EMPLOYMENT TRIBUNALS

Claimant:	**Mr D Izilein**	
Respondent:	**Royal College of Nursing**	
Heard at:	**Cardiff via CVP**	**On: 21, 22, 23, 24, 25, 28 (in chambers) and 29 June 2021**
Before:	**Employment Judge S Jenkins** **Mrs A Burge** **Mr C Stephenson**	

Representation:
Claimant: In person
Respondent: Ms G Roberts (Counsel)

JUDGMENT having been sent to the parties on 30 June 2021, and reasons having been requested by the Respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The hearing was to deal with the Claimant's claims, initially of direct race and disability discrimination brought on 7 January 2020 whilst he was still employed, but subsequently expanded by way of amendment to include claims of unfair dismissal and victimisation following his dismissal on 17 January 2020.

2. We heard evidence from the Claimant on his own behalf and from Sally Ashman, Advice Centre Manager; David Pickford, Team Manager; Terina Scheeres, Head of UK Customer Services; Sian Morris, Team Manager; Norman Provan, Associate Director of RCN Scotland; John Nelson, formerly

Interim HR Support; and Helen Whyley, Director of RCN Wales; on behalf of the Respondent.

3. We considered the documents in a bundle spanning 1,425 pages to which our attention was drawn, and we took into account the parties' submissions.

Issues

4. The issues agreed between the parties were as follows.

Unfair dismissal

1. *What was the reason or the principal reason for the Claimant's dismissal?*

2. *Was that reason a potentially fair reason for the purposes of section 98 Employment Rights Act 1996? The Respondent relies on some other substantial reason.*

3. *In the circumstances, did the Respondent act reasonably in treating its reason as sufficient to dismiss the Claimant?*

Discrimination – Jurisdiction

4. *Are any of the Claimant's discrimination claims out of time?*

5. *If so, do they amount to conduct extending over a period that ends in time?*

6. *If not, would it be just and equitable to extend time?*

Direct discrimination (Race)

7. *Did the Respondent do the following matters:*

   i) *In 2010 Terina Scheeres denied the Claimant's request to visit his father in the USA (Scott Schedule 1 "SS1" - comparator hypothetical);*

   ii) *On 28 March 2016 and 8 April 2016 Sally Ashman denied the Claimant's request to attend his father's 80th birthday celebration in Nigeria and did not offer the Claimant the opportunity to swap the weekend (SS2 - comparator Employee D, another unnamed adviser, and hypothetical);*

   iii) *On 8 May 2018 David Pickford and Sally Ashman placed the Claimant on performance management without giving him the*

required explanation and this decision, which was bullying and harassment but was not looked into (SS3 - comparator Employee B and hypothetical);

iv) On 15 August 2018 David Pickford and Terina Scheeres extended the Claimant's informal performance management plan beyond three months (SS4 - hypothetical comparator);

v) On 15 August 2018 Terina Scheeres instructed David Pickford to look for evidence over the previous year to justify placing the Claimant on performance management rather than relying on the evidence presented at the beginning of the informal performance management plan (SS5 - hypothetical comparator);

vi) On 24 August 2018 Sally Ashman used an unorthodox method of highlighting "precis" writing to present regional office feedback to the Claimant (SS6 - hypothetical comparator);

vii) On 10 January 2019 despite having had his appeal against formal monitoring of performance upheld, evidence of bullying and harassment of the Claimant was ignored and the Claimant was moved from stage 2 to stage 1 rather than being removed entirely from performance management (SS7 - hypothetical comparator);

viii) In February 2019 Sian Morris failed the Claimant on calls when he had followed policy in order to provide credence for progressing the Claimant's performance management (SS8 - comparator Employee A and hypothetical comparator);

ix) On 5 September 2019 Sian Morris rebuked the Claimant for not going for an eye test whilst on annual leave (SS9 – comparator relied on Employee C and hypothetical comparator); and

x) On 10 September 2019 Sian Morris accused the Claimant of not sending a referral to the Scottish region when this could have been easily verified with the Regional Officer (SS10 - hypothetical comparator).

8. If so, did it thereby treat the Claimant less favourably that it treated or would have treated a hypothetical comparator and/or the actual comparators listed above and in the Claimant's Scott Schedule?

9. If so, was that less favourable treatment because of the Claimant's race?

Direct discrimination (Disability)

10. *On 5 September 2019 did Sian Morris rebuke the Claimant for not going for an eye test whilst on annual leave (SS9 - comparator Employee C and hypothetical comparator)?*

11. *If so, did it thereby treat the Claimant less favourably that it treated or would have treated a hypothetical comparator and/or the actual comparators listed above and in the Claimant's Scott Schedule?*

12. *If so, was that less favourable treatment because of the Claimant's disability?*

Victimisation

13. *The Respondent accepts the Claimant did the following protected acts:*

    i) *Making a complaint on 24 June 2016 about the way he was treated in the run up to his father's 80th birthday; and*

    ii) *Issuing the claim form in these proceedings on 7 January 2020 (the "Protected Acts").*

14. *Did the Respondent do the following matters:*

    i) *On 28 March 2016 and 8 April 2016 Sally Ashman denied the Claimant's request to attend his father's 80th birthday celebration in Nigeria and did not offer the Claimant the opportunity to swap the weekend (Scott Schedule victimisation 1 "SSV1");*

    ii) *On 8 May 2018 David Pickford and Sally Ashman placed the Claimant on performance management without giving him the required explanation and this decision, which was bullying and harassment but was not looked into (SSV2);*

    iii) *On 15 August 2018 David Pickford and Terina Scheeres extended the Claimant's informal performance management plan beyond three months (SSV3);*

    iv) *On 15 August 2018 Terina Scheeres instructed David Pickford to look for evidence over the previous year to justify placing the Claimant on performance management rather than relying on the evidence presented at the beginning of the informal performance management plan (SSV4);*

    v) *On 24 August 2018 Sally Ashman used an unorthodox method of highlighting "precis" writing to present regional office feedback to the Claimant (SSV5);*

vi) On 10 January 2019 despite having had his appeal against formal monitoring of performance upheld, evidence of bullying and harassment of the Claimant was ignored and the Claimant was moved from stage 2 to stage 1 rather than being removed entirely from performance management (SSV6);

vii) In February 2019 Sian Morris failed the Claimant on calls when he had followed policy in order to provide credence for progressing the Claimant's performance management (SSV7);

viii) On 5 September 2019 Sian Morris rebuked the Claimant for not going for an eye test whilst on annual leave (SSV8);

ix) On 10 September 2019 Sian Morris accused the Claimant of not sending a referral to the Scottish region when this could have been easily verified with the Regional Officer (SSV9);

x) On 2 October 2019 Norman Provan and John Nelson invited the Claimant to a disciplinary investigation hearing during which the Claimant was not allowed to respond to the charges and was suspended (SSV10);

xi) On 11 November 2019 Norman Provan and John Nelson asked the Claimant to retract his comments without giving him the option to explain any of them (SSV11); and

xii) On 17 January 2020 Helen Whyley, Norman Provan and John Nelson dismissed the Claimant without following a disciplinary policy and citing some other substantial reason as the reason for dismissal (SSV12).

15. If so, did it thereby subject the Claimant to a detriment?

16. If so, did it do so because the Claimant had done the Protected Acts?

<u>Remedy</u>

17. What is the period of loss of earnings to be awarded, if any?

18. Should the Claimant receive compensation for injury to feelings? If so, how much?

19. Should compensation be reduced following Polkey v AE Dayton Services Limited [1987] ICR 142 and/or to reflect the Claimant's contributory conduct and/or as is just and equitable and, if so, by how much?

20. Should there be a reduction to any award to reflect an unreasonable failure to follow the ACAS Code?

21. Should there be an increase in award for an unreasonable failure to follow the ACAS Code?

5. As there did not seem to be any evidence in the bundle, or indeed in the Claimant's witness statement, about remedy, we decided to focus on liability first and then move on to consider remedy, in terms of what compensation to award, if the Claimant's claims succeeded.

Law

6. The relevant applicable law was largely encapsulated within the List of Issues, but we bore in mind the following additional matters.

7. First, with regard to unfair dismissal, the first point for us to address was the reason for dismissal, the burden being on the Respondent to satisfy us that it dismissed the Claimant for a potentially fair reason falling within Section 98(1) or (2) of the Employment Rights Act 1996 ("ERA"). In this case. the Respondent contended that the reason for dismissal was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held ("SOSR"), which would fall within Section 98(1)(b) ERA, on the basis that the trust and confidence between the parties had been irrevocably destroyed.

