



EMPLOYMENT TRIBUNALS

claimant: Mr T Nettey

respondent: Department for Work and Pensions

Heard at: Birmingham Employment Tribunal by cvp

On: 22 - 26 March 2021, 29 30 and 31 March 2021 plus 6 and 7 May (tribunal panel only in chambers)

Before: Employment Judge Cookson sitting with Mrs Campbell and Mr Murray

Representation

claimant: In person

respondent: Ms Hodgetts (counsel)

RESERVED JUDGMENT ON LIABILITY

It is the unanimous decision of the Employment Tribunal that the claimant's claims of direct race discrimination under s13 of the Equality Act 2010 ("EqA") (discrimination), harassment related to race contrary to s26 of the EqA and victimisation contrary to s27 of the EqA are not upheld and are dismissed.

REASONS

Introduction

1. The Department for Work and Pensions (DWP), the respondent, is responsible for welfare, pensions and child maintenance policy. As the UK's biggest public service department, it administers the State Pension and a range of working age, disability and ill health benefits to around 20 million claimants and customers.

2. By an ET1 filed on 23 April 2019 the claimant Mr Nettey, who commenced employment with the respondent in 2009 and remains employed, brought complaints of race discrimination. The respondent denied those claims. At a Case Management Preliminary Hearing on 7 August 2019 Employment Judge Self set out the issues agreed by the parties as being pleaded in the ET1. The respondent filed an amended response to the claim which was now more precisely defined following Employment Judge Self's identification of the issues and claims.
3. There was an open preliminary hearing before Employment Judge Hindmarch on 7 and 8 January 2020 to determine an application to amend the claim if such an application was made. It was not.
4. The second matter she had to determine was whether any of the 28 allegations set out in Employment Judge Self's order at paragraph 12 (1) to (28) inclusive were in fact particularised in the ET1 or required an amendment application by the claimant. Finally, she had to determine which of the claims which were allowed to continue had been presented in time, if any, and if it would be just and equitable to extend time in relation to any of those claims. She found that it was not equitable to extend time for the majority of the claims. She also identified the legal issues to be determined at this hearing.

Legal Issues for this hearing

5. Having determined the matters set out Employment Judge Hindmarch set out in a case management order the issues to be determined at this hearing. Those are as follows:

Race related harassment

6. Issue 1

Did the conduct of the investigation by Steve Billington of HMRC, in response to C's grievance dated 3/7/18 against 13 managers of R, between 3/7/18 and 23/10/18, constitute:

- a. Unwanted conducted related to race.
- b. That had the purpose or effect of violating C's dignity or creating a [relevant] environment, and
- c. If it had such an effect, is it reasonable in all the circumstances for it to have had that effect?

7. Issue 2

Did Mr Billington's interpretation of the evidence of witnesses¹, between 3/7/18 and 23/10/18, constitute:

- a. Unwanted conducted related to race
- b. had the purpose or effect of violating C's dignity or creating a [relevant] environment, and
- c. If it had such an effect, is it reasonable in all the circumstances for it to have had that effect?

8. Issue 3

¹ This was amended from the terms of the original order

Did the outcome of the investigation by Steven Billington, dated 23/10/18 and sent to C on 2/11/18, constitute

- a. Unwanted conduct related to race
- b. That had the purpose or effect of violating C's dignity or creating a [relevant] environment, and
- c. If it had such an effect, is it reasonable in all the circumstances for it to have had that effect?

9. Issue 4

Did the conduct of the grievance appeal hearing by Simon Monks of R on 10/11/19 constitute:

- a. Unwanted conduct related to race
- b. That had the purpose or effect of violating C's dignity or creating a [relevant] environment, and
- c. If it had such an effect, is it reasonable in all the circumstances for it to have had that effect?

10. Issue 5

Did the outcome of the grievance appeal on 24/1/19 constitute:

- a. Unwanted conducted related to race
- b. That had the purpose or effect of violating C's dignity or creating [relevant] environment, and
- c. If it had such an effect, is it reasonable in all the circumstances for it to have had that effect?

Direct discrimination because of race

11. Issue 6

If any of the matters set out in paragraph 1-5 above did not constitute race-related harassment, did the same constitute less favorable treatment than was or would be afforded to others, because of race? For the purpose of this complaint:

- a. C relies on his race as a black person of African origin
- b. C relies on a hypothetical comparator.

12. **Victimisation**

13. R accepts the following was a protected act.

- a. Email on 3 July 2018 to Permanent Secretary and Cabinet Minister about HMRC's refusal to handle C's upheld appeal.

14. **Issue 7**

Did any of the matters at paragraph (3) above constitute unfavorable treatment because C had done a protected act or protected acts?

Additional jurisdictional issue

15. In her closing submissions, Ms Hodgetts drew our attention to an additional issue which is that a number of the legal issues relate to matters which predate 3 January 2019. That is significant because in light of the date when early conciliation began and when the claim was submitted, anything before 3 January 2019 is potentially out of time. At the preliminary hearing Employment Judge Hindmarch had determined timing issues in relation to the allegations referred in paragraphs 12 (1) to (28) of Employment Judge Self's order but not in relation to these matters. As this is a jurisdictional matter it is right that the tribunal consider this legal issue even though it is not included in the list of issues. Our conclusions on this are set out below.

What we considered in reaching our judgment

16. In reaching our judgment the employment tribunal has considered:
- a. an agreed bundle of documents prepared by the respondent (simply referred to as the bundle in this judgment) which runs to some 1328 pages.
 - b. the evidence in witness statements and given orally by:
 - i. the claimant in his witness statement ("C1") and in a supplemental witness statement ("C2") and his oral evidence
 - ii. Mr Devoy (C3);
 - iii. Ms Wells; (C4);
 - iv. A witness statement from Ms Pule (although as she did not attend the tribunal limited weight could be attached to this evidence).
 - c. The evidence in witness statements and given orally by:
 - i. Ms Ballantyne ("R1")
 - ii. Mr Billington ("R2");
 - iii. Mr Monk ("R3").
 - d. The opening skeleton argument from Ms Hodgetts (R4).
 - e. Written submissions from Ms Hodgetts which were supplemented by oral submissions, together with a bundle of authorities ("R5").
 - f. Written and oral submissions from the claimant.

Difficulties with the claimant's case

17. Despite the orders made by Employment Judge Hindmarch and the detailed discussions about his specific allegations at the preliminary hearings before Employment Judge Self and Employment Judge Hindmarch, the eight-page witness statement the claimant presented to the tribunal at the start of this hearing contains only broad allegations of discrimination. He failed to refer to specific events or evidence relevant to the issues above.

18. Mr Devoy's witness statement contains substantial hearsay evidence from the claimant and, as Ms Hodgetts pointed out in her opening skeleton, largely sets out evidence relevant to the allegations against the individuals whose actions Mr Billington examined in his investigation rather than the allegations against Mr Billington and Mr Monk themselves. That is significant because Employment Judge Hindmarch found that this tribunal had no jurisdiction to consider those allegations. The statement only refers in the briefest terms to the actions of Mr Billington and Mr Monk and makes no specific reference to discrimination or refers to facts from which it is said we should draw an inference of discrimination in terms of what is set out there. The evidence of Ms Wells and Ms Pule likewise refers to historical matters more relevant to allegations against Mr Bird and Ms Adamson than Mr Billington and Mr Monk.
19. On the first day of the hearing and subsequently at various points in the hearing, because the claimant is a litigant in person, this tribunal panel sought to remind him that the Tribunal would be determining on the issues set out in the list of issues above and stressed that we would not be considering the claims which had been found to be out of time. I drew the claimant's attention to s136 of the Equality Act 2010 which sets out the burden of proof in race discrimination cases that at the first stage it is for the claimant to show that there are facts from which, on the balance of probabilities, a tribunal could conclude, in the absence of an adequate explanation, that an act of discrimination has taken place. I also drew the claimant's attention to the guidance of the Court of Appeal in *Madarassy v Nomura International Plc* [2007] ICR 867 which is well summarised in this quote "*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination.*"
20. Ms Hodgetts explained that the respondent was keen to see this case resolved. In her opening skeleton she said this "*It is recognised that the claimant may apply to confirm the content of his ET1 by way of his evidence in chief, and/or to rely on the content of an appropriate document in the bundle, or even simply adopt Mr Devoy's statement as his own (given that its content largely came from the claimant anyway)*".
21. On the first day this tribunal was troubled by the lack of specificity in the claimant's case as presented to us. While the panel undertook initial reading, the claimant was offered the opportunity to identify a document or documents which set out his case which he could rely on in addition to his witness statement as had been suggested by Ms Hodgetts, although he was warned this was not to be seen as an opportunity to raise new allegations. Unfortunately, initially he simply provided a list of pages referring to pages in the bundle which he had been warned in the hearing would not be appropriate. He then provided a supplemental witness statement which was seen by the tribunal on the morning of the second day. The supplemental statement runs to 22 pages. However, despite the time taken to explain to the claimant that we would not be considering the out of time claims, the first 18 pages of the document are relevant to those excluded claims and Ms Hodgetts objected to that part of the statement on that basis. The remaining four pages refer to the processes involving Mr Billington and Mr Monk but contain little detail or explanation as to why the matters complained of are said to be

harassment because of race, less favourable treatment related to race or victimisation. In essence they simply repeat the broad assertions of discrimination.

22. As a tribunal panel we concluded we had gone as far as we could to get the claimant to identify his claim. Ms Hodgetts indicated that the respondent was willing to proceed to deal with the claimant's case on the basis of his witness statement and this supplemental statement and that is how we proceeded. In short, we did the best that we could.

Submissions

23. We received written and oral submissions from both parties. The submissions from Ms Hodgetts were particularly detailed running to some 32 pages and I have not sought to summarise those here, but we found her submissions on the law and how the law should be applied to the facts to be helpful and in the main we accepted her submissions as being well founded.

Witness credibility

24. Insofar as we had to resolve conflicts of evidence, the panel had to make an assessment of the credibility of witnesses. As explained above, this case was unusual in that the claimant led very little direct evidence in his own witness statements. Instead, the majority of his evidence about the facts which relied upon are set out in Mr Devoy's statement, although much of that evidence is secondhand in that Mr Devoy refers to what he has been told by the claimant. We are not bound by strict rules of evidence in the Employment Tribunal, but this is clearly an unsatisfactory state of affairs which must affect the weight that we can attach to Mr Devoy's evidence when he is giving sworn evidence on matters on which he has no firsthand knowledge.
25. Our concerns about Mr Devoy's evidence were compounded by the fact that despite affirming the truth of his statement, Mr Devoy seemed to struggle to recall the detail of many of the events which he had referred to in his statement. He was vague in his answers and seemed to lack any familiarity with the contents of documents. We had no confidence that his statement had been prepared with care and by reference to actual evidence as opposed to setting out beliefs, assumptions and impressions.
26. It became clear in the course of cross-examination that in places that the contemporaneous documents directly contradicted what Mr Devoy said in his witness statement. For example, in his witness statement, Mr Devoy says this about the appeal hearing before Ms Beetison which is referred to further below in our findings of fact. *"She [Ms Beetison] constantly kept telling him [the claimant] to stop being aggressive. I honestly felt Tom was very calm and told her so."* In cross-examination Mr Devoy conceded that in fact this is a reference to the one occasion when Ms Beetison asked the claimant to calm down in the meeting which had lasted around 3 hours. His witness statement is substantially misleading.
27. Mr Devoy also says in the same paragraph of his statement, *"Tom also explained how all this had made him feel and how at times he had contemplated suicide. Bev Beetison burst out in tears and stated she had recently found someone who had*

committed suicide so Tom shouldn't mention the word suicide. This was interesting from a senior manager who claimed she was up to the task. When the minutes of the meeting was sent to Tom, none of this was mentioned and when Tom and I amended it and sent it back to her, she made her decision in Tom's favour on 15th May 2018 and ordered another investigation going as far as stating Geraint Lewis was incompetent to have been appointed the decision maker in the first place".

28. The Tribunal notes that it is simply untrue to say that the original appeal minutes did not mention the discussion about the claimant being asked to calm down or the suicide issue. They clearly do. The claimant made amendments to these sections of the notes but both matters are clearly referred to in the first version. Mr Devoy's suggestion that it was the amendments that promoted the grievance to be upheld therefore appears to be unwarranted. We also fail to see the relevance of the reference to the suicide issue at all in terms of whether an inference of discrimination can be drawn or to the credibility of evidence. It does not assist this tribunal to decide the legal issues we are asked to determine. It appears to be referred to simply to disparage Ms Beetison because she became upset when discussing an issue that she found upsetting. We find this unhelpful and unwarranted.
29. Finally, in relation to that meeting Mr Devoy says that *"Tom felt she bullied and abused her power in that meeting and also 'doctored' the notes to be favourable to her"*. We do find not any suggestion in the notes of bullying or an abuse of power nor were taken to any point in the notes where this is said to be shown. The claimant asked for some changes to the notes. Some of those were accepted and some were not. The changes he made do not affect how we perceive Ms Beetison's role in that meeting. The claimant seems able to express his views in the course of that meeting in strong terms and shows no sign of being intimidated or upset. Mr Devoy is an experienced trade union representative and if he had felt that the tone and conduct of the meeting was inappropriate the tribunal considers that it is likely that he would have raised that at the time or through formal channels immediately afterwards. We think it is likely that the evidence is presented by reporting the claimant's opinion (i.e. "Tom felt...") because this was an opinion Mr Devoy did not share. That seems to us to be disingenuous.
30. In his criticism of Mr Billington Mr Devoy says this, *"none of the senior managers were confronted with the hard evidence against them to ascertain the truth but their words were just accepted and a conclusion drawn"*. However, in cross examination Mr Devoy was unable to point to a single piece of "hard" evidence of discrimination in the bundle.
31. Taking into account the matters above we found that Mr Devoy was not a credible and reliable witness. This significantly affected the weight that we could attach to his evidence.
32. In terms of the claimant, there was one matter which particularly troubled us in relation to his credibility and reliability. The claimant does not dispute that over an 18-month period from 10 September 2015 to January 2017 he was allowed special leave with pay of 2 days per month and had been allowed to not take further time off "for magistrate's duties" through the use of flexi-time. It is the respondent's case that this was granted because the claimant had told his manager, Iona Olds,

that he was a magistrate. It was a request by a manager to see his leave chart that led to some of the matters that the claimant complains about in this claim.

