file or other records. He said that he discovered that it had not, albeit that a copy of Ms James-Ford's email on 20 February 2020, page 312, was provided as one of the documents on the DSAR response.

38. The Claimant alleged that Ms James-Ford did not follow any disciplinary process in giving him this warning.

39. The Tribunal considered that an "informal discussion" within the meaning of the First Respondent's disciplinary policy was another term for an informal warning. Otherwise, there would have been no provision for informal warnings in the policy. It was quite clear from the wording of the policy that an "informal discussion" was a serious matter which required immediate improvement thereafter – it was in the nature of a warning. On the Respondent's disciplinary policy, however, there was no requirement to follow any particular process when having an "informal discussion". Nor was there any requirement that an informal warning/discussion be documented in any particular manner.

40. In Ms James-Ford's email of 20 February 2018, she recorded that the Claimant had told her, on 19 February 2018, that he would take a grievance against her if they were unable to reach a resolution of issues. Ms James-Ford attached a link to the grievance procedure for the Claimant to use if he felt it was appropriate.

41. In addition, Ms James-Ford referred to the Claimant having told her that he had not been sleeping. She said that he could access support through the First

Respondent's Simply Health providers or a free counselling service the First Respondent also provided. Ms James-Ford included the web link for all those services.

42. On 9 May 2018, the Claimant and Ms James-Ford met again, pages 697-698. They had discussions about issues which had arisen, including the Claimant mixing his housing officer role and his position as a tenant of the First Respondent, as well as the Claimant having failed to arrange safety certificates for an empty property, delaying its availability.

43. On 21 May 2018 the Claimant and Ms James-Ford had another meeting. The Claimant, by this time, was writing up very lengthy notes of the meetings afterwards, for his own use, pages 334-338. From the Claimant's own notes, the Claimant repeatedly questioned Ms James-Ford about why he had not been supported for progression in September 2017. Ms James-Ford told the Claimant that she wanted to make sure the Claimant passed his progression. She asked the Claimant whether he would like to move to another team and discussed this with him. The Claimant declined. Ms James-Ford asked the Claimant whether he wanted a new manager; she told him to let her know if he did.

44. There was a further meeting between the Claimant and Ms James-Ford on 26 June 2018, pages 347-358. From the Claimant's notes of this meeting, Ms James-Ford told him that she was planning to meet him the following Monday, to discuss performance concerns with him. She said that this would involve meeting regularly, p348. Ms James-Ford discussed the Claimant's relationship with other team members in some detail.

45. The Claimant's notes record that he told Ms James-Ford that he had had a mental breakdown after not being supported for progression in February 2018. The Claimant told Ms James-Ford that he had seen his GP twice and was waiting for a referral. Ms James-Ford encouraged the Claimant to ask for help when he needed it and told him that he could talk to her, page 352. The Claimant responded that he had not had mental health issues before and did not intend to do so again.

46. In her notes of that meeting, p 702, in a section entitled, "Mental Health and wellbeing. Recent behaviour seems out of character. Says that manager has affected health and well-being. What support is needed?", Ms James recorded, "CJF outlined the employee assistance contact number and information. IA (the Claimant) confirmed that he has this information already. IA also confirmed that he has spoken to his GP about his mental health and is waiting for a referral. CJF explained that IA doesn't have to talk in detail to her regarding his mental health if he does not feel comfortable but that he should talk to someone and must make CJF aware of support or adjustments he needs."

47. From the Claimant's notes of that meeting, Ms James-Ford was pausing to make notes on the computer of their discussions. She asked the Claimant whether he wanted to read them as she did so, and he responded by saying that "as per our agreement I would read the notes at the end of the meeting."

48. In the meeting, Ms James-Ford raised some issues which had arisen with the Claimant's customer relations, including recording that he had conducted an annual visit when the tenant herself had not been at the property.

49. On 28 June 2019 Ms James-Ford sent the Claimant all the notes of their previous 1-2-1 meetings, page 359.

50. The Claimant made a subject access request on 6 June 2018, to which the Respondent responded on 6 July, page 360.

51. On 11 July 2018 Ms James-Ford and the Claimant met again, pages 680-685. Ms James-Ford sent the Claimant her notes of their meeting the same day, p680. Ms James-Ford addressed complaints from other members of staff that the Claimant had recorded meetings on his phone without permission, page 681. The Claimant refused to discuss the subject, saying it was inappropriate to do so. Ms James-Ford made clear, in any event, he should not record meetings. Ms James-Ford also asked the Claimant about him having complained to other team members about his manager, and him saying that he felt alienated and that there was a divide in the team. Ms James-Ford asked the Claimant whether he would like to move teams, or whether mediation would help. The Claimant declined both.

52. Ms James-Ford asked the Claimant why he was falling asleep in meetings. The Claimant assured Ms James-Ford that there was no underlying condition which was causing his sleeping at work. He said that the room was stuffy and airless, and that other people fell asleep too. Ms James-Ford remarked that she had never seen anyone else falling asleep at work, p682.

53. There was a further meeting between Ms James-Ford and the Claimant on 18 July 2018, following which she sent the Claimant the notes of their meeting, pp 381 and 678.

54. In their 18 July meeting, the Claimant said that he had read through the notes of their previous meetings and that there were vast amounts with which he did not agree. He then went through the issues again, saying, for example, that Ms James-Ford was being picky by raising the Claimant falling asleep at work. He said that there should be a disciplinary process in relation to the Claimant being called "aggressive" (in February 2018). Ms James-Ford said that there would be no disciplinary process in this regard and that there would be no formal record of the warning.

55. At this meeting, the Claimant told Ms James-Ford that he was becoming a union representative. Ms James-Ford's notes of the meeting recorded that she told him that she was happy for him to do this and that she approved his leave for training. Ms James-Ford also asked the Claimant to give notice of any large amounts of time he was likely to be away from the phone, so that she could arrange cover, page 384

56. The Claimant confirmed in evidence at the Tribunal that Ms James-Ford had, indeed, been apparently happy and supportive about him becoming a union representative.

57. It was not in dispute that around this time, Ms James-Ford and Ms Thomson approached the UNISON Trade Union convenor, Chris Milson, to ask whether there was any barrier to someone who was being performance managed becoming a union representative. Mr Milson confirmed that there was not. However, Mr Milson then told the Claimant that he had been approached and had deduced that it was the Claimant who was undergoing performance management.

58. Ms James-Ford and Ms Thomson told the Tribunal that they had first approached HR to enquire about whether performance management was a bar to someone becoming a union representative. HR had not been able to answer the question and suggested they speak to Mr Milson, who was known to be very helpful. Ms James-Ford and Ms Thomson agreed at in evidence at the Tribunal that, in hindsight, they should not have asked Mr Milson the question, as it potentially breached the Claimant's confidentiality.

59. On 8 August 2018, the Claimant was invited to a meeting with Ms James-Ford to discuss his September 2018 progression application. Ms James-Ford said, "We need to get that project off the ground!", p677. The Claimant was on holiday for 3 weeks in August and returned on 28 August, but did not reply to Ms James-Ford until 31 August 2018, and only partially completed the relevant form, p428. The Claimant had not undertaken a project in 2018 for the purposes of this progression, nor had he provided Ms James-Ford with his supporting evidence for progression.

60. In the period 2017 – 2018 the Claimant underwent a series of appraisals in which his performance was assessed. On 16 November 2017 his appraisals assessed him as 'Performing well', p1375. On 24 May 2018 he was assessed as 'Developing', page 1392. On 8 November 2018 his appraisal recorded him as 'Meeting requirements' p1408.

61. On 15 November 2018 at 08.17, page 450, the Claimant emailed Ms James-Ford saying that said he would be unable to complete his work that week "due to the sign up". Ms James-Ford replied saying, with regard to the sign up, "… you were offered help to cover it numerous times and so it should not be reason for you not to complete your weekly rent accounts." Ms James-Ford said that a number of the Claimant's tasks had been outstanding for some time and said that none of them were surprises and should have been planned in advance. Ms James-Ford nevertheless offered to help the Claimant plan his work. At 12.56 that day, the Claimant replied further, now saying that he had told Ms James-Ford that trade union training would have an impact on his job. He also said that he was unable to discuss his workload with Ms James-Ford because of their current relationship, p449.

62. In about November 2018 Caroline James-Ford and Emily Thomson contacted Jill Cook, to ask whom they should meet in HR regarding staff who were union representatives. Ms Cook arranged to meet them on 22 November 2018. At the meeting, Mses James-Ford and Thomson explained that they had performance concerns about the Claimant and wanted to know how to manage his union responsibilities alongside his normal job role. Ms Cook told them that, under

the First Respondent's agreement with UNISON, union representatives were given reasonable time off for their duties and training but that the expectation was that the employee and the organisation worked together to ensure their work was not impacted. She said that union representatives needed to explain briefly to their manager why the relevant time off was required and to record all time off for union activities on the HR system.

63. On 27 November 2018, the Claimant met with Ms James-Ford, pp 1330 and 456. This appears to have been a very unproductive meeting, with Ms James-Ford raising issues with the Claimant and the Claimant responding that he should not be penalised for taking time off as a union representative. Ms James-Ford started to read out the role profile of a Housing Officer and the Claimant objected to this, saying that he was performing well. Ms James-Ford did not agree.

64. The next day, 28 November 2018, Ms James-Ford sent the Claimant an email setting out the parts of the core competencies for a housing officer on which the Claimant needed to improve, p460-467.

65. The Claimant responded on 7 December 2018, p471, saying that Ms James-Ford had not allowed him to respond in the meeting on 27 November 2018. He said, "...I will respectively not allow myself to be bullied, treated unfairly or have accusations on multiple occasions thrown at me only to be proven false...".

66. On 12 December 2018, page 664, Ms James-Ford responded yet further, saying that there had been some misunderstanding, as she had explained that the second column on the "expectations" document was for the Claimant to input his own experiences and not for him to refute the examples Ms Ford had given of her expectations of him. She said that she would meet the Claimant the following week, with an independent person present.