8. We noted that the Court of Appeal, in ***Abernethy -v- Mott Hay and Anderson*** **[1974] ICR 323**, noted that the reason for dismissal is "*the set of facts which led to the decision to dismiss*".

9. If the Respondent satisfied us that the dismissal was by reason of SOSR, we would then have to consider whether dismissal for that reason was fair in all the circumstances, applying Section 98(4) ERA where the burden of proof is neutral. In the context of SOSR dismissals, the Employment Appeal Tribunal ("EAT") in ***Ezsias -v- North Glamorgan NHS Trust*** **[2011] IRLR 550**, noted that Tribunals must be alive to the important distinction between the dismissal of a Claimant for conduct as a result of causing the breach of trust and confidence and dismissal due to the fact of the breach.

10. In assessing fairness we would also need to consider whether the Respondent had followed appropriate procedures, although the EAT, in ***Phoenix House Limited -v- Stockman*** **[2017] ICR 84**, made it clear that the ACAS Code on Disciplinary and Grievance Procedures does not apply to SOSR dismissals.

11. We were also conscious that our role in assessing the fairness of the dismissal was not to step into the shoes of the Respondent, but to consider whether the decision fell within the range of responses that a reasonable employer might adopt in the circumstances.

12. Turning to the discrimination claims, with regard to the Claimant's claims of direct discrimination, we noted, with regard to the burden of proof, that Section 136 of the Equality Act 2010 ("EqA") provides that we would first need to consider whether there were any facts from which we could decide, in the absence of a non-discriminatory reason from the Respondent, that an act of unlawful discrimination had taken place. If so, the burden would then shift to the Respondent to demonstrate a non-discriminatory explanation.

13. In this regard, the appellate courts have regularly made clear, for example the Court of Appeal in ***Khan -v- The Home Office*** **[2008] EWCA Civ 578** and the EAT in ***Chief Constable of Kent Constabulary -v- Bowler*** **(UK EAT 0214/16)**, that Tribunals should avoid a mechanistic approach to the drawing of inferences.

14. We were also conscious that the Court of Appeal, in ***Madarassy -v- Nomura International PLC*** **[2007] ICR 867**, had noted that the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination, and that they are not, without more, sufficient material from which a Tribunal can conclude that, on the balance of probabilities, a Respondent had committed an unlawful act of discrimination.

15. We also had to consider whether the Claimant had been treated less favourably than a comparator in circumstances which were not materially different. Section 23 EqA notes that, for the purposes of the comparison required in a direct discrimination claim, there must be no material difference between the circumstances relating to each case, and that includes the Claimant's and any comparator's abilities.

16. With regard to direct disability discrimination the House of Lords, in ***London Borough of Lewisham -v- Malcolm*** **[2008] IRLR 700**, confirmed by the Court of Appeal to apply in the employment field in ***Stockton-on-Tees Borough Council -v- Aylott*** **[2010] ICR 1278**, noted that the appropriate comparator was a non-disabled person who was otherwise in the same circumstances as the disabled claimant.

17. We also noted that there was a jurisdictional element for us to consider, and with regard to the question of whether any of the claims had been brought out of time, we noted the terms of Section 123(3) EqA, that conduct extending over a period is to be treated as having been done at the end of the period.

18. With regard to the victimisation claim, the Respondent accepted that the two asserted protected acts, the raising of a grievance in June 2016 and the submission of the Claimant's claim form in January 2020, were protected acts for the purposes of Section 27 EqA. We therefore had to consider whether the Claimant had been treated to his detriment as a result of having made the protected act or acts, i.e. that the protected act or acts had been the cause, or at least a material cause, of the detrimental treatment. In that regard we noted the guidance provided in respect of detriment in the House of Lords decision of ***Shamoon -v- Royal Ulster Constabulary*** **[2003] IRLR 285*.***

19. We noted that the first claimed detriment asserted to have taken place in March 2016 could not have been caused by the protected acts as it preceded them. We also noted that all of the remaining asserted detriments bar the very last must, if they were to succeed, have been caused by the first protected act, as they were asserted to have occurred before the second.

Findings

20. In terms of the evidence we heard from the witnesses, we generally found the evidence of the Respondent's witnesses to have been delivered openly and straightforwardly, with much of it finding corroboration in the contemporaneous documents, and we therefore largely preferred the evidence of those witnesses.

21. Although we formed that opinion, it does not mean that we considered that the Claimant was untruthful in the evidence he provided. We considered that he genuinely believed that matters had developed in the way he advanced them, and that he felt that he had been badly treated by the Respondent's managers, in particular by Mrs Ashman, Mr Pickford and Mrs Scheeres.

22. However, we found no real basis for that belief, and felt that the Claimant was someone who was unwilling to accept that matters were not how he perceived them, even when it would have been apparent to a neutral observer that that was the case. An example of this was the Claimant's insistence that Mr Provan, at an investigatory meeting with the Claimant in November 2019, should discuss the allegations that the Claimant had advanced in several review meetings, appeals and grievances, which had in all material respects been rejected, as opposed to dealing with Mr Provan's concerns, which had been clearly identified in the invitation letter, about the Claimant's conduct and its impact on the trust and confidence between the parties.

23. The Claimant was also, in our view, someone who had a tendency to seize on any comment or decision which he perceived as favourable, even where it was relatively neutral and/or of very limited practical significance. An example of that was the conclusion reached, as part of one of the Claimant's

appeals, that Mrs Ashman's method of seeking feedback on a complaint had been unusual when she had asked the manager lodging the complaint to highlight her areas of concern on the text of the Claimant's summary of the call, when the usual process would be to obtain that feedback via a telephone call. However, despite describing the process adopted by Mrs Ashman as unusual, the Reviewing Manager did not indicate that there was anything untoward with it.

24. Mrs Ashman, in her evidence, was very clear that her approach was simply driven by the fact that the manager lodging the complaint had done so by email, in which she had included a screenshot of the summary, commenting that she could not highlight her concerns on it. In our view, there was nothing in Mrs Ashman's actions which could reasonably have led to any criticism of her. However, even if there had been, the clear conclusion was that it did not detract from her conclusion that the call had indicated concerns over the quality of the Claimant's work.

25. The Claimant's approach was also apparent from his questioning of several of the Respondent's witnesses, where he often spent some considerable time putting a particular point to a witness which did not accord with the documentation he was quoting from. An example of this was an exchange with Mrs Whyley over what the Claimant had contended had amounted to discrimination.

26. In our view, the Claimant was someone who had a tendency to view matters through a prism of unfairness, when the reality was that there was nothing to suggest that he had been treated unfairly. Indeed on occasions we felt that he had been treated quite generously.

27. Moving on to our specific findings, the Respondent is a professional body and trade union for nurses, student nurses, midwives and nursing support workers. It operates a national and regional structure, which includes RCN Wales, the office at which the Claimant worked. However the Claimant actually worked as an Adviser in the Respondent's Advice Centre.

28. Although situated in Cardiff, the Centre provides initial employment advice by telephone, and more recently by email and webchat, to the Respondent's members throughout the country. That advice is provided on a 7-day week basis between the hours of 8.30am and 8.30pm, being closed only on certain bank holidays when a call-back service is operated. The provision of advice is undertaken by advisers split into four teams (until 2018 there were five) of approximately ten advisers, each under the supervision of a team manager.

29. During the period giving rise to the claims in this case the Claimant was the only black African adviser in the Advice Centre, although there were advisers with other non-white ethnic backgrounds.

30. As the advice is provided by the Respondent on a 7-day week basis, there is a need for regular weekend working, with each team being required to work one weekend in every four, previously five. As this is done regularly, the members of each team are able to assess in advance the weekends on which they are likely to be required to work throughout a year. As there is less demand at weekends, six advisers are generally required to work on Saturdays and four on Sundays. Specific rotas are generally released around five or six weeks in advance, at which point an adviser will know the specific shifts he or she will be required to work.

31. A particular issue in this case revolved around holidays and, in particular, holidays at weekends. The Respondent operates a computerised leave booking system known as Verint. Bookings for leave can be made a year in advance, and the system will confirm whether particular leave has been approved or if too many advisers have already booked the period off, and that it has been "waitlisted". That means that the leave has not been granted, but that the request remains on the system and if, for example because another person cancels their booked leave, the period becomes available, the waitlisted request will be approved.

32. When an adviser wishes to book leave including a weekend they are expected to assess whether it is a weekend they are expected to work and, if so, then to book the weekend as holiday as well.

33. Advisers are free to swap shifts, and it appears do so with some regularity. If the shifts being swapped are the same length the advisers can note that themselves on the system, otherwise the approval of a manager is needed.

