RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr JW Lam**

Respondent: **London Borough of Hackney**

Heard at: **East London Hearing Centre**

On: **12, 13, 14, 20 and 21 March 2019**

Before: **Employment Judge Russell**
Members: **Ms M Long**
Mrs P Alford

Representation
Claimant: **In person**
Respondent: **Ms C MacLaren (Counsel)**

JUDGMENT

The judgment of the Tribunal is that:

1. **The claim for public interest disclosure detriment fails and is dismissed.**

2. **The claim of discrimination on grounds of race fails and is dismissed.**

3. **The claim of victimisation fails and is dismissed.**

4. **The claim of unfair dismissal fails and is dismissed.**

5. **The claim of disability discrimination in respect of a home working is dismissed upon withdrawal.**

REASONS

1 By a claim form presented to the Tribunal on 21 April 2017, the Claimant brought a complaint of unlawful victimisation between the period July 2016 until 20 January 2017. When his employment terminated, the Claimant presented a further claim form on 26 October 2017, alleging further acts of victimisation, race and disability discrimination and also of detriment because of a protected disclosure and unfair dismissal. The Respondent admits that the Claimant satisfies the statutory definition of a disability by reason of the

physical impairment of chronic obstructive pulmonary disease. The Claimant describes his race as a British national of Chinese origin.

2 The Respondent produced a list of issues based upon the content of the pleadings and discussions at Preliminary Hearings on 19 June 2017 and 5 December 2017. The Claimant had accepted in an amended Particulars of Claim considered at the second hearing that the disability discrimination claim was out of time and was relied upon as background. That claim is therefore dismissed with this Judgment. The Claimant also confirmed that the protected disclosure claim is detriment and not dismissal and withdrew a suggested TUPE claim and some allegations of victimisation.

3 Despite being ordered to agree a final list of issues, the Claimant and Respondent each produced their own list. These largely overlapped and we clarified at the outset of the hearing the differences. Referring to the Claimant's list, issue 3 is part of the factual context and not a claim in its own right. Where new allegations of discrimination were made, we decided that given the late stage of the proceedings and the absence of any good reason for failing to raise them sooner, it would not be just to allow their inclusion as it would materially expand the scope of the claim and the Respondent had not anticipated their inclusion (these were issues 9, the second part of issue number 10 in respect of an invitation alleged to Mr Pillai, and 16 to 21). The Claimant agreed that the issues he had raised at numbers 1, 2, 4, 5, 6, 7, 8, the first part of issue 10 and in issues 11, 12, 13, 14 and 15 were all included within the issues raised by the Respondent. Accordingly we adopted the Respondent's list of issues which is attached hereto.

4 The Tribunal heard evidence from the Claimant on his own behalf. On behalf of the Respondent, the Tribunal heard evidence from: Mr Michael Scorer (former Director of Housing Services); Mr Stuart Davis (former Head of Property and Asset Management); Mr John Wheately (Head of Environmental Waste); Mr Aled Richards (Director Public Realm); Mr Steve Swain (Senior HR Business Partner) and, via videolink, Ms Carol Hinvest (Head of Housing Transformation). The Respondent produced a signed witness statement from Ms Odile Anderson (Strategic HR Business Partner) and we attached such weight as we thought appropriate given that she did not attend to be cross-examined.

5 We were provided with an agreed bundle of documents extending over three files. This was not a particularly well-structured bundle, the internal pagination involving numerals and letters (often doubled). This made navigation particularly tricky for witnesses and Tribunal alike. This form of numbering system is best avoided if possible as it causes delay and frustration for all concerned.

Findings of fact

6 The Claimant was employed by the Respondent as a Senior Database Manager. His employment with the Respondent commenced on 7 May 1999. He was TUPE transferred to an arms-length management company for about 10 years before being transferred back to the Respondent in April 2016.

7 When he transferred back to the Respondent, he was line managed by Mr Pillai, with whom he had a good working relationship. Mr Pillai was managed by Ms Carol Hinvest. Ms Hinvest was appointed to decide the appeal by the Claimant against the rejection of his grievance in connection with a request to work at home following an Occupational Health recommendation. Mr Pillai had agreed to the request but, on HR

advice, Mr Gary Saunders carried out a health and safety inspection and decided that the adjustment ought not to be approved until the condition of the Claimant's home was improved. The Claimant was unhappy both by the failure to implement the recommendation and because he believed that other employees had been allowed to work from home without a prior inspection. It is agreed that the Claimant's grievance dated 16 May 2016 was a protected act as it included allegations of race and disability discrimination. The Claimant's displeasure with the process to date was set out in a considerable number of lengthy emails.

8 On 21 July 2016 the Claimant sent an 8-page statement of case to Ms Hinvest setting out in detail his reasons for complaining about Mr Saunders and why he believed that it was discrimination because of race and disability. The Claimant referred to the possibility of Tribunal proceedings as an alternative if a satisfactory conclusion could not be found. In her response on 25 July 2016, Ms Hinvest proposed that as the grievance was clearly defined and all concerned had submitted relevant evidence, she would review the papers and any further submissions received before 3 August 2016 and then meet the Claimant to give her conclusions which she would confirm in writing. The Claimant disagreed as he believed that the grievance procedure required a meeting with him before a decision was reached.

9 The grievance procedure which applied to the Claimant provided at paragraph 6.1 that the manager *must* meet formally with the aggrieved employee to listen to their complaint and explore possible resolution. However, paragraph 6.4 also provided that depending on the circumstances of the grievance, the manager may decide to investigate and consider the evidence before or after the meeting or may hold a reconvened meeting for further clarification. Finally, paragraph 6.6 provided that *at or after* the meeting, the manager will consider the case and try to find a resolution which may include deciding that all, none or some of the remedy sought is possible and reasonable. The decision would be communicated to the employee within 10 days. The separate Prevention of Harassment and Bullying policy states that the process thereunder will normally be the same as the grievance procedure.

10 In his capacity of Senior HR Business Partner, Mr Swain informed the Claimant that he considered that Ms Hinvest's approach was permitted by paragraph 6.4 of the grievance procedure. The Claimant was not satisfied and maintained that there must be a meeting with him before any decision could be reached. He expressed his belief in a email sent on 28 July 2016 to Mr Dan Paul, the Head of HR, in which he raised further concern that he was being treated differently and was critical of Ms Hinvest's approach. The email was copied to Ms Hinvest. Further email exchanges confirmed Ms Hinvest's intention to hold a meeting after reviewing the written evidence but with an assurance that if the meeting raised new material, she would consider the matter further. The Claimant provided further written information but continued to express his disagreement with the proposed approach. On balance, the Tribunal find that the tone and content of the Claimant's emails about this procedural matter could reasonably be described as pedantic, seeking to continue a time-consuming debate about the interpretation of the policy rather than accepting that his managers held a different view and being comforted by the assurance that a further meeting would be held if further investigation or consideration was required.

11 On 2 August 2016, the Claimant was typing a further email to Mr Swain and Ms Hinvest about his continued view that they were in breach of the grievance procedure. Mr

Pillai saw him doing so and asked to speak to him in private. The Claimant's evidence is that Mr Pillai told him:

> "**You'd better be careful, someone is very unhappy about the email you sent. In the middle of our conversation, the person said "*I wish he is dead, I wish he is not here*". I was shocked by what I heard. The person probably saw my expression then said "*I mean I wish he is not exist*"."**

12 Mr Pillai declined to tell the Claimant who had said this to him, saying that he was telling the Claimant in confidence as he did not wish him to get into trouble. Mr Pillai told the Claimant that he thought that the person had made the comment out of frustration. In context, we find that this is a reference to the Claimant's ongoing email exchanges about the proposed process for the grievance appeal.

