EMPLOYMENT TRIBUNALS

Claimant: H Amin

Respondent Manchester Airports Group plc

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Manchester (by video platform) **ON:** 15, 16, 22–26, 29–31 March, 1 April, 1–3 June 2021 (and in chambers on 4 June, 11, 12 August 2021)

BEFORE: Employment Judge Batten
A Gilchrist
AJ Gill

REPRESENTATION:
For the Claimant: M Broomhead, non-practising Solicitor
For the Respondent: N Grundy, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the claim of race discrimination fails and is dismissed.

REASONS

1. By a claim form dated 15 February 2019, the claimant presented a claim of race discrimination comprising complaints of direct discrimination, harassment and victimisation. On 22 March 2019, the respondent submitted a response to the claim.

2. In total, 4 case management preliminary hearings took place: on 6 December 2019; on 1 September 2020; on 3 November 2020; and on 22 February 2021. Following the preliminary hearing on 1 September 2020, the claimant filed a Scott schedule, which he subsequently amended. Following the preliminary hearing on 3 November 2020, the claimant filed further and better particulars of his claim on 2 December 2020 and later he served further particulars of one allegation, on 23 February 2021. On 10 March 2021, the respondent served an amended response.

3. The hearing of the evidence took place over 14 days, due in part to the need to adjourn on several occasions to allow individuals to attend to personal matters that unfortunately arose due to the COVID-19 pandemic. Whilst the case was originally listed for 8 days, the oral evidence and submissions were completed only on the fourteenth hearing day and so the Tribunal reserved its judgment, meeting in chambers on 3 later dates in order to deliberate.

Evidence

4. A bundle of documents was presented at the commencement of the hearing in accordance with the case management Orders. A number of further documents were added to the bundle in the course of the hearing. References to page numbers in these Reasons are references to the page numbers in the bundle.

5. The claimant gave evidence himself by reference to a lengthy witness statement. The respondent called 13 witnesses, being: Simon Brooks – security training manager; Lynsey Jackson – HR adviser; Mark Van Der Laan – Terminal Security manager; Julie Ellis – security team manager; Matthew Grundy – security recruitment manager; Stephen McLaughlin – HR consultant; Tania Gonzalez –HR adviser; Fiona Wright – Business Change Director; Laura Astbury – recruitment adviser; Emma Rigby – information intelligence analyst; Hardik Modha – Head of Customer Transport; Sarah Lyons – HR adviser; and Francesca Abbott – HR adviser. All of the witnesses gave evidence from written witness statements and were subject to cross-examination. In addition, the respondent tendered witness statements from 2 further employees who were not called to give oral evidence or be cross-examined, largely because the claimant withdrew certain allegations which are crossed out in the list of issues below, and so the Tribunal did not take the contents of those statement into account in reaching its judgment.

Issues to be determined

6. A draft schedule of factual allegations had been prepared at the case management preliminary hearing on 6 December 2019. The schedule was incorporated into a list of the legal issues at the case management

preliminary hearing on 1 September 2020 but had not, since then, been finalised or agreed between the parties. At the outset of the hearing, the Tribunal therefore discussed the draft list of issues with the parties. After amendment, it was agreed that the issues to be determined by the Tribunal were as follows [the claimant confirmed to the hearing that those matters crossed out in the list below were not pursued. They remained in the list so as to preserve the numbering]:

Direct discrimination because of race – s13 Equality Act 2010

1. Has the respondent subjected the claimant to the following treatment?

1.1 On or around 21 January 2015, the claimant applied for the positions of Duty Manager but was initially refused an interview – s13 (line 3 of the Amended Scott Schedule)

1.2 In February/March 2015, the claimant's application for the post of Security Team Manager was refused – s13 (line 4 of the Amended Scott Schedule)

1.3 Between March and July 2015, the claimant's application for a position as a Technical Training Coach was refused – s13 (line 7 of the Amended Scott Schedule)

1.4 Requests made by the claimant after July 2015 for training and development to help further his career were ignored, namely he requested Level 2 / Level 3 training – s13/s27 (line 5 of the Amended Scott Schedule)

~~***1.5 The claimant's grievance process triggered by his letter dated 14 June 2015 was delayed in that the grievance hearing was not held until 21 July 2015 (line 9 of the Amended Scott Schedule)***~~

1.6 Following his return to work in September 2016, a phased return to work which should have lasted for eight weeks lasted for five months, during which time the claimant: was not provided with vetting, ID, First Level Training, a work station, a roster, supported, given anything to do, and/or returned to his usual job; was isolated without support and victimised; did not have Occupational Health guidance applied to him in that he was not provided with light duties – s13/s26/s27 (line 15 of the Amended Scott Schedule)

~~***1.7 The investigation of the claimant's grievance in November 2016 was carried out so badly that it had to be postponed and it was never resumed (line 18 of the Amended Scott Schedule)***~~

1.8 Obstacles had been put in the claimant's way in trying to get a response to his subject access request of 8 November 2016 and, when the response was received on 27 December 2016, it was incomplete– s13/s27 (line 17 of the Amended Scott Schedule)

1.9 Following the annual x-ray test in December 2017 the claimant received a total of eight capability letters from Julie Ellis, one of which was sent in error, and was taken to a formal final capability stage without any coaching. Telephone calls were made to his house and two text messages and an email sent to him –s13/ s26/s27 (line 22 of the Amended Scott Schedule)

1.10 Following a meeting with Tania Gonzalez on 15 August 2018 the investigation of the claimant's concerns was delayed for three months before she spoke to anyone about it – s13/s27