34. In terms of the work undertaken by advisers, they provide initial advice on the problems raised by the particular member, and record it in a précis on the system. There are however, a number of procedural aspects to their work, such as checking the person's membership, and that they are indeed who they say they are. If it is clear that the caller needs further assistance, the adviser will refer the matter to an officer in the relevant region who will provide further advice and, if required, representation. Sometimes members call more than once in relation to the same issue, hence the need for the record of the advice previously given.

35. Team managers undertake regular monitoring of calls undertaken by advisers in their team, both in terms of compliance with the Respondent's processes and the quality of the advice given, and advisers are rated on their work via a scoring system. Team managers will also look into complaints that may be made about the service provided by advisers, either from members themselves or from the region to which a referral has been made.

36. Over the years since the Claimant commenced employment, the operation of the Advice Centre has become more technologically advanced, with calls being recorded and with a number of areas of advice being covered by the Respondent's website which members can access on a self-service basis. This has led to the work of advisers becoming more involved, as straightforward matters are now more likely to be resolved by members themselves via the web-based resources provided.

37. Turning to the Claimant's specific circumstances, he commenced his role as an adviser in October 2002 and, apart from time spent on secondment as an officer in the South West region between the middle of 2012 and the middle of 2013, remained in that role until his employment ended in January 2020.

38. The first incident giving rise to the Claimant's claims occurred in June 2010. The Claimant booked two weeks' annual leave between 21 June and 6 July to visit his family in the United States. No leave was available for 24 June and therefore the request for that day was rejected. However, the Claimant made an informal arrangement with a colleague to swap his shift on that day. Unfortunately, shortly before the holiday, on 18 June, it became apparent that the colleague could not now cover the shift on 24 June. As the swap had not been formalised it remained the Claimant's responsibility to work the shift on 24 June or to obtain cover, and, despite attempts to obtain a swap, none was forthcoming, and the Claimant went to the United States with a shift uncovered.

39. On the Claimant's return, his manager directed that an investigation be undertaken into what was considered to have been the Claimant's unauthorised absence. That then led to a disciplinary hearing before Mrs Scheeres, then the Contact Centre Manager, on 27 August 2010.

40. Mrs Scheeres' decision was that, despite the allegation having been proved, no formal action would be taken on that occasion. She confirmed that if further incidences of unauthorised absence arose in the future then formal action would be undertaken, and she told the Claimant to make sure that his absences were approved in accordance with the Respondent's procedures before taking time off.

41. In June 2015 the Claimant requested a period of leave for two consecutive weeks at the end of March and beginning of April 2016 for his father's birthday. Approval was initially granted for the first week, but he was waitlisted for the second. No leave was requested for the weekend between the two weeks, of 26 and 27 March.

42. By 18 February 2016, Mrs Ashman had prepared the rota for the relevant period, and she emailed the Claimant to inform him that she had been able to approve the leave request from 29 March and 1 April i.e. the second week

but that the Claimant had not requested leave on Saturday 26 March and would be expected to work that day unless he could arrange a swap. Although not directly clear from the email, it appeared that the Claimant had not been expected to work on Sunday 27 March.

43. Mrs Ashman's oral evidence to us, which we accepted, was that she thought she was being the bearer of good news for the Claimant, as she was able to approve the second week of leave, and that she did not anticipate that there would be any difficulty in the Claimant obtaining a swap for 26 March. She noted that a colleague had been able to effect a swap for the same period at the start of March, i.e. some two weeks later.

44. For some reason however, rather than pursue a swap for 26 March the Claimant changed his request to move his first week of leave to after the second, but that was within the period of school Easter holidays and therefore was more problematic. Some leave was able to be approved, but not 8 April.

45. On 25 March 2016 the Claimant sent an email to his manager, and to Mrs Ashman and another employer involved with rostering, explaining that he had arranged his visit to travel overseas to celebrate his father's 80th birthday and that he was at his "*wit's end*". His manager and Mrs Ashman separately replied noting that they were sorry to hear that the Claimant was stressed, but pointing out that it was his obligation to book his leave appropriately or to arrange a swap, that he would now need to arrange a swap, and that if he did not and took the leave, it would be unauthorised absence.

46. We observed that the Claimant contended his treatment at this time contrasted with that of another employee, in fact his trade union representative, and referred us to an email sent to that employee in relation to leave she had booked in 2016. In both cases the manager involved in preparing the rota, not Mrs Ashman, pointed out that the representative's team was due to work on a weekend in the middle of, or at the start of, her booked leave, and enquired if she would be in, pointing out that, if not, she would need to arrange a swap for the Saturday, the manager being able to adjust the rota for the Sunday in each case. As we previously observed only four advisers are required to work on Sundays as opposed to six on Saturdays. However, it appeared to us that the other employee's treatment was very much the same as the Claimant's. Both were told that the Sunday could be accommodated but that they would need to arrange swaps for the Saturday.

47. We also observed that the Claimant in his oral evidence contended that the Respondent would call people in to work when there were shortages of staff,. However, Mrs Ashman's clear evidence, which we accepted, was that whilst they could ring around staff to see if any were available to work, for example, where shortages had arisen due to sickness absence, they would not require

people to work on days on which they had not been rostered, and would instead work around the absence or turn on their answerphones and move to a call-back process.

48. In the event, the Claimant remained absent on 8 April and his absence was recorded as unauthorised. A disciplinary investigation took place, which recommended, on 13 May 2016, that there be a disciplinary case to answer on the basis that the Claimant had been absent without authorisation and had failed to follow a reasonable management instruction, i.e. to attend work on 8 April 2016.

49. In response, on 24 June 2016, the Claimant raised a grievance against Mrs Ashman alleging direct and indirect discrimination and victimisation in relation to the rejection of his leave request. Mrs Scheeres was identified, as the Head of the Respondent's Customer Service Centre at the time, as the appropriate person to consider the disciplinary and grievance matters. However, after discussions with the Respondent's HR Department, and in order to address any possible conflict issues arising from Mrs Scheeres carrying out both roles, it was decided that she would consider the grievance, and that her manager, Mr Chris Cox, Director of Membership Relations, would consider the disciplinary allegations.

50. A disciplinary hearing then took place on 19 July 2016 and a grievance hearing took place on 20 July 2016, with the Claimant being accompanied by his trade union representative on both occasions.

51. Mr Cox provided his decision on the disciplinary allegations by letter of 28 July. He upheld both allegations and imposed a sanction of a written warning for a period of six months. He advised the Claimant of his right to appeal the decision, and the Claimant lodged an appeal by email on 11 August 2016. The outcome of that, following an appeal hearing on 13 August before a panel of two senior employees from the Respondent's Head Office, was that it was concluded that the decision that the Claimant had been absent without authorisation was upheld as the facts were not in dispute, but that the decision that the Claimant had failed to follow a reasonable management instruction was only partially upheld as it was felt that there could have been more accommodation and consideration from the Respondent's management to resolve the problem. The panel concluded that the formal written warning remained the correct sanction, but that its duration should be reduced to the period up to the day of the appeal hearing such that it was, by that time, spent.

52. Mrs Scheeres provided her decision on the grievance to the Claimant by letter dated 7 September 2016. She did not uphold any aspect of it and reminded the Claimant of his right to appeal her decision.

53. The Claimant lodged an appeal against the grievance outcome on 15 September 2016, and that was considered by Ms Theresa Fyffe, Director RCN Scotland, at an appeal hearing on 18 October. She provided her decision in a letter to the Claimant dated 11 November 2016. She did not uphold the appeal but she outlined some learning that she felt could be undertaken regarding the process for requesting annual leave and on communication.

54. By this stage the relationship between the Claimant and his then Team Manager was proving difficult. Although there was no documentary evidence in the bundle, Mrs Scheeres' evidence' which we had no reason to doubt as it reflected the lack of any dialogue over the holiday request, was that there was a lack of engagement between the two of them. She also noted that there were a number of concerns about the Claimant's performance which his manager had found difficult to address with him.

55. In February 2017 therefore, the Claimant moved to a team managed by Mr Pickford. There was evidence in the bundle from soon after that, the first instance being March 2017, of Mr Pickford raising concerns over the Claimant's performance with him. Concerns were also raised over the Claimant's time keeping, relating both to late arrivals at work and his break periods during the working day. Other emails and records of one-to-one discussion throughout 2017 and into 2018 record similar comments, and, on 5 April 2018, Mr Pickford indicated in an email to the Claimant that he was going to put together some development objectives around précis writing and possibly some other policy issues noting that "*this really does seem to be impacting on your call quality*".

