EMPLOYMENT TRIBUNALS

Claimant: Mr M Charles

Respondent: West Midlands Fire Service

Heard at: Birmingham (by CVP) **On:** 8, 9, 12, 13, 14 & 15 July 2021

Before: Employment Judge Miller
Mr D Faulconbridge
Ms W Ellis

Representation
Claimant: Mr K Zaman – counsel
Respondent: Mr P Starcevic - counsel

JUDGMENT having been sent to the parties on 19 July 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant in this case, Mr Mark Charles, is and remains employed by the respondent, West Midlands Fire service, as a crew commander.

2. By way of a claim form dated 15 August 2018 and following a period of early conciliation from 31 May 2018 to 15 July 2018 the claimant brought claims of discrimination on the grounds of disability and sexual orientation. There was a series of case management hearings in this case and the claims now before the employment tribunal are victimisation and harassment.

Issues

3. The parties confirmed at the start of the hearing that the only protected acts relied on are those set out at page 54 of the bundle. There is also the same document starting at page 54 of the bundle a list of alleged attachments which comprises those detriments relied on for both the victimisation claim and the harassment claim. A copy of that list of issues is annexed to these reasons.

4. The protected characteristics in this case that underlie the victimisation and harassment claims are not those of the claimant but of a firefighter employed by the respondent by the name of Wesley Vanes, hereafter referred to as Wes at their request.

5. The respondent's pleaded case is that they did not have knowledge of the particular protected characteristics of Wes and, in any event, the pleaded detriments are either denied, do not amount to a detriment or were legitimate acts by the respondent as employer.

6. We do not propose to recite the list of alleged acts of detriment or harassment at this stage but it may be appropriate to explain the claimant's case in respect of the alleged protected acts for the purposes of his victimisation claim and the basis on which the claimant's harassment claim is said to be related to Wes's protected characteristics.

7. Before we do, however, we interpose here to record that at the start of the hearing the tribunal gave consideration to whether it was necessary or appropriate to make an order under rule 50 of the Employment Tribunal Procedure Rules 2013 (relating to privacy) in respect of Wes. This was an issue quite properly raised by Mr Starcevic on behalf of the respondent at the outset, Wes still being employee of the respondent and, presumably, having regard to the fact that this claim revolves around an alleged unwanted disclosure of the personal information of Wes relating to their protected characteristics. We enquired of Wes at the start of the hearing whether they wished the tribunal to consider making a rule 50 order restricting Wes's privacy to any extent. Wes made it clear that they did not require or want such an order to be made. Notwithstanding, therefore, the

tribunal's obligation to consider such an order of its own volition there was, in our view, no basis on which to make such an order.

8. The basis of the claimant's claims then is as follows.

9. The claimant says he was asked by the respondent's officers on 2 August 2017 to find out from Wes, who was his direct report, whether he had intended to complete one of the respondent's forms in the way that he did and particularly in a way that identified Wes's sexual orientation as transgender. The tribunal recognises, of course, that not only is it not appropriate to identify transgender status as a sexual orientation it also does not make any sense. However, Wes's evidence which was not disputed was that the form did list the status of being transgender as an option for choosing sexual orientation.

10. The claimant says that being aware both of Wes's status and the sensitivity of making such an enquiry he refused to do so and thereafter reported the fact to Wes that Wes's status was known to officers of the respondent when it should not have been.

11. The claimant relies firstly on refusing to make this enquiry and informing the relevant officers (watch commander Gill and station commander Rainey) that it was not appropriate to ask Wes the questions he had been asked to ask them, and that he was concerned that the information about Wes was public knowledge as a protected act.

12. Secondly, the claimant relies on in his later support for Wes throughout their absence and grievance as a subsequent protected act.

13. The protected characteristics in respect of which the claimant says he was harassed are sexual orientation and gender assignment also arising from the claimant's association with Wes.

14. Thereafter, the claimant says, he was subject to numerous instances of harassment or detriment as set out in the agreed list of issues from page 52 of the bundle.

The hearing

15. This case was initially intended to be heard in person but parties agreed on the first day to convert it to CVP and all the evidence was heard remotely by video. The claimant gave evidence and Wes also attended and gave evidence on the claimant's behalf. There was a witness statement from Paul Lovell produced by the claimant which the respondent did not challenge so is taken as read.

16. Station commander Andrew Rainey, former group commander Ben Diamond and former HR business partner Melissa Cunningham all provided witness statements and attended and gave evidence for the respondent. The tribunal was also provided with an agreed bundle of 470 pages and further document comprising of an email dated 29 March 2018 from Sean Dakin to the claimant was produced during the hearing.

Findings of fact

17. We make only such findings as are necessary to determine the issues. Where issues are disputed we made findings on the balance of probabilities.

Structure, policies and general information

18. The structure of the respondent as it applies the claimant and as far as is relevant is as follows:

19. Wes is a firefighter.

20. The claimant is a crew commander and the immediate superior to Wes. There may be either one or two Crew commander's for each Watch.

21. Sean Dakin and Mr Gill are all were Watch commanders. In the fire station where the claimant works, being Fallings Park, there were at the relevant time four Watches: green (to which the claimant was assigned), white, blue and red. Watch commanders are the immediate superior to Crew commanders. At the relevant time each Watch worked an eight day week comprising of two day shifts followed by two night shifts followed by four

days off. This meant, relevantly, that the claimant will be able to predict precisely the days which he was working or not working into the future.

22. Watch commanders are managed by a Station commander. At the relevant time Andrew Rainey was the Station commander at Fallings Park.

23. Immediately superior to Station commander is a Group commander and at the relevant time the Group commander responsible for Fallings Park was Ben Diamond.

24. Mr Diamond was responsible for eight fire stations comprising approximately 200 personnel.

25. The other relevant person in this case is Melissa Cunningham. At the relevant time she was an HR business partner who worked in people support services and consequently was interchangeably referred to as HR or PSS. Melissa Cunningham provided HR advice at the time across two areas comprising approximately 16 fire stations and, we conclude, in the region of at least 400 employees.

26. Before considering the alleged incidents starting from 2 August 2017, we refer to a matter relating to the respondent's absence management policy.

27. In July 2017 Ms Cunningham attended at the Fallings Park fire station to provide some training or information about sickness absence management. She said in evidence that it had been raised at a senior level that the sickness level in the Black Country North area where Fallings Park was situated was noticeably high. She therefore prepared a training package for presentation to staff at those fire stations referring to the absence management policy and outlining the expectations of employees and managers and explaining the support available in respect of sickness absence.

28. Ms Cunningham said that there was no new absence management policy brought in at that time, it was just about providing information to try to manage sickness absence.

29. The claimant and Wes refer to this meeting in their respective witness statements (although the claimant refers to June 2017 and Wes refers to July 2017) and they say that the purpose of the meeting was to discuss a new sickness absence management policy. The claimant and Wes described the meeting as uncomfortable and criticise the attitude and behaviour of Ms Cunningham at this meeting to the extent that Wes felt compelled to raise a complaint about Ms Cunningham's perceived behaviour. That complaint did not relate to any alleged disclosure by Ms Cunningham or anyone else of information about Wes's sexual orientation or transgender status. Wes was clear that the complaint was about Ms Cunningham's attitude. We heard and saw no further evidence about the outcome of that complaint. However, we find that there was clearly an issue between Ms Cunningham and Wes at that time but that it was unrelated to any protected characteristic of Wes at all.

30. In respect of the absence management policy, there is no absence management policy in the papers that we saw.

2 August 2017

31. On 2 August 2017 Station commander Rainey asked Watch commander Gill to ask the claimant to ask Wes whether he had filled in the information on the respondent's computer system, HRMS, correctly. The system recorded Wes's sexual orientation as transgender and the member of the respondent's HR team responsible for diversity and inclusion on checking this wanted to ensure that Wes's status had been recorded correctly.

32. Station commander Rainey says in his witness statement "I confirm that I did not ask Watch Commander Gill to speak to Mark and as part of a previous grievance investigation Watch Commander Gill confirmed that I did not". However, in cross examination Mr Rainey agreed that that part of his witness statement was not correct and in fact he had asked Mr Gill to ask the claimant to check with Wes whether what was recorded on HRMS about Wes's status was correct.

33. The claimant's evidence, which we accept, is that he refused to ask the question and told both Mr Gill and Mr Rainey that he was not going to ask

the question and why. The claimant also said, and again we accept, that he informed Wes of this request. The claimant said in evidence, again which we accept, that he was previously aware of Wes's status following an earlier data breach some years previously but had not disclosed that to anyone else. Wes confirmed that prior to 2 August 2017 he was unaware that the claimant knew about his status and was impressed by his willingness and ability to keep such sensitive information confidential.

34. In his witness statement Mr Rainey refers to the grievance appeal hearing outcome for Wes in which the circumstances leading up to this conversation were outlined. We have no other evidence, but the clear and detailed grievance findings of Jason Campbell Area Commander at page 362 are that Mr Rainey was motivated to ask Wes about the sensitive information because he had been asked to do so by PSS business partner Clare Glover as a result of a conversation with DICE manager Tristan Dugdale-Pointon. Dice means diversity, inclusion, cohesion and equalities.