33. In due course this resulted in an investigation into the allegation that the claimant had breached Departmental Standards of Behavior in relation to claiming special leave and his use of flexi-time. That investigation did not result in any action being taken but the investigation ended in unusual and sad circumstances. We understand the investigator died between the first meeting with the claimant where he had said he needed to consult to his records and a follow up meeting. Mr Devoy in cross examination admitted that he had sought to ensure that this investigation had been spun out as long as possible because "It wouldn't be a benefit to Tom to attend the interview" which appears to be a concession that the hearing was likely to result in recommendation of disciplinary action.
34. Following the investigator's death his line senior line manager, Ms Hindson, wrote to the claimant to give him a decision about the investigation. Her letter refers to the fact that the investigation meeting had never been reconvened and having considered all the available paperwork she was concluded that the allegation was not proven and the misconduct had not occurred and that further action would not be taken.
35. In his evidence and in his written submissions the claimant refers to this to say he was exonerated in relation to the allegation that he had misled his managers. While that can be said to be strictly true based on what Ms Hindson said, before us the claimant admitted that he is not, and has never been, a magistrate. When challenged in cross examination about these matters the claimant maintained that he had never said to his managers that he was a magistrate and he insisted that he had only ever said that he was considering becoming a magistrate and had wanted time to attend magistrate court to observe what this involved and that as far as he was concerned that was what the leave was for. He maintained that his manager had simply assumed that he was a magistrate and that there had been no deceit or dishonesty on his part. He said that he only ever referred to "magistrative [sic] stuff" (whatever that means) in discussions.
36. Whilst the tribunal can see that the whole situation is somewhat curious – for example it is surprising that special leave was granted without the claimant being required to produce evidence of his appointment and sitting days, we found that it was simply implausible that the claimant could have thought that he would be granted substantial special leave over 18 months simply to observe the magistrates' courts in action. It must have been clear to the claimant that his manager thought he was a magistrate. He chose not to correct that misunderstanding whilst benefiting from the special leave over a long period of time. In his complaints and grievances presented to the respondent, the claimant himself places great store on that fact that a lie can not only arise from a dishonest statement, it can also rise from an omission. The claimant acted dishonestly by his own definition by not correcting the misunderstanding in his favour. However, what is of even more concern to us is that the documents support the respondent's case that claimant had gone further than simply failing to correct a misunderstanding. In his grievance against Gail Barnett at p163 in January 2017 he said, "*my magistrate's duty was only known to Iona Old and Deb Pattern and this had been the case for the last 2 years*". That was the claimant's own written account in a

complaint against a manager and was clearly highly misleading. The fact that the claimant had also described as himself as undertaking magistrates' duties on other occasions is reflected in what Gail Barnett reported was said to her – she uses that same phrase “magistrates' duties”. In other words the evidence strongly suggests the claimant misrepresented himself as being a magistrate. Someone who is not a magistrate does not undertake magistrate's duties.

37. This is a case where the claimant has asked us to draw adverse inferences from what he says were the lies of his managers and that had been a key strand of his case throughout. In that context the fact that that he was misleading his managers at exactly the time he was accusing those managers of lying has to be something which we take into account in assessing his credibility. We consider him to be an unreliable witness.

Findings of fact

38. We make our findings of fact on the basis of the material before us taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on the balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.
39. The claimant was 56 years of age at the time of this hearing. He is employed as an employment relationship manager and his employment is continuing. His employment started on 2 November 2009.
40. It is relevant to set out a brief background to some of the events leading to this claim. Regrettably the parties had not provided a chronology of events or a cast to assist the tribunal. It should not be necessary for these to be ordered if it would clearly assist for the documents to be prepared. We note that that it would have benefited us considerably if they had. It is not necessary for us to make findings about these things because the complaints we are concerned with are about how they were investigated by Mr Billington and Mr Monks rather than whether they happened, but the case management record of Employment Judge Self does provide a chronology of sorts of the concerns raised by the claimant that led to him raising the grievance that was investigated by Mr Billington and highlights a series of events involving the claimant:

ALLEGATIONS MADE BY C IN ADDITIONAL "PARTICULARS" AND NOT ACCEPTED BY R TO HAVE BEEN PRESENTED IN ET1

Race-related harassment

11. In the case of the allegations at paragraph 12(1) to (29) herein, did this take place as alleged by C?

12. Did the following constitute:

- (a) unwanted conduct related to race
- (b) that had the purpose or effect of violating C's dignity or creating a [relevant] environment, and
- (c) if it had such an effect, is it reasonable in all the circumstances for it to have had that effect:

- (1) On 28/1/15, Lee Bird (a) shouting "look at me when I'm talking" (b) saying "look at the aggression you're demonstrating" (c) threatening to take flexi-time off C
- (2) On 27/5/15, Sophie Alker telling C that his People Performance Reporting mark is 'must be improved'
- (3) On 3/6/15, Iona Old providing C with a disciplinary letter about his conduct when told about his PPR mark?
- (4) On 8/1/16, Iona Old imposing a written warning for breach of the guidance on electronic communications with third parties?
- (5) On 23/2/16, Wendy Crayton dismissing C's appeal?
- (6) On 8/3/16, Martin Buxcey responding to C's attempt to appeal further his written warning
- (7) Between 16/3/16 and 8/4/16, Martin Buxcey sending emails to C inviting him to discuss his correspondence

- (8) On 8/4/16, Martin Buxcey imposing a final written warning for repeated examples of minor misconduct
- (9) On 21/6/16, Mark Poultney saying that he felt that C had insulted him
- (10) On or after 21/6/16, Mark Poultney instructing an HEO to document conversations with C, to copy emails with C to him, and advising an HEO to speak to HR
- (11) [On 25/7/16, Gail Barnet requesting to see, and then directing C to provide, his leave chart?]
- (12) On 16/8/16, Gail Barnet telling C 'you're a frustrating character, that's why I treat you the way I do'
- (13) On or before 26/8/16, Gail Barnet raising a grievance/making a complaint in respect of C's failing to provide his leave chart and failing to attend a team meeting?
- (14) On or before 9/10/16, Gail Barnet alleging that C had called her a liar
- (15) On or before 9/10/16, Gail Barnet asking that C provide her with photographic evidence of performing his objectives
- (16) On or before 9/10/16, Gail Barnet giving C the lowest mid-year box marking
- (17) On 14/10/16, Amy Adamson suspending C
- (18) On 6/1/17, Mark Whitehouse imposing a final written warning in respect of (a) failing to supply Annual Leave Chart when asked for (b) not attending a team meeting (c) C's calling his manager, a liar?
- (19) From 6/1/17 until 27/2/18, failing to progress C's appeal against the final written warning
- (20) On or after 6/1/17 [date to be confirmed, following C's return from suspension], Gail Barnet failing to invite C to mid-year review
- (21) On or after 6/1/17 [date to be confirmed], [David Kerr? Lee Bird?] countersigning C's end of year mark
- (22) On or before 24/4/17, David Kerr providing information that triggered an internal fraud investigation into C's use of annual leave, special leave, and flex-sheets
- (23) On 18/5/17, Joy Farrin dismissing C's grievance against Gail Barnet
- (24) On 26/6/17, Stacey Scriven dismissing C's grievance appeal
- (25) On 3/1/18, Geraint Lewis dismissing C's grievance (dated 24/10/17) against various managers
- (26) On 9/4/18, Paul Phillips dismissing C's appeal against the final written warning imposed on 5/1/17?
- (27) On or before 15/5/18, Bev Beetison 'doctoring' the appeal hearing notes
- (28) On 8/1/19, Vince Coton rejecting C's special payment request.

41. The respondent's reply to these allegations is set out in paragraph 9 of the amended particulars of response filed by the respondent on 7 October 2019.
42. We found it helpful to make some findings of fact about the things which happened which led to the investigation and decision of Mr Billington and the appeal to Mr Monk to put what follows into context.

43. In January 2018 the claimant appealed against Geraint Lewis's grievance decision about concerns the claimant had raised about various management actions. The appeal was considered by Ms Beetison who was a regional leader within the child maintenance group at the relevant time. The grounds of that appeal are set out in the bundle at pages 296 and following of the bundle. The precise grounds of appeal are not easy to discern from this document, but in essence the claimant appears to suggest that Mr Lewis must not be aware of the relevant legislation and definitions because the claimant says this

THE GRIEVANCE DECISION LETTER

The meeting was to address a complaint about discrimination, harassment, bullying, victimisation motivated possibly by racism.

The following are definitions of these words in the Cambridge dictionary, explanations by ACAS and an extract from the DWP guidance regarding how to recognise Bullying, Harassment and Discrimination.

I don't mean to be disrespectful by providing definitions of them but it seems wherever I turn, nobody wants to understand what's going on with the exception of one Grade 7 who happens to be of the same origin as I am.

44. The claimant then goes on to quote extensively from a number of different sources, including by reference to dictionaries and ACAS guidance. The claimant says that if the information from ACAS and the respondent's own policies is taken into account, it shows that Mr Lewis' actions were themselves a form of victimisation bullying, harassment and discrimination although it is not entirely clear why. He asserts that Mr Lewis should have recognised there was a failure to follow procedures, that Mr Lee Bird, Grade 7 District Operations Leader, had advised and directed Sophie Alker EO, Disability Employment Adviser to give him an unfair performance grading and should have recognised that this was racially motivated discrimination, "passive bullying", harassment and victimisation. The claimant asserts that the point of his grievance has been missed about this and goes on to make similar points about Mr Lewis' findings in relation his complaints in the grievance about other managers.
45. After that appeal was lodged the claimant's appeal against disciplinary action taken the previous year was also considered. At the appeal hearing before Mr Phillip on 23 March 2018 the claimant had raised concerns about delay in that appeal being considered. In his outcome letter Mr Phillips referred the claimant's case to Ms Claire Hindson to consider appropriate action as a result of the delay and the claimant's concerns.
46. An appeal hearing in relation to the grievance outcome from Mr Lewis was conducted by Ms Beetison on 23 March 2018. On 13 April 2018 appeal minutes were sent to the claimant and Mr Devoy as his trade union representative. On 23 April 2018 the claimant provided extensive suggested amendments to the appeal minutes which were sent to the notetaker for review. Some of his amendments were accepted but some were rejected on the basis that the matters he referred had not been discussed. The claimant was told why his amendments were not accepted. No further dispute about the minutes were raised and we have accepted the amended minutes as an accurate record of that meeting.

47. The meeting on 23 April 2018 started at 11 am and ended at 3pm, with two, half hour adjournments. Mr Devoy in his statement refer to various criticisms that the claimant makes of this meeting. As our comments on credibility indicate those criticisms are not supported by either the original notes of the meeting or the claimant's amended notes. It is relevant here to note matters which arise of the claimant's cross examination. There are references in the meeting notes to Ms Beetison referring to the claimant behaving in an intimidating way. The claimant says this is unfair and has referred to the fact that he uses hand gestures when he talks and that fact that he is tall. In his own email of concern of 3 July 2018, referred to below, he compares himself to Muhammad Ali in terms of his build. At one stage in cross examination of Mr Monks in particular he appeared to suggest that this perception of him being intimating was because of racial characteristics in how he expresses himself and his use of hand gestures. The claimant presented no evidence in support of these rather vague assertions and as a panel we will make clear that we felt the claimant was inviting us to apply some vague racial stereotype in support of his case. We declined to do so but the question of whether the claimant did, on occasion, behave in an intimidating way is an important one.
48. In the course of the meeting with Ms Beetison the notes show that she asked him to calm down. Mr Devoy is critical of that and said that the claimant was "*not behaving aggressively*". The notes indicate that Ms Bettison went on to say "*I'm trying to take the emotion out of this so I can get to the facts; but I can understand if you do behave aggressively that colleagues/managers may feel intimidated and take grievance/disciplinary action.*" The claimant and Mr Devoy object to that but the claimant himself describes himself as becoming irate on other occasions, for example in the meeting with Sophie Alker. Earlier in the meeting with Ms Beetison the claimant had said (in the context of the confrontation with Lee Bird in 2015 and when self-reporting what he had said to Lee Bird) "*TN explained to BB that he replied "if whatever you call yourself you really are in that position, then I suggest you go and up skill yourself with dealing with people from diverse backgrounds because what you saw out there was me talking to you with gestures but if I was to show you aggression for what you did out there; I would have banged your head against the wall"*". The claimant may not have intended that to seem threatening, but we can see how this comment could easily be perceived in that way. English is not the claimant's first language, but he speaks English very well, he is clearly intelligent and is well educated and articulate. He often refers to dictionary definitions and it seems to us that the claimant is in fact very careful and precise in his use of words. The tribunal finds that it is not plausible that the claimant (and Mr Devoy for that matter) would not understand that this statement could be seen as intimidating. The comment he had reported to Ms Bettison suggests that if the claimant were to become annoyed and aggressive he could pose a threat to his managers. In that context it is not surprising that Ms Beetison was keen to see the claimant keep his temper and not become agitated. The tribunal find no grounds for drawing an adverse inference from the claimant being asked to calm down if that is what Mr Devoy is inviting to do though this evidence.
49. An appeal outcome letter was sent on 15 May 2018. In that letter Ms Beetison says that what had been clear to her was that the claimant was alleging that what had happened to him had been orchestrated by Mr Bird and that this may or may not have been due to racism. She upheld the claimant's appeal because she concluded that Mr Lewis had only considered the case as being about race. She

directed that a more thorough investigation should be conducted into the claimant's grievance and she recommended that the investigation be conducted by an independent and experienced investigation manager and that setting that up would be coordinated by Vince Coton, a human resources business partner. That was an outcome which was favourable to the claimant. This is the investigation which was in due course undertaken by Mr Billington.