56. That was confirmed by Mr Pickford in a "Continuing Conversation" on 8 April 2018, and, on 8 May 2018, Mr Pickford provided the Claimant with a Supporting Performance Plan under the Respondent's Supporting Performance Policy. There was then to follow a three-month review period. Mr Pickford set out five objectives relating to; précis writing, schedule adherence (i.e. time-keeping and breaks), being receptive to feedback, process (i.e. following internal processes), and advice giving and communication style.

57. The Claimant replied to Mr Pickford by email dated 11 May 2018, setting out his objections to being placed on the performance plan, in which we observed, with some irony, that the Claimant commenced his objection to the objective of being receptive to feedback by saying "*I'm afraid I disagree entirely with this point*". During the hearing the Claimant was critical of Mr Pickford not replying to his email and, in particular, not providing specific examples of calls which had given rise to concern until 28 July 2018. However, we were satisfied, from a variety of emails in the bundle, that the

broad concerns had been brought to the Claimant's attention before the performance plan was put in place.

58. In light of the Claimant's concerns however, Mr Pickford arranged for the plan he had drawn up to be peer-reviewed by Ms Morris, and she confirmed that the plan was appropriate. During the hearing the Claimant questioned the fact that Ms Morris had not had sight of examples of the Claimant's under-performance before carrying out her review of the plan, and she explained that that had not been the purpose of her involvement, which had been to assess whether the objectives put in place were reasonable and appropriate. We accepted that that had been her role, and we saw no reason why she would have needed to examine whether it had been appropriate for the Claimant to be placed on the performance plan.

59. Over the three month review period several examples of under-performance arose and, on 31 July 2018, Mr Pickford wrote to the Claimant arranging a formal review meeting for 8 August. However, due to concerns the Claimant had raised with the Respondent's HR Department about the performance management process, it was suggested by HR that a "facilitated conversation" between the Claimant and Mr Pickford, chaired by Mrs Scheeres, should take place to try to address the Claimant's concerns. The review meeting was therefore postponed and the facilitated conversation took place on 15 August 2018.

60. During this meeting, the Claimant indicated that being placed on the performance plan had come out of the blue to him, which Mr Pickford refuted. However, Mrs Scheeres suggested that it would be useful for Mr Pickford to put all the concerns that had arisen in one document to ensure that the Claimant fully understood why he had been placed on the performance plan, which Mr Pickford did by way of an attachment to an email on 27 August 2018. That document gave rise to one of the Claimant's allegations in this case, that Mrs Scheeres had advised Mr Pickford to go back over the last year to look for evidence, which the Claimant described in the hearing as "trawling for evidence". However, we were satisfied that Mr Pickford had done nothing more than collate pre-existing documentation into one document for ease of presentation to the Claimant. We saw no evidence of any additional matters being raised.

61. During the facilitated conversation, the Claimant also raised concerns about the postponement of the review meeting, and queried whether the review period had been extended, the three-month period having been due to end on 8 August. This appeared to have been the source of some confusion on the part of the Claimant as the actual review meeting only took place in early September. However we were satisfied that the review meeting only took into account concerns which had arisen in the review period of 8 May to 8 August 2016, and therefore the Claimant did not suffer any disadvantage due to the

fact that the review meeting took place nearly a month later than planned, due to the intervention of the facilitated conversation and Mrs Scheeres' direction that Mr Pickford collate all the relevant material into one document.

62. The review meeting took place on 4 September 2018, and Mr Pickford concluded that, whilst the précis writing objective had been met, the others had not. He confirmed that the Claimant would therefore move to stage 2 of the performance policy with a further review period of three months expiring on 11 December 2018. Mr Pickford advised the Claimant that he had the right to appeal against his decision and the Claimant submitted an appeal on 24 September, that led to an appeal hearing before Lara Carmona, the Respondent's Associate Director of Policy, Public Affairs, on 6 November.

63. Ms Carmona provided her decision to the Claimant in a letter dated 10 January 2019. In this she confirmed that she felt that there was sufficient evidence to conclude that the Claimant's performance was enough of an issue to necessitate the application of the Supporting Performance Policy. However, she felt that Mr Pickford's management practice could have been of higher quality in terms of his communication with the Claimant. She confirmed however, that she did not consider that Mr Pickford's actions had been unfair or in breach of the policy.

64. She decided that the Claimant should not move to Stage 2 of the Policy but should return to the start of Stage 1. She also recommended that mediation should take place between the Claimant and Mr Pickford to repair their relationship, which Ms Carmona had felt had broken down. However, rather than undergo mediation it was agreed with the Claimant that he would transfer to a different team. The Claimant asked that he return to the team managed by a previous manager but that was not possible, and he therefore moved to the team managed by Ms Morris and that occurred in February 2019.

65. Ms Morris met the Claimant on 22 February 2019, and in that meeting she outlined the improvement she expected to see in relation to the four remaining objectives under the performance plan, and the support that would be provided to him in meeting them. This included adjusting the Claimant's start time from 9am to 9.15am. Following the meeting she provided the Claimant with a revised Supporting Performance Plan.

66. On 9 March 2019 however, the Claimant submitted a lengthy grievance against Mrs Scheeres, Mrs Ashman and Mr Pickford alleging bullying and harassment. This largely focused on the Claimant's placement on the performance plan in May 2018 but also included a concern about the way Mrs Ashman had dealt with the complaint raised by the South-East region in August 2018. Jude Diggins, Regional Director based in the Respondent's Head Office, was designated to investigate the grievance.

67. Ms Diggins and the Claimant met on 29 March 2019, and she produced her report on the grievance for Mrs Whyley on 22 May 2019. In this she confirmed that she had identified seven areas of concern in the Claimant's grievance, that three had been comprehensively covered by Ms Carmona, and one had been dealt with by Ms Fyffe, which left three which she had investigated.

68. Following receipt of Ms Diggins' report, Mrs Whyley wrote to the Claimant, on 10 May 2019, inviting him to a grievance outcome meeting on 24 May. Following that meeting, Mrs Whyley wrote to the Claimant, on 13 June 2019, with her decision on his grievance. That was that it was not upheld in any part. Mrs Whyley noted that they had discussed the loss of trust and confidence between the Claimant and his management which needed to be repaired, and that one way of doing that was through mediation which, if the Claimant wished, would be explored. She also reminded the Claimant of his right to appeal her decision as an alternative, and the Claimant did then appeal by email on 24 June 2019.

69. In the meantime, the Claimant's three month review period had expired, and the Claimant and Ms Morris met on 3 June 2019 to review the Claimant's progress. She confirmed the outcome in a letter dated 10 June, which was that she was happy to sign the Claimant off in relation to being receptive to feedback and process, but not in relation to time keeping or advice giving. There would therefore be a further stage 2 of the process which would be reviewed on 7 September 2019. Ms Morris reminded the Claimant of his right to appeal her decision, which the Claimant did on 28 June 2019.

70. The appeal from the Claimant's second grievance outcome was considered by Ms Patricia Marquis, a Director of RCN England, at a hearing on 19 July 2019. She provided her decision on the appeal on 10 September 2019.

71. Ms Marquis concluded that she partly upheld some elements of the Claimant's appeal. In fact, in relation to the three elements of the appeal that Ms Marquis indicated at the outset of her letter that she had agreed with the Claimant were in the scope of the appeal, she appeared to find in his favour in relation to all of them to a degree.

72. Ms Marquis was not one of the witnesses at this hearing, and we could therefore do no more than consider the content of her letter. However, we found her conclusions somewhat surprising. Bearing in mind that the Claimant appeared to draw great support from these conclusions, and that two of them formed specific allegations of discriminatory treatment, it was appropriate for us to consider them in some detail.

73. The three areas considered by Ms Marquis were: (1) That the way in which the complaint had been dealt with i.e. the complaint from the South-East, had

been outside the usual process, with the Claimant claiming that the grievance considered whether what happened had been reasonable as opposed to whether normal process was followed; (2) That the facilitation meeting with Mrs Scheeres had lengthened the performance process as opposed to interrupting it; and (3) Concerns that Mr Nelson, who had assisted Ms Diggins and Mrs Whyley in relation to the Claimant's appeal and grievance, had threatened the Claimant with disciplinary action and had accused him of trying to delay the performance management process by presenting a grievance.