35. Ms Cunningham said that prior to being called as a witness for Wes's grievance, she was unaware of Wes's protected characteristics. As at August 2017, Ms Cunningham effectively said she had never heard of Wes and did not know who he was. She said that although she had access to HRMS she would not routinely look at it unless required to do so for a particular case. Ms Cunningham also said that she did not speak to her colleagues Ms Glover or Mr Dugdale Pointon about any of these issues.

36. We find, on the balance of probabilities, that Ms Cunningham did not know about Wes's protected characteristics as at August 2017 and further that she did not ask Mr Rainey to make enquiries about Wes's protected characteristics. We consider it is possible that she was aware of Wes's existence based on the complaint made following the meeting in July 2017, but there is no basis on which can conclude that she connected this with Wes's protected characteristics.

September 2017

37. In September 2017, Mr Rainey contacted Wes directly to ask about the information recorded on the HRMS system and said that he had been

asked to check whether it was correct. Wes says in his evidence that Mr Rainey said that he was entitled to know the information and the reason he had asked was that some people might treat it as a joke. He referred, as an example, to people recording their religion as Jedi Knight on the census. Mr Rainey agreed that there was a conversation at which he made enquiries of Wes about the information recorded on the HRMS system but denied the reference to Jedi Knight. We find on the balance of probabilities that Mr Rainey did make this comment. Wes refers to it in his grievance and it is recorded in the grievance outcome as misguided. We are inclined to agree with the grievance outcome. Wes's account is consistent throughout his grievance and the meetings.

38. We note here about access to the HRMS system. Mr Rainey agreed that until February 2018 managers had access to that personal information including personal sensitive information about employees' sexual orientation and, presumably, other protected characteristics. This was clearly recognised as inappropriate because access was removed from 13 February 2018.

39. We find that as at September 2017, Mr Rainey was aware of Wes's transgender status and sexual orientation. Wes confirms in his witness statement that he felt compelled to confirm this at that meeting.

October 2017

40. In October 2017 the claimant had an IPDR (appraisal) meeting with Sean Dakin, who was a temporary Watch commander replacing Watch commander Gill. The claimant says that at that meeting Mr Dakin suggested that the claimant should go for promotion. The claimant says that he told Mr Dakin at that meeting his personal circumstances which meant that his current location and shift pattern on green watch suited him.

41. The particular circumstances to which the claimant refers are that he had in place a court order specifying the contact he could have with his children. He said that his ex-wife was inflexible in those arrangements and that in order to comply with the court order and maintain contact with his children he needed to remain on green watch.

42. A copy of that order has never been produced and was not before the tribunal but we accept that it was the claimant's belief that a change to his working arrangements would cause him significant problems in maintaining contact with his children.

43. Mr Dakin did not attend to give evidence or produce a witness statement and we therefore prefer the claimant's evidence of this conversation and find that he did in this meeting explained to Mr Dakin his personal circumstances and the attendant difficulties he would have in changing his shift arrangements.

6 November 2017

44. On 6 November 2017 there was a meeting between the claimant and Mr Rainey. Mr Dakin was also in attendance. The claimant said that on return from an incident he was called into the office with no warning or explanation as to what the meeting would be about and he was not given any opportunity to have a representative with him. Mr Rainey says that there was no need for him to have a representative as it was not a disciplinary or attendance meeting.

45. This meeting comprised a conversation about the claimant moving from green Watch to white Watch. White Watch is described as directly opposite in terms of shift patterns to green Watch.

46. Mr Rainey's account of the meeting is that he needed to rebalance the Watches in terms of experienced crew commanders and particularly there were two inexperienced crew commanders on white Watch and two experienced crew commanders on green Watch so that it made sense to him to move one of the experienced commanders from green Watch to White watch. The other crew commander on green Watch, Paul Lovell, was not asked. Mr Rainey's explanation for not asking Mr Lovell and just asking the claimant was that Mr Lovell was nearing retirement. Mr Lovell says in his unchallenged witness statement that he had expressed no intention to retire whatsoever.

47. Mr Rainey says that he raised the possibility of the claimant transferring to white Watch and the claimant said that this would be difficult for him because of his childcare arrangements. Mr Rainey says that he was aware of the contact order at the time but not the details. Mr Rainey says that the claimant said he would not in principle be opposed to any such move but there would be a financial impact on him if he did and it would impact too much.

48. Mr Rainey says that he then said “look I don’t want to impact your financial family circumstances and will leave it at that”. Mr Rainey recognises that the claimant was upset by the suggestion that he would move Watches and was worried about the impact on his childcare arrangements. However, Mr Rainey’s view is that having said ‘we will leave it at that’ the matter was closed.

49. The claimant’s account is that Mr Rainey said he had some decisions to make on the station and he was going to move the claimant onto white Watch. The claimant describes this as just being thrown at him. He said it was very cold, tense meeting and watch commander Dakin just stood in the corner and offered no support at all despite him knowing from the recent IPDR meeting of the claimant’s circumstances. The claimant also says that Mr Rainey mentioned that the claimant’s working relationship with Mr Gill had not been great.

50. The claimant then says that the door was left open to the office and he had to explain his personal circumstances while people were walking past and that he felt singled out because nobody else had been asked then or since if they wanted to move and nor were they told that they were being moved.

51. The claimant does not describe how the meeting concluded. He does describe the impact on him and the fact that he had experienced years of stress and illness.

52. In our view, having heard from Mr Rainey and the claimant we prefer the evidence of Mr Rainey to this extent. We find that the reason Mr Rainey raised the issue with the claimant of moving from green Watch to white Watch was because he wanted to rebalance the experience of the Crew

commanders across the two respective Watches. In oral evidence Mr Rainey described the conversation as exploratory. He said that as soon as the claimant raised his personal issues he didn't pursue it any further with him. In our view, this was what Mr Rainey intended to communicate to the claimant - that he was not going to proceed with moving the claimant. We do not think this is inconsistent with Mr Rainey being previously aware of the claimant having a contact order.

53. We have no hesitation in accepting the respondent's case that these are the types of conversations that managers have all the time and in our view it is wholly plausible that a manager would explore whether a person was interested in moving when they consider that a move might be necessary before embarking upon any formal process.

54. We consider that the claimant was being honest in his description of the meeting from his perspective, but we think it likely that the claimant misunderstood or misheard or misinterpreted what Mr Rainey was saying. We understand that the suggestion that the claimant might be required to move had a substantial impact on him because of his concerns about his contact with his children. However, we conclude from the emotive language in the witness statement and the claimant's oral evidence that once the possibility of him moving had been raised he was in such a state of concern about this that his perception may well have been distorted.

55. We also heard a great deal of evidence about the applicability of the managing vacancies policies in respect of this conversation. Although it is not obvious that this policy applies to the circumstances it is clear that all those concerned treated it as applying and we agree that it does set out useful principles for a process exploring voluntary transfers through to a mandatory change of shift pattern. However, there can be no criticism of the respondent in failing to apply the policy in the circumstances because, as we have found, Mr Rainey's conversation was brief and exploratory and, from his perspective, no further steps needed to be taken in respect of transferring the claimant as Mr Rainey had decided not to do so almost immediately.

56. Mr Rainey also says that the claimant asked for written confirmation at that meeting that he would not be transferred. Mr Rainey said that it would not have been possible or appropriate to give a written guarantee that the claimant would never be transferred. We accept Mr Rainey's evidence of this and find that it was a reasonable approach to take given that the needs of the service could change. It would not be realistic to commit in those circumstances to never moving the claimant from his current shift pattern.

Conversation in the corridor

57. Around two weeks later there was a chance meeting in a corridor at the station between the claimant and Mr Rainey. The claimant says that this was the first point at which Mr Rainey indicated to him that the move to white Watch would not be going ahead. The claimant described Mr Rainey as saying "just forget about it and move on". The claimant says this did not provide him with any reassurance and he still felt singled out.

58. Effectively, Mr Rainey agreed that this chance conversation took place. We find that this conversation was merely confirming what Mr Rainey had said at the meeting on 6 November 2017 that the claimant would not be transferred at that point to white watch. By this date the claimant could not reasonably have had any belief that a move to white Watch was still an imminent possibility.

Occupational health

59. In November the claimant was referred to occupational health by Mr Dakin.

60. The claimant was seen by Dr Halliday Bell on 22 November 2017. The report deals predominantly with the claimant's physical problems arising from a previous incident of meningitis. However, it also says "he is generally quite well, but mentioned that he had been upset by an issue at work recently that was very quickly resolved. He feels optimistic for the future".

61. Then on 1 December 2017 the claimant again met with occupational health, this time Fozia Dean Reeve, following a referral from Paul Lovell. Paul Lovell was not the claimant's line manager. The claimant said that he approached him, we conclude, about the stress he was experiencing

following the meetings and proposed move to white Watch. The claimant said that because Mr Dakin had not offered any support in the meeting on 6 November he did not feel comfortable approaching him about his problems.

62. This report which is in the form of an email specifically refers to the claimant experiencing an episode of increased anxiety as a result of work-related incident. It says “Crew Cmdr Charles was visibly upset during consultation today stating that he had been told, without warning or prior discussion, that he was being moved on to another watch. This caused such distress as, if it had come to fruition, it would have created enormous difficulties in his personal life with regard to the care of his children. Whilst this issue would have presented a problem for any parent, for crew commander Charles it was especially upsetting as he had fought legally for over two years to establish the current childcare regime that has only recently been put in place; needless to say that events throughout the process were very complex and made it most difficult for him to gain regular access to his children. In addition to this potential issue crew commander Charles was also very angry as he feels that the incident was dealt with in an unprofessional manner. I am pleased to note that it currently appears that the transfer is not going to happen and therefore there will not be any of the issues that he anticipated which can only be a good thing for him and his family.”