1.11 On 26 September 2018 the claimant was informed that he would not be interviewed for the post of Security Performance Coordinator – s13/s27

1.12 There was a delay in arranging a grievance meeting for more than a month after the claimant lodged his grievance on 11 October 2018, the meeting taking place on 19 November 2018 – s13/s27

1.13 The respondent refused the claimant's request through his union for a temporary redeployment when his secondment to the Pass and Permit Office ended on 15 October 2018; the return to his old role of Aviation Security Officer caused the claimant to have a breakdown and sick leave due to stress and anxiety – s13/s27

~~1.14 Colleagues of the claimant interviewed for the purpose of his grievance of 11 October 2018 gave false statements to the investigator –s13/s26/s27~~

1.15 At the outcome meeting on 20 December 2018 the grievance was rejected – s13/s27

1.16 The respondent delayed fixing a meeting to deal with the appeal against the grievance outcome submitted on 26 December 2018 – s13/s27

2. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on a hypothetical comparator.

3. If so, was this because of the claimant's race?

<u>Harassment related to race – s26 Equality Act 2010</u>

4. Did the respondent engage in conduct as follows?

~~4.1 The claimant's grievance process triggered by his letter dated 14 June 2015 was delayed in that the grievance hearing was not held until 21 July 2015 (line 9 of the Amended Scott Schedule)~~

4.2 In August 2016, having been on long-term sick leave, the Claimant was informed that Annie Palmer was thinking about terminating his employment as no return-to-work date given, and that Julie Ellis had overridden what Giselle Hyams had said about a phased return to work – s26/s27 (line 13 of the Amended Scott Schedule)

4.3 Following his return to work in September 2016, a phased return to work which should have lasted for eight weeks lasted for five months, during which time the claimant: was not provided with vetting, ID, First Level Training, a work station, a roster, supported, given anything to do, and/or returned to his usual job; was isolated without support and victimised; did not have Occupational Health guidance applied to him in that he was not provided with light duties – s13/s26/s27 (line 15 of the Amended Scott Schedule)

~~4.4 The investigation of the claimant's grievance in November 2016 was carried out so badly that it had to be postponed and it was never resumed (line 18 of the Amended Scott Schedule)~~

4.5 Following the annual x-ray test in December 2017 the claimant received a total of eight capability letters from Julie Ellis, one of which was sent in error, and was taken to a formal final capability stage without any coaching. Telephone calls were made to his house and two text messages and an email sent to him – s26/s13/s27 (allegation 8 and line 22 of the Amended Scott Schedule)

~~4.6 Colleagues of the claimant interviewed for the purpose of his grievance of 11 October 2018 gave false statements to the investigator – s26/s13/s27 (allegation 13 of the Amended Scott Schedule)~~

5. If so was that conduct unwanted?

6. If so, did it relate to the protected characteristic of race?

7. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

<u>Victimisation – s27 Equality Act 2010</u>

8. Did the claimant do a protected act(s) as follows?

PA1: The grievance of July 2015, namely the claimant's grievance letter dated 14 June 2015 and comments made by him during the grievance hearing on 21 July 2015.

PA2: The grievance of 11 November 2016.

PA3: The verbal discussions with Ms Gonzalez on 30 March 2017;

PA4: The verbal discussions with Ms Wright on 6 April 2017;

PA5: The verbal discussions with Helen Kenny on 18 February 2018;

PA6: The verbal discussions with Ms Gonzalez on 15 August 2018;

PA7: The grievance of 11 October 2018.

PA8: The ET1 form

9. Did the respondent subject the claimant to any detriments as follows?

9.1 Requests made by the claimant after July 2015 for training and development to help further his career were ignored, namely he requested Level 2 / Level 3 training – s13/s27 (line 5 of the Amended Scott Schedule)

9.2 The claimant's grievance process triggered by his letter dated 14 June 2015 was delayed in that the grievance hearing was not held until 21 July 2015 (line 9 of the Amended Scott Schedule)

9.3 The outcome to the claimant's grievance of July 2015 was delayed for 15 months as he did not receive the outcome letter dated 18 September 2015 until 8 November 2016 – s27 (line 10 of the Amended Scott Schedule)

9.4 In August 2016, having been on long-term sick leave, the Claimant was informed that Annie Palmer was thinking about terminating his employment as no return-to-work date given, and that Julie Ellis had overridden what Gisselle Hyams had said about a phased return to work – s26/s27 (line 13 of the Amended Scott Schedule)

9.5 Following his return to work in September 2016, a phased return to work which should have lasted for eight weeks lasted for five months, during which time the claimant: was not provided with vetting, ID, First Level Training, a work station, a roster, supported, given anything to do, and/or returned to his usual job; was isolated without support and victimised; did not have Occupational Health guidance applied to him in that he was not provided with light duties – s13/s26/s27 (allegation 5 and line 15 of the Amended Scott Schedule)

9.6 The claimant's grievance of 11 November 2016 was not properly addressed but instead the claimant was called in to two meetings with the HR Business Advisor, Stephen McLaughlin, with no notice and intimidated and bullied by being told that he had no

evidence and that his grievance would be thrown out. There was no outcome to that grievance – s27 (allegation 6)

9.7 The investigation of the claimant's grievance in November 2016 was carried out so badly that it had to be postponed and it was never resumed (line 18 of the Amended Scott Schedule)

9.8 Obstacles had been put in the claimant's way in trying to get a response to his subject access request of 8 November 2016 and, when the response was received on 27 December 2016, it was incomplete– s13/s27 (allegation 7 and line 17 of the Amended Scott Schedule)