74. With regard to the first of these, Ms Marquis did not speak to the manager who raised the complaint or to Mrs Ashman who dealt with it, but spoke to one of the team managers in the Advice Centre and a Regional Operations Manager and asked them how complaints would usually be dealt with. Both confirmed that complaints would usually be followed up by telephone rather than by email, and would not usually require the record of the call to be highlighted, something with which Mrs Ashman in her evidence did not disagree. That then led Ms Marquis to uphold the appeal as the way in which Mrs Ashman had sought clarification was, as she described it, "*not usual*".

75. That however did not address what we felt was the key question of whether what had happened had been fair, as opposed to usual. Had Ms Marquis spoken to the manager raising the complaint and to Mrs Ashman, she would have understood that Mrs Ashman's request to the manager, to highlight her concerns on the text of the record of the call, only arose due to the manager initially attaching a screenshot of the record and commenting that she could not highlight her concerns. Mrs Ashman was only responding to that communication and was not in any way seeking to go outside usual channels to disadvantage the Claimant.

76. Further direct investigation would also, in our view, have concluded that, whilst not the usual process, it nevertheless fulfilled the same purpose and had the same outcome as the more usual telephone call in which Mrs Ashman would verbally have received the manager's concerns, as opposed to receiving them by way of an email.

77. With regard to the second matter, Ms Marquis noted that the review process, which had been expected to be concluded on 8 August had been delayed to accommodate the facilitated conversation on 15 August. Ms Marquis concluded that the meeting would technically have lengthened the time the Claimant was on the performance plan. Again however, Ms Marquis did not appear to have spoken to Mrs Scheeres or Mr Pickford about the delay to the performance review meeting, and did not appear to have given any thought to the impact of the delay on the fairness of the process. Had she done so, we felt that she would have concluded, as we have, that the performance plan, although being reviewed on 4 September 2018, only took into account

matters up to 8 August 2018. In circumstances where it was not unreasonable for the Respondent to consider that the facilitation meeting was a useful step to try to clarify various concerns raised by the Claimant about the process, the delay was understandable and we did not see that the Claimant suffered any prejudice or disadvantage as a result. Indeed, Ms Marquis made no comment about the potential for the Claimant to have suffered disadvantage, only noting that the meeting at which the process could have been finalised was delayed.

78. With regard to the third matter, Ms Marquis concluded that Mr Nelson had not threatened the Claimant with disciplinary action and had not suggested that the Claimant was deliberately trying to delay the performance management process, but she felt that Mr Nelson's comments had been misjudged and could reasonably have been interpreted in the way the Claimant had described.

79. Ultimately, in her conclusions, Ms Marquis felt that the action taken by Mrs Ashman was a reasonable management action, that the action taken by Mrs Scheeres did not breach the Respondent's Supporting Management Policy, and that whilst Mr Nelson's comments had been open to interpretation there was no malice in making them. Although therefore, in the body of her letter, Ms Marquis referred to upholding or partly upholding the Claimant's grievances, in her conclusions it was clear that she had not upheld them. We felt that this rather mixed message from Ms Marquis was unhelpful in the circumstances of the Claimant who, as we have noted, presented to us as someone determined to view matters from his own perspective and as someone who was unwilling to accept that he was potentially at fault.

80. Ms Marquis also noted that the Claimant had raised concerns that he was being treated differently because of his race, and stated that as they had not been raised previously they would be explored under the Respondent's Respect at Work Policy.

81. In the meantime, the Claimant's appeal against the outcome of the stage 1 review meeting was considered by Lorna Deans, Operational Manager for the West Midlands Region, at a hearing on 24 July 2019, and she provided her decision to the Claimant in a letter dated 30 August 2019. In this, she did not uphold his appeal. Ms Deans confirmed that she had listened to the six calls that the Claimant had contended had been reviewed inappropriately, and had concluded that the scoring of them was, in her opinion, fair and appropriate. She took care to note in each case her reasons for those conclusions. She also concluded that the Claimant's concerns about Ms Morris's view on his time keeping should not be upheld, noting that she was satisfied that that aspect had been fairly and appropriately managed.

82. On 4 September 2019 an issue arose which gave rise to one of the Claimant's complaints. On that day, a Wednesday, the Claimant sent an email to Ms Morris, at that time his Team Manager, at 6.34pm noting that he had placed a request for leave on Friday morning, i.e. 6 September, for an eye appointment. We observed that the Respondent's Taking Time Off Policy states that every effort should be made by staff to arrange medical, dental or ophthalmic appointments in off duty time, and we also observed that the Claimant had only returned that week from a period of annual leave.

83. We also noted that the Claimant suffered with glaucoma, which the Respondent accepted amounted to a disability. However, in his email the Claimant specifically referred to the appointment not involving his glaucoma treatment, only saying that he may need bi-focals as he seemed to be getting far sighted, and that Friday morning seemed to be the only time available for weeks.

84. In his oral evidence before us, and in his questioning of Ms Morris, the Claimant contended that he had been unable to see in work at that time, and therefore made an urgent appointment for that reason, and that he had spoken to Ms Morris to confirm that. However, we did not find the Claimant's contentions credible. Had he really, as he contended, been unable to see, he would have been unlikely to be at work, or to have worked through most of a full working day, and his email to Ms Morris towards the end of the working day gave no hint of such a concern.

85. Ultimately, whilst Ms Morris questioned why the Claimant had not arranged the eye test for his period of annual leave, she allowed him to take the time off as requested. We saw no evidence of what the Claimant described in his claim as a "rebuke" by Ms Morris of the Claimant for not arranging a test for his period of annual leave. The Claimant contended that the treatment he received on this occasion was less favourable than a colleague who was permitted to take time off to attend glaucoma appointments. However, it was clear that this appointment did not relate to the Claimant's glaucoma, and also that he was always able to attend glaucoma appointments when they arose.

86. On 17 September 2019 Ms Morris met the Claimant for the formal stage 2 review meeting, and she provided her outcome from that meeting by letter dated 26 September. She concluded that the Claimant had not met the required standard with regard to time keeping or quality of advice, and therefore that the Claimant would move to stage 3 of the Policy, with his performance being reviewed over a three-month period up to 17 December 2019.

87. With regard to the quality of the Claimant's advice, Ms Morris confirmed that she had reviewed five calls which had been marked as good, which

demonstrated the Claimant's ability to meet the required standard. However, there had been eleven calls which had been marked below standard; three had failed, three had been classed as "development", and five had been classed as "unacceptable".

88. Ms Morris explained her reasons for her marks, and also confirmed that all calls below standard had been second marked, i.e. marked by another manager or supervisor, and similar conclusions had been reached. Ms Morris concluded her letter by reminding the Claimant of his right to appeal against her decision.

89. One matter which occurred just before the review meeting on 17 September 2019, although, as it occurred on 10 September, just after the review period had ended, it was not discussed at the meeting, was that Ms Morris had accused the Claimant of not sending a referral to the Respondent's Glasgow Office when in fact he had, and the issue had arisen due to an IT glitch which she could easily have verified.

90. The matter was readily identified from the emails at the time, and, at 12.40pm on 10 September, Ms Morris emailed the Claimant to note that a member, who had called the day before and had spoken to the Claimant, had called back that morning, but there was no record of the advice the Claimant had provided on the system. Ms Morris asked the Claimant to clarify what had happened and had put appropriate information on the record, asking him to take himself offline to do that as soon as possible.

91. The Claimant then later in the afternoon, at 3.27pm, forwarded an email to Ms Morris that he had sent to the Glasgow office the day before, in which he had referred the case. He explained that the Glasgow office had been having IT problems. Mi Morris replied saying, "*Phew ta*" and also said, "*That's a relief but also a pain that it has done that*". Ms Morris, in her evidence, which we accepted, stated that she had attempted to resolve the matters prior to her lunch break, following which she was due to attend a management meeting until the middle of the afternoon. As it is important for records of advice given to be taken and stored, she asked the Claimant to look into it, which he did. Ms Morris would have been in no better position that the Claimant to verify what had happened. In fact we considered she would have been in a worse position, as the Claimant was able to remember the email that he had sent the day before. Ultimately, we did not see how Ms Morris could, in the circumstances, have easily verified the issue without involving the Claimant and asking him to do what he did.

92. Following Ms Marquis' indication that the Claimant's complaint that he had been treated less favourably because of his race would be dealt with under the Respondent's Respect at Work Policy, Mr Provan was assigned to investigate those matters, and he held an investigation meeting with the

Claimant on 2 October 2019. In advance of that, Mr Provan had written to the Claimant, on 26 September, noting that the meeting would explore the concerns the Claimant had raised. He had also asked the Claimant to bring with him any information or documentation that might assist with the investigation.