67. Ms James-Ford told the Tribunal that she decided that matters had reached a stage with the Claimant when a formal disciplinary process was required, as he was resisting management. On 10 December 2018, an HR adviser, Lydia Brandon, sent an email to Ms James-Ford and Emily Thomson, attaching the Respondent's disciplinary guides and advising Ms James-Ford on how to approach a disciplinary process with the Claimant, page 474.

68. Ms James-Ford met with the Claimant on 18 December 2018. She asked Alvin Inboli, a Housing Operations Manager based in a different location, Bruce Kenrick House, London, N1, to attend as an independent observer. From the Claimant's notes of that meeting, Ms James-Ford started the meeting by saying that she wanted to improve their relationship and asked the Claimant to define his job role and what their work relationship should be. The Claimant responded by blaming their poor relationship on Ms James-Ford failing to support his progression. He said he had been forced to attend performance management/performance support meetings. The Claimant also recorded that Ms James-Ford said, for the first time, that the meetings had been about his conduct and not his performance. The Claimant's notes record that, at the end of the meeting, Ms James-Ford said that she would not be adopting an informal

approach to the Claimant's conduct in future, but would be following "the formal route", page 483.

69. At the meeting, the Claimant continued, as he had done previously, to challenge Ms James-Ford's view of his performance. As at previous meetings in 2018, the Claimant did not accept that the points which Ms James-Ford raised about his performance were valid and he reiterated his complaints about not being supported for progression.

70. The Claimant told the Tribunal that he had a mental health breakdown following his meeting with Ms James-Ford on 14 February 2018.

71. The Claimant did not produce his GP records, despite an order from the Tribunal requiring him to do so. He said that his GP had told him that the GP would draft a report for him instead.

72. The Claimant produced a medical report dated 20 September 2019, prepared by Dr Dhanjal, GP. The report stated that the Claimant had not presented nor been referred for any mental health problems prior to May 2018. The report said that the Claimant sought a referral to mental health services on 29 May 2018 when he presented to the GP with work related stress. Dr Dhanjal's report went on to say that on 28 January 2019 the Claimant again presented to the GP with "further stress related to his work leading to depressive symptoms" He was again referred to mental health services for support on 29 January 2019". The Claimant again presented with symptoms of low mood and stress on 28 February 2019. He was taken on by the local psychology service and, after a period on the waiting list, was seen for 6 sessions of CBT which ended on 3 July 2019.

73. The Claimant's GP produced a further report dated 23 July 2020, p1446. This stated that the Claimant presented to the surgery on 29 May 2018, reporting symptoms of stress. The GP reported that, after the completed his CBT course in July 2019, he felt he needed further psychological support in the form of counselling. The service required a 3-month gap in treatment and the Claimant was put back on a waiting list for counselling in October 2019. The GP report recorded that the Claimant was certified as unfit for work due to stress, anxiety and depression from 28 February 2019 to 11 March 2019 and again from 17 June 2019 to 27 May 2020.

74. The Claimant produced a disability impact statement for the Tribunal, p220. In it, the Claimant told the Tribunal that he has suffered from poor sleep, anxiety, loss of concentration and a lack of interest in activities since February 2018. He said that he had lost enjoyment in singing and that colleagues would notice that he no longer sang around the office. He said that he was so tired that he would fall asleep in the office. The Claimant highlighted that he told Ms James-Ford in numerous meetings that he was suffering mental health issues and symptoms of stress. For example, on 19 February 2018, the Claimant said that he had not been sleeping as a result of being turned down for progression. In May, June and July 2018, he told Ms James-Ford that he had had a mental breakdown, and in June 2018 he explained that he had spoken to his GP about

mental health issues and was waiting for a referral. He said that, in a meeting on 28 November 2018 with Emily Thomson, he had broken down.

75. The Claimant was referred to Occupational Health in April 2018 in relation to a physical injury he had suffered at work. The OH health report dated 19 April 2018 reported that the Claimant was in good general health, page 320.

76. During the Claimant's grievance meeting with Emily Thomson, the Claimant confirmed that he had been given the information regarding Simply Health and the employee support line, but said that this was of no value because Ms James-Ford was the cause of his illness and she was not prepared to change her behaviour. He said that Ms James-Ford had not offered to refer him to OH. He went on to say that that there was a perception that HR would side with the manager and he didn't feel confident that any approach he made to the service offered would be confidential, pages 629-630.

77. Despite Ms James-Ford having told the Claimant, in the meeting of 18 December 2018, that she would be following the formal route thenceforth in relation to his conduct, Ms James-Ford did not send the Claimant any notes of their meeting, nor did she send him written notification that a formal disciplinary process had commenced. In a Human Resources email of advice to her dated 10 December 2018, HR advised Ms James-Ford that she should inform the Claimant that she was formally investigating via the disciplinary route before she invited him to a meeting, page 474.

78. On 24 January 2019 'X', a female surveyor employed by the Respondent, complained in writing to Kerrie, a manager in the Sussex Place office, that, on 21 January that year, the Claimant had walked up her behind her in the office, put his arms around her waist, grabbed her tightly, picked her up and twirled her around 360 degrees. She said that she was embarrassed, angry, and taken aback. She had told him that it was not appropriate and he had apologised but, on the same day, the Claimant had stuck his leg out in front of X as she was walking back to her cubicle, meaning she would have to step over his leg to get into the cubicle. The Claimant appeared to find this funny, but X did not, p487-488.

79. The Claimant was suspended on 25 January 2019, p497, 498-501. This was confirmed in writing on the same day, p499. The letter said that the allegations would be confirmed in due course, but that the general nature of the allegations was "potential indecent behaviour towards another member of staff".

80. On 25 January 2018 Y told Kerrie that the Claimant had also picked her up.

81. Ms James-Ford conducted an investigation into the allegation.

82. She interviewed X on 25 January 2019, p1188. X confirmed that she had been talking with a colleague, Y, on 21 January 2019, when the Claimant had stood behind her, put his arm around her waist on top of her stomach, pulled her tightly in to his body and spun her round. X said that this made her feel violated and that she had felt the Claimant's body tight against her. She said it felt like a violation. X explained that, later, she had been joking with a friend, NS, about

his leg being in the way and that the Claimant had overheard the conversation and put his own leg in X's path, so that she would have to step over it. X said that she did not feel that he was coming on to her, p1188-1189.

83. Ms James-Ford also interviewed Kerrie McKinley, who confirmed that X had spoken to her about the incident with the Claimant on the day it happened, p1190-1191

84. Ms James-Ford spoke to Y on 28 January 2019, p 1193—1194. Y told Ms James-Ford that the Claimant had "done the lifting up thing" to her, that she had told him not to do it because she had a bad back and had been angry with him.

85. Ms James-Ford sent the notes of the meetings to the witnesses, p1595-1596. There was a dispute of fact about whether these witnesses confirmed the content of the statements sent to them. Ms James-Ford's email to Y said, "If there is anything else you remember and want to add, please let me know. Y responded, "I have had the opportunity to review. Please proceed."

86. X's response to Ms James-Ford email was, "I just wanted to go over it and read it alone to make sure I was happy with everything I discussed, we did say I agree I would have a chance to do this so thank you really appreciated."

87. The Tribunal concluded, from the responses, that X and Y were each happy with the statements sent to them. Neither said they wanted to change any of the statement and both expressed satisfaction.

88. Ms James-Ford did not interview the Claimant during her investigation.

89. Ms James-Ford produced an investigation report at the end of January 2019, p502-515. The report not only addressed gross misconduct allegations of indecent behaviour towards other staff, in that the Claimant had bodily lifted X and Y, but also "persistent failure to carry out management instructions", and misconduct allegations in relation to "failure to comply with policy and procedure", "disruption to other employees from carrying out their duties", "failure to carry out role duties in a timely manner following a challenging interaction with a resident" and "inappropriate communication with other staff and customers, due to failure to act in a professional and courteous manner".

90. By letter of 1 February 2019, the Claimant was invited to a disciplinary hearing, to be held on 7 February, pp516-518.

91. Unsurprisingly, the Claimant pointed out that he had not been interviewed as part of the investigation. On 5 February 2019, Jill Cook emailed the Claimant, converting the disciplinary hearing into an investigatory meeting, p525.

92. At that meeting, Ms James-Ford asked the Claimant about the incidents with X and Y, p533-536. The Claimant agreed that he had hugged X from behind and twirled X round. He also agreed that he had hugged Y from behind and that she had complained about him hurting her back.

93. Ms James-Ford failed to interview the Claimant about the other allegations in the investigation report.

94. Ms James-Ford updated her report following the interview with the Claimant and invited the Claimant to a disciplinary hearing scheduled for 21 February 2019, p544-560. This was postponed to 4 March 2019 to facilitate the Claimant's requests for IT access, pp 580-81.

95. Ms James-Ford told the Tribunal that the fact that she had failed to invite the Claimant to an investigation meeting was pure oversight on her part. She had not been involved in a disciplinary process previously and was following HR advice. Ms James-Ford said that she also assumed that a separate meeting with the Claimant was not necessary. She said that she now realised that she ought also to have given him a chance to respond to the other allegations as part of the investigation process, but, at the time, had believed that she had discussed them with him in 1-2-1s and included his responses in the investigation report.

96. On 1 March 2019, the Claimant presented a 13-page grievance entitled "Formal grievance against Ms Caroline James-Ford", p591-603. The Claimant set out 22 allegations, including "indirect racial discrimination". Towards the end, the Clamant included a section, "Additional concerns/whistleblowing". In that section, he alleged that Ms James-Ford had failed to book alternative accommodation for a tenant who was concerned for their safety and that Ms James-Ford had then blamed the failure on another colleague, Z, and had failed in her duty of care to the tenant, p601.

97. The Claimant's complaints also included a section entitled, "Targeting me for becoming a union rep", p595, which comprised 6 separate allegations. One of these said that "Ms James-Ford and Mrs Emily Thomson asked Chris Milson about whether someone on 'performance management' was allowed to train to become a union rep.'"

98. The Respondent's Grievance Policy provides, at p1630, "If you are subject to disciplinary action yourself, then any grievance you have relating to the disciplinary issues will usually be heard during the disciplinary process", p1630.

