Case Nos: 2200417/2019
1403093/2019
1406340/2019

EMPLOYMENT TRIBUNALS

Claimant: **AB**

Respondents: **(1) Department for Environment, Food and Rural Affairs**
(2) XY

Heard at: **Bristol (in person, with closing submissions by video-CVP)**

On: **15 and 16 February 2021 (Tribunal reading)**
17, 18, 19, 22, 23 and 24 February 2021 (Hearing)
25 and 26 February 2021 (in Chambers)

Before: **Employment Judge Livesey**
Mr HJ Launder
Ms S Maidment

Representation:
Claimant: In person
Respondents: Mr Poole, counsel

RESERVED JUDGMENT

The Claimant's complaints of discrimination on the grounds of sex and/or disability, harassment, victimisation, unfair dismissal and wrongful dismissal are all dismissed.

REASONS

1. The claims

1.1 By a Claim Form dated 6 February 2019, the Claimant brought claims of discrimination on the grounds of sex against both Respondents (No. 220417/2019, 'Claim 1').

1.2 By a further Claim Form issued on 23 July 2019, the Claimant brought complaints of unfair dismissal, breach of contract and discrimination on the grounds of disability against the First Respondent only (No. 1403093/2019, 'Claim 2').

1.3 By a further Claim Form dated 19 December 2019, the Claimant brought further complaints of discrimination on the grounds of sex against the First Respondent only (No. 1406340/2019, 'Claim 3').

2. Rule 50

2.1 Rule 50 orders were made on 20 December 2019 in respect of the Claimant and the Second Respondent in Claim 1, both restricted reporting and anonymity orders. The restricted reporting order was said to have been '*in force indefinitely*' and was made pursuant to s. 11 of the Employment Tribunals Act (sexual misconduct) and the anonymity order was unlimited in time and was made pursuant to s. 10A (confidential information).

2.2 Employment Judge Midgley made a further order 30 March 2020, a further restricted reporting and anonymity order under ss. 10A and 11 in respect of Claims 2 and 3 '*until promulgation of Judgment or further Order.*'

2.3 At the Case Management Preliminary Hearing which took place on 1 February 2021, it was agreed that Employment Judge Mulvaney's orders should have applied to all claims (paragraph 5 of the Order).

2.4 As a consequence, neither the Claimant nor the Second Respondent have been referred to by name in these Reasons and the identity of a number of other individuals has been concealed to prevent 'jigsaw' identification.

3. The evidence

3.1 The Claimant gave evidence in support of his claims and we read the witness statement of Mr Lee, a former colleague, whose evidence was not challenged.

3.2 The following witnesses gave evidence on behalf of the Respondents;
- The Second Respondent, Senior Executive Officer with the First Respondent (by video);
- C1, a Deputy Director with the First Respondent (by video);
- LM, the Claimant's line manager and a former Director of the First Respondent;
- Ms Hindmarch, Investigating Officer with the Professional Standards Unit (by video);
- Ms Ledward, First Respondent's Natural Environment Director (by video);
- Mr Watters, former Director of the First Respondent (by video);
- Mr Gallagher, the First Respondent's former Director-General, Strategy Delivery.

3.3 The following documents were produced;

A1; Claimant's written closing submissions;
R1; A hearing bundle of over 2,000 pages. The index made reference to audio recordings of a number of investigatory interviews, but neither party sought to have them played;
R2; A Statement of Agreed Facts;
R3; An Agreed Reading List;
R4; An Agreed Cast List;
R5; An Agreed Chronology;
R6; Respondents' written closing submissions;
R7; A separate bundle of supporting authorities.

3.4 There were 1,750 pages of WhatsApp messages which had passed between the Claimant and the Second which were not produced into evidence. The Claimant was asked a number of questions about them and was offered the chance to check that the messages to which he was referred were being accurately quoted by Mr Poole. He declined.

4. The issues

4.1 There was considerable discussion before Employment Judge Midgley about the issues in the case on 30 March 2020. The Judge ordered that a final, revised List of Issues be prepared in accordance with paragraph 3 of his Order.

4.2 Three revised Lists of Issues were then provided in relation to each claim under cover of a letter dated 15 June 2020. Rather unusually for such lists, the parties' positions in relation to the complaints were also set out (see pages [160-6] of R1 in respect of Claim 1, [167-180] in respect of Claim 2 and [181-6] in respect of Claim 3).

4.3 A number of amendments were made to the Lists as follows;
4.3.1 At the hearing on 8 December 2020, it was clarified that the Claimant was entitled to rely upon a hypothetical comparator within paragraph 4 of the List of Issues in relation to Claim 1;
4.3.2 At the hearing on 1 February 2021, it was clarified that the First Respondent was also relying upon the statutory defence in s. 109 (4) in relation to the complaints of direct discrimination. Paragraph 5.5 of the List was inserted to reflect that;
4.3.3 During the hearing, the Claimant abandoned the issue within paragraph 5 (w) of Claim 2 [175].

5. The hearing

5.1 The hearing had been listed to deal with all matters of liability only. It was clarified and agreed at the start of the hearing that the issues of contributory conduct and the application of the *Polkey* principle should also have been dealt with (paragraphs 18 and 20 of the List of Issues in respect of Claim 2 [179-180]).

5.2 It was determined at the hearing on 8 December 2020 that the Second Respondent would join the hearing by video (CVP) for the reasons explained within paragraphs 55-58 of the Case Management Summary and Order of 8 December 2020. It was also determined that the Claimant's written questions were to have been put to her by the Tribunal, which was how her cross-examination was conducted. The questions were each previewed by quite lengthy introductions which the Judge summarised, with the Claimant's agreement, before putting the questions verbatim. Not all of the questions were put; a small number were considered to have been irrelevant to the issues and, with the Claimant's agreement, they were passed over.

5.3 Further discussions were held on 1 February 2021 about the format of the final hearing and it was determined that it would proceed as a hybrid hearing, with the Claimant, the Respondents' representative and some of the Respondent's witnesses attending in person and the remainder by video (CVP). The reasons for the choice of that format were explained in the Case Management Summary of that date.

6. Facts

6.1 The Tribunal reached its factual findings on a balance of probabilities. It attempted to restrict its findings to matters which were relevant to a determination of the issues in the case. Any page references cited within these Reasons are to pages within the hearing bundle, R1, unless otherwise stated and are quoted in square brackets.

Introduction

6.2 The First Respondent is the Ministry of State responsible for the environment, food and rural affairs. The Claimant began employment within the Ministry in 2017 as a Deputy Director, but he already had a significant period of continuous service within the civil service. He had a professional background working as a statistician and, as a Deputy Director, he was responsible for a team of economists, statisticians and scientists who ensured that policy options were tested, properly framed, designed and delivered. A broad understanding of his role can be taken from the advertisement [1185].

6.3 His skills as an analyst and statistician were evident during the events in the case and at the hearing. He has a meticulous eye for detail and an ability to draw on evidence, sometimes minute pieces, to support the points he wished to make.

6.4 The Claimant's line manager was LM throughout his time with the First Respondent. She is a Director. The only civil servants above her in the hierarchy are Director Generals and Permanent Secretaries.

6.5 At all material times the Claimant was posted to a Bristol office, but would frequently commute to London for work and would sometimes have to stay overnight.

6.6 As a civil servant, the Claimant accepted that he was bound by the standards of behaviour laid out in the Civil Service Code [1995-7]. It required him to show integrity, honesty, objectivity and impartiality. The Code was expressly incorporated as terms of his employment (s. 5 (8) of the Constitutional Reform and Governance Act 2010). He was also expected to comply with the First Respondent's own Code of Conduct which dealt with conflicts of interest (paragraph 5.6 [1976]) and the use of IT equipment (paragraph 10 [1978]).

6.7 A number of other policies were referred to during the evidence and have been mentioned below, where relevant.

Disability and knowledge

6.8 The Claimant claimed to have suffered from a disability, Generalised Anxiety Disorder ('GAD'), whilst working for the First Respondent.

6.9 It was the Claimant's case that, between October 2017 and June 2018, he described some symptoms to his line manager, LM, which ought to have led her to the knowledge that he had a significant underlying problem.

6.10 LM accepted that, in early 2018, he had described feeling 'poorly' and/or 'under the weather', symptoms which he had attributed to tonsillitis. He had also informed her that he had had a chest scan, although he did not explain why, which he confirmed in cross-examination. She knew that he kept fit and enjoyed running and cycling in his spare time. She had no reason to believe that the Claimant had been suffering from anything other than the occasional bug or virus.

6.11 Further, she said that she had no reason to conclude that the Claimant had experienced stress or difficulty with her management style. To the contrary, in October 2017, the Claimant had provided positive feedback that she had been '*empowering, inclusive and supportive*' [669]. That was an email in which he had claimed that he had "*let her know that her management style gave him anxious thoughts"* (paragraph 15 of the Claim Form [72]). That was not how we read it.

6.12 It was not until the Claimant's suspension and the disciplinary process that he turned to LM to convey the difficulties that he was suffering with his mental health. In October, he spoke about the fact that he had not been sleeping well, had seen a doctor for support and was obtaining help from a counsellor ([396], [437] and [710]). By December, he appeared to have been getting a little better [788].

6.13 During the investigation process, he did not inform Ms Hindmarch and/or Mr Adamson, the investigating officers, of any mental ill-health. He stated that he had been under pressure at work, but nothing more.

6.14 Once the disciplinary process started, however, he informed Ms Ledward that he was ill and that his illness made it difficult to respond effectively to the allegations which had been brought against him. He expressed his thanks to "*the NHS mental services who have helped to ensure that I have overcome the many suicidal thoughts I have suffered*" [916]. Further, in the lengthy statement which he provided just before the hearing, he described a '*mental impairment*', stress and anxiety which he claimed to have been under at the time that the misconduct had occurred (paragraphs 14 [976], 21 [978], 52 [984],148 [1006] and 149 (d) [1007]). At the disciplinary hearing itself, he confirmed that he had not been diagnosed as suffering from any mental health condition, that he had not told anyone else that he had been suffering from such issues and that he had no further evidence to confirm the existence of such an illness ([1062] and paragraph 40 of Ms Ledward's witness statement).

6.15 Of more importance was the existence of evidence on the point of causation in relation to how any earlier illness may have caused or contributed to the alleged misconduct. In the statement which the Claimant submitted two days before the disciplinary hearing, he suggested that the '*mental impairment'* and/or anxiety may have led to the behaviour and had been caused by his illness (paragraph 45 [982] and paragraph 156 (a) [1010]). At the hearing itself, he was not able to further explain or provide any evidence of such a link. He was much more vague (e.g. [543]).

6.16 Ahead of the appeal hearing, an OH report was commissioned after the Claimant had disclosed a GP's letter had made that recommendation (see, further, below).

6.17 The medical evidence indicated that the Claimant had presented with anxiety on occasions in 2013, 2014 and 2015 due to ordinary life events (a house move, a new baby and work), but it did not suggest that he had seen his GP between October 2017 and April 2018 for such a condition, or anything else for that matter [2005]. In April, he complained of chest pains. An ECG was undertaken, but no problem was identified. He suggested to the Second Respondent in a message that he thought that it was a virus. He did not visit again until September, but it was on 1 October 2018 when he appeared to explain the mental health problems that he was experiencing. It was recorded then that he had "*no previous HM* [mental health] *problems*" [2005].

6.18 He returned to his GP on 1 November when he was said to have been "*very anxious in regards an extra marital* affair" which had "*led to a disciplinary*" and "*catastrophic thinking*". He then received counselling

between October 2018 and February 2019 and, at the end of those sessions, he was started on antidepressant medication (Sertraline).

6.19 In March 2019, a GPs' letter was submitted as part of the Claimant's appeal [1153]. He had complained to his GP of poor sleep, '*brain fogging*' and muscle aches. Having had a discussion with him, Dr Lloyds thought "*that this* [situation] *has put a great deal of pressure upon him and probably impaired his judgement at times.*" He further opined that he thought that he "*would qualify under the Disability Discrimination Act*".

6.20 An OH report, dated 21 June 2019, followed a telephone assessment [1439-1443]. At that point he was described as being "*quite depressed*" and it was not anticipated that he would have been likely to stop needing antidepressants for the "*foreseeable future*" [1441]. Dr Sheard was asked a number of specific questions about the acts of misconduct committed between October 2017 and August 2018 which led to the Claimant's dismissal. He was asked whether the Claimant's condition was likely to have caused him to have acted irrationally and/or without awareness of the significance of his actions. Whilst not a psychiatrist, Dr Sheard offered the following view [1442]:

> "*In my opinion there is evidence that* [the Claimant] *was under pressure at this time. There is evidence he was distressed and suffering from anxiety…*
> *However the medical evidence itself is very limited as he did not attend any medical practitioner…*
> *While he may have been unwell I have no new 'medical' evidence that he was likely to act irrationally/without awareness/with significantly impaired judgement as a result.…I would not "disagree" that there is a possibility that his judgement may have been impaired but I am afraid I cannot with any confidence or based on any medical evidence suggest how substantial any impairment may have been. I note that any other* [sic] *neither you nor* [the Claimant] *have provided me with evidence that he otherwise acted irrationally, without awareness or with significantly impaired judgement at that time in any other respect of his daily living.*"

6.21 Dr Lloyds provided further evidence in the form of a letter dated 14 February 2020 [2012-3]. The GP again recounted what the Claimant had told him and expressed the view that the "*excessive stresses*"..."*would have exacerbated his medical condition and impaired his performance.*" He also said this;

> "*I understand Mr* [AB] *made an error of judgement in an attempt to retain a colleague with his former employer to enable him to deliver his work. It is common for individuals with extreme anxiety to have an irrational behavioural response to escape the situation causing the suffering and I have no reason to dispute this was the case for Mr* [AB] *given a common reaction to his medical condition is excess fear*".

6.22 Dr Lloyds also suggested that "*Dr Rachel Bennett had made a formal diagnosis of anxiety*" in 2015. We could see no basis for such an assertion. That was not what the note said and the Doctor did not explain how he had reached such an interpretation. Mr Poole's submissions on that point, we felt, were correct (paragraph 76, R6).

6.23 A second OH report was provided on 10 July 2020 [2018-2022]. Dr Sheard was specifically asked to reconsider his view of the impact of the Claimant's condition upon his judgment during the material time. Having considered all of Dr Lloyds' correspondence, the GP notes and the WhatsApp messages, amongst other things, he concluded that there was only limited information regarding the Claimant's reduced mental well-being between October 2017 and April 2018. He stated that a long-standing general anxiety disorder caused people to feel anxious most days, being a common condition affecting up to 5% of the UK population. However, the extent to which that affected his functioning was difficult to gauge given the nature of the contemporaneous documentation (the WhatsApp messages) and the fact that he was at work and performing well.

6.24 Dr Lloyds reported again on 26 August 2020 [2023-6], another letter in which the Tribunal felt the strength of his advocacy for the Claimant. He referred to the fact that the Claimant's alleged condition, GAD had been the subject of clinical guidance from NICE since 2011. He considered that the Claimant had suffered with GAD "*for several years*" and, from the summer of 2017, "*it had a significant impact on his ability to carry out normal day-to-day activities.*"

6.25 The final piece of the medical jigsaw was the evidence of Mr Tennent, a consultant psychiatrist, who was instructed by the Respondents to prepare a report, dated 9 January 2021, which was the only report written by an expert from the appropriate discipline in respect of the Claimant's condition [2137-2156]. That said, Mr Tennent did not meet or interview the Claimant. He reviewed all of the relevant medical evidence and some of the WhatsApp messages before addressing the central question as to whether the Claimant's conduct could have been explained on the basis of his alleged GAD.