13 The Claimant's evidence about what he was told on 2 August 2016 is consistent with the content of a grievance raised by Mr Pillai in November 2016. He describes a meeting with Ms Hinvest on 1 August 2016 in which she had expressed disappointment about having to deal with the outstanding grievance, she questioned the Claimant's motives in "dragging things on" and looked down at the table, then with clenched fists banged the desk and said "**oh Javez what is he doing? I wish he was dead and he didn't exist**". When Mr Pillai saw the Claimant writing another email to Mr Swain the next day, and out of concern to prevent matters escalating with long drawn out email exchanges, he told the Claimant about the comments but without disclosing Ms Hinvest's identity. Mr Pillai was surprised that the Claimant had taken the comment very seriously as a "death wish" and had tried to keep the Claimant calm to prevent the matter escalating out of control but the Claimant was not having any of this.

14 In evidence, Ms Hinvest did not deny that she made comments along these lines to Mr Pillai, describing them as an off the cuff and meaningless expression of frustration due to the way in which the Claimant was progressing his grievance. On balance, we find that the comment was made in the terms described by Mr Pillai. It was deeply inappropriate and it should not have been made; however, it was not a serious death threat or even a literal wish that the Claimant was dead. It was instead an unprofessional but figurative expression of frustration.

15 Despite the attempts of Mr Pillai to reassure the Claimant that this was not a literal threat, the Claimant was genuinely distressed. He emailed all members of his team and tried to raise it as any other business at a team meeting which took place on 11 August 2016. The Claimant said that he had been told out of concern for his safety that a council employee had said "I wish he is dead", that he believed that this was a hate crime which he was taking seriously and potentially linking it to an incident when riding his motorbike days after learning about the comment. He asked that if anything happened which left him unable to talk, his colleagues should report the death wish to the police. The impression given by the Claimant to his colleagues was of a literal threat to his life which he believed could be carried out.

16 Ms Hinvest became aware of the Claimant's comments to colleagues. She contacted HR and emailed the Claimant on 18 August 2016. Ms Hinvest advised the Claimant that unnamed threats of this sort were not appropriate for a team meeting as they may create unnecessary fear and anxiety, rather it was a potential criminal matter and that he should report them to the police. Ms Hinvest assured that neither she nor Mr

Pillai had made the comment and asked that he keep them updated. The Claimant did report the matter to the police and confirmed that he had done so to Ms Hinvest and Ms Anderson (HR). Ms Anderson asked that the Claimant liaise with her directly and try to persuade his informant to speak with her; the Claimant replied that the informant refused to do so and suggested that it may be due to fear of reprisal.

17 The grievance hearing took place on 25 August 2016 and lasted approximately two and a half hours. Towards the end, the Claimant said that somebody was not happy with an email in which he had made allegations against Mr Saunders and wished him dead. He said that the police were treating it as a death threat and that the email had been sent to only three people.

18 At the end of a one-to-one meeting on 12 September 2016, Ms Hinvest and the Claimant spent about 10 minutes again discussing his concerns about the death wish. The Claimant was tearful and, after she said that she wanted to find a resolution, the Claimant asked Ms Hinvest how she could do that when it had nothing to do with her. The Claimant asked "**how can you resolve it when you have nothing to do with it right, can you unwish it?**" Ms Hinvest said no. Ms Hinvest again suggested that the Claimant's informant speak with HR to find out what had been said and what had been meant. The Claimant confirmed that he had been told that the person making the comment had not meant it and was speaking out of frustration but he did not regard this as an excuse. The Claimant again referred to problems with his motorbike since the comment had been relayed to him, inferring to a reasonable listener that these were somehow linked. The Claimant referred to previous unexpected death threats and racial attacks he had received. The Claimant told Ms Hinvest that he had shared the comment with his colleagues so that the person who made it would hear of it and, if not meant, would apologise to him. As almost two months had passed without apology, he had formed that view that it had been meant.

19 From the note of the discussion, which we accept as contemporaneous and accurate, it is evident that it was Ms Hinvest who raised the issue and that she did not appreciate that the Claimant was referring to her earlier remark to Mr Pillai. We did not consider it plausible that if she was aware throughout that it was her comment which was causing the Claimant such distress, she would have encouraged him to progress matters with HR or would have dealt with it in the way that she did. This is consistent with the fact that on 8 September 2016, Ms Hinvest had initiated contact with HR to seek confirmation of the progress of the investigation in the context of the Claimant having been knocked off his motorbike in the preceding days.

20 By letter dated 20 September 2016, the Claimant's grievance was not upheld. Ms Hinvest accepted that the Claimant had been treated differently in that he had been subjected to a home visit while other employees had not. However, she found that this was because the comparators were only to work at home on a temporary basis whereas the adjustment was to be permanent for the Claimant. In other words, she did not accept that it was because of race.

21 In September 2016, Ms Hinvest announced a review of the Housing Transformation Team. Initial proposals were published on 7 October 2016 and the team was asked for their comments as part of a period of individual and collective consultation. The review affected the Claimant as Ms Hinvest proposed to move his post of Database Manager into the Property and Asset Management team which was created as part of the review. The move was to be effective from 1 April 2017. The Claimant expressed

concern in a group consultation meeting on 12 October 2016 that Property and Asset Management may not be the best home for the role. He subsequently confirmed that he believed that two other teams were a better fit for his role. There was an individual consultation meeting on 25 October 2016 and the Claimant again expressed his views. The final report on the restructure was produced on 11 November 2016 and confirmed that the Claimant's role would move to Property and Asset Management with effect from April 2017. The review affected a significant number of individuals, including Mr Pillai whose PO11 grade post of Principal Performance Manager was deleted and replaced by a lower grade PO8 role. Mr Pillai was unhappy with the restructure proposal and in a conversation with the Claimant informed him that Ms Hinvest was the person who made the comment which he regarded as a death wish.

22 Upon becoming aware of the author of the comment, the Claimant sent an email to Mr Scorer on 14 November 2016 with an attachment setting out his grievance against Ms Hinvest. The content of the email is unusual. The Claimant suggests that the comment by Ms Hinvest was in the manner of an implicit threat by a character played by Marlon Brando in "The Godfather" and possibly even an express threat as made by a character played by Charles Bronson in "Death Wish". The grievance itself is more conventional, referring to the comment which Mr Pillai had told him was said in frustration and the Claimant's efforts to find out who made it, accusing Ms Hinvest of lying in their earlier discussions. The Claimant believed that there was a conflict of interest in Ms Hinvest hearing his grievance and that the organisational review was designed to remove him from her team. The Claimant referred to the harassment and bullying policy and alleged that Ms Hinvest's behaviour amounted to hate and victimisation in his earlier grievance against Mr Saunders about hate and discrimination. From the content and tone of the grievance and email, there can be no doubt that the Claimant had been very upset to discover that it was Ms Hinvest who had made the comment.

23 On 16 November 2016, the Claimant met Mr Stuart Davis, the Head of the Property Asset Management team to which his post would transfer. Mr Davis was concerned that the Claimant's subsequent email did not record at all accurately the content of their discussion and suggested to Ms Hinvest that the Claimant would need to be called to task on the matter. It does not appear that this happened.

24 The Claimant appealed against Ms Hinvest's decision on his grievance and the matter was passed to Mr Scorer.

25 On 24 November 2016, the Claimant intended to accompany a colleague, Mr Mekala, who was required to attend a meeting with Ms Hinvest. The meeting was to consider the impact of the restructure on Mr Mekala's tier 2 work permit. As they were walking to the meeting room, Ms Hinvest called the Claimant's name in a raised voice to attract his attention. Ms Hinvest then told the Claimant that he was not a lawyer and was not permitted to attend the meeting. On 5 December 2016, the Claimant complained about Ms Hinvest's conduct, describing it as rude, unreasonable and humiliating.

26 On 7 December 2016, the Claimant sent an email to his colleagues outlining the powers available to victims of stalking, referring to the death wish and stating that if anything were to happen to him the police could find the perpetrator in the Housing Transformation Team. The Claimant also described the incident on 24 November 2016 as "an angry woman", marching out towards him, speaking to him loudly and rudely. He questioned how his abuser had been able to track his movement and again asked

colleagues to report any suspicious activity to the police. We find that there could be no doubt in the mind of the recipients that the Claimant was referring to Ms Hinvest both as the author of the death wish and the "angry woman".