93. The notes of the meeting indicated that Mr Provan regularly asked the Claimant to provide details of the concerns he was raising. However, other than making general comments that he had been treated differently over a long period, the Claimant did not provide any such detail. Instead, he referred to matters which had previously been addressed by way of grievances and/or appeal, such as the delay in the performance review and the way in which the complaint from the South-East region had been handled, but without, it seemed to us, and, as it transpired, it seemed to Mr Provan, making any connection of those concerns to his race.

94. At one point the notes indicate that Mr Provan asked the Claimant to tell him who discriminated against him due to his colour, and that the Claimant responded that that was one of the questions he had spoken to his trade union representative about and that they had agreed that it should be referred to another time. Mr Provan then explained that that was what that meeting was about, but the Claimant did not provide any clarity.

95. Mr Provan, in his evidence, confirmed that the Claimant's approach to the meeting led him to be concerned that the Claimant's approach was preventing the relationship between the Claimant and Respondent from moving forward positively, and the meeting notes record that Mr Provan, towards the end of the meeting, asked the Claimant how much he understood of the concept of trust and confidence in the workplace, to which the Claimant replied that he understood it "*quite a lot*". Mr Provan then asked if the Claimant felt it was present, to which the Claimant replied "*No, I absolutely do not*".

96. Mr Provan then pointed out that there seemed to be no evidence of discrimination, and asked the Claimant if he had any specific evidence to provide in relation to his claim of discrimination, to which the Claimant replied "*No, but if I hadn't gone for the appeal I wouldn't have been heard*".

97. Mr Provan then adjourned the meeting and asked Mr Nelson, as an HR professional, to clarify what was meant by a loss of trust and confidence. Mr Nelson attended the meeting to do that, and the Claimant confirmed that he understood what Mr Nelson had explained.

98. During the adjournment, Mr Provan had discussed with Mr Nelson his view that the apparent breakdown of the Claimant's trust and confidence in the Respondent should be investigated under the Respondent's Disciplinary

Policy. He felt that, as the Claimant was repeatedly raising matters which had been formally addressed, the Respondent needed to consider whether he was doing that in a vexatious manner.

99. Mr Nelson, during the adjournment, contacted Mrs Whyley who, under the Respondent's Policy, had authority to suspend an employee. She agreed that it was appropriate for the matters identified by Mr Provan to be investigated, and because the Claimant did not seem able to accept that the issues he had raised had already been addressed and seemed unwilling to accept decisions of management, that he be suspended whilst that investigation was undertaken. Mr Provan then concluded the meeting by confirming that the Claimant would be suspended pending that investigation.

100. Mrs Whyley wrote to the Claimant, on 8 October 2019, confirming that an investigation would be undertaken in relation to the allegations that the Claimant had brought multiple and, in the main, unfounded complaints against the Respondent and its staff, demonstrating a loss of trust and confidence, which was considered to have been a breach of the Respondent's standards of conduct and the Claimant's employment contract. She also confirmed that the Claimant would be suspended whilst that investigation took place.

101. Mr Provan was then tasked with investigating the allegations, and he produced a preliminary fact-finding report on 10 October 2019. In this, he outlined four findings. First, that it was clear, as far back as 2016, that the Claimant had demonstrated that there was a lack of trust in management and their judgment in relation to the decisions and actions they took implementing the Respondent's Policy and Procedures. He found that the Claimant's view at that time was that he was being discriminated against, however the grievance procedure applied to deal with that had not substantiated his viewpoint or found any evidence to support that.

102. Second, in reviewing the substantial volume of claims, allegations and accusations made by the Claimant in the March 2019 grievance, and the nature and magnitude of those, it was evident that the relationship from the employee towards the employer had further reduced to a level that demonstrated a complete breakdown in trust and confidence on the part of the Claimant.

103. Third, the investigation into accusations under the Dignity at Work Policy, of unwanted behaviour and victimisation by three named managers, revealed that the Claimant was still of the opinion that he was being systematically and deliberately targeted by them to his detriment. That gave rise to concerns from management that that could become irrevocable if no repair process was put in place. Mr Provan noted that an offer had been made to the Claimant to enter mediation in an effort to restore the trust and confidence in

management and the Respondent in general, but that that was not taken up by the Claimant as an option.

104. Fourth, that it was recognised by Mr Provan that the Claimant, at his appeal meeting, remained convinced that management actions were of the design to cause him detriment, with further accusations against an HR staff member and allegations hinting that the Respondent had discriminated against him for reasons of race and colour. Those additional complaints had not been found to have been substantiated, and Mr Provan noted that it was clear, when examining the evidence and the notes from the meeting on 2 October 2019, that the Claimant not only was of the belief that a loss of trust and confidence existed by him against the Respondent, but, by his own admission to that question, had agreed that it did.

105. Mr Provan concluded that the issue of breach of contract by way of a loss of trust and confidence by the Claimant should therefore form the basis of a formal disciplinary investigation. He wrote to the Claimant on 16 October 2019 inviting him to attend a meeting on 1 November, and he enclosed a copy of his investigation report which he said contained the evidence to be relied upon at the meeting. He confirmed that the Claimant would have the opportunity to respond to all the allegations and put forward his defence or any mitigating circumstances.

106. Mr Provan also wrote to the Claimant on 20 October 2019 with the outcome of the Respect at Work investigation, which was that he felt that the Claimant had failed to present a viable complaint to be investigated, and that his decision could only be that there was no case to hear or answer.

107. The Claimant's suspension was reviewed by Mrs Whyley, in accordance with the Respondent's Policy, on 23 October and 6 November, and confirmed to be appropriate, and the investigative meeting with Mr Provan then took place on 15 November 2019. The Claimant was again accompanied by his trade union representative, and Mr Nelson was present to assist Mr Provan.

108. Mr Proven commenced by saying that the allegations would be put to the Claimant in the order they appeared in the investigation document, and that the Claimant would have the opportunity to comment, produce counter evidence, or refer to any supporting statements or witnesses.

109. The Claimant initially questioned whether Mr Nelson could be unbiased, bearing in mind Ms Marquis' comments about comments Mr Nelson had made in a previous meeting, to which both Mr Nelson and Mr Provan responded that Mr Nelson's role was to assist Mr Provan, and to provide any HR advice that might be required. In that context, we did not see anything untoward in Mr Nelson's attendance.

110. Mr Provan then commented that, in terms of the allegations, he would provide the Claimant with a number of issues that he had looked at to assess whether or not a fundamental breach of contract had occurred. In our view, the reference to the allegations in the investigation document, and to the assessment of whether a fundamental breach of contract had occurred, made it clear that that was what the meeting was to consider. However, the notes of the meeting, and indeed the Claimant's approach to his questioning of Mr Provan and Mr Nelson at this hearing, indicated that the Claimant was either unable or unwilling to appreciate that.

111. The Claimant, throughout the meeting, attempted to go into the detail of the allegations he had brought through the various grievances and appeals. He started by referring to the leave issue in 2016, noting that he had been disciplined and that he felt that he had been treated differently to other staff. That led to Mr Nelson suggesting there should be a brief adjournment, and the evidence of Mr Nelson and Mr Provan, which was supported by the ensuing notes of the meeting, was that Mr Nelson outlined to Mr Provan his concern that the Claimant had not understood the purpose of the meeting, i.e. that it would consider the allegations that had been brought against the Claimant and not the allegations the Claimant had himself previously brought against the Respondent.

112. After the brief adjournment, Mr Provan explained that the purpose of the meeting was not to revisit the earlier matters, but to look for evidence about the new allegations i.e. the ones raised against the Claimant and the breach of trust and confidence. However, the meeting did not progress in the way indicated and the Claimant continued to want to explore matters that he felt had been handled wrongly by the Respondent. That then led to a further brief adjournment suggested by Mr Nelson, and a longer adjournment suggested by the Claimant's trade union representative.

113. On return from that, the trade union representative commented that the Claimant was finding it hard to respond to the allegations without providing context. She also commented that she had advised the Claimant that the meeting was about him responding to the allegations. Mr Provan then indicated that if the Claimant could provide context, succinctly and briefly, that would be helpful.

114. The Claimant then provided some context by referring back to his grievance of March 2019, referring to the fact that he felt that there had been dishonesty and conspiracy on the part of the Respondent's managers. Mr Provan then asked the Claimant if he still felt the same, and the Claimant responded by saying that he would tone down his language but that he still felt the same.

115. On 3 December 2019, Mr Provan provided the Claimant with the outcome of the disciplinary investigation, which was that he felt that there was a case to answer in relation to each of the four allegations set out in his report.