9.9 Following the annual x-ray test in December 2017 the claimant received a total of eight capability letters from Julie Ellis, one of which was sent in error, and was taken to a formal final capability stage without any coaching. Telephone calls were made to his house and two text messages and an email sent to him – s26/s13/s27 (allegation 8 and line 22 of the Amended Scott Schedule)

9.10 Following a meeting with Tania Gonzalez on 15 August 2018 the investigation of the claimant's concerns was delayed for three months before she spoke to anyone about it – s13/s27 (allegation 9)

9.11 On 26 September 2018 the claimant was informed that he would not be interviewed for the post of Security Performance Coordinator – s13/s27 (allegation 10)

9.12 There was a delay in arranging a grievance meeting for more than a month after the claimant lodged his grievance on 11 October 2018, the meeting taking place on 19 November 2018 – s13/s27 (allegation 11)

9.13 The respondent refused the claimant's request through his union for a temporary redeployment when his secondment to the Pass and Permit Office ended on 15 October 2018; the return to his old role of Aviation Security Officer caused the claimant to have a breakdown and sick leave due to stress and anxiety – s13/s27 (allegation 12)

~~***9.14 Colleagues of the claimant interviewed for the purpose of his grievance of 11 October 2018 gave false statements to the investigator – s26/s13/s27***~~

9.15 At the outcome meeting on 20 December 2018 the grievance was rejected – s13/s27

9.16 The respondent delayed fixing a meeting to deal with the appeal against the grievance outcome submitted on 26 December 2018 – s13/s27

~~9.17 In October / November 2018, the respondent failed to deal with the claimant's grievance expeditiously and in a timeous manner taking some five weeks arranging for it to be heard – s27 (line 25 of the Amended Scott Schedule)~~

9.18 In October – December 2018, the respondent failed to deal with the claimant's grievance expeditiously and in a timeous manner taking some five weeks arranging for it to be heard – s27 (line 25 of the Amended Scott Schedule)

9.19 In December 2018, the respondent failed to carry out the claimant's grievance in good faith by not carrying out the basic of investigations and then did not uphold the grievance – s27 (line 26 of the Amended Scott Schedule)

9.20 In December 2018 – March 2019, the respondent failed to deal with the claimant's 2nd stage grievance expeditiously and in a timeous manner in arranging the 2nd stage to be heard – s27 (line 27 of the Amended Scott Schedule)

9.21 In March – October 2020, while on furlough, the claimant has not been advised of his status despite making enquiries. Despite the furlough coming to an end at the end of October he does not know what his status is and neither has he been placed on the rota – s27

10. If so, was this because the claimant did a protected act?

<u>Jurisdiction – time point - section 123 Equality Act 2010</u>

11. Whether any complaint concerning an event that took place, or a series of events that ended on or before 20 September 2018 (3 months prior to EC notification) has been presented outside of the relevant time limit for so doing?

12. If so, whether it would be just and equitable to extend time?

Findings of fact

7. The Tribunal made its findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. Having made findings of primary fact, the Tribunal also considered what inferences it should draw

from them for the purpose of making further findings of fact. The Tribunal have not simply considered each particular allegation but have also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

8. In making its findings of fact, the Tribunal found it difficult to ascertain what had happened so long ago from very limited evidence and often in the absence of contemporaneous notes or records. In particular, it was not clear from the evidence which roles the claimant had applied for in 2014 and 2015 and/or when. Evidence was heard about numerous conversations and the respondent's witnesses were, at times, subject to aggressive cross-examination about those conversations when such were not material to the substance of the claim or the issues and did not form part of the case against the respondent.

9. The findings of fact relevant to the issues which have been determined are as follows.

10. The claimant has been employed by the respondent from 17 May 1993 as an aviation security officer ("ASO") and remains employed by the respondent. His contract of employment appears in the bundle at page 89. The claimant is a British citizen of Pakistani descent.

11. The respondent operates 3 airports in the UK. Manchester airport is a major international airport and is very busy around the clock. Security is of paramount importance to the respondent. In 2015, approximately 900 ASOs worked at Manchester airport and the claimant was one of around 230 ASOs who worked at Terminal 2. The respondent's witnesses' unchallenged estimates were that approximately 20% of the ASOs identify as not being white British, as do approximately 6% of the Security Team Managers ("STM").

Applications for STM role and SDM role

12. In late 2014, the claimant heard that an STM role was going to come up and, in December 2014, the claimant applied for the role of STM. His letter of application appears in the bundle at page 188. This was the first time the claimant had applied for such a role at the respondent.

13. In the bundle at pages 178 – 181 is a detailed job description for the STM role, including principal accountabilities, knowledge and experience, skills, values and core beliefs which the respondent was looking for from applicants for the role of STM. However, the claimant submitted a general CV listing the jobs he had done, and a covering letter with brief details of the jobs he had done and without reference to the competencies that the respondent was looking for.

14. At the end of December 2014, the claimant applied for the job of Security Duty Manager (SDM) which is a post at a level above that of STM. The claimant submitted his CV and the same covering letter to apply for the SDM role - see bundle page 183. Approximately 100 people applied for the SDM and STM roles and around half were interviewed.

15. On 21 January 2015, HR called the claimant to inform him that his application(s) were rejected, in that the claimant was not shortlisted for either role. The respondent explained to the claimant that this was due to the fact that he had not addressed the requirements of either role in the information set out in his application. It is not clear from the documentary evidence in the bundles which roles the claimant in fact applied for, or when in late 2014/early 2015, but the respondent's refusal to shortlist the claimant was due to the inadequacy of his applications and had nothing to do with race.