27 After receiving his email, Ms Hinvest walked past the Claimant as they were going to different offices. Ms Hinvest told the Claimant that she would reply to his email later. The Claimant's evidence is that Ms Hinvest charged towards him, stopped and said this in an aggressive tone. Ms Hinvest did reply later that day, stating that she found its content totally unacceptable, in breach of the council's Code of Conduct and significantly damaging their working relationship. She intended to ask for a formal investigation and told the Claimant not to circulate her response or discuss it with colleagues. We find on balance that Ms Hinvest was clearly upset and annoyed that such an email had been sent to her team and we accept that her tone was likely to have been brusque. However, we also take into account that she accepted raising her voice on the earlier occasion and therefore it seemed to us unlikely that she would not have made the same admission if the same were true on 7 December 2016. We also took into account the Claimant's tendency to use hyperbolic language and, on balance, find that Ms Hinvest was not aggressive and did not shout.

28 Ms Hinvest raised her complaint with Mr Scorer and he agreed that there should be an investigation. In the meantime, he decided to move the Claimant to Property and Asset Management with immediate effect due to the breakdown in the working relationship. In evidence, the Claimant accepted that he had been happy to move from Ms Hinvest's team and felt that at least a manager was taking him seriously and looking to protect him. His issue was not that the move had been brought forward but that Property Asset Management was not the appropriate team.

29 Mr Scorer sent the Claimant email on 7 December 2016, telling him that he had read the "stalking email" and that a full investigation needed to be carried out into whether it was a breach of the Code of Conduct. Mr Scorer wrote that he did not expect the investigation, the subject matter or individual opinions to form part of any general office discussions or circulated in any written correspondence. He then instructed the Claimant that **"any further communication on the matter must be restricted to your nominated representative or those officers responsible for conducting or supporting the investigation. In order to avoid any ambiguity on this point, I would consider any breach of this instruction as a breach of the council code of conduct**".

30 As with his earlier grievance, the Claimant's reaction was to engage in protracted email correspondence with Mr Scorer raising a number of procedural points rather than engaging with the issue of whether his conduct had been appropriate. In an email sent on 12 December 2016, the Claimant asserted that this was an act of victimisation by Ms Hinvest in response to his complaints that she had made a death wish against him and had failed to treat him with respect and courtesy, thereby abusing her position and authority.

31 Mr Scorer met with Ms Hinvest and they discussed the Claimant's complaints made on 14 November 2016, 5 December 2016 and the content of the email sent on 7 December 2016. Ms Hinvest admitted that she had made what she described as an off-the-cuff comment consistent with that described by the Claimant as a death wish and that she had spoken to the Claimant firmly and loudly in front of colleagues on 24 November 2016. Ms Hinvest said that her comment had been made in frustration and that she was

prepared to apologise to the Claimant.

32 Mr Scorer wrote to the Claimant on 16 December 2016, referring explicitly to the grievance of 5 December 2016 and the complaint of 7 December 2016. The letter did not expressly cite the grievances submitted on 14 November 2016 or 12 December 2016. In his letter, Mr Scorer said that he had read all of the correspondence on the matter, had addressed the serious issues raised directly with Ms Hinvest and would not be dealing with this under the grievance procedure. Nor would there be further investigation about the Claimant's email on 7 December 2016. Mr Scorer stated that in light of Ms Hinvest's admissions, he accepted that the incidents had happened and he had dealt with them directly. Mr Scorer informed the Claimant that Ms Hinvest had expressed great regret about the death wish comment, which she was categoric had not been meant literally, and was prepared to apologise personally for any distress caused. Mr Scorer assured the Claimant that he should have no concern about his personal safety due to Ms Hinvest and reminded him that grievances that are false and not in good faith could give rise to a disciplinary action. As for the Claimant's conduct, Mr Scorer said that he should have used better judgment than sending the email to colleagues about a formal matter being investigated and asked that in future he desist from copying colleagues into such emails as it could indirectly inflame matters which would otherwise had been dealt with in a more private and professional way. Finally, Mr Scorer informed the Claimant that he had told Ms Hinvest that any further breach of the code of conduct by her may lead to a formal process. Equally should Ms Hinvest raised further concerns about the Claimant's behaviour, he may also be subject to a formal process. Mr Scorer hoped that it did not come to this and that a clear line could be drawn under all of the issues, hoping that the Claimant would have a better working relationship with colleagues in Property Asset Management.

33 Mr Scorer wrote to Ms Hinvest the same day, informing her that he had decided not formally to investigate either the Claimant's grievance or her complaint. He recorded his conclusion that Ms Hinvest's conduct had fallen below the standard of behaviour expected of a senior officer and warned her that if any further matters between her and the Claimant came to his attention, it may lead to a more formal process being considered. As in the letter to the Claimant, Mr Scorer expressed hope that this drew a clear line under the matter.

34 In evidence, Mr Scorer candidly accepted that he had failed to comply with the requirements of the formal grievance procedure. We accepted his evidence that this was because he was looking to the future working relationship and believed that things had escalated out of proportion to the initial comment. He believed that there would be no benefit served in going through a formal process to confirm what Ms Hinvest had already accepted had happened and for which she had apologised. Mr Scorer was an impressive witness, he acknowledged the distress caused to the Claimant by the original comment and apologised appropriately, rather than simply "being prepared to apologise" which is no apology at all. We accepted that he believed that the bullying and harassment procedure permitted him to deal with matters informally if he considered it appropriate, which he did.

35 The Claimant was dissatisfied with the response, taking it as an indication that the Respondent had no intention to address his concerns identified in the 14 November 2016 and 12 December 2016 grievances. Indeed, in evidence he maintained that Mr Scorer's letter dealt only with that submitted on 5 December 2016 regarding the exclusion from his colleague's meeting. We considered this an unduly literal reading of the letter and one

which was not objectively reasonable given the content of Mr Scorer's letter which expressly addressed the death wish comment raised in the 14 November 2016 grievance and where the entirety of the correspondence raised overlapping issues.

36 Despite Mr Scorer's hope that his decision to take no formal action against either the Claimant or Ms Hinvest would draw a line under matters, essentially this being a breakdown in the working relationship addressed by a change of team in the restructure, the Claimant continued to correspond with HR between 12 and 16 January 2017 expressing a desire to appeal. Ms Anderson declined, stating that Mr Scorer's decision was final. As a result, there was no formal grievance investigation or hearing to consider the Claimant's complaints.

37 On or about 18 January 2017, a member of the Claimant's former team complained to Mr Davis about the Claimant's behaviour. We accepted as truthful Mr Davis' evidence that Mr Iwogu complained that the Claimant was acting in an irrational, odd and incoherent manner in over-frequent visits despite now being based on a different floor, leaving him feeling intimidated. This is consistent with the content of Mr Iwogu's email sent at 11.45am on 19 January 2017, in which he described the Claimant's conduct that morning, including visiting his former team wearing a hard hat and loudly telling Mr Pillai that he had asked for it to protect him as somebody had a death wish on him and copying former colleagues into an email in which he referred to being "exiled" to the Property and Asset Management Team. Mr Iwogu said that the next time the Claimant came to the second floor he would call for Mr Davis to remove him. In evidence, the Claimant said that he had been at the end of his tether at this time and had to treat everyone as if they were ganging up on him. He accepted that his behaviour may have appeared odd.

38 Mr Davis was concerned by the Claimant's behaviour, including his continued reference to the death wish issue despite Mr Scorer's earlier instruction that he should not do so. On 20 January 2017, Mr Davis met the Claimant and informed him of the complaint about his behaviour during his frequent visits to his former team which was creating an intimidating working environment in apparent breach of a management instruction. The Claimant was sent home, effectively suspended.

39 On 23 January 2017, Mr Scorer rejected the Claimant's appeal against the decision on his initial grievance against Mr Saunders. In his opening statement, the Claimant referred to the death wish from Ms Hinvest, going on to say that he had since had problems with his motorbike, had been burgled and suffered the bereavement of close friends and family. He suggested that the perpetrator's death wish was powerful and cited black magic death spells. The Claimant referred to earlier experiences of threats from his work which brought him into conflict with triads, the Chinese National Security Bureau and CIA, before stating that he could not be complacent given what had happened to the MP Jo Cox, and so had asked family, friends and colleagues to watch over his back and report Ms Hinvest to the police as the prime suspect if any harm came his way resulting in serious injury, life threatening condition or sudden, suspicious or violent death. We consider that the unusual nature of these submissions indicates the Claimant's fraught state of mind, caused in large part by frustration that there had been no formal grievance process and his genuinely held deep sense of injustice.