50. We will observe here that in his evidence Mr Billington referred repeatedly to looking at whether race was the motivating factor for what had happened to the claimant. That is not what Ms Beetison had directed should be the focus of his investigation and decision-making. We were not taken to any terms of reference for what Mr Billington's investigation. That is surprising and the use of terms of reference may have ensured a better focus on what the purpose of the process was supposed to be. However, as Mr Billington concentrated on whether there was racial discrimination in the managers' decision making and actions we do not see any basis for drawing an adverse inference that he appeared to fail to consider if there was another, non-discriminatory motivation.
51. In the meantime, Mr Coton had tried to resolve why there had been a delay in hearing the claimant's appeal against the final written warning from the final warning given by Mr Mark Whitehouse which had been highlighted by Mr Phillips. Mr Coton established that an appeal had been raised which had been assigned to Mr Taj Singh who worked in a different district to the claimant, but the claimant had challenged Mr Singh's impartiality. This had raised a question mark over who would examine the issue and it appears that the appeal fell between different offices and was overlooked until the issue was raised by the claimant some 12 months later. It is clear from the correspondence that Mr Coton considered that these might be circumstances which would justify a compensatory payment as this had been failing by the respondent's systems. There was no attempt to hide what had happened. It also seems likely that if either Mr Devoy or the claimant had raised the failure to progress that appeal the failure would have been identified earlier. Although the delay was a breach of procedure we did not draw any adverse inference from this delay.
52. In light of Ms Beetison's decision, Mr Coton began to progress the next steps to initiate the further investigation she had directed. However the claimant was losing patience and on 12 June 2018 he emailed Mr Coton to say that he expected an investigation hearing to be arranged without delay and said that he expected a solution by 30 June 2018, warning that if this did not happen he would "escalate externally". Mr Cotton replied to say that he was in dialogue with HR Investigation Services to discuss a way forward.
53. On the 3 July 2018 the claimant wrote to a number of very senior individuals including the Cabinet Secretary, the Permanent Secretary to the DWP, the HR Director General of the DWP and various MPs. This email is at pages 385 and following of the bundle. This is a wide ranging document which alleges "*bullying, discrimination, harassment, victimisation, unconscious bias, ostracism, racism, constructive dismissal implication and unfair treatment at the hands of senior management within Central England District for over a period of years*". In terms of the allegations that document contains the claimant refers to the previous meeting with Ms Beetison and the fact that she did not accept all of his

amendments to the notes and that she had not recalled something referred to in the original grievance. He also specifically names Mr Lewis, Mr Buxcey and David Kerr, but although the document is some 11 pages long and refers in the strongest terms to alleged discrimination and other improper conduct, it contains little in the way specific allegations. It attaches a large number of documents including one called “unanswered concerns”, but that document was not referred to us. It does refer to an expectation of compensation and demands the dismissal of the managers the claimant says are responsible for his treatment.

54. A reply to the claimant was sent on behalf of Peter Schofield on 17 July 2018 explaining that the correspondence has been referred to the Human Resources Mediation and Investigation Service so the complaint can be fully investigated.
55. In the meantime, on 9 July 2018, Mr Coton had made an application for a special payment on the claimant’s behalf because of the delay in progressing the appeal and referring to the concerns raised by the claimant more generally and his deterioration in health. That application was considered by the Special Payment Panel. In due course that request was refused because the Panel determined that although a mistake had been made because there had been no significant inconvenience or distress. On the basis of the claims outlined to Employment Judge Self, the claimant appears to blame Mr Coton for that decision, but it is not clear why.

Findings in relation to issues 1, 2 and 3: The Billington investigation

56. Mr Billington who appeared to give evidence before us, was appointed on 10 July 2018 to consider the claimant’s concerns, both in accordance with Ms Beetison’s decision on the appeal and the referral by the Permanent Secretary. Mr Billington does not work for the DWP but is employed by HMRC as a specialist investigation manager. He was appointed to investigate the claimant’s concerns because he was external to DWP. This was the first time he had conducted an investigation for the DWP.
57. By an email on 19 July 2018 the claimant confirmed that the specific allegations he wished Mr Billington to investigate are set out in an appendix to a meeting with Mr Dez Grant on 31 August 2017.
58. Mr Billington was supported by Ms Ballantyne from the DWP’s HR department. The tribunal will note here that we found Ms Ballantyne to be a straightforward and credible witness and we accept that, whatever the claimant’s concerns, her role was purely administrative, and she did involve herself at all in the substance of Mr Billington’s conduct of the investigation or his decision making. If support for that were needed, the fact that Mr Billington made mistakes in the procedure that he was applying, adopting the approach used by HMRC rather than the procedure of the DWP points to the fact that Ms Ballantyne was not directing Mr Billington. If she had been, we think it is unlikely that this procedural mistake would have been made.
59. Before us the claimant was highly critical of the involvement of the HR team in this investigation, asserting that this meant the investigation was not impartial and that

in consequence the investigation was not the one he had promised. However, Ms Beetison had determined in her outcome that

This means the following action will be taken to address concerns raised in your grievance:

- a more thorough investigation and detailed consideration of the grievance to be conducted. I have recommended that the investigation is conducted by an independent and experienced investigation manager. I have asked Vince Coton, HR Business Partner for Work Services Directorate to arrange for the grievance to be re-investigated.

60. Mr Scofield in his correspondence said this:

I have therefore made arrangements for your case to be referred to the Human Resource Mediation and Investigation Service (HRMIS), for your complaint to be fully investigated. You will be contacted in the next few days by a member of that team to make the necessary arrangements and check your availability.

61. In neither case was the claimant promised an investigation that would exclude HR nor has the claimant suggested to any facts from which we draw an inference that the way the investigation was set up was related in any way to his race. We accept that it was appropriate for someone from DWP's HR team to support the investigator to ensure that arrangements because it was necessary to have someone which could contact DWP staff and make arrangements for interviews, booking rooms and so on.
62. In the course of cross examination, the claimant was highly critical of Mr Billington's skills and experience as an investigator. The claimant himself has qualifications in forensic computer investigations and this perhaps leads him to have a particular view of what background and experience an investigator should have. However, it has not been suggested that other staff in similar situations who do not share the claimant's protected racial characteristics have had their cases investigated by more experienced investigators or that in any way that the decision to appointment Mr Billington was influenced by the claimant's race. We accept that Mr Billington was appointed because he was external to DWP, he had experience of investigating grievances and, importantly, was available at that time to undertake a substantial investigation given the claimant's complaint about how long it was taking to move matters forward. We would observe that it appears Mr Billington had limited experience of investigating race discrimination claims. This was a case which perhaps would have been better assigned to someone more experienced specifically in discrimination investigations but that in itself is not evidence of discrimination and is not something which we find is something from which we can or should draw an adverse inference.
63. Mr Billington, met with the claimant and Mr Devoy, as his trade union representative, on 26 July 2018 in the presence of Kina Phillips as a notetaker. The notes of that meeting are as pages 506 and following the bundle. The claimant was asked to identify the managers against whom he was making allegations. He said that he thought Lee Bird was behind everything and named a further 12 managers as perpetrators of improper conduct towards him.

64. The legal issues which we had to determine include “*whether the conduct of the investigation by Steve Billington of HMRC, in response to C’s grievance dated 3/7/18 against 13 managers of R, between 3/7/18 and 23/10/18*” and “*whether Mr Billington’s interpretation of the evidence of witnesses constituted harassment related to race or direct race discrimination*”. We have already identified the difficulty we faced with the claimant’s evidence. We found the approach adopted by Ms Hodgetts was helpful. She generously, in light of the claimant’s failure to offer a positive evidential case in his evidence in chief, looked at the specific matters referred to by the claimant in the meetings with Mr Grant and Mr Billington manager by manager to examine the allegations about Mr Billington’s decision making. We have adopted the same approach to our fact finding. We have made findings about the conclusions reached by Mr Billington taking the managers in the same chronological order as Ms Hodgetts. We reminded ourselves that in examining this evidence we were not looking to see if there are facts from which we could draw an interference that the actions of the managers amounted to race harassment or discrimination, but rather whether there are facts from which we could draw adverse inference that the way Mr Billington, and Mr Monks at the appeal stage, conducted these investigations, or the interpretation he placed upon the evidence, suggested a prima face case of harassment or discrimination.
65. In terms of the broad approach of the investigation, when Mr Billington was asked by the claimant “is that how you do it [conduct an investigation] every time?” Mr Billington replied “yes”. We accept that this was an honest answer. The claimant may not think the investigation was thorough enough, he may believe that that Mr Billington did not possess the right skills and was not a good enough investigator, but those are not matters from which we can draw an adverse inference because there is no suggestion those are facts related to the claimant’s race. As already noted, we were offered no evidence by the claimant or Mr Devoy that Mr Billington would have applied to a different methodology, skills or diligence if the claimant had been white British or indeed any other racial or ethnic origin.
66. Turning then to how Mr Billington interpreted the evidence against the managers:
- Mr Lee Bird**
67. The primary account that Mr Billington had to investigate, at the insistence of the claimant, is set out in the meeting with Dez Grant. The allegations concern events at a communications meeting with a large number of staff in January 2015 and an allegation that Mr Bird was behind the treatment of other managers towards the claimant. Mr Billington also had the information provided to him at his meeting with the claimant, and the previous investigations. Following the meeting with him the claimant confirmed the allegations he was to examine in the record of the meeting with Mr Billington. In connection with these matters Mr Billington also interviewed Mr Bird, Ms Alker and Ms Patten about the concerns raised by the claimant.
68. Mr Billington did not interview Ms Pule whose unsworn statement was produced to us. Her evidence related to the communications meeting in January 2015 but she was not interviewed by Mr Billington because Ms Ballantyne was told by the DWP’s payroll providers that Ms Pule had retired. In fact this was not true, Ms Pule retired shortly afterwards and before she left the claimant was able to get a statement from her. We accept however that Ms Ballantyne gave us an honest truthful explanation for the fact that Ms Pule was not interviewed.

69. In terms of the relevance of Mrs Pule's evidence to the legal issues in this case, although Ms Pule's statement confirms that Mr Bird was angry with the claimant after, in Ms Pule's words, the claimant arrived in the meeting late, nothing in her statement suggests discrimination or any sort of racial bias. Her account broadly supports what others reported what had happened during in the meeting itself, including what the claimant said to Mr Bird about "listening with his ears", but other than this document is of limited value to us and we satisfied would also have been limited value to Mr Billington.
70. At the meeting with Mr Billington the claimant described what had happened at a communications meeting on 28 January 2015 and alleged that after this Mr Bird had influenced the actions taken by the claimant's line manager, Ms Alker. When he was asked why he had said to Mr Lewis that Mr Bird's actions were racially motivated, the claimant said that *"I never used to think of it in terms of racism, but the more I think about I was the only ethnic minority – given a box 3 performance marking, the suspension"*. When pressed on why he thought there was a racial dimension, the claimant said that he didn't deserve the box 3 performance marking and his thoughts had been *"the manager thought "where are you come from" "* but he did not identify anything that Mr Bird had said or done which suggested that his motivation was racial or why the claimant thought that it was. This appears to have been entirely a suspicion in the claimant's mind unsupported by any external evidence and was pure supposition on the part of the claimant.
71. In terms of the facts of the case, there is very little material difference between the claimant and Mr Bird in terms of the communications meeting looking at the various accounts given to various DWP managers and Mr Billington. Mr Bird was one of the claimant's senior managers, that is he managed the claimant's line managers. On 28 January 2015 there was a meeting underway with a large number of staff that Mr Bird was addressing which the claimant walked into. It appears that the claimant was not late into work, he was using flexi-time, but he had come into the meeting part way through. The claimant had come in and started to log into a computer. Mr Bird had challenged the claimant because of the disruption he was causing. On the claimant's account, when Mr Bird had said *"look at me when I'm talking"* the claimant had said *"I listen with my ears"* and had continued working on the computer. The claimant alleges that two white staff members were sleeping in the meeting although we were taken to any place where he has never named them and that was something not mentioned by anyone else, including Ms Pule. The fact that anyone was asleep was denied by Mr Bird and Ms Alker. Given the claimant's account of his engagement with the meeting it seems implausible that he could have observed anyone else in the meeting closely enough to see if they were actually asleep and in any event it is difficult to see why this was an excuse for his own disruptive behaviour.
72. After the meeting Mr Bird had spoken to the claimant about his conduct. He had accused the claimant of being aggressive and the claimant had denied that. It was during this encounter that the claimant told Ms Beetison that he had said that if he wanted to be aggressive he *"would bounce Mr Bird's head off the wall"*. The claimant has given various slightly different accounts of this meeting but in all of those accounts he makes clear that he had said to Mr Bird that he felt no need to listen to him or may attention in the meeting and did not accept that he had acted inappropriately. The claimant self-reported that he called Mr Bird *"an idiot"* because

he was behaving in an idiotic manner. That was simply a rude way to speak to a senior manager and we find implausible that the claimant did not realise that.

73. In his interview Mr Bird had denied shouting at the claimant during the communications but admitted to raising his voice. The claimant accuses him of lying about that. This seems to be a matter of semantics. Some people will understand someone "shouting" to indicate a degree of anger or aggression in tone, others will simply understand "shouting" to mean speaking very loudly. We do not consider that Mr Bird can reasonably be described as lying when he said he spoke with a raised voice but didn't shout. He did not deny that he had raised his voice which seems to us to be the key factual issue.
74. The notes show that Mr Billington took steps to identify when Mr Bird had been involved in decisions, such as the marking of his appraisal grade, the PDP, his move to another team and the later decision to suspend the claimant and that he also looked at those issues with relevant witnesses.
75. In his report Mr Billington dismissed allegations of direct racial discrimination, bullying, harassment, victimisation and "unconscious bias and abuse of power" because he found "*that Mr Bird's actions and behaviors were in line with what may be considered normal management duties and reasonable management action*". As a panel we observe that this repeated conclusion in relation to each individual allegation is not helpful. It may have helped all concerned if, instead of using this phrase each time, Mr Billington had explained what he meant, what his key findings of fact were and why, and what he concluded as a result, but the fact that outcome could be better expressed is not a finding of fact from which we have drawn any drawn any inference of discrimination.
76. In short that Mr Billington had concluded the claimant had acted rudely and belligerently towards Mr Bird in the communication meeting. Mr Bird had been entitled as a senior manager to challenge conduct he felt was inappropriate. In the meeting that followed the claimant had made matters worse with further rudeness and his comment about bouncing Mr Bird's head of the wall was highly inappropriate. Those are reasonable conclusions to draw from the evidence before Mr Billington. The claimant had not pointed to anything that suggested an improper motivation related to his race except to point out the fact that he was the only black African person in the team. There is however nothing to suggest that it was anything but his unreasonable behaviour which triggered Mr Bird's attention and action.
77. In relation to what followed, Mr Bird was the ultimate line manager of others including Ms Alker but the claimant appears to have offered Mr Billington and those who went before him no substantial evidence to support the allegation that Mr Bird had orchestrated others to act in discriminatory towards the claimant, except that he had been involved on occasion in management decisions in his role as a senior manager. There is no suggestion that Mr Bird had not also been involved in or aware of other managerial decisions in the team he managed. It was not put to us by the claimant or Mr Devoy that there was anything improper in that.
78. We have concluded that any reasonable person considering the claimant's case against Mr Bird would have reached the same conclusion as Mr Billington and not

evidence was offered to us which would enable us to find that there is evidence of any influence of the claimant's race in this decision.

Ms Sophie Alker

79. The allegation here related to the application of a box 3 grading in the course of the respondent's annual appraisal process, known as the PDP. The claimant's allegation to Mr Grant had been as follows: *"following this discussion [the discussion about his behaviour in the meeting above], Lee Bird called a meeting with his manager whom LB was mentoring and he was given a Box 3 Marking unbeknown to him. TN said due to the written warning on his file having expired, he asked Sophie Alker to locate the paperwork so he knew it was destroyed. SA told him later that she couldn't locate the paperwork and to go and discuss this in a private room. TN said he told her if she was adamant she couldn't find it then it's not a problem as he can always remember the conversation they had just had. TN said when he got up to leave, she said to him, by the way your box marking for your EOY is a 3. TN said that he was livid as he did not deserve it and told SA how he felt and believed she SA was the one who deserved a 3 not him. TN said he left the room furious and went back to his desk. TN said that he was not advised the meeting was regarding a Box Marking and that a box marking should not come as a surprise. SA was in tears and went to speak to Iona Old who was on TDA as Operations Leader about this. SA submitted a grievance that TN had threatened her and she felt frightened so IO brought a typed letter of this grievance to TN and explained that Debbie Patten would be taking over from her so would be the decision maker."* When discussing this with Mr Billington the claimant said that that he got irate when dealing with Ms Alker and that she had asked him why he was so aggressive and had said that he was threatening her.
80. In his outcome Mr Billington explains that he has interviewed Ms Alker and two other witnesses. Ms Alker denied that she told the claimant about his appraisal grading for the year 2014/2015 as an off the cuff remark. The meeting had been one to discuss his PDP appraisal and that is consistent with the claimant's evidence that he would only meet with Ms Alker if he was required to. He told that that he would attend not ordinary one-to-one meetings but he was required to attend an annual PDP meeting. That was also confirmed by Mr Devoy. Ms Alker said the mark had been discussed with Mr Bird and approved by the validation panel.
81. Ms Alker had told Mr Billington this about why she had given the claimant a box 3 grading:

I can't remember if it was part of this conversation. I really don't recall specifics of the conversations. My reason for taking him into a private room was with the intent of having the End of Year box mark conversation. He was talking to me about things he had done. He had some papers on him and we had a discussion to look at his evidence and examples and how that sit with his objectives and if he met all objectives.

I remember my feelings and emotions prior to the meeting. When I told him the box marking he was talking very loudly saying that I was a rubbish manager and that I should be a box 3 and that he would take further action. He banged his hand on the desk. It is metal desks so it was quite loud. He got up and slammed the door open against the wall and stormed out. There was no physical contact or threats.

Tom was marked a 3 because of a number of issues. He refused to send customers on work experience which was a Departmental priority. He did not agree with the approach and therefore refused to do it. With regards to general team working; he would not engage and take part in any of that. This put the team under a lot of pressure.

Up to that point, did you discuss performance or behaviours with Tom and that he was heading for a box 3 mark?

I was unable to have any of those kind of conversations with Tom because he would not engage with me and refused to do any 1:1 meetings with me.

82. Ms Alker's account is broadly in line with the claimant's account, except that Ms Alker says the meeting was about his appraisal grading so it is misleading to say that this was an afterthought. What was not in dispute is that the claimant had been irate. The claimant is quite candid that he did not respect Ms Alker as his manager and told her so, and that he refused to meet with her for one-to-one meetings except, as already noted, the one meeting that he was compelled to attend, which was the annual appraisal meeting. The respondent did not require the claimant to attend one-to-one meetings on a monthly basis so the claimant was entitled to refuse to attend them, but equally if the claimant chose not to attend those meetings it is not surprising that Ms Alker had not been able to raise issues with him informally, with the perhaps unfortunate but inevitable outcome that those concerns were discussed for the first time at the final appraisal meeting. This appears to be an unfortunate consequence of the claimant's attitude towards Ms Alker but in any event it appears to be something entirely unrelated to his race.

83. Ms Alker had disputed that she had raised a grievance about the claimant's conduct at that meeting but told Mr Billington that she had told another, more senior, manager about the claimant's conduct towards her. It appears that that manager had spoken to the claimant as a result. The claimant accused Ms Alker of lying about raising the grievance, but we can see why Ms Alker said she had not. She had not submitted a complaint about the claimant under the respondent's grievance procedure. It had been the senior manager's decision to take up the claimant's conduct with him, perhaps a sign of just how inappropriate it had been, but this was not at Ms Alker's request. It cannot reasonably be said that Ms Alker was lying when she said that she had not raised a grievance. She did not try to hide the fact that she had spoken to her manager about it. Mr Billington's conclusions that there was nothing to suggest race discrimination in this appears to be entirely reasonable.
84. Mr Billington's outcome in relation to Ms Alker complaint is set out in in the bundle at pages 418 to 422. His outcome follows the same format as for the complaint in relation to Mr Bird. He sets out what he has looked at, summarises the key events and evidence sources and then for each allegation of direct racial discrimination, bullying, harassment, victimisation and "unconscious bias and abuse of power" states that *"Ms Alker's actions and behaviors were in line with what may be considered normal management duties and reasonable management action"*. We make the same observation as before, that instead of setting out the outcome in that way it would have been helpful if Mr Billington had set out why he had made the findings that he had, but we have not found anything in Mr Billington's conclusions from which any inference of discrimination could be drawn. We are satisfied that Mr Billington was entitled to conclude on the evidence available to him that Ms Alker's decision about the claimant's appraisal grading stemmed from the claimant's behaviours and was not a matter of discrimination or bullying.

Mr M Buxcey

85. The outcome for the complaint relating to Mr Buxcey is found at pages 440 to 444. Mr Billington identified the complaint raised to Mr Grant which concerned what happened when Mr Buxcey has investigated a complaint about the way the claimant had been treated in relation to a disciplinary matter relating to confidential data. In the course of this process Mr Buxcey had arranged a meeting with the claimant which the claimant had decided not to attend because, he told Mr Grant *"Martin Buxcey couldn't answer the questions directly and chose to give him political blabbering so TN realised that Martin Buxcey had the same mind-set as the other managers he had been dealing with so when he was offered a meeting to discuss the guidance with him he declined"*. Mr Buxcey had interpreted that as an act of insubordination and issued the claimant with a final written warning. He had then moved to another civil service department shortly afterwards. That final written warning had been overturned in due course. In examining this allegation Mr Billington interviewed Mr Buxcey. By the time of this interview it appears that Mr Buxcey could recall little of what happened.
86. Mr Billington's conclusions in relation to Mr Buxcey follow the same format as before, for each allegation direct racial discrimination, bullying, harassment, victimisation and "unconscious bias and abuse of power" he states that Mr Buxcey's actions and behaviors *"were in line with what may be considered normal management duties and reasonable management action"*. This finding troubled the

tribunal panel. Mr Buxcey's imposition of the final written warning was overturned by Ms Hindson because it had been applied without following proper procedure and appeared to be unfair, so it cannot have been "reasonable management action."

87. In his witness statement Mr Devoy said this

Tom was later accused of breaching media policy and was given a written warning. However, there was an error with the date of expiry on the document so Tom appealed against the warning unsuccessfully but he strongly believed natural justice had not been meted out to him so he wrote to relevant senior management to get this overturned. Martin Buxcey then started writing to Tom to explain how they arrived at the decision. There was an exchange of emails between Martin Buxcey and Tom and I read each of them. Martin then invited Tom to meet up with him for a discussion about the emails. Tom refused. On Martin Buxcey's last day in that office, he dropped a final written warning letter on Tom's desk including a copy of an email supposedly sent to Tom by Deb Pattern for clarification. Tom appealed against this warning successfully with the decision maker concluding that, having checked all records and seeking advice from HRMIS, there was no evidence of any formal invitation to the meeting Martin Buxcey invited Tom to and procedures had not been followed therefore his records would be amended accordingly. I truly believe and said at the appeal meeting with Claire Hindson that Martin Buxcey had abused his power severely with his actions.

88. The tribunal panel found Mr Billington's decision of this aspect of the complaint to be somewhat unsatisfactory. Mr Buxcey's decision was overturned on appeal so it appears his decision making had been considered to be flawed by a DWP senior manager but Mr Billington appears not to have considered that. However, neither the claimant and Mr Devoy nor offered any evidence to suggest Mr Billington's decision about this was tainted by discrimination. It is suggested that it is unfair but that is not evidence of discrimination. There appears to have been no evidence available to Mr Billington to suggest that the decision of Mr Buxcey was discriminatory or tainted in some way, nor does the claimant suggest any reason to think it was discriminatory except to point to his ethnic origin which is different from Mr Buxcey's and to say what he did was unfair. That is not enough for us to draw an adverse inference. Although she had upheld the appeal and overturned the warning, the documents suggest that at the appeal stage, Ms Hindson believed that Mr Buxcey thought that he was following the fast-track procedure in moving to a final written warning suggesting non-discriminatory reason for that decision. Mr Buxcey in his interview with Mr Billington suggested that he would have followed HR procedures and advice. This panel has little doubt that Mr Buxcey's decision was flawed and in light of Ms Hindson's decision on the appeal it is surprising that Mr Billington's decision did not reflect that. At the very least we would have expected Mr Billington to explain his decision to the claimant. However we were offered no evidence of any fact from which we could draw an inference that Mr Billington's decision about this was discriminatory in some way.

Mark Poultney

89. Mr Billington's outcome in relation to Mr Poultney can be found at p464- 468. Mr Poultney is a HEO Partnership Manager at Rugby Jobcentre. The claimant had said this Mr Grant about Mr Poultney(p781):

38. TN feels **she colluded with Mark Poultney to passively bully him and antagonise me so they could bring disciplinary actions against him which could lead to dismissal.** It was **Mark Poultney** who advised her to **be writing notes of any interactions she had with TN so Mark can put a formal investigation together.** Instead of advising her or trying to find out what was going on from TN before arriving at that decision as a competent senior manager would, **he rather advised her to carry on antagonising me so they can build a good case.** TN says he knew this because each email **Gail** sent to him; she copied **Mark Poultney** or Richard Sharp in secretly thinking TN wouldn't be any wiser. **Mark Poultney** was on TDA as operations manager in Richard Sharp's absence so was picking up his emails. They deliberately tried their very best to use passive aggressive methods and

bullying tactics to achieve that result. Why would she be copying **Mark Poultney** or **Richard Sharp** into emails ahead of any investigation unless they had planned this together all along and had ulterior motives? TN feels constructive dismissal was on their agenda. **TN stated that Gail always spoke to his colleagues in the team in private away from their desks and in private rooms** but not once did she do that because of what she and Mark Poultney had set out to achieve. **He found this discriminatory and prejudice.** TN said when he mentioned this in his grievance to Joy Farrin, her

90. The claimant told Mr Billington (notes showing the claimant's amendments are at pages p549 and 550) that the incident with Mr Poultney had happened in a meeting with four other members of staff. Mr Poultney had said to the staff present that they should feel free to ask him any questions in the context of an announcement about Gail Barnett being announced as the new team manager. The claimant had said to him "*are you for real about the information*". The claimant alleged that Mr Poultney "*went off on one at him*". The claimant went to tell Mr Billington that in his view the phrase "*are you for real*", with reference to the Oxford and Cambridge dictionaries, simply means "are you serious" and is not an insult and that Mr Poultney's reaction showed an ulterior motive. We do not accept the claimant's evidence about that. We find it entirely plausible that someone would find the phrase "*are you for real*" (or indeed "*are you serious*") unless it is said in a jovial context, to be at best dismissive and at worst rude.
91. Mr Poultney's evidence to Mr Billington was that "*TN was quite aggressive when he said are you for real, I was surprised we had had a good working relationship, later I asked him why he'd spoken the way he did, he said he didn't mean like that, I said he needed to give everyone a chance, but I decided not to take it further, I think he said it out of frustration because GB hadn't actually done the work of the team she was going to manage*".

92. The notes of the meeting show that Mr Billington did not simply accept this account but put to Mr Poultney the claimant's further case that Mr Poultney had then carried out an investigation into the claimant. Mr Poultney explained that he had conducted an investigation into an allegation made by Gail Barnett that the claimant had not attended team meetings, an allegation that the claimant had called Ms Barnett a liar and an issue about the claimant refusing to hand over his leave sheet which HR had advised should be combined into one investigation. That explanation suggested no link to the "are you for real" comment nor is one suggested by the claimant.
93. Mr Poultney explained that he had found that there was a case to answer for not supplying leave sheet when asked and for calling GB a liar, but there had been mitigating circumstances for not attending the meeting because the claimant had met with an employer. We note that the fact that Mr Poultney had not pursued the rudeness shown to him and the fact that he had accepted the claimant's mitigation is not consistent with him being hostile to or biased against the claimant.
94. Mr Billington's outcome in relation to the complaint against Mr Poultney is set out in in the bundle at pages 464-468. His outcome follows the same format as for the complaint in relation to the others. He sets out what he has looked at, summarises the key events and evidence sources and then for each allegation of direct racial discrimination, bullying, harassment, victimisation and "unconscious bias and abuse of power" states that "*Mr Poultney's actions and behaviors were in line with what may be considered normal management duties and reasonable management action*". We make the same observation as before, that instead of setting out the outcome in that way it would have been helpful if Mr Billington had set out why he had made the findings that he had, but we have not found anything in Mr Billington's conclusions from which any inference of discrimination could be drawn.

Gail Barnett

95. The claimant had made wide-ranging allegations against Gail Barnett to Mr Grant. In summary those were:
 - a. That she had asked him about his personal details on the resource manager system in front of everyone and wanted to speak to him about his annual and special leave – the claimant thought that this was either racially motivated or "because she was hard on him because of his opinionated nature";
 - b. That Ms Barnett had taken action because the claimant didn't attend a team meeting;
 - c. That Ms Barnett making a complaint that the claimant had called the her a liar when what he had said was "go write your notes you don't tell the truth anyway";
 - d. That the claimant had been checked on and micromanaged when others were not;
 - e. That Ms Barnett was incompetent and told lies to get the claimant into trouble;

- f. That Ms Barnett had said “you are a frustrating character that’s why I treat you the way I do” which the claimant said was discriminatory enough on its own;
- g. That while he was suspended Ms Barnett had told team members that the claimant was dismissed;
- h. That she had colluded with Mark Poultney;
- i. That Ms Barnett had given him a box 3 PDP appraisal grading.

96. In the meeting with Mr Billington the claimant largely repeated those allegations.

97. Mr Billington interviewed Gail Barnett on 21 August. It can be seen that the various accusations are put to her and she answered them, in essence explaining that what happened with the claimant was because he had been hostile from the start, he would not cooperate with her and do as she asked, including by attending team meetings and producing leave charts. The reference to him being a frustrating character had been a reference to the claimant’s refusal to co-operate with her. She had been concerned that there was no evidence the claimant was undertaking magistrate’s duties. She explained why the claimant had been suspended was because that was an approach Lee Bird had previously used with a member of staff in the past who was constantly creating problems. She also described the claimant as unmanageable.

98. Mr Billington’s outcome in relation to Ms Barnett complaint is set out in the bundle at pages 423 to 428. His outcome follows the same format as for the complaint in relation to the others set out above with the uses of the phrase “*actions and behaviors were in line with what may be considered normal management duties and reasonable management action*” for each allegation. We make the same observation as before, that this is unhelpful way of explaining what the conclusions actually were, but we are satisfied that Mr Billington was entitled to conclude on the evidence available to him that there was no discrimination. We accept the reasonable conclusion to draw from the evidence is that Ms Barnett had simply reacted to a somewhat difficult and unmanageable individual because much of the behaviour she referred to was not in dispute. Her concerns that the claimant was not actually magistrate despite him taking special leave for magistrate’s duties was well founded. It is also clear that the account given by Ms Barnett was consistent with the evidence of other managers. In his cross examination Mr Devoy said that he thought the difficulty between the claimant and Ms Barnett was a clash of personalities. That is a non-discriminatory reason and we find no evidence was offered by the claimant from which we could draw an inference that Mr Billington decision was tainted by discrimination.

Amy Adamson

99. Ms Adamson was not mentioned significantly by the claimant in the meeting with Mr Grant except to refer to her alleged collusion with Mr Bird. She is referred to by reference to his suspension in the meeting with Mr Billington but it is difficult to discern the complaint against her from the notes of that meeting.

100. In his witness statement Mr Devoy says this

“Amy Adamson told Tom she would think about it. When she finally called Tom on the 14th October 2016 after 5pm when most colleagues had left for the day and without any TU representation, she handed Tom a suspension letter with reasons underlined telling him it was for his own protection and didn't mean he was guilty of anything but it had to be done just for a few days to clear the atmosphere. It lasted 3 months.

Whilst he was on suspension, efforts were made frantically to get him to meet a decision maker (Mark Whitehouse) regarding his refusal to provide his leave chart, calling his manager a liar and not attending a meeting. Senior management realized that his written warning on his record from the media policy case was going to expire in January and wanted him to have the meeting so when that was taken into consideration – even though the charge was a minor misconduct, he would be given a final written warning.

Tom received a text message from Amy Adamson to come back to work and report to Gail Barnett. Tom refused and called Amy Adamson querying why he should attend the office if the reasons given for his suspension was anything to go by. Amy said Tom was a common employee so he should do as he is told and Tom replied I may be so but I also have rights. Tom was told by Amy Adamson that Gail Barnett was no longer going to be his line manager so it was ok to attend work on the 4th January 2017. Tom attended the office on the 4th as agreed.

The decision (final written warning) from the case involving Gail Barnett's allegations was sent to Tom on the 5th January 2017 meaning that, the suspension, truly did not make sense and Amy Adamson refused to give us the HRMIS advice she used to suspend Tom.”

101. In the interview with Ms Adamson she told Mr Billington this

When I first stated I was on Temporary Duty Allowance (TDA) to SEO. I took over from Richard. Richard told me about an ongoing investigation. It was my understanding that Gail raised a complaint about Tom's behaviour in particular about his refusal to follow any reasonable management requests and that this was being investigated. At that time Tom was still under Gail's management and she kept on raising issues. A colleague called Nula also raised a complaint about Tom. I was worried that incidents were being added to the investigation all the time which meant that we would potentially never deal with it. I spoke with my Line Manage and CS HR Casework to establish if suspension would be in line with the policy procedures or if there were other alternatives. I wanted to know what we would normally do in these circumstances so we can draw a line.

My preferred option was to suspend Tom so we could conclude the investigation. This would stop more incidents from happening while we could get the investigation done and line drawn under it. If anything else happened subsequently, then we could deal with it separately.

102. The minutes of the meetings show that Ms Adamson also referred to the fact that as far as she was concerned the allegation of misconduct which required investigation were allegations about the claimant's refusal to comply with reasonable management requests. She referred to having got on well with the claimant previously and that she had still tried to be friendly with him despite him having strained relationship with other managers. In his cross examination Mr Devoy accepted that it reasonable to conclude that Ms Adamson's actions had nothing to do with race.
103. The outcome in relation to Ms Adamson is found in the bundle at p 414 to 417. The format is the same as the ones described above, with the same summary of evidence but no explanation of the conclusions which use Mr Billington's standard phrases. We make the same observations as previously about that format. However, as a panel we accept that Mr Billington's conclusions seem to be reasonable in light of the evidence. It is very doubtful that the claimant should have been suspended without his agreement because he was not accused of gross misconduct, but Ms Adamson's reasons for doing so were not apparently discriminatory and had been agreed with her line manager and HR. We were not presented with any evidence from which we could draw an inference that the conclusions reached by Mr Billington were tainted with any discrimination.

Mark Whitehouse

104. The allegation of discrimination against Mr Whitehouse relates to the imposition of a final warning for arising out of the concerns that had been raised by Ms Barnett and which are referred to above. The claimant had not referred to Mr Whitehouse's decision in his discussion with Mr Grant and the allegations against Mr Whitehouse are only expressed in the vague terms to Mr Billington. The allegation of discrimination was strongly denied by Mr Whitehouse in his discussion with Mr Billington (see page 795 and following). It can be seen from the meeting notes between Mr Whitehouse and Mr Billington that Mr Billington did explore with Mr Whitehouse why he did not interview the people referred to in his discussion with the claimant – his reason was the matter had already been investigated and he had the relevant evidence and he did not consider that further meetings were required. That is a non-discriminatory reason.
105. In Mr Devoy's cross examination he conceded that his use of the word "frantic" in his witness statement in relation to the arrangements for the hearing before Mr Whitehouse was unfair because the process was delayed by the claimant's leave of absence at the time his mother died. There is nothing in the correspondence between Mr Whitehouse and the claimant suggesting that there was any undue haste in attempts to arrange that meeting and Mr Devoy's evidence about this appears to this panel to have been exaggerated.
106. In his decision at the relevant time Mr Whitehouse explained to the claimant that his decision to give the final warning, which would have been a written warning if not for a previous written warning, was based in large part on the claimant's own admissions about his conduct. That is a non-discriminatory reason. Mr Whitehouse also made the point to the claimant that if he continued being disrespectful to managers that is likely to result in a further deterioration in his relationship with those managers. That evidence corroborates the evidence of other managers including Mr Bird, Ms Alker and Ms Barnett. Mr Whitehouse

warned the claimant that there is a difference between not respecting someone and acting in a disrespectful way. That warning suggests that Mr Whitehouse's perceptions is that the breakdown of the claimant's relationship with his managers was based on his attitude towards them rather than his race and it also suggests that Mr Whitehouse had tried to go beyond a simple disciplinary role to offer some advice to the claimant which might help him rebuild his relationships with managers. That is no consistent with any hostility or racial bias.

107. The outcome in relation to Mr Whitehouse is found at p 473 to 476. The format is the same as the ones described above, with the same summary of evidence but no explanation of the conclusions which use Mr Billington's standard phrases and we have the same reservations already set out about that. However, as with the other outcomes, as a panel we accept that Mr Billington's conclusions in relation to the allegations against Mr Whitehouse seem to be reasonable in light of the evidence without any evidence that he has overlooked or ignored any apparent discrimination. We were not presented with evidence from which we could draw an inference that Mr Billington's conclusion that Mr Whitehouse was not motivated in his decision to give a final written warning, was tainted by discrimination.

Joy Farrin

108. A number of allegations had been made in relation to Ms Farrin, including that she had behaved in a discrimination manner because she had turned a blind eye to the discriminatory treatment of other managers, she had not read the claimant's grievance properly, had failed to interview relevant witnesses and rushed her decision, that she should not have considered a grievance against someone she line managed.

109. In his statement Mr Devoy states this

"On 20th January [2017] Tom put a grievance against Gail Barnett for bullying, harassment, victimisation, racially motivated abuse of power and discrimination. Joy Farrin was appointed the decision maker and she found nothing wrong with Gail Barnett's behavior even though Tom provided compelling evidence. She categorically stated there was no evidence. This then went to appeal and Stacey Scriven was appointed the appeal decision maker. She also claimed Gail Barnett acted correctly and the department later promoted Gail Barnett to a substantive HEO grade. Tom felt if the decision makers could not see anything wrong with Gail Barnett's actions, then both decision maker and appeal decision maker were complicit of Gail Barnett's charges".

110. The notes show that in the discussion between Ms Farrin and Mr Billington, Mr Billington raised the matters that the claimant had raised with him including to cover the extensive amended questions that the claimant had added in his amendments to the notes of the meeting. Before Employment Judge Hindmarch the discrimination which Ms Farrin was guilty of had been asserted to be her dismissal of the grievance. Although Mr Devoy refers to "compelling evidence" of discrimination he did not say what that evidence was in his statement nor was it introduced to us by the claimant or referred to by Mr Devoy in the course of cross examination. Indeed in his cross examination Mr Devoy conceded that Ms Farrin's decision was a fair and balanced outcome in light of the evidence before her.

111. Mr Billington's decision about Ms Farrin is set out at pages 445 – 449. He summarises the allegations and the evidence considered and using his standard formulation of words finds that the allegations are not upheld and we have already noted our concerns that his approach. However, we were not presented with any evidence from which we could conclude that Mr Billington's decision about the allegations about Ms Farrin was tainted by discrimination.

Stacey Scriven

112. Ms Scriven had heard the claimant's appeal against Ms Farrin's outcome to his grievance. That appeal was determined in June 2017. In his statement Mr Devoy said this *"She [Ms Scriven] claimed Gail Barnett acted correctly and the department later promoted Gail Barnett to a substantive HEO grade. Tom felt if the decision makers could not see anything wrong with Gail Barnett's actions, then both decision maker and appeal decision maker were complicit of Gail Barnett's charges"*.

113. In essence it appeared to be the claimant's belief that if Ms Scriven did not uphold the appeal she must have acted in a discriminatory way but we were not taken any evidence from which that inference could be drawn. In cross examination Mr Devoy accepted that this did not appear to be harassment and the decision appeared to be made on the basis of the information available to Ms Scriven. No evidence was presented to us from which we could draw an inference that Mr Billington's conclusion about this was tainted by discrimination in some way although we make the same observations about the way Mr Billington set out the outcome which can be found at p469 - 472.

David Kerr

114. Mr Devoy makes 3 references to David Kerr in his statement. He says this: *"On 9th January 2017(?) Tom submitted a grievance against Mark Poultney for his bullying, harassment and threatening behavior. His Manager David Kerr was appointed as the decision maker and those members who were present did not want to get involved for fear of being victimised. As usual, senior management turned a blind eye to this by stating there was no evidence to this."*

115. We note here that Mr Devoy failed before us to identify any trade union members who had complained of victimisation and in terms of the plausibility of that evidence, if he had been aware of unlawful victimisation in the workplace as an experienced official of a recognised trade union we find that it might have been expected for that to be raised as a concern with the employer at national level. It would be a very serious matter, but it was not suggested that any such action was taken. We conclude that we can attach no weight to that assertion.

116. Mr Devoy also says this *"On 23rd May 2017 Tom received an investigation meeting from the Counter Fraud and Investigation Team about alleged misconduct regarding Flexi and Special Leave obviously sent there by David Kerr and senior management. His manager Cath Wilcox travelled to hand deliver this to him. This is the case I believe they were relying on to dismiss Tom. This I believe was the reason why they did not hear his appeal, suspended him without following procedures, sided with managers who had treated him totally different*

because of his origin and race and above all, refused to allow Tom to be who he is in the department.”

117. The third thing Mr Devoy says is this, *“9th June 2017 Tom put in a grievance against his end of year mark which was signed by David Kerr and Counter signed by Lee Bird because he stated on his performance report he had not had a mid-year review yet they went ahead against procedures to award him with a bottom mark”.*
118. Before Employment Judge Hindmarch the claimant had identified only one possible act of discriminatory conduct on the part of Mr Kerr, namely that Mr Kerr had discriminated against him when he provided information that resulted in an investigation into the claimant’s use of annual leave, special leave and flexi-leave.
119. In the meeting with Mr Billington the claimant referred to his end of year appraisal being overturned in 2017 and to be being exonerated in relation to his use of special leave but he did not accuse Mr Kerr of being behind that despite adding a significant number of specific allegations in relation to Mr Kerr to the meeting notes (as shown by the amendments on p558 and 559). The claimant did not suggest to Mr Grant that he thought Mr Kerr was behind the special leave investigation. It is therefore unsurprising to us that in his meeting with Mr Kerr Mr Billington did not deal with the special leave investigation. In relation to the end of year scoring Mr Kerr referred to the fact that he had only line managed the claimant for about 6 weeks so had relied on the previous manager’s feedback which had referred explicitly to the behaviour being the reason for the scoring. Mr Kerr referred to the claimant not bringing him a 300-word summary of his achievement which is what he had been asked to do, but to bringing many pages of notes to his appraisal. The questions Mr Billington put to Mr Kerr were quite blunt, he put to Mr Kerr in terms that he had lied as alleged by the claimant and Mr Kerr offered answers and explanations to all of those questions and accusations.
120. In terms of the special leave investigation, because it was an issue that was not raised with Mr Billington and so was not considered by him this is not something which can be relevant to the legal issues in this case. In terms of the end of year appraisal grading, Mr Kerr gave a straightforward non-discriminatory explanation for his decisions to Mr Billington which Mr Devoy in cross-examination conceded did not seem to suggest any discrimination.
121. No evidence was presented to us from which we could draw an inference that Mr Billington’s decision about Mr Kerr was tainted by discrimination. This can be found at p450 and following. We make the same observation as previously about the format used.

Geraint Lewis

122. Before Employment Judge Hindmarch it was alleged that the claimant was discriminated against by Mr Lewis when his appeal against the grievance lodged in October 2017 was dismissed. Mr Devoy said this in his witness statement, *“29th November 2017 Geraint Lewis was appointed the decision maker for this case and after meeting him on 14th December 2017, he decided on 3rd January 2018 that Tom had no grounds to complain and believed that he can conclude without reasonable doubt that all the actions by senior management was normal and*

reasonable management actions. He tried to imply that it was actually down to Tom's character that Tom had been treated this way by falsely stating that Tom said he didn't want anything to do with management. This he had to retract on 23rd April 2018 after the appeal manager Bev Beetison had contacted him. Tom strongly felt that Geraint Lewis by his conclusion was also complicit to the actions of all the senior managers Tom had accused".

123. In terms of the evidence that Mr Lewis have retracting a previous falsehood, in the letter referred to by Mr Devoy, Mr Lewis accepted that amendments made by the claimant to the grievance meeting notes but we were not offered any evidence to justify Mr Devoy's commentary about that and we were not offered any evidence that this something which had been referred to Mr Billington.
124. The minutes of the meeting between Mr Billington and the claimant do not refer to any specific allegations being raised against Mr Lewis. Mr Lewis is referred to in terms of evidence being presented about Mr Bird and there are vague allegations about senior managers but it is difficult to identify the precise concerns which were raised against Mr Lewis. In the meeting between Mr Billington and Mr Lewis, Mr Lewis explained his decision on the grievance. In his cross examination Mr Devoy conceded that it appeared that Mr Lewis had drawn his conclusions on the basis of the information the claimant had provided and not because of the claimant's race, and agreed with Ms Hodgetts that it was unfair to allege race discrimination against Mr Lewis.
125. Mr Billington's outcome about Mr Lewis can be found at p455 – 458 and we repeat our previous comments about the format. He concluded that the allegations against Mr Lewis could not be upheld and we were presented with no evidence from which we could draw an inference that this conclusion was tainted by discrimination.

Paul Phillips

126. On 9 April 2018, Mr Phillips dismissed the claimant's appeal against the final written warning given the previous year by Mr Whitehouse. Clearly there was unusual delay in dealing with that appeal but that was not blamed on Mr Phillips personally. The evidence that we heard about the reasons for the delay is noted above. In his statement Mr Devoy sates that *"Tom felt Paul Philips was also complicit in the conspiracy of bullying, harassment, victimisation etc. with his decision and I totally agree"*.
127. Mr Phillips in his outcome letter said this

As I said when we met, my remit as Appeal Manager is not to reconsider the case entirely and in all its detail, but to consider whether the Decision Manager took into account the relevant circumstances when making his decision. In addition, my role is to ensure that the decision reflects a satisfactory understanding of and adherence to relevant policy and procedures. Finally, I have given consideration to whether, in making his decision, Mark Whitehouse misunderstood or ignored critical evidence and that ultimately his decision was soundly based. As a disciplinary penalty was imposed as a result of the original decision, I have assessed whether the penalty imposed is consistent and proportionate with guidance.

Your appeal has not been upheld because the original decision that was taken was correct according to procedural guidance. This means that the Final Written Warning issued by Mark Whitehouse on 5 January 2017 (now served) stands. This decision is final.

With regard to the allegation that you failed to submit your annual leave chart to your line manager when requested to do so, I am of the opinion that, although this requirement is not written into national guidance, it can be reasonably expected that, under local or district protocols, the request should be accommodated. Consequently, I am in agreement with the Decision Manager's conclusion that you should have complied and provided your leave chart as requested.

In relation to the allegation that you failed to attend a meeting when requested to do so by your line manager, although you have contested Mark Whitehouse's understanding of the detail of the circumstances leading up to this event, his conclusion that you should have attended the meeting as per your line manager's request is in my opinion correct.

Finally, with regard to the third allegation in this case, although there remains a disparity in accounts as to what was actually said, I believe that Mark Whitehouse has taken into consideration and has accurately represented the issue at hand, which concerns the manner in which comments are delivered. I therefore support his conclusions and rationale in arriving at his decision.

128. We were not presented of any evidence that there was conspiracy of which Mr Phillips was part nor were we taken to any evidence of a conspiracy presented to Mr Billington. During his cross-examination Mr Devoy conceded that Mr Phillips had made his decision on the basis of the information available and not on the basis of the claimant's race. Mr Billington's outcome about Mr Phillips can be found at p459 – 463 and we repeat our previous comments about the format. We found no evidence from which we could draw any inference that Mr Billington's decision about the allegations against Mr Phillips was tainted with discrimination.

Bev Beetison

129. In his witness statement, Mr Devoy says this about Ms Beetison *"23rd March 2018 Bev Beetison met both Tom and I and during the meeting, I asked her if she was experienced in handling such complex cases and she answered in the affirmative. She even went further to say she had read Tom's grievance thoroughly several times and was well versed in it. When Tom pointed out the lie told by Geraint Lewis regarding his character, she exclaimed that was a strong word. During the meeting when Tom was being descriptive in a calm voice but with gestures to explain what he had been through, she constantly kept telling him to stop being aggressive. I honestly felt Tom was very calm and told her so. Tom also explained how all this*

had made him feel and how at times he had contemplated suicide. Bev Beetison burst out in tears and stated she had recently found someone who had committed suicide so Tom shouldn't mention the word suicide. This was interesting from a senior manager who claimed she was up to the task. When the minutes of the meeting was sent to Tom, none of this was mentioned and when Tom and I amended it and sent it back to her, she made her decision in Tom's favour on 15th May 2018 and ordered another investigation going as far as stating Geraint Lewis was incompetent to have been appointed the decision maker in the first place. Tom felt she bullied and abused her power in that meeting and also 'doctored' the notes to be favourable to her." It was only the alleged "doctoring" of the notes which the claimant had identified as discriminatory treatment to Employment Jude Hindmarch.

130. The only reference to the doctored notes at the meeting between Mr Billington and the claimant or otherwise to Ms Beetison was a single comment made that

Beverley Beetison latest investigation Decision Maker, the notes were doctored. I mentioned harassment and bullying and was told to calm down.

131. When she met with Mr Billington, Ms Beetison said

14. **SB** – How would you respond to TN's claim that you have doctored the notes?

BB – Absolutely not, we had an HR person doing notes, TN made extensive comments, some things that were not said are shown in his notes. I met with the note taker on 4th May and compared notes/some amendments accepted, I

also added a couple of my own amendments and sent the final version on 15th May to TN, there was no comeback on those.

i. **SB** – Do you recall asking TN to calm down, if so, why was that?

BB – Yes I did, his choice of language and his tone was emotive bordering aggressive, and inappropriate for work place, he spoke about what he'd said to LB about banging his head. TN was agitated, bordering aggressive and I can understand why colleagues felt intimidated.

i. **SB** – TN claims that you have bullied, harassed and victimised him and that you have abused your power and shown unconscious bias, how would you respond to that?

BB – Absolutely not, I was a facilitator for unconscious bias training so well aware of this, I've had positive feedback from these sessions, if I'd been unconsciously bias I wouldn't have upheld his appeal, I was robust during the meeting.

132. As already noted, as a panel we found Mr Devoy's evidence about the meeting notes was unfair and misleading. It was untrue to suggest that Ms Beetison had

not referred to the request to asking the claimant to calm down in the meeting and related matters in the original minutes. He accepted in cross examination that Ms Beetison has not “constantly” asked the claimant to calm down. As also noted the reference to the suicide issue seemed to be included by Mr Devoy as a way to disparage Ms Beetison and we could see no relevance of that evidence to the legal issues in this case. We also noted that the claimant requested some amendments to the meetings notes and some of his requested changes were accepted but the notes of the meeting with Mr Billington show that Ms Beetison reported that some things were not said at all and looking at the amendments it seemed plausible that some of the changes were things the claimant wished he had said or thought were relevant rather than things which had been omitted from the minutes. Mr Devoy accepted in his cross examination that his allegation of “doctoring” was unreasonable.

133. Mr Billington’s outcome about Ms Beetison can be found at p429 – 431 and we repeat our previous comments about the format. We were not presented evidence from which we could draw an inference that Mr Billington’s conclusions about the allegations against Ms Beetison were tainted by discrimination.
134. In terms of the other criticisms that Mr Devoy and the claimant made of Mr Billington’s investigation and conduct of the grievance process we have made the following findings of fact:
135. It is asserted in Mr Devoy’s statement in relation to Mr Billington’s decision making and the process that *“vital witnesses were not interviewed; none of the senior managers were confronted with the hard evidence against them to ascertain the truth but their words were just accepted and a conclusion drawn. The decision-making procedure to follow for such cases were not followed”*. In the absence of the positive case from the claimant we examined whether there was evidence to support findings in relation to these matters.
136. In terms of not interviewing vital witnesses the only witness we could identify who could have been interviewed but who was not, is Ms Pule and, as explained above, we accepted that she was not interviewed because of a mistake by the respondent’s payroll providers and in any event her evidence as presented by the claimant did not support his allegations of discrimination
137. The claimant also told Mr Monks at the appeal stage that Mr Devoy should have been interviewed by Mr Billington. However, Mr Devoy was not an independent witness. He was involved in the process as the claimant’s representative, and he was candid before us that he saw his role as representing his member’s best interests and that he would not contradict the claimant even if he knew what the claimant was saying was incorrect. We accept that Mr Devoy was not seen as a potentially impartial witness during the grievance process. In any event Mr Devoy could have contacted Mr Billington directly if he had relevant evidence that he thought should be considered. It appears that Mr Devoy did not expect to be interviewed as a witness suggesting this would have been an unusual approach in a grievance investigation conducted by the respondent. We do not find that surprising, we doubt that many employers would interview the trade union representative except in exceptional circumstances.

138. We cannot draw an adverse inference from Mr Billington's failure to interview Mr Devoy or Ms Pule.
139. Mr Billington interviewed a number of witnesses who were not alleged to be perpetrators of discrimination and who had been referred to as relevant by the claimant including Iona Old, Debbie Patten, Aaron Power and Craig Guest. Another individual who the claimant had referred to, Bally Nagra, was asked if they would provide evidence to Mr Billington but declined to do so. We accept that in those circumstances Mr Billington's decision not to insist that they provide evidence was a reasonable one and there is no evidence from Mr Devoy or the claimant that Mr Billington would have taken a different approach if he was investigating concerns from someone who did not share the claimant's protected characteristics or who has not raised a complaint of discrimination.
140. In his statement Mr Devoy said that none of the senior managers were confronted with the hard evidence against them but in cross examination he was not able to say what that hard evidence was. The claimant had presented a wide-ranging grievance and it is clear that in the meetings both with Mr Billington and later with Mr Monk as he did before us, the claimant had a tendency to make assertions and generalised allegations about discrimination and, for example assert that the people are lying if he disagrees with something that someone had said but offered little in the way of concrete facts as matters which Mr Billington could investigate. It appears to this panel that Mr Billington did the best he could in the interview with the claimant to identify particular matters to investigate and the outcome report and its appendices show that he did gather and have before him relevant documents. It was suggested to us by Mr Devoy that he failed to put relevant matters to the witnesses he interviewed. We conclude that this assertion by Mr Devoy is unsupported by any evidence.
141. It also appears to be suggested that we should draw adverse inferences from the fact that Mr Billington acknowledged that when he first sent the grievance outcome to the claimant he did not also send the appendices setting out the evidence. We accept Mr Billington's evidence that this was the first time he had worked with DWP procedures and he made a mistake because under HMRC procedures only the outcome is provided to the complainant. This was corrected and the claimant was provided with the appendices.
142. We have not drawn any adverse inference from this issue because the claimant did not highlight anything in the appendices which suggested discrimination which could give any motive for withholding it if there was discrimination in the evidence or decision making which was being hidden. We accept that it was a simple mistake.
143. We are also invited to draw an adverse inference from the failure of Mr Billington to discuss the evidence received from witnesses before the decision on the grievance was reached. However in cross examination it was conceded by the claimant that there was no requirement for Mr Billington to discuss that evidence with him and his assertions about this appear to have been based on a misunderstanding of the respondent's procedures. We did not receive any evidence from which we could draw an inference that the evidence would have been discussed with someone who did not share the claimant's protected

characteristics which raised a grievance which was not accepted by witnesses or that it would have been shared if the claimant had not done a protected act.

Findings in relation to legal issues 4 and 5: The appeal stage

144. Mr Monks, who also appeared before us, was appointed to consider the claimant's appeal against Mr Billington's decision not to uphold any of his grievances on 30 November 2018. The bundle of documents does not contain a copy of the appeal document. It appears that this could not be found and the claimant did not produce a copy. We were not referred to any document setting out the grounds of appeal except as explained as Mr Monks in the appeal meeting.
145. Mr Monks met with the claimant and Mr Devoy on 10 January 2019 the minutes of that meeting are found at pages 799-822 of the bundle.
146. In his statement, Mr Monk describes the claimant as being quite confrontational in the appeal meeting. That description appears fair in light of what the appeal minutes show. The claimant challenged Mr Monk's expertise and ability to consider the appeal and it can be seen that a significant amount of time was taken up with Mr Monk responding to those challenges.
147. Mr Monks says too that as an appeal hearing manager, it was very difficult to establish the challenges the claimant was making against the decision-making process. It is clear to this panel that Mr Monks faced similar difficulties to those faced by this tribunal, namely that the claimant repeatedly asserted that there had been wrongdoing and discrimination without it necessarily being very clear the basis for asserting that why he said this. The notes show that Mr Monk reminded the claimant on several occasions that what he needed to consider was whether correct procedures had been followed and whether Mr Billington's decision was on balance correct and that he asked the claimant if he had any new evidence.
148. It can be seen that one issue which featured significantly was the fact that Mr Billington had not given the claimant the opportunity to comment on all the witness statements. We have set out above our findings on that previously. Mr Monks' view was that the witness statements were made available to the claimant following the report being issued. Mr Monks concluded that if the statements had been provided before the outcome that would have been affected.
149. The claimant also expressed his opinion that many of the statements contained lies. Mr Monks told us in his statement that he saw no evidence that witnesses had lied. We accept that was a conclusion that he could reasonably come to on the evidence before him. We dealt with our findings above about some of the lies that the claimant has asserted, in the main these appear to arise out of differences in language such as the grievance issue with Ms Alker and the raising the voice issue with Mr Bird.
150. The claimant raised with Mr Monk the failure of Mr Billington to interview Ms Pule and Mr Devoy. He presented Mr Monks with Ms Pule statement. Mr Monks read that but concluded it would not have affected the outcome if the information

had been available to Mr Billington. He also gave Mr Monks the witness statement of Ms Laura Walls which was presented to us. Ms Wall attended this tribunal to give sworn evidence. Mr Monks described the way this evidence was presented to him as rather theatrical. The claimant allowed him to read the statement but would not provide a copy it or allow the details to be recorded. The claimant said that was to protect Ms Wall, but it appears that Mr Monks was unable to recall much of the detail of what the statement said, which was perhaps understandable in light of the way this information was provided.

151. Ms Wall refers to the claimant being regarded as the “enemy” by managers. In light of the evidence that his behaviour meant he was regarded as being difficult and unmanageable that evidence is plausible but we were not presented with any evidence that this was a negative reference to the claimant’s race in any way.
152. We did not draw any inference of discrimination from the fact that Ms Wall’s manager had been approached about whether it was appropriate to take action about the claimant calling Ms Wall “hot babe” as we are invited to do. Ms Wall herself did not like the claimant using that name and had asked the claimant to stop. It was not appropriate and whatever Ms Wall thought, the claimant’s conduct in his regarded could have been the ground for disciplinary action – that would not require her consent although that appeared to Ms Wall’s belief. In any event that evidence would have been relevant to a claim against Ms Adamson but it’s relevance to the legal issues in this case was not satisfactorily explained.
153. We cannot draw any adverse inference from Mr Monks failure to act on the information contained in Ms Wall’s statement the fact that Mr Monks did not attach any weight to that statement because the way the claimant had presented this to him had made it difficult for Mr Monk to take it on board. We are satisfied that in similar circumstances in any grievance appeal, and in the context of a long appeal hearing, Mr Monk would have struggled to recall the details of a statement he was not allowed to record or take a copy of.
154. In relation to the allegation of alleged earlier procedural errors and shortcomings, Mr Monks rejected the suggestion that these had had a profound impact on the Billington decision making process because Ms Beetison had already dealt with some of those in her decision.
155. Importantly Mr Monks concluded that there was no reason to conclude that Mr Billington had been wrong in his decision that there had been no discrimination, harassment, bullying, victimisation, and the claimant’s allegation of an abuse of power was unfounded because of the absence of evidence put forward by the claimant of such behaviours.
156. The claimant suggested that he had some new evidence to present but Mr Monks concluded that much of this had been considered by Mr Billington and was not new at all. We are satisfied that this was a reasonable conclusion in the circumstances.
157. In terms of the grounds of appeal put forward by the claimant at the appeal hearing, Mr Monks told us that he argued that the investigation conducted by

Mr Billington was weighted heavily in favour of the individuals against whom he complained. Mr Monks told us that he concluded that the Steve Billington had interviewed a lot of people who had been consistent in their account of events and that the weight applied by Mr Billington to that evidence was fair and reasonable. On the basis of the evidence we have seen that conclusion by Mr Monks was reasonable and no evidence from which we drew an inference that his decision was tainted in any way by race discrimination has been presented to us.

158. Mr Monks' outcome can be found in the bundle at page 828.
159. The claimant challenged little of the substance of Mr Monks evidence and Mr Devoy in his cross examination conceded that it was fair for Mr Monks to come to the conclusions that he did which he had done on the evidence. Mr Devoy also accepted that Mr Monk had not drawn those conclusions on the basis of the claimant's race. No evidence that Mr Monk would have presented his outcome any differently if she had determined a grievance for someone who did not share the claimant's protected characteristics or had done a protected cat was presented to us. We could find no evidence from which we could draw an inference of discrimination against Mr Monk.

The Law

160. Section 13 EqA provides that

*“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others...
(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.”*

161. Section 26 EqA provides that

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

162. Section 27 EqA provides that:

*“(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;*

(d) making an allegation (whether or not express) that A or another person has contravened this Act.”

163. Section 136 EqA Burden of proof:

*“(1) This section applies to any proceedings relating to a contravention of this Act.
(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.”*

164. Section 123 EqA provides so far as is relevant:

*“(1) ... Proceedings on a complaint within section 120 may not be brought after the end of —
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”*

The timing jurisdictional issue

165. The most recent Court of Appeal guidance on the exercise of the just and equitable discretion was given in *Abertawe Bro Morgannwg University Local Health Board v Morgans* [2018] EWCA Civ 640 by Leggatt LJ

“18. ... it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980, the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998.

19. *That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).*”

166. The exercise of the broad discretion involves a multi-factoral approach taking into account all of the circumstances of the case in which no single factor is determinative. In addition to the length and reason for delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the merits and balance of prejudice, other factors which may be relevant are the extent to which the respondent has cooperated with any request for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate legal advice once the possibility of taking action is known.

167. The Court of Appeal in *Robertson v Bexley Community Centre (CA)* [2003] IRLR 434 went on to say this:

“25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”

168. That said, a failure to provide a good excuse for the delay in bringing the relevant claim will not inevitably result in an extension of time being refused, the tribunal must weigh in the balance the prejudice and potential merit of the claim (*Rathakrishnan v Pizza Express (Restaurants) Ltd* UKEAT/0073/15. It is important that we also bear in mind that the exceptional circumstances are not required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable — *Pathan v South London Islamic Centre* EAT 0312/13.

169. S123(3) refers to circumstances in which where there a series acts it may be argued there has been a continuing act of discrimination, but the acts are linked.

170. In *Commissioner of Police of the Metropolis v Hendricks* 2003 ICR 530, CA, the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to ‘continuing acts’ by focusing on whether the concepts of ‘policy, rule, scheme, regime or practice’ which had been referred to in the leading case of *Barclays Bank plc v Kapur and ors* 1991 ICR 208, HL, fit the facts of the particular case. Instead, the focus should be on whether the employer has been responsible for an ongoing situation or a continuing state of affairs in which the less favourable treatment has occurred. The correct is whether that was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

171. This test was confirmed as the correct approach in *Lyfar v Brighton and Sussex University Hospitals Trust* 2006 EWCA Civ 1548, CA. *Hendricks* was also cited with approval by the Court of Appeal in *Aziz v FDA* 2010 EWCA Civ 304, where the Court noted that in considering whether separate incidents form part of an act extending over a period, '*one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents*'.
172. If there is a case concerning a continuing act of discrimination, we must determine when the continuing act came to an end to calculate the limitation date.

Applying the burden of proof

173. In terms of applying the burden of proof we have borne in mind the guidance given by Lord Nicholls in the case of *Nagarajan v London Regional Transport* [1999] ICR 877:

"Many people are unable or unwilling to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim, members of an Employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. At the root of every case like this a Tribunal must ask "why did the alleged discriminator act as he or she did? What consciously or unconsciously was his or her reason".