63. We draw further support from the issues recorded in these reports for our conclusions about the outcome of the meeting on 6 November 2017. It is clear that the issue of potentially moving the claimant was raised and then quickly dismissed.

64. The claimant’s other complaint about the second occupational health report, but not the first, is that no one discussed the occupational health report with him.

65. The email of 1 December 2017 was sent to Paul Lovell, who made the referral, and was copied to the claimant, Sean Dakin, Andrew Rainey, Mr Cunningham, Claire Glover and Lorna Muir. In the list of issues the claimant

particularly complains that all of the recipients except for Mr Lovell failed to discuss report with him.

66. In cross examination the claimant agreed that the referring officer, Mr Lovell, did discuss the report with him and he describes him as continually asking how he was and confirmed that he was able to discuss his personal circumstances with Mr Lovell.

67. Melissa Cunningham said that although she was copied in she would not routinely discuss occupational health reports with the employee concerned as that was a management function.

68. Neither Mr Dakin nor Mr Rainey contacted the claimant to discuss the report or enquire after his welfare. Mr Rainey says in his witness statement that he would not routinely do so because this was a line management function but reasonably reflects that in retrospect it would have been appropriate to meet the claimant and discuss the issues.

69. There is no evidence as to why Mr Dakin did not seek to discuss the two occupational health reports with the claimant. Clearly, it would have been appropriate to do so.

70. Equally, however, there is no evidence of any link between the incident on 2 August 2017 and Mr Dakin's failure to discuss the occupational health report with the claimant. As will be seen in respect of the later occupational health report on 26 March 2018 to which we will return the most likely reason for the failure of Mr Dakin to discuss the occupational health report is something akin to neglect or lack of awareness on the part of Mr Dakin. We understand that Ms Glover and Ms Muir are both HR officers. We conclude that, for the same reasons that Ms Cunningham gave, it would not be usual practice or necessarily appropriate for either of those people to discuss directly with the claimant this occupational health report.

71. Ms Cunningham gave evidence that she would not routinely chase up such reports and/or check whether responsible manager had in fact dealt with it appropriately. Even though Ms Cunningham was responsible for HR advice to approximately 16 fire stations, it may well have been appropriate for her

to take a more proactive role in ensuring that managers fulfil their job. However, there is no evidence of any suggestion that a failure by Ms Cunningham to chase up Mr Dakin or Mr Rainey in respect of this report was in any way connected with the instance of 2 August 2017. She simply did not consider that it was her role to do so.

Wes's occupational health referral/ill health

72. The claimant's unchallenged witness evidence was that he referred Wes to occupational health on 30 November 2017 and received feedback from Ms Dean Reeve about this on 8 December 2017 following which the claimant offered Wes support.

73. On 19 January 2018, Wes went off sick and remained absent until July 2019.

January 2018

74. The claimant was absent from work for two weeks from 19 January 2018. His uncontested evidence was that although he was on leave he also had a fit note for that period. The claimant returned to work in the first week of February.

75. On 21 February 2018 Wes submitted an anonymous complaint. We have not seen that complaint but conclude that it related to disclosures of Wes's protected characteristics.

26 February 2018

76. On 26 February 2018, the claimant met with Wes and they agreed that the claimant would act as what has been referred to as the Single Point of Contact for Wes. This is abbreviated to SPOC. The claimant said that he confirmed by email to Wes that he was happy to act in this capacity on 28 February 2018.

77. The role of SPOC in this context is not agreed by the respondent to be a formal role under any of the respondent's policies. Unfortunately, we did not have a copy of the respondent's absence management policy in which this

role was likely to be mentioned. The claimant's apparent understanding of this role was that he was the only person from the respondent with whom Wes was required to have contact during his sickness absence. It is clear that the claimant considered that the role of SPOC was predominantly, if not exclusively, for the benefit of the employee - in this case Wes, although the claimant did not set out anywhere what he considered the role specifically to be.

78. Ms Cunningham explained that there is no such role referred to in the absence management policy. The two roles that are relevant for employees on long-term sick are the line manager with responsibility for making decisions about sickness absence and welfare officer for individual employee contact.

79. Ms Cunningham explained that in the case of Wes, the appropriate person for making decisions about their long-term sickness absence was the Watch commander who was at the relevant time Mr Dakin. The claimant, as Crew commander, would have no authority to make any decisions about progressing Wes through the long-term sickness policy or any other matters.

80. The claimant said in evidence that he understood the welfare of employees to be a basic role of line manager or Watch commander. This, he thought, was separate from a single point of contact. The claimant said in oral evidence that the role of the SPOC was to manage the welfare of the employee who was off sick and look after things like the anticipated date of return. He denied that part of the role was to pass on information. However, the claimant then said that if the employee was off with something like a cough or a cold or broken leg for example it would be appropriate for the SPOC to pass on information.

81. We conclude, in the particular context of Wes's absence, that Wes anticipated that once the claimant had been appointed as a single point of contact for them, the claimant would be their primary point of contact with the respondent.

82. In considering the evidence in this case it has become clear that the role of the claimant in respect of Wes was not clearly understood by all parties.

83. The claimant alleges that following his meeting with Wes at which he was appointed as SPOC he was grilled for information by Mr Rainey and Mr Dakin as to what was said by Wes at that meeting.

84. The claimant has not been specific as to what information was requested and Mr Rainey has not addressed it in his witness statement specifically either. Having heard the witnesses, we think it likely that Mr Rainey and/or Mr Dakin did ask for information from the claimant about Wes's absence. However, in our view it was reasonable for them to do so. Any manager who has an employee who is off sick is entitled to make enquiries as to the reason for their absence so they can assess the likelihood of their return and consider whether they need to take any action to support the employee or facilitate their return to work. We heard that a fit note had been provided identifying that Wes was absent with work-related stress and self-evidently this gives rise to a need for further information for the managers if they are to take any steps to attempt to deal with any causes of that stress.

85. The claimant suggested in answer to questions in cross examination that this information was available via occupational health and that he had an obligation of confidence to Wes in respect of all the matters relating to their protected characteristics. We do not think that this is a reasonable position to take. Occupational health provide support to employees and advice to managers. It is not, in our experience, the role of occupational health to act as a conduit between employee and employer for the transfer of information about the employee's absence. That is clearly a management role. We observe also that later on Wes withheld consent for occupational health to disclose information to their managers which further undermines the suggestion that the job of passing information is that of Occupational health.

86. The claimant also confirmed in cross examination that the enquiries that Mr Rainey and Mr Dakin made were not made in an aggressive or inappropriate way. When asked, he said that the questions Mr Rainey and

Mr Dakin were asking the claimant were what was Wes off with, what's wrong with Wes and what can they do.

87. The claimant said that his response was "nothing, he has appointed me as SPOC and it's my firm belief that Andrew Rainey and Melissa Cunningham knew full well why Wes was off".

88. In our view, the enquiries described by the claimant were perfectly reasonable and wholly unsurprising enquiries from managers responsible for managing Wes's sickness absence.

89. We find that, on the balance of probabilities, the reason that Mr Rainey and Mr Dakin asked those questions was because they wanted to manage Wes's sickness absence. Those enquiries were wholly unrelated to Wes's protected characteristics or the conversation on 2 August 2017.

90. We refer also to the enquiry about the reasons for Wes's absence. It's clear that Mr Dakin was concerned that he had in some way caused or contributed to Wes's absence and the claimant said that he obtained permission from Wes to reassure Mr Dakin that that was not the case. This, in our view, is further confirmation that the reason Mr Dakin and Mr Rainey were asking about Wes's absence was unrelated to anything connected in any way at all with Wes's protected characteristics.

Feb/March 2018

91. On unspecified dates in February and March 2018, the claimant says that Mr Rainey said in the kitchen and lecture room at Fallings Park that he thinks crew commanders will get moved to facilitate falls responses.

92. This referred to a new initiative by the Fire Brigade to respond to reports of vulnerable people falling to ease pressure on the ambulance service. This was a contentious policy with which not all employees agreed and the Fire Brigade Union objected to. In order to facilitate this new policy, Mr Rainey said that he needed to consider in the longer term the possibility of moving employees who were not prepared to undertake the falls responses to a different station as Fallings Park was potentially being trialed as a hub for this initiative.

93. Mr Rainey's evidence was that he did say that people might be required to be moved but that this was addressed to the station as a whole on various watches. He specifically denied making eye contact with the claimant, as the claimant alleged, in a meaningful way when giving this information to the station generally. Mr Rainey said, and it did not appear to be disputed, that the claimant was prepared to undertake the Falls response to avoid any risk of further disruption to his childcare arrangements. From Mr Rainey's perspective, therefore, these discussions did not particularly apply to the claimant.

94. We prefer Mr Rainey's evidence about this issue and find that Mr Rainey was giving information to the station generally about the possibility of moves for some people in the future. It was not directed at the claimant and the information was imparted because of the issues relating to the Falls response. It follows, therefore, that it was wholly unconnected with Wes or any of their protected characteristics.