99. In light of the Claimant's grievance, the disciplinary meeting did not proceed, and Emily Thomson invited the Claimant to a grievance meeting on 14 March 2019, p623-646.

100. Ms Thomson was Regional Head of Housing and was Ms James-Ford's line manager. Jill Cook was cross examined about whether Ms Thomson should have conducted the grievance, given that she was mentioned in it. Ms Cook said that the Claimant's grievance was about Caroline James-Ford and that nobody had taken it as a grievance against Emily Thomson.

101. Sue Sergeant was also cross examined about the choice of Emily Thomson to chair the grievance meeting. She told the Tribunal that a grievance about a manager would normally be dealt with by that manager's line manager, because this "keeps accountability in the right place".

102. The Claimant gave a list of people to the Tribunal who he had asked to be interviewed as part of the grievance process, but who were not. These were: Benedict, Sonia Grant, Siobhan Minter, Daniel Ogun, Debi Gardiner, Peter Beale, Jerome Otto, Idris Razaq and Laura Moss. The Tribunal found that these people were not listed as potential witnesses in the Claimant's grievance.

103. Ms Thomson met with Caroline James-Ford, Y, Yusuf Yawe, Mariam Adamson, Ava Blake, Kira Curtis Howard, Lisa Green and Lisha Woodstock. In the Claimant's grievance, he had listed those individuals as possible witnesses, as well as Funmi Omoniyi, Siobhan Minter and Clare Hingley, who was a Planner employed by Wates, a construction/property services firm.

104. Ms Thomson told the Tribunal that she decided to interview all the individuals the Claimant had mentioned, barring Funmi, Siobhan and Clare. She said that, due to the need to keep the matter confidential, she wanted to ensure only permanent members of staff were involved. Funmi was not interviewed because she was a temporary member of staff and Clare was not interviewed because she was employed by Wates, a contractor. Ms Thomson said that she did not interview Siobhan because she was on long term leave at the time and Ms Thomson she was able to use other witnesses to cover the sections relevant to her evidence.

105. From the notes of the grievance hearing, p623 the Claimant mentioned Benedict and Peter Beale, p629, Debi Gardner, p636, and Tania Sullivan, p637, during his grievance hearing, but he did not specifically ask for them to be interviewed.

106. In cross examination, Ms Thomson was only challenged about failing to interview Funmi Omoniyi, Siobhan Minter and Clare Hingley. There was no challenge about her failure to interview other witnesses.

107. The Claimant also alleged that Ms Thomson should not have chaired the grievance hearing as well as the disciplinary hearing. Ms Thomson told the Tribunal that she discussed this with HR and it was felt that, due to the complexity of the case and the volume of information involved, it was beneficial for her to continue with the disciplinary as she was familiar with the facts and would be able to keep the grievance and disciplinary processes separate, because she was aware of what was discussed in each of the processes.

108. Debbie Smith (Head of Region) was asked to sit in the disciplinary meeting as an independent manager, to address any concerns the Claimant had about Ms Thomson's impartiality. Prior to attending the disciplinary meeting, Ms Smith had no knowledge of the Claimant. In the event, Ms Thomson told the Tribunal that Debbie Smith agreed with the outcome of the disciplinary hearing.

109. The grievance hearing proceeded on 14 March 2019. During the hearing, the Claimant said that he would provide further information in support of his grievance. Ms Thomson told the Claimant that she intended to give her outcome in 10 working days; and the Claimant confirmed that he would provide the further information promptly.

110. Ms Thomson provided her findings on the grievance in a report dated 11 April 2019, 20 working days after the grievance hearing, p704-711. The Claimant sent his additional documents to Ms Thomson the same day. She did not consider them in her grievance outcome. Three elements of the grievance were upheld. These were:

a. That Ms James-Ford had not always followed correct procedures in relation to the First Respondents sickness and absence policy and in relation to the Claimant's flexible working requests, although Ms James-Ford had taken appropriate steps to check that the Claimant was well enough to return to work and had discussed the flexible working request informally and permitted him to work flexibly as requested;

b. There was no up-to-date stress assessment for the Claimant's team as it had due to be reviewed in November 2018, nor was there an individual stress assessment for the Claimant; and

c. Ms James-Ford had engaged in conversation with another colleague while the Claimant was chairing a team meeting.

111. Ms Thomson did not uphold the Claimant's other grievances. Ms Thomson told the Tribunal that she did later consider the additional information after her grievance outcome, but decided it would not have changed her decision, page 884-885.

112. The Claimant appealed against the grievance outcome on 17 April 2019, p718.

113. Ms Thomson did not deal with the Claimant's whistleblowing allegations in her grievance outcome letter. She told the Tribunal that it was a confidential matter relating to Z's employment and that she had previously addressed all of these concerns directly with Z, through a formal grievance process in July 2018.

114. Other witnesses for the Respondents told the Tribunal that the First Respondent's whistleblowing process is separate to, and distinct from, its grievance process.

115. The grievance appeal hearing was held on 14 May 2019 by Sue Sargent (Director of Housing Management).

116. On 11 June 2019, Ms Sergeant dismissed the appeal, pages 991-998. In her outcome, Ms Sergeant stated that the Claimant's appeal in relation to neglect and duty of care were mostly repeated points already raised at the grievance meeting. Ms Sergeant did not agree that Ms Thomson should not have allowed the Claimant to return to work, but should have conducted a risk assessment following his distress in the meeting with her on 28 November 2018. Ms Sergeant said that this was because, unless the employee is signed off as unfit to work, or the individual is incapable of making a decision, it would typically be up to the individual employee to determine whether they are fit to work.

117. Ms Sergeant found that the Claimant had not raised the issue of a risk assessment with Ms Thomson or Ms James-Ford, or anyone else. Nevertheless, she said that the issue of whether a stress assessment should have been completed had already been considered by Ms Thomson and upheld in the original grievance outcome.

118. Ms Sergeant said that she had reviewed the Claimant's On-Track documents. She said that the role of HR was to review trends from On-Track documents, and training requirements, but not to intervene at individual level. Ms Sergeant commented that it was possible for the appraiser and the person being appraised to disagree. She assured the Claimant that Ms James-Ford was taking advice and working closely with an HR Advisor in relation to the Claimant's comments on his On-Track documents. She concluded that the Claimant's comments had not been ignored and that the On-Track process had worked in the way that it was supposed to. She expressed the view that the appraisal was balanced, noting where the Claimant had been working well, as well as the areas where he was doing not so well, with a plan to improve.

119. Ms Sergeant addressed the Claimant's allegation that Ms James-Ford had falsified records in relation to the performance management process. She said that she felt that the Claimant had been contradictory in his answers when she had questioned him about this. On the one hand, he was saying that the On-Track documents and action plan had been falsified (on the basis that he had not seen them before), and, on the other, he said that he had received the action plans, but that they were delayed. Ms Sergeant said that, having reviewed the documents, she had concluded that the Claimant had seen the action plans and support plans. They referred to improving behaviours and improving performance.

120. She noted an email from Ms James-Ford to the Claimant dated 21 February 2018, entitled "progression/performance support meeting", pages 311-313. This mentioned monthly 1-2-1s and the Claimant's progress against specific action points to be a high performing housing officer. Ms Sergeant concluded that the Claimant was aware of the performance issues and that he had had conversations with Ms James-Ford about the standards required and how they might be achieved. However, Ms Sergeant concluded that Ms James-Ford's communication could have been clearer in relation to underperformance. Ms Sergeant noted that Ms James-Ford had used the phrase 'support plan' interchangeably with 'performance'. He said that she could understand how the Claimant may have misunderstood the process as one of support, and not necessarily a performance issue.

121. The Claimant had appealed on the basis that the grievance had not been held in line with Acas guidelines and that he had insufficient time to address the initial grievance hearing. Ms Sergeant noted that the original grievance meeting lasted 5.5 hours. She said that he had had sufficient time to prepare and present his concerns, both at the initial hearing on 14 March 2019 and at the appeal hearing on 14 May 2019.

122. The Claimant had asserted, as part of his appeal, that he was not aware of the performance and behavioural issues that had been outlined as part of the

disciplinary case against him. Ms Sergeant said that the Claimant was aware of those issues through the On-Track process and 1-2-1 meetings, as well as action and support plans.

123. Ms Sergeant upheld the Claimant's grievance appeal in relation to the disciplinary allegations against him not being addressed in the disciplinary investigation meeting, which had focused on his conduct towards X. However, Ms Sergeant said that this had not affected the grievance outcome because the Claimant had had ample opportunity to prepare and present his evidence on these matters.

124. During the grievance appeal meeting, the Claimant asked that a grievance he had raised with Ms James-Ford, about Rob Manning treating him less favourably, be addressed. On 16 May 2019, the Claimant provided further details of his complaint, to Sarah Skipp, an HR adviser, p913. He said that he he had previously raised the complaint with Ms James-Ford in January 2019. The same day, Ms Skipp spoke to Ms James-Ford, who recalled the Claimant raising the matter, and said that she had spoken to Mr Manning, and agreed to provide a response to the Claimant, pages 912-919.

125. Ms James-Ford wrote separately to the Claimant on about 31 May 2019, to relaying what she had been told by Rob Manning in response to the Claimant's complaint, pages 966-997.

126. Ms Sergeant addressed the Claimant's complaint about Rob Manning in her outcome letter. The Claimant's complaint was that Mr Manning deliberately did not authorise his work orders and that Caroline had colluded in this, and that this was an act of discrimination. Ms Sergeant said that, as a manager, Ms James-Ford had the authority to make and challenge decisions on the use and distribution of resources. She said that the same was true of Rob Manning; challenge to work orders was to be expected and was normal practice.

127. Ms Sergeant told the Tribunal that she considered that the Rob Manning matter had been dealt with and that it was not appropriate for a separate grievance meeting to be convened to deal with the issue. However, she reviewed the evidence as part of the appeal process. Having done so, Ms Sergeant told the Tribunal that she could see that the Claimant's work order referrals and applications had only been refused when supporting evidence, such as photographs, was missing, or where the Property Asset Management (PAM) team was able to make immediate recommendations for repairs. Ms Sergeant considered that this was to be expected.