174. The claimant has referred to unconscious bias many times in the case before us. We have recognised it is a way in which discrimination can arise. However, making an allegation of unconscious bias does not absolve the claimant of the need to meet the burden of proof to show that the alleged discriminatory treatment was because of a protected characteristic or, in the case of victimisation, because of protected act.
175. We have reminded ourselves of the statutory burden of proof provision set out above and the guidance highlighted to the claimant from the case of *Madarassy v Nomura International Plc* [2007] ICR 867 that *"the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination."*
176. In applying the burden of proof, the first stage is to establish whether there are facts found, on the balance of probabilities, from which a tribunal could conclude, in the absence of an adequate explanation, that an act of discrimination has taken place. If there are not the claim will fail. However, it is unusual to find direct evidence of discrimination and the discrimination may be unintentional. Accordingly, it is for a tribunal to draw appropriate inferences from the primary facts
177. At this stage a tribunal does not have to reach a definitive determination that there was unlawful discrimination merely that there could have been and, in those circumstances, we must assume that there could also be an adequate explanation at the second stage.

178. We can have reference to any relevant code of practice and draw inferences from any failure to comply with any provision of such code.
179. Where facts are proved from which conclusions could be drawn of less favourable treatment because of a protected characteristic, then the burden of proof moves to the respondent and it is then for them to prove that they did not commit, or are not to be treated as having committed, the discriminatory act.
180. To discharge that burden it is necessary for the respondent prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic.
181. Accordingly, the tribunal must assess not merely whether there is an explanation for the facts but also whether such explanation is adequate to discharge the burden of proof. Cogent evidence is required to discharge that burden.
182. A difference in treatment alone would not be sufficient to establish that discrimination could have occurred and pass the burden of proof to a respondent. Similarly, unreasonable conduct, without more, is not enough. Context is important and adverse inferences may, where appropriate, be drawn from the surrounding circumstances and the respondent's conduct.

Discussion and our Conclusions

183. As noted above Ms Hodgetts drew our attention to a jurisdictional issue in relation to time which had not been identified in the list of issues. Based on the dates of early conciliation and when the claim form was submitted, any claim relating to something 3 January 2019 would not have been made in accordance with the primary time limit set out in s123 above. In terms of the matters referred to in the list of issues claims only that the complaint that the appeal outcome was discriminatory was submitted in time.
184. We considered if there was a continuing act of discrimination. The claim relating to the outcome of the appeal was brought in time. We accepted the issues about the conduct of the appeal was linked sufficiently to the outcome of the appeal hearing such that issue 4 should be regarded as part of an alleged continuing act of discrimination which ended with the appeal outcome. However, the allegations of discrimination against Mr Billington were quite distinct. We found no basis for finding a link between the decisions between Mr Billington and Mr Monks such that they could be regarded as continuing discrimination.
185. We therefore had to consider if the claims against Mr Billington were out of time. They were clearly presented outside the primary statutory time limit. We therefore had to consider whether to extend time on the basis that it would be just and equitable to consider whether the legal issues 1,2 and 3. We found this to be a very finely balanced decision. We are mindful that the respondent has offered us no suggestion of any prejudice from the delay in the claims against Mr Billington's decisions being brought. We considered the balance of prejudice between the parties and found that the claimant would be more prejudiced that the respondent if his claim could not proceed. The greater prejudice resulting from memory loss and delay in our view has been borne by the claimant. Although no explanation

for delay was offered to us, and as already indicated we found this finely balanced, and, because in this case the issue of time did not arise until submissions, we considered that it would be just and equitable to extend time such that we would consider all of the legal issues and explain our reasoning in full to the parties.

186. For this reason, leave has been granted to the claimant to under s123(1)(b) such that all of the legal issues before us may be considered taking into account the balance of prejudice notwithstanding the claimant's unfortunate failure to offer any evidence as to why claims were submitted out of time.

The legal issues

187. The claimant in this case had failed to engage with what would be required of him in terms of presenting his case to the tribunal. The way he presented evidence was, in our view, wholly unsatisfactory. The claimant appeared unable to appreciate the difference between evidence and the assertion of broad allegations, but we found it particularly curious that he had presented evidence of discrimination in terms of specific incidents and events and referred to specific matters in his grievances and before Employment Judge Hindmarch and then failed to present his own account of those matters as substantive evidence. Mr Devoy was a poor witness. He made serious allegations against named individuals in his statement but appeared to have little recall of events either in terms meetings or documents. His evidence seemed to be exaggerated.
188. It appeared to the tribunal that despite being pointed to relevant case law the claimant continued to believe that simply pointing to a detriment and the fact that he had a different ethnic origin from the managers who had complained about should be enough to establish discrimination. He failed to address the need to present at least prima facie evidence that the reason for the complained treatment was race or the fact that he had done a protected act.
189. It was further clear that, despite the fact that the claimant had been told that his claims against the managers were out of time that he was under the misconception that he could raise these complaints in another way by simply asserting that the grievance and appeal decisions were discriminatory. If an employer fails to treat a grievance seriously because of a protected characteristic, this will amount to a detriment and direct discrimination and a failure to investigate a complaint adequately may in itself amount to a detriment. However, a failure to deal adequately with complaints does not constitute discrimination merely because the initial complaint concerned discrimination (or harassment). Such a failure will only give rise to a claim if the employer would have behaved differently in response to a similar complaint from an appropriate comparator — see for example *Eke v Commissioners of Customs and Excise* 1981 IRLR 334, EAT.
190. The impression we gained of the claimant was that he is an intelligent and capable man but one who feels no need to temper the expression of his opinions of anyone he does not consider to be good manager, even if that means he acts in way which is disrespectful and rude. We have no doubt that this will result in his managers interacting differently with him compared to his colleagues who do not behave as he does. The claimant attributes what has happened to him to his race because he has often been the only employee of Black African ethnic origin in the teams he

has worked in but without, it appeared to us, asking himself if he was also the only employee who behaved as he did, for example by refusing to have one to one meetings with managers or by calling managers idiots. The claimant gave us no evidence that other employees behaved towards, or spoke to, managers as he did and were allowed to behave that way. It is also clear to us that a number of managers have tried to encourage the claimant to moderate his behaviour, but he has chosen to reject that advice. That is a matter for him, but the consequences of this chosen rude and disrespectful behaviour is not direct race discrimination, harassment, or victimisation because the claimant is Black African if the reason for the treatment by his managers is not his race but the behaviour which he has been advised to moderate.

191. The claimant shows a tendency to insist that if someone gives a different version of events to him or, as with Ms Alker and Mr Bird, uses a word in a way that he disagrees with, they are lying. To lie is to intentionally mislead or deceive. People can give different accounts or use language in different ways, perhaps even misusing words in their strict dictionary sense, without intending to mislead or deceive. To accuse someone of lying is to accuse them of dishonesty. The tribunal panel has little doubt that the claimant's insistence that people are lying and his quickness to make that accusation publicly, as well as his tendency to be very open in expressing his disdain for others if he did not consider them to be effective in their role, made him a difficult individual to manage especially for a manager like Ms Alker who was new to a managerial role.

192. *Issue 1 – was the conduct of the investigation by Steve Billington of HMRC, in response to C's grievance dated 3/7/18 against 13 managers of R, between 3/7/18 and 23/10/18, unlawful harassment, direct discrimination (issue 7) or victimisation (issue 7)?*

a. We found in relation to this claim that the claimant had failed to meet the burden of proof to establish facts from which an inference of discrimination of discrimination, harassment or victimisation arising out of the conduct of the grievance by Mr Billington could be drawn. That is, he failed to meet the burden which would have required the burden of proof to shift onto the employer because he failed to suggest any basis for any of the alleged detriment being because of race or a protected act other than pointing to difference in ethnic origin from the alleged perpetrator of the discrimination but without anything more.

b. In terms of some the key strands, as our findings of fact demonstrate this panel had some doubts about whether Mr Billington had the necessary experience and competence to make him the best choice of decision maker for this case. However, those doubts are not evidence that the conduct of the grievance was discriminatory. We accept that Mr Billington was chosen because he was independent of the DWP and he was available. We are satisfied that Mr Billington would have taken the same approach to any grievance he was asked to consider and that none of his conclusions suggest that he was motivated to try and cover up discrimination, close his eyes to obvious evidence or treat the claimant's grievances less seriously because of the claimant's race or because he had done a protected act. We found the involvement of

the respondent's HR department in the process was not evidence of discrimination. Mr Billington did not work for the respondent and therefore required some support from within the department in undertaking his investigation and determinations. We were satisfied there was no evidence that the HR team were in any way biased or sought to influence his decision making.

- c. We accept that Mr Billington breached the DWP procedure when he sent out the grievance outcome without the evidential appendices, but we were satisfied this simply arose from an assumption on his part that DWP procedures would be the same as HMRC's rather than any attempt to withhold relevant evidence or hide discrimination. Our reason for that conclusion was that there was nothing in the evidence once disclosed to suggest any discrimination was being hidden. There was no basis to draw an adverse inference from that issue which was, in any event, rectified reasonably quickly.
- d. I will stress that these are not the only relevant findings which led us to conclude that the claimant had failed to meet the burden of proof as our detailed findings of fact will show.

193. Issue 2 Did Mr Billington's interpretation of the evidence of witnesses between 3/7/18 and 23/10/18, constitute harassment related to race, direct race discrimination or victimisation:

- a. The claimant failed to establish that Mr Billington's interpretation of the evidence was discriminatory in any way. We were satisfied that Mr Billington's interpretation of the evidence was reasonable in all the circumstances of the case. The claimant failed to establish any inference that a different interpretation would have been applied if he had been a white British employee or other employee who was not Black African or that in interpreting the evidence Mr Billington closed his eyes to evidence of discrimination either because of the claimant's race or because he had made protected disclosures.
- b. We found in relation to this claim that the claimant had failed to meet the burden of proof to establish facts from which an inference of direct race discrimination, harassment or victimisation arising out of the conduct of the grievance by Mr Billington.
- c. This panel were not somewhat concerned by the quality of Mr Billington's explanation of grievance outcomes as set in writing to the claimant. It should have been clear to this tribunal on the face of the written outcome why he reached the decisions that he did. Indeed, if that had been done more carefully and thoroughly it is possible this tribunal hearing may have been avoided altogether or at the very least it would have been a shorter hearing and understanding the decision making would have been a much more straightforward task for this panel. The fact that Miss Hodgetts had to take so much time working through documents to unpick the decisions in cross examination and this panel had to take so much time considering the text of meetings

and documents rather than the outcome documents demonstrates the inadequacies of the outcome documents. The repeated use of the stock phrases was unhelpful. The outcome in relation to Mr Buxcey in particular contradicted the evidence that there had been a breach of procedure.

- d. Although we did not consider that the claimant had established a prime facie case such that the burden of proof shifted, in the case of the outcome in relation to Mr Buxcey in case we were wrong about that, we also asked ourselves what our conclusion would have been if in relation to that issue the burden had shifted. We reminded ourselves that the question for us was, of course, not whether there was evidence that Mr Buxcey had unlawfully discriminated against the claimant, but whether Mr Billington had discriminated in his interpretation of the evidence. We were satisfied that Mr Billington had satisfied us, on the balance of probabilities, that he had non-discriminatory reasons for reaching the conclusions that he did.

194. Issue 3 did the outcome of the investigation by Mr Billington, dated 23/10/18 and sent to C on 2/11/18, constitute harassment related to race, direct race discrimination or victimisation

- a. The claimant failed to meet the burden to show from facts from which we could conclude that the grievance outcome was discriminatory on any of the grounds claimed. It is not contested that Mr Billington breached the DWP procedure when he sent out the grievance outcome without the evidential appendices, but we were satisfied this simply arose from an assumption on his part that DWP procedures would be the same as HMRC's rather than any attempt to withhold relevant evidence or hide discrimination. In any event a breach of a procedure without any evidence at all that the reason for the breach for the breach is race or a protected act is not sufficient to shift the burden of proof.
- b. We were disappointed with the quality of Mr Billington's explanation of grievance outcomes as set in writing to the claimant. We can understand why the claimant reacted negatively to them. It is surprising to us that the outcomes do not explain in any meaningful way why Mr Billington reached the decisions that he did. Indeed, if these had been prepared more carefully and thoroughly it is possible this tribunal hearing may have been avoided or at the very least it would have been a shorter hearing and a much more straightforward task for this panel. The fact that Miss Hodgetts had to take so much time working through documents to unpick the decisions in cross examination and this panel had to take so much time considering the text of meetings and documents demonstrates the inadequacies of the outcome documents. The repeated use of the stock phrases was unhelpful particularly in relation to the outcome to the complaint about Mr Buxcey. However, we were not offered any evidence from which we could conclude that the reason for these failings was the claimant's race or the fact that he done a protected act.

195. Issue 4: did the conduct of the grievance appeal hearing by Simon Monks on 10/11/19 constitute direct race discrimination, harassment, or victimisation:
- a. The claimant failed to establish any facts which could suggest that Mr Monk's conduct of the appeal hearing was discriminatory on any ground. The claimant failed to establish any inference that a different approach would have been adopted if he had been of white British employee or had otherwise not shared the claimant's protected characteristic or done a protected act and had not shown any evidence that in considering the appeal Mr Monks closed his eyes to evidence of discrimination either because of the claimant's race or because he had made protected disclosures.
196. Issue 5 did the outcome of the grievance appeal on 24/1/19 constitute direct race discrimination, harassment, or victimisation:
- a. The claimant failed to establish any facts which could suggest that Mr Monk's outcome that was discriminatory on any ground. The claimant failed to establish any inference that a different outcome or that the outcome would have been expressed differently if the claimant had been a white British employee or had otherwise not shared the claimant's protected characteristic or done a protected act.
197. Our conclusions on issues 6 and 7 are set out in the earlier conclusions.
198. None of the claimant's claims have been upheld and accordingly are dismissed.

Employment Judge Cookson
22 June 2021