16. On 25 January 2015, the claimant wrote to the respondent to complain about not being shortlisted. The claimant said that HR had told him his CV was "impressive" whilst offering him a CV building class and he articulated his unhappiness that he did not even get an interview. The claimant contended that he was as qualified for the job(s) as any other applicant and he suggested a resolution through reconsideration of his initial application. The claimant's letter of complaint is 4 pages long and makes no mention of race discrimination. In response to the claimant's complaint, Ms Jackson from HR acknowledged the claimant's letter and said she would look into it.

17. On 9 February 2015, the respondent sent the claimant an email to confirm he has been invited to interview for "an opportunity within our company" – bundle page 196. The position for which the claimant was to be interviewed is left blank in the email, so it is unclear to which role the email referred.

18. On 13 February 2015, the claimant had an interview for the STM role. He was unsuccessful. The respondent's unchallenged evidence was that the claimant had not given clear and detailed examples of how he met the 6 criteria for the role. Such documents as existed supported this view.

<u>Applications for Compliance Officer role and Technical Training Coach role</u>

19. On 20 February 2015, the claimant applied for a Compliance Officer role with the respondent. The claimant submitted the same CV and covering letter for this role as he had done for the STM and SDM roles, despite the feedback he had been given on that application.

20. On 21 February 2015, the claimant requested Level 2 or Level 3 training, which he believed would prepare him for an application for an STM role in future. On 23 February 2015, the respondent's Terminal Security manager, Mr Van Der Laan, emailed the claimant to explain that Level 3 training was

for STMs who were in post and that Level 2 training was for those ASOs who had secured an STM role and, therefore, the claimant was not eligible for the training – see bundle page 201. Mr Van Der Laan suggested that the claimant might look at joining the model lane teams, or the Matrix training team, which was shortly to be formed, so as to enhance his experience for the future.

21. On 4 March 2015, the claimant applied for a Technical Training Coach role. The claimant submitted the same CV and covering letter for this role. On 12 March 2015, the claimant was told that his application would not be taken further because his application, by covering letter and generic CV did not make any reference to how he met the requirements of the role.

22. The next day, 5 March 2015, the claimant attended a meeting to receive feedback on the STM interview which he had attended. The feedback was given by Mr Van der Laan and Ms Anne Hagan, Terminal 1 security manager, to a number of applicants including the claimant. Mr Van der Laan had been involved in the interview process for STM and for a number of posts, although he had not interviewed the claimant himself.

23. On 23 March 2015, the claimant contacted Mr Van der Laan, saying that he would like to put his name forward for the Matrix training team position. Mr Van der Laan responded the next day to say that a communication would be sent to employees' home addresses and that the claimant would then be able to apply. The claimant took no further action to pursue an opportunity to join the Matrix training team and did not apply even though he had been advised to do.

24. On 8 April 2015, the claimant was told by the respondent that it was no longer recruiting for the Compliance Officer role.

First grievance

25. On 14 June 2015, the claimant sent the respondent a grievance which appears in the bundle at page 206. The claimant's case was that this was his first protected act for the purposes of his victimisation complaint. The Tribunal disagreed that the letter of grievance alone amounts to a protected act within the meaning of section 27(2) of the Equality Act 2010 ("EqA"). The letter is brief and makes no reference to any form of discrimination. It merely records the claimant's concern about the selection and recruitment procedures for security management and projects and teams. The letter is devoid of any detail to illustrate what it might be that the claimant is in fact concerned about.

26. On 24 June 2015, the respondent asked the claimant for further particulars of his grievance. He provided these on 19 July 2015, mentioning that his concerns included "the lack of diversity in managerial roles" and "the

percentage of staff from ethnic minority backgrounds in security and MAG departments, compared to management." The Tribunal considered such statements within the claimant's further particulars to amount to a protected act pursuant to section 27(2) EqA.

27. On 18 June 2015, the respondent emailed the claimant to arrange a grievance hearing on 25 June 2015. The claimant asked for the proposed date to be changed due to his annual leave. Eventually the parties agreed that the hearing would take place on 21 July 2015 which was a convenient date for all concerned.

The grievance hearing

28. The grievance hearing took place on 21 July 2015 and the notes appear in the bundle at pages 215-225. The meeting was conducted by Simon Brooks with Ms Jackson taking notes. The claimant attended with his trade union representative. The claimant indicated at the outset of the meeting that his grievance was "not the fact I've not been successful. It is the reasons – I'm not satisfied." A discussion took place about the job applications which the claimant had made. The claimant was asked whether he had attended the CV writing workshop and he said, "No. I did not get any dates". The claimant asked for more feedback on his applications as a resolution to his grievance. This was offered by the respondent and, after discussions with his trade union officer, the claimant agreed to receive more feedback.

29. At the end of the meeting the claimant produced a list of employees in security. The lists were on computer-based training (CBT) sheets. He raised the issue of diversity across the respondent's organisation and said that he wanted the respondent to investigate the issue. Ms Jackson raised the issue of a data protection breach arising because the claimant had obtained the CBT sheets with data about his colleagues, without apparent authority to do so. The claimant would not say how he had come to possess the sheets, and the meeting was ended.

30. On 24 July 2015, Ms Jackson emailed the claimant to say that Mr Brooks would only be investigating the first part of the claimant's grievance with regard to selection and recruitment. The claimant did not raise any objection to this at the time.