116. Following two further suspension reviews, Mrs Whyley then wrote to the Claimant on 8 January 2020, inviting him to a formal review meeting on 17 January. In her letter, Mrs Whyley noted that although the investigative process had initially been undertaken in accordance with the Respondent's Disciplinary Policy, on reviewing the report and Mr Provan's recommendations, she now wished to progress the matter by convening a formal review meeting.

117. Mrs Whyley in her evidence, which was supported largely by her letter to the Claimant and the subsequent meeting between them, confirmed that she did not feel that the Claimant had been malicious or vexatious in the making of his complaints, and therefore that it would be inappropriate to consider the issue as one of misconduct. However, the concern remained that the trust and confidence between the Claimant and the Respondent had been damaged, and therefore that the meeting would review that. Mrs Whyley indicated to the Claimant that an outcome of the meeting could be termination of his employment on the SOSR ground. She noted that the review would explore the questions, first, "*That over a period of time the relationship between the RCN and yourself has irrevocably broken down*" and, second, "*That you have brought multiple and unfounded complaints against the employer and its staff, demonstrating a loss of trust and confidence*".

118. Prior to Mrs Whyley's letter however, the Claimant had submitted his claim form to the Tribunal on 7 January 2020, having made contact with ACAS for the purposes of early conciliation on 25 November 2019. The claim form was dispatched by the Tribunal to the Respondent's Head Office on 8 January 2020, and is understood to have been received by the Respondent on around 14 January 2020. Mrs Whyley confirmed in her evidence, which we had no reason to doubt as no reference to it was made in the subsequent meeting, that she was not aware that the Claimant had brought a Tribunal claim before the meeting on 17 January 2020.

119. The notes of that meeting indicate that Mrs Whyley explored with the Claimant whether trust and confidence remained or had irrevocably broken down, to which, at most, the Claimant gave non-committal answers, such as that, "*it was difficult to say*".

120. Ultimately, after an adjournment, Mrs Whyley concluded that the relationship between the Claimant and the Respondent had irretrievably broken down. She indicated to the Claimant that she felt that the relationship of trust and confidence had been damaged beyond repair, that she had seen no attempt from the Claimant to build bridges with his managers or with the Respondent

overall, that he appeared to remain fixated on being disgruntled and had been unable to assure her that he had trust and confidence in his managers. She therefore confirmed that the Claimant's employment was being terminated by SOSR with contractual notice.

121. She confirmed her decision by letter dated 23 January 2020, confirming that the Claimant's employment ended on 17 January 2020, and that he would be paid in lieu of his 12 weeks' notice entitlement. Mrs Whyley advised the Claimant of his right to appeal, and he did appeal, but ultimately withdrew it shortly before an appeal hearing was due to take place in March 2020, as the Tribunal case was by then making progress.

Conclusions

122. Applying our findings and the relevant law to the agreed issues, our conclusions were as follows.

Jurisdiction

123. We first considered whether any of the Claimant's discrimination claims had been brought out of time and, if not, whether it would be just and equitable to extend time. We noted that the Respondent's submissions focused on the Claimant's first two complaints relating to his leave requests in 2010 and 2016.

124. We were satisfied that those two events were distinct and separate in character from the events of 2018 onwards, such that they did not form part of a course of conduct extending over a period. They were then brought significantly out of time, some nine and a half years after the event in relation to the first matter, and some three and a half years after the event in relation to the second.

125. We then considered whether it would be just and equitable to extend time, noting the recent guidance from the Court of Appeal, in ***Adedeji -v- University Hospitals Birmingham NHS Foundation Trust*** **[2021] EWCA Civ 23**, that the key factor is the length of and reason for the delay. As we have noted, long periods elapsed between the events complained of and the submission of the Claimant's Tribunal claim form. With regard to the reason for his delay, the Claimant contended that he had not wanted to take his employer to a Tribunal, and had wanted to engage with the Respondent via its processes. However, the Claimant was an adviser on employment matters and must therefore have been aware of the need to pursue matters before a Tribunal within the relatively limited time allowed. We did not consider the Claimant's reason for not pursuing matters in relation to the events of 2010 or 2016 was a compelling one, and therefore considered that it would not be

just and equitable to extend time. However, as we heard evidence on the points we nevertheless recorded our conclusions on them for completeness.

Direct race discrimination

126. Looking first at the Claimant's ten complaints of direct race discrimination, we considered each aspect of them in turn. We focused on considering whether there had been any treatment of the Claimant which we considered to have been unfavourable, before, if required, moving on to consider whether any such treatment had been less favourable on the ground of the Claimant's race.

127. The first allegation was that, in 2010, Mrs Scheeres had denied the Claimant's request to visit his father in the USA. With regard to that, as a matter of fact, Mrs Scheeres did not deny the Claimant's request to visit his father in the US in 2010; Mrs Scheeres was not the Claimant's manager and the request was rejected automatically by the Respondent's systems due to there being insufficient leave available.

128. Even looking at this allegation more broadly however, we saw no evidence of any unfavourable treatment, the decision to progress matters via the disciplinary process was taken by the Claimant's then line manager, in circumstances which we felt were justified, and Mrs Scheeres ultimately decided not to take any disciplinary action and merely to advise the Claimant that he should take care to observe appropriate procedures when booking leave. That was not, in our view, unreasonable, if anything it was generous.

129. The second complaint was that on 28 March 2016 and 8 April 2016 Mrs Ashman had denied the Claimant's request to attend his father's 80th birthday celebration in Nigeria and did not offer the Claimant the opportunity to swap the weekend.

130. One part of this allegation was very similar to the 2010 one and could be responded to in a very similar manner. Mrs Ashman did not deny the Claimant's request for leave to attend his father's birthday celebration, the Respondent's systems did that due to the fact that too many of the Claimant's colleagues had already booked off the relevant period.

131. With regard to the second aspect, Mrs Ashman, when drawing up the rota, confirmed to the Claimant that he could take the second week off, that he did not have to work the Sunday, and therefore only needed to arrange a swap for the Saturday. We felt that this was very similar to the approach taken in relation to the Claimant's trade union representative, his named comparator, who was also warned that she would need to arrange a swap for two Saturdays if she did not wish to work them.

132. We also noted that another employee had effected a swap for the relevant period in early March, and therefore had the Claimant taken action promptly he would have been able to swap the shifts himself. Ultimately, he did not do so and, by the time he raised his difficulty, just before departing on his period of leave, it was too late. In our view there was therefore again no unfavourable treatment, and if there was any, there was none which was less favourable than that which was afforded, or would have been afforded, to a comparator.

133. The third allegation was that, on 8 May 2018, Mr Pickford and Mrs Ashman had placed the Claimant on performance management without giving him the required explanation, and that this decision, which was bullying and harassment, was not looked into.

134. As a matter of fact, we did not conclude that the Claimant was placed on performance management without being given the required explanation. There was no set process for doing that within the Respondent's Policy and we noted the evidence in the bundle from 2017 and into 2018 of one-to-one meetings and emails in which concerns over the Claimant's performance were raised with him. He was then warned by Mr Pickford in April 2018 that the issues were going to lead to objectives being set, and Mr Pickford set out those objectives in a formal plan in May 2018.

135. We also noted that Ms Carmona, who considered the Claimant's appeal against being placed on a performance plan, whilst noting some deficiencies in Mr Pickford's management, agreed that it was appropriate to put the Claimant on the plan. We did not therefore see anything to support a conclusion of unfavourable treatment in this regard.

136. The fourth complaint was that, on 15 August 2018, Mr Pickford and Mrs Scheeres extended the Claimant's informal performance management plan beyond three months.

137. As our findings have indicated, we did not consider that the Claimant's performance plan was extended beyond three months. As a matter of fact, the review itself took place approximately a month later due to the intervention of the facilitated conversation and Mrs Scheeres' suggestion that Mr Pickford should collate his concerns into one document, but it was clear that the review itself only covered the three-month period from 8 May to 8 August 2018. We again found nothing untoward about that and did not consider any unfavourable treatment had arisen.

138. The fifth complaint was that, on 15 August 2018, Mrs Scheeres had instructed Mr Pickford to look for evidence over the previous year to justify placing the Claimant on performance management rather than relying on the evidence presented at the beginning of the informal management plan.

139. We did not consider that this had occurred as contended. Mrs Scheeres, in the facilitated conversation meeting on 15 August, had noted the Claimant's apparent concern that the imposition of the performance plan had come out of the blue, a concern which we did not consider justified in the context of the one-to-one records and emails to which we have referred. Mrs Scheeres nevertheless, to allay the Claimant's concerns, directed Mr Pickford to put his concerns, and the evidence relating to them, into one document, which Mr Pickford then did. We saw no evidence to support a conclusion that there had been any instruction by Mrs Scheeres to Mr Pickford to look for evidence over the previous year, or indeed that Mr Pickford had done any such thing. He had only collated all his material, which already existed, into one document. Again therefore, we saw nothing which suggested that the Claimant had been treated unfavourably in any aspect of this.