12 March 2018

95. On 10 March 2018 Mr Rainey wrote to Wes and informed them that their sickness was to be managed by Mr Rainey and not the claimant as it was not normal practice for an individual's long-term sick to be managed by the Crew commander. The letter said that as Mr Dakin was temporary Watch commander Mr Rainey would undertake the sickness management instead.

96. Wes responded to that letter on 12 March 2018 explaining that they had maintained contact with Mr Dakin as their line manager and it had been agreed that the claimant could act as Wes's SPOC.

97. In that letter, particularly, Wes says "I have been more than happy with the support provided so far by WC Dakin and CC Charles and would wish that to continue as it is helped immensely". Wes goes on to say "regardless whether WC Dakin is a temporary WC at Fallings Park, I am currently very happy with his handling of my absence therefore I would feel more comfortable talking to him regarding my welfare and moving forward with my return to work. I would therefore be more comfortable attending a

meeting with him and CC Charles as well as support for me from a work colleague".

98. Wes also identifies in this letter that it has been common practice at Fallings Park for people other than responsible line manager to undertake the SPOC role.

99. We conclude from this correspondence that the decision to remove the claimant as SPOC had been taken on or before 10 March 2018 and further that Wes was content to discuss elements of their sickness absence with Mr Dakin as responsible line manager.

13 March 2018

100. On 13 March 2018 Mr Rainey informed the claimant that he was no longer to be the single point of contact welfare support for Wes. Ms Cunningham said that she had advised Mr Rainey that it was not usual brigade practice to have the Crew commander as the point of contact for employees on long-term sick and that it should have been Mr Dakin. Ms Cunningham said, and we accept, that she was not aware of the local practice at Fallings Park at that time.

101. Mr Rainey understood that he was effectively instructed by Ms Cunningham to remove the claimant as the single point of contact.

102. Ms Cunningham said, and we accept, that at this point she was unaware of Wes's sexual orientation or transgender status.

103. In our view, the reason that Mr Rainey removed the claimant as SPOC for Wes was because he understood Ms Cunningham be telling him that that's what he needed to do. The reason that Ms Cunningham gave the advice that she did to Mr Rainey was because that was her experience of the policy across the brigade. In our view, neither of these decisions was connected in any way with Wes's protected characteristics or the claimant's support for Wes generally except insofar as the role of SPOC was inherently connected with Wes's sickness absence.

104. On the same day, 13 March 2018, the claimant was referred again to occupational health by Mr Dakin and the reason for that referral is recorded as “stress”. On the referral form under the heading any other relevant information Mr Dakin has written “possible moves”. The claimant in his witness statement refers to Mr Rainey talking about the possible moves relating to the Falls response as being a trigger for his stress at this time and we therefore conclude that the reference to possible moves in the occupational health form is the claimant’s ongoing concern about the risk of him being required to change Watch. It is clear that by this time the claimant remained concerned that he might be required to change a shift pattern at some point in the future.

105. We refer to our previous findings, however, that the issue in respect of the mooted move from green Watch to white Watch was concluded by November 2017. The claimant therefore had, in our view, no reasonable reason to be concerned at this point about the potential for an imminent move. We do accept, however, that the claimant was genuinely concerned about this because of the significant difficulties such move would cause to his personal life.

106. It is part of the claimant’s case that on this date Mr Rainey asserted that the claimant was removed as Wes’s SPOC was because the claimant had refused to undertake the role.

107. The claimant says that this came to his attention on 29 March 2018 when Mr Dakin told him about a conversation he had on the phone with Ms Cunningham in which Ms Cunningham told him that the claimant had refused to act as Wes’s SPOC. Ms Cunningham agreed that she had said this but she had been given this information by someone else and it could only have been from Mr Rainey or Mr Dakin.

108. Given that the reported conversation on 29 March 2018 comprised a report of Ms Cunningham telling Mr Dakin that the claimant had refused to act as Wes’s SPOC, we conclude that Ms Cunningham understood at the time that she had been told by Mr Rainey that the claimant did not want to act as Wes’s SPOC. Mr Rainey denies that he said such a thing. In any event, he

did not say it to the claimant as the claimant does not report hearing it directly.

109. There is an email from another firefighter who says that he overheard the alleged conversation on 29 March between the claimant and Mr Dakin.

110. In respect of this conversation, we prefer the evidence of Mr Rainey. We consider that Ms Cunningham genuinely believed that that was what Mr Rainey had told her but think that it is most likely that there was a miscommunication between Mr Rainey and Ms Cunningham. There is simply no reason, that we can conceive of, for Mr Rainey saying such a thing to Ms Cunningham in circumstances where from his perspective the instruction to remove the claimant as SPOC had come from Ms Cunningham in the first place. Ms Cunningham's reasoning for that advice is clear and makes sense. We therefore find, on the balance of probabilities, that Mr Rainey did not explicitly say that the claimant did not want to be Wes's SPOC.

16 March 2018

111. On 16 March 2018 Wes submitted a formal grievance and there was a sickness meeting with Wes, the claimant, Mr Dakin and Leanne Byrne, a union representative. The notes of this meeting record that Mr Dakin confirmed that the welfare SPOC was changed without consultation with Wes or the claimant following a meeting between Ms Cunningham and Mr Rainey. The claimant is recorded as stating that he did not agree with that change. The outcome of that meeting is recorded that Mr Dakin would act as the single point of contact for Wes although the claimant would most likely make contact and would act as Wes's welfare officer. Wes stated that no fire brigade personnel were to attend their home address without their prior permission.

112. The content of that email was not challenged and we find that it is an accurate reflection of that meeting. We also find that there was no consultation with either Wes or the claimant for the decision to remove the claimant from the role of SPOC for Wes was taken. That is clear from the chronology.

17 March 2018

113. It is the claimant's case that on 17 March 2018, he was "grilled" by Mr Rainey and Mr Dakin for information as to what was said by Wes to the claimant in his role as SPOC. There is no evidence in the claimant's witness statement about anything happening on 17 March 2018 no documents that we have been shown that suggest anything happened on that date. We considered whether there was anything potentially arising from dates around then but we can find no suggestion of any questioning at that time by Mr Rainey or Mr Dakin. We therefore find that there was no "grilling" by Mr Dakin or Mr Rainey on 17 March 2018 of the claimant.

26 March 2018

114. On 26 March 2018, an occupational health report was produced by Teresa Harrison and emailed to Mr Dakin, copied to Ms Cunningham and Claire Glover. This was the report produced following the referral made by Mr Dakin on 13 March 2018.

115. The report says:

> "I assessed Mark in the OH department following your management referral, as you are aware he has concerns over possible future moves and the impact this will have on his childcare responsibilities. He advised me today that this is starting to impact on his health and wellbeing, by starting to affect his sleep and he is noticing an increase in his head and neck symptoms, which are residual from a previous health condition
>
> I would advise that his manager talks with him to establish what can be done in the meantime to make management aware of his current circumstances, so there is some understanding prior to any decisions being made".

116. The report concludes:

> "Please note that shift patterns are a managerial issue to be agreed and managed locally".

117. It is clear both that the claimant remained concerned about the possibility of being moved from his job on green Watch and that the occupational health recommendation was that the claimant's Line Manager discuss the issue with the claimant as the shift pattern is a managerial, rather than health, issue.

118. Mr Dakin did not discuss the report with the claimant. The claimant did ask Mr Dakin if he had the report and Mr Dakin said that he had and had forwarded it to the claimant. The email, which was only finally disclosed in the course of this hearing, is dated 29 March 2018 and timed at 08.24. The entirely of the email is "fyi mate".

119. Ms Cunningham was copied into the email from Occupational Health and did not either discuss the report with the claimant, which is not surprising, and nor did she contact Mr Dakin or Mr Rainey to see if they had followed up the report which is more surprising. By this time, Ms Cunningham ought to have realised that the claimant had some continuing issues which it seems likely would have come to her attention as a result of the SPOC removal issue.

120. Again, we observe that there is no evidence from Mr Dakin so we have no explanation why he did not consider it necessary to discuss the occupational health report with the claimant. However, the claimant's evidence in respect of the meeting on 8 April, to which we will come, is that at that meeting Mr Dakin confirmed that he had discussed the report with Mr Rainey.

121. The claimant's evidence was not contradicted by Mr Rainey and we find that Mr Dakin did talk to Mr Rainey about the occupational health report of 26 March 2018 but did not talk to the claimant about it.

122. In our view, the casual nature of the email and the lack of chasing up from Ms Cunningham reflects the approach of the respondent at the time to this issue. We think it likely that Mr Dakin either did not recognise the seriousness of the claimant's concerns or did not know how to respond. We think it more likely the latter which would explain his conversation with Mr Rainey about it. The grievance findings of Mr Diamond about the handling

of the claimant's occupational health reports is that it could have been dealt with better in a more sensitive manner. We agree. The occupational health reports clearly demonstrate that the claimant continued to be anxious about his perception of the continuing possibility of a move and Mr Dakin or Mr Rainey should have spoken to the claimant sooner about this to further allay his concerns.

123. However, we have heard no evidence which links this failing by Mr Dakin and Mr Rainey to anything connected with Wes, or their protected characteristics. In our view, it was handled badly either as a result of uncertainty, incompetence, oversight or neglect. We do not, however, find that it was a deliberate decision by either Mr Rainey or Mr Dakin and was not because of or related to Wes or their protected characteristics in any way.

124. We have not heard any evidence that Mr Dakin was aware of either the conversation on 2 August 2017 or Wes's sexual orientation or transgender status at all by this date. However, Mr Dakin and Mr Rainey were friends and clearly had discussions so it is possible that Mr Rainey had disclosed this information to Mr Dakin. However, this potential does not change our findings about the reason for the failure to discuss the OH report of 26 March 2018 with the claimant.

29 March 2018

125. On 29 March 2018, the claimant was reinstated as the SPOC for Wes. Ms Cunningham and Mr Rainey both said that the reason they reinstated the claimant as the SPOC for Wes was because of Wes's strong reaction to his removal. We accept their evidence on this and find that they were prepared to be flexible, despite their view of the policy, in providing support to Wes. Mr Rainey fairly agreed in evidence that had they consulted about the change in SPOC before removing the claimant, as they ought to have done, he would not have been removed in the first place.

2 April 2018

126. On 2 April 2018, having still not been able to speak to anyone about his occupational health reports and while on leave, the claimant emailed Mr Rainey (copying Mr Dakin) and asked for a meeting to discuss his occupational health reports and proposed some dates of 16 or 17 April on the night shift. The claimant says “These visits to Occupational Health were due to the stress and anxiety caused by you suggesting you were going to move me to white watch Fallings Park , 6 November 2017 and is ongoing”.

127. The claimant says “I am relieved that a move didn’t happen, however I am really upset and would like to understand the rationale behind the decision to move me originally. I would like some reassurance that going to be in the same position in the future, as the unknown hanging over me is causing me unnecessary stress”.

128. It concludes, “I would like to bring a colleague with me for support”.

8 April 2018

129. On 8 April 2018 on return from his leave, the claimant had not received a reply to this email so he spoke to Mr Dakin on shift to see if he had received the email. The claimant says in his witness statement, and we have heard nothing to contradict it, that Mr Dakin said “yes, and me and Andy have been talking about it”.

130. Mr Dakin emailed Mr Rainey suggesting the meeting proposed by the claimant and making himself available on 16 and 17 April. He reiterated that the claimant required some assurances about his future role.

9 April 2018

131. On 9 April 2018, the claimant replied to Mr Dakin confirming that he would welcome the meeting with him and Mr Rainey. That evening, Mr Rainey attended at the Fallings Park fire station and asked to see the claimant there and then. The claimant describes his attendance as unannounced and this caused him to feel stressed and anxious. He had said previously that he wanted a colleague with him and he felt unprepared and stressed

and anxious about going into a meeting with Mr Rainey in these circumstances. Mr Rainey confirms that he did not notify the claimant in advance of his intention to meet him then but said that he had just come back from leave and noted that the claimant had been asking for a meeting for weeks. He understood the purpose of the meeting to be providing reassurance about the claimant not being required to move and, specifically, that the claimant wanted confirmation of this in writing. In the event, the claimant did meet with Mr Rainey and he was able to be accompanied by another colleague Mr Paul Clark.

132. There is no clear evidence about what was discussed at that meeting. The claimant says in his witness statement that there was no discussion of his occupational health reports, Mr Rainey lied and said he had not made comments around the station about crew commanders being moved to facilitate fall responses and that Mr Dakin stood in the corner and did not offer assistance.

133. Mr Rainey does not offer any information about what was actually discussed in that meeting in his witness statement.

134. The claimant said in cross examination that Mr Rainey lied in the meeting in, as we understand it, two ways. Firstly that he reasserted that the claimant had said in the November meeting that he was “up for” a move which the claimant denied and secondly that he said he had not been making comments around the station when the claimant said he had, which we take to be a reference to comments about watch commanders potentially being required to move.

135. Our view of this meeting is that Mr Rainey attended in good faith to try to resolve matters quickly. It must have been apparent that the claimant was still upset about the possibility of moving and we think it was appropriate to try to offer further reassurances. We prefer Mr Rainey’s evidence about this. We conclude that the content of the meeting must have been a discussion about the exploratory proposal to move the claimant in November 2017 and this would necessarily have included a discussion of what was discussed then including what Mr Rainey believed the claimant to have said.

136. We agree that the meeting took place without notice. This was naïve on Mr Raney's part – the claimant had made it clear that he wanted to be accompanied and by this time Mr Rainey should have realised the importance in the claimant's mind of this ongoing issue, even though from Mr Rainey's perspective it was concluded. However, in our view the reason that no notice was given was because Mr Rainey wanted to resolve matters quickly. It was unconnected with Wes or their protected characteristics.

137. We do not believe it was a deliberate "ambush" and we do not believe that Mr Rainey accused the claimant of lying. As stated, we think it more likely that it was a discussion about what had and hadn't been said before.

138. We consider that the claimant was not being disingenuous in his evidence to the Tribunal. We accept his evidence about how he felt at that meeting.

139. However, again, we think it likely that the claimant's recollection of events and conversations was coloured by the significant emotional and psychological impact on him of his perception of how events had transpired.

140. We also note, however, that some of these issues would most likely have been avoided had Mr Dakin responded timeously and appropriately to the occupational health reports and it is not surprising that the claimant felt the need to seek feedback and reassurance from Mr Rainey, rather than his line manager.

10 April 2018

141. On 10 April 2018, Mr Rainey sent a meeting invitation to the claimant copied to Melissa Cunningham entitled flexible working request. The body of the invitation said "to discuss flexible working request on green watch shift pattern".

142. The claimant said in evidence that he did not know what the meeting was intended to be about. However, in his reply to that email the claimant says "hi Andy that's great thanks. I was going to ask a time as I didn't get that from you. It's good Melissa will be there as I haven't spoken to her. It will be good to talk so I can clear up she alluded to Sean I passed on information about another member of the watch."

143. It seems likely to us that the motivation for sending this invitation was in response to the conversations between Mr Rainey and the claimant on 9 April about the claimant's continuing concerns around potential moves. This is reasonably clear from the claimant's response to that email. It is wholly possible that an imaginative application of flexible working policy could be used to provide the reassurance that the claimant was seeking about his shift pattern.

144. Thereafter in the email chain the parties were trying to arrange diaries and there was a fairly significant delay in finalising the meeting.

22 and 26 April

145. The uncontested evidence of the claimant is that on 22 and 26 April the claimant visited or called Wes in his role as SPOC. On both occasions, the claimant said that Mr Dakin afterwards asked the claimant what was said.

146. The claimant did not provide any further information about the content or nature of the questioning. We conclude, on the balance of probabilities, that the reason for the enquiry was for the purposes of Mr Dakin's sickness absence management role under the respondent's absence management policy. Again, we recognise that the claimant felt this was inappropriate and said that he felt hounded and stressed – he refers to it being a busy day at work. However, we have not seen or heard any evidence to suggest that the questions asked by Mr Dakin actually were inappropriate or in any way linked to Wes or their protected characteristics.

1 and 2 May 2018

147. By 1 May 2018, the claimant was still trying to arrange a date for the meeting that was referred to as a flexible working arrangements meeting. The claimant was understandably feeling frustrated and on this date wrote to Mr Rainey and Ms Cunningham informing them that he had recently spoken to his counsellor who had confirmed that he was continuing to feel stressed and upset. He therefore requested a meeting with the Borough commander to progress matters.

148. It is relevant to note that on 30 April Mr Rainey had sought to arrange a meeting with the claimant on 16 May and had copied Ms Cunningham in to check her availability. On 2 May 2018 Ms Cunningham replied to that email. She recited the brief history of trying to arrange the meetings and the parties' respective unavailability. She said that "I am unable to attend on the morning of the 16th which you have arranged without considering either my diary or Andy's. I have a number of case conferences at occ health which have been in place now than a few months and cannot be cancelled". Ms Cunningham then says "the reason for my attendance was to discuss the various policies which might assist you in your manager with your current concerns of being moved from your current watch if falls response was to return to Fallings Park taking into consideration your personal requirements. If you still do not wish for a meeting to take place on the afternoon of 16th then please confirm and I will remove this from my diary in order to enable other meetings to take place".

149. The claimant criticises this email and says in the list of issues that it was highly inappropriate in its tone.

150. In cross-examination, the claimant's complaint really seemed to be that Ms Cunningham replied rather than his managers. He also seemed to be unhappy with the fact that the meeting arrangements were delayed by the requirement for Ms Cunningham to attend when the claimant considered that that was not necessary.

151. Having read the email and the chain in its entirety and heard evidence from the parties we can see nothing wrong at all with either the tone or content of that email. In our experience it is an innocuous email of the type commonly sent by HR professionals or other managers when trying to accommodate a number of people in a meeting request. We particularly refer to the fact that Ms Cunningham refers to the claimant's "personal requirements". Clearly this is a reference to the claimant's personal circumstances which caused his concerns about being required to move and it was wholly appropriate for Ms Cunningham to reference those.

152. We further find that the reason for sending this email was to seek to facilitate a meeting to help resolve the claimant's concerns. As far as we can ascertain this was intended to be for the claimant's benefit and was not in any way connected with Wes or their protected characteristics.

Grievances

153. On 2 May 2018 the claimant was signed off sick and on 4 May 2018 the claimant raised an informal grievance to Ben Diamond the group commander. There is no copy of either the grievance policy or that grievance in the bundle but the outcomes that the claimant required are listed in the amended notes of a meeting that was held between the claimant and Mr Diamond on 16 May 2018. The claimant lists 11 outcomes.

154. The claimant sets out the history effectively as we have discussed in this judgment. It is unnecessary to repeat it in detail here. It is clear from the notes of the meeting that the claimant continued to be concerned and anxious about the prospect of a move. The first outcome that the claimant required was written assurance that this would never happen again including assurance that his post at Fallings Park green Watch would be maintained.

155. It is also correct to note that in that meeting the claimant asserted that he felt he was being singled out because of his role as SPOC for another firefighter and particularly he said that he felt if Mr Dakin were the SPOC, it would breach confidentiality and provide information to Mr Rainey.

156. The evidence of Mr Diamond is that he thereafter made enquiries with the people that the claimant said were responsible for what he was aggrieved about. He said that he spoke with Mr Rainey and one of the claimant's watch managers although he said he cannot recall which one. There were no notes of any of these meetings in the bundle. It is difficult to understand why these notes were not provided as in our view they are likely to have given useful insight into interested parties' responses at the time. We do accept, however, Mr Diamond's evidence that he undertook these investigations. There is also no criticism of Mr Diamond in relation to this

failure to disclose the documents as by the time of this tribunal he was no longer employed by the respondent.

157. Before Mr Diamond was able to provide an outcome to the informal grievance, which we conclude is the first stage in the respondent's grievance policy, the claimant submitted a formal grievance.

158. The date of that grievance is unclear. The form itself is dated 6 June 2018, the claimant in his witness statement said he submitted it on 8 June 2018 and Mr Diamond says it was 11 June 2018. It may be that the claimant wrote it on 6 June 2018 did not submit it until 8 June 2018 and it found its way to Mr Diamond by 11 June 2018. It seems likely, however, that the claimant completed writing the formal grievance by 6 June 2018.

159. The claimant criticises Mr Diamond for not producing an outcome to the informal grievance. The meeting to discuss his informal grievance was held on 16 May 2018. Thereafter the notes were sent to the claimant, he amended them and sent them back. In our view this is likely to have taken the best part of a week so that in all likelihood Mr Diamond would not have had the claimant's amended notes until sometime after 20 May 2018. Mr Diamond was undertaking investigations and at the same time was investigating a separate grievance from Wes.

160. In our experience, a period of three weeks between the initial grievance meeting and the claimant's decision to submit a formal grievance was not an excessive amount of time for a manager to complete a grievance investigation. Particularly one as complex as the claimant's.

161. The claimant agreed with him that having put in a formal grievance it was appropriate to wrap the two grievances, namely the informal and formal ones, up together and provide only one outcome. We prefer Mr Diamond's evidence on this and find that the claimant did agree to this outcome. In our view this was a perfectly sensible and reasonable approach to take.

162. We therefore find, in respect of the informal grievance, that there was no separate outcome for the informal grievance but that was because it was reasonably and with the agreement of the claimant merged with the formal

grievance that was submitted on or around six or 8 June 2018. The decision by Mr Diamond not provide a separate outcome to the informal grievance was in no way whatsoever connected with Wes or any of their protected characteristics.

163. Having already met with the claimant and undertaken an investigation, Mr Diamond's evidence was that, again with the agreement of the claimant, he would use that information to provide formal outcome to the formal grievance. That formal outcome dated 28 June 2018 is set out at pages 166 to 171 of the bundle.

164. Mr Diamond sets out each of the claimant's desired outcomes and addresses each one of them.

165. It is not necessary to recite all of those required outcomes and Mr Diamond's responses. They speak for themselves. The claimant's complaint about this is that Mr Diamond did not address all the issues. In our view he did.

166. However, interpreting the claimant's complaints generously we consider whether Mr Diamond has *adequately or properly* responded to each of the claimant's point. Again, in our view, he did but it's worth addressing a couple of the particular points. In respect of point number five the claimant says that no feedback was provided about his several occupational health reports. We made findings about that and it is correct that this was not dealt with well. Mr Diamond says "I acknowledge that this could have been dealt with by managers in a more sensitive manner". In our view this response could have been more detailed and more comprehensive. However, it does address the point. For point 6 the claimant requires a written apology from Mr Rainey and Ms Cunningham for their inappropriate actions. Mr Diamond does deal with this and he says I do not believe that the behaviours of the Station Manager or the PSS business partner warrants a written apology. We recognise this is probably not the outcome the claimant wanted but that does not mean that Mr Diamond has not dealt with the allegation. At point 7 the claimant requires financial compensation and Mr Diamond's response is that it is not possible to resolve this to the grievance process. Again we

recognise this was probably not the outcome that the claimant wanted but it is a response. Further, in our experience, it is not an uncommon one and it would be unusual for a grievance outcome to include the payment of compensation. Points 10 and 11 require respectively discounting of the claimant's sickness and the reinstatement of annual leave. Mr Diamond's responses are that these are not appropriate to be dealt with under the grievance policy. Again, we accept this is unlikely to be the outcome that the claimant wanted but also again in our experience this is not an unusual outcome in the circumstances.

167. Having considered the notes of the grievance meeting, the evidence of Mr Diamond and the claimant and the outcome letter, in our view Mr Diamond did address all of the outcome points required by the claimant in his grievance and further we think that he sought to deal with them thoroughly and in good faith.

168. The claimant was unhappy with the grievance outcome and on 5 July 2018 he submitted an appeal. The claimant remained off sick at this point and was unable to attend the appeal hearing so was represented by his union representative Leanne Byrne.

169. The appeal was heard by Mr Hamilton-Russell, a senior officer for the respondent, and he sent his outcome letter on 1 August 2018 to the claimant. Again, Mr Hamilton Russel sets out the claimant's complaints and addresses each one. In a literal sense, therefore, Mr Hamilton Russell clearly does address all of the claimant's complaints. But having reviewed the outcome letter we consider it more likely than not that Mr Hamilton Russell did genuinely seek to deal with the claimant's grievances in good faith and address each of his issues.

170. In his witness statement, the claimant complains that things that were discussed at the hearing never materialised. The only specific default he refers to is a failure to implement a development plan for Mr Dakin. It is clear in the transcript of the appeal meeting that Mr Diamond does refer to proposed development activities for both Mr Rainey and Mr Dakin. In the grievance outcome Mr Hamilton Russell agrees that the occupational health

report should have been followed up and they weren't. He says that he will be asking Mr Diamond to follow this up with the appropriate action. To this extent, therefore, Mr Hamilton Russell did address the claimant's complaint about his occupational health report and thereafter took steps to improve things.

171. If this did not happen, we have heard no evidence as to why but, on the balance of probabilities, we think it extremely unlikely that any such failure was in any way connected with Wes or their protected characteristics.

172. We note further, that in the course of the appeal hearing Mr Diamond recognised the failings of Mr Rainey and Mr Dakin in the way in which they had dealt with the claimant's ongoing issues. He concluded, however, that the failings were as a result of Mr Rainey's poor leadership and behaviours which were pre-existing. Having heard the evidence and set out our findings above we are inclined to agree that any faults by Mr Rainey in the way in which he handled the claimant's issues were as a result of his management approach generally rather than connected in any way with the incident of 2 August 2017 or the claimant's subsequent support for Wes.

General matters

173. Finally, we consider some other general evidential matters that do not fit neatly into the chronology. Particularly we were asked to find Mr Rainey's evidence to be lacking in credibility. This was predominantly on the basis that he agreed that his witness statement was inaccurate in a number of material respects.

174. We found that the evidence of both Mr Rainey and the claimant was at times unhelpful and it was difficult to know what weight to attach to their evidence. This is for different reasons. We recognise that Mr Rainey's witness statement did appear to contradict contemporaneous evidence and what he subsequently said in oral evidence. We do not necessarily consider that this was because Mr Rainey was being deliberately disingenuous. These events happened between three and four years ago and we think it likely that they played a much larger part in the claimant's life than they did in Mr Rainey's. In our view Mr Rainey may well at times have avoided

answering questions by referring to his lack of recollection but we think it more likely that any inconsistencies or poor recollection reflect both the passage of time and his lack of preparedness for this hearing rather than any deliberate attempt to mislead the tribunal.

175. In respect of the claimant, as we have already referred to, we are of the view that the claimant's evidence while honestly given was coloured by his psychological and emotional reaction to the events as he perceived them at the time. It appears to us that once the claimant considered that the mooted changes in shift arrangements might impact adversely on a particularly difficult area of his life this caused him a very substantial level of anxiety. It is clear from the expressive and emotional language that the claimant uses in his witness statement and used in oral evidence that he was for a very long period extremely concerned about this. All of the claimant's recollections of the events are therefore seen through the filter of this anxiety and we think it likely that this has impacted on the reliability of the evidence of incidents that the claimant is able to give.

Law

Harassment

176. S 26 Equality Act 2010 says, as far as is relevant,

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(c) the perception of B;

(d) the other circumstances of the case;

(e) whether it is reasonable for the conduct to have that effect.

177. Subsection 5 lists the relevant protected characteristics, and they include sexual orientation and gender reassignment.

178. In *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, the EAT analysed this provision. There are a number of elements to this provision

1. The unwanted conduct. Did the respondent engage in unwanted conduct? This is a subjective test

2. The purpose or effect of that conduct: Did the conduct in question either:

(a) have the purpose or

(b) have the effect

of either

(i) violating the claimant's dignity or

(ii) creating an adverse environment for her 2 ? (We will refer to (i) and (ii) as 'the proscribed consequences'.)

3 The grounds for the conduct. Was that conduct on the grounds of the sexual orientation or gender reassignment. (it does not need to relate to the claimant's protected characteristic – section 26 refers to the conduct being related to *a* relevant protected characteristic)

179. We were also referred to *Bakkali v Greater Manchester Buses* [2018] IRLR 906 EAT in which it was confirmed that "related to" is wider than "because of". This requires a more intense focus on the context of the offending words or behaviour.

180. If the conduct had the effect of violating the claimant's conduct or creating an adverse environment, was it reasonable for the claimant to have felt that way. It is clear from subsection 4 that all the circumstances must be considered. In *Richmond Pharmacology*, it was said that

"…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if [he] did genuinely feel [his] dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt [his] dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt".

Victimisation

181. The claimant's other claim is for victimisation. Section 27 Equality Act says, as far as relevant,

> (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.

Protected act

182. The claimant relies on subsections (2)(c) and (d) as the basis for his protected acts.

183. We agree with Mr Starcevic that the words in subsection 2 (c) should be given a wide meeting. We referred to the case of *Aziz v Trinity Street Taxis* [1988] IRLR 204 which dealt with the predecessor legislation. In that case it was held that *"An act can, in our judgment, properly be said to be done 'by reference to the Act' if it is done by reference to the race relations legislation in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act".* Although the phrase in the Equality Act is "for the purposes of or in connection with", in our view this tends to suggest a wider, rather than narrower, interpretation of acts as protected acts.

184. In *Beneviste v Kingston university* EAT 0393/05 the EAT held that, to be a protected act under (2)(d) – contravention of the Act, it must be that if the allegations were proved, the act would be a contravention of the legislation. It is not necessary to specify what part of the Equality Act would be breached but there must be facts asserted that would, if proved, amount to a breach.

Detriment

185. In *MOD v Jeremiah* [1979] IRLR 436 the court of appeal held that a detriment exists if a reasonable worker would take the view that the treatment was to his detriment. In many cases it is obvious. In *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, it was held that it is not necessary to demonstrate some physical or economic consequence for something to amount to a detriment but Lord Nicholls said : "*while an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute 'detriment', a justified and reasonable sense of grievance about the decision may well do so"*.

Burden of proof/causation

186. Section 136 Equality Act 2010 provides

187. Section 136 provides

> (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.

188. We refer to the case of *Igen Ltd v Wong* [2005] IRLR 258. That case says that the tribunal must consider all the evidence before us to determine whether the claimant has proved facts from which we could conclude that the respondent has committed the discriminatory acts complained of. We are entitled at that stage to take account of all the evidence but must initially disregard the respondent's explanation.

189. In *Bahl v Law Society* [2004] IRLR 799 CA the court of appeal restated the principle that it is not sufficient to infer discriminatory treatment solely from unreasonable treatment. There must be some evidence that the unfavourable treatment was for a discriminatory reason.

190. If we are satisfied that the claimant has proven such facts, it is then for the respondent to prove that the treatment suffered by the claimant was in no sense whatsoever on the grounds of the relevant protected characteristics or protected act.

191. This means that the reason for the detriment, if any, must be the reason why the decision to subject the claimant to any detriments was made. If the claimant can show facts from which we could conclude that the protected act was the reason for the detriment, it will be for the respondent to show

that in fact the detriment was in no way because of the protected act. It is not enough to show a detriment and a protected act, there must be at least something which connects the two. However, if the claimant shows that something, the burden of proof will be reversed.

Time

192. In respect of the time for bringing the claims, s 123 (1) EQA provides that

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.

193. Subsections (3) and (4) say

(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.

Conclusions

Protected acts

194. The incident of 2 August 2017 was a protected act under s 27(2)(c). We have not heard anything that amounts to an allegation under subsection (2)(d) but we think it likely that the reason that the claimant did not agree to question Wes and why he referred to it as being inappropriate was because he was aware on some level that asking such a question would amount to harassment under the Equality Act. This is because the claimant was aware of Wes's transgender status and sexual orientation and recognised o believed that they were protected characteristics under the Equality Act. The claimant said in cross examination that he knew for a fact that if he had asked that question he would be out of a job. In our view, the claimant's refusal to question the claimant, to communicate that refusal to Mr Rainey and Mr Gill and to inform Wes was for the purposes of avoiding harassing the claimant or discriminating against them. This is sufficient to pass the test in *Aziz* in that it was clearly, in our judgment, done by reference to the Equality Act. Applying the direct words of the statute, it was in our judgment certainly *in connection with* the Equality Act.

195. The second pleaded alleged protected act is harder to pin down. Mr Zaman said that is was a continuing act comprising of the support given to Wes at the time.

196. In the list of issues, the second alleged protected act is recorded as "supporting WV while absent and during the grievance". We heard no evidence about any particular support that the claimant gave to Wes during the grievance.

197. The only particular support that we can identify from the evidence is the claimant's continuing to act as SPOC for Wes and his insistence that he do so. The claimant was clear that the reason he wanted to act as SPOC rather than allowing Mr Dakin or Mr Rainey to do so was to protect Wes's privacy. In our view, for the same reasons as in respect of protected act 1, (namely for the purposes of preventing Wes from being subject to discrimination in respect of their protected characteristics of sexual

orientation and gender reassignment) this activity by the claimant amounts to a protected act.

198. The claimant started acting as SPOC for Wes from his return from leave at the beginning of February 2018. We find therefore that from the beginning of February 2018 until at least 26 April 2018 (when the claimant gave evidence that he undertook a SPOC visit) the claimant continued to do a further protected act under section 27 (2) (c).

Detriments/harassment

199. The alleged acts set out in the table of detriments are said to amount to both harassment and detriments for the purposes of the claimant's victimisation claim.

200. We therefore deal with each allegation in respect of both claims. We have considered the burden of proof provisions in respect of each allegation but it is clear from our findings that we have identified reasons for acts where such acts have been found to have occurred. It is not necessary therefore to explore the reversal of the burden of proof separately in respect of each allegation.

201. Allegation 1 on 6 November 2017 Andy Rainey suggested a move to white watch with no explanation.

202. Our findings are that the reason for Mr Rainey suggesting that the claimant transfer to white watch was because he had a genuine wish to rebalance the experience of the crew commanders across the watches. The conversation was over very briefly so it is possible that any explanation Mr Rainey gave was brief. However, the reason was unrelated to either of the two protected acts for the reasons that we have set out previously.

203. In respect of harassment, it was not related to a protected characteristic. We accept that the claimant was distressed by this conversation and this may have amounted to a hostile environment for the claimant in the circumstances. However, considering it objectively we do not think that it was reasonable for it to do so and in any event it was unrelated to a protected characteristic.

204. For these reasons we find that this incident did not amount to victimisation or harassment under either section 27 or 26 of the Equality Act respectively.

205. Allegation 2: on 1 December 2017 no one discussed the occupational health report with the claimant. This refers to Mr Dakin, Mr Rainey, Ms Cunningham, Claire Glover and Lorna Muir.

206. We have found that Mr Lovell did discuss the report with the claimant. None of the other named people did. In respect of the three HR officers the reason for this was because they did not consider that it was their role to do so. In respect of Mr Rainey, the reason for this was that he considered it to be Mr Dakin's role. We have found that the reason Mr Dakin did not discuss occupational health report was because of either his neglect or lack of awareness.

207. We are prepared to accept that this failure was both detrimental and potentially for similar reasons to the first allegation could amount to a hostile environment for the claimant in that he genuinely perceived that he was being ignored. However, given that he had already discussed the OH report with the referring officer, Mr Lovell, we do not think it was reasonable for him to have such an extreme reaction. In any event, the failure to discuss the occupational health report was not connected in any way with either of the protected acts or the protected characteristics of Wes.

208. For these reasons we find that this incident did not amount to victimisation or harassment under either section 27 or 26 of the Equality Act respectively.

209. Allegation 3: that the claimant was grilled for information as to what was said by Wes in the claimant's role of SPOC on 26th February 2018 by Mr Rainey and Mr Dakin.

210. Our findings are that this act did not amount to either a detriment or harassment. It was a normal management activity whereby Mr Dakin and Mr Rainey were making enquiries for the purposes of the absence management procedure. It could not reasonably have caused an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

211. In any event the actions of Mr Dakin and Mr Rainey were in no way connected with either protected act or any protected characteristics of Wes.

212. For these reasons we find that this incident did not amount to victimisation or harassment under either section 27 or 26 of the equality act respectively.

213. Allegation 4: Andy Rainey and Melissa Cunningham removing the claimant as Wes's SPOC on 13 March 2018. We have found that the reason for this decision was solely based on Ms Cunningham's understanding of the policy or practice at the time and Mr Rainey followed Ms Cunningham's advice. We accept that this is capable of amounting to a detriment because the claimant had a sense of grievance about this and that sense of grievance was not wholly unjustified. We do not consider that it could reasonably have been said to have created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We understand that the claimant was upset by this hence the finding that it could amount to a detriment but for harassment he needs to go further than this.

214. However, in any event, we found that this decision was in no way connected with either protected act or any protected characteristic of Wes.

215. For these reasons we find that this incident did not amount to victimisation or harassment under either section 27 or 26 of the Equality Act respectively.

216. Allegation 5: on 13 March 2018 Andy Rainey asserting that the reason for removing the claimant as Wes's SPOC was because the claimant had refused the position.

217. Our finding is that on the balance of probabilities Mr Rainey did not say this.

218. For these reasons we find that this incident did not amount to victimisation or harassment under either section 27 or 26 of the Equality Act respectively.

219. Allegation 6: on 17 March 2018 Andy Rainey and Sean Dakin grilled the claimant for information as to what was said by Wes to the claimant in his role of SPOC.

220. Our finding is that on the balance of probabilities this incident did not happen as pleaded by the claimant.

221. For these reasons we find that this incident did not amount to victimisation or harassment under either section 27 or 26 of the Equality Act respectively.

222. Allegation 7: on 26 March 2018 Sean Dakin, Melissa Cunningham and Claire Glover failed to acknowledge or discuss the claimant's occupational health report.

223. In our judgement this did amount to a detriment to the claimant. The occupational health report was clear that the matters should be discussed with the claimant and they were not. We also consider that this inaction by Mr Dakin was capable of creating a hostile environment for the claimant. The claimant was clearly by this point upset and distressed by the consistent failure by his managers to discuss his occupational health report with him. Both subjectively and objectively viewed this amounted to the creation of a hostile working environment for the claimant in circumstances where he clearly perceived his managers to be not taking his concerns seriously.

224. However, the reason that Mr Dakin did not discuss this was because of his previously referenced inadequacies as a manager. These problems were also identified by Mr Diamond in the grievance process.

225. We agree that the claimant was treated poorly at this stage and there was no excuse for it. However this poor treatment was unconnected with either of the protected acts or Wes's protected characteristics.

226. For these reasons we find that this incident did not amount to victimisation or harassment under either section 27 or 26 of the Equality Act respectively.

227. Allegation 8: on 9 April 2018 the claimant was invited to attend a meeting without notice by Andy Rainey.

228. We have found that Mr Rainey did attend at fallings Park fire station on 9 April 2018 to meet with the claimant without notice. This was in the context of the claimant specifically having asked to be able to bring a representative

with him. Considering the whole context of the situation, including that the claimant had been trying for some months to have a discussion about occupational health reports, we find that this did amount to a detriment. Similarly we consider that it subjectively and objectively created a hostile environment for the claimant again in the context of him perceiving his managers as being ambivalent about his problems.

229. However, we have found that the reason that Mr Rainey attended in that way and in the circumstances that he did was out of a genuine wish to seek to resolve things quickly. Consequently, this decision was not in any way connected with either of the protected acts or Wes's protected characteristics.

230. For these reasons we find that this incident did not amount to victimisation or harassment under either section 27 or 26 of the Equality Act respectively.

231. Allegation 9: on the same date 9 April 2018 at that meeting the claimant was accused of lying by Mr Rainey.

232. We have found that on the balance of probabilities Mr Rainey did not accuse the claimant of lying.

233. For these reasons we find that this incident did not amount Victimisation or harassment under either section 27 or 26 of the Equality Act respectively.

234. Allegations 10 and 11: On 22 April and 26 April 2018 the claimant was questioned as to what was discussed between him and Wes.

235. Our findings are that this act did not amount to either a detriment or harassment. It was a normal management activity whereby Mr Dakin was making enquiries for the purposes of the absence management procedure. It could not reasonably have caused an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

236. In any event the decisions of Mr Dakin and Mr Rainey to question the claimant were in no way connected with either protected act or any protected characteristics of Wes.

237. For these reasons we find that these incidents did not amount to victimisation or harassment under either section 27 or 26 of the Equality Act respectively.

238. Allegation 12: Melissa Cunningham's email response on 2 May 2018 was inappropriate in tone.

239. We have found that Ms Cunningham's email was not to any extent inappropriate in tone.

240. For these reasons we find that this incident did not amount to a victimisation or harassment under either section 27 or 26 of the Equality Act respectively.

241. Allegation 13: Mr Diamond did not provide an outcome to the claimant's informal grievance

242. Our findings are that the reason Mr Diamond did not provide an outcome to the claimant's informal grievance was because the claimant agreed that he would receive an outcome to his formal grievance instead.

243. For these reasons we find that this incident did not amount to victimisation or harassment under either section 27 or 26 of the Equality Act respectively.

244. Allegation 14: That the outcome to the claimant's formal grievance by both Mr Diamond and Mr Hamilton Russell failed to address all the issues.

245. We have found that Mr Diamond did address all the issues in the claimant's grievance. Consequently, all the issues were addressed at the formal stage. We have also found that Mr Hamilton Russell also addressed all issues at the appeal stage. To the extent that the outcomes were not implemented, we have found that this was not in any way connected with either protected act or and protected characteristic of Wes.

246. For these reasons we find that these allegations did not amount to victimisation or harassment under either section 27 or 26 of the Equality Act respectively.

247. For these reasons, the claimant's claims of victimisation and harassment are dismissed.

Time

248. We deal briefly with the time point.

249. In our judgment, the acts complained of are evidently part of a continuing course of conduct. Although we have found they do not amount to victimisation or harassment, it is clear that they comprise a continuation of issues arising from the conversation on 6 November 2017. To that extent, and as the last act complained of is in time, the tribunal has jurisdiction to consider the whole of the claimant's claim.

Employment Judge Miller

30 July 2021

List of issues

In the Employment Tribunal **Case no: 1303808/2018**

(West Midlands)

Between

Mr Mark Charles

Claimant

-v-

West Midlands Fire Service

Respondent

C's List of Issues - draft

The Complaints

- Discrimination claims (sexual orientation / disability):
  - Victimisation
  - Harassment
  - Direct Discrimination

1. **Victimisation (sexual orientation / disability) - pursuant to section 27 of the Equality Act 2010**

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

   1.2 Did C do a protected act, including:

   1.2.1 in about August 2017, when C refused to ask a colleague about his protected characteristic (sexual orientation) due to being a contravention of the EqA 2010;

   1.2.2 when C gave evidence / information to his colleague about a breach of his personal sensitive data (sexual orientation) and the contravention of the EqA 2010;

   1.2.3 when C supported his colleague's grievance about the breach of his personal sensitive data (sexual orientation) and the contravention of the EqA 2010;

   1.2.4 on or about 2nd April 2018, when C asserted that his medical condition(s) were covered by the EqA 2010 (disability), and that it

would be detrimental to his health / well-being if R moved C to another watch / shift pattern in contravention of the EqA 2010;

1.3 Did R subject C to a detriment when:

1.3.1 in about November 2017, R suggested / proposed to C that he be moved to another watch / shift pattern;

1.3.2 in about November - December 2017, R failed to discuss the Occupational Health report / advice with C, and R proceeded to suggest falsely that it had done so;

1.3.3 from around 26th February 2018 onwards, in R continually 'grilling' C for confidential information about a colleague;

1.3.4 on or around 13th March 2018 in R removing C as a Special Point of Contact (SPOC), and R subsequently stating that the reasons was because C had refused;

1.3.5 on or around 9th April 2018 in R holding a meeting with C without notice at which time C was 'ambushed' by R and accused C of 'lying', and in R ignoring the Occupational Health report / advice;

1.3.6 on or around 22nd and 26th April 2018, in R further 'grilling' C for confidential information about a colleague;

1.3.7 on or around 2nd May 2018, in R responding inappropriately to the issues raised by C;

1.3.8 from about 16th May 2018, in R failing to provide a substantive response / outcome to the issues raised by C in his informal / formal grievances.

2. Harassment (sexual orientation / disability) - pursuant to section 26 (1) of the Equality Act 2010

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

2.2 Did R carry out the acts alleged (as outlined in paragraph 1.3 above);

2.3 Did R engage in unwanted conduct related to a relevant protected characteristic by carrying out such acts;

2.4 If so, did that conduct have the purpose of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or otherwise offensive environment for him;

2.5. Did it have that effect considering:

2.5.1 C's perception;

2.5.2 the other circumstances of the case; and

2.5.3 whether it was reasonable for the conduct to have that effect on C.

2.6 Has C proved facts from which the Tribunal could properly and fairly conclude that the unwanted conduct related to a protected characteristic.

2.7 If so what is R's explanation, has R proved a non-discriminatory reason for the acts.

3. Direct discrimination because of sexual orientation / disability - pursuant to section 13 Equality Act 2010

3.1 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.

3.2 Did R carry out the acts alleged (as outlined in paragraph 1.3 above);

3.3 Did R carry out the alleged acts because of a protected characteristic;

3.4 If so, did R treat C less favourably than R treats or would treat others because of a protected characteristic.

3.5 C relies on a hypothetical comparator:

3.5.1 another employee in the same role as C with R and/or fulfilling such duties, who was asked a question which was not related to a colleague's sexual orientation, who was not disabled.

3.6 Has C proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of a protected characteristic;

3.7 If so what is R's explanation, does it prove a non-discriminatory reason for any proven treatment.

4 **ACAS Code**

4.1 Did R unreasonably fail to comply with the ACAS Code:

4.1.1 by unreasonably delaying in progressing C's grievance;

4.1.2 by failing to carry out the necessary investigations and failing to establish the facts;

4.1.3 by unreasonably delaying in coming to a decision in relation to C's grievance, and providing confirmation of such a decision to C in writing.

5 Remedy

5.1 Is C entitled to an award (including financial / non-financial loss), and if so to what value (including interest):

5.1.1 Financial loss;

5.1.2 Injury to feelings.

5.2 Should any adjustments be made for a failure to follow the ACAS Code.