September 2015 – sickness absence

31. On 10 September 2015, the claimant was signed off work, sick with back issues, and was later diagnosed with a prolapsed disc. He was away from work for 12 months during which time he was subject to an informal absence review meeting on 24 February 2016. Later, on 11 June 2016, the claimant attended an occupational health appointment which resulted in advice to the respondent that the claimant was unfit for work.

32. On 12 July 2016, the claimant attended a further absence meeting with Giselle Hyams of HR, at which they discussed a phased return to work. The notes are in the bundle at pages 259-261. During the meeting, the claimant was told that the respondent was considering termination his employment due to his sickness absence. The claimant had been off almost 12 months, with no obvious date for a return to work, and this was one of several options for the claimant's future which were discussed. Following the meeting and having had time to think about his situation, the claimant wrote to the respondent, on 3 August 2016, asking about a return to work or to know what his options are.

33. On 10 August 2016, occupational health reported on the potential for the claimant to return to work and opined that the claimant's work capabilities and hours would be limited. After this report was received, the claimant met with Julie Ellis and Matthew Grundy, to discuss his options including a phased return to work. On 29 August 2016, the claimant attended a further meeting with STMs Mr Grundy and Ms Andrews. The claimant said he wanted to return to work and he set out his limitations, asking for working hours of 5 hours per day, for 4 days on and then 4 days off. Mr Grundy went through the claimant's role with him. The working hours and pattern, which were agreed, are set out on bundle page 270, with weekly reviews built in. It was also agreed that the claimant would return to work on 13 September 2016.

Return to work in September 2016

34. On 13 September 2016, the claimant returned to work, arriving on site at 7am. He waited for Mr Grundy to arrive. At one point, Mr Van der Laan passed by and asked the claimant what he was doing. The claimant said he was waiting for Mr Grundy. The claimant sat in the brew room until 10 am when Mr Grundy arrived at work. Mr Grundy was not expecting the claimant to be waiting for him and had expected that the claimant would report to his working area in passenger preparation. The claimant told Mr Grundy that his pass had expired and that he needed to go to vetting first.

35. The next day, 14 September 2016, the claimant attended a return-to-work meeting at which it was confirmed that he would work shifts between the hours of 7am to 12 noon, 4 days on/4 days off, on an 8 weeks' phased return and slowly build up his hours. The length of the claimant's phased return to work was subject to review and a further occupational health report. The claimant was given a 'landside' pass so he could come into work and he was told that he would undergo training once he had his 'airside' pass which had lapsed due to the length of the claimant's sickness absence.

36. During his return-to-work period, the claimant worked in “passenger prep” in effect doing light duties and he was supplied with a chair so he could manage his back condition by varying his stance – standing or sitting as required. This was a flexible arrangement to assist the claimant’s return to work. However, on occasion, the claimant came to work to find that his chair had been moved or had disappeared. When this happened, the claimant did not take any action to find another chair nor did he report it at the time.

Grievance outcome

37. On 2 November 2016, the claimant chased progress of his grievance with the respondent. This was his grievance dated 14 June 2015, about which he had heard nothing whilst he was off sick.

38. Meanwhile, on 3 November 2016, the claimant had a meeting with Ms Ellis, at which the claimant said that the respondent had not implemented the occupational health recommendations.

39. On 8 November 2016, the claimant was given a grievance outcome letter, which was dated 18 September 2015. It appears in the bundle at pages 248-252. The letter had been drafted by Ms Jackson, of HR, using notes prepared by Mr Brooks, the grievance investigator. The letter had been signed off by Mr McLaughlin, an HR consultant who had only started working for the respondent in August 2016. In explaining the delay, Ms Jackson said that the claimant’s grievance outcome had not been a priority once the claimant went off sick in September 2015 and that she had assumed that somebody else would deal with it. In evidence, Ms Jackson accepted that this was not best practice. The respondent had not given the letter to the claimant before he returned to work in November 2016, because he was absent on long-term sick and also due to a number of HR personnel changes which delayed the finalisation of the letter. The date of the letter was therefore inaccurate.

40. That day, the claimant made a ‘Subject Access Request’ (“SAR”) to the respondent and subsequently paid the £10 fee required. In the respondent’s HR central services team, Ms Abbott was the individual tasked with the administration behind an SAR. Due to confusion within HR central services, Mr McLaughlin at one point told the claimant that he needed to put his request in writing rather than email, and later the claimant was told to write again to Ms Abbott directly. This arose because the respondent’s HR personnel were confused about the SAR procedure.

Grievance stage 2

41. On 11 November 2016, the claimant submitted a Stage 2 grievance by letter to the respondent. This appears in the bundle at pages 307-308 and it is the

claimant's case that this constituted a protected act of the purpose of his victimisation complaint.

42. The respondent's grievance procedure, Stage 2, includes an indication that an employee would be expected to outline why they consider that their grievance had not been considered correctly at Stage 1. The claimant does not use the word "discrimination" in his letter. However, it is apparent from the matters listed in the claimant's letter that he is referring to his stage 1 grievance and to the fact that the respondent had not investigated the diversity issues that he raised at the end of the stage 1 meeting. In addition, in the meetings with Mr McLaughlin which followed, it is apparent that Mr McLaughlin understood that the claimant's complaint related to diversity and less favourable treatment.