140. The sixth allegation was that, on 24 August 2018, Mrs Ashman had used an unorthodox method of highlighting précis writing to present regional office feedback to the Claimant.

141. We noted that the word used by Ms Marquis in relation to this matter was "unusual" and not "unorthodox". As we have noted in our findings, we did not consider that her conclusion that the method was unusual was, in fact, justified, but we also found nothing to suggest that the process, whether unusual or not, had been unfair. In our view, the outcome of the handling of the complaint, whether dealt with in the way that it was, or dealt with by way of a telephone call, would have been exactly the same, with the matter being raised with the Claimant as an example of poor performance. We again therefore found no unfavourable treatment.

142. The seventh complaint was that, on 10 January 2019, despite having had his appeal against the formal monitoring of his performance upheld, evidence of bullying and harassment of the Claimant was ignored, and the Claimant was moved from Stage 2 to Stage 1 rather than being removed entirely from performance management.

143. The evidence, as indicated in our findings, did not actually support the Claimant's contention that his appeal against the formal monitoring of his performance had been upheld in any material sense. Ms Carmona's conclusion was that, whilst Mr Pickford had not worked to exemplary management practice, his actions were not unfair and had not breached the Respondent's Policy. Ms Carmona also confirmed that there were credible issues relating to the Claimant's performance which he needed to address substantively. We did not therefore consider that the direction that the Claimant be moved back to Stage 1 of the Policy rather than be removed from it entirely was in any way unfair or unfavourable. Again, if anything, it

was generous, as we would have considered that a decision to carry on to Stage 2 would have been reasonable.

144. The ninth complaint was that, on 5 September 2019, Ms Morris rebuked the Claimant for not going for an eye test whilst on annual leave.

145. As we have noted, we did not consider the Claimant's evidence of his need to make an urgent eye test at this time to have been credible. It was therefore appropriate in our view for Ms Morris to raise a query with the Claimant about why he had not arranged the appointment whilst not on annual leave. However, we did not consider, in any event, that this involved any form of rebuke, or that, even if it had, it would have been, in any way, unfair or unfavourable, bearing in mind the clear terms of the Respondent's Policy.

146. The tenth, and last, complaint of direct race discrimination was that, on 10 September 2019, Ms Morris accused the Claimant of not sending a referral to the Scottish Region, when that could have been easily verified with the regional office.

147. In our view, Ms Morris provided a clear and cogent explanation of why she handled the matter in the way she did. It was always, in our view, going to be much easier for the Claimant to address the point, as he had taken the relevant call. As we have noted, we did not see how Ms Morris could have easily verified matters without involving the Claimant. We also noted that Ms Morris's communications with the Claimant over this issue were not accusatory. She was only concerned, quite properly, to ensure that it was addressed and when the Claimant confirmed that it had been, her reply of "*Phew ta*" should not have given the Claimant any concern about how she had viewed it. Again, we saw nothing to lead us to a conclusion that there had been unfavourable treatment in this regard.

148. Overall therefore, we did not conclude that the Claimant had, in any way, been treated unfavourably in relation to any of the direct race discrimination concerns he had raised. Even if we had, we saw nothing to suggest, beyond the fact that the Claimant was the only adviser of a black African background, that any treatment of him was less favourable than others had been, or might have been, treated. His claims of direct race discrimination therefore failed.

<u>Direct disability discrimination</u>

149. The Claimant's one complaint of direct disability discrimination was identical to his ninth complaint of direct race discrimination. In addition, therefore, to the difficulty of establishing an appropriate comparator applying the ***Malcolm*** case, we found nothing to lead us to a conclusion of unfavourable treatment, let alone less favourable treatment in relation to this matter. The Claimant's claim of direct disability discrimination therefore also failed.

Victimisation

150. As we have noted, the Claimant's first complaint of victimisation could not succeed as it pre-dated his first protected act. With regard to the others, the second to ninth complaints repeated his second to ninth complaints of direct race discrimination. As we have noted in respect of them, we saw no evidence of unfavourable, or less favourable, treatment for the purposes of the direct race discrimination claim, and, for the same reasons, we saw no evidence of detrimental treatment of the Claimant in the ways he asserted.

151. Turning to the Claimant's tenth, eleventh and twelfth complaints of victimisation, again as a matter of fact we were not satisfied that any detrimental treatment had arisen. The tenth and eleventh complaints were very similar, involving complaints that the Claimant was not allowed to respond to the charges and was not given the option to explain his comments. However, as we have noted, the Claimant simply did not seem to be on the same wavelength as Mr Provan and Mr Nelson, and did not seem to understand or accept that what they were looking at was not what he was discussing or wished to discuss.

152. With regard to the meeting on 2 October 2019, that was under the Respect at Work Policy, and was the opportunity for the Claimant to explain how and why he felt that he had been discriminated against, but he did not, despite some repeated prompting, provide anything. Similarly, at the meeting on 11 November 2019, the Claimant was given an opportunity to explain his comments, but did not engage with the issues that we felt had been made clear were to be considered.

153. With regard to the suspension decision, we were satisfied that Mr Provan had reached the point where he felt that the Claimant's actions amounted to misconduct which, in circumstances where the Claimant demonstrated his lack of trust in the Respondent's management, justified suspension. Whilst Mrs Whyley ultimately did not pursue matters as ones of misconduct, we saw nothing unreasonable in Mr Provan's approach, and did not consider that the suspension decision involved detrimental treatment as a result of a protected act.

154. Finally, with regard to the twelfth complaint of victimisation, Mrs Whyley had made clear, in advance of the meeting, that she was not pursuing the matter under the Disciplinary Policy, but nevertheless still needed to explore the perceived breakdown of trust and confidence from the SOSR perspective. The Claimant's comments in his meetings with Mr Provan clearly supported that and, if anything, Mrs Whyley's change of approach may have been advantageous to the Claimant rather than deleterious, in that he did not have to address his motive behind his actions, only the question of whether trust

and confidence had irrevocably broken down. Again therefore, we did not consider that the approach taken involved detrimental treatment on the ground of a protected act, particularly as the treatment could not have been caused by the second protected act as Mrs Whyley was not aware of it at that time.

Unfair dismissal

155. Turning finally to the unfair dismissal claim, we first had to consider whether the Respondent had established a potentially fair reason, that of some other substantial reason, and we were satisfied that it had. Mrs Whyley had clearly given some thought as to whether to address matters as relating to conduct or not, and had decided not to. She nevertheless still had in mind her perception that the relationship between the parties had broken down, which is something often cited as falling within the ambit of SOSR. Applying the ***Abernethy*** test, we considered that the Respondent had established that the set of facts in the mind of the decision maker, Mrs Whyley, gave rise to dismissal on the SOSR ground as the reason for dismissal.

156. We turned then to consider whether dismissal for that reason was fair in all the circumstances. We were conscious of the direction of the EAT, in the ***Ezsias*** case, of the need to be alive to the important distinction between dismissal for conduct which caused a breach of trust and confidence, and dismissal due to the fact of such a breach, and we were satisfied that the Respondent, in the form of Mrs Whyley, had adopted the latter approach. Examining the fairness of that approach, we did not see that there was more that the Respondent could reasonably have done. The Claimant himself had accepted that trust and confidence no longer existed between himself and the Respondent, and maintained his belief, which we accepted was genuinely held but we felt was misplaced, that his managers were colluding or conspiring against him. Indeed, the Claimant's evidence at this hearing, and his questioning of the Respondent's witnesses indicated that he still feels that collusion and conspiracy had occurred.

157. As we have indicated, we saw nothing to support a conclusion that collusion or conspiracy had existed. Even if we had, the point had, in our view, clearly been reached where there was no relationship left between the Claimant and Respondent collectively, and between the Claimant and his managers specifically. There was no way of repairing that relationship, and no ability to move the Claimant into a different environment, which we did not consider would have resolved matters in any event, in light of the previous changes that had been implemented.

158. Overall therefore, we considered that the decision to dismiss on the SOSR ground fell within the range of reasonable responses, that the Claimant's

dismissal had been fair, and that his claim of unfair dismissal should therefore be dismissed.

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Employment Judge S Jenkins
Dated: 27 September 2021

REASONS SENT TO THE PARTIES ON 28 September 2021

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS