EMPLOYMENT TRIBUNALS

Claimant:	**Mr M. Headley**
Respondent:	**London Fire and Emergency Planning Authority**
Heard at:	**East London Hearing Centre**
On:	**29-30 June, 1-2 and 6 July 2021, and 7 July 2021 (in chambers)**
Before:	**Employment Judge Massarella**
Members:	**Mrs B. Saund Mr T. Burrows**

Representation
Claimant: Mr D. Panton (Solicitor)
Respondent: Ms S. King (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the claims of victimisation in relation to Issues 11(b) and (c) succeed;**

2. **the Claimant's claims of direct race discrimination in relation to Issue 1(a)(iii) and victimisation in relation to Issue 5(a)(iii) are dismissed, the Claimant having not paid the deposit ordered as a condition of his pursuing them;**

3. **all other claims of victimisation are not well-founded and are dismissed;**

4. **all other claims of direct race discrimination are not well-founded and are dismissed.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it

Procedural history

1. The Claimant brought three cases:

   1.1. Case No. 3201597/2017 was presented on 24 November 2017, after an ACAS early conciliation period between 11 and 26 October 2017 ('Case 1').

   1.2. Case No. 3200756/2018 was presented on 9 April 2018, after an ACAS early conciliation period between 26 February and 13 March 2018 ('Case 2').

   1.3. Case No. 3200312/2019 was presented on 6 February 2019, after an ACAS early conciliation period between 31 December 2018 and 15 January 2019 ('Case 3').

2. Cases 1 and 2 were brought while the Claimant was still in the Respondent's employment. Case 3 was brought after the employment was terminated and contains a claim of unfair dismissal. The first two claims were consolidated in May 2018, the third in May 2019.

3. The first hearing, listed to be heard in January/February 2019, was postponed because the Claimant was unwell and because he intended to issue a third claim. The second hearing, which was listed in April/May 2021, was postponed because of the Covid-19 pandemic.

4. A deposit order was made by EJ Moor at a hearing on 27 March 2018 in respect of one factual allegation, pursued as both direct race discrimination and victimisation. At the same hearing, the Judge refused the Respondent's application for a strike-out of these and other claims.

5. Although this hearing was originally listed to deal with all three cases, the Respondent's main witness in Case 3 (Ms Philpott, who took the decision to dismiss) was unable to attend because of illness. EJ Jones ordered that Case 3 be heard separately. She considered it vital that Cases 1 and 2 proceed, given that they relate to events in 2017/2018. Case 3 will be heard over three days in November 2021.

The hearing

6. We had an agreed bundle running to some 1250 pages. We heard evidence from:

   6.1. the Claimant;

   for the Respondent, we heard from:

   6.2. Mr Rhys Powell (Group Manager at the time; Deputy Assistant Commissioner since July 2017);

   6.3. Mr Wayne Brown (Deputy Assistant Commissioner for Operational Policy at the London Fire Brigade headquarters);

   6.4. Mr Nicol McCallum (Station Manager);

   6.5. Mr Jamie Jenkins (Group Manager, Borough Commander for the Waltham Forest Borough at the material time);

6.6. Ms Catherine Gibbs (Senior HR Adviser (Discipline & Grievance) at the time); and Mr James Sivell (Information Access Manager at the time).

7. We also had a statement from Mr Allen Perez (Deputy Assistant Commissioner for the North-east London area). He could not attend the hearing for health reasons.

8. We had helpful written submissions from both advocates, which they supplemented orally. We do not summarise them in what is already a long judgment; we are grateful to them both for their assistance.

Findings of fact

9. The Claimant successfully completed his training as a fire officer in August 1989. He spent twelve years at Westminster Fire Station on Red Watch. He was the first Black fireman on this watch. The Claimant's evidence was that, while at Westminster, he was present at (but not the target of) two incidents of racism.

10. He transferred to Leyton fire station, where he remained for seven years and was promoted to Crew Manager ('CM'). He also completed the training which enabled him to act up as a temporary Watch Manager ('WM') at any fire station. Because of this additional qualification, his rank was referred to as 'CM+', the additional duties as the 'plus role'. It attracted an additional payment of £1000 per annum.

11. The Claimant moved to Bethnal Green in 2006, where he spent eight years. In 2016 he moved to Walthamstow, as Crew Manager, where he had hoped to finish his career in April 2019. The Claimant reported to SM McCallum, who reported to Group Manager ('GM') Jenkins.

12. By 2016, the Claimant no longer wanted to carry out the plus role and he asked to be relieved of it, partly because he disliked not knowing from one day to the next which station he would be sent to. The Respondent refused because they lacked the resources to replace him. At the grievance meeting on 1 June 2017, the Claimant's trade union representative renewed the request.

<u>SM Cook's complaint on 13 April 2017</u>

13. The trigger for Cases 1 and 2 was an incident on 13 April 2017. On that day the Claimant was assigned to Bethnal Green station to stand in for a WM who was on annual leave. One function of a WM is to organise fire exercises, to give officers the opportunity to practice skills and techniques, including assessing situations and searching and finding. A four-pump fire drill (a training exercise, when four fire engines, or appliances, are present), was scheduled to take place at Royal Mint Court in East London. The Claimant was assigned as officer in charge ('OIC') of the drill.

14. During that exercise, there was an altercation between the Claimant and SM Shane Cook, who was observing the drill. SM Cook was senior to the Claimant. Each alleged that the other had behaved in an aggressive and confrontational manner. We record at this point that SM Cook is of dual heritage (White British/Indian).

15. Later the same day SM Cook complained about the Claimant's behaviour to the Borough Commander (who was also the Claimant's Station Manager), GM Jenkins. SM Cook's account of the incident was as follows.

16. He noticed that the Claimant was wearing a Fire Brigades Union (FBU) badge on his tunic. He took him aside and asked him to remove it because it was not part of his uniform. The Claimant removed it but asked why firefighters were allowed to wear Union Jack badges. SM Cook asked him to point out anyone who was wearing a Union Jack badge, which the Claimant declined to do. SM Cook asked the Claimant why he had ordered firefighters to set up the dry riser before the drill and observed that this should not be done until the drill started. The Claimant's response (which SM Cook could not recall) caused SM Cook to take him aside and ask him whether he had a problem with what he was saying. According to SM Cook, the Claimant told him in a confrontational manner that he had been 'stitched up' by being put in charge of the exercise. SM Cook then asked the Claimant why he had taken the CM+ role, knowing that he could be in charge of exercises. The Claimant replied: 'who did I think I was, the Commissioner?' The Claimant then walked away from SM Cook, saying that he had a headache and was going to sit on the appliance for ten minutes. SM Cook told him that if he was unwell, he would place him on sick leave. The Claimant objected. SM Cook told him that he was not going to delay the drill for ten minutes to see if the Claimant would be able to take part. SM Cook twice asked the Claimant what station he was from, but the Claimant refused to tell him and walked away from him. SM Cook asked SM Coleman to take the Claimant back to Bethnal Green, so that he could go home. They went to find the Claimant. SM Cook asked the Claimant whether he still felt unwell, but he refused to answer any questions from him unless he had a witness. The Claimant then told SM Coleman that SM Cook could not place him on sick leave; SM Coleman told the Claimant that was wrong.

17. SM Cook wrote as follows:[1]

> 'I felt Marcus was being very confrontational, disrespectful and aggressive throughout our conversation. I have concerns that Marcus felt he was being stitched up by taking command of this exercise. Being a T/WM [in] this exercise could have greatly help[ed] Marcus take charge of a high-rise incident. I feel that further development is required for Marcus to undertake the role of CM. In light of his actions today I have several concerns over today['s] incident the main one being his refusal to answer questions from the senior officer.'

18. On 13 April 2017, CM Norris, who was also present at the drill, provided a written account of the incident. According to CM Norris, the Claimant felt uncomfortable being OIC of the drill, because it had been over a year since he had been in charge at fire. The Claimant asked him to take over some of the tasks, which he agreed to do. CM Norris then went up to the fourth floor of the building, so he did not observe the altercation between the Claimant and SM Cook. When he came down, SM Cook told him that the Claimant was sitting on an appliance, complaining of a headache. SM Cook asked him to appoint a new OIC, which

[1] minor amendments for sense shown in square brackets, otherwise original spelling/grammar retained in all extracts from contemporaneous documents

he did. The drill then began. CM Norris later (on 30 April 2017) forwarded his statement to SM McCallum, along with that of Firefighter ('FF') Holmes.

19. SM Cook's complaint was forwarded to Deputy Assistant Commissioner (DAC) Perez on 14 April 2017, who authorised a local management investigation (LMI) into the incident. GM Jenkins instructed SM McCallum and SM Digby to carry it out.

20. The Respondent's policy 'Local Management Investigation - Guidance for Managers' provides that the primary purpose of an LMI is to gather information, in order to decide what, if any, further management action is required. Under that policy individuals are not entitled to representation at the LMI stage. If, on review, it is considered that action at Stage 1 of the disciplinary procedure is appropriate, the matter is referred back to local management. If there is the possibility of action at Stages 2 or 3 of the disciplinary procedure, the matter is referred to the Authority Discipline Manager, at which point a formal disciplinary investigation is undertaken by an HR adviser.

21. We find that, once SM Cook had made what was, on its face, a complaint about the Claimant which raised significant concerns, it was inevitable that an investigation of some sort would take place.

22. On 14 April 2017 the Claimant became aware that he had been relieved of his CM+ duties. That decision was taken at the request of SM Cook; it was authorised by GM Jenkins.

23. The Claimant contacted colleagues, who were present at the drill, and who he thought may have witnessed the incident, to ask them to provide supporting statements but he received no responses. He did not tell his managers that he was doing this.