43. On 17 November 2016, Mr McLaughlin, an HR consultant at the respondent, came to find the claimant at work and called him into a meeting, unannounced. Mr McLaughlin was accompanied by Ms Ellis, who took notes which appear in the bundle at pages 321 – 325 and are headed "investigation notes" and "Hearing for Stage Two Grievance". Mr McLaughlin opened the meeting by telling the claimant that "it's got to be closed down". The claimant said he needed to consult his notes and that he did not want things to be dealt with "unofficially like this". When the claimant mentioned his union, Mr McLaughlin said, "I won't be dominated by Unite union" and "The union create chaos over nothing". The meeting ended with Mr McLaughlin saying, "close this off" and the claimant saying "No, move forward to Stage 2". The Tribunal considered that the meeting was an attempt by Mr McLaughlin to compel the claimant to drop his stage 2 grievance.

44. A grievance meeting was scheduled by the respondent for 24 November 2016. However, the claimant telephoned Ms Ellis to say that he would not attend a grievance meeting until he had been given the minutes of the grievance hearing on 21 July 2015 and until he had a reply to his SAR.

45. On 21 December 2016, Mr McLaughlin sought out the claimant again and called him into a meeting, again unannounced. Mr McLaughlin was accompanied by Ms Ellis who took notes which appear in the bundle at pages 344 – 347. Mr McLaughlin declared, "there is no grievance" and "there is no evidence". He asked the claimant "are we looking at diversity and equality?" and said, "I need the info if you are being treated differently." The claimant said he needed to get his file and asked for a meeting once he had reviewed his file. In response, Mr McLaughlin said that the claimant had given opinions and no evidence. At the end of the meeting, the claimant referred to the CBT sheets and Mr McLaughlin said that he would have to speak to a senior manager, Dave Hollingworth, about them. The Tribunal considered that this was a further attempt by Mr McLaughlin to intimidate the claimant and to persuade him to drop his grievance. In any event, there

is no evidence that the claimant's stage 2 grievance was investigated, and no outcome was ever produced by the respondent. Mr McLaughlin left the respondent in January 2017.

The SAR

46. On 29 December 2016, the respondent's response to the SAR was delivered to the claimant's home. The respondent provided the claimant with in excess of 400 pages of documents just within the relevant time frame of 40 days, taking account of the Christmas bank holidays. The claimant contended that the response to his SAR was incomplete. The claimant was expecting to receive records going back many years, and he was concerned to find that a number of his appraisals and documents relating to his job applications in 2015 and early 2016 had not been retained and so were not provided to him. It had been explained to the claimant that the respondent has a data retention policy incorporating a number of time frames for the retention of data, beyond which the data was destroyed. In addition, the respondent's file(s) had not previously been held centrally or electronically and, in 2016, changes to the respondent's systems in an effort to centralise everything meant that not all data was transferred to a new system and some was lost. In the circumstances, the Tribunal considered that there was no deliberate attempt by the respondent to deny the claimant the documents he sought. The respondent produced all the documents relating to the claimant that it had retained following centralisation of its systems.

47. The claimant asked for a meeting about his SAR and he was asked to specify which documents he considered were missing. The claimant subsequently pursued the matter with the Information Commissioners' Office.

Ongoing issues

48. On 17 January 2017, the claimant was told he was going on 3 weeks of Level 1 training, from 19 January 2017. This was later pushed back and took place from 31 January 2017 to 20 February 2017, following which the claimant was issued with an 'airside' pass.

49. In February 2017, the claimant had a conversation with Mr Van Der Laan about the respondent's requirement for him to start to increase his working hours up to those of a full-time ASO role, following an occupational health report, in the bundle at page 359-362, which stated that the claimant anticipated that he would "not be limited in his capacity to fulfil the full remit of an ASO" but also opined that until the claimant actually tried working again as an ASO, this would not be clear. The claimant told Mr Van der Laan that he wanted to stay on a part-time roster but that he did not wish to transfer to work part-time in terminal 3. This option had been offered to the

claimant because it was the only place at the airport where there were part-time vacancies.

50. On 30 March 2017, the claimant had a meeting with Ms Gonzalez of HR, about what he said were his ongoing issues. Ms Gonzalez asked the claimant if he thought there was discrimination. The respondent accepts that this conversation amounted to a protected act for the purposes of the victimisation complaint because the claimant was speaking about diversity. Ms Gonzalez referred the matter to Ms Wright, the respondent's Business Change Director.

51. On 6 April 2017, the claimant had a meeting with Ms Wright, about his issues and his grievance. The respondent accepts that this conversation amounted to a protected act for the purposes of the victimisation complaint because the claimant was speaking about diversity.

52. On 27 October 2017, the claimant's MP said he should take matter to an Employment Tribunal and, on 20 November 2017, the claimant told the respondent that his trades union had suggested he go to an Employment Tribunal. However, the claimant did not, at that time, act upon these suggestions.

53. On 11 December 2017, the claimant undertook his annual Continuation Training for his ASO role. The claimant failed the X-Ray test twice, following which the respondent offered the claimant refresher training because a third failure of the X-ray test would put the claimant's ASO role in jeopardy.

Application for Pass & Permits Administrator role

54. On 18 January 2018, the claimant applied for an administrator role in the respondent's Pass and Permits office, on a 6 months' secondment. The claimant was successful in this application.

55. On 20 January 2018, Ms Elis wrote to the claimant inviting him to attend a formal capability meeting on 25 January 2018, to discuss the X-ray test failures. The claimant received the same letter at least 3 times. In addition, Ms Ellis had created a number of letters with incorrect dates in them or dates which the claimant had said he could not attend and she had to telephone and send a text to the claimant to correct the information he had been given. Ms Ellis apologised for the situation at the time. Ultimately, the meeting had to be cancelled due to Ms Ellis being ill.

56. In the meantime, on 30 January 2018, the claimant went to his GP who diagnosed stress and anxiety. As a result, the claimant was signed off work, sick, from 1 to 6 February 2018.

57. On 15 February 2018, the claimant was interviewed for a secondment to an administrative role in the respondent's Pass and Permits office. The claimant at all times knew that this position was on the basis of a 6 months' secondment. The claimant was offered the secondment on 20 February 2018, to commence on 9 April 2018.

58. On 18 February 2018, the claimant attended a capability meeting with an STM, Helen Kenny. The claimant's case is that the discussions at this meeting constituted a further protected act for the purpose of the victimisation complaint. The Tribunal did not find this to be the case. There was no evidence that any discussion of discrimination or diversity took place at this meeting. The meeting notes (bundle pages 426-430) do not show the claimant raising discrimination at any point. The claimant's witness statement also does not refer to raising any issues of race discrimination at this meeting.

59. On 21 February 2018, the respondent issued its decision from the capability meeting, namely that no formal action would be taken – see bundle pages 435-436. However, the claimant was told that he must undertake a 1-day training course, on 28 February 2018, and that at the end of the day he must re-take the X-ray test for a third time. The claimant was warned that if he failed the test for a third time, he would be the subject of a final formal capability meeting which might result in redeployment or possibly the termination of his contract. In fact, the claimant never took the X-ray test for a third time because his secondment to the Pass and Permits office did not require it.

60. On 9 April 2018, the claimant started working in the Pass and Permits office on a 6 months' secondment.

Ongoing issues renewed

61. In May 2018, the claimant's trade union emailed Ms Gonzalez to raise issues on the claimant's behalf. The Tribunal has not seen that email and was unable to ascertain what issues were in fact raised. Ms Gonzalez was surprised to receive the claimant's email because she was under the impression that previous discussions between her and the claimant, and also the claimant's meeting with Ms Wright, had resolved matters and that the claimant was no longer pursuing any issues.

Application for Security Performance Co-ordinator role

62. On 11 August 2018, the claimant applied for a Security Performance Co-ordinator role with the respondent.

63. On 15 or 16 August 2018 the claimant had a meeting with Ms Gonzalez and his trade union representative, about what the claimant described as "all

unresolved issues". The meeting was informal. There were no notes and no evidence of which issues the claimant had referred to nor how they were raised and/or discussed. The claimant suggested that Ms Gonzalez had declared, "This is harassment", without identifying specifically what she was referring to. Ms Gonzalez denies that she had made such a comment. In those circumstances, the Tribunal considered that whatever was said or discussed at the meeting could not be ascertained and so the Tribunal did not find that the claimant had done a protected act in his meeting with Ms Gonzalez.

Application for Terminal Appearance Officer role

64. On 26 August 2018, the claimant applied for a Terminal Appearance Officer role with the respondent. He was interviewed on 14 September 2018 for the Terminal Appearance Officer role but was unsuccessful.

65. On 23 September 2018, the claimant wrote to HR about the length of the interview and he set out what he felt would be good practice in the process. The claimant's email was acknowledged but he did not take it further.

66. On 26 September 2018, the claimant was told that the respondent had received so many applications (77) for the Security Performance Co-ordinator role that it would not be interviewing any more applicants and therefore the claimant wouldn't be interviewed. The claimant was also told that the respondent could only shortlist candidates who most closely matched the skills and experience which the respondent was looking for. The Tribunal considered the respondent's approach to be reasonable in the circumstances - see bundle page 469.

67. On 2 October 2018, the claimant contacted ACAS for advice on his situation. This led to some efforts between the parties to resolve matters but without success.

68. On 8 October 2018, the claimant's 6 months' secondment in the Pass and Permits office came to an end. The claimant asked to continue working in the Pass and Permits office, but the respondent decided that the claimant should return to his substantive ASO role.

Second grievance

69. On 11 October 2018, the claimant presented a second grievance to the respondent which he said was "on the grounds of race discrimination". The grievance email appears in the bundle at pages 474-475. The claimant's grievance has no details or facts within it. The letter simply says that the grievance is about "the way in which I have been treated by [the respondent] ever since I was unsuccessful in applying for promotion in 2015 which I challenged via the grievance procedure" and "I feel as a direct result of

these ongoing, unresolved issues I am experiencing Bullying, Harassment and intimidation." The claimant goes on to say that he will be able to provide full details, examples and dates but he does not set anything out in his letter of grievance which might explain how his grievance is on the grounds of race discrimination or about such. Importantly, at the end of the letter the claimant says, "Finally, given my grievance relates to MAG Security, I do not believe it would be appropriate for me to return to that Area. I have been working in the Pass Office for several months and would request that whilst my Grievance is ongoing, I either remain in the Pass Office or be redeployed elsewhere."

70. The Tribunal noted the respondent's concession that this email amounted to a protected act but disagreed. The Tribunal considered the claimant's second grievance to be a tactic to ensure the claimant did not return to an ASO role and either stayed in Pass and Permits or worked elsewhere. From the evidence, the Tribunal did not consider that the claimant sought to pursue a grievance again, about the same issues which he had pursued through 2 stages of the respondent's grievance procedure in previous years, except as a means to other ends. He had not made any specific allegations, nor had he substantiated anything which he alluded to. The 'grievance' letter was sent merely in an effort to avoid returning to his ASO role which brought with it the prospect of a further X-ray test, by seeking to engineer a reason to remain working in the Pass and Permits office.