6.26 Mr Tennent agreed that the medical notes reflected symptoms of anxiety in 2011, 2012, 2015 and 2018. The symptoms recorded, however, appeared to have been physical, without symptoms of autonomic arousal (for example, panic attacks). He went on; "*There is no indication that the symptoms or any more generalised anxiety impacted upon his work performance, sickness record or honesty*" (paragraph 9.6 [2149]). He had a successful career and intermittent symptoms, but not ones which were persistent enough to warrant a formal diagnosis of GAD in Mr Tennent's

view (paragraph 9.8). As to the key question in relation to the impact upon the Claimant's judgment, Mr Tennent said this;

> "*In my opinion based on Mr* [AB] *medical history (especially the intermittent nature of any anxiety related symptoms) and the contemporaneous WhatsApp records for this period there is a probability of less than 50% that Mr* [AB] *judgement and decision-making were undermined by an anxiety state such that as obtains in GAD.*" (paragraph 10.8.1 [2153]).

The Claimant accepted in cross-examination that the WhatsApp messages were probably a good indication of how he had felt at the time.

6.27 In a subsequent set of answers provided to the Claimant's questions on 5 February 2021, Mr Tennent seemed a little more sympathetic to his cause; he acknowledged the possibility of a link between GAD and impaired cognitive performance and stated that 'he could not rule out' the possibility of a GAD suffered making a 'hasty or rash' decision [2156A-E].

6.28 The Claimant himself had provided two impact statements (16 January and 23 February 2020 [2009-11] and [2014-7]). He claimed that, due to overwork and a lack of resources, he developed anxiety and worry which was increased in October 2017 when LM asked him to manage his deputy out of the organisation and when a colleague announced that he was likely to leave. He stated that, "*from July/August 2017 the condition worsened such that it had a detrimental impact on my ability to carry out normal day-to-day activities*". He described difficulty with concentration, fatigue, irritability, headaches and memory loss amongst other things. He stated that he struggled with activities "*such as concentrating, gardening, running, cycling, care for children, commuting, social activities, sleeping, going to the toilet and occasions of struggling to get out of bed*" (paragraph 7 [2010]). In paragraph 10 of his second statement [2016], he said this;

> "*My disorder and its persistent effects over several months had a significant impact on my cognitive performance. The negative thoughts and apprehension about consequences to me, impaired my judgement and led to an irrational decision to try to retain the colleague for the Respondent. My intervention was to discourage B* [XY] *from accepting a position in the private sector and helped the Respondent*".

6.29 We found the Claimant's account of his condition and his symptoms unreliable for a number of reasons;

- He changed his impact statement during his evidence; he stated that paragraph 2 ought to have referred to 'anxiety', not 'GAD' having been diagnosed in 2015. The 'diagnosis' was simply based upon a brief reference to 'anxiety' in the GP notes;
- He gave inconsistent evidence about the start of his condition; he told OH [1440] and the appeal officer [1406] that it had been in August 2017. In his first impact statement, he stated that he had symptoms since 2011 (paragraph 2), which worsened in July or August 2017

[2009-10] and in his second, he referred to the daily impact of GAD since 2011 (paragraph 3 [2014]);

- Given that he had stated that his GAD had pre-dated his work with the First Respondent, it was odd that he attributed its cause to his work with Defra (see [1006], [1527] and [1717]);
- His evidence misquoted and/or changed other pieces of evidence to improve his case;
    - Mr Sheard's report [1442] was misquoted in paragraph 96 of the Claimant's witness statement;
    - Several of the WhatsApp messages which he relied upon to portray a serious condition had been changed or taken out context. For example, an emoji with sunglasses had been omitted from a message in which he suggested that he was having a heart attack, completely changing its tone [2038-9]. In another, he simply deleted the words '*ha ha*' from a message sent on 6 December which also changed its tone dramatically [2039-2040];
- He also attempted to exaggerate or heighten other symptoms. For example, on 23 April 2018, there had been an evening which he had spent with the Second Respondent after they had both been for a run when she had put her head on his chest. He reported that she had said that his heart had been beating fast ([514] and [626]). He subsequently described the event as a 'panic attack' to the grievance investigation (paragraph 2.9 (c) [1658]).

Dr Lloyds' opinion, since it appeared to have been largely based on self-report, was similarly tainted by those shortcomings.

<u>Evidence relevant to the First Respondent's statutory defence</u>

6.30 The First Respondent sought to rely upon the statutory defence contained within s. 109 (4) of the Equality Act 2010. The following evidence was relevant to that issue;

- The Claimant's line manager, LM, said that she has received training on equality and diversity issues and attended a course on 'Unconscious Bias' in early 2017;
- Ms Ledward received training on unconscious bias and inclusive leadership, although it was not clear when. She had a Masters Degree in mental health and was an accredited member of an HR organisation;
- Mr Gallagher was a 'Disability Champion' within the First Respondent which, he told us, meant that he had been chosen by the Permanent Secretary to act as a lead in that area.

6.31 The First Respondent adduced no evidence of the dates and content of any training nor, even, its Equal Opportunities' Policy, if it had one.

Claimant's career with the First Respondent

6.32 The Claimant was one of seven Deputy Directors who reported to LM. Each oversaw a sub-team and, although the Claimant had the largest sub-team within the Directorate, he had three direct reports at Grade 6 level. He described LM in favourable terms, both to her face [669-670] and behind her back [195].

6.33 LM described the Claimant as "*consistently driven, energetic, self-assured and highly motivated*" who was "*determined to do a good job and to be recognised as a top performer*" (paragraph 7 of her witness statement). This was reflected in a strong performance review in March 2018 [1017-8] and a significant bonus. Feedback from peers was also strong [1024-1048]. It was clear from the Claimant's messaging to the Second Respondent that he had a high regard for his own abilities too (paragraph 9 of LM's witness statement, [194-5] & [200]).

6.34 She did not consider that the Claimant had an excessive workload. Indeed, she considered that he had the lightest work load of all of her Deputy Directors. He had appeared to be comfortable with the work that he was given and completed it to a high standard and on time. He did not raise complaints of overwork. Rather, he asked for ways he could have been 'stretched'.

6.35 The Claimant was tasked with delivering a piece of work known as the Evidence Compendium, evidence which was to support the Bill for the reform of the Common Agricultural Policy. The additional task of delivering the outline business case with the Bill was ultimately taken away from him. He was allocated a small sub-team including C3 and another Bristol based employee, whose skills ultimately proved ill-suited to the task. The Second Respondent came to work on the project too, more about which later. The Compendium was published in February 2018.

6.36 The Claimant complained that his workload was 'oppressive'. He claimed that the job of delivering the business case on the Bill was a job which would ordinarily have been allocated to a Programme Director. His stress levels increased and he claimed that he was "*pushed to breaking point in Summer 2017*" (paragraphs 8-12 [2067-8]).

6.37 Our impression of the evidence overall was that the Claimant was clearly working extremely hard in the run up to the production of the Compendium in February 2018. There were, as in so many walks of life, periods in which work intensity increased and others when it was less severe. In that period, even LM accepted that the Claimant and his team were under a lot of pressure [1064-6]. His colleagues, C1 and C3, reflected that too ([963] and [694-5]). The fact that he was relatively new into his post and that there were themes of non-delegation within his 360º review (e.g. [1035]) perhaps led him to doing more of the work than may have been necessary

but, even amongst these more hectic periods, he had still found time to send copious WhatsApp messages during work and to conduct his affair with the Second Respondent. Importantly, he had not been complaining of over work to LM. Quite the opposite as we had said, he was asking to be stretched (in order to achieve a higher appraisal rating) and was grateful for her empowerment which enabled him to develop and flourish in the role [669-670].

Second Respondent

6.38 The Second Respondent came to work for the First Respondent as an intern on a six month contract in May 2017. Her immediate line manager was then a Mrs Sherry and she suggested that she should shadow other senior managers. The Claimant agreed to take her on and they met for the first time on 13 September 2017. Shortly afterwards, he extended her internship for a further 12 months.

6.39 LM had indirect management responsibility for her Second Respondent who, as an Executive Officer and later as an Senior Executive Officer ('SEO'), was 6, then 4, grades below her. She was therefore 5, then 3, grades below the Claimant. She was also approximately 10 years younger than him.

Relationship between the Claimant and the Second Respondent

6.40 In October 2017, the Second Respondent was offered a position at Unilever. The Claimant had already informed her of the possibility of recruitment into a vacancy at Higher Executive Officer ('HEO') level, but he then arranged for an SEO recruitment campaign to be run, which he encouraged her to enter into. He helped her with the application process. She was reluctant to turn down the Unilever role on the basis of a possibility of a promotion within the First Respondent, but the Claimant assured her that she would have been successful; he helped her with her application, with one other he sifted the applications for interview, which was rare for someone of his seniority, he informed her of the questions (both his and his fellow panel member), he told her how to answer them, he practised the process with her and he then chaired the interview with Ms Rios-Wilks. Perhaps not unsurprisingly, she was successful. He accepted in evidence that it had been a '*done deal*', despite having denied that proposition at a subsequent disciplinary interview [534].

6.41 The Claimant demonstrated, both through his own evidence and through the cross-examination of others, that the retention of the Second Respondent was enormously beneficial to his delivery of the Evidence Compendium; she had skills which were well suited to the work and, as someone already in the Department, she knew and understood what was required. He relied upon those matters for explaining his conduct in relation to her recruitment.

6.42 In or around November 2017, it was agreed that the Claimant and the Second Respondent commenced a sexual relationship which continued for several months. Sexual intercourse had in fact had taken place before the Second Respondent's SEO job interview in December. At that point in their lives, the Claimant had a long-term partner with whom he had two children. The Second Respondent was married.

6.43 There was considerable dispute between the Claimant and Second Respondent as to who was responsible for the start of their relationship. The Second Respondent pointed to the messages which she had been sent which had become increasingly flirtatious and the level of confidence which he appeared to place in her.

6.44 The Claimant's case was that, having agreed to end the relationship, the Second Respondent continued to "*make sexual advances towards him*" (paragraph 4 of the Claim Form [14]). He said that she engineered situations when she was able to be alone with him. She discussed the difficulties with her marriage and suggested that they should continue to be "*friends with benefits*" (paragraph 5 [14]). Their intimacy continued and it made the Claimant feel uncomfortable. As time passed, she began to ask what his partner would have done if she were to have found out about their relationship. This, the Claimant alleged, "*raised alarm bells*" with him because he felt that the question was a veiled threat to reveal their relationship if she did not get the further intimacy that she sought.

6.45 The Second Respondent's account was entirely different. She suggested that she had been coerced into the relationship to start with, that she felt afraid of jeopardising her career by refusing the Claimant's requests for intimacy and that it was she, not him, who had attempted to stop their activity.

6.46 The truth of these allegations was not relevant to a determination of the claims save in respect of the complaints which had been brought against the Second Respondent personally within Claim 1 under s. 26 (3). Those allegations required the Tribunal to make specific findings in relation to events which occurred on two occasions; 4 July and 1 August 2018 (see paragraph 16 (a) and (b) of the List of Issues [164]).

6.47 Nevertheless, in general terms, we could not accept the level of reluctance portrayed by the Claimant in light of the WhatsApp messages. Both parties appeared to have been willing participants in the relationship for several months, however it started.

<u>4 July 2018</u>

6.48 In the days before 4 July, the Claimant accepted that many of his WhatsApp messages had been flirtatious and suggestive of a continued sexual relationship (discussions, for example, around the purchase of lubricant).

6.49 On 4 July 2018, the Claimant attended London for a drinks party for the Grade 7 team as a means of thanking them for their hard work during a challenging period. He alleged that, although the Second Respondent had not been invited, she attended and arranged to catch up with him afterwards. She accompanied him to his hotel that she made sexual advances towards him. She suggested that contraception was bought from a shop at Marylebone Station. The Claimant delayed, knowing that the store was to close. He then returned and informed her that it had closed and that they had agreed to remain as friends only. The allegation was that the Second Respondent's sexual advances on that occasion were rejected (see paragraph 16 (a) of the List of Issues [164]).

6.50 The Second Respondent stated that her meeting with the Claimant after the drinks event had always been planned because she had needed some feedback from him in respect of some slides which were going to have been shared with the Director General the following day. She took her laptop to the drinks event with the intention that he would review her slides there. He, however, persuaded her to go back to his hotel in Marylebone, asked for a massage and insisted that they should have sex. He then suggested that he would go and buy condoms, he left for a while, returned empty-handed because the shop was shut, but they then nevertheless engaged in sexual activity.

6.51 In our judgment, it was noteworthy that the Claimant did not refer to the fact that there had been sexual activity between him and the Second Respondent on this occasion in his Claim Form (paragraph 10 [15]), yet it was clearly admitted in the Statement of Agreed Facts at paragraph 4. Her advances were not 'rejected' therefore, even if she had made them. We concluded that he Claimant willingly engaged in sexual activity.

<u>1 August 2018</u>

6.52 Between 4 July and 1 August, further, frequent provocative WhatsApp messages were sent, including several photographs of him in states of some undress. The Claimant even suggested that they might take a week's holiday together the following year.

6.53 On 1 August, the Claimant and Second Respondent met again at the Claimant's hotel. He alleged that she deliberately left her bag in his room before they went out for food so that she had an excuse to return once they have eaten. Again, she made it evident that she wanted to recommence their sexual relationship and, again, he said that he felt pressured because of a fear of disclosure of their affair to his partner. The conversation progressed and he alleged that she told him that she wanted him to leave his partner, but he claimed that he was happy in his relationship. She then called him a "*bastard*" and made it clear that she was unhappy about his decision.

6.54 The Second Respondent's account was that the Claimant told him to leave her bag before they went to dinner. She described mutual oral sex which she was reluctant to participate in, after which they argued. She considered that it arose because the Claimant was experiencing guilt in relation to his partner. He threatened to report her for sexual harassment if she did not stay quiet about their relationship. She reassured him that everything was okay between them and that they would continue to work effectively together.

6.55 The Claimant also did not refer to the fact that there had been sexual activity between him and the Second Respondent in his Claim Form on this occasion (paragraph 11 [15-6]). He referred, somewhat obliquely, to 'interactions' between them, yet that was also clearly admitted in paragraph 4 of the Statement of Agreed Facts. He also said in evidence that the oral sex which they had that night had not been unwanted. He did not 'reject' her advances that night on that basis.

6.56 The Claimant then had 2 weeks' leave, during which he did not contact the Second Respondent. This, she said, was a "*turning point*" for her; without him there, she stated that she began to realise how coercive and controlling his behaviour had been.

6.57 When he returned from leave, he contacted her again. She notified him that she was thinking about applying for another role out of his team. In reply, she received a photograph of the Claimant in a hot tub [348]. She formed the view that his behaviour was not going to change and she resolved to report the matter. She confided in a close friend who convinced her to take steps to change the situation. We considered those exchanges to have been particularly candid, honest and revealing (see the references within paragraph 37 of her witness statement).

<u>Second Respondent's complaint and the Claimant's suspension</u>

6.58 On 14 August, the Second Respondent spoke to her Grade 6 Manager and the Claimant's Deputy in confidence, C1. She told him that she had been sexually harassed by the Claimant for several months. She had been upset and anxious about the ramifications of making a formal complaint. He reassured her and she eventually resolved to take her allegations to senior management. He kept notes of their conversations [304].

6.59 On 5 September 2018, the Second Respondent approached LM and indicated that she wanted to raise a complaint of bullying and sexual harassment against the Claimant.

6.60 A meeting was set up on 10 September 2018, when the Second Respondent was by C1 and LM was supported by Ms Ayres, an HR Business Partner. At the meeting, the Second Respondent set out her allegations in more detail, as reflected in the notes [355-8]. She then sent a number of documents which included a written summary of her

allegations [307-316] and a record of her WhatsApp communications with him over 11 months. Also included were the photographs that the Claimant had sent to her [348-353].

6.61 The essence of the complaint was that the Claimant built her trust, flattered her, did favours for her and bought her dinner. He found reasons for them to spend time together and enabled them to be isolated. Her attempts to prevent physical contact were undermined (him requesting a massage, for example) and, when away, he would always visit her in her room which made it difficult for her to leave or escape. She described having been scared to deny him what he wanted. She described his conduct as dominating and his messages were frequent, to the point of being 'constant'. She eventually gave in and they started a sexual relationship on 13 December. She described that it would have seemed as if she had consented, but she described herself as having been 'coerced'. After an agreement in January for the relationship to end, she described his flirting beginning again. There were further sexual encounters and she described a pattern of him persuading her into such conduct, with subsequent agreements for them not to be repeated then later broken. The Second Respondent identified some specific dates, but many of them were framed within time periods [307-316].