24. On 15 April 2017, FF Holmes gave his account of the Claimant's conduct, which included the following:

> 'As the drill was beginning, SM Cook approached a group of us which included CM Headley, FF Beecham and CM Bass. SM Cook asked why we were getting the dry riser ready before the drill had officially commenced and he suggested to CM Headley that the drill should run as if it were a real incident in real time rather than getting things prepared first. CM Headley did not answer SM Cook and after SM Cook asked for a response several times, CM Headley walked away and was then followed by SM Cook. The conversation that then followed between the two individuals was away from myself and I did not hear what was said.'

<u>The meeting of 20 April 2017</u>

25. The Claimant was interviewed on 20 April 2017 by SM Digby about the events of 13 April 2017. SM McCallum attended as notetaker.

26. The Claimant said that he was given no forewarning of the meeting. There was no requirement for forewarning: there is nothing unusual in an employer seeking to elicit an unguarded account of events from an employee, about whom concerns have been raised, nor is there an entitlement to representation at a preliminary investigation meeting.

27. The Claimant also said that he was told that there were two purposes to the meeting: fact-finding and welfare. He said that it was only when he was required to sign the statement that he noticed that the document referred to a management investigation. We do not accept that evidence. The notes record SM Digby explaining to the Claimant at the beginning of the meeting that it was part of a management investigation, following a complaint made by SM Cook; the purpose was to ask him questions in order to determine whether a formal investigation was required. The notes record the Claimant being asked whether he understood SM Digby's explanation of the interview (he answered 'Yes I do') and whether he had any questions before SM Digby proceeded (he answered 'No'). The Claimant made some handwritten amendments before countersigning the notes; he did not amend the record of what he was told the beginning of the hearing. We are satisfied that it is an accurate record.

28. At the interview, the Claimant agreed that he was wearing a FBU badge, and that he was aware of the policy regarding the wearing of badges on uniforms. He did not recall being asked by SM Cook what station he was from but insisted that he had answered all the questions SM Cook asked him, including questions about his well-being. Later in the process (para 48 below), and indeed in his evidence to the Tribunal (paras 54-59), the Claimant accepted that he walked away from SM Cook, and that he refused to answer some of his questions. That is also consistent with the evidence of SM Coleman (para 39). In that respect his answers at the initial interview were not truthful.

29. In response to the suggestion that he had been disrespectful and aggressive towards SM Cook, the Claimant asserted that SM Cook had been aggressive and confrontational towards him. This was the first time the Claimant raised SM Cook's behaviour towards him with senior officers. He said that SM Cook had said to him: 'if you don't like the rank, then jack it in'. He denied ignoring or walking away from SM Cook at any point. He said that he had turned away and asked if they could talk privately. According to the Claimant's account at this meeting, SM Cook then told him not to turn away and threatened him, saying: 'turn away again and see what happens'. He said that he was shocked by how he had been spoken to by SM Cook.

<u>The Claimant's first grievance</u>

30. On 24 April 2017, the Claimant lodged a formal grievance, which he sent to DAC Allen Perez. In it he alleged that SM Cook had displayed 'aggressive and bullying conduct', and that this conduct was 'because of my race (Black) and therefore constituted unlawful discrimination in accordance with the provisions of s.13 and s.26 EQA 2010'. He did not explain why he thought that race was a factor at this stage.

31. Because he received an out-of-office reply, he forwarded the email to DAC Perez's line manager, Assistant Commissioner ('AC') George. He also copied in Commissioner Cotton, the HR advisor and the Respondent's equality team. He explained that he wanted them to know that he was complaining of race discrimination; he did not want his grievance to get lost in the system.

32. AC George replied immediately, stating that the grievance would be referred to GM Jenkins. The Claimant replied, expressing concern about involving GM Jenkins, given his role in the suspension of his plus duties.

33. On 25 April 2017, Ms Sara Matthews of HR wrote to GM Jenkins, asking for further information. Later the same day, Mr Jenkins forwarded her email to SM McCallum.

34. While the Claimant's grievance - and subsequent grievances and appeals - were being dealt with, no further action was taken in relation to the LMI, other than the taking of statements from officers.

The provision of statements to the LMI

35. On 26 April 2017, Mr Jenkins provided SM McCallum with a list of the appliances present at the drill. On 28 April 2017, SM McCallum wrote to the watch managers of the relevant fire stations, asking for statements (known as 'F10 statements') from officers who were present.

36. The Claimant is critical of the delay in seeking these statements. He maintains that the approach was triggered by his complaint of race discrimination. We reject that suggestion: we find that the steps were a natural extension of the process; they would have happened whether or not he raised a grievance, given the answers the Claimant gave at the interview. There were disputes of fact as to what had happened on 13 April 2017. The only way of resolving them was to secure further evidence, which is what the Respondent did. We do not consider that the six-day delay between the interview and the actioning of gathering further evidence is significant, particularly as it included a weekend.

37. On 17 May 2017 GM Jenkins chased the outstanding statements from officers present at the drill on 13 April 2017. The following accounts were provided between 29 April and 22 May 2017.

    37.1. FF Wildeman saw the Claimant walk towards the appliance and sit on the back of it; he later heard that there been some kind of altercation/disagreement, but did not witness it; he stated that at some point in the exercise SM Cook had approached him and asked him to check if the Claimant was okay, and whether he needed any water; the Claimant said that he was 'somewhat distressed but required nothing'.

    37.2. CM Bass witnessed SM Cook asking the Claimant why the crews had started, saying that he wanted the drill to run in real time, as if they just arrived at the incident. He asked the Claimant to stop them. The Claimant did not act on this straight away; SM Cook asked him politely if he could speak to him alone. They went to one side; CM Bass did not know what was said between them.

    37.3. WM Beers described being told that the Claimant was ill but did not witness any inappropriate behaviour or conduct between the two men.

    37.4. FFs Shepherd, Tuohy and Whitefield stated that they had not witnessed any inappropriate behaviour or conduct. FF Hopson, WM Lawes and WM Horrigan stated that they did not witness the exchange but were aware that something had occurred. FFs Prior, Green, Cawley, Ford, Maclean and Attfield had nothing of substance to report.

38. On 2 May 2017, GM Paul Trew conducted an interview with SM Coleman, who witnessed some of the altercation between the Claimant and SM Cook.

39. SM Coleman, who is Black, only witnessed the discussion at the back of the appliance. He said that the Claimant refused to speak to SM Cook and did not respond to questions from him, but did answer questions which he, SM Coleman, asked him. He stated that the Claimant said that SM Cook was confronting him and being aggressive. SM Cook said: 'if you're going to step up to the plate and take the money then you should be expected to fulfil your duty as an officer'. SM Coleman described the Claimant as agitated, and 'shaking with frustration'. SM Coleman did not consider that SM Cook was being unreasonable and did not witness him being aggressive or confrontational. He confirmed that he took the Claimant away from the scene, as he had been asked to do by SM Cook. In the car, the Claimant said that SM Cook was aggressive and rude to him. The following evidence was recorded in the notes of the interview:

> 'Q: Did CM+ Headley say anything to you while being removed to Bethnal Green fire station?
>
> A: Yes, before he began to speak, I told him that anything he says to me I would be duty bound to relay if investigated. Mr Hedley said I understand [but] it's just that he (I assume he was talking about SM Cook) was aggressive and rude to me and I wasn't going to let him talk to me like that. I then said to him that it was a pretty tense situation and he said he had previously been off with stress to which I said with all due respect maybe acting up isn't for you if this induces your stress levels but that is not for me to say.
>
> Q: During your time in the car did CM+ Headley appeared to be suffering with his stomach-ache and headache?
>
> A: No, because whilst talking to him on the back of the appliance at the training venue I repeated SM Cook's question of whether or not Mr Headley was sick to which he said "No I just need to be removed from this environment and him".
>
> […]
>
> Q: Do you have anything else to say in relation to this investigation?
>
> A: Mr Headley seemed very distressed upon my arrival and SM Cook had not acted out of the normalcy required of a Station Manager in my opinion, whilst I was present on [the] scene.'

40. The Claimant challenged the accuracy of the statement, without identifying specific inaccuracies. We have no reason to doubt its truthfulness: it struck us as detailed and nuanced; we noted the scrupulousness with which SM Coleman warned the Claimant that what he said might be referred to in any subsequent investigation; moreover, in cross-examination of the Respondent's witnesses, Mr Panton (the Claimant's solicitor) relied on elements of the statement, which he regarded as helpful to the Claimant, such as the fact that Mr Coleman confirmed that the Claimant had told him that SM Cook used the phrase 'jack it in'. However, that in itself adds little to the overall picture. There was no real dispute that SM Cook questioned why the Claimant had accepted the plus role, if he did not want the responsibility; the only dispute was about whether he used

that expression, which, in our view, can hardly be characterised as so offensive as to amount to bullying.

Arrangements for dealing with the Claimant's grievance

41. DAC Perez asked GM Powell to hear the Claimant's grievance. On 8 May 2017, GM Powell invited the Claimant to a meeting on 10 May 2017. At the Claimant's request, the hearing was postponed twice, the first time to give the Claimant more time to prepare, the second because his union representative was not available. It eventually took place on 1 June 2017.

42. On 21 May 2017, the Claimant wrote to SM McCallum, telling him that he had submitted a grievance, and referring to the general email SM McCallum had sent to officers asking for their accounts of the events; he asked to be provided with the responses.

43. SM McCallum replied on 23 May 2017, stating that the LMI began before the grievance was submitted, and was independent of it. He declined to disclose the statements for two reasons: the possibility that the LMI could be prejudiced; and the fact that the responses would contain the personal information of others. He explained that the Claimant could make a subject access request ('SAR') and he provided the contact details of the Information Access team.

44. On 24 May 2017 GM Jenkins provided DAC Perez with his final version of the LMI, which consisted of SM Cook's original complaint, the notes of the interviews with the Claimant and SM Coleman, the memo prepared by C.M. Norris, and all the written statements provided by the other officers. Although the covering letter referred to containing signed copies of the statements, they were unsigned. The section in the report for analysis and conclusions was left blank.