40 The Claimant attended a suspension meeting with Mr Davis on 26 January 2017. He was accompanied by a trade union representative and notes were taken. The

Claimant produced a statement but Mr Davis said that it would be considered as part of the investigation rather than as part of the suspension. In this statement, the Claimant accepted that he would visit his former team every day to access his locker or see former colleagues and referred to conversations with colleagues in the last four months being "**dominated by the death wish on me**", that Ms Hinvest's admission of the comment did not make him any less vulnerable to her attacks and that he had urged colleagues to continue to watch his back. The Claimant asked Mr Davis to ensure that staff did not touch his possessions. Mr Davis arranged for the Claimant's possessions to be boxed up and stored safely.

41 In an email sent later that day, the Claimant expressed concern that a photograph of him at a charity walk had been removed from his former team's notice board. In the email, he referred to being "cursed by death wish", suggested that the photograph had been removed so that it could be used to put a curse on him and gave a link to a web page on how to put a curse on someone. We did not find credible or plausible the Claimant's evidence that his suspension and the removal of the photograph were being co-ordinated by high level management to engineer a situation to satisfy Ms Hinvest's wish that the Claimant did not exist. By this date, the Claimant was no longer part of her team and Mr Scorer had resolved the issue insofar as the Respondent was concerned.

42 The suspension was confirmed in writing. We do not consider it relevant whether it was the letter dated 27 January or that dated 30 January 2017 which was in fact sent. Both contained an explicit prohibition on contacting any of the council's managing agents or third parties and any council employee, with the exception of Mr Davis, a trade union representative or any colleague accompanying him at meetings.

43 On 2 February 2017, the Claimant sent an email to the Mayor and three Councillors seeking their assistance and informing them that he was subject to "**differential treatment/discrimination at work**" and bringing to their attention a "**culture of racial discriminatory employment practices, hate and bullying in Hackney Housing, in particular Ms Hinvest acts in breach of Council policy of oppose to hate crime, racism and xenophobia**". The Claimant described Ms Hinvest's comment to Mr Pillai, his attempts to find out who had made the comment in order to protect his personal safety, Ms Hinvest's conduct as he accompanied his colleague to a meeting in November 2016, his move to Property Asset Management, his grievances, the content of Mr Scorer's letter dated 16 December 2016 and his subsequent suspension from work. In cross-examination, the Claimant agreed with Ms MacLaren that he had written to seek guidance and advice and had not been conveying information and that he had not consulted the Respondent's whistle-blowing policy before sending the email.

44 In his response, the Mayor told the Claimant that there were strict rules that prevented the involvement of elected members in employment issues and that it would not be appropriate for any Councillor to intervene or advise him on his employment dispute. He directed the Claimant instead to HR or Mr Davis.

45 On 10 February 2017, Mr Davis wrote to the Claimant to inform him that his email to the Mayor and Councillors would be included as part of the ongoing conduct investigation.

46 On 14 February 2017, Mr Davis wrote to the Claimant setting out in three bullet points the conduct being investigated, namely:

(1) Whether the Claimant's frequent visits to his former team and his conduct during said visits created an intimidating working environment.
(2) Whether the Claimant's email to the Mayor and Councillors contravened the instructions given in the suspension letter and the general principles of the Code of Conduct about officers' interaction with elected members.
(3) Whether the Claimant had failed to follow a reasonable instruction given by Mr Scorer by continuing to making reference to the incident between himself and Ms Hinvest.

Mr Davis made clear that he was not investigating the previous issues already dealt with by Mr Scorer but the Claimant's conduct since then.

47 As with previous formal procedures in which he had been involved, throughout the investigation the Claimant sent frequent, lengthy emails to Mr Davis in which he alleged procedural breaches. These included: the failure to identify the specific provisions of the Code of Conduct being investigated, the failure to provide an unredacted statement from the complainant, an assertion that Mr Davis could not fairly investigate himself or Mr Scorer (although the conduct of Mr Davis and Mr Scorer was not the subject of the investigation), the failure to provide dates and times for each visit to his former team and the failure to give specific details of the instruction from Mr Scorer which he said to have breached.

48 A disciplinary investigation meeting took place on 8 March 2017 and the Claimant was accompanied by a trade union representative. The Claimant replied "no comment" to Mr Davis' questions. The only information he provided was that he used the kitchen on the floor of his previous team as it had a kettle. The Claimant's explanation in evidence was that he took a "no comment" stance because he hoped that the disciplinary officer would then reject the investigation report. This did not appear to the Tribunal to be logical. The Claimant was given an anonymised copy of Mr Iwugo's email dated 19 January 2017 during the meeting. The Claimant subsequently sent emails alleging further procedural breaches including the fact that it was not explicitly stated to be a complaint; this was consistent with what appeared to the Tribunal to be the Claimant's unduly literal approach to procedural issues and failure to engage with the substance of the matter. In evidence, Mr Davis accepted that he had not interviewed either Mr Pillai or Mr Mekala as he did not consider the Claimant's behaviour towards them was relevant to his behaviour around the more junior employees who had complained. Ms Hinvest was not interviewed as she had not been in the office on 16 or 17 January 2017.

49 Mr Davis produced an investigation report dated 24 March 2017. The Tribunal find that it is full and a comprehensive analysis of the information available. Mr Davis described the investigation period as being protracted by availability restrictions and complicated by the array of confusing and conflicting emails received from the Claimant. The report repeated the three allegations of misconduct as breaches of the Code of Conduct in three ways: paragraph 3.4 (respect for others) and paragraphs 6 (refusing to carry out a legitimate management instruction) and 9 (deliberate acts of discrimination, harassment or bullying). Relevant evidence in support, including the policies, meeting minutes and statements of three named complainants were attached.

50 Over three pages, the report set out the factual basis of the complaint, the evidence received and the procedure adopted. This includes evidence that on 16 January

2017, the Claimant was said to have visited his former team office on no less than ten separate occasions throughout the day, during which time he had openly said that a member of the team was actively involved in a plot to kill him and that he was wearing a hard hat because of the death wish. Other evidence in the report was that during these visits, the Claimant had routinely and openly discussed the alleged death wish in a manner described as being sinister, unprovoked, intimidating, designed to provoke a reaction, unpleasant and inappropriate. Mr Davis said that the Claimant had refused to cooperate in his investigation interview. Overall, Mr Davis concluded that there was a disciplinary case to answer on each of the three allegations. On the third allegation, Mr Davis relied only upon the email from Mr Scorer dated 7 December 2016 as the source of the management instruction.

51 Mr John Whetley the Head of Environmental Waste was appointed to hear the disciplinary hearing. The Claimant objected as he was at the same level of seniority as Ms Hinvest and was junior to Mr Scorer. Mr Whetley did not see any reason why he could not hear the case as it did not concern the conduct of either Ms Hinvest or Mr Scorer.

52 The disciplinary hearing took place on 19 April, 21 April and 3 May 2017. The Claimant was unable to call Mr Pillai as a witness as he had left the Respondent under terms of a confidentiality agreement. Mr Pillai had been unhappy in his employment since September 2016 and had raised a whistle blowing grievance making a wide range of allegations, including a reference to Ms Hinvest's comment about the Claimant. He, the Claimant and Mr Mekala contacted ACAS for early conciliation. The report of a subsequent external investigation dismissed Mr Pillai's complaint that Ms Hinvest's comment was an act of discrimination. Mr Pillai subsequently expressed concern that the investigation report had been tampered with. The Respondent denied any impropriety. The Tribunal did not consider it necessary in deciding the Claimant's case to resolve this dispute or the circumstances of Mr Pillai's discontent. We find only that Mr Pillai's departure from the Respondent came after several months of ongoing dispute between him and his employer which was not connected with the Claimant's disciplinary hearing, grievances or subsequent claim form.