6.62 Needless to say, LM regarded the complaint as extremely serious.

6.63 It was clear to LM at that point that an investigation was necessary but, before taking action, she sought advice from HR, the Civil Service Complex Casework HR team, the First Respondent Security and the Permanent Secretary. She considered the grounds for suspension in the First Respondent's Disciplinary Procedure [1951] and other alternatives, such as moving the Second Respondent or restricting the Claimant's duties. She considered that the former option was inappropriate because of the potential disadvantage to the alleged victim. She ruled out the latter option for the reasons recorded in an email on 10 September [360].

6.64 LM was cross-examined on the basis that her record of events of 10 September showed that she suspended as a knee jerk reaction to the allegation (paragraph 2 (c) [360]). She explained that the decision was not taken until the very end of the day, after she had received the HR advice referred to above, and her email, written at 5.30 pm was written in the present tense then. We accepted why the Claimant had read LM's document as he had, we believed that her account of the material was reliable.

6.65 The Claimant was suspended the next day by LM at a meeting. She explained the nature of the complaint that the Second Respondent had made and his suspension was confirmed in writing on the basis that an allegation of misconduct had been made which "*involves a complaint of*

harassment" [361-2]. He was informed that it was to have been kept under review.

6.66 Thereafter, LM provided the Claimant with details of the First Respondent's Employee Assistance Programme, which enabled him to obtain advice and counselling. She then maintained regular contact with him through telephone, email and text message (see paragraph 24 of her witness statement, [1112-4] regarding the texts and [372], [396], [437], [607], [710], [745], [755], [780], [788], [877], [900], [906] and [1107]). The Claimant was also entitled to keep his electronic devices and so he had access to emails. He was also provided with a companion through the investigation who was to support him and alert the employer if he became worried about his well-being [395].

Investigation

6.67 On 17 September 2018, Ms Hindmarch, an experienced Home Office Security and Professional Standards Unit ('PSU') investigator, was appointed to conduct the investigation into the allegations and Ms Ledward, Director of Natural Environment, was appointed as the decision manager. Neither of them had previous knowledge of the Claimant or the Second Respondent. This was an investigation into the Second Respondent's complaint as a grievance but also into the Claimant's alleged behaviour as allegations of potential misconduct.

6.68 The Claimant was informed that disciplinary action was being instituted against him on 26 September in respect of the following allegations, referred to as 'Terms of Reference ('TORs') [391];

(i) That the Claimant's "*unwelcome sexual advances and repeated sexual activity*" with the Second Respondent caused her harassment as defined within the Equality Act;

(ii) That he had influenced recruitment decisions and had acted in breach of departmental policy the Civil Service Code "*in relation to integrity, honesty and impartiality*";

(iii) That he had acted inappropriately by creating opportunities to further his relationship with the Second Respondent at public expense and had thereby acted in further breach of the Code;

(iv) That he had breached the Conflicts of Interests Policy and the First Respondent's Code of Conduct in failing to declare a relationship with a colleague;

(v) That he had failed to follow the First Respondent's Code of Conduct and the Social Media Policy when using official IT systems.

6.69 The Second Respondent was interviewed on 10 October. She chose to be unaccompanied, although Ms Hindmarch was supported by a male colleague, Mr Adamson. The audio recording was subsequently transcribed [439-489]. She was asked detailed questions about the relationship with the Claimant, how it had started, the key events and the nature of their intimacy. By their nature, some of the questions required

her to give details which were sexually explicit [480-1]. She followed up the interview with a document of clarification [609-613].

6.70 At a further interview which occurred on 16 October, she was asked similarly detailed questions about their interactions [570-606].

6.71 C1 was interviewed on 11 October and provided some further answers to questions in writing ([491-2] and [775-9]).

6.72 The Claimant was interviewed on 15 October 2018. Ms Hindmarch was again accompanied by Mr Adamson, for the interview. The Claimant was accompanied by Mr Horsington. The interview was also audio recorded and was transcribed [493-567]. At points during the interview, the Claimant read from a script which he had preprepared [496-514].

6.73 The Claimant alleged that the "*line of questioning during the course of the interview..was degrading and unnecessary in the extreme*". He complained that he was "*subjected to an excruciating experience..in having to reveal explicit details of the sexual activity between himself and the Second Respondent*" (paragraphs 20-27 of the Claim Form [18]). The Claimant alleged that none of the detail that he was asked for was necessary for a determination of the allegation which had been raised by the Second Respondent. He claimed that the interview was demeaning, even more so because he had Mr Horsington present, in front of whom he was required to reveal explicit sexual details.

6.74 Ms Hindmarch referred to the very specific nature of some of the allegations which the Second Respondent had made on 10 September [355-8]. The nature of the physicality involved was relevant to the seriousness of the allegations, she said. There had been consideration about whether the matter ought to have been handed over to the police at the outset, but the Second Respondent had indicated that she did not want to pursue a criminal investigation [367-9].

6.75 Having considered all of the evidence in relation to the interview, we determined that;

- The tone was appropriate for the circumstances. We noted that it started in a friendly and supportive manner and did not deteriorate. The interview was lengthy, but many of the Claimant's responses to questions were detailed and extensive. Ms Hindmarch and Mr Adamson managed to keep the tone light with occasional humour [505-6];
- The interview was not oppressive. The Claimant was offered breaks and the interviewers attempted to calm his nerves ([494], [495] and [524]). The Claimant did not complain about the circumstances in which he was asked the questions;
- The questioning was not unnecessarily detailed. Details of intimacy were provided by the Claimant voluntarily (for example, the nature of

their contact having been oral sex on particular occasions [514]). The specific questions which were asked about the Claimant's position on 27 November 2017 were directly relevant to the Second Respondent's allegation that she had been '*pinned down*' whilst made to perform oral sex (see [356] and [556-7]). Mr Adamson also asked questions which were similarly detailed [565-6].

6.76 The Claimant subsequently produced a long written account of the matters about which he had been asked [615-708].

6.77 He was interviewed again on 29 October 2018 [712-743]. Ms Hindmarch, Mr Adamson and Mr Horsington were in attendance again. He was asked whether he had forewarned the Second Respondent about the questions that she was to have faced at interview, to which he said that he could not remember [712].

6.78 The Claimant was also asked questions about the contents of some of his WhatsApp messages, copies of which were made available to him. He was asked about having referred to LM as a '*bitch*', another female employee as a '*cunt*', '*a slapper*' and a '*bitch*' and Government Special Advisers ('Spads') as '*mainly useless fuckers*', '*cunts*' and '*thick twats*'. He had the opportunity to look at the messages and then comment. It was clear that he took that opportunity on a number of occasions (e.g. [715], 718] and [723]). In another message, he had sent the Second Respondent an image of a 'sensitive official' document [787].

6.79 He complained that it was an ambush and that he ought to have been given the WhatsApp messages before the meeting so that he could have considered them. He did not say that then and did not object to answering questions on them. He did not ask for an adjournment, nor did he deny that he had sent the messages. He accepted that it had not been appropriate to have done so whilst he was attending meetings [716].

6.80 It was important to note that he had used his work phone to send the messages whilst the Second Respondent had used her private phone to communicate.

6.81 All of the interviews were completed by 29 October 2018.

6.82 Ms Hindmarch had had a week's leave in late October 2018. A delay was also caused when the Claimant was chased to agree the summary of his interview ([781] and [791]). A final question was put to him in relation to a document on 3 December, which he answered that day ([786] and [790]).

6.83 The PSU report was completed on 5 December 2018, within the 12 week target which it operated under, and it then went to Ms Ledward on the 6th [794-837]. Ms Hindmarch also appended evidence from the Second Respondent and C1 [845-55]. In all, Ms Ledward had 44 annexes

amounting to approximately 2,000 pages (see paragraph 10 of her witness statement).

6.84 Ms Hindmarch considered that there was a case to answer in respect of three of the six allegations (paragraph 68 (ii), (iv) and part of (v) above), but no case in relation to the other elements and, specifically, not in relation to the allegations of sexual harassment and/or inappropriate use of public funds. In relation to paragraph (v), the activity was not considered to have been in breach of the social media policy, but was nevertheless contrary to the Defra Code of Conduct (paragraph 8.5 [836]).

6.85 LM stated that she had reviewed the Claimant's suspension, but had no reason to alter the decision that she had taken at the outset because the circumstances had not changed. She was speaking to her HR Business Partner, Ms Ayres, regularly and always discussed the Claimant's position when she did. She had explained her thinking to the Claimant and was open to the possibility of further, earlier reviews if the situation changed [756]. When the Claimant did raise an issue in November 2018, LM considered the matter, took further advice, but did not consider that a change to the suspension had been warranted ([758], [763] and [766]). The Claimant had seemed content with that approach then [755]. LM requested updates on the progress of the investigation, which she was told was "*not straightforward*" [840]. What LM did not do was to note her reviews so that she could demonstrate compliance with the First Respondent's policy [1951].

6.86 As the end of the year approached, LM indicated a willingness to review the suspension again but, with no new information, it was maintained [875].

Disciplinary process

6.87 Ms Ledward had wanted to convene a disciplinary hearing before Christmas in 2018 but the report took time to digest and the Claimant had a week's leave booked in December. She was also conscious of the fact that he would have required reasonable notice for any disciplinary hearing. It was not therefore possible to convene one before Christmas.

6.88 Ms Ledward explained that her desire to hold one, instead, at the start of January proved optimistic as well; the invitation letter took time to draft as it contained a summary of the evidence with reference to the allegations. She was also dealing with the grievance which the Second Respondent had made. That required her to meet the Second Respondent and inform her that her complaints of harassment had been dismissed, which she was able to do on 17 January [911-3]. The Second Respondent did not take the news well. She was told that that it was felt that there was insufficient evidence to meet the definition of harassment contained within the Equality Act but that that did not mean that she had been disbelieved. A formal grievance meeting was held on 11 February [1104-6] and, despite

the Second Respondent's concerns [945-9], she received a formal grievance outcome letter on 6 March [1099-1103].

6.89 The Claimant objected to his continuing suspension on 11 January [885] and the matter was discussed between him and LM on 16 January [900]. On that day too the Claimant was invited to a disciplinary hearing on 24 January 2019 [894-9]. The letter was long and detailed and drew on the main pieces of evidence in support of the three remaining allegations;

(i) "*You have acted in an unprofessional manner by inappropriately influencing recruitment decisions and by doing so you have breached departmental policy and the Civil Service Code in relation to integrity, honesty and impartiality;*

(ii) *You have reached the Conflict of Interests Policy and the DEFRA Code of Conduct by failing to declare a relationship with a colleague;*

(iii) *You have failed to follow DEFRA Code of Conduct and the Social Media Policy when using official IT Systems.*"

It was accepted by Ms Ledward that the reference to the Social Media Policy was an error given the PSU findings.

6.90 In relation to the last allegation, although Ms Ledward did not include all of the WhatsApp messages given their volume, key examples were referred to the Claimant was told that he was at liberty to review all of the material if he did not still have it himself [898]. He did not ask for the documents.

6.91 Various pieces of HR advice were supplied. Ms Scotcher, the Complex Caseworker, had advised on the framing of the charges *vis* the policies in December [861], Ms Ayres provided an analysis of the evidence in support of the allegations and where it was to have been found [865-9] and Ms Scotcher also provided an analysis document in which her conclusions were caveated with a number of 'ifs' and 'shoulds'. The document made it clear that "*decisions must be yours*" and Ms Ledward told us that she regarded the advice as nothing more than that. She had not felt 'beholden' to anyone to reach a certain decision. It was very much her own.

6.92 As to his suspension, although the allegations of sexual harassment against the Second Respondent were not to form any further part of the disciplinary process, LM considered that he continued to face serious allegations of misconduct which concerned his honesty and integrity "*that certainly called into question whether he could be trusted to return to the workplace*" (paragraph 37 of her witness statement). Nevertheless, his suspension was reviewed by LM and maintained for the reasons set out in an email to Ms Ledward [905] and the Claimant [906].

6.93 On 18 January, the Claimant emailed Ms Ledward and asked her to postpone the hearing and for 11 witnesses to be called to give evidence [915-6]. He then produced a reduced list of 5 people on 23 January [934] and, ultimately, Ms Ledward decided to interview a further two, C1 and

another colleague, C3. The others were not considered to have been relevant in light of the further details supplied about the nature of their evidence [933].

6.94 Those two employees were then interviewed, as was Ms Rios-Wilks, who had been part of the interview panel when the Second Respondent had been recruited to her SEO role. That evidence was sent to the Claimant on 7 February [958-970].

6.95 On 25 January 2019, the Claimant raised a grievance in which he alleged that *he* had been the victim of sexual harassment by the Second Respondent. He also complained about the hostility of the investigation and the handling of his suspension [918-930]. It was clear that he considered that the issues which he raised ought to have been considered before the disciplinary process went any further [929].

6.96 Ms Ledward did not share the view that the disciplinary process needed to have been paused. She wrote to the Claimant on 7 February and explained that many of the matters which he had raised concerned allegations for which there was no case to answer (the Second Respondent's allegations of sexual harassment) but those which did (paragraphs 53 to 61 of the Claimant's letter) were to have been taken into account before she reached a decision. She therefore indicated that the disciplinary hearing would proceed on 14 February 2019 [958-9].

6.97 Two days before it started, the Claimant produced another lengthy document which fleshed out his points of mitigation [971-1010].

6.98 The disciplinary hearing was chaired by Ms Ledward and she was supported by an HR Case Manager. The Claimant was accompanied by Mr Horsington again and a dedicated notetaker was present [1060-3].

6.99 The Claimant called the accuracy of the notes into question. It was, perhaps, a little surprising that, given the fact that the disciplinary investigation interviews had been recorded, the disciplinary hearing itself was not. Nevertheless, there was a dedicated notetaker and Ms Ledward stated that she reviewed the notes soon afterwards whilst her memory was fresh. Having heard the evidence from the relevant witnesses, we were content that the notes were likely to have been a reasonably accurate record of the hearing. No material discrepancy was put to any witness during cross-examination.

6.100 In relation to the first allegation, Ms Ledward indicated that the evidence showed that the Claimant had promised the Second Respondent an SEO role, had agreed to set up an interview panel, had written her application form, had agreed to tell her the interview questions in advance and had promised to ensure that she would have been "*101% successful.*" The Claimant was then asked if he agreed with the allegations and factual

findings and he said that he did. He stated that he had made "*an error of judgement*" because he had been so keen to keep the Second Respondent because she was such an asset to the Department. He nevertheless accepted that what he had done was wrong.

6.101 In relation to the second allegation, the Claimant accepted that he had not informed LM, or anyone else in authority, about his relationship with the Second Respondent. He accepted that "*with hindsight he should have*" [1062]. He raised his mental health issues as an explanation for his poor judgement and stated that "*his brain was foggy*" and that he had a mental impairment from March 2018, an explanation which Ms Ledward had difficulty accepting in light of the nature of the WhatsApp messages that had been exchanged at the same time [1062].

6.102 As to the third allegation, the Claimant was asked about the offensive WhatsApp messages referred to above. He said that he "*accepted all the findings and said that he had learnt his lesson*" [1062].

6.103 The Claimant expressed regret and conceded that his conduct had not been acceptable. He indicated that the long suspension had been extremely difficult for him but he hoped that his career was not to have been ended. He asked for a demotion rather than dismissal. Ms Ledward indicated that she wanted time to review the evidence and the meeting ended [1063].

6.104 After the hearing on 15 February, Ms Ledward reverted to LM for clarification in relation to matters which the Claimant had raised by way of mitigation. She raised some specific questions with her which were answered [1014-6] and she also interviewed her on 18 February about issues of workload [1064-6].

6.105 The Claimant was summarily dismissed for gross misconduct on 26 February 2019. Ms Ledward's detailed letter explained her findings [1067-79]. She considered that the most serious allegation had been the first in relation to the Second Respondent's recruitment. The Claimant had taken a number of sophisticated steps over an extensive period of time to ensure that she was appointed. He had seemingly known of the risk and she described it as "*calculated, deliberate and intended to subvert fair and open competition*". In relation to the second allegation, the Claimant had been all too aware how his failure to divulge his relationship with the Second Respondent might have looked given the fact that he managed her and the Code of Conduct's requirement for employees to keep their work and private life out of conflict. Ms Ledward considered that the third allegation revealed numerous examples of language which had been used about colleagues which was offensive, distasteful and unpleasant although, again, she accepted that the inclusion of the reference to the Social Media Policy, in addition to the Defra Code, had been in error.

6.106 She took into account the points of mitigation which the Claimant had raised; his length of service and his positive performance feedback. She did not, however, accept his assertions in relation to his workload, having spoken to LM and having considered the contemporaneous documentation, for instance the 360° feedback [1024-48]. Her interview with LM was included in the outcome letter.

Appeal

6.107 The Claimant appealed against the decision on 12 March 2019 [1116-1202]. With attachments, the appeal documentation was over 80 pages in length. Mr Gallagher, a Director-General, was appointed to act as decision-maker.

6.108 On 30 April 2019, the Claimant informed Mr Gallagher that he wanted him to take into account information unearthed through the grievance process. Mr Gallagher indicated that he was happy to consider such documents before determining the appeal [1376]. That therefore caused the appeal to be halted pending the resolution of the Claimant's grievance (see below).

6.109 Amongst the Claimant's documentation was a GP's letter of 5 March 2019 which suggested that, before any appeal hearing was convened, an Occupational Health report ('OH') should have been obtained. An OH report was therefore requested and provided on 2 July 2019 [1439-1443].

6.110 The grievance report was produced in late July but, for reasons explained more fully below, the grievance outcome hearing did not take place until a while later. At or around that time, Mr Gallagher also received analysis and advice from HR similar to that received by Ms Ledward [1775-9]. He did not consider it to have been directional or determinative.

6.111 Nevertheless, the conclusion of the report enabled the disciplinary appeal to proceed. The Claimant appeared happy to do so [1518]. A scheduled appeal hearing for 22 August, however, did not take place as planned; the Claimant emailed on 20 August to ask for the appeal to take place after the grievance had been "*determined*", even though the report was available [1527]. He had been made aware that, as an ex-employee, the grievance determination would have been final. Mr Gallagher was prepared to wait and the meeting did not take place but, on 3 September, the Claimant indicated that the delay was causing him distress and he asked for the appeal to proceed. It was rescheduled for 20 September [1548-9].

6.112 The Claimant's appeal hearing was recorded and transcribed [1594-1621]. Again, the Claimant referred to his grievance. After the hearing, Mr Gallagher explained what he understood the Claimant's position was; he was happy to have his appeal allowed before the grievance outcome but, if there was about allowing it, he was to await the outcome before reaching

a conclusion [1643]. Mr Gallagher was not prepared to proceed on that basis.

6.113 In the meantime, the Claimant provided further lengthy information to Mr Gallagher which he had also provided to Mr Watters, including a 40 page response to questions that he had been asked back in August [1553].

6.114 Mr Watters' final grievance decision was dated 17 December 2019 [1831-9]. The Claimant asked Mr Gallagher to proceed and also sent further enclosures for him to consider [1830] (365 pages [1760] and further documents [1780]).

6.115 Mr Gallagher was on leave over Christmas and a portion of the New Year. He was able to devote himself to the substantial task of considering the documentation which had been provided by the Claimant. He then concluded the Claimant's disciplinary appeal on 11 February 2020; it was rejected and his dismissal was confirmed [1894-1906]. Mr Gallagher considered that, although the Claimant had provided a substantial amount of evidence which dealt with peripheral matters, at the heart of the case was the fact that he had committed the three counts of disciplinary misconduct which had been alleged. The primary issue was the severity of the sanction and Mr Gallagher stated that he focused upon the Claimant's mental health and the evidence around it when assessing the contributory factors to his conduct. Ultimately, however, he disagreed with the Claimant's summary of the medical advice and evidence. The contemporaneous evidence (for example, the WhatsApp messages) he found more persuasive than the Claimant's retrospective evidence about how he thought that he had behaved at the time. It was clear to him that "*the evidence that the Claimant's behaviour in deliberately fixing a recruitment process in favour of one of the applicants was pre-planned, extended over a period of two months, and was done in the clear knowledge that this was wrong, had to be kept secret, and could if discovered leave to his dismissal*" (paragraph 28 of his witness statement). He considered that such activity would have been regarded by almost any civil servant as "*an extremely serious issue, going to the heart of civil service values of integrity and honesty*" (paragraph 29).

Claimant's grievance

6.116 As stated above, the Claimant's grievance had been issued on 25 January 2019 [918] and, although Ms Ledward had not considered that it ought to have delayed the disciplinary process, it was investigated.

6.117 Mr Watters was appointed as the decision maker and Terms of Reference were drawn up in February [1085-92];

(i) That the Second Respondent had made her complaints of sexual harassment against him as "*a malicious act of retaliation*";

(ii) That the manner in which the complaint had been handled by the First Respondent, particularly the interviews by Ms Hindmarch, amounted to discrimination and harassment;

(iii) That no or no adequate consideration had been given to the effect upon his mental health as a result of the suspension.

6.118 On 6 February, the Claimant issued his first Tribunal claim, Claim 1. Mr Watters became aware of it in or around May but said that he did not see it or ask to see it. He knew nothing of its contents.

6.119 Mr Lyons, who was appointed to lead the investigation, spoke to Ms Hindmarch on 27 February and they met initially on 22 March. She then provided copy documents and audio recordings of the investigatory interviews. LM also provided some initial evidence [1110].

6.120 The Claimant was interviewed on 25 March [1321-2] and he subsequently provided numerous, lengthy documents to the investigation. The Second Respondent was also interviewed in April [1318-9].

6.121 Mr Lyons then prepared a first draft of his findings at the end of April [1274-85]; he found no evidence to support the Claimant's complaints, although there were some criticisms of the effect of the suspension and the formality of its review. However, the draft was prepared before the interview recordings had been heard and compared. The recordings arrived in May. A further draft report was produced In early May. The conclusions were similar [1294-1305].

6.122 Having considered the recordings of the Claimant's interviews himself, Mr Watters had some concerns about the style of questioning; that it had been repetitive and the changing of subjects may have put him 'off balance'. At points, he even considered that the questioning could have been 'overbearing' or 'bullying' (paragraph 14 of his witness statement). He then listened to the interviews of the Second Respondent. It was only then that he realised how detailed and serious the Second Respondent's allegations had been. That led him to a discussion with Mr Lyons, Ms Ayres and, subsequently, the Second Respondent about approaching the police (see, further, below). He considered that PSU had been equally robust with the Second Respondent in interview; "*the general style was to pursue hard-line questioning, they did not shy away from sensitive topics, and they pressed for answers to some questions*" (paragraph 16 (a) of his witness statement).

6.123 The documentation and broad ranging complaints widened the investigation. Other matters were also considered; an alleged breach of security when PSU sent the Claimant the summary interviews to his email address without security measures and the failure to discipline the Second Respondent. Although Mr Watters found it difficult to deal with every single

point raised by the Claimant, even at the end of the process, he confirmed that the correct issues had been investigated [1655].

6.124 An updated draft of the report was provided by Mr Lyons on 20 May [1346-58] which prompted further discussions between him and Mr Watters and amendments. At that stage, because of some disagreements, Mr Watters was not prepared to sign the report off. His concerns were set out within paragraph 19 of his witness statement; the Claimant's relative seniority and experience *vis* the Second Respondent had not been addressed and Mr Lyons had not then interviewed Ms Hindmarch properly, yet had chosen to criticise some "*minor shortcomings*" of the investigation process. Mr Watters had been keen for Mr Lyons to clear up some matters with Ms Hindmarch but she was on leave in June and made representations in writing in reply to Mr Lyons's questions [1430-6]. Mr Watters was also keen for LM to have been interviewed in relation to the Claimant's suspension. This he did himself on 13 June [1499-1504]. He also decided that he should speak to the Second Respondent in person, which he also did on 13 June; she was interviewed [1468-71] and subsequently provided answers to specific questions [1462]. The Claimant too provided additional evidence in June in the form of a diary documenting his health [1407-1425].

6.125 Following the completion of that further work, the final report was prepared by Mr Lyons on 10 July 2019 [1473-83]; the Claimant's grievances were not upheld.

6.126 The Claimant was then invited to a grievance meeting on 8 August and he was provided with a copy of the report [1495-6]. In response, the Claimant asked for the initial draft report and notes of all meetings with all witnesses. He threatened that, if the information was not provided, he would make a subject access request ('SAR') [1507-8]. Mr Watters had not supplied the minutes of the interviews with the Second Respondent because of the highly personal information contained within them and because of concerns about her mental health (see, further, below). He did not consider that sharing the information was necessary for the grievance process to have been fair. He responded in those terms [1507] and provided a more complete explanation for his reasoning in his ultimate grievance outcome letter [1830-9];

> "*Defra owes confidentiality to other staff. I have ensured that I have read the documents I feel I need to see to reach a fair decision on your grievance. Raising a grievance does not mean that you also have a right to access all those documents..*"

6.127 The Claimant, however, insisted on a postponement of the grievance hearing pending a response to his SAR [1506]. There was then a delay whilst both sides waited on the SAR. The Claimant had actually submitted eight emails in which nearly 30 SARs had been made [1888].

6.128 On 30 October, the Claimant requested that Mr Watters proceed with the grievance meeting on 15 November [1645]. That was agreed but, 2 days before the meeting, he sent some answers to questions which he had been asked. The answers extended over 96 pages, with attachments, there were 460 pages of information in all for Mr Watters to consider [1653-1759].

6.129 The meeting then took place on 15 November and Mr Watters emailed the minutes, which prompted further, detailed comments from the Claimant [1806-1825]. The grievance outcome letter was dated 17 December 2019 [1831-9].

6.130 The Claimant was not provided with a right of appeal because, as a former employee at that stage, it was considered that he had no such right under the First Respondent's Policy ([1968] and [1971]).

6.131 The Claimant nevertheless submitted a letter of appeal against the grievance decision on 20 December 2019 [1840]. The First Respondent confirmed its position on 31 December 2019 [1886].

Second Respondent

6.132 On 19 February 2019, Ms Ledward wrote to LM setting out concerns that she had about the Second Respondent's potential involvement in the misconduct perpetrated by the Claimant [1020]. She was concerned about the recruitment exercise. Steps were taken to correct that (another exercise was run by C1) but LM also wrote to the Second Respondent on 5 April to set out her concerns about her own conduct [1239-41]. The meeting at which those matters was discussed was held on 11 April [1331]. As a result of their discussions, she was directed to undertake training on open and fair competition and to reacquaint herself with the First Respondent's social media and data protection guidance [1329].

6.133 The Second Respondent had been treated for depression since July 2018. The GP notes referred to the cause as having been "*work stress and relationship issues*" [1932]. She had a period off work and was prescribed medication. In September 2019, she was formally diagnosed with Post Traumatic Stress Disorder and stated that she continues to suffer flashbacks, nightmares and anxiety if she recalls the events with the Claimant [1934-6]. She continues to take antidepressant medication and to receive psychological therapy.

Subsequent events

6.134 The Claimant was included in the Cabinet Office Internal Fraud Database. The definition of 'internal fraud' was (paragraph 138, A1);

> "*Dishonest or fraudulent conduct, in the course of employment in the Civil Service, with a view to gain for the employee or another person.*"

6.135 As stated above, the First Respondent also referred the matter to the police in late 2019 [1623-5] and the Second Respondent was interviewed by them on 3 and 4 December. On the basis of that interview though, the police did not consider that an "*offence is made out on the facts*" [1826-7]. The Claimant was never interviewed.

6.136 The referral had seemed an odd decision at first sight in view of the result of the PSU investigation and the fact that the events had arisen a year earlier and the decision then had been *not* to refer them, but LM's rationale was carefully explained and the points covered in paragraphs (c)(i)-(iii) on [1624] were important developments. LM was clearly not entirely content with the decision at that point, but she said that other senior civil servants had listened to the tapes of the Second Respondent's interview and had considered that Defra had a responsibility to report potentially criminal activity.

6.137 For the avoidance of doubt, no formal disciplinary action was taken against the Second Respondent nor was she included in the Cabinet Office Internal Fraud Database.

7. Conclusions

7.1 The Agreed Lists of Issues of 15 June 2020 were addressed [160-186]. The wording of each issue for determination appears below in italics. The numbering from the Lists has been maintained. Paragraphs relating to issues of remedy have been omitted, save in relation to issues concerning contributory conduct and the application of the *Polkey* principle to the claim of unfair dismissal, as agreed with the parties at the start of the hearing.

Claim 1; relevant applicable law

Direct discrimination: s. 13

7.2 Some of the Claimant's claims were brought under s. 13 of the Equality Act 2010:

> "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*"

7.3 The protected characteristic relied upon was sex. The comparison that we had to make under s. 13 was that which was set out within s. 23 (1):

> "*On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case.*"

7.4 We approached the case by applying the test in *Igen-v-Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

"*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

7.5 In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could have been drawn might have sufficed. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others not of his sex, because of his sex.

7.6 The test within s. 136 encouraged us to ignore the First Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see *Madarassy-v-Nomura International plc* [2007] EWCA Civ 33 and *Osoba-v-Chief Constable of Hertfordshire* [2013] EqLR 1072). At that second stage, it's task would always have been somewhat dependent upon the strength of the inference that fell to be rebutted (*Network Rail-v-Griffiths-Henry* [2006] IRLR 856, EAT).

7.7 If we had made clear findings of fact in relation to what had been allegedly discriminatory conduct, the reverse burden within the Act may have had little practical effect (per Lord Hope in *Hewage-v-Grampian Health Board* [2012] UKSC 37, at paragraph 32). When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why' something happened (see *Fraser-v-Leicester University* UKEAT/0155/13/DM). In *Shamoon-v-Royal Ulster Constabulary* [2003] UKHL 11, the House of Lords considered that, in an appropriate case, it might have been appropriate to consider 'the reason why' something happened first, in other words, before addressing the treatment itself.

7.8 As to the treatment itself, we always had to remember that the legislation did not protect against unfavourable treatment per se, but *less* favourable

treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (*Law Society-v-Bahl* [2004] EWCA Civ 1070).

7.9 We reminded ourselves of Sedley LJ's well known judgment in the case of *Anya-v-University of Oxford* [2001] ICR 847 which encouraged reasoned conclusions to be reached from factual findings, unless they had been rendered otiose by those findings. A single finding in respect of credibility did not, it was said, necessarily make other issues otiose.

Harassment: s. 26

7.10 Three different types of harassment were pursued under ss. 26 (1), (2) and (3) of the Act.

7.11 The first was the type so often considered by a Tribunal. The subsection covered treatment which had the purpose or effect of violating a victim's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment in circumstances where the conduct related to a protected characteristic. The second specifically concerned conduct of a sexual nature which had the same purpose or effect and the third, covered by s. 26 (3), concerned a situation where there had been conduct of a sexual nature as in s. 26 (2), which was either rejected or submitted to and the rejection or submission *then* led to less favourable treatment.

7.12 Under s. 26 (1), the conduct had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (*Bakkali-v-Greater Manchester Buses* [2018] UKEAT/0176/17). In each case also, the conduct had to have been 'unwanted'.

7.13 As to causation, we reminded ourselves of the test set out most recently in the case of *Pemberton-v-Inwood* [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) had either of the prescribed effects under sub-paragraph (1) (b), a tribunal had to consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)), whether it was reasonable for the conduct to have been regarded as having had that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

7.14 It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in *Grant-v-HM Land Registry* [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in *Betsi Cadwaladr Health Board-v-Hughes* UKEAT/0179/13/JOJ.

The statutory defence: s. 109 (4)

7.15 Section 109 (4) of the Act reads as follows;

> "*In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A -*
> *(a) from doing that thing, or*
> *(b) from doing anything of that description.*"

7.16 We bore in mind the guidance from the case of *Canniffe-v-East Riding of Yorkshire Council* [2000] IRLR 555 in which the Employment Appeal Tribunal stated that the proper approach to the defence was to consider, first, what steps were taken, secondly, whether they were reasonable and, lastly, whether any other steps ought reasonably to have been taken (see the recent restatement of the approach in *Allay (UK) Ltd-v-Gehlen* UKEAT/0031/20/AT). It was important to remember that an employer would not be exculpated if it had not taken reasonably practicable steps simply because, if it had taken those steps, they would not necessarily have prevented the thing from occurring, but a tribunal could still take into account the extent that suggested actions might have altered the position; "*the concept of reasonable practicability is well known to the law and it does entitle the employer the in this context to consider whether the time, effort and expense of the suggested measures are disproportionate to the result likely to be achieved*" (see Pill LJ's judgment in *Croft-v-Royal Mail Group plc* [2003] ICR 1425).

7.17 In considering the defence, we had to focus upon what the First Respondent did *before* the acts complained of occurred, not how it reacted after it was aware. We had to look at its policies and the extent to which they were reviewed, its training regime on equality and diversity issues and its approach to issues of discrimination in the past. We also considered the EHRC's Code of Practice (2011) and, in particular, paragraph 10.50-10.53 and, in the context of its policies, paragraph 18.

Claim 1; conclusions

Direct discrimination: s. 13

1. *Did the First Respondent treat the Claimant less favourably? The Claimant relies upon the following alleged conduct of the First Respondent:*

(a) *Immediately suspending the Claimant following the Second Respondent's complaint of sexual harassment.*
(b) *Instituting disciplinary action against the Claimant for breaching the Civil Service Code, including the failure to declare his relationship with the Second Respondent and excessive communication with her during "official time".*
(c) *Degrading, intrusive and unnecessary questioning of the Claimant by Ms Hindmarch on 15 October 2018.*
(d) *Failing to conduct a review of the Claimant's suspension either at regular intervals or at all.*

2. *Was the less favourable treatment because of a protected characteristic?*
3. *Did the First Respondent treat the Claimant less favourably compared to a hypothetical female comparator as regards the conduct set out at paragraphs 1(c) to (d) above, and/or the Second Respondent as regards the conduct set out at paragraphs 1(a) to (b) above, for the purposes of section 23 EqA 2010.*
4. *Can the claimant also rely on a hypothetical female comparator as regards the conduct set out at paragraph 1(a) above, for the purposes of section 23 EqA 2010?*

The issue in paragraph 4 was accepted by the First Respondent (see paragraph 49 of the Case Management Summary of 8 December 2020).

(a) It was admitted that the Claimant was suspended the day after the Second Respondent's complaint of sexual harassment. It was also admitted that it was disadvantageous treatment.

The Claimant's case here mirrored much of the themes elsewhere; that the First Respondent was too keen to accept the Second Respondent's account at face value, that it too readily assumed that, as the man in the relationship, he was likely to have led it and controlled it. Whether as a result of sexual stereotyping or as a result of an over-zealous reaction to the '*#metoo*' campaign, the Claimant alleged that he was the victim of direct sex discrimination.

The genesis of the events was important; the Second Respondent raised a number of serious allegations against the Claimant. She did not just disclose allegations of sexual harassment. The nature of her recruitment was disclosed at the outset too [355-6]. He had not, himself, raised any allegations against her. His suspension was not, in our judgment, because he was a man. It was because of the nature of the allegations. The Claimant was not treated differently from the Second Respondent who, in the absence of similar allegations, had not been in the same or a similar position. It was not until 25 January, over four months after his suspension, that he raised a grievance against her in part. Alternatively, there was insufficient evidence to simply infer that, had he been a woman, he would not have been suspended. LM's thought process was clearly laid out at [360]. She told us that, as a result of the '*#metoo*' campaign, she was aware of increased complaints

of harassment from men as she was from women. There was no gender stereotyping.

(b) It was also accepted that disciplinary action was further disadvantageous treatment suffered by the Claimant, but the framing of this issue in the List only captured part of the reasons for it.

The institution of such action was not because of the Claimant's sex in our judgment. Serious allegations had been made against him. Whilst it is true that one aspect of one of the allegations, the sending of WhatsApp messages whilst at work, could equally have been alleged against the Second Respondent, the thrust of the allegation concerned the *nature* of the messages which he had sent; the fact that they had been offensive, demeaning and rude and had been sent using the First Respondent's equipment. The same could not have been said about hers. As to the recruitment, it was the Claimant who had controlled that process, not the Second Respondent. Further, the allegation in relation to the non-declaration of his relationship with her to management, did not apply equally to her. The policy prohibited the *management* of a partner (paragraph 5.6 [1976]).

(c) To some extent, depending upon the Claimant's sensibilities, any questions about the physicality of his relationship with the Second Respondent may have been degrading or embarrassing. The real issue for us was whether they had been unnecessary, unnecessarily intrusive and discriminatory.

The Claimant alleged that, on an objective reading of the WhatsApp messages around this time, no sensible investigator could have concluded that some of the Second Respondent's allegations were ever likely to have been made out (for example, the messages around the incident referred to as 'oral rape' on 27 November 2017 [1254-5]). Ms Hindmarch stated that the messages were only part of the interactions between the parties and we concluded that, given the nature of the actual allegations, the Claimant was bound to have been asked about their detail. The details were important because, on the face of the Second Respondent's account, the physical position of the Claimant and the sexual acts involved led the First Respondent to believe that a criminal act may have occurred. It was necessary to gain his account of the incident.

On a straightforward reading of the records, the Claimant was questioned in a similar manner to the Second Respondent about the details of their physical intimacy, a view shared by Mr Watters. He accepted that she had been asked about the same instances as he had in interview. There was insufficient evidence of a difference in treatment and, to the extent that there was, this was explained on the basis that much of the Second Respondent's evidence had been set out in written documents presented

to PSU before the Claimant's interview which then had to be examined in detail.

(d) The Claimant's suspension was reviewed by LM at regular and reasonable intervals, as set out above, evidence which we accepted, albeit that LM kept no formal record as such. She considered whether the circumstances had changed and whether a different view could have been taken and she considered alternatives to suspension. This allegation failed as a matter of fact. For the sake of completeness, we considered the First Respondent's policy [1952] and the ACAS Code in that respect.

5. *If so, are the Respondents able to show that the less favourable treatment was for a non-discriminatory reason unconnected to sex?*

The burden of proof did not shift to the First Respondent in respect of any of the four allegations. To the extent that it did, it explained the conduct for reasons which were not related to the protected characteristic.

5.5 *If so, did the First Respondent take all reasonable steps to prevent its employees from doing the discriminatory acts alleged or anything of that description such that it has a defence under s.109(4) EqA 2010?*

This issue was added by agreement at the Case Management Preliminary Hearing which was conducted on 1 February 2021.

There was insufficient evidence upon which the Tribunal could find that the First Respondent had taken all reasonable steps within the meaning of the Act. Some of its witnesses gave evidence that they had received some training, but the evidence was very broad and we were not provided with details of the training itself or when it had taken place. We had no means of accessing its efficacy and/or whether it may have become stale. Further, none of the First Respondent's witnesses gave evidence about their knowledge or understanding of an Equal Opportunities Policy, which was not itself produced, if one existed.

The defence under s. 109 (4) was not made out, but was unnecessary.

<u>Harassment related to sex: s. 26 (1)</u>
These complaints were in the alternative to those under s. 13 above as a result of the operation of s. 212 (1) of the Act; an act or omission was not capable of being both a detriment and harassment.

6. *The Claimant relies upon the conduct of the First Respondent set out at sub-paragraphs 1(a) and 1(c) above. Did that conduct occur?*
7. *Was the conduct unwanted?*
8. *Was the conduct related to the Claimant's sex?*
9. *Did the conduct have the purpose or effect of either violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*

(a) The Claimant's suspension was not related to his sex nor, properly defined, was it an act of harassment.

(b) The disciplinary action taken against the Claimant was also not related to his gender. It was also not harassment in context; the matters which were taken forward were matters for which the Claimant ultimately admitted responsibility.

(c) On the basis of our findings, the questioning of the Claimant was not an act of harassment. Although the questions may have been unwanted, degrading and/or humiliating for the Claimant, they were not related to his gender in the sense required under the Act. The fact that the subject matter was of a sexual nature did not mean that the harassment had related to his gender. Further, considering all of the circumstances, as we were required to do under s. 26 (4), it could not have been said, from an objective standpoint, that questioning an employee about an alleged sexual assault and/or harassment ought itself to have amounted to harassment.

10. *If so, did the First Respondent take all reasonable steps to prevent its employees from doing the discriminatory acts alleged or anything of that description such that it has a defence under s.109 (4) EqA 2010?*

See 5.5 above. The defence failed.

<u>Sexual harassment: s. 26 (2)</u>
These allegations were also alternatives to those under s. 13 and s. 26 (1) above.

11. *The Claimant relies upon the conduct of the First Respondent set out at sub-paragraph 1 (c) above. Did that conduct occur?*
12. *Was the conduct unwanted?*
13. *Was the conduct of a sexual nature?*
14. *Did the conduct have the purpose or effect of either violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*
15. *If so, did the First Respondent take all reasonable steps to prevent its employees from doing the discriminatory acts alleged or anything of that description such that it has a defence under s.109(4) EqA 2010?*

Having considered the different test, there was no reason to reach different conclusion under s. 26 (2) than were reached under s. 26 (1). Further, the questioning was not '*unwanted conduct of a sexual nature*'.

<u>Less favourable treatment for rejecting unwanted conduct of a sexual nature (claims against First and Second Respondent): s. 26 (3)</u>

16. *Did the following conduct occur?*

(a) On 4 July 2018, the Second Respondent made sexual advances to the Claimant in a hotel room after a work social event, which were rejected.

(b) On 1 August 2018, the Second Respondent made it evident through her behaviour that she was keen for there to be sexual activity between her and the Claimant in a hotel room outside working hours. Following sexual activity, the Claimant said that he was happy in his relationship with his partner.

The first point to make here was that s. 26 (3) sought to outlaw less favourable conduct which *resulted* from the rejection or submission to unwanted sexual conduct. The sexual conduct itself was not the focus.

Nevertheless, as framed in paragraph (a) above, we rejected the allegation in respect of the events of 4 July. We were far from convinced that anyone 'made advances'. These were two adults who had been long engaged in a sexual relationship. The Claimant alleged in evidence that the 'advance' was, specifically, the Second Respondent's desire for intercourse. They did not have intercourse, but oral sex instead. We failed to grasp how that was a 'rejection' as alleged.

The manner in which the allegation in respect of 1 August was framed was less divisive. We accepted, because it was agreed, that there was sexual activity between the parties outside working hours that night. We also accepted that the Claimant had indicated that he was happy in his relationship with his partner, but not that the Second Respondent had been '*keen*' for the events to have occurred. Having considered the evidence, we might have adopted a more neutral word.

17. *If so, was the Second Respondent acting in the course of her employment such that the First Respondent is liable for her actions under s.109 (1) EqA 2010?*

She was and the First Respondent was vicariously liable under s. 109 (1). That was the effect of Employment Judge Mulvaney's Judgment of 5 December 2019, as discussed in the Reconsideration Judgment of 1 February 2021.

18. *Was the conduct unwanted?*
19. *Was the conduct of a sexual nature?*

Whilst it was accepted that the conduct was of a sexual nature, the Respondents contended that it was not unwanted by the Claimant. We broadly accepted that proposition in respect of both events. There was some degree of mutual complicity at least at that point. Things then changed for the Second Respondent, as set out in paragraphs 6.56-7 above.

20. *Did the conduct have the purpose or effect of either violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*

No. In light of our findings, these events did not constitute harassment.

Further and in any event, even if the events had occurred as the Claimant had described, we found it difficult to see how they could have been described as acts of harassment under the Act given the nature of their relationship.

21. *Because of the Claimant's rejection of the conduct, did the Second Respondent treat the Claimant less favourably than she would treat him if he had not rejected the conduct, by raising a complaint of sexual harassment and bullying on 10 September 2018?*

This was the real act of harassment relied upon under s. 26 (3); the Second Respondent's complaint on 10 September 2018.

We were satisfied that the Second Respondent raised her complaint against the Claimant for the following reasons; she had come to the view that her relationship with the Claimant was toxic and coercive, she was concerned that his conduct was unlikely to change, she took advice from a friend and, subsequently, C1. We could find no reasonable evidence upon which to conclude that the Second Respondent had been specifically motivated to bring her complaint following the events of 1 July or 4 August. It seemed to have been the Claimant's *absence* on leave in August and a friend's advice which changed her mind.

Claim 2; relevant applicable law

Unfair dismissal

7.18 In cases involving dismissals for reasons relating to an employee's conduct, the Tribunal had to consider the three stage test in *BHS-v-Burchell* [1980] ICR 303;

(i) Did the employer genuinely believe that the Claimant was guilty of the misconduct alleged
(ii) Was that belief that based upon reasonable grounds;
(iii) Was there a reasonable investigation prior to it reaching that view?

Crucially, it was not for the Tribunal to decide whether the employee actually committed the act complained of.

7.19 Beyond those considerations, the Tribunal had to consider the fairness of the sanction imposed in the case. It was not permitted to impose its own view of the appropriate sanction but had to ask whether it fell somewhere within the band of responses available to a reasonable employer in the circumstances (*Foley-v-Post Office, HSBC-v-Madden* [2000] ICR 1283). An employer should have considered any mitigating features which might have justified a lesser sanction and the ACAS Guidance was useful in setting out some of the relevant factors in that respect.

7.20 Section 98 (4)(b) of the Act required us to approach the question in relation to sanction "*in accordance with equity and the substantial merits of*

the case". We were entitled to find that a sanction *was* outside the band of reasonable responses without being accused of having taken the decision again; the "*band is not infinitely wide*" (*Newbound-v-Thames Water* [2015] EWCA Civ 677).

7.21 Although an employer had to consider each case on its merits, inconsistency was an entirely legitimate challenge to the fairness of a dismissal under s. 98 (4). In *Hadjiannous-v-Coral* [1981] IRLR 352, the EAT held that arguments of inconsistency were to be limited to situations which were "*truly parallel*";

> "*Industrial Tribunals should scrutinise arguments based upon disparity with particular care and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for argument. It is of the highest importance that flexibility should be retained and employers and Tribunals should not be encouraged to think that a tariff approach to industrial misconduct is appropriate.*"

7.22 More recently, in cases such as *Paul-v-East Surrey DC* [1995] IRLR 305, *Honey-v-City of Swansea* [2010] UKEAT/0465/09 and *General Mills-v-Glowacki* [2011] UKEAT/0204/12, the EAT restated the approach; that the question should simply be whether a reasonable employer could, within the bounds of reasonable responses, have treated them differently.

7.23 In terms of the fairness of the disciplinary procedure adopted by the First Respondent, we bore in mind the wording of its own policies, the ACAS Code of Conduct and Guidance and the wording of the section itself. We had to consider the process overall in relation to the circumstances of the case (the nature of the allegations and the evidence) and whether, considering the employers' size and administrative resources, it was fair in that the employer acted reasonably.

Remedy; the *Polkey* principle

7.24 As to possible deductions from any compensation awarded, the Tribunal was also asked to examine the *Polkey* principle.

7.25 In situations where the dismissal was found to have been unfair, the decision in *Polkey-v-AE Dayton Services* [1988] ICR 142 required us to reduce compensation if we found that there was a possibility that the Claimant would still have been dismissed even if a fair procedure had been adopted. Compensation could have been reduced to reflect the percentage chance of that possibility. We had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (*Singh-v-Glass Express Midlands Ltd* UKEAT/0071/18/DM).

7.26 It was for the employer to adduce relevant evidence on this issue, although we should have had regard to any relevant evidence when

making the assessment. A degree of uncertainty was inevitable, but there may have been circumstances when the nature of the evidence was such as to have made a prediction so unreliable that it was unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, we ought not to have been reluctant to undertake an examination of a *Polkey* issue simply because it involved some degree of speculation (*Software 2000 Ltd.-v-Andrews* [2007] ICR 825 and *Contract Bottling Ltd-v-Cave* [2014] UKEAT/0100/14).

Remedy; contributory conduct

7.27 We were also invited to consider whether the Claimant's dismissal was caused by or contributed to by his own conduct within the meaning of ss 122 (2) and/or 123 (6) of the Act. In order for a deduction to have been made under those sections, the conduct needed to have been culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. It did not have to have been in breach of contract or tortious (*Nelson-v-BBC* [1980] ICR 110). We applied the test recommended in *Steen-v-ASP Packaging Ltd* [2014] ICR 56. We had to;

(i) Identify the conduct;
(ii) Consider whether it was blameworthy;
(iii) Consider whether it caused or contributed to the dismissal;
(iv) Determined whether it was just and equitable to reduce compensation;
(v) Determined by what level such a reduction was just and equitable.

7.28 We also had to consider the slightly different test under s. 122 (2); whether any of the Claimant's conduct prior to his dismissal made it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

Wrongful dismissal

7.29 We also had to decide whether, in fact, the Claimant was guilty of the conduct alleged in order to determine whether he had been in fundamental breach of contract such that a summary dismissal was justified. That was a very different test from the test that which we considered under the Employment Rights Act when applying the *Burchell* test (see above).

7.30 Repudiatory conduct must ordinarily have disclosed a deliberate intention not to have been bound by the essential requirements of the contract. The burden was on the employer to demonstrate that the Claimant's conduct was of such a nature so as to have justified his dismissal without notice. We adopted and applied the approach set out in *IDS* and *Chitty on Contracts* recommended in paragraph149 (a) and (b) of R6.

Disability

7.31 A person had (or has) a disability if he had a physical or mental impairment which had a substantial and long-term adverse effect on his ability to carry out normal day to day activities (s. 6 of the Equality Act). Schedule 1 of the Act contained further guidance in relation to the

definition and we took account of the '*Guidance on the Definition of Disability*' which we were required to do under Schedule 1, Part 1, paragraph 12.

7.32 In *Goodwin-v-Patent Office* [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to have been taken in determining the issue of disability. A purposive approach to the legislation was required. A tribunal had to remember that, just because a person could undertake day-to-day activities with difficulty, that did not mean that there was no substantial impairment. The focus ought to have been on what the Claimant could not have done or could only have done with difficulty. The effect of medication ought to have been ignored for the purposes of the assessment. The approach in *Goodwin* was approved in *J-v-DLA Piper UK LLP* [2010] ICR 1052, a decision which we also considered.

7.33 The impairment had to have effected a claimant's normal day-to-day activities. In other words, those things which were normal for the particular claimant, as long as they were not specialised activities, as defined in paragraphs D8 and 9 of the *Guidance.* The correct approach involved a consideration of all matters, but particular attention had to be paid to those activities that the claimant could not do (*Leonard-v-Southern Derbyshire Chamber of Commerce* [2000] All ER (D) 1327).

7.34 As to the length of the impairment, it was clear from paragraph 2 of Schedule 1 of the Act, that an impairment was long term if it had lasted for 12 months or more, or was likely to have lasted that long or for the rest of the life of the Claimant.

7.35 As to the last limb of the test, the Claimant told us that he did not put his case on the basis of the possibility of a likelihood of a recurrence, but there was some equivocation (see paragraph 36 of A1). In terms of the assessment of such a likelihood, all of the circumstances of the case had to be taken into account and that included what the person could reasonably have been expected to have done to have prevented the recurrence. It was also possible that the way in which a person attempted to control or cope with the effects of an impairment may not always have been successful (*Guidance* C9 and C10). As to the question of likelihood, the Tribunal had to determine whether it 'could well' have happened (*Guidance*, paragraph C3 and *SCA Packaging-v-Boyle* [2009] IRLR 746).

7.36 In cases involving mental impairments, the EAT in *Morgan* underlined the need for a claimant to prove his case on disability; tribunals were not expected to have anything more than a layman's rudimentary familiarity with mental impairments or psychiatric classifications. The value of informed, objective medical evidence was not to have been underestimated (see *Ministry of Defence-v-Hay* [2008] ICR 1247 and *RBS plc-v-Morris* [2012] 3 WLUK 323). Nevertheless, where there was no

evidence that demonstrated that an employee was suffering from a disability at the time the alleged act of discrimination occurred, a tribunal was entitled to consider evidence of disability more generally and to infer from that evidence that the disability existed at the relevant time (*All Answers Ltd-v-Wain and another* UKEAT/00232/20/AT).

7.37 The time at which to assess the disability was the date of the alleged discriminatory act (*Richmond Adult Community College-v-McDougall* [2008] ICR 431, at paragraph 24 and *Cruickshank-v-VAW Motorcast Ltd* [2002] ICR 729, EAT and *Tesco-v-Tennant* [2020] IRLR 363).

Knowledge of disability

7.38 Section 15 (2) provided as follows;

> "*Subsection (1)* [the provision relating to discrimination] *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*."

7.39 Ignorance itself was not a defence under the sub-section. We have had to ask whether the First Respondent knew or ought reasonably to have known that the Claimant was disabled. In relation to the second part of that test, we had to consider whether, in light of *Gallop-v-Newport City Council* [2014] IRLR 211 and *Donelien-v-Liberata UK Ltd* [2018] IRLR 535, the employer could reasonably have been expected to have known of the disability. In that regard, we had to consider whether it ought reasonably to have asked more questions on the basis of what it already knew and we had in mind Lady Smith's Judgment in the case of *Alam-v-Department for Work and Pensions* [2009] UKEAT/0242/09, paragraphs 15 – 20.

7.40 Under s. 15, a respondent could not claim ignorance in respect of the causal link between the 'something arising' and the disability and benefit from the defence (*City of York Council-v-Grosset* [2018] EWCA Civ 1105). The defence related to the Claimant's possession of the disability, not other elements of the test and an employer could not, for example, readily claim ignorance of the fact that his actions had arisen in consequence of his disability.

Section 15; discrimination arising from disability

7.41 When considering a complaint under s. 15 of the Act, we had to consider whether the employee was "*treated unfavourably because of something arising in consequence of her disability*". There needed to have been, first, '*something'* which arose in consequence of the disability, which was an objective question and, secondly, unfavourable treatment which was suffered because of that '*something*' (*Basildon and Thurrock NHS-v-Weerasinghe* UKEAT/0397/14). That second question was subjective, in the sense that it required us to examine the employer's mind in order to establish whether the treatment had been by reason of its attitude or reaction to the '*something*' (*Dunn-v-Secretary of State for Justice* [2019] IRLR 298, CA). Although an employer must have had knowledge (actual

or imputed) of the disability, there was no requirement for it to have been aware that the relevant '*something*' had arisen from the disability, as stated above.

7.42 Although there needed to have been some causal connection between the '*something*' and the disability, it only needed to have been loose and there might have been several links in the causative chain (*Hall-v-Chief Constable of West Yorkshire Police* UKEAT/0057/15 and *iForce Ltd-v-Wood* UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause (*Pnaiser-v-NHS England* [2016] IRLR 170), but the statutory wording ('in consequence') imported a looser test than 'caused by' (*Sheikholeslami-v-University of Edinburgh* UKEATS/0014/17 and *Scott-v-Kenton Schools Academy Trust* UKEAT/0031/19/DA).

7.43 In *IPC Media-v-Millar* [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

7.44 No comparator was needed. '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a claimant had been subjected to something that was adverse rather than something that was beneficial. The test was not met simply because a claimant thought that the treatment could have been more advantageous (*Williams-v-Trustees of Swansea University Pension and Assurance Scheme* [2019] ICR 230, SC).

Justification

7.45 If the Claimant was able to demonstrate the essential elements of the test within s. 15 (1)(a), the First Respondent had a defence if it could show that the treatment had been "*a proportionate means of achieving a legitimate aim*" (s. 15 (1)(b)).

7.46 The legitimate aims relied upon here did not concern cost and the familiar legal difficulties experienced in handling such arguments did not arise (*Heskett-v-Secretary of State for Justice* [2021] ICR 110).

7.47 Proportionality in this context meant 'reasonably necessary and appropriate' and the issue required us to objectively balance the measure that was taken against the needs of a respondent based upon an analysis of its working practices and wider business considerations (per Pill LJ in *Hensman-v-MoD* UKEAT/0067/14/DM at paragraphs 42-3). Just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, did not necessarily render it impossible to justify the step that *was* taken, but it was factor to have been considered (*Homer-v-West Yorkshire Police* [2012] IRLR 601 at paragraph 25 and

Kapenova-v-Department of Health [2014] ICR 884, EAT). The test was not as loose, however, as the range of reasonable responses test (*Scott-v-Kenton Academy Schools* UKEAT/0031/19/DA, paragraph 58).

Claim 2; conclusions

Unfair Dismissal: section 98 ERA 1996

1. *What was the reason or principal reason for dismissal and was it a potentially fair one in accordance with the five potentially fair reasons under ERA 1996 section 98?*

   The First Respondent contended that the Claimant was dismissed on grounds of his conduct between October 2017 and August 2018. That was admitted by the Claimant (paragraph 59, A1). See, also, the List of Issues at [168] on the point.

2. *Did the Respondent act reasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant?*

   This appeared to be a repetition of the issue identified within paragraph 4 below. The question has been addressed there.

3. *Did the Respondent hold belief in the Claimant's misconduct on reasonable grounds following a reasonable investigation?*

   The First Respondent had reasonable evidence upon which it could have concluded that the Claimant had committed the acts of misconduct alleged for the following reasons;
   (i) The recruitment issue; the Claimant had accepted the allegation as it was put to him at the disciplinary hearing, as summarised in the dismissal letter [1069];
   (ii) Breach of the Conflicts of Interest Policy and the Code by failing to declare the relationship; again, the Claimant accepted that he had not informed LM or anyone else about his relationship and that, with hindsight, he ought to have done (paragraph 7.4.10 [830] and [1062]);
   (iii) Breach of the First Respondent's Code in relation to IT use; similarly, the Claimant accepted the findings and that he had '*learnt his lesson*' [1062].

   To the extent that the Claimant criticised the investigation, those criticisms have been dealt with in paragraph 5 below.

4. *Was the decision to dismiss a fair sanction, that is, was it within the band of reasonable responses that a reasonable employer in the circumstances might have adopted?*

   In relation to the first allegation, it was noteworthy that the Claimant had impressed upon the Second Respondent the need for her to never reveal the extent of the assistance that he provided. He knew then that it was a '*sackable offence*' but a risk that he felt had been worth taking [1061]. This allegation placed the Claimant in breach of the Civil Service Code and

Defra's recruitment principles [772], which he accepted. The decision to have favoured the Second Respondent at interview was clearly to the potential disadvantage of other applicants and many of the First Respondent's witnesses were keen to stress the importance of open, fair and competitive recruitment as a cornerstone of the Code and the civil service's ethos. The Claimant's clear indication that the job was the Second Respondent's before interview ([1900] and [331]) struck at the heart of that principle.

Ms Ledward and Mr Gallagher were particularly concerned that the manipulation took place over a prolonged period of 2 months. It had not been a single, momentary lapse of judgment and paragraph 70 of his closing submissions, A1, could not be accepted. The second allegation was strongly attached to the first. It was really another facet or aggravating feature of it.

In relation to the allegation concerning the WhatsApp messages, there were three main strands; the fact that the Claimant had sent them on his work phone and was therefore in breach of the Defra Code in respect of IT misuse [1978], the fact that he had sent so many (sometimes, more than 300 on a day) such that his work must have been interfered with at least to some extent and, finally, the rude and offensive nature of some of them (see the summary of the worst at [1903-4]).

Ms Ledward's full reasons for regarding the allegations as serious enough to merit dismissal were set out in her letter of dismissal and witness statement. She clarified that they constituted gross misconduct as defined because they were "*significant or repeated breaches of the Civil Service Code*" and/or "*very offensive behaviour*" [1943-5]. We were satisfied that she acted within the band of responses available to a reasonable employer in the circumstances.

In more general terms, at the end of the disciplinary hearing, it was also noteworthy that the Claimant expressed hope that the sanction would not end his civil service career and he asked for a demotion instead of a dismissal. He clearly knew then that his conduct was likely to have placed his career in jeopardy [1063].

The real issue for the Claimant here was the extent to which his mitigation was taken into account. It was clear that Ms Ledward explored the issues that he raised in some depth; the alleged workload issues, his prior good service, stress and lack of support [1074-7]. Although we had to consider one aspect of that mitigation in more detail below (stress/anxiety in relation to alleged disability), we were again satisfied that her balancing of those issues, against what were seen as serious acts of misconduct, was a balance which was undertaken within the range of responses available to a reasonable employer in the circumstances. On that point alone, Ms Ledward was very clear about her views in cross-examination, paraphrased as follows; '*no matter how much pressure you are under at work, you do not manipulate a recruitment process over a period of 2 months*'.

Another issue which was raised in respect of sanction, although it appeared elsewhere in the List of Issues, was that of inconsistency (paragraph 5 (t) [175]). The Claimant complained that he was dismissed, yet the Second Claimant was not. She was not, however, in a situation which was truly

parallel; she had 6 months experience, not 17 years, she had not directed or conceived the misconduct in respect of her recruitment to the SEO role, she had been the beneficiary, nor had she used the First Respondent's IT equipment to send copious inappropriate or rude WhatsApp messages. Although we were a little surprised that she was not treated more harshly, the fact that she was not treated in the same manner as the Claimant was certainly not outside a reasonable employer's view of her comparative culpability.

5. *Did the Respondent undertake a reasonable and fair procedure? The Claimant contends that the Respondent conducted an unreasonable process and/or failed to follow its own policies and procedures in the following respects:*

   (a) failing to conduct its disciplinary investigation and dismissal process without unreasonable delay when considering their size and resources;

   Each case of this sort had to be considered, not only in light of the size and administrative resources of the employer, but in light of the size and complexity of the matters in issue.

   The disciplinary investigation commenced in September 2018 and, in December 2018, investigation findings were provided to the Respondent's disciplinary decision-maker. A disciplinary hearing was held on 14 February 2018, after some additional witness interviews requested by the Claimant had been conducted. The Claimant was then dismissed by a letter dated 26 February 2019 (effective 27 February 2019).

   The First Respondent submitted that the timeframe was not unreasonable in light of the complexity and seriousness of allegations against the Claimant, the substantial volume of documentary evidence to be considered and the sexual nature of some allegations against the Claimant, which necessitated careful handling of data.

   We too concluded that the time taken to conduct the interviews, prepare the report and convene the disciplinary hearing was not unreasonable. Ms Ledward had strived to conclude the matter before Christmas 2018, but the length of the report and the Claimant's leave prevented that. In early 2019, she also had to deal with the Second Respondent's grievance, the Claimant's grievance and his request to postpone the hearing and involve a further 11 personnel (2 of whom she interviewed) before the hearing was actually convened on 14 February.

   (b) subjecting the Claimant to alleged sex discrimination and sexual harassment during the course of the investigation;

   There was no merit in this allegation. See above.

(c) failing to provide the Claimant with any evidence at the investigation meetings for him to adequately respond to the allegations before him;

In our experience, many employers do not disclose evidence to an employee before they are interviewed about an allegation initially. An investigation often garners the best evidence when people do not have time to pre-prepare their answers.

The First Respondent's position was that the Claimant had been permitted to retain systems access throughout the investigation, notwithstanding that he was suspended from work. Consequently, he had an opportunity to access documentation which he believed was relevant or helpful to his response to the allegations against him, and did so.

The Claimant complained that he was asked questions about the WhatsApp messages which he had not retained. As we have said, however, he was given time to read the messages at the second interview, he did not complain about the questions, ask for an adjournment or deny that he had sent them, either then or subsequently.

(d) misrepresenting evidence during the investigation interviews on 15 October 2018 and 29 October 2018;

The Claimant particularised the allegation within his Claim Form as follows: "*eg* [Ms Hindmarch indicated] *that the Claimant had referred to* [LM] *as a "bitch" when in fact the Claimant had referred to the situation in those terms*".

The First Respondent pointed to the WhatsApp messaging which showed that the Claimant had referred to the LM, then used the word '*bitch*'. The link was obvious but, if it was unfair, it was a tiny issue given the amount of other offensive WhatsApp messages which were in issue. Further, the Claimant had previously admitted to calling LM a bitch (see his written statement provided on 12 February 2019 in which he said "*I message* [the Second Respondent] *saying I had received those comments and refer to Ms Church as 'a bitch'… I don't believe I am the first civil servant to have complained about their boss*" at paragraph 130 [1002]).

(e) subjecting the Claimant to highly oppressive and aggressive questioning in investigation meetings on 15 October 2018 and 29 October 2018;

The Tribunal noted that the disciplinary investigators checked with the Claimant that he had sufficient breaks from the discussion and that he was happy to continue with the investigation meeting. The Claimant was

also accompanied by a colleague as his companion throughout the discussion. We also repeat our findings above.

(f) misrepresenting evidence in the investigation report provided to the Respondent's disciplinary decision-maker;

The Claimant particularised this allegation in his Claim as follows (paragraph 47 (i) [79]): "*For example,* [Ms Hindmarch] *wrote, 'It is accepted that messaging interfered with* [the Claimant's] *work'. This referred to the Claimant spending 11 seconds during a 9000-second meeting sending a quick message*". The investigation report stated: "*It is considered that there were times where* [the Claimant] *was messaging* [the Second Respondent] *from meetings and that this is likely to have interfered with his participation in meetings, therefore it is accepted that on occasion the messaging interfered with his work.*"

We did not consider there to have been a '*misrepresentation*' as alleged. That part of the report was based upon the investigators' review of over 1,700 pages of WhatsApp messages, by reference to meeting appointments in the Claimant's diary. Three examples of such meetings were included in the report (paragraphs 7.5.18-20 [833-4]) upon which the Claimant had an opportunity to comment at the disciplinary hearing.

Further, in cross-examination of Ms Hindmarch, the Claimant demonstrated that some WhatsApp messages in which '*harassment*' had been referred to [1283] may have been misquoted as '*sexual harassment*' in the investigation report. In its full context, it was easy (and not misleading) to see how the word 'sexual' had been used (see [1836-7], paragraphs 14-5).

(g) omitting from the investigation report evidence provided by witnesses providing a counter-view of the case against the Claimant, and omitting evidence provided by the Claimant about alleged stress and anxiety and his explanation of this and his conduct;

The evidence provided by those witnesses (C1 and C3) was in fact enclosed with the investigation report, in full, for Ms Ledward. The report also referred to work-related pressure as an alleged mitigating factor (paragraph 7.2.40 [823], stating: "[the Claimant] *has sought to advance mitigation for his actions. He has described his perception of the culture of the department, and his own workload and pressures at the time...this is a matter for the Decision Manager in any subsequent action*".

(h) asking witnesses leading questions during the investigation;

This allegation was put to Ms Hindmarch in relation to the interview summary of C1 which appeared to suggest that he had been asked leading questions [775-9]. She clarified that, as a summary, that was how

it read, but a verbatim account would have read differently. We had no reason to doubt her in that respect particularly as, during the hearing, the First Respondent indicated that it had found and disclosed a recording of that interview to the Claimant. The Claimant did not seek to have it played to support his point and/or discredit Ms Hindmarch's account, nor did he put the point to C1 in evidence.

(i) failing to keep the Claimant's suspension under review and as brief as possible;

See paragraph 1 (d) above in relation to Claim 1. LM did review the Claimant's suspension.

(j) inappropriate influence from HR;

The nature of the alleged influence was explained by the Claimant during his evidence and his cross-examination of Ms Ledward; that HR effectively told her how the allegations ought to have been framed (e.g. [861]), what key letters ought to have said and what sanctions ought to have been available [865-8] which was, he considered, in excess of the type of assistance which ought to have been provided by HR in such circumstances.

In our view, it was not. In fact, it was just the sort of assistance we would have expected from HR in such circumstances. That was why they were there.

Ms Scotcher's proposals in respect of the framing of the allegations [861] was not surprising. Ms Ayres' document, which drew the evidence in support of the allegations to Ms Ledward's attention in a tabular form which she referred to as a 'decision tree', was also the type of support that we might have expected from HR in such circumstances [865-8]. Although we certainly had more sympathy with the Claimant's case in respect of the wording of Ms Scotcher's further 'Case Analysis Submission' document [890-3], particularly the last paragraph, it was clearly written with the possibility that 'if' or 'should' certain decisions have been reached. We were also impressed by Ms Ledward who left us in no doubt that she did not feel beholden to HR, or anyone else, to reach a certain decision. Her decision had been hers alone (see paragraph 6.91 above). Mr Gallagher had received similar advice and treated it in the same manner.

This was not "*lobbying*" as *Ramphal-v-Department for Transport* (A1, paragraph 29) but, even if it was, it had no effect upon the decision makers.

(k) proceeding with a disciplinary hearing before concluding the Claimant's grievance;

Shortly after the Claimant was invited to his disciplinary hearing, he raised a grievance on 25 January 2019. Ms Ledward, the disciplinary decision-maker, considered whether there was a need to pause the disciplinary process in order to determine the grievance. She concluded that it was unnecessary given that the allegations within it were mostly irrelevant to her decision. She was also aware that the Claimant had stated the disciplinary process was causing him stress. The limited extract from the grievance letter which she believed may have been relevant to her decision, was considered as part of the disciplinary process.

Delaying a disciplinary process when an employee issues a grievance is a frequent problem faced by employers. We have seen claimants raise complaints about whatever decision is taken. Ms Ledward's approach here appeared to have been sensible, proportionate and justified.

(l) failing to provide the Claimant with evidence that was referred to at the disciplinary hearing;

This appeared to replicate (c) above.

(m) failing to accurately record the disciplinary hearing in which the Claimant contends there are numerous inaccuracies and omissions;

No material omissions were identified to us which might have undermined or diluted that Claimant's response to the three allegations of misconduct. The issue was not explored with Ms Ledward in evidence.

(n) gathering of additional evidence by the disciplinary chair after the disciplinary hearing had taken place;

(o) a failure to give the Claimant a right to respond to information gathered and used within the dismissal letter;

There was more merit in these points.

One of the central complaints made by the Claimant was that his level of overwork, coupled with his stress, had led him to a state of desperation in which he committed the first act of misconduct regarding the Second Respondent's SEO recruitment. His claims of overwork were a central theme of his mitigation. Ms Ledward went to LM to ask about his claims after the disciplinary hearing, evidence which she did not share with the Claimant before she reached her conclusion.

Although Ms Ledward was obtaining LM's evidence on points which the Claimant had made part of his case on mitigation, which would not have featured within the investigation, the failure to allow him to comment upon it was less than ideal. Nevertheless, he did not challenge its accuracy with LM in evidence, he was provided with it within the outcome letter and had ample opportunity, which he took, to challenge it at the appeal before Mr Gallagher.

(p) pre-determining the decision to dismiss the Claimant;

We found no evidence that Ms Ledward's mind was closed or pre-determined.

(q) failing to obtain any, or any appropriate, medical advice prior to the decision to summarily dismiss the Claimant;

The Claimant was questioned about his mitigating factors by Ms Ledward, including his claims of work-related anxiety and stress. She also reviewed a letter from the Claimant's GP which made no mention of any impairment that may have affected his conduct in his role [2002]. On the basis of what she had and what the Claimant had told her, she could not have been criticised for having failed to unilaterally commission additional medical evidence at that point. Things changed of course before his appeal.

We could not see why else at that point a reasonable employer might have been advised to obtain medical evidence unilaterally.

(r) failing to give due consideration to mitigation evidence submitted by the Claimant;

The dismissal letter contained significant consideration of each of the factors raised by the Claimant. It appeared that the Claimant was not really complaining that the factors were not considered, but that they were not considered to have been sufficient to have upset the decision to dismiss.

(s) failing to reasonably consider a less draconian sanction other than dismissal;

See the conclusions in respect of paragraph 4 of this List of Issues above. A number of alternatives to dismissal were considered [1077-8].

(t) inconsistency of treatment, when compared with the Second Respondent to the Claimant's first claim (where it is alleged that equivalent disciplinary allegations arose against the Second Respondent);

This was not a procedural complaint. Rather, it concerned the inconsistency of the sanction vis the Second Respondent and was addressed under paragraph 4 above.

(u) labelling the Claimant's actions as gross misconduct where it is alleged 'certain allegations were quite clearly far less serious and were, in practice, misdemeanours perpetrated by other civil servants';

This issue as largely covered by (j) above, but Ms Scotcher's email of 19 December 2018 [861] was the main focus here. The evidence was that the 'Managers' or 'Disciplinary Toolkit' [1942-6] ought to have been applied by the relevant line manager [1950]. Here, LM had handed her role to Ms Ledward and we saw nothing unusual in her seeking guidance from HR as to how the charges ought to have been framed. The email was explicit in stating that they were Ms Scotcher's '*suggestions*'.

(v) a delay in conducting the appeal process;

The appeal was delayed, but for no reason for which the First Respondent ought to have been blamed.

The Claimant launched his appeal on 12 March 2019. The following month, he asked Mr Gallagher to consider documentation unearthed by the grievance process and so he agreed to delay. The grievance report was not concluded until July and an appeal hearing was then scheduled for August. It was the Claimant who asked for the hearing to take place after the grievance had been '*determined*' [1527], a decision which he changed and so the appeal was re-scheduled for 20 September.

Once the hearing was over, however, the Claimant asked for Mr Gallagher to delay his outcome until after the grievance outcome which was itself delayed for other reasons which have been referred to (the Claimant's extensive SAR request in particular). Mr Watters' outcome on the grievance was provided in mid-December. Due to annual leave and the amount of work involved, the appeal outcome was provided in early February.

(w) at the appeal stage, giving reasons to justify the Claimant's dismissal that were not given by the original dismissing officer and were not put to the Claimant.

This allegation was abandoned at the conclusion of the evidence.

<u>Issues of remedy relating to unfair dismissal</u>

18. *If the Claimant's dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed or that he would have been dismissed in time anyway.*

Even if we had concluded that Ms Ledward's failure to share the evidence which she gathered from LM had rendered the entire process unfair (paragraphs 5 (n) and (o) above), despite the Claimant's ability to comment

upon it at the appeal, we would have considered there to have been a very high percentage likelihood that the provision of the material and the Claimant's inevitable comments upon it would not have altered Ms Ledward's decision and the Claimant's ultimate dismissal. Her clear view was that a heavy workload did not excuse his manipulation of the recruitment exercise over such a protracted period.

20. *If the Claimant's dismissal was unfair, did the Claimant contribute to the dismissal by any blameworthy or culpable conduct? If so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award?*

In short, the Claimant's conduct contributed to his dismissal to a very high degree within the meanings of ss. 122 (2) and 123 (6). We did not need to consider this issue further in light of our other findings.

Wrongful dismissal

6. *Was the Claimant in fact guilty of gross misconduct such as would justify the summary termination of his contract of employment?*

The Claimant's guilt in relation to his involvement in the recruitment process was stark. Similarly, his mis-use of his work phone by sending copious unnecessary, private and rude WhatsApp messages was plain. The conduct went to the heart of the relationship between him and his employer and, in light of the breaches of the Civil Service and Defra Codes, constituted misconduct which was properly characterised as gross such that it constituted a fundamental repudiation of the contract.

Disability: s. 6

7. *Did the Claimant have a mental impairment at the relevant time i.e. between October 2017 and 26 February 2019?*
8. *Does any qualifying impairment have an adverse effect on the Claimant's ability to carry out normal day-to-day activities?*
9. *Is that effect substantial?*
10. *Is that effect long-term?*

The First Respondent denied that the Claimant was disabled at any material time. At the end of the evidence, but prior to closing submissions, the Claimant contended that he had been disabled from the Summer of 2017 since, at that point, the impairment had a substantial adverse impact upon his day-to-day activities. Having considered the need to establish the long-term nature of the condition, he then asserted that it had been from the Summer of 2018, a position he maintained at the end of his case (see paragraph 28, A1).

The impairment relied upon by the Claimant was Generalised Anxiety Disorder or GAD, a recognised disorder in both the DSM and ICD classifications (paragraph 41, R6).

We had no difficulty in accepting that the Claimant had *some* mental impairment in the sense that he is and was always someone who has suffered with anxiety. Attendances upon his GP in 2013, 2014 and 2015

suggested a background, long-standing propensity to worry. As Dr Sheard stated, such a condition affected a significant portion of the population.

Further, we had no difficulty accepting that the Claimant's impairment was debilitating and intrusive from March 2019. Dr Lloyds' letter [1153] and the subsequent OH report [1439-1443] both described a man who was then 'quite depressed' and struggling. He had been taking Sertraline since February.

But did the substantial effects upon day-to-day activities predate early 2019? The Claimant and Dr Lloyds clearly thought so.

Having considered the Claimant's evidence, it seemed to us that much of his case on disability had been engineered or retro-fitted to the case. As Mr Poole put it, it read like "*a series of after the event arguments*" or "*ex post facto rationalisations*" (paragraph 14, R6).

Dr Lloyds' evidence contained a great deal of self report and subjectivity. The Doctor's reference to the Disability Discrimination Act in the first of his letters did not lead us to the view that assessing disability under section 6 of the Equality Act was something with which he was well versed or familiar. Although he expressed the clear view that the Claimant's GAD had had a "*significant impact*" upon his day-to-day activities from the summer of 2017, a view obviously shared by the Claimant himself, we considered that the objective and contemporaneous evidence pointed in a different direction.

The Claimant was undertaking a sophisticated job and was seen to have been performing very well. From November 2017, he was also conducting an affair, which must have required a significant degree of calculation, subterfuge and planning. The WhatsApp messages also reflected a man who appeared confident, open, natural and strong. The Claimant had accepted in evidence that they were a good indication of how he had felt at the time. He had not been reluctant to report bouts of anxiety to his GP in the past, yet he did not attend in 2017 or early 2018 for any reason relating to his mental health, or at all.

Mr Tennent was clearly unconvinced by the assertions of a significantly debilitating condition. Although we were alive to the limitations of his evidence (the fact that he had not interviewed the Claimant), as a consultant psychiatrist, we considered that his view carried significantly more weight than that of the Claimant's own treating GP.

In answer to the four issues grouped together here therefore, we accepted that the Claimant had a mental impairment, in the sense that he had a propensity to be anxious, but we did not consider that it had an adverse impact upon his ability to carry out normal day-to-day activities until his suspension in or around September 2018. Whilst it appeared to us that the effect of his anxiety was becoming more prevalent in the spring of 2018, it did not appear to substantially interfere with his functioning. In September, however, his world collapsed, he turned to his GP, he received counselling and subsequently medication.

There was the further issue of the long-term nature of the condition to consider. In the summer of 2017, even if the Claimant's impairment had been substantial, we had no evidence upon which we could have been satisfied that it was then likely to have lasted at that level for over 12 months. On our analysis, however, there were more difficulties; even if the threshold level of substantiality was reached in September 2018, could we have said that the Claimant was likely to have suffered then at that level for over 12 months? Where was the evidence to make such a prediction possible? Although we recognised that 'likely' in that context was a low threshold ('could well happen'), there still had to be some evidence. It was all too easy to tie the likely course of the Claimant's predicted condition at that point to what we knew actually happened in retrospect, which was impermissible (see *McDougall* above).

From the evidence that we heard, we could only say that, by March 2019, the Claimant's condition had been at the threshold level for approximately six months. He had received counselling and had started antidepressant medication. Although there was still a lack of medical evidence predicting it's likely course at that point, our experience taught us that a continuation of the condition at or around that level could well have happened then.