The Claimant's written account of the incident on 13 April 2017

45. In an email of 29 May 2017 sent to GM Powell, the Claimant set out his recollection of the incident on 13 April 2017. He also attached a statement from his wife.

46. The Claimant wrote that, on 12 April 2017, he was notified that he had been assigned to Bethnal Green fire station the next day. He was concerned that he had not been given enough information to prepare for the drill and familiarise himself with the building layout. He thought either CM Norris or CM Bass should take charge of the drill. They told him they already had roles.

47. He complained that SM Cook interrupted him when he was briefing the crew. SM Cook asked him to remove his FBU badge. The Claimant asked why some officers were wearing Union Jacks, although none were present that day. The Claimant continued to give instructions to other officers. SM Cook approached him and asked why he was doing so before the drill had started. SM Cook then took him to one side and asked him what his problem was, and whether it was because he had asked him to take off his FBU badge. The Claimant said he had forgotten all about it, but SM Cook said: 'no you haven't, you're giving it the "bigun"'. SM Cook asked him whether he went out as Watch Manager at other stations. The discussion continued:

> ‘I said “can I stop you right there, I know what you are going to say” I said “you are going to say that because I’m in charge I will come into incidents like this”. He then replied “I wasn’t going to say that so don’t interrupt me”. He then went on to say “if you don’t like the rank then jack it in.” I said “excuse me!” He then repeated “if you don’t like the rank then jack it in”. I said to him “so now you’re telling me what rank I should be”.’

48. The Claimant said that he told SM Cook that he was feeling unwell and would like to go and sit on the appliance for a few minutes. He said that SM Cook raised his voice and said several times that, if he was ill, he would book him off sick and send him home. The Claimant accused SM Cook of invading his personal space and speaking to him in an aggressive manner, including shouting ‘don’t turn away from me’. The Claimant walked away from him and went to sit on the appliance for about fifty minutes. When SM Cook came to find him with SM Coleman, the Claimant accepted that he refused to speak to SM Cook and told him that he had no respect for him because of the way he had spoken to him. He stated that SM Cook confirmed in front of SM Coleman that he had told the claimant to ‘jack it in’ and ‘stop giving it “the bigun”’.

<u>The Claimant’s evidence at Tribunal as to what happened on the day</u>

49. In cross-examination the Claimant accepted the following matters.

50. Although he did not know the layout of the building, he accepted that the OIC of a real-life incident would also not know the layout. However, he said that, when organising drills, it was important from a health and safety perspective to make sure the crew knew the layout, and that safety measures were in place. We find that the Claimant felt unprepared and anxious about being OIC of the drill.

51. He had a conversation with SM Cook in the watch room at Bethnal Green, SM Cook told him that he would be joining the drill some twenty minutes before it started. Once they arrived at Royal Mint House, CM Norris gave an initial briefing. SM Cook interrupted and instructed them to run it like a normal incident. The Claimant was aggrieved by his interruption. He accepted that he gave the crew instructions as to where the fire was, and the route they should take to get the fourth floor, as well as specific directions as to where to find equipment, and where to put kit. Again, SM Cook intervened to instruct him to run it as a normal incident. The Claimant said that he was ‘on my shoulder commenting’.

52. The Claimant agreed in cross-examination that it should have been run like a real-life incident, even though he had written in his grievance statement: ‘I could not understand his reasoning as this was not a real-life incident but a pre-planned drill organised by Bethnal Green’. We find that SM Cook’s requests were reasonable.

53. The Claimant accepted that he was wearing an FBU pin, and that SM Cook had taken him to one side, away from the rest of the crew, to ask him to remove it. He raised the subject of others wearing Union Jack pins but, when challenged by SM Cook, could not see anyone present who was doing so. The Claimant assumed that SM Cook was ‘taunting’ him.

54. Sometime later SM Cook approached the Claimant again and asked him why equipment was being set up before the start of the drill. He said that it needed

to be run in real time. The Claimant accepted that he walked away from SM Cook and said this was because SM Cook had started 'shouting at me'. He accepted that none of the crew involved in the exercise, who gave statements to the LMI, reported SM Cook shouting at the Claimant. We find that he did not.

55. The Claimant accepted that he took offence at being asked why he had accepted the rank, if he was not willing to perform it, and questioned SM Cook's right to do so.

56. The Claimant was taken to SM Cook's account. Although he denied asking SM Cook whether he thought he was the Commissioner, and saying that he had it in for him, he 'could not recall' saying that he felt he had been stitched up, and asking SM Cook who he thought he was. He accepted that he walked away and went to sit on the appliance. He told SM Cook that he did not feel well, and SM Cook said that he would put him on sick leave.

57. SM Cook approached him with SM Coleman. When SM Cook tried to speak to him, the Claimant agreed that he refused to do so. He accepted that he put his hand out to stop SM Cook speaking. When SM Cook said: 'have some respect I am a SM', the Claimant replied: 'I have no respect for you, after the way you spoke to me'. SM Coleman then ushered SM Cook away and asked the Claimant if he was okay. When the Claimant said no, SM Coleman told him that he would book him 'incomplete' and drive him back to Bethnal Green.

58. The Claimant accepted that SM Coleman was right to say that SM Cook had said: 'if you're going to step up to the plate and take the money then you should be expected to fulfil your duty as an officer'. The Claimant accepted that he became agitated and said that he was not going to let him, or anyone, disrespect him.

59. The Claimant accepted that SM Cook asked him which station he was from and whether he was unwell. The Claimant refused to answer on both occasions and would only communicate with SM Coleman.

60. We find that was unreasonable behaviour on his part. In our judgment, the Claimant over-reacted to what was, at worst, a robust challenge by SM Cook, which could not properly be characterised as aggressive or bullying behaviour.

<u>The Claimant's first SAR</u>

61. The Respondent's grievance procedure provides:

> 'Copies of meeting records should be given to the employee including any formal minutes that may have been taken. In certain circumstances (for example to protect a witness) some information may be withheld.'

62. An issue arose as to whether the obligation to provide minutes of meetings went beyond the minutes of the employee's own meetings. Mr Sivell accepted that it did. If that were not the case, the reference to the need to 'protect a witness' would make no sense.

63. The Respondent's harassment procedure provides (under 'Guidance for complainants'):

> 'If there is a formal investigation you are entitled to a copy of your interview notes and a statement of documents which you provide. If you wish to see any other documentation you must make an information access request to the Head of Information Management (see policy number 351).'

64. The reference to policy number 351 is a reference to the Respondent's data protection policy, which provides:

> '8. Procedure for handling a SAR
>
> 8.9 In preparing to send the collected information to the applicant, the Information Access Team will filter the information to:
>
> - Make sure that only the information requested is included.
> - Remove duplication (where possible).
> - Delete personal information relating to third parties.
> - Seek the consent of the third party(ies) to disclose the information where simply deleting the personal information relating to third party(ies) is not practicable.
> - Where consent to disclose information is not obtained, consult as appropriate, (including with the Head of Information Management), as to whether it will be lawful to disclose it without consent.
> - Consider the application of exemptions where withholding certain information may be deemed necessary.'

65. On 3 May 2017, the Claimant made an SAR. The request did not refer in terms to the incident of 13 April 2017. Its scope was very broad indeed: he identified fifteen individuals from whom data should be sought and sought documents dating back to 2014. By way of example, he requested:

> '1. All correspondence/documents/emails from May 1, 2014 onwards and concerning me being moved from Bethnal Green fire station, to 1st Islington fire station and subsequently to Walthamstow fire station.'

66. On 21 May 2017, the Claimant sent a further email asking for disclosure of the F10 statements which had been gathered during the LMI. That request was denied.

67. On 21 July 2017 Mr Sivell provided a substantive response to the Claimant's SAR, informing him that data relating to the Respondent's investigation was exempt from disclosure. Among other things, he wrote:

> 'We have also withheld correspondence where disclosing the information would also disclose the personal details of another person (for example where you are a named person in another individual's Form 10/statement).
>
> I can confirm we hold further data about you where you are the 'subject matter' which we are not disclosing at this time. Due to the current management investigation into your ongoing grievance, we consider this

information exempt from disclosure until a time that the investigation has come to a conclusion. I explain this further below.

The DPA provides an exemption for personal data that is part of management forecasts (by virtue of Schedule 7(37)(5) of the DPA – Management forecasts etc.)

This exemption applies to personal data that is processed for management forecast or management planning. Such data is exempt from the subject information provisions to the extent that applying those provisions would be likely to prejudice the business or other activity of the organisation. To disclose to you the content of the management investigation, before the papers are compiled, could be detrimental to the process.'

68. Mr Sivell agreed in cross-examination that the key point of this response was that data could not be disclosed until such time as the investigation was concluded. He accepted that 'on the surface of it', the Claimant should have received the documents at the conclusion of the grievance. He agreed that, according to this response, the Claimant would be entitled to see the papers from the LMI once they had been 'compiled'. He explained that the Information Access team would wait for them to be requested; they would not seek proactively to make disclosure.

The outcome of the LMI

69. On 31 May 2017, the Claimant sent a second grievance to Mr Perez, complaining about the fact that he had discovered that he was subject to an LMI. The grounds were as follows:

'1) that contrary to the disciplinary code that my employers insisted that I attended what now seems clear was a disciplinary investigation meeting on the 20th April 2017. This meeting was chaired by SM Colin Digby. Contrary to LFB's disciplinary policy I was never given advanced warning of this meeting and further allowed to be represented.

2) further or in the alternative, that my employers have only instigated a disciplinary process of which I am the subject matter after I submitted a protected act (see s.27 EQA 2010) on the 24th April 2017 when I complained of unlawful discrimination. This is clearly victimisation and contrary to s.27 EQA 2010.'

70. Mr Perez replied the same day, pointing out that the Claimant was not currently the subject of a disciplinary investigation; an LMI was different from a disciplinary investigation. He referred to the explanation given at the beginning of the record of interview taken on 20 April 2017 (above at para 27). He explained that there was no requirement for advance notice of an LMI, nor was there a right to be accompanied. He confirmed that no live disciplinary investigation was taking place, and that, while the Claimant's grievance was being investigated, no decision would be taken as to whether, or how, the LMI would be progressed.

71. In a further email on 6 June 2017, Mr Perez explained the difference between an LMI and a disciplinary investigation. He set out the steps which would be followed if there was a possibility of action under the disciplinary procedure. He

attached copies of the relevant procedures. He took care to explain to the Claimant in some detail the significance of an LMI, as well as emphasising the fact that it had been paused, pending the outcome of the grievance procedures.

The grievance hearing

72. The Claimant attended a grievance hearing on 1 June 2017, chaired by GM Powell. The Claimant hand-delivered a document, containing detailed submissions on discrimination law, and how it should be applied in the circumstances. The main point was that SM Cook's conduct was unreasonable, and that the Respondent should establish whether there was a non-discriminatory explanation for it. The Claimant identified four witnesses, who should be interviewed: CM Bass and FFs Beacham, Green and Holmes. He did not mention SM Coleman.

73. At the beginning of the hearing, GM Powell observed that the Claimant was alleging that SM Cook's conduct was related to his race. The Claimant replied:

> 'MH – the reason I put this forward was to find out why he behaved in this way to me. Does he behave in this way to others. I will be submitting a list of questions about his behaviour in general to assess whether his behaviour is discriminatory conduct.
>
> RP – do you think he behaves similar to others.
>
> MH – I don't know but I have reviewed my behaviour and what I did on the day and the only thing I can think is because of my colour.'

74. During the hearing, the Claimant's FBU rep, Mr Dave Waterman said:

> 'Marcus feels he is lacking in any full explanation for removal of CM+. He is seeking permanent removal of CM+. He feels that the Brigade did this unfairly and would like arrangement for it to be permanently removed.'

75. Towards the end of the hearing GM Powell said that, although normally he would aim to conclude the investigation within seven days, it was likely that this exercise would take 'a bit longer' but that he would get back to him as soon as possible. The Claimant said this was agreeable.

Subsequent investigations

76. On 7 June 2017, GM Powell conducted interviews with CM Bass, and FFs Green, Prior, Beacham and Holmes. The records of the interview all state at the outset: 'the interview is strictly confidential'.

    76.1. CM Bass stated that SM Cook initially spoke to the Claimant 'in a nice manner'. They then moved away, and he did not hear what was said. He did not see a problem. He did not witness any heated or aggressive discussion.

    76.2. FF Green did not hear the discussion or notice anything untoward. He said that it 'looked like a serious conversation'.

    76.3. FF Prior saw the conversation but couldn't hear it; he did not notice any aggressive behaviour or anything out of the ordinary. He did notice the

Claimant walking away from SM Cook who appeared still to be tried to talk to him.

76.4. FF Beacham stated that SM Cook 'just made a simple request and did not speak out of turn at all'. He described the Claimant's demeanour as that of 'someone that was "pissed off". He was slouched down with arms folded'. He did not witness any heated or aggressive discussion.

76.5. FF Holmes described SM Cook saying something to the Claimant, which the Claimant ignored, and SM Cook said something to the effect of 'Marcus, did you hear that', at which point the Claimant walked away. He described SM Cook's conduct as normal, and the Claimant's conduct as dismissive. All the witnesses were asked whether they heard SM Cook saying 'if you don't like the rank, then jack it in', and all said No.

77. On 9 June 2017, GM Powell interviewed SM McCallum; on 13 June 2017, he interviewed SM Cook, whose account was consistent with his original statement.

78. On 11 June 2017, the Claimant wrote to GM Powell, attaching a document similar to the questionnaire which used to be a common feature of discrimination cases, before the repeal of the relevant statutory provision. The first six questions asked for further information about the LMI; seven other questions asked for more general information, for example about the racial composition of the workforce, the number of LMIs conducted since 2012, broken down by categories including the race of the subjects.

79. On 14 June 2017, the Grenfell fire occurred.

80. On 21 June 2017, GM Powell invited the Claimant to a meeting on 26 July 2017 to discuss his second grievance. The Claimant asked for a postponement to enable him to secure representation.

81. On 23 June 2017 GM Powell interviewed GM Trew, who was not present for the events, but had received SM Cook's initial complaint. On 24 June 2017, GM Powell interviewed CM Norris, who said:

> 'A: Yes [SM Cook] came up to both of us and asked [us] to stop what we were doing as he wanted the drill to go at real time.
>
> Q: Did SM Cook say that in an aggressive or unreasonable manner?
>
> A: No, he just asked us. If you say he was having a go at Marcus, then he must have been doing the same to me, as he asked both of us at the same time. But I didn't take it as him having a go, he just asked us.'

82. He also stated:

> 'I am aware that Marcus has been phoning others, telling them to remember to say that SM Cook had a go at him and shot him down. I have known Marcus for a long time, but I think what he's doing is wrong and I don't understand why he's doing this, as SM Cook did not do that.'

83. We accept GM Powell's explanation that he wished to interview SM Coleman but could not find a mutually convenient date. Instead he read the statement given by SM Coleman to the LMI.

84. On 2 July 2017 the Claimant asked for the second grievance hearing to take place on 14 July 2017. On 6 July 2017, GM Powell told the Claimant that he was on two weeks' annual leave and would then be taking on a new role as temporary DAC. He asked DAC Perez to allocate a different GM to hear the Claimant's second grievance. DAC Perez assigned GM Norman the next day.

Outcome of the first grievance

85. On 11 July 2017, GM Powell informed the Claimant that his first grievance had been dismissed. He concluded that there was no evidence to support the Claimant's allegation that SM Cook was aggressive, nor that he behaved in a bullying manner towards him. He reached his conclusions on the balance of probabilities. He recorded that the Claimant had failed to follow SM Cook's request for him to treat the drill as if it were an incident and had walked away from SM Cook when he was trying to speak to him. GM Powell accepted that SM Cook asked the Claimant why he had taken the role, but he did not consider this to constitute harassment.

86. He also wrote:

> 'In addition, I understand that you only raised your complaints after you became aware that a management investigation had commenced as a result of your own behaviour. In view of this and given that your claims are not supported by any evidence, I am led to question your motivation in raising your complaint and it appears that your complaint may be designed to frustrate the management investigation.'

87. Although GM Powell had found that the bullying and harassment did not occur as alleged, he went on to find that the Claimant had provided no evidence that SM Cook's behaviour was related to his race; nor was there evidence from other sources from which inferences could be drawn to support the allegation.

88. GM Powell told the Claimant that, if he wished to appeal, he should write to DAC Perez within seven days. The Claimant appealed on 17 July 2017. There were four grounds:

    88.1. the first was that GM Powell had 'failed to set out the methodology adopted to conduct an investigation into my originating grievance';

    88.2. the second was that GM Powell's analysis was insufficiently robust, in that he 'fails to set out any "weighting" he gives to any of the evidence he secured from witnesses';

    88.3. the third was that GM Powell had failed to engage with legal authorities concerning proving unlawful discrimination, but had simply 'taken SM Cook's rejection of my complaint of unlawful discrimination at face value'; at this point the Claimant mentioned that 'a very senior officer of the LFB described SM Cook as acting like a "Nazi". This characterisation of SM Cook flies in the face of what GM Powell described';

88.4. the fourth ground was that GM Powell had implied that his grievance was made in bad faith.

89. There was a delay in arranging the appeal hearing, in part because the Claimant was on leave between 6 August 2017 and 26 August 2017. The appeal hearing took place on 1 September 2017, and was conducted by DAC Brown.

90. At the hearing, the Claimant declined to provide the name of the officer who he said had described SM Cook as a Nazi. It emerged in cross-examination that this referred to an occasion when SM Cook had been (according to the a fellow officer) 'loud, officious and demanding'. It was put to the Claimant that no link was made by the officer to white supremacy, Holocaust denial, or any other form of racism. The Claimant's evidence was that he 'could not comment' on what was in the officer's mind when he made the remark. The term appears to have been used in a casually offensive manner.

91. The Claimant wrote to DAC Brown on 4 September 2017, reminding him that he had asked for the name of the individual who made the 'Nazi' comment about SM Cook. He said that he intended to write to DAC Brown about this and other matters by 6 September 2017.

92. DAC Brown responded:

> 'In relation to your email below, my appeal outcome review is based solely on the points first raised within your initial grievance and information available to GM Powell as part of his decision-making process, plus his subsequent grievance decision. This review is not a separate grievance or investigation into any new or other issues you would like to raise, as they were not part of your initial grievance and as such played no part in GM Powell's decision. With this in mind you are not required to provide me with any further information, as it will not play a part in my review and subsequent outcome decision. Any other matters you feel you need to raise, need to be made via your appropriate line management chain in line with authority policy.'

93. DAC Brown wrote to the Claimant setting out the grievance appeal outcome on 20 September 2017. He dismissed the appeal. In relation to the discrimination aspect of the grievance, DAC Brown recorded:

> 'further when asked by me at your appeal hearing why you felt that any issues which occurred on the 13th April were as a result of your race as you originally stated, you were unable to provide me with any information which supports this assumption other than your response of "a gut feeling". I went on to ask you whether any derogatory terms were used by SM Cook which may have been of a racist nature. Your response was that "it was derogatory but not race specific."'

<u>The Claimant's second grievance</u>

94. There were two issues in the second grievance: that the Claimant was required to attend 'what now seems clear was a disciplinary investigation' on 20 April 2017, without warning or representation; and that the Respondent had only instigated a disciplinary process when the Claimant complained of discrimination, and this amounted to victimisation.

95. On 11 July 2017 GM Norman wrote to the Claimant to set out his understanding of the scope of the second grievance. The hearing took place on 31 August 2017.

96. On 12 September 2017, GM Norman wrote to the Claimant, dismissing the grievance. He found that the LMI was not a disciplinary investigation, and that the Claimant was not entitled to notice of, or representation at, the meeting which took place on 20 April 2017. Further, he found that the LMI predated the Claimant's complaint of race discrimination.

97. In the letter he also provided a response to questions 1 to 6 of the Claimant's quasi-questionnaire. He recorded that GM Powell had told the Claimant that question 7 to 13 should be asked by way of a freedom of information request to the Information Access team.

98. On 19 September 2017, the Claimant indicated that he wished to appeal the outcome of the second grievance and said that he would provide particulars 'as and when directed'. On 20 September 2017 DAC Perez assigned DAC Hughes to manage the second grievance appeal. On 27 September 2017, DAC Hughes and the Claimant agreed a dated of 9 October 2017 for the hearing.

99. At the hearing the Claimant submitted a further document entitled 'grievance appeal particulars – unlawful victimisation because of a protected act'. It alleged that the failure to release the statements collected by GM Powell as part of his investigation into the Claimant's first grievance was an act of victimisation because he had complained of unlawful discrimination. The Claimant declined to expand upon this when asked to do so at the hearing. After reviewing the document, DAC Hughes declined to deal with points which had not been raised in the original grievance.

100. On 13 October 2017 DAC Hughes dismissed the Claimant's appeal against the outcome of the second grievance. He concluded that the grievance had been conducted in a reasonable manner, and that a fair decision had been reached by GM Norman.

The conclusion of the LMI

101. On 17 October 2017 DAC Perez contacted Ms Gibbs for a decision on how to proceed with the Claimant's case, now that the grievance procedures had been concluded. She told him that a decision would be made following review by Mr Robert Bond, the Authority's discipline manager.

102. On 25 October 2017 SM Cook wrote to BC Trew, asking that the investigation into the Claimant's conduct on 13 April 2017 be resumed. BC Trew consulted Ms Gibbs, who gave him the same answer she had given DAC Perez.

103. On 26 October 2017 Mr Bond wrote to Mr Trew and Ms Gibbs, copying in Mr Jenkins stating that he did not think the matter warranted an investigation by an HR advisor, and that it should be managed locally (i.e. at Stage 1).

104. On 15 November 2017 Mr Jenkins informed DAC Perez that his view, and that of DAC Trew, was that the Claimant's conduct would more appropriately be dealt with at Stage 2, and asked DAC Perez to seek further advice from HR. On the same day, DAC Perez wrote to Mr Bond, saying that he agreed that a review

was required 'due to the attitude, rudeness and insubordinate actions in a public venue at a live exercise'.

105. On 17 November 2017 Assistant Commissioner Rowe (HR Review) wrote to Mr Perez, saying that in his view rudeness/attitude would correctly be dealt with at Stage 1, but asked for the case to be looked at again in the context of refusing a reasonable order, which might give rise to a higher level of discipline hearing.

106. On 24 November 2017 the Claimant lodged Case 1.

107. On 27 November 2017 DAC Perez informed Mr Jenkins that his decision was that the matter should proceed with a Stage 1 conduct hearing.

108. On 20 December 2017 Mr Bond wrote to Ms Matthews that:

> 'the view was that CM Headley was rude in his responses to SM Cook, at some point refusing to answer him directly and choosing to answer another Station Manager. However, there was no reference to refusal of an order, or what that order would have been.'

109. SM McCallum had a further discussion with Ms Matthews. She advised him that, because there was no allegation that the Claimant had refused to obey an order, the matter should be dealt with informally through the use of a Performance Development Plan ('PDP'), a discussion and a confirmatory letter ('Letter 1').

<u>The PDP</u>

110. A meeting took place on 10 January 2018 between SM McCallum and the Claimant. SM McCallum discussed the original incident with the Claimant. The outcome was confirmed in an email of 18 January 2018. SM McCallum resolved the issue by way of a Letter 1 and a PDP for 2 months (backdated to 20 December 2017). The PDP itself contained the following 'Details of Observation':

> 'Your performance as an officer when undertaking or duties should be to take a full and active part of the tasks and duties which are allocated to you. It is your responsibility to inform your line manager [at] the earliest opportunity if you are unable to do so, for example if you have not undertaken role before wife become unwell. This is vital to the demonstration of competent and professional standards, that the Brigade seeks to maintain.'

In the Tribunal's judgment, it was self-evident that this referred to the fact that the Claimant had walked away from the drill on 13 April 2017, when he was OIC, and had consequently not discharged his duties on the day. The letter confirmed that this was an informal measure, which did not constitute a disciplinary sanction, and would not form part of the Claimant's disciplinary record.

111. The Claimant said that he had 'no idea' why he was being issued with PDP. He explained that he had not seen the investigation report, when the PDP was issued. When the Claimant asked to see the evidential basis, SM McCallum advised him to make another SAR. However, when he did make the request, the Respondent refused to provide the F10 statements.

<u>The grievance about the PDP</u>

112. On 17 January 2018, the Claimant wrote to SM McCallum about the meeting on 10 January 2018 (from which it is plain that they discussed the incident on 13 April 2017). The Claimant raised a grievance about the outcome:

> 'I write to advise that I do not accept the PDP and do so on the following grounds
>
> 1) That I have never been advised what was the actual specific charge/accusation levelled against me and which has resulted in the sanction of the PDP.
>
> 2) That I have never been provided with any documentary evidence obtained as a consequence of the LMI. Therefore not only do I not know of the specific charges/accusations levelled against me but nor have I been provided with the documentary evidence relied upon by my employer and which they used to justify the imposition of the PDP.
>
> 3) Further and without prejudice to the above, I have not been provided with the particulars of what the PDP will entail and the implications it has on my future employment with LFB.
>
> 4) Further and in the alternative I believe that the imposition of a PDP arises out of my complaints against the LFB and which were based on my belief that my employer had discriminated against me on grounds of race and also victimised me contrary to s.27 EQA 2010.
>
> 5) Finally, I consider that I have been victimised and/or discriminated against because of my race and on the grounds that I reasonably believe that my employer has failed to impose a similar sanction of PDP or its equivalent, on SM Cook'.

113. In the email of 18 January 2018 (para 110 above) SM McCallum also wrote:

> 'I can confirm that my decision to issue a confirmation of discussion letter and a PDP were not acts of victimisation or race discrimination. I hope that this response resolves this matter informally. If not, please let me know and I will arrange a formal grievance hearing.'

114. On 21 January 2018 Claimant wrote to SM McCallum, informing him that he wished to proceed with his grievance, and asking him to arrange a formal grievance hearing. He wrote:

> 'Further and with respect I would advise you that I have copied in DAC Perez as he is your line manager and the grievance pertains to you and your decision.'

115. On 24 January 2018, the Claimant wrote to SM McCallum, seeking disclosure of all documents relating to the LMI, and asking for a hearing by a different decision-maker. He explained:

> '[…] as my grievance pertains to you and your decision re the LMI and as you were the recorder of the LMI on the 20th April 2017, it is neither ethical nor legal for you to be the person hearing the grievance. Therefore, I am

requesting that the grievance hearing is heard by someone other than yourself.'

116. SM McCallum replied the same day. He explained that it was common practice within the Brigade for managers to review decisions they have made in a formal grievance procedure; the appeal stage provided the opportunity for the grievance to be reviewed by an independent manager. SM McCallum wrote: 'I have no 'motive' in making this decision, except to apply normal Brigade policy.'

117. The Respondent's grievance policy provides as follows:

'*Informal stage*

Employees should aim to resolve most grievances quickly and informally by discussing them with their line manager. When the grievance is a complaint against the line manager with whom the grievance would normally be raised, the employee can approach that person's manager or another manager at the same or similar level of authority. If employees are not satisfied with the outcome of this initial informal stage, they may move to the next stage of a formal hearing.

Formal stage

If a grievance cannot be settled informally, it should then be raised formally in writing with the appropriate level of management. Normally, this will be the line manager. Again, where the grievance is a complaint against the line manager with whom the grievance would normally be raised, the employee can approach that person's manager or another manager at the same or similar level of authority.'

118. On 30 January 2018, the Claimant wrote to GM Jenkins asking him to intervene and remove SM McCallum from hearing the grievance. He confirmed that he would not be attending any grievance hearing chaired by SM McCallum. On 31 January 2018, GM Jenkins refused to intervene:

'I am satisfied that SM McCallum is 'not the subject of the grievance' nor is the grievance 'against' him. As I understand the subject of the grievance is the PDP. I therefore see no reason for him to recuse himself from hearing your grievance on 2 February 2018 […] If you choose not to attend the planned grievance hearing on Friday, the grievance will be treated as withdrawn.'

119. The grievance was dealt with by SM McCallum. The Claimant declined to attend the grievance meeting, because he did not trust that he would receive a fair hearing. The grievance was not upheld.

120. On 20 February 2018, the PDP ended.

<u>The Claimant second SAR</u>

121. On 18 February 2018, the Claimant made a second SAR. He asked for the LMI report, with the supporting evidence. He reminded the recipient that the LMI had now been concluded with the outcome being informal action. He specifically requested the F10 interview forms.

122. Mr Sivell accepted in cross-examination that there was no evidence of the Information Access team seeking third-party consent to release data. His explanation was that 'if we believe it is not possible to disclose the information without disclosing identities, and not reasonable to seek consent, we can exempt'. He explained that part of the reasoning was that individuals gave statements believing them to be confidential, and that if the information access team started asking them to give consent for release, they may not think that would be a presumption of confidentiality later on.