128. Ms Sergeant did not specifically answer the issue of Ms Thomson's impartiality in her outcome letter, save to say that the Claimant had raised this along with numerous other matters. She the matters had already been discussed and that, where no further evidence had been submitted, she had not considered these again.

129. On 4 May 2019, the Claimant raised the whistleblowing allegations again through the Respondent's whistleblowing mailbox, p862.

130. Mr Andrew Nankivell (Director of Governance) appointed Mr Neil Coils to conduct an investigation. At the conclusion of the investigation, Mr Coils prepared a report, p1058-1119. The Claimant was informed that a report had been produced, but he was not told of its findings. Mr Nankivell simply informed the Claimant on 2 July 2019, p1120, that he was satisfied with the actions taken by Ms James-Ford regarding the matter.

131. On 20 May 2019, the Claimant was informed that the disciplinary hearing would take place on 28 May 2019, 921-923. That letter enclosed the original disciplinary letter setting out the charges, p516-518,

"Gross misconduct:

•Indecent behaviour towards another staff member, specifically picking up a colleague from behind without cause or permission.

•Persistent failure to carry out reasonable management instructions or insubordination.

Misconduct

•Failure to comply with policy and procedure regarding repairs, income collection and voids.

•Disruption to other employees carrying out their duties.

•Failure to positively engage in discussions regarding performance.

•Failure to carry out duties in a timely manner following a challenging interaction with resident.

Code of conduct:

•Failure to act in a professional and courteous manner due to inappropriate communication and conduct with other staff and customers.

132. Following a request from the Claimant, his IT account was reactivated so that he could access the material he needed for the disciplinary hearing. p944. Ms Thomson told the Tribunal that the Claimant as also given IT access on 31 May 2019, following the disciplinary hearing.

133. The hearing proceeded on 28 May 2019. The Claimant was accompanied by his union representative, p1410-1422.

134. Ms Thomson conducted the hearing, accompanied by Debbie Smith. Ms James-Ford presented the management case.

135. The Claimant declined to answer questions about the incident involving X, saying it would impact on his mental health.

136. At the conclusion of the meeting, Ms James-Ford was asked to make her closing points. The notes record that she said that she felt it was "a shame

that the situation had come this, that if IA had engaged in performance management rather than fighting it, the situation could have been resolved in a ore positive way". The Claimant objected to Ms James-Ford's use of the term "fighting". The meeting notes record that Ms Thomson said that perhaps language was becoming emotive and Ms James-Ford should not have used the word.

137. Ms James-Ford was cross examined about her use of the word "fighting" in this meeting. It was put to her that she was stereotyping the Claimant as an aggressive black man.

138. Ms James-Ford said that her use to the word "fighting" was a reference to the Claimant being obstructive, rather than engaging with the process.

139. During the Claimant's evidence to the Tribunal, he mentioned in passing that his wife had observed to him that he seemed to be fighting everything and that it was not like him.

140. During the disciplinary hearing, the Claimant did not suggest that his mental health had affected his conduct. There was no medical evidence produced to the Tribunal which suggested this, either.

141. In evidence to the Tribunal, the Claimant accepted that his conduct towards X could be construed as gross misconduct.

142. In cross examination, it was put to the Respondent witnesses that the appropriate outcome would have been a final written warning.

143. Ms Thomson dismissed the Claimant by letter of 18 June 2019, p1423-1431.

144. In that letter, Ms Thomson said that she had found that allegation 1 was an act of gross misconduct – Picking X up was inappropriate and unacceptable behaviour in the workplace. Ms Thomson said, "Not only is it unprofessional and clearly left [X] feeling that her dignity had been violated, but it could also be considered to be harassment of a female colleague."

145. Ms Thomson said that there were no mitigating circumstances; the Claimant had already picked up Y in a similar manner and she had complained to him, so he had been on notice that such behaviour was unwelcome. Ms Thomson also found that allegation 5 was proven and was an act of misconduct – the Claimant had failed to act in a professional and courteous manner. His emails were unnecessarily confrontational and challenging.

146. Ms Thomson did not uphold allegations 2-4 and 6 against the Claimant. She said that she considered that those were performance matters, although they also reflected on the Claimant's conduct in the workplace.

147. Ms Thompson said that allegation 1 was very serious and that such unprofessional behaviour could not be condoned in the workplace. She said that, given that the Claimant had repeated the behaviour after being told that it was not acceptable, summary dismissal was appropriate. She said that

allegation 5 displayed further inappropriate behaviour and reinforced her decision to dismiss.

148. The Claimant appealed against his dismissal on 25 June 2019, p1433-1435. A number of hearing dates were proposed for the Claimant and his representative to attend in the period July to November 2019.

149. The appeal hearing took place on 19 November 2019 before Mr Jake Brodetsky (Joint Venture Partnership Director). The Claimant emailed on 28 October 2019 to say that he would not attend a 'Kangaroo court', p1555.

150. The appeal was dismissed by letter dated 28 November 2019, p1605-1609.

151. The Claimant made a Subject Access Request ("SAR") on 19 March 2019, p737. He made various refinements of the searches he required, pp 647-648, 1031.

152. On 4 April 2019 Lamin Ceesay, from the Respondent's Employee Resources function, wrote to the Claimant, saying that the request was complex and that the response date was extended until 3 June 2019, p744. The First Respondent provided the SAR documents to the Claimant in tranches electronically on 29 May 2019 and 16 June 2019. The complete set of documents in hardcopy was available for the Claimant to collect on 20 June 2019. The Claimant did collect the documents on 21 June 2019, pp1032-1033.

153. In evidence, the Claimant agreed that the documents were available within the statutory time for a response to a DSAR.

154. The Claimant submitted several grievance letters on 18 June 2019 against several individuals and against the First Respondent, pp1004-1007, 1008-1010, 1011-1013, 1018-1021. More grievance letters were sent on 23 June 2019, pp1044-1045, 1046-1047, 1048, 1049.

155. Mr Nankivell divided the complaints into different categories, and told the Claimant this, pp1134-1138: Complaints which had been raised earlier and already dealt with; Complaints regarding dismissal which should be raised as an appeal against dismissal; Complaints which could be responded to immediately; and complaints which required consideration through the grievance procedure.

156. A grievance meeting was originally organised for 16 July 2019, p1139-1141. Shortly before it was due to start, the Claimant asked for the meeting to be rearranged because of his ill health. The meeting was rearranged for 26 July 2019, 1165-1167. The Claimant asked for that to be rescheduled because his chosen union representative was unavailable. The Respondent suggested an alternative representative could be arranged. The hearing proceeded on 26 July in the Claimant's absence, pp 1491-1494.

157. Mr Nankivell also met with Mr Lamin Ceesay, as he had responded to the SAR in question, p 1436.

158. Mr Nankivell provided a letter setting out the outcome of the grievance process on 8 August 2019, p1507-1511. The conclusion stated that the SAR had been dealt with appropriately: It had been responded to one day late, but that could be explained by the complexity of the request and the need to redact passages containing personal data of others; the delay was not intended to prejudice the Claimant - he had access to the IT systems on two occasions during the disciplinary process and all documents had been supplied to him before his appeal hearing. The Claimant did not appeal against this conclusion.

159. Mr Nankivell told the Tribunal that any delay in answering the DSAR was because of the volume of documents generated and the redactions required. He said that the First Respondent was only able to allocate one person to the task because of limited resources.

Law

Disability

160. By *s6 Equality Act 2010*, a person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

161. The burden of proof is on the Claimant to show that he or she satisfies this definition.

162. *Sch 1 para 12 EqA 2010* provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to be taken into account in this case is Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011).

163. Whether there is an impairment which has a substantial effect on normal day to day activities is to be assessed at the date of the alleged discriminatory act, *Cruickshanks v VAW Motorcrest Limited* [2002] ICR 729, EAT.

164. A mental impairment may be deduced from the severity of the symptoms complained of, but it is not the same as a reaction to stressful events, which is not an impairment. (*J v DLA Piper LLP* [2010] ICR 1052, para.42). The EAT in *Herry v Dudley Metropolitan Council* [2017] ICR 610 said:

"Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a

refusal to compromise (if these or similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an employment tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the employment tribunal to assess."

165. Section D of the *2011 Guidance* gives guidance on adverse effects on normal day to day activities.

166. D3 states that day-to-day activities are things people do on a regular basis, examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food.., travelling by various forms of transport.

167. D22 states that an impairment may not directly **prevent** someone from carrying out one or more normal day to day activities, but it may still have a substantial adverse long term effect on how he carries out those activities, for example because of the pain or fatigue suffered.

168. A substantial effect is one which is more than minor or trivial*, s 212(1) EqA 2010*. Section B of the Guidance addresses "substantial" adverse effect.

169. The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.

170. Where an impairment ceases to have an effect but that effect is likely to recur, it is to be treated as continuing, *Sch 1 para 2, EqA 2010.* "Likely" again means, "could well happen".

171. In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything occurring after that time is not relevant in assessing likelihood, Guidance para C4 and *Richmond Adult Community College v McDougall* [2008] ICR 431, CA.

Discrimination

172. By *s39(2)(c)&(d) Equality Act 2010*, an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.

Direct Discrimination.

173. Direct discrimination is defined in *s13(1) EqA 2010:*

"(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."

174. Race is a protected characteristic, *s4 EqA 2010.*

175. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

Victimisation

176. By *27 Eq A 2010*,

" (1) A person (A) victimises another person (B) if A subjects B to a detriment because—(*a*) B does a protected act, or (*b*) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—(*a*) bringing proceedings under this Act;(*b*) giving evidence or information in connection with proceedings under this A (*c*) doing any other thing for the purposes of or in connection with this Act; (*d*) making an allegation (whether or not express) that A or another person has contravened this Act."

177. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

178. There is no requirement for comparison in the same or nor materially different circumstances in the victimization provisions of the EqA 2010.

Causation

179. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

180. If the Tribunal is satisfied that the protected characteristic is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

181. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However,

to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC [2003] UKHL 11.*

Harassment

182. *s26 Eq A* provides "

(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."