53 The transcript of the disciplinary hearing demonstrates a careful and detailed consideration of the allegations, the evidence in support and the Claimant's defence. Witnesses were called including the three employees who had given evidence about the Claimant's visits to his former team and his conduct at those times. Mr Iwugo added that the Claimant had followed his former colleagues to the pub and filmed them on his mobile telephone only a matter of weeks before the disciplinary hearing. Other former colleagues who gave evidence at the hearing described the Claimant's behaviour as "pushing boundaries" and "strange", affecting morale, creating an uncomfortable atmosphere and making it an awful place to work.

54 The Claimant called former colleagues to give evidence at the hearing. The Claimant's position was that Mr Iwugo's statement was all lies, to deny that he had visited frequently or that his conduct when he did had been inappropriate. As the Mayor and Councillors were not employees, the Claimant did not accept that he had breached the suspension instruction. The Claimant maintained that Mr Scorer had not expressly said that the Claimant could not discuss the death wish issue, rather the Claimant believed that the instruction applied only to the 2016 stalking email and only for the period between 7 December 2016 (Mr Scorer's email) and 16 December 2016 (Mr Scorer's decision letter). At the end of the hearing, the Claimant was asked whether he took any responsibility for

his behaviour. The Claimant's reply was that "**if the same circumstances happened, I would do it again. If management had not been lying - what choice did I have?"** The Claimant did not regard his behaviour as exaggerated; he described it as a measured response.

55 On 21 June 2017 the Claimant attended a hearing at which he was informed that all of the allegations were found proven and that he was to be dismissed for gross misconduct. This decision was subsequently confirmed by Mr Whetley in a 15 page decision letter which clearly and carefully set out the allegations, the evidence considered and Mr Whetley's findings of fact. In his decision, Mr Whetley relied upon six breaches of the Code of Conduct. In addition to paragraphs 3.4, 6 and 9 as cited in the investigation report, Mr Whetley also considered relevant paragraph 3.2 (political neutrality), paragraph 3.3 (honesty and integrity) and paragraph 5 (seriously demeaning or offending the dignity of others or abusing their position).

56 On the first allegation, Mr Whetley found that some members of the Claimant's former team had felt personally intimidated but others had not. One of the Claimant's own witnesses had accepted that his conduct could have been unsettling for some people, the others had not been present at the material times. On balance, Mr Whetley found that there was strong, first-hand evidence that on 16 and 17 January 2017 the Claimant had repeatedly visited his former team and discussed the death wish and stalking emails in a manner intended to cause alarm and distress, not least as it was presented as an imminent threat against his life about which he was very concerned. New members of the team in particular were affected by this behaviour.

57 On the second allegation, Mr Whetley concluded that the Claimant had completely ignored the terms of his suspension and, by contacting elected officials, was seeking to influence the outcome of the Davis investigation. Mr Whetley regarded this as an act destroying the relationship of trust and confidence.

58 Mr Whetley considered the third allegation to be covered by much the same evidence as the first. He analysed the competing evidence and submissions and concluded that the Claimant had continued to talk about the death wish issue after being instructed by Mr Scorer not to do so in his email sent on 7 December 2016 and his letter sent on 16 December 2016. He did not accept that the Claimant believed that the instruction applied only to the stalking issue or for a limited period until Mr Scorer sent his decision letter. Taking all of the evidence into account, Mr Whetley concluded that the employment relationship had been damaged beyond repair due to the Claimant's conduct and that the appropriate sanction was summary dismissal.

59 In his oral evidence, Mr Whetley was an impressive and candid witness of truth. The Tribunal accepted his evidence that he took great care to conduct his role with diligence and impartiality. This is consistent with the three days he dedicated to the hearing and the manner in which it was conducted, as is evident from the transcript. Having heard the evidence at the disciplinary hearing, he genuinely believed that whilst the Hinvest comment was totally inappropriate, the Claimant had been told repeatedly, including by Mr Pillai, that it was not to be taken literally. Nevertheless, the Claimant had engaged upon a campaign to suggest that his life was in danger and that his reaction had gone beyond any form of reason. Mr Whetley regarded it as totally unacceptable that the Claimant was talking to junior members of staff as if this were some potential physical threat which could terminate his life and to contact the police if something were to happen to him. The Claimant was conducting himself in a way that created an intimidating

atmosphere, putting people on edge and ultimately leading to the complaints which he regarded as genuine and well-founded. The Claimant had effectively forced management to hold a disciplinary hearing by his failure to co-operate and his choice of a no comment investigative interview.

60 The Claimant appealed against dismissal and the appeal was chaired by the Director of Public Realm Neighbourhood and Housing, Mr Alec Richards. Grounds for appeal were that the evidence did not support the conclusion, the sanction was too severe and that procedure had not been properly followed. The Claimant provided further details in support of his appeal in an email sent on 6 July 2017: four of the six witnesses had not supported the allegation of frequent visits and intimidating behaviour; Councillors were not employees; Mr Scorer's instruction was unclear; Mr Whetley had not properly considered his conduct in the context of the Hinvest comment which explained most, if not all, of what had happened; the earlier grievances had not been heard; he had a clean disciplinary record; the charges had changed from three breaches of the Code at investigation to six breaches by dismissal; neither Mr Pillai nor Ms Hinvest had given evidence and Mr Whetley should not have heard the disciplinary as he was subordinate to Mr Scorer.

61 The appeal hearing took place on 6 October 2017 from 10am to 4pm, the Claimant was accompanied by his trade union representative and notes were taken. The Claimant sought to rely upon Mr Pillai's protected disclosure complaint. After an adjournment to read the document, Mr Richards decided that it did not raise anything new and ruled it inadmissible. The Tribunal have read the statement and find that it does not address the Claimant's conduct in January 2017 which was the subject of the dismissal. The hearing considered in detail the points raised by the Claimant and the evidence which had been available to Mr Whetley. Mr Whetley attended the appeal hearing as a witness to explain his decision.

62 By letter dated 23 October 2017, the Claimant was informed that his appeal had not been successful. Mr Richards set out his conclusions under each ground of appeal. Mr Richards considered that Mr Whetley had been very meticulous and impartial. Mr Richards observed that throughout the appeal hearing, the Claimant continued to be reluctant to accept the decision of Mr Scorer in December 2016, had not shown any remorse and would not accept that the earlier matters had been concluded. Mr Richard agreed that the relationship of trust and confidence had irredeemably broken down.

Law

Discrimination and Victimisation

63 Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Race is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that race had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

64 Section 27 of the Equality Act 2010 prohibits victimisation. The Claimant does not need to show a comparator but he must prove that he did a protected act and that he was subjected to a detriment because he had done that protected act. As with direct

discrimination, it is not necessary for the Claimant to show conscious motivation, it is sufficient that the protected characteristic or protected act had a significant influence on the outcome.

65 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the prohibited ground.

66 Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the First Respondent. We should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see **X v Y** [2013] UKEAT/0322/12. We must consider the totality of the evidence and decide the reason why the Claimant received any less favourable treatment.

Protected Disclosure

67 A qualifying disclosure requires a 'disclosure of information' which in the reasonable belief of the worker tends to show, amongst other things, that the health or safety of any individual has been, is being, or is likely to be endangered, s.43B(1)(d) Employment Rights Act 1996 or a legal obligation breached, s.43B(1)(b). A disclosure can include a failure to act as well as a positive act, **Millbank Financial Services Ltd v Crawford** [2014] IRLR 18.

68 The Tribunal must look at the words used by the Claimant to decide whether they convey information (and an allegation may contain information); words which are too general and devoid of factual content tending to show breach of a legal obligation will not amount to information. Words which otherwise fall short may be boosted by context or surrounding communication. The assessment is an objective evaluation in all of the circumstances of the case, **Kilraine v LB of Wandsworth** [2018] IRLR CA. The question is whether there is a disclosure of information, not a strict distinction between information and allegation as had previously been thought.

69 The Claimant must reasonably believe that the information tends to show a relevant breach and that it is in the public interest to make the disclosure. The belief that a disclosure is in the public interest must actually be held at the time of the disclosure; whether or not it was a reasonable belief may include consideration of matters not in his mind at the time and it need not be the only or predominant motivation in making the disclosure, see **Chesterton Global Ltd v Nuromohamed** [2017] IRLR 837 at paragraphs 27 to 31 and 37.

70 The requirement for reasonable belief, which should not be conflated with good faith which is addressed below, involves an objective standard by reference to the

circumstances of the discloser, including their qualifications, knowledge of the workplace and experience, **Koreshi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4, EAT.

71 In **Blackbay Ventures Ltd v Gahir** [2014] IRLR 416, the EAT gave helpful guidance as to the approach to be adopted by a Tribunal considering a protected disclosure claim. This emphasised the need not to adopt a rolled up approach but to consider each disclosure by date and content, identify the risk to health and safety in each case and the detriment (if any) which is caused thereby. The need to apply this detailed analysis was confirmed in **Patel v Surrey County Council** UKEAT/0178/16.

Unfair Dismissal

72 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b). The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

(1) did the employer genuinely believe that the employee had committed the act of misconduct?
(2) was such a belief held on reasonable grounds? And
(3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

73 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

74 In an unfair dismissal case it is not for the tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

75 The range of reasonable responses test or, to put it another way, the need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA. What is reasonably required of an investigation must be looked at as a whole and will depend upon the gravity of the charges, the extent to which the employee disputes the factual basis of the allegations concerned and the nature of the defence advanced by the employee.

76 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v-**

Madden [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the range of reasonable responses test is not a test of irrationality; nor is it infinitely wide. It is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

77 Relevant factors in the overall assessment of reasonableness under s.98(4) include, amongst other matters going to the equity of the case overall:

(1) The conduct of an employee in the course of a disciplinary process, including whether they admit wrongdoing and are contrite or whether they deny everything and go on the offensive.
(2) Disparity of treatment or inconsistency;
(3) Mitigating factors. These include length of service and disciplinary record.

78 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

79 The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures.

Conclusions

Victimisation – issue 1

80 It is admitted that the Claimant's grievance dated 16 May 2016 (working from home) and his first ET1 presented on 21 April 2017 amount to protected acts.

81 In his grievance sent on 14 November 2016, the Claimant complained about the Hinvest comment and the review of his team. Whilst the Claimant does not specifically refer to the Equality Act or discrimination because of race, he does refer to harassment, discrimination and victimisation generally. In particular, the Claimant asserts that Ms Hinvest's behaviour amounted to hate and victimisation due to his earlier grievance against Mr Saunders. This earlier grievance is accepted as a protected act as it makes allegations of race and disability discrimination. We conclude that this reference to Ms Hinvest's behavior being caused by the earlier protected act is an allegation that a person has contravened the prohibition on victimisation in section 27 of the Act. The grievance dated 14 November 2016 is a protected act.

82 In his grievance sent on 5 December 2016, the complaint is about insulting behaviour, a lack of respect and courtesy. There is nothing to suggest that the conduct was due to race or due to an earlier protected act. The email of 5 December 2016 is not

a protected act.

83 Finally, the 12 December 2016 grievance is expressly said to be an allegation of victimization. The Claimant alleges that Ms Hinvest's comment and subsequent lack of courtesy were caused by his earlier complaints. In context, a reasonable objective reader would understand this to refer to the earlier grievances of 14 November 2016 and 5 December 2016. We have found the 14 November 2016 grievance to be a protected act. The Claimant is complaining that he has been treated badly by Ms Hinvest because of it. Again, this is an allegation of a contravention of section 27. The grievance dated 12 December 2016 is a protected act

Victimisation – issue 2

84 At the heart of this case was the Claimant's unhappiness about the comment made by Ms Hinvest to Mr Pillai. Over the course of time, the Claimant's use of language to describe the comment has evolved. Initially, he referred to it as a death wish but latterly as a death threat. He has referred to black magic, attempts to put a curse on him and made a reference to the murder of the MP Jo Cox. It was clear to the Tribunal that, subjectively, the Claimant genuinely believed that there was a serious risk of imminent danger to his safety. However, the Tribunal is asked to decide whether it was a serious death threat, in a literal sense. We have found in paragraph 14 that it was not.

85 Mr Pillai, to whom the comment was made, understood at the time that it was not meant literally when he told the Claimant that it was said in frustration. As we found, by his own account, Mr Pillai was surprised that the Claimant had taken the comment very seriously despite his efforts to keep the Claimant calm. The Claimant accepted in the meeting on 12 September 2016 that he had been told that the person making the comment had not meant it. We infer from that from the date he told the Claimant about Ms Hinvest's comment, Mr Pillai had attempted to reassure him that the comment had not been made as a serious or literal death threat. The Claimant and Mr Pillai had a good working relationship, there was no objective reason for him not to take Mr Pillai's assurance as genuine and accurate.

86 The Tribunal considers that Ms Hinvest's comment was unprofessional and entirely inappropriate. It was reasonable for the Claimant to feel offended and upset when Mr Pillai told him that such a comment had been made. This offence and upset was aggravated when Mr Pillai told him some months later that the comment had been made by Ms Hinvest. However, the extent of the Claimant's reaction was not proportionate and no reasonable employee in his position could have regarded it as a literal threat to his life.

87 As for whether Ms Hinvest lied by pretending not to know who had "issued the death threat" (as it is put in the issues), the contemporaneous documents show that she first became aware of it on 16 August 2016, some two weeks after her actual comment to Mr Pillai. The Claimant described a hate crime and death wish in the context of an incident which had occurred when he was on his motorbike. This description suggests a real and very serious risk to his physical safety, rather than an inappropriate comment made figuratively. We accept that Ms Hinvest genuinely did not recognise her own comment because of the extreme way in which the Claimant described the death threat. This is consistent with her referring the Claimant to the police, an act which is not plausible if she realised that it was her own conduct which they would be investigating.

88 As for the one to one discussion on 12 September 2016, it was again Ms Hinvest who raised the issue as she was aware that the Claimant was concerned. The context is a report that the Claimant had been knocked off his motorbike only days earlier and a concern that this was linked to the death threat he described. In that discussion, the Claimant told Ms Hinvest twice that it had nothing to do with her. Whilst he may have said that to prompt an apology, we have concluded that the effect was further to ensure that Ms Hinvest did not recognise her comment as the source of the threat being described by the Claimant. Any suspicion that she might have had that her comment made in frustration had been shared to the Claimant, was entirely removed by the Claimant both in the extreme and literal way in which he portrayed the threat and his assurance that it had nothing to do with her. We conclude that Ms Hinvest genuinely did not realise that the Claimant was talking about her comment; she did not lie to the Claimant.

89 Ms Hinvest has admitted that on 24 November 2016, she raised her voice to catch the Claimant's attention and had told him, in front of colleagues, that he was not welcome at the Mekala meeting because he was not a lawyer. We consider that this is consistent with the Claimant's description of her shouting and that a reasonably objective employee would find such conduct in front of their colleagues offensive.

90 The reference to not being a lawyer is consistent with the purpose of the meeting being the impact of the restructure on Mr Mekala's immigration status. Given that the Saunders grievance had been decided on 20 September 2016, we do not think it plausible that this was in any way in Ms Hinvest's mind when she encountered the Claimant with Mr Mekala that day. We carefully considered whether the Claimant's grievance only 10 days earlier played any effective part, even subconsciously, in the evident irritation displayed by Ms Hinvest on 24 November 2016. On balance, we consider that it did not. The reason for the irritation was Ms Hinvest's view that the Claimant involvement in complicated issues arising from the restructure and in which he was not qualified was undesirable. Ms Hinvest did not handle the situation well, she should have allowed the Claimant to go to the meeting room and asked him to leave rather than in front of his colleagues in a public space. It was not, however, an act of victimisation because of a protected act.

91 As we have set out in paragraph 27 above, we have not found that Ms Hinvest shouted at the Claimant on 7 December 2016.

Victimisation – issue 3

92 As for the Claimant's grievances, Mr Scorer admitted that he had not followed the formal grievance procedure. That is not to say, however, that he had not dealt with them at all. Mr Scorer took the grievances seriously and investigated their contents with Ms Hinvest. He took informal action as recorded in his letter dated 16 December 2016. Whilst this only referred expressly to the complaints on 5 and 7 December 2016, we have found that he had read all of the correspondence and that it is not objectively reasonable to read the decision letter as referring only to those complaints expressly listed. There was significant overlap in the subject matter of the Claimant's grievances about Ms Hinvest's conduct. Mr Scorer addressed the two most serious matters – the inappropriate comment and her conduct towards the Claimant on 24 November 2016 – as set out in the grievances dated 14 November and 5 December 2016 and again on 12 December 2016. Mr Scorer accepted that on both occasions Ms Hinvest's behaviour had fallen below the standard expected. Mr Scorer decided that an informal resolution of drawing a line under the dispute was appropriate in the circumstances. His decision was even handed in that

Ms Hinvest's complaint about the Claimant's conduct was not formally investigated either.

93 The Tribunal considered that this was a sensible and pragmatic response to a difficult situation, designed to help both to move forward following the restructure rather than revisiting old disagreements. This informal approach and resolution is consistent with the spirit of the grievance and bullying and harassment policies. The Tribunal considers that it would have been better practice for Mr Scorer to meet the Claimant and discuss his complaints either before reaching that conclusion or in providing and explaining his decision. It would also have been better had Mr Scorer ensured that the apology offered by Ms Hinvest was in fact given at the time. Nevertheless, in the unusual circumstances of the case, we can understand why Mr Scorer thought that little would be gained by a formal meeting. Even during this Tribunal hearing, the Claimant lacked objective insight as to the reasonableness of his conduct and behaviour. As Ms MacLaren submitted, to have followed a formal procedure would have prolonged and likely exacerbated the situation rather than calming it. In conclusion, the approach adopted by Mr Scorer was not in any way because the Claimant had alleged breaches of the Equality Act in his grievances but instead was a sensible and well-reasoned course of action to address the breakdown in the relationship in a difficult situation. It was not an act of victimisation.

Victimisation – issue 4

94 In addition to the above, the list of issues identifies eight further detriments said to be due to the protected acts. We refer to our findings of fact above. The decision to move the Claimant to the Property Asset Management team was due to genuine organisational need. The Claimant did not contest a move from his former team, he simply disagrees as to which team was a better fit. His expedited move to the new team was sensible in the circumstances and again not a matter about which the Claimant complains. The Claimant was not the only employee affected, and indeed unhappy, with the restructure proposal. We do not find that this was in any way connected with his protected act many months earlier on 16 May 2016 (the other protected acts not yet having been done).

95 The Claimant was subjected to a disciplinary procedure, suspended, dismissed and his appeal failed entirely because of his conduct in January 2017. At Tribunal, he accepted that his behaviour may have been seen as odd. There was ample evidence from junior employees in the Housing and Transformation Team that it was seen not only as odd but also intimidating and inappropriate. He demonstrated little or no insight into the effect that it may have on others in the team. The Claimant's case is that he was at the end of his tether, not only because of Ms Hinvest's conduct but also because of the refusal of a formal grievance process. We can understand the Claimant's frustration, however, his behaviour was becoming more unusual and needed to be addressed. The Claimant unwisely chose not to cooperate in the investigation meeting in an attempt to force the hand of the dismissing officer. He was given every opportunity to acknowledge that his ongoing references to a death threat in front of colleagues was inappropriate and must stop but did not do so, even at the disciplinary hearing. The Tribunal concluded that Mr Whetley did not want to dismiss the Claimant and gave him every opportunity to say that he would act differently in the future, but he did not. The Claimant did not put to Mr Whetley that his decision to dismiss was because of a protected act. This was not a conspiracy by management to remove him for reasons of convenience and expedience, as the Claimant submitted. Nor was it in any way because he had raised grievances which we have found to be protected acts. The disciplinary procedure and all that then

followed were entirely caused by the Claimant's behaviour in the workplace.

96 The Claimant did not call Mr Pillai as a witness at the disciplinary hearing as he had already left his employment under the terms of a settlement agreement. This was raised at the outset of the hearing and the transcript does not record a refusal by Mr Whetley. It was for the Claimant to press the point and there is no evidence that Mr Pillai was prevented by the Respondent from participating in the hearing even if he felt unable or unwilling to do so because of the settlement agreement. We have found that the termination of Mr Pillai's employment on agreed terms was due to his own dispute with the employer following the restructure and that it was not connected with the Claimant's disciplinary hearing or any of the protected acts.

97 At the appeal hearing, Mr Richards read the letter from Mr Pillai before deciding not to accept it as evidence. We have agreed that its contents do not address the Claimant's conduct in January 2017 which was the cause of dismissal and the appeal hearing. As Ms MacLaren submitted, it was not put to the witness that his decision was in some way because of the protected acts and the Tribunal accepts that it was not.

98 Having considered each of the detriments individually, the Tribunal then considered holistically the totality of the Claimant's victimisation claim and the explanations provided by the Respondent. The Tribunal is satisfied that whilst the Hinvest comment was made in frustration as she dealt with the first protected act, it was not because the Claimant had complained about discrimination but because of the lengthy and procedurally pedantic emails which he was sending and a refusal to accept that the manager handling the grievance disagreed with him. Thereafter, the Claimant's reaction to Ms Hinvest's comment, in particular, his decision to discuss it with colleagues and refer to it as a literal and imminent threat to his life caused the working relationship to breakdown irretrievably. The protected acts played no part at all in the detriments alleged, when considered individually or holistically, For all of these reasons, the victimisation claim fails and is dismissed.

Protected Disclosure – issues 5 and 6

99 The Claimant relies upon his email to the Mayor and Councillors on 2 February 2017 as a protected disclosure. In sending the email, the Claimant did not consult the whistleblowing policy and accepts that he was seeking guidance and advice. Reading the email, however, we consider that he was also conveying information about the situation which led to him needing advice and asking for a review of his case. The Claimant also clearly referred to the death wish as hate crime and a matter which he had reported to the police. We are satisfied that in this email the Claimant is disclosing information which he believed tended to show that a criminal offence had been committed or a legal obligation breached.

100 A subjective belief, however, is not sufficient for section 43B(1) ERA. The Claimant must show that it was also a reasonable belief. As made clear in **Koreshi**, this involves an objective standard by reference to the circumstances of the Claimant including knowledge of the workplace and experience.

101 As we have found, by 2 February 2017 the Claimant had been assured by Mr Pillai and Mr Scorer that this was not a genuine or literal threat, but an ill-judged figurative expression of frustration. The Claimant had not heard the comment and had no

reasonable basis for disagreeing with Mr Pillai who had. Ms Hinvest had offered to apologise. The Claimant had changed team and Mr Scorer had made clear that both parties were to draw a line and move on. In the circumstances, we conclude that the Claimant's belief that his email tended to show a criminal offence or breach of a legal obligation was not objectively reasonable. The email is not a protected disclosure.

Discrimination – issues 7, 8 and 9

102 There is no evidence that Ms Hinvest incited others to "share her hate" towards the Claimant. Indeed, there is no evidence that Ms Hinvest did in fact hate the Claimant. At most, the comment to Mr Pillai and her conduct on 24 November 2016 were a product of frustration and irritation. Each falls a long way short of incitement to share hatred because of the Claimant's race. As set out above, we have not accepted the Claimant's case that his dismissal was part of an ongoing conspiracy by management to remove him for reasons of convenience and expedience at the instigation of Ms Hinvest. Moreover, the Claimant has not produced any evidence from which we could make primary findings of fact to enable us to find that race was any part of the reason for Ms Hinvest's conduct or that an employee of a different race in the same circumstances would not also have been treated in the same way. The claim of race discrimination fails and is dismissed.

Unfair Dismissal – issues 10 to 12

103 As we have set out in our findings of fact, the disciplinary hearing conducted by Mr Whetley was lengthy and constituted a careful and detailed consideration of the allegations and supporting evidence. The letter setting out the reasons for dismissal was equally considered. Mr Whetley did not jump quickly to a belief in misconduct but only formed that view after careful consideration of all of the points raised by the Claimant. He genuinely believed that the Claimant had conducted himself in a way which had intimidated some of his former colleagues. He also genuinely believed that the Claimant had disobeyed clear management instructions not to discuss these matters with colleagues or, after suspension, anyone other those expressly identified in the suspension letter.

104 In reaching that belief, Mr Whetley relied not only on the contents of the detailed investigation report produced by Mr Davis but also had the benefit of evidence from additional witnesses called by the Claimant during the disciplinary hearing. Not all of those confirmed that there had been intimidating behaviour but Mr Whetley properly considered what weight could be attached to that evidence depending on their presence on the days in question and accepted as truthful the evidence of Mr Iwogu. This was a reasonable course of action. The Claimant raises two specific challenges to the investigation – firstly, the Respondent's failure to facilitate the attendance of Mr Pillai as a witness and secondly, the refusal to admit a complaint by Mr Pillai against Ms Hinvest. This latter document is Mr Pillai's whistleblowing grievance in September 2016 which was produced by the Claimant at the appeal hearing. We refer to our conclusions on both points above. Mr Pillai's evidence about the comment itself and events leading up to his grievance in September 2016 was of no relevance to the Claimant's conduct in January 2017. At best, it provided a reason for why the Claimant had acted as he did but this was not necessary as Mr Scorer's letter dated 16 December 2016 which was considered as part of the process had accepted that the comment had been made by Ms Hinvest.

105 Although not set out in the list of issues, at the hearing the Claimant raised a

number of other points which he said were relevant to fairness. In applying section 98(4) to the facts of this case, the Tribunal decided that it was just to consider each point raised.

106 First, the Claimant suggested that he had not breached the instruction given by Mr Scorer on 7 December 2016 as it related only to his stalking email. In essence, submitting that it was not fair to dismiss him for breach of that instruction as it did not prohibit his conduct in January 2017. We disagree. In his email, the Claimant referred not only to stalking and the "angry woman" incident, but also to the death wish and told his colleagues that if anything were to happen to him the police could find the perpetrator in the Housing Transformation Team. Mr Scorer made clear in his email on 7 December 2016 that he did not expect the investigation, the subject matter or individual opinions to form part of any general office discussions or circulated in any written correspondence. It was reasonable for Mr Whetley to conclude that the instruction covered ongoing discussion with colleagues about the death wish as well as the stalking allegation. The Tribunal also regard Mr Scorer's instruction as clear and unambiguous.

107 Second, the Claimant contended that his email to the Mayor and Councillors was not a breach of an instruction on suspension as Mr Davis letter referred to employees. He had not contacted employees but elected officials. This may have been an attractive argument but for the fact that it is based upon a material inaccuracy. The suspension letter did not only refer to employees but also to the council's managing agents and third parties. In other words, the prohibition extended beyond employees and included the Mayor and Councillors.

108 Third, the Claimant contended that Mr Whetley had expanded the case and allegations against him in two material ways in order to secure his dismissal. The expansions were that Mr Whetley had relied upon 6 paragraphs in the Code of Conduct rather than the three listed in the investigation report and he had relied upon the instruction in Mr Scorer's 16 December 2016 letter which was not included in the investigation report either. For reasons already given, we have rejected the Claimant's submission that Mr Whetley was engaged upon a conspiracy with management to secure the Claimant's dismissal. The factual basis of the conduct for which the Claimant was dismissed did not change – he had continued to discuss the death wish with colleagues despite being told not to and did so in a way which was intimidating. We have not accepted that the 7 December 2016 instruction did not prohibit such discussions and, therefore, the reference to the repeated instruction on 16 December 2016 did not expand the case against the Claimant.

109 Throughout the disciplinary process the Claimant had pressed for clarity on which paragraphs of the Code of Conduct he was said to have breached. Mr Davis' investigation report identified paragraph 3.4 (respect for others) and paragraphs 6 (refusing to carry out a legitimate management instruction) and 9 (deliberate acts of discrimination, harassment or bullying). The additional paragraphs cited by Mr Whetley also considered relevant paragraph 3.2 (political neutrality), paragraph 3.3 (honesty and integrity) and paragraph 5 (seriously demeaning or offending the dignity of others or abusing their position). These additional paragraphs did not change the nature of the misconduct alleged nor impede the Claimant's ability to respond fully. They are essentially overlapping, for example paragraphs 3.4, 5 and 9. The Claimant said in evidence that he had not dismissal and appeal decision letters. Had he done so, he would appreciate that the additional paragraphs were already covered by those in the investigation report and attempted to provide the clarity he had requested. In evidence,

the Claimant gave the impression of being pedantic with regard to policies and procedures, tending to take an unduly literal approach and losing sight of the bigger picture. His submissions about the inclusion of the additional paragraphs in the dismissal decision letter demonstrated this further.

110 The application of section 98(4) also requires the Tribunal to consider whether the misconduct was sufficient reason for dismissal and whether it fell within a range of reasonable responses, essentially issues 12(d) and (e). The Claimant had been given an opportunity to move forward in December 2016 and had been told twice by Mr Scorer not to discuss the death threat with colleagues. In January 2017, however, he continued to do so in his frequent visits to the former team. His behaviour was odd, wearing a hard hat and saying that it was for protection and referring to an active plot to kill him. The Claimant's comments at the disciplinary hearing gave no confidence that he would change his behaviour, indeed even during the disciplinary process he had followed his former colleagues to a pub and filmed them on his mobile phone. The Claimant's questioning of Mr Davis suggested a belief even now that because the comment had been made in the first place by Ms Hinvest, his behaviour in talking about it with colleagues thereafter in a manner which made them feel intimated and uncomfortable was and continued to be acceptable. In the circumstances, it was reasonable for Mr Whetley to conclude that the employment relationship had been damaged beyond repair due to the Claimant's conduct. The conduct was sufficient for a fair dismissal and summary dismissal fell within the range of reasonable responses.

111 The appeal conducted by Mr Richards carefully scrutinised Mr Whetley's decision to dismiss. The Claimant was able to advance his arguments and they were properly considered by Mr Richards. The exclusion of Mr Pillai's letter was not unfair as it did not contain evidence relevant to the misconduct which had led to dismissal. The Tribunal agree with Mr Richards' conclusion that Mr Whetley had been very meticulous and impartial in reaching his decision and that the Claimant continued to be reluctant to accept the decision of Mr Scorer in December 2016, had not shown any remorse and would not accept that the earlier matters had been concluded. Mr Richard agreed that the relationship of trust and confidence had irredeemably broken down. This decision was within the range of reasonable responses in the circumstances. The dismissal was fair.

Final Comments

112 For all of the reasons set out above, all claims fail and are dismissed. We appreciate that this will be a disappointment for the Claimant. The Tribunal would like to assure him that we accepted and understood that he has been genuinely affected by Ms Hinvest's comment and all that happened afterwards. He may still feel that it is unjust that Ms Hinvest was not formally punished for her misjudged behaviour where he has been dismissed. However, that would be to miss the point of our Judgment. Ms Hinvest did conduct herself badly but, when she realised that it was her comment which had caused the problem, she admitted it, offered to apologise and accepted that a line should be drawn. The Claimant's conduct in response to the comment was misjudged but when brought to his attention, he did not apologise, admit wrongdoing or accept to draw a line and move on. Had he done so, he would not have been dismissed either. Unfortunately, "two wrongs don't make a right"; in other words, just because Ms Hinvest was wrong at the beginning, the Claimant is not excused of the consequences of his subsequent wrongdoing.

113 The language of a Judgment may at times seem harsh, focusing as it does on legal matters. At the end of his submissions, the Claimant accepted Mr Scorer's apology and said that the hearing had enabled him to feel more at peace. The Tribunal sincerely hope that the Claimant focuses on that apology and the peace he felt and is at last able to move on positively with his life.

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Employment Judge Russell
01/07/2019