123. Mr Sivell responded to the Claimant's second SAR on 27 March 2018:

> 'Having spoken with those responsible for conducting this investigation, it has been confirmed to me that as this was dealt with at local management level, no further management investigation report was written and that the 'PDP Letter One' sent to you by SM McCallum is considered the formal outcome report. I understand you will already have a copy of this however I have reattached this for your records.
>
> To address your request for a copy of the 'supporting evidence that was sent to the area DAC' and 'the 21 Form 10s which formed part of this investigation…' I would draw your attention to my original response, where we exempted this information as its disclosure would result in disclosing the personal details of other individuals. Any statement made by an individual will be considered to be their own personal data and therefore, you would not be entitled to this as part of your SAR. Furthermore, we consider that staff giving witness evidence as part of the conduct investigation do so under presumption of confidentiality.'

124. Mr Sivell accepted that when he wrote this, it was likely that he knew that the LMI and all other processes had been completed, yet he still refused to provide data from the LMI.

125. Mr Sivell did not even authorise the release of the Claimant own interview notes, even though he accepted in evidence before the Tribunal that the Claimant was entitled to them. As for the other statements, he continued to maintain that 'statements given in confidentiality would be the overriding consideration'. He maintained that it would not be possible to redact the statements of others. In our view, that was an indefensible position; it would have been perfectly possible to redact the statements, if it was genuinely considered necessary. In any event, Mr Sivell accepted that there was no evidence of any exercise taking place to review the material and consider whether redaction would be possible.

126. Mr Sivell accepted that, when he refused the second SAR, he knew that the Claimant had issued a grievance alleging race discrimination, that he had appealed the outcome of that grievance and complained again of race discrimination, that he had issued Tribunal proceedings in which he complained of discrimination, and that he had issued a further grievance in January 2018 in which he complained of discrimination.

127. Mr Sivell was asked by the Tribunal whether he had ever disclosed F10 statements. He said that he could not recall a case when witness statements had been disclosed; the fact that statements were given with confidentiality 'would have been our position most times, we would review on a case-by-case

basis, but that is likely to be the case when were asked to disclose other people's witness statements'.

128. Because the Claimant was dissatisfied with the Respondent's response to his request, he complained to the ICO. The Respondent explained to the ICO in its response that it had relied on specific exemptions in refusing access to statements:

> 'The Brigade has generally relied on this exemption when dealing with subject access requests linked to investigations connected with staff conduct matters (e.g. grievance and disciplinary cases). In such cases, there is often a large volume of material including witness statements collected as part of an investigation. In line with ICO guidance relating to the 'management forecasting' exemption, we recognise that some of the withheld information relates to Mr Headley, but it is also the date of third parties. As we advised Mr Headley, much of the data collected as part of the management investigation is exempt from the subject access provisions to the extent that applying those provisions would be likely to prejudice the business or other activity of the Brigade; in this case, in being able to conduct an internal management investigation connected with staff conduct (i.e. a complaint/grievance). We believe, that to disclose to Mr Headley the content of the management investigation could be detrimental to the process.'

129. The response also contained a detailed timeline of the handling of the request, and acknowledged some failings, particularly unjustified delay in dealing with the Claimant's May 2017 request.

130. The ICO replied on 14 August 2018, stating that it seemed likely that the personal data to which the Claimant was entitled had been provided, and that the exemption used had been applied correctly, because the information withheld constituted third-party data. It was critical of the delays.

The law

The burden of proof

131. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(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.**

132. The effect of these provisions was conveniently summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[2] He explained the two stages of the process required by the statute as follows:**

[2] *Madarassy v Nomura International plc* [2007] ICR 867, CA

(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

> **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
>
> **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**

(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

133. In *Royal Mail Group v Efobi* [2021] ICR 1263, the Supreme Court held that, at the first stage all the evidence had to be considered, from whatever source it had come, not just the evidence adduced by the Claimant. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense; that whether any positive significance should be attached to the fact that a person had not given evidence depended entirely on the context and particular circumstances. Where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference which allegedly should have been drawn. Even if the inference is drawn, the question then arises as to whether it would, without more, have enabled the Tribunal properly to conclude that the burden of proof had shifted to the employer.

134. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

135. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 at [2, 9, 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts. The Tribunal should consider indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by unlawful factors.

<u>Direct discrimination because of race</u>

136. S.13(1) EqA provides:

> **(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.**

137. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [2000] ICR 501, *per* Lord Nicholls at 511). Lord Nicholls considered the distinction between the 'reason why' question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at [29]:

> **'Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**

138. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan per* Lord Nicholls at 513).

139. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 at [36], the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic.

140. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

141. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [11-12], Lord Nicholls questioned the need for a two-stage approach, particularly in cases where no actual comparator was identified:

> **'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.**
>
> **The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment**

issue until after they have decided why the treatment was afforded to the Claimant […]'

142. Since *Shamoon*, the appellate courts have encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in *Martin v Devonshire's Solicitors* [2011] ICR 352 at [30]:

> **'Elias J (President) in *Islington London Borough Council v Ladele (Liberty intervening)* [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, eg, *D'Silva v NATFHE [2008] IRLR 412*, para 30 and *City of Edinburgh v Dickson (unreported)*, 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'**

<u>Victimisation</u>

143. S.27 Equality Act 2010 ('EqA') provides as follows:

> **(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.**
>
> **…**

144. The test of causation in a victimisation complaint is whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

Conclusions: Case 1

<u>Victimisation: protected act</u>

145. The Respondent accepts that the Claimant's grievance of 24 April 2017 was a protected act.

<u>Issues 1(a)(i) (direct discrimination) and 5(a)(i) (victimisation): GM Powell failed to carry out a reasonable investigation into the Claimant's grievance of 24 April 2017, in that he simply accepted SM Cook's version of events. The Respondent contends that GM Powell reached his decision on balance or probabilities after carrying out a reasonable investigation</u>

146. In our judgment, GM Powell did not 'fail to carry out a reasonable investigation', nor did he 'simply accept SM Cook's version of events'. He interviewed the Claimant and the four witnesses the Claimant identified. He also interviewed SM Cook and three other witnesses, and reviewed the LMI statements. As for the fact that he did not interview SM Coleman, we have accepted that he was unable to do so. In any event, this did not disadvantage the Claimant, since SM Coleman did not support the Claimant's account. We note that the Claimant did not ask GM Powell to interview SM Coleman, probably because he knew that it would not assist him.

147. We regard Mr Panton's criticisms of GM Powell's process as unrealistically demanding. This was not a judicial, or quasi-judicial process, it was an internal grievance process. In the circumstances, we are satisfied that GM Powell conducted a balanced and thorough investigation.

148. Because we have concluded that the conduct did not occur as alleged, these claims of direct discrimination (Issue 1(a)(i)) and victimisation (Issue 5(a)(i)) fail.

<u>Issues 1(a)(ii) (direct race discrimination) and 5(a)(ii) (victimisation): [GM Powell and Mr Brown] failed to disclose witness statements obtained as part of the investigation into the Claimant's grievance or appeal, and such failure to disclose witness statements was contrary to the Respondent's grievance policy. The Respondent disputes that it was obliged to disclose witness statements</u>

149. We are satisfied that it was the general practice of this Respondent to require employees to make a formal request for disclosure to the Information Access team in order to secure documents.

150. We have concluded that the sole reason why both GM Powell and DAC Brown declined to disclose witness statements, relating to the Claimant's grievance and appeal, was because it was their genuinely held belief that the correct procedure for requesting such statements was for the complainant to make an SAR to the Information Access team, and it was not open to them to grant disclosure outside that procedure. Whether the underlying policy was a sound one is immaterial: that was the reason why they acted as they did; it had nothing to do with the Claimant's race or with the fact that he had complained of discrimination in the grievance of 24 April 2017.

151. For these reasons the claims of direct discrimination (Issue 1(a)(ii)) and victimisation (Issue 5(a)(ii)) fail.

<u>Issues 1(b) (direct race discrimination) and 5(b) (victimisation): GM Powell dismissed the Claimant's grievance of 24 April 2017 on 11 July 2017</u>

152. The following exchange took place in cross-examination of the Claimant:

> Counsel: GM Powell's dismissal of the grievance had nothing to do with your race?
>
> C: No.
>
> Counsel: Can I suggest that GM Powell did not decide your case against you because you had made an allegation of race discrimination, agree or disagree?

C: That's correct.

153. In our view, those were sensible concessions by the Claimant. We have concluded that the sole reason why GM Powell dismissed the Claimant's grievance was because he concluded that SM Cook had not conducted himself in the manner alleged by the Claimant: he had not acted aggressively, nor in a bullying way. None of the witnesses to whom GM Powell spoke, nor indeed the witnesses who provided statements in the context of the LMI (which he read), corroborated the Claimant's account of what had happened on the day. Further, the Claimant made damaging concessions in his own account of the events. Self-evidently, GM Powell did not have to go on and consider the reason for treatment which he had concluded did not occur; he did so for completeness, concluding that race was not a factor in the events in question.

154. GM Powell reached his conclusions on the balance of probabilities. We are satisfied that they were open to him, supported by evidence, and represented his genuine assessment of the merits of the grievance. Neither the Claimant's race, nor the fact that he had complained of discrimination in the grievance of 24 April 2017, played any part whatsoever in his decision.

155. The claims of direct race discrimination (Issue 1(b)) and victimisation (Issue 5(b)) fail.

<u>Issues 1(c) (direct race discrimination) and 5(c) (victimisation): [GM Powell] accused C in the grievance outcome letter of 11 July 2017 of acting in bad faith but failing to provide any evidence to support this assertion in the grievance outcome letter. R denies accusing C of acting in bad faith and will say GM Powell's reasons for doubting C's account are clear on the face of the letter</u>

156. It is right that GM Powell referred, in his outcome letter, to his doubts about the Claimant's motivation in raising his grievance (para 86). However, he did not 'accuse the Claimant of acting in bad faith', as the Claimant alleged; he did not even express a concluded view. Nor was there an absence of evidence to support his doubts: it was unarguably correct that the Claimant raised his grievance about SM Cook after he became aware of the LMI into his own conduct on 13 April 2017; and GM Powell's doubts were compounded by what he regarded as the unmeritorious nature of the complaint, which had not been corroborated by witnesses. On one view, the conduct did not occur as alleged.

157. In any event, we have concluded that the reason why GM Powell questioned the Claimant's motivation was because he was genuinely concerned that the Claimant may have been acting tactically in submitting a grievance at a time when he was facing disciplinary charges.

158. We tested that conclusion by reference to the burden of proof provisions. There was no evidence of less favourable treatment by reference to an actual comparator. Nor were we satisfied that there was evidence, from which we could reasonably conclude that GM Powell, in comparable circumstances, would have omitted these observations, had the complainant been white, or not done a protected act. The mere fact that he accepted in cross-examination that he was aware that the Claimant had instructed solicitors and that there was a risk of Tribunal proceedings was not enough, in our judgment, to shift the burden of proof in relation to the victimisation claim. We note that there was no reference

in the passage in question to the fact that the grievance contained an allegation of discrimination.

159. For these reasons, the claims of direct discrimination (Issue 1(c)) and victimisation (Issue 59c)) fail.

Issues 1(d) (direct race discrimination) and 5(d) (victimisation): The Respondent's Information Access Team failed to provide the witness statements obtained during the grievance investigation to the Claimant in response to his subject access request on 21 July 2017

160. This allegation relates only to the protected act contained in the first grievance of 24 April 2017, and can only relate to conduct predating the ET1 in Claim 1.

161. It is accepted that the Respondent failed to disclose these statements. In the Respondent's ET3 (at paras 44-45), it pleaded that the data was exempt from disclosure 'until such time as the management investigations/grievances were concluded, on the basis that the disclosure could be detrimental to the process'. Mr Sivell accepted that, on its face, this suggested that the Claimant would be able to see the data once the process was concluded. We also record Mr Sivell's evidence that relevant statements might still be withheld for data protection reasons, even if the statement was potentially exculpatory. He explained: 'until the process was concluded, he may not see the witness statements'.

162. In relation to this complaint, we are satisfied that the reason why disclosure was not provided at this stage was because it was the Respondent's general practice to withhold disclosure until the completion of the process. We record that, in our experience, that is a very unusual practice, which has the potential to give rise to unfairness. Nonetheless, we are satisfied that this was the Respondent's practice and neither the Claimant's race, nor the fact that he had done a protected act, payed any part in the decision. Consequently, the claims of direct race discrimination (Issue 1(d)) and victimisation (Issue 5(d)) fail.

163. We note that this explanation gives rise to an expectation that, once the process *was* completed, disclosure could take place, subject to other considerations. That will be relevant to our conclusions in relation to the claims below.

Issues 1(e) (direct race discrimination) and 5(e) (victimisation): [Wayne Brown] dismissed the Claimant's grievance appeal of 17 July 2017 on 20 September 2017

164. The Tribunal considers it is in a position to make a positive finding as to why DAC Brown dismissed the Claimant's grievance appeal: he did so because he concluded that GM Powell had good grounds for rejecting the grievance and had not made any error is doing so; DAC Brown agreed with GM Powell's conclusion and did not consider that the Claimant's grounds of appeal had any merit. The Claimant's race, and the fact that he complained of discrimination, played no part whatsoever in his decision to dismiss the appeal.

165. We observe at this point that DAC Brown is Black and, although it is not impossible for someone to subject a person of the same racial group to direct race discrimination, there must be same basis for pursuing the allegation.

166. Mr Panton argued that there was some inconsistency in relation to DAC Brown's handling of the 'Nazi' comment which the Claimant had mentioned (para 90-92).

It is right that, when the Claimant first mentioned this incident, DAC Brown appears to have been open to considering the matter, if the Claimant provided further information. When the Claimant indicated in an email after the hearing that he might do so, DAC Brown decided that the issue could not be considered. Mr Panton submitted that this showed DAC Brown had a closed mind in dealing with the appeal. What he did not submit was that this was indicative of race being a factor in DAC Brown's decision, or the fact that the Claimant had complained of race discrimination. In any event, we have concluded that there is a simpler explanation, which is that DAC Brown changed his mind: on reflection he decided that the matter was not relevant.

167. The only other matter which Mr Panton relied on was the absence of notes of a discussion which Mr Brown said he had with GM Powell. It was an error of process not to keep notes, but in our judgment it does not provide evidence from which we could reasonably conclude that the Claimant's race, or the fact that he had made protected disclosures, played any part in Mr Brown's decision.

168. For these reasons the claims of direct race discrimination (Issue 1(e)) and victimisation (Issue 5(e)) are not well-founded and are dismissed.

Conclusions: Case 2

<u>Protected acts</u>

169. The Respondent accepts that the Claimant's grievance (24 April 2017), grievance appeal (17 July 2017), Tribunal ET1 In Case 1 (24 November 2017), and grievance (17 January 2018) are protected acts.

<u>Issues 7(a) (direct race discrimination) and 11(a) (victimisation): On 10 January 2018, [SM McCallum] issued the Claimant with a personal development plan (PDP) which was to last for a period of two months</u>

170. We are satisfied that the sole reason why SM McCallum issued the Claimant with a PDP was because, on the information available to him, he concluded that the Claimant's actions at the April exercise fell short of what was expected of him as a junior manager, and needed to be addressed. He discussed the events with the Claimant at the meeting of 10 January 2018, explained his reasoning, and issued a PDP and Letter 1 which reminded the Claimant of his obligations to take a full and active part in the duties assigned to him, and to tell his manager if he felt unwell, or otherwise unable to perform a task. There was nothing improper in that. A PDP is an informal mechanism, not a disciplinary sanction. It was the lowest available marker of concern available to the Respondent.

171. In the Tribunal's view, the Claimant's conduct might properly have been the subject of disciplinary action. On his own account, he had declined to run the exercise in real-time, despite being asked to do so by SM Cook; he had walked away from an exercise, of which he was in charge; he had refused to answer questions from SM Cook, who was his superior officer; and he had told SM Cook, in front of another officer, that he had no respect for him. In the circumstances, the Tribunal would have been surprised if no action had been taken. The Claimant was aggrieved that no action was taken against SM Cook for his actions on the day. However, there was no evidence to corroborate his

allegation of misconduct against SM Cook: none of those who witnessed the interaction agreed that SM Cook had behaved aggressively or improperly. There was a material difference in their circumstances.

172. We are satisfied that the Claimant's race, and the fact that he had done protected acts, played no part whatsoever in SM McCallum's decision.

173. The claim of direct race discrimination (Issue 7(a)) and the claim of victimisation (Issue 11(a)) are not well-founded and are dismissed.

<u>Issues 7(b) (direct race discrimination) and 11(b) (victimisation): SM McCallum refused to recuse himself from hearing C's grievance about the decision to issue him with a PDP dated 17 January 2018</u>

174. Mr Panton did not pursue a submission that SM McCallum refused to recuse himself because the Claimant is Black. Apart from the fact that the allegation was not pursued, we have concluded that there is no evidence on the basis of which the Tribunal could reasonably conclude that SM McCallum's decision not to recuse himself was in any way influenced by the Claimant's race. For that reason, the claim of direct race discrimination (Issue 7(b)) fails.

175. The position is different in relation to the victimisation claim, which Mr Panton did pursue. The Claimant was raising a grievance about a decision taken by SM McCallum (SM McCallum himself refers to it as 'my decision' in his email of 18 January 2018). For that reason alone, he was the wrong person to deal with the grievance. The fact that Claimant had alleged that the decision was discriminatory made it even more inappropriate. It ought to have been obvious to him, and to those advising him, that natural justice precluded him for determining those allegations himself. He should have recused himself. In our judgment, the decision not to do so was more than unreasonable, it was perverse.

176. Further, we have concluded that there is the 'something more' needed to shift the burden of proof in the fact that SM McCallum summarily rejected the allegation of discrimination (before hearing any evidence) in his email to the Claimant of 18 January 2018, without even meeting the Claimant to discuss the allegation. In our judgment, this was such an extraordinary thing to do, that a Tribunal could reasonably conclude, absent an adequate explanation, that the fact that the Claimant had complained of discrimination, rather than (say) unfairness, was particularly objectionable to SM McCallum, and was a material factor in his approach to the matter. Accordingly, we are satisfied that the burden shifts to the Respondent.

177. The Respondent's explanation was essentially that its decision was consistent with its own policies. SM McCallum explained in his statement (para 19) that:

> 'there is an informal stage in the Respondent's grievance policy, whereby the manager (original decision maker) can discuss the grievance with the employee in an attempt to resolve the grievance.'

178. The difficulty with this is that SM McCallum rejected the allegation of discrimination before any kind of discussion (formal or informal) had taken place. Further, the Claimant declined to address the matter informally and asked

to proceed to a formal grievance. SM McCallum's evidence continue (para 20) as follows:

> 'It should be noted that it is the Respondent's practice for managers to review decisions they have made under the formal grievance procedure on the basis that the appeal stage provides an opportunity for the decision to be reviewed by another manager.'

179. It would be an exceptionally unusual policy, which allowed a grievance officer to rule on his own decision, in circumstances where the employee has already declined to engage in informal resolution with him. In fact, there is no such policy: it is clear from the terms of the Respondent's policy (para 117) that the employee has the option, at both formal and informal stages, to ask for his grievance not to be heard by his line manager, if the complaint is about that manager.

180. GM Jenkins' explanation was that SM McCallum was 'not the subject of the grievance and the grievance is not against him, but the subject of the grievance was the PDP'. Ms Gibbs stated that 'in my view, the grievance was not 'about' SM McCallum but about a decision he had taken'. This is pure sophistry. The Claimant's grievance was about a decision (to issue a PDP), taken by SM McCallum. It was clearly a complaint about SM McCallum, and he was clearly the subject of the complaint.

181. We have concluded that such explanations as were advanced by the Respondent were not adequate, and did not discharge the burden on the Respondent to show that the decision that SM McCallum should not recuse himself was in no sense whatsoever because the Claimant had complained about discrimination.

182. The detriment to the Claimant is obvious: his grievance was dealt with by a decision-maker who had already pre-determined part of it, and who could not reasonably be regarded as impartial.

183. Consequently, and by operation of the burden of proof provisions, this claim of victimisation (Issue 11(b)) must succeed.

<u>Issues 7(c) (direct race discrimination) and 11(c) (victimisation): R refused to provide the Claimant with the evidential basis for the decision to issue him with a PDP, including failing to provide C with a copy of the Local Management Investigation report and the 21 collected witness statements.</u>

184. We consider that the Claimant has not proved facts from which we could reasonably conclude that that decision not to disclose the statements was because of the Claimant's race. He has led no evidence of a difference of treatment, coupled with a difference of race, let alone evidence, from which the Tribunal could reasonably conclude that Mr Sivell's decision was tainted by considerations of race. We are not persuaded that the failure to answer some of the questions in the Claimant's quasi-questionnaire, or the existence of articles criticising the Respondent's record on diversity, provided that evidence; it was too generalised to throw any meaningful light on Mr Sivell's own mental

processes. For these reasons, the claim of direct race discrimination (Issue 7(c)) fails.

185. Again, the position is different when it comes to the victimisation claim.

186. The Claimant had been led to believe when he made his first SAR that, once the LMI process had been concluded, he would be entitled to see the relevant documents. However, when he made his second SAR in February 2018, by which time the LMI had been concluded, he was told that the material would not, in fact, be disclosed to him.

187. Between the two SARs, the Respondent's position appeared to have changed. Between the two SARs, the Claimant had issued Tribunal proceedings, raising complaints of race discrimination. Mr Sivell accepted that he knew this, although it was unclear to the Tribunal why the Head of Information Access would be informed about the existence of Tribunal proceedings. Moreover, there was no evidence that Mr Sivell, or anyone else in the Information Access team, had gone through the kind of case-by-case review which the Tribunal was told would usually occur. The Claimant's request met with a blanket refusal; in that respect he was treated differently.

188. Taking these factors together, we consider that the Claimant has proved facts from which a Tribunal could reasonably conclude that the decision not to disclose the documents was materially influenced by the fact that the Claimant had issued proceedings in the intervening period; the burden passes to the Respondent to show that this played no part whatsoever in the decision.

189. Mr Sivell was asked by the Tribunal whether he had ever disclosed F10 statements. He said that he could not recall a case when witness statements had been disclosed; he added that the issue of confidentiality 'would have been our position most times, we would review on a case-by-case basis, but that is likely to be the case when were asked to disclose other people's witness statements'. We found that explanation to be contradictory: on the one hand it suggested that non-disclosure happened 'most times' and was 'likely', which suggested that there were exceptions; on the other hand Mr Sivell could not recall any such exceptions. Moreover, there was no explanation as to why there was no case-by-case review in this instance.

190. Ms Gibbs, who is Head of HR and Employee Relations, gave somewhat different evidence: that F10 statements would be disclosed, but only if the matter proceeded to a Stage 1 conduct hearing (a distinction which Mr Sivell did not make). Ms Gibbs said that an employee would be 'unlikely' to have disclosure at a more initial stage 'because it's a live investigation'. That explanation was itself unsatisfactory since, at the point when the Claimant made his second SAR, the LMI had been concluded.

191. In her closing submissions, Ms King submitted that 'under the disciplinary policy, employees are not entitled to the disclosure of documents and witness statements when matters are dealt with informally'. In fact, the disciplinary policy is silent on the issue of disclosure at the informal stage.

192. Taking into account the contradictory nature of Mr Sivell's evidence, the different explanation given by Ms Gibbs, which was also unsatisfactory, and the absence

of any documentary evidence to support the Respondent's position, we are not satisfied that the Respondent has given an adequate, non-discriminatory explanation for the failure to disclose to the Claimant the LMI material, including the F10 statements, after the LMI was concluded.

193. Because the Respondent has failed to discharge the burden on it, the claim of victimisation (Issue 11(c)) succeeds.

Remedy

194. The parties shall attend the November hearing of Case 3, prepared to deal with the issue of remedy (which the Tribunal understands to be confined to injury to feelings), arising out of our conclusions in relation to Case 2.

____

Employment Judge Massarella

4 October 2021

<u>Case No. 3201597/2017</u>

<u>DIRECT RACE DISCRIMINATION CONTRARY TO SECTION 13 EQUALITY ACT 2010</u>

1. Did R treat C less favourably than R did or would treat others who did not share C's race in the following ways:

   (a) Failing to carry out a reasonable investigation into the Claimant's grievance/appeal in the following ways:

      (i) C will say Group Manager (GM) Rhys Powell, the manager who investigated C's grievance, simply accepted Station Manager (SM) Cook's version of events. R will say GM Powell reached his decision on balance or probabilities after carrying out a reasonable investigation.

      (ii) C will say R failed to disclose witness statements obtained as part of the investigation into the Claimant's grievance or appeal and such failure to disclose witness statements was contrary to R's grievance policy. R disputes that R was obliged to disclose witness statements.

      ~~(iii) The Respondent failed to offer the Claimant the opportunity to consider mediation. The Claimant alleges that this was contrary to the Respondent's Grievance Procedure.~~

   (b) Dismissing C's grievance of 24 April 2017;

(c) Accusing C in the grievance outcome letter of 11 July 2017 of acting in bad faith but failing to provide any evidence to support this assertion in the grievance outcome letter. R denies accusing C of acting in bad faith in the letter and will say GM Powell's reasons for doubting C's account are clear on the face of the letter;

(d) The Respondent's Information Access Team failed to provide the witness statements obtained during the grievance investigation to the Claimant in response to his subject access request on 21 July 2017.

(e) Dismissing C's grievance appeal of 17 July 2017 on 20 September 2017.

2. Has C proved facts from which a Tribunal could conclude in the absence of any other explanation, that R directly discriminated against C because of his race?

3. If so, has R proved that it did not discriminate against C because of his race?

VICTIMISATION CONTRARY TO SECTION 27 EQUALITY ACT 2010

4. R admits that C's grievance of 24 April 2017 is a protected act.

5. Did R subject C to the following detriments:

(a) Failing to carry out a reasonable investigation into the Claimant's grievance/appeal in the following ways:

(i) C will say Group Manager (GM) Rhys Powell, the manager who investigated C's grievance, simply accepted Station Manager (SM) Cook's version of events. R will say GM Powell reached his decision on balance or probabilities after carrying out a reasonable investigation.

(ii) C will say R failed to disclose witness statements obtained as part of the investigation into the Claimant's grievance or appeal and such failure to disclose witness statements was contrary to R's grievance policy. R disputes that R was obliged to disclose witness statements.

~~(iii) The Respondent failed to offer the Claimant the opportunity to consider mediation. The Claimant alleges that this was contrary to the Respondent's Grievance Procedure.~~

(b) Dismissing C's grievance of 24 April 2017 on 11 July 2017 (R admits C's grievance was dismissed.)

(c) Accusing C in the grievance outcome letter of 11 July 2017 of acting in bad faith but failing to provide any evidence to support this assertion in the

grievance outcome letter. R denies accusing C of acting in bad faith and will say GM Powell's reasons for doubting C's account are clear on the face of the letter;

(d) The Respondent's Information Access Team failed to provide the witness statements obtained during the grievance investigation to the Claimant in response to his subject access request on 21 July 2017.

(e) Dismissing C's grievance appeal of 17 July 2017 on 20 September 2017. (R admits C's grievance appeal was dismissed.)

6. If so, did R subject C to the above detriments because of his protected act?

Case No. 3200756/2018

DIRECT RACE DISCRIMINATION CONTRARY TO SECTION 13 EQUALITY ACT 2010

7. Did R treat C less favourably than R did or would treat others who did not share C's race in the following ways:

(a) On 10 January 2018, R issued C with a personal development plan (PDP) which was to last for a period of two months;

(b) Station Manager McCallum refused to recuse himself from hearing C's grievance about the decision to issue him with a PDP dated 17 January 2018;

(c) R refused to provide the Claimant with the evidential basis for the decision to issue him with a PDP, including failing to provide C with a copy of the Local Management Investigation report and the 21 collected witness statements.

8. Has C proved facts from which a Tribunal could conclude in the absence of any other explanation, that R directly discriminated against C because of his race?

9. If so, has R proved that it did not discriminate against C because of his race?

VICTIMISATION CONTRARY TO SECTION 27 EQUALITY ACT 2010

10. R admits that C's grievance dated 24 April 2017, appeal dated 17 July 2017, ET Proceedings dated 24 November 2017, and grievance dated 17 January 2018 are protected acts.

11. Do the following acts amount to detriments:

(a) On 10 January 2018, R issued C with a personal development plan (PDP) which was to last for a period of two months;

(b) Station Manager McCallum refused to recuse himself from hearing C's grievance about the decision to issue him with a PDP dated 17 January 2018;

(c) R refused to provide C with the evidential basis for the decision to issue him with a PDP, including failing to provide C with a copy of the Local Management Investigation report and the 21 collected witness statements.

12. If so, was C subject to a detriment because he undertook a protected act?