183. In *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336 the EAT held that there are three elements of liability under the old provisions of *s.3A RRA 1976*: (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's race.

184. Element (iii) involves an inquiry into perpetrator's grounds for acting as he did. It is logically distinct from any issue which may arise for the purpose of element (ii) about whether he intended to produce the proscribed consequences.

185. This guidance is instructive in respect of harassment claims under *s26 EqA,* albeit under the EqA, the conduct must be for a reason which relates to a relevant protected characteristic, rather than on the grounds of race or sex. There is no requirement that harassment be "on the grounds of" the protected characteristic – *R(EOC) v Secretary of Statefor Trade and Industry* [2007] ICR 1234.

Burden of Proof

186. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

187. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

188. In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, and confirmed that the burden of proof does <u>not</u> simply shift where M proves a

difference in sex and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

Protected Disclosure

189. An employee who makes a "protected disclosure" is given protection against his employer subjecting him to a detriment, or dismissing him, by reason of having made such a protected disclosure.

190. Protected disclosure is defined in *s 43A ERA 1996*: "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

191. "Qualifying disclosures" are defined by s *43B ERA,* which provides,

"43B Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence had been, was being or was likely to be committed; or
(b) that a person had failed, was failing or was likely to fail to comply with a legal obligation;
…
(d) that the health and safety of any individual had been, was being or was likely to be endangered;
(f) that information tending to show any matter falling within any one of the preceding paragraphs had been, was being or was likely to be deliberately concealed."

192. The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions/allegations), *Cavendish Munro Professional Risk Management v Geldud* [2010] ICR [24] – [25]; *Kilraine v LB Wandsworth* [2016] IRLR 422. The disclosure must, considered in context, be sufficient to indicate the legal obligation in relation to which the Claimant believes that there has been or is likely to be non-compliance, *Fincham v HM Prison Service* EAT 19 December 2002, unrep; *Western Union Payment Services UK Limited v Anastasiou* EAT 21 February 2014, unrep.

193. Protection from being subjected to a detriment is afforded by s47B ERA 1996, which provides:

"47B Protected disclosures

A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

194. A "whistleblower" who has been subjected to a detriment by reason of having made protected disclosures may apply for compensation to an Employment Tribunal under section 48.

195. “Detriment” has the meaning explained by Lord Hope in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at 34.

Protected Disclosure Detriment – Causation

196. In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, “the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower." Per Elias J at para [45].

197. The making of a protected disclosure cannot shield an employee from disciplinary action, including dismissal, which is taken for reasons other than the fact that the employee has made a protected disclosure, *Bolton School v Evans* [2007] ICR 641.

Automatically Unfair Dismissal

198. A whistleblower who has been dismissed by reason of making a protected disclosure is regarded as having been automatically unfairly dismissed (see section 103A):

"103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

199. In order for an employee to have been automatically unfairly dismissed under *s103A ERA*, the reason or principal reason for dismissal must be that the Claimant had made one or more protected disclosures.

Trade Union Activities

200. By *s152 TULRCA 1992*, a dismissal is automatically unfair if the (principal) reason for it was that the employee—

“(a) was, or proposed to become, a member of an independent trade union, …

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, ….”

Ordinary Unfair Dismissal

201. By *s94 Employment Rights Act 1996,* an employee has the right not to be unfairly dismissed by his employer.

202. *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA.* Conduct is a potentially fair reason for dismissal.

203. If the employer shows that the reason for dismissal was misconduct, the Tribunal determines whether the dismissal was fair in accordance with the principles set out *British Home Stores Ltd v Burchell [*1980] ICR 303 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111:

a. Was the investigation into the allegation of misconduct within the band of reasonable responses?

b. Did the Respondent have a genuine belief in the Claimant's guilt?

c. Did the Respondent have reasonable grounds to sustain that belief?

d. Was the sanction of dismissal within the band of reasonable responses?

204. In *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439, the EAT set out the following guidance to Tribunals: "The starting point should always be the words of s.57(3) themselves; in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair; in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair." This guidance was approved by the Court of Appeal in *Post Office v Foley* [2000] IRLR 827 and the Supreme Court in *Reilly v Sandwell Metropolitan Borough Council* [2018] ICR 705.

Discrimination Arising from Disability

205. *s 15 EqA 2010* provides:

"(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".

Reasonable Adjustments

206. By *s39(5) EqA 2010* a duty to make adjustments applies to an employer. By *s21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

207. *s20 EqA 2010* provides: that there is a requirement on an employer, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

208. *Para 20, Sch 8 EqA 2010* provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage.

209. A failure to make a referral to occupational health cannot be a failure to make reasonable adjustments because it is not a 'step' to avoid a disadvantage, *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664.

Discussion and Decision

210. The Tribunal took into account all its findings of fact, and the relevant law, when reaching its decision. For clarity, it has stated its conclusion on individual allegations separately.

Race Discrimination. Race Harassment

211. Allegation 12.1 R2 sanctioned the Claimant with an informal warning for being aggressive in a meeting on 14 February 2018, without following a disciplinary process (R2 only).

212. The Tribunal has found that there was no disciplinary process prescribed in the Respondent's disciplinary process for an informal warning/discussion. Ms James-Ford therefore did not treat the Claimant less favourably than she would have treated a comparator who was given such an informal warning. The Tribunal has also accepted Ms James-Ford's evidence that she described the Claimant as aggressive because she genuinely felt he was being aggressive, because of way he was behaving. The Tribunal was satisfied that Ms James-Ford would have described a non-black male who was behaving in the same way as "aggressive". Again, she did not treat the Claimant less favourably than she would have treated a comparator who was not black. The allegation of race discrimination fails.

213. The Tribunal was satisfied that the reason Ms James-Ford gave the Claimant an informal warning for being aggressive was not related to race in any way. The allegation of harassment fails.

214. Allegation 12.2. R2 failed to support the Claimant's application and/or recommend the Claimant for progression in September 2017, February 2018 and July 2018 (R2 only)

215. Ms James-Ford failed to support the Claimant for progression in September 2017, February 2018 and July 2018. In September 2017, in particular, she did support Owen Wiggins for progression. However, Ms James-Ford also supported Pia Attard-Brown, a mixed race woman (white and black Caribbean), for progression, at the same time.

216. On the evidence, Ms James-Ford supported a number of black and mixed race employees in their applications for progression and promotion; Mariam Adamson, who is black - black British African; Keira Curtis-Howard, who is mixed race, multi ethnic group and white; Debi Gardiner, who is mixed race, white and black Caribbean; Siobhan Minter, who is black - black British African.

217. Ms James-Ford did not support Alex Green, a housing officer who is white, for progression, when he initially requested it.

218. Further, Ms James-Ford documented many performance issues with the Claimant during the relevant period, including in September 2017.

219. On all the evidence, the Tribunal did not consider the Claimant had shown facts from which the Tribunal could conclude that Ms James-Ford's failure to support the Claimant for progression was because of race. There was evidence that the Claimant was not meeting the expectations of his current level and that Ms James-Ford supported other black people for progression.

220. Even if the burden of proof did shift to the Respondent to show that race was not the reason for Ms James-Ford's failure to support the Claimant, the Tribunal was satisfied that the Respondent had discharged the burden of proof. Ms James-Ford was able to explain why she had supported Ms Attard-Brown and not the Claimant – in that Ms Attard-Brown had led on a project and her performance was exemplary. Further, Ms James-Ford was also able to explain why KPIs on their own were not necessarily an indicator of a high-performing housing officer. Most significantly, however, Ms James-Ford's 1-2-1 meetings and support plans set out numerous performance issues and areas for improvement. The Tribunal accepted that, in order to progress, a housing officer would have to be meeting the performance requirements of their job. The Claimant was not, as was documented at the time. It is entirely logical that an employee would not progress to a higher level of pay unless and until they were meeting the requirements of their existing level.

221. The Tribunal was satisfied that Ms James-Ford's failure to support the Claimant for progression was not related to race in any way. These allegations of race harassment and discrimination fail.

222. Allegation 12.10. R2 used untrue support plans on the Claimant's employment record during the disciplinary process (R1 and R2).

223. The Claimant contended that Ms James-Ford had fabricated support plans. He said that the support plans which she used during the disciplinary process were not shown to him when they were allegedly created.

224. The Tribunal rejected this allegation on the facts.

225. On 20 February 2018, Ms James-Ford emailed the Claimant, page 311, attaching an action plan for the Claimant's work.

226. Further, the Tribunal accepted that Ms James-Ford had created 3 action plan documents 3a – 3c by Spring 2018. They were different iterations of the action plan, dealing with different areas for development, with relevant expectations and targets discussed, at different times. They were produced at different times as 2018 progressed; the first document recorded issues arising out of the meeting of 14 February 2018. Action plans 3b and 3c dealt with the Claimant's relationship with his team in work and how this could be improved. Action plans 3b and 3c also recorded that, in April 2018, the Claimant had twice been warned about not mixing his housing officer role with his own personal situation as a tenant of the First Respondent. The Tribunal was satisfied that the action plans were produced during 2018, were shown to the Claimant and were true and accurate reflections of the discussions between the Claimant and Ms James-Ford at the time.

227. Allegations 12.3. R1 and R2 failed to notify the Claimant of the alleged disciplinary investigation which commenced on 18 December 2018 (R1 and R2); 12.4. The conclusion of the disciplinary investigation, without interviewing the Claimant on all the allegations (R1, R2 and R4); 12.5. R1 and R2 sent the Claimant an invitation to a disciplinary hearing on 1 February 2019 which included additional allegations that were not matters for which the Claimant was suspended (R1, R2 and R4).

228. Ms James-Ford notified the Claimant verbally, in their meeting on 18 December 2017, that she would commence disciplinary action against him. However, she failed to confirm this in writing until after the incident concerning X in January 2018. In doing so, she failed to follow the advice that she had been given by HR.

229. Ms James-Ford failed to act fairly in a number of respects in the disciplinary process. However, while Ms James-Ford may have acted unreasonably in doing so, the Tribunal did not consider that there was evidence that Ms James-Ford would have treated a non-black comparator differently. Ms James-Ford was not the ultimate decision-maker in the disciplinary process. The Tribunal accepted her evidence that she was not experienced in disciplinary processes.

230. Taking into account all the evidence in the case, the Tribunal accepted Ms James-Ford's evidence that she had not been involved in a disciplinary process previously and assumed that a separate meeting with the Claimant was not necessary. It also accepted that she believed that she had discussed the other allegations concerning his conduct in 1-2-1s and had included his responses in the investigation report.

231. The Tribunal decided that Ms James-Ford was relatively inexperienced and that her failures to act fairly during the disciplinary investigation were because of this and were not to do with race. The Tribunal accepted that Ms James-Ford and the Claimant had a difficult relationship, but the Tribunal concluded that this was due to the Claimant's unwillingness to accept Ms James-Ford's advice and guidance as his manager and his consistent and continuous challenge to her during their 1-2-1 meetings. This was not related to race but because of the Claimant's conduct towards Ms James-Ford.

232. These allegations of race harassment and discrimination fail.

233. Allegation 12.6. R2 made false allegations about the Claimant during the disciplinary process by (i) labelling the Claimant as aggressive; (ii) stating the Claimant was 'fighting' the performance management process; and (iii) stating the Claimant was under performance management (R1 and R2).

234. The Tribunal did not accept that Ms James-Ford made "false allegations" during the disciplinary process. It found that she experienced the Claimant's behaviour as aggressive and described it accordingly. The Tribunal also concluded that Ms James-Ford used the word "fighting" as an everyday term, to describe the Claimant resisting and obstructing performance management. The Tribunal decided that the Claimant had been under performance management throughout 2018 – his own notes of meetings demonstrate that he knew this. In his notes of 18 December 2020, the Claimant said that he had been forced to attend performance management/performance support meetings. The Claimant also recorded that Ms James-Ford said in that meeting, for the first time, that the meetings had been about his conduct and not his performance.

235. The Tribunal was satisfied that Ms James-Ford's actions in this regard had nothing to do with race. This allegation of race harassment and/or discrimination fails.

236. Allegation 12.7. All Respondents relied on the use of performance management information during the disciplinary process, which was not produced in accordance with the policy provided by R2 (All Respondents).

237. The Respondents did not use performance management information which was not produced in accordance with the disciplinary process. This allegation appeared to relate to the Claimant's contention that the action plans produced by Ms James-Ford ought to have been signed. The Tribunal was not taken to any provision in the First Respondent's processes requiring action plans to be signed.

238. There was no doubt that Ms James-Ford conducted numerous informal 1-2-1 meetings during which the Claimant's performance was managed. Again, the Tribunal was not taken to any policy provision which indicated that these informal meetings should have been conducted in a different format. The Respondents' conduct in this regard was not related to race in any way. The allegation of race discrimination/ harassment fails.

239. Allegation 12.8. All Respondents allowed and relied on the use of unsigned statements during the disciplinary process in relation to the allegation of gross misconduct concerning a colleague, X, and R3 relying on verbal assurances given by R2 around their validity (All Respondents); 12.9.The Claimant was not provided with information relied upon by R2 and R3 from other sources pertaining to the validity of the unsigned witness statements, contrary to the Respondent's disciplinary policy (All Respondents).

240. This was not a criminal investigation but an internal employment investigation. The Respondents ensured that the witnesses were happy with their interview notes and had an email record of this. The Tribunal concluded that the natural reading of both X and Y's email replies was that both women were happy with the content of the interview notes which were sent to them. There was no evidence that any greater degree of proof would have been required for allegations against a non-black comparator. The Respondent's actions in this regard were not related to race in any way.

241. Allegation 12.11. R2 falsified and/or fabricated and/or made alterations to the Claimant's electronic records and/or diaries relied upon during the disciplinary process (R1, R2 and R3).

242. The Tribunal heard no evidence about the Claimant's records or diaries. The Respondents' witnesses were not cross examined about this. Insofar as this allegation relates to Ms James-Ford's action plans and 1-2-1 meeting records, the Tribunal has found that these were true and accurate records of discussions between Ms James-Ford and the Claimant. This allegation fails on the facts.

243. Allegation 12.12. R1 operated recruitment processes that made it extremely likely that black males were deemed not suitable candidates for housing officer roles and/or regional housing officer roles, limiting their progression in the organisation (R1 only).

244. This allegation was not relevant to the Claimant. It is dismissed.

Victimisation

245. The Claimant did a protected act on 1 March 2019 by raising a grievance which included an allegation of indirect racial discrimination

246. Allegation 19.1.The Respondent(s) failed to properly address matters in the Claimant's grievance dated 1 March 2019 in that (i) the Claimant provided additional information on 11 April 2019 and this was not properly considered by R3; (ii) there was no reference to the whistleblowing allegations as to what next steps should be taken or under what policy it should be addressed; and (iii) the Claimant provided names of those to be interviewed in relation to investigating his grievance that were not interviewed, being Benedict, Sonia Grant, Siobhan Minter, Daniel Ogun, Debi Gardner, Peter Beale, Jerome Otto, Idris Razaq and Laura Moss (R1 and R3)

247. On the facts, the Claimant provided his additional information too late to be considered in Ms Thomson's original outcome letter. He provided it on the day when Ms Thomson sent out her lengthy decision letter, far beyond 10-day period Ms Thomson indicated for her decision in the grievance meeting. The Tribunal decided that Ms Thomson did not take the additional information into account in her original outcome solely because of the Claimant's delay in providing it. In any event, the Tribunal found that Ms Thomson did consider the evidence afterwards, but decided it would not have changed her decision. None of this was because the Claimant had done a protected act.

248. The Claimant's whistleblowing allegations were not relevant to the Claimant's own employment or his own grievance. The Tribunal accepted Ms Thomson's evidence that she had already investigated the same allegations in relation to the relevant employee, many months previously. The Tribunal decided that these allegations were appropriately dealt with under the First Respondent's Whistleblowing Policy when the Claimant pursued them under the Whistleblowing Policy. The failure to deal with them in the Claimant's grievance, when they did not relate to his own employment, was nothing to do with the fact that he had done a protected act.

249. The Tribunal was satisfied, from looking at the Claimant's written grievance, that the Claimant did not ask for all these witnesses to be interviewed. Ms Thomson interviewed all the witnesses which the Claimant did suggest in his grievance, save Funmi Omoniyi, Siobhan Minter and Clare Hingley.

250. The Tribunal decided that Ms Thomson had valid, logical, non-discriminatory reasons for not interviewing these 3 potential witnesses. It is not unusual for employers to limit interviewees to permanent members of their own staff, to preserve confidentiality. Funmi was not interviewed because she was a temporary member of staff and Clare was not interviewed because she was employed by Wates, a contractor. Siobhan was on long term leave and Ms Thomson she was able to use other witnesses to cover the sections relevant to her evidence.

251. Allegations 19.2. R1 appointed R3 to chair the Claimant's grievance meeting but she was the subject matter of complaints in his grievance (complaint 6D in the grievance) (R1 and R4); Allegation 19.3. R1 appointed R3 to chair the Claimant's grievance meeting when she was also chairing his disciplinary hearing (R1 and R4).

252. The Tribunal accepted Ms Cook's evidence that the Respondents had understood that the Claimant's grievance was against Caroline James-Ford and not against Emily Thomson. The Tribunal observed that the Claimant wrote, at the top of his grievance letter, "I am submitting this letter to raise a formal grievance in accordance with Notting Hill Genesis' (NHG) grievance policy and procedure against my line manager Ms James-Ford." He then set out his grievance over 13 pages under 22 headings. In a single paragraph of that very lengthy grievance he mentioned that Ms Thomson had approached Chris Milson, the Union convenor, along with Ms James-Ford. It was entirely understandable that the Respondent did not consider that the grievance was

against Ms Thomson. Sue Sergeant also told the Tribunal that a grievance about a manager would normally be dealt with by that manager's line manager, because this "keeps accountability in the right place". The Tribunal also accepted that evidence, which accorded with the Tribunal's own workplace experience.

253. The Tribunal considered that it was a sensible decision for Ms Thomson to chair the disciplinary hearing. There was a very large amount of information, and Ms Thomson would have been able to distinguish between matters relevant to the grievance and to the disciplinary, because she was aware of what was discussed in each of the processes. Further, the Tribunal considered that the Respondents appropriately addressed the Claimant's concerns about impartiality by appointing Debbie Smith (Head of Region) to sit in the disciplinary meeting as an independent manager. Ms Smith had no prior knowledge of the Claimant.

254. None of these actions by the Respondents was because the Claimant had done a protected act.

255. Allegation 19.4. R3 was not impartial in relation to matters concerning the Claimant's disciplinary (R1 and R3)

256. The Tribunal rejected the contention that Ms Thomson was not impartial regarding the Claimant's disciplinary. On the contrary, it found that Ms Thomson demonstrated her impartiality by rejecting many of the allegations against the Claimant. She gave a considered and reasoned outcome to each allegation. Debbie Smith, who did not know the Claimant, also sat in the disciplinary hearing. The Tribunal accepted the Respondents' evidence that she did not know the Claimant before the disciplinary hearing and that she agreed with all the conclusions. The Respondents ensured an impartial disciplinary hearing for the Claimant.

257. 19.5. Failed to properly deal with the matters raised in the Claimant's appeal, being (i) the alleged neglect of the duty of care owed by R1 towards the Claimant, given its knowledge that he had a mental breakdown; (ii) the failure to review the Claimant's alleged performance management in line with the evidence provided by the Claimant and R1's Performance Policy; (iii) the decision for R3 to preside over the grievance given she was subject to complaint 6D in the grievance complaint she was investigating; (iv) the Claimant's comments that he was being discriminated against in relation to comments on his On-Track and this being ignored by HR; and (v) that the Claimant was informed on 3 June 2019 that a formal grievance meeting would be held in relation to his grievance against Rob Manning but it was decided that this would not go ahead (R1 and R3)

258. The Tribunal rejected the contention that the appeal failed to deal with matters (i), (ii), (iv) and (v). Each was addressed in the appeal and a fully reasoned outcome was provided.

259. (i) Neglect of duty of care. Ms Sergeant stated that the Claimant's appeal regarding duty of care were mostly repeated points already raised at the grievance meeting. She did not agree that Ms Thomson should have not allowed the Claimant to return to work and conducted a risk assessment following the 28 November 2018 meeting. Ms Sergeant explained that unless the employee is signed off as unfit to work, or is incapable of making a decision, it is up to the individual employee to determine whether they are fit to work. The Tribunal considered that this was a rational decision and that there was nothing to indicate that Ms Sergeant would have made a different decision if the Claimant had not done a protected act.

260. Ms Thomson had already upheld the Claimant's complaint about Ms James-Ford's failure to carry out risk assessments in the original grievance outcome.

261. (ii) Failure to review the Claimant's alleged performance management in line with the evidence provided by the Claimant and R1's Performance Policy. Ms Sergeant addressed the Claimant's allegation that Ms James-Ford had falsified records of the performance management process. She said that she felt that the Claimant had been contradictory in his answers when she had questioned him about this. Ms Sergeant noted an email from Ms James-Ford to the Claimant dated 21 February 2018, entitled "progression/performance support meeting", pages 311-313. This mentioned monthly 1-2-1s and the Claimant's progress against specific action points to be a high performing housing officer. Ms Sergeant also noted that the support plans mentioned the need for improved performance. She concluded that the Claimant was aware of the performance issues and had had conversations with Ms James-Ford about the standards required and how they might be achieved. However, Ms Sergeant concluded that Ms James-Ford's communication could have been clearer in relation to underperformance. Ms Sergeant noted that Ms James-Ford had used the phrase 'support plan' interchangeably with 'performance'. She said that she could understand how the Claimant may have misunderstood the process as one of support, and not necessarily a performance issue.

262. Ms Sergeant rejected the Claimant's contention that he had insufficient time to address the initial grievance hearing. She noted that the original grievance meeting had lasted 5.5 hours and said that the Claimant had had sufficient time to prepare and present his concerns at the initial hearing on 14 March 2019 and at the appeal hearing on 14 May 2019.

263. Ms Sergeant said that the Claimant was aware of the behavioural and performance issues relied on in the disciplinary process issues through the On-Track process and 121 meetings, as well as action and support plans.

264. Ms Sergeant upheld the Claimant's grievance appeal in relation to the disciplinary allegations against him not being addressed in the disciplinary investigation meeting, which had focused on his conduct towards X. However, Ms Sergeant said that this had not affected the grievance outcome because the Claimant had had ample opportunity to prepare and present his evidence on these matters.

265. In summary, the Tribunal concluded that Ms Sergeant gave a thorough and balanced response to the Claimant's appeal regarding failures to review the Claimant's performance in line with policy and evidence. Ms Sergeant upheld part of the grievance appeal in this regard. Where she rejected the appeal, she gave a reasoned explanation. There was no evidence that her conclusions would have been different had the Claimant not done a protected act.

266. (iv) HR ignoring the Claimant's comments, in his On-Track documents, about being discriminated against. Ms Sergeant reviewed the On-Track documents. She explained that the role of HR was to review trends from On-Track documents, and training requirements, but not to intervene at individual level. She concluded that the Claimant's comments had not been ignored and that the On-Track process had worked in the way that it was supposed to. She expressed the view that the appraisal was balanced, noting where the Claimant had been working well, as well as the areas where he was doing not so well, with a plan to improve. There was no evidence that this conclusion was linked to the Claimant's protected act.

267. (v) Claimant being informed that a formal grievance meeting would be held in relation to his grievance against Rob Manning but it was decided that this would not go ahead. Ms Sergeant addressed the Claimant's grievance about Rob Manning in the grievance appeal hearing and in her outcome letter. The Claimant's complaint was that Rob Manning deliberately did not authorise his work orders and that Caroline had colluded in this, and that this was an act of discrimination. Ms Sergeant said that, as a manager, Ms James-Ford had the authority to make and challenge decisions on the use and distribution of resources. She said that the same was true of Rob Manning; challenge to work orders was to be expected and was normal practice.

268. The Tribunal accepted Ms Sergeant's evidence that, having reviewed the relevant documents, Ms Sergeant could see that the Claimant's work order referrals and applications had only been refused when supporting evidence, such as photographs, was missing, or where the Property Asset Management (PAM) team was able to make immediate recommendations for repairs.

269. The Tribunal concluded that Ms Sergeant fully reviewed the relevant evidence regarding Rob Manning. The Claimant was given a complete answer to his grievance in this regard. There was no failure to provide him with a formal grievance meeting; the grievance appeal process fully encompassed this aspect of the Claimant's grievances. There was no link between the Respondent's treatment of this matter and the Claimant's protected act.

270. (iii) Decision for R3 to preside over the grievance given she was subject to complaint 6D in the grievance complaint she was investigating.

271. Ms Sergeant did not specifically address this matter in her grievance appeal outcome. However, she did say that many of the Claimant's arguments had already been dealt with and, where there was no new evidence at the

appeal, she had not given a separate outcome. The Tribunal has accepted the Respondents' evidence that Ms Thomson was the appropriate person to deal with the grievance because she was Ms James-Ford's manager and no one understood the grievance to have been against Ms Thomson. The Tribunal considered that the Claimant's grievance appeal, like his grievance, was very lengthy. It considered that Ms Sergeant explored it in great detail and attempted to give the Claimant a full and proper response. It decided that there was no evidence that Ms Sergeant failed specifically to address any aspect of his appeal because the Claimant had done a protected act.

272. 19.6.The Claimant was not provided with reasonable time in which to gather evidence during his disciplinary proceedings (R1, R3 and R4).

273. The Tribunal rejected this contention on the facts. The Claimant was given access to IT systems. His IT account was reactivated so that he could access the material he needed for the disciplinary hearing. p944. Ms Thomson told the Tribunal that the Claimant as also given IT access on 31 May 2019, following the disciplinary hearing. Further, the whole process, including the grievance process, took many months. The Claimant had ample time to gather evidence and to request access to relevant documents. In any event, there was no evidence that that Respondents treated the Claimant any differently to any other employee who had been suspended during a disciplinary process.

Disability

274. The Claimant relied on his depression and anxiety conditions in contending that he was a disabled person.

275. The Tribunal decided that the Claimant was not disabled during his employment with the First Respondent.

276. The Claimant told the Tribunal that he had a mental health breakdown in the aftermath of his meeting with Ms James-Ford on 14 February 2018, p220. He said that, since that time, he has suffered from poor sleep, anxiety, loss of concentration and a lack of interest in activities.

277. However, the Tribunal noted that the Claimant had not visit his doctor until late May 2018 and, when he saw the Respondent's Occupational Health practitioner in April 2018, he was noted to be in good general health. The Tribunal did not accept the Claimant's evidence that he had had a "mental breakdown" following the meeting in February 2018.

278. On 29 May 2018, the Claimant presented to the GP with "work related stress". It was not until 28 January 2019 that the Claimant again presented to the GP with "further stress related to his work leading to depressive symptoms." The Claimant presented with symptoms of low mood and stress on 28 February 2019. He was taken on by the local psychology service and, after a period on the waiting list, was seen for 6 sessions of CBT which ended on 3 July 2019. The Claimant was certified as unfit for work due to stress, anxiety and

depression from 28 February 2019 to 11 March 2019 and again from 17 June 2019 to 27 May 2020.

279. The Tribunal decided that the Claimant was diagnosed with "work related stress" in May 2018. It was not until January 2019 that he was considered by his GP to have depression and low mood. The Claimant's GP appears to have distinguished between the conditions. From January 2019, the GP specifically diagnosed depression and anxiety. The Claimant was signed off work with anxiety and depression in February – March 2019 and from 17 June 2019.

280. The Tribunal noted that the Claimant was clearly dissatisfied with his work circumstances during 2018. He was obdurate and argumentative in his 1-2-1s with Ms Ford-James from February 2018, resisting her attempts to manage him and to change his behaviour in the workplace. The Tribunal noted that, when the Claimant was asked about sleeping in the workplace during 2018, he blamed environmental conditions and said that other people fell asleep too. This contradicted his assertion in his disability impact statement that he was suffering from poor sleep due to depression after February 2018 and was so tired that he would fall asleep in the office.

281. The Tribunal decided, applying *J v DLA Piper LLP* [2010] ICR 1052, para.42, and *Herry v Dudley Metropolitan Council* [2017] ICR 610, that the Claimant did not have a mental impairment (of depression or anxiety) until January 2019. Before this time, he was suffering from work related stress, which was a reaction to his situation at work, and did not amount to a mental impairment.

282. The Tribunal accepted that the Claimant's symptoms did amount to a mental impairment from January 2019.

283. However, there was no medical evidence that the depression which was diagnosed in January 2019 was likely to last for 12 months thereafter – in the sense that "it could well happen". Even by June 2019, there was nothing to indicate then that the depression was likely to last until January 2020, or to recur in the future. The Claimant had suffered from depression and/or anxiety for under 6 months by the date of his dismissal. The Claimant was undergoing CBT in June - July 2019. Treatment is given with the intention that it will resolve or improve the relevant condition.

284. It is now known that the Claimant's depression did last for 12 months after January 2019, but this was not known at the relevant time and cannot be taken into account.

285. The Tribunal decided that the Claimant was not a disabled person during his employment.

286. In any event, regarding adjustments 29.3, failing to assign the Claimant to be managed by a different manager; and 29.4, failing to assign Claimant to a different department / team in R1, the Tribunal concluded that the Respondents did not fail to make these allegedly reasonable adjustments. Ms

James-Ford offered both to the Claimant, including during a meeting on 21 May 2018 and he refused them. The Tribunal also concluded that such adjustments would not have been "reasonable" in that it would not have been reasonable to impose them on an unwilling Claimant.

287. Further, regarding adjustments 29.1, failing to alter the Claimant's working hours; and 29.2, failing to alter the Claimant's workload; again, the Respondent did not fail to make reasonable adjustments. On the facts, on 26 June 2018 Ms James-Ford asked the Claimant to tell the First Respondent what adjustments he needed and advised him to speak to someone, even if not to her. Ms James-Ford therefore offered to make adjustments, but the Claimant did not tell her he needed any. Further, on 15 November 2018, Ms James-Ford offered to help the Claimant plan his workload, but the Claimant declined this help, saying that he could not discuss it with her because of their relationship. Nevertheless, the Claimant did not speak to any other person at the First Respondent about his workload or hours, despite Ms James-Ford inviting him to do so on 26 June.

288. The Tribunal also considered that the Respondents did not know and could not reasonably have known that the Claimant was put at a disadvantage by any particular PCP in the circumstances that the Claimant refused to engage with Ms James-Ford on the subject of adjustments, and refused to accept the help she offered.

289. The Tribunal concluded that the Respondents did not know and could not reasonably have been expected to know that the Claimant would be put at a substantial disadvantage by not referring him to Occupational Health. On 26 June 2018, the Claimant told Ms James-Ford that he had seen his GP twice and was waiting for a referral. Ms James-Ford encouraged the Claimant to ask for help when he needed it. Ms James-Ford also discussed the employee support services offered by the First Respondent. The Claimant responded that he had not had mental health issues before and did not intend to do so again. Despite Ms James-Ford attempting to discuss the Claimant's mental health and his needs, the Claimant dismissed the matter, saying that he did not intend to have mental health issues in the future. The Claimant therefore gave no indication that an OH referral was required. In those circumstances, the Tribunal also considered that it would not have been a reasonable adjustment to refer the Claimant to Occupational Health when he dismissed a suggestion that he would have mental health needs in the future.

290. In any event, a failure to make a referral to Occupational health cannot be a failure to make reasonable adjustments because it is not a 'step' to avoid a disadvantage, *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664.

291. The Respondents failed to undertake stress risk assessments on the Claimant and his workplace during 2018 and 2019. There was, however, no evidence that a stress risk assessment would have indicated the need for any particular adjustment, or that failure to carry one out put the Claimant at a substantial disadvantage.

Discrimination Arising from Disability

292. The Claimant relies on his dismissal as unfavourable treatment.

293. The Claimant told the Tribunal that his conduct towards his colleague, X, on 21 January 2019, arose in consequence of his alleged disability. The Tribunal did not accept his evidence at the Tribunal that there was a link between his depression and anxiety and his behaviour towards X. The Claimant did not say that there was, at the time. The Tribunal considered that there was no logical link between the disability and the conduct. The Tribunal considered that it would need some medical or psychological expert evidence that there was such a link, in order to find that there was.

294. The Claimant was not dismissed because of something arising in consequence of his alleged disability.

Protected Disclosure

295. The Claimant made a protected disclosure when he said in his grievance dated 1 March 2019 that Ms James-Ford had neglected the wellbeing of a tenant and blamed it on another employee, Z. The Claimant gave further information that the relevant tenant had been concerned for her safety due to anti-social behaviour on the part of another tenant. He said that Ms James-Ford was supposed to have booked an alternative accommodation using a company credit card for the tenant, but failed to do so and the tenant was subsequently attacked.

296. The Tribunal accepted that this was information which, in the Claimant's reasonable belief, was made in the public interest and tended to show, both that the health and safety of an individual had been endangered; and that information tending to show that had been deliberately concealed.

Reason for Dismissal

297. The Claimant was a Trade Union representative from summer 2018. There was evidence that Ms James-Ford and Ms Thomson had reservations about the Claimant becoming a Trade Union representative and about him managing his workload at the same time as being a Trade Union representative. They raised these reservations with the Trade Union itself and with HR.

298. Nevertheless, the Tribunal concluded that the Respondent showed that the Claimant's conduct in bodily lifting X was the reason for his dismissal. This was conduct which the Claimant admitted at the time.

299. The Tribunal was satisfied that reasons in Ms Thomson's letter of dismissal were the genuine reasons for dismissal. The Claimant had been suspended because he bodily lifted X and there had also been an investigation into that conduct. It was plain that that matter was foremost in Ms Thomson's mind. Ms Thomson explained why it was an act of gross misconduct – Picking

X up was inappropriate and unacceptable behaviour in the workplace. Ms Thomson further explained that there were no mitigating circumstances; the Claimant had already picked up Y in a similar manner and she had complained to him, so he had been on notice that such behaviour was unwelcome.

300. The Claimant's protected disclosure was made when the Claimant had already been suspended and had already been invited to a disciplinary hearing to answer allegations of gross misconduct. The Tribunal was satisfied that he was not dismissed because he had made a protected disclosure. Rather, it appeared from the chronology of events that he made a protected disclosure because he was at risk of dismissal.

301. The Tribunal was also satisfied that the dismissal was nothing to do with the Claimant being a member of an independent trade union or taking part in the activities of an independent trade union. The immediate and obvious cause of the Claimant's suspension from work was him picking up X. The only other allegation which Ms Thomson upheld against the Claimant - that he had failed to act in a professional and courteous manner, in that his emails were unnecessarily confrontational and challenging, was not related to his Trade Union activities.

302. To be clear, the Tribunal found that the reason for the Claimant's dismissal was nothing to do with race or his protected act.

Reasonableness of Dismissal

303. The Tribunal also concluded that the decision to dismiss the Claimant was within the range of reasonable responses of a reasonable employer. The Claimant accepted, in evidence at the Tribunal, that his act was one of gross misconduct.

304. On the evidence available to Ms Thomson, X felt violated and reasonably so. Ms Thomson reasonably considered that the conduct could amount to harassment. Ms Thomson also reasonably considered that there were no mitigating circumstances, in that the Claimant ought to have known that picking up colleagues was unwelcome – he had already been told this. The Tribunal considered that it was open to a reasonable employer to dismiss the Claimant for this first offence.

305. There were considerable defects in Ms James-Ford's original investigation – she failed to interview the Claimant at all before inviting him to the original disciplinary hearing. When this was converted into an investigatory meeting, Ms James-Ford only dealt with the allegation regarding X. Nevertheless, the Tribunal considered that these defects were remedied by converting the disciplinary into an investigatory meeting and by Ms Thomson holding the grievance hearing, which explored alleged defects and problems with Ms James-Ford's approach to performance management. Ms Thomson then held a disciplinary hearing, at which the Claimant was able to present all his arguments regarding the allegations against him.

306. Ultimately, the reason for the Claimant's dismissal - picking up X - was properly investigated, both by Ms James-Ford during the appropriately extended investigatory process, and in the disciplinary meeting.

307. The Tribunal also refers to its findings on the Claimant's race discrimination/harassment and victimisation allegations, regarding the fairness of the procedure adopted.

Protected Disclosure Detriments

308. Allegation: R1 or R3 subjecting the Claimant to a detriment pursuant to s.47B ERA, by not dealing with his data subject access request in a timely manner.

309. The Claimant made a Subject Access Request ("SAR") on 19 March 2019, p737. He made various refinements of the searches he required, pp 647-648, 1031.

310. The Tribunal has found that the First Respondent provided the SAR documents to the Claimant in tranches electronically on 29 May 2019 and 16 June 2019. The complete set of documents in hardcopy was available for the Claimant to collect on 20 June 2019. The Claimant did collect the documents on 21 June 2019, pp1032-1033.

311. In evidence, the Claimant agreed that the documents were available within the statutory time for a response to a DSAR.

312. Even if they were not, the Tribunal accepted Mr Nankivell's evidence that any delay was because of the volume of documents generated and the redactions necessary. The Claimant did submit a number of refinements of the searches he required. Each refinement would have taken time to understand and address. Many documents were generated and each would have needed to be examined and redacted if appropriate. The Tribunal accepted that the First Respondent had limited resources to allocate to the task. It accepted that only one person could be made available. None of this had anything to do with the fact that the Claimant had made a protected disclosure.

313. Allegation: R1 subjecting the Claimant to a detriment pursuant to s.47B ERA, by not properly addressing his grievances sent on 17 June 2019, 18 June 2019 and 23 June 2019?

314. The Tribunal rejected, on the facts, the allegation that the First Respondent had not properly addressed these grievances.

315. The Claimant submitted several grievance letters on 18 June 2019 against several individuals and against the First Respondent, pp1004-1007, 1008-1010, 1011-1013, 1018-1021. More grievance letters were sent on 23 June 2019, pp1044-1045, 1046-1047, 1048, 1049.

316. The Tribunal found that Mr Nankivell assiduously considered and addressed these grievances. He undertook the considerable task of dividing the complaints into different categories: Complaints which had been raised

earlier and already dealt with; Complaints regarding dismissal which should be raised as an appeal against dismissal; Complaints which could be responded to immediately; and complaints which required consideration through the grievance procedure.

317. Mr Nankivell then appropriately attempted to organize a grievance meeting for 16 July 2019, p1139-1141. This meeting was rearranged, at the Claimant's request, for 26 July 2019, 1165-1167. The Claimant also asked for that to be rescheduled because his chosen union representative was unavailable. The Respondent quite reasonably suggested an alternative representative could be arranged. The hearing proceeded on 26 July in the Claimant's absence, pp 1491-1494. Mr Nankivell also conducted appropriate investigations, including meeting with Mr Lamin Ceesay, who had dealt with the DSAR in question, p 1436.

318. Mr Nankivell then gave a detailed written outcome to the grievances on 8 August 2019, p1507-1511.

319. The Tribunal concluded that Mr Nankivell had undertaken a careful investigation of the Claimant's grievances and had provided an appropriate response. This allegation failed on the facts.

320. Even if Mr Nankivell had failed to answer one of the Claimant's many complaints, the Tribunal considered that the First Respondent showed that this was nothing to do with the fact that the Claimant had made a protected disclosure. The Claimant had submitted extremely lengthy grievances after his dismissal. The First Respondent allocated considerable resources and time to dealing with grievances made by an ex-employee. There was nothing to suggest that any failure to deal with any particular aspect of these many faceted grievances was because of a protected act, rather than an inadvertent omission.

321. The Claimant's claims fail and are dismissed.

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Employment Judge **Brown**

Date: 3 December 2020

SENT to the PARTIES ON

04/12/2020.

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FOR THE TRIBUNAL OFFICE