As to the earlier periods, we preferred and adopted R6 at paragraphs 40-7, 51-8, 62-5 and 69-79.

Discrimination arising from disability: s. 15

11. *Does the decision to summarily dismiss the Claimant on 28 February 2019 for gross misconduct amount to unfavourable treatment of the Claimant?*
12. *Was such treatment afforded to the Claimant because of something arising in consequence of the Claimant's disability? The "something arising" relied upon by the Claimant is the link between the Claimant's mental health impairment and his conduct.*

The Claimant had clearly demonstrated that the 'something' (the conduct which he ascribed to his disability) had led to his dismissal, the unfavourable treatment. What he had not done, however, was demonstrate that the conduct (the 'something arising' and not the treatment) had taken place when he was disabled.

Although we therefore did not need to determine these issues in light of our findings in respect of issues 7-10 above, we nevertheless considered whether there was a link between the misconduct and the Claimant's mental health condition.

As to the recruitment issue, it was worth noting that the Claimant himself was less than sure of the issue of causation himself at the outset. His case was slow to emerge; compare his account at his first interview [534] with paragraph 14 of his witness statement, for example.

Ultimately, the issue turned upon a conflict between the evidence of Dr Lloyds and the Claimant (see, in particular, paragraph 10 of his impact statement [2016] and paragraphs 13-9 of his witness statement) on the one hand and Mr Tennent and, to a lesser extent, Dr Sheard on the other.

We could not accept Dr Lloyds' opinion that the Claimant's conduct had been some form of "*irrational behaviour response*" [2012-3] for the reasons set out more fully above. We also found the Claimant's evidence to have been somewhat curious in that respect; whilst he was at pains to explain the effect of his condition in respect of the acts of misconduct, he said nothing about its interplay with the lengthy affair which he conducted with the Second Respondent and the WhatsApp messages. His acceptance that his conduct was likely to have been a "*sackable offence*" certainly showed that his condition, whatever it was, did not prevent him from telling right from wrong.

We were also not able to accept, as the Claimant contended (paragraph 96 of his witness statement) that Dr Sheard had supported Dr Lloyds on the causation issue. His report of 21 June 2019 was very heavily caveated and diluted [1442].

Given the amount of sophistication and planning involved and the amount of time over which the recruitment exercise took place, Mr Tennent's view, that the Claimant's misconduct in that respect had probably had not arisen from his alleged condition, was to have been preferred (paragraph 10.8.1 [2153]). We should make it clear that we did not consider that Mr Tennent's answers to the Claimant's questions of 5 February 2021 served to undermine the thrust of his opinion. The questions were posed with caveats or as theories [2156A-E].

As to the WhatsApp messages, the Claimant was disciplined for the sending of hundreds of messages over a long period of time. Many of them were self-evidently sent before his suspension and his subsequent complaints of mental health problems. In themselves, they demonstrated no temporary lapse of judgment or sudden moment of madness. As Mr Poole contended, they demonstrated that the Claimant was something of a gambler, a risk taker and a rule breaker.

13. *Can the First Respondent show that the treatment was a proportionate means of achieving a legitimate aim, namely:*

The First Respondent relied upon a number of aims. First, the need to uphold the Civil Service Code and the values of integrity, honesty and impartiality (and to be seen to be doing so in order to maintain public confidence in the impartiality of the civil service). Secondly, the need to ensure that staff met the standards of conduct required, including under the Respondent's policies and procedures. Thirdly, the requirement of the Constitutional Reform and Governance Act 2010 that selection to the Civil service must have been on merit on the basis of fair and open competition. We considered that they were all legitimate aims.

The real question, however, was whether the Claimant's dismissal had been a proportionate means of achieving those aims. On that point, Mr Poole argued that dismissal was proportionate because it was not reasonably possible to retain someone in the civil service who had behaved so far outside the accepted standards, whatever the cause. He was probably right but, again, the point was academic.

14. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability in question?

There was nothing in the nature and quality of the information about the Claimant's health which he shared with LM between October 2017 and June 2018 which *"ought to have reasonably given her constructive knowledge I was suffering mentally"*, as he claimed (see paragraphs 6.10 and 6.11 above). He had been asking her to be stretched in his work.

Once within the disciplinary process, the Claimant indicated to LM, Ms Hindmarch and Ms Ledward that he was *then* ill, but did Ms Ledward have knowledge of any disability at the time of the misconduct?

She was made aware of some work-related stress/anxiety (e.g. [534], [646] and [648]), but he did not refer to GAD nor produce any medical evidence (see paragraph 6.14 above).

It was only after his dismissal that he then provided a more elaborate account of his mental health to the appeal manager, Mr Gallagher. His production of Dr Lloyds' March 2019 letter and the OH report revealed the matter more fully. That was the point at which, in our judgment, he first met the definition of disability.

Accordingly, although we found that the Claimant was not disabled within the meaning of the Act until approximately March 2019, even if we were wrong, the First Respondent did not have the necessary knowledge of his condition at any point up to that point. There was nothing in what he told LM which either gave her knowledge of any disability or put her on notice that more questions ought to have been asked in that respect until the Claimant spoke to her in October and informed her that he had been seeing his doctor and a counsellor. Although he did not inform Ms Hindmarch and/or Mr Adamson of any mental ill-health, he informed Ms Ledward that he had had suicidal thoughts *then*. As to his condition at the point of the misconduct, there was evidence which he raised which put her on reasonable enquiry and she *did* make reasonable enquiries, but the Claimant took the matter no further.

Claim 3; relevant applicable law

Victimisation

7.48 Although the First Respondent did not dispute the fact that the Claimant had performed protected acts within the meaning of s. 27 (1) in the form of his grievance and the issuing of Claim 1, it disputed the allegation that he had been subjected to detrimental treatment because of those acts.

7.49 The test of causation under s. 27 was similar to that under s. 13 in that it required us to consider whether the Claimant had been victimised '*because*' he had done a protected act, but we were not to have applied the 'but for' test (*Chief Constable of Greater Manchester Constabulary-v-Bailey* [2017] EWCA Civ 425); the act had to have been an effective cause

of the detriment, but it did not have to have been the principal cause. However, it had to have been the act itself that caused the treatment complained of, not surrounding issues.

7.50 In order to succeed under s. 27, a claimant needed to show two things; that he was subjected to a detriment and, secondly, that it was because of the protected act(s). We applied the 'shifting' burden of proof s. 136 to that test as well.

Jurisdiction (time)

7.51 Under section 123 of the Equality Act 2010, a complaint of discrimination may not have been brought after the end of the period of three months starting with the date of the act to which the complaint relates (s. 123 (1)(a)). For the purposes of interpreting this section, conduct extending over a period was to be treated as done at the end of the period (s. 123 (3)(a)) and the provision covered the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

7.52 When dealing with a series of discriminatory acts, it was not always easy to discern the line between a continuing policy and a discriminatory act which caused continuing effects. In *Hendricks-v-Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal established that the correct test was whether the acts complained of were linked such that there was evidence of a continuing discriminatory state of affairs. One relevant feature was whether or not the acts were said to have been perpetrated by the same person (*Aziz-v-FDA* [2010] EWCA Civ 304 and *CLFIS (UK) Ltd-v-Reynolds* [2015] IRLR 562 (CA)).

7.53 Should a claim have been brought outside the three month period, it was nevertheless possible for a claimant to pursue it if the tribunal considered that it was just and equitable to extend time (s. 123 (1)(b)). There was no presumption in favour of an extension. The onus remained on a claimant to prove that it was just and equitable to extend time.

7.54 Time limits were not just targets, they were 'limits' and were generally enforced strictly. A good reason for an extension generally had to be demonstrated (*Robertson-v-Bexley Community Centre* [2003] EWCA Civ 576) albeit that the absence of one would not necessarily be determinative (*ABMU-v-Morgan* [2018] IRLR 1050 (CA)). Tribunals had been encouraged to consider the factors listed within s. 33 of the Limitation Act 1980 (the *Keeble* factors), although it was not necessary to use the section as a framework for the approach (*Adedeji-v-University Hospital Birmingham NHS Foundation Trust* [2021] EWCA Civ 23). We have considered the length of and reasons for the delay, the extent to which the Claimant had sought professional help and the extent to which information, which he said that they needed, was not known by him until much later and the degree to which the Respondent should have been blamed for any late disclosure in that respect. We also had to consider

whether the Claimant had dragged his feet once he knew all of the relevant information. It was thought that the touchstone, however, was the issue of prejudice; whether and to what extent the delay has caused prejudice to either side. Although certainly relevant, it was by means a determining factor (see Laing J in *Miller-v-Ministry of Justice* UKEAT/0003/15 at paragraph 13).

Claim 3; conclusions

Victimisation: s. 27

1. *Did the Claimant do a protected act for the purposes of section 27(2) EqA 2010?*

The protected acts relied upon, and admitted by the First Respondent, were the Claimant's grievance of 25 January 2019 and, in relation to the detriments at paragraphs 2 (d) and 2 (f) below, Claim 1.

2. *If so, did the Respondent treat the Claimant to his detriment because the Claimant had done a protected act or the Respondent believed he had done or may do a protected act?*

The Claimant relies upon the following alleged detriments:

(a) LM allegedly providing a "false narrative of events" to Ms Ledward in an interview on 18 February 2019;
(b) Ms Ledward's alleged acceptance of LM's claims in the face of factual documentation providing a contrary view;
(c) Alleged delay in the Respondent considering the Claimant's grievance;

(a) The '*false narrative*' was said to have been LM's evidence around his mitigation [1964-6]. It was never suggested to her in cross-examination that she had given her account because of his grievance. She had not seen his grievance when she had been interviewed (paragraph 48 of her witness statement), a point which was also not challenged.

(b) The suggestion that Ms Ledward rejected the Claimant's mitigation (in preference to LM's evidence) because he had brought a grievance which contained matters covered by the Equality Act was also not put to her. We considered it to have been implausible and, having been impressed by Ms Ledward generally, we rejected it.

(c) Several complaints under s. 27 were raised around the grievance and the manner in which it was investigated and determined. In general terms, we considered that there was an inherent implausibility in the argument that those acts had occurred because the grievance had been raised. That proposition was never in fact put to any witness, and certainly not Mr Watters. As to the other protected act, Claim 1, we had no reason to doubt what Mr Watters had said; that he did not know of the contents of the claim at any time during his determination of the grievance.

In terms of the alleged delay, Mr Watters provided a detailed chronology of the grievance investigation and explained, in particular, the significant

amount of information that had to be collated and considered. The speed at which the Claimant's grievance was resolved was certainly not ideal, but it was understandable given the size of the task. In essence, it took between 25 January (the date of the grievance) and 10 July (the date of the final report) to deal with the matter. We had no sense that Mr Lyons or Mr Watters had dragged their feet because the grievance had included allegations of discrimination. The delay beyond 10 July to hold the grievance meeting was because of the Claimant's desire to pursue his SARs.

(d) *Respondent allegedly withholding documents regarding the Second Respondent (to the first claim) from the Claimant to frustrate his grievance process*;

Mr Watters withheld the interview conducted with the Second Respondent for reasons which were unrelated to the fact that the grievance had concerned allegations of discrimination. He was keen to preserve the Second Respondent's privacy and was then aware of her fragile mental state. He had not considered it necessary for the Claimant to have seen the interview for his grievance outcome to have been understood. He also did not know of the contents of Claim 1 at that stage.

(e) *Respondent not allowing the Claimant to appeal his grievance decision;*

The Claimant's case here was that the Grievance Procedure which was in force at the time, catered for ex-employees who issued grievances after the end of their employment (paragraphs 40-43 [1968]). He claimed that it did not bar an employee, who left *during* a grievance, from appealing against a grievance outcome. In an annexe produced in June 2019, such a right appeared to have been closed off [1971].

The arguments were flawed. First, paragraph 40 appeared to cover the Claimant's position and, in conjunction with paragraph 43, the First Respondent's interpretation seemed tenable. Secondly, even if it was a mis-interpretation, was it really the case that the Claimant was accusing a wide range of personnel of victimisation? A number of people had taken the same view; the HR Chief Operating Officer [1886], and whoever had initially told the Claimant amongst them [1800]. Mr Watters, the most obvious target, did not appear to have been the interpreter himself [1832].

(f) *Respondent allegedly removing grievance investigation findings;*

See paragraph 6.123 above; the draft reports changed over time as the evidence changed and as key personnel, LM and Ms Hindmarch

amongst them, had a chance to state their cases to Mr Lyons. Even if certain findings within the body of the report changed through the drafts, the ultimate conclusions remained largely unchanged.

There was no evidence to suggest that Mr Lyons or Mr Watters had removed certain earlier comments because of the grievance or Claim 1.

(g) *Respondent allegedly failing to decide on the Claimant's grievance and appeal in a timely manner;*

This allegation effectively repeated (c) above.

(h) *Respondent allegedly failing to investigate / determine aspects of the Claimant's grievance.*

After submitting his grievance on 25 January 2019, the Claimant expanded upon it in a series of further documents in which his complaints became increasingly detailed and wide-ranging (shortly before the grievance hearing, for example, the Claimant's provision of an additional 460 pages). The decision-maker therefore identified five key matters which appeared to form the basis of the Claimant's complaints, and asked the Claimant to confirm whether this was an accurate summary; the Claimant responded to agree. In light of the very high volume of documentation provided, the decision-maker confirmed that "*It will not be feasible for me to respond in writing to every point you have made in all of the documents provided to me*". The decision-maker responded to each of the five topics agreed upon with the Claimant, as well as addressing other points.

Jurisdiction: s. 123 (1)

3. *Are any of the Claimant's claims prima facie out of time (i.e. are they brought more than 3 months after the date of the act to which the complaint relates)?*

Claim 3 was presented on 19 December 2019. ACAS conciliation took place between 27 September and 1 October 2019. The Claimant's alleged detriments dated back to February 2019, nine months earlier.

The First Respondent argued that the matters covered by paragraphs 2 (a), (b), (d) and (f) were issued out of time. Mr Poole stated that they were crystallised on 26 February 2019 in respect of (a) and (b) and 29 July 2019 in respect of (d) and (f). We considered that to have been correct and the Claimant did not challenge those assertions.

4. *If so:*
   (a) *Was the conduct in question conduct extending over a period? Alternatively,*

(b)Is it just and equitable to extend time?

Although, in light of earlier findings, we did not need to deal with this issue, we reached the following further conclusions which we have expressed briefly.

The allegations in (a) and (b) both concerned Ms Ledward. They were out of time and were not linked to allegations which were potentially in time (e.g. the grievance, which was a factually distinct process, conducted by different personnel). The Claimant argued in closing that Ms Ayres was the link; that she had received the grievance, had responded to his SARs, had met with Mr Watters and had received Mr Lyons' report. Her acting as a post box was not enough in our view. There was no suggestion to Mr Watters in evidence that he had been led to treat the grievance in a particular manner as a result of Ms Ayres' influence. The link was tenuous and not made out.

The allegations in (d) and (f) were potentially tied to others which were in time. They concerned the grievance process and Mr Watters' conduct within it. The allegations were part of a potential course of conduct, part of which was in time.

We would not have exercised our discretion to extend time in relation to (a) and (b) in the Claimant's favour; he led no evidence explaining his delay, he had issued two previous claims in time and with solicitors' support and the delay was substantial. The issue was not addressed in A1 either.

7.55 The effect of the Tribunal's conclusions was therefore that the Claimant's claims failed. In light of comments made at the end of his submissions, the Tribunal was aware quite how significant these claims were to him and how disappointing this Judgment will have been. It was nevertheless hoped that these detailed findings enabled him to have a full understanding of the reasons why his claims were not well founded and move on with his life.

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Employment Judge Livesey

Date: 26 February 2021

Corrected under rule 69 and re-dated 28 April 2021

Corrected Judgment & Reasons re-sent to the Parties: 28 April 2021

FOR THE TRIBUNAL OFFICE