Application for Customer Feedback Case Manager

71. On 14 October 2018, the claimant applied for a Customer Feedback Case Manager role. He was invited for interview but was unsuccessful. The claimant was given feedback on his interview and he was offered the opportunity to shadow the team to get more experience for future job applications. The claimant did not take up the offer.

72. The following day, 15 October 2018, the claimant started 3 weeks of Level 1 training which was a precursor to a return to his ASO role. That same day, the claimant's trade union were instructed to and did chase HR for a reply to the claimant's request to stay in the Pass and Permits office.

73. On 19 October 2018, the claimant went off work, sick, tendering a fit note for 3 weeks due to work-related stress and anxiety – see bundle page 684.

74. In early Nov 2018, the respondent told the claimant informally that he could stay working in the Pass and Permits office whilst his grievance proceeded.

75. On 19 November 2018, the claimant attended a grievance meeting with Emma Rigby. The meeting had originally been arranged for 8 November 2018, but the claimant's trade union had suggested that Ms Gonzalez, who had been nominated to handle the grievance process, should not do so due

to her previous involvement with the claimant. In addition, the claimant's trade union representative was not available on the date proposed or on a number of alternative dates. When the matter was passed to Ms Rigby, because of the claimant's trade union having raised concerns about Ms Gonzalez, this led to a delay in finding a date that all the necessary parties could attend. The consequent delay was nobody's fault. The notes of the grievance meeting appear in the bundle at pages 505-519.

76. On 5 December 2018, the respondent confirmed formally that, when the claimant was fit to return-to-work, he would continue to work in Pass and Permits administration while his grievance was dealt with.

Second grievance outcome

77. On 20 December 2018, Ms Rigby issued the outcome of the claimant's second grievance which she turned down. The outcome letter appears in the bundle at pages 605-614. The Tribunal considered that Ms Rigby approached the claimant's grievance diligently and in a structured way, producing a table of the matters raise in the grievance which were to be assessed. She went about her investigation and interviews thoroughly, covering every matter raised by the claimant. The witness evidence collected was cogent and credible, and it formed part of a comprehensive investigation. The Tribunal therefore rejected the claimant's challenge to Ms Rigby's competence on the basis that her approach was reasonable, thorough and professional. Her conclusions are set out in a 10-page outcome letter which is comprehensive. There was no evidence that the grievance process or the outcome was tainted by race discrimination nor did the Tribunal consider, based on the evidence before it and the reasoned conclusions of Ms Rigby, that the process and/or the decision to turn down the claimant's grievance was because of race.

Second grievance stage 2

78. On 26 December 2018, the claimant submitted a second Stage 2 grievance by email to the respondent. This appears in the bundle at page 617 and is extremely brief, containing an allegation that, "the issues which [the claimant] highlighted in the stage 1 meeting … have not been fully investigated … and those interviewed have not fully and honestly co-operated in the investigation conducted by Emma Rigby." On 20 January 2019, the claimant supplied further information on his thoughts about the grievance outcome which appear in the bundle at pages 622 – 625.

79. On 21 January 2019, the claimant returned to work in the Pass and Permits office.

80. In February 2019, a manager, Mr Modha was appointed to hear the claimant's stage 2 grievance. Mr Modha's diary was already very busy in

February 2019 and so he wrote to the claimant suggesting a meeting on 7 March 2019. The claimant replied that this date was not convenient, and he suggested the meeting take place after 14 March 2019, giving 2 dates when he was available. Eventually, 28 March 2019, was settled on as the date which the claimant said would be better for him. Given that the claimant's desire was to stay in the Pass and Permits office, the Tribunal failed to see how any delay in arranging the stage 2 grievance meeting was detrimental to the claimant when it served to prolong the claimant's time working in the Pass and Permits office.

81. On 15 February 2019, the claimant issued his claim of race discrimination in the Employment Tribunal. The Tribunal accepts this is protected act for the purpose of the victimisation complaint.

82. On 28 March 2019, the claimant attended his stage 2 grievance meeting with Mr Modha. The notes appear in the bundle at pages 637-649.

83. In May 2019, the claimant was off work, sick, and a referral to occupational health was set up.

84. On 23 May 2019, Mr Modha issued the second stage 2 grievance outcome. His letter appears in the bundle at pages 678-681 and is a comprehensive document providing what the Tribunal found to be a reasonable response to mainly historic events and allegations. The parties met to discuss the outcome on 29 May 2019 and Mr Modha made it clear to the claimant that his decision was the end of the respondent's grievance process.

85. On 2 June 2019, the claimant wrote to the respondent suggesting that his issues had "never been fully and honestly addressed" without explaining what he meant by that. The claimant also said he was studying his options under European law and the European Court of Human Rights – see bundle page 685.

86. On 11 June 2019, when the respondent raised the matter of the claimant's return-to-work in his ASO post, the claimant said he would look at his options to stay off sick or to resign and claim constructive dismissal – bundle page 689. The claimant has not resigned.

2020

87. In 2020, the claimant was still on temporary secondment, working as an administrator in the Pass and Permits office. On 7 March 2020, the claimant went on holiday abroad. He was due to return to work on 27 March 2020. However, on 23 March 2020, the UK went into lockdown due to the COVID-19 pandemic. The claimant therefore remained abroad for an extended period of time, returning to the UK on 6 May 2020.

88. On 1 April 2020, the respondent furloughed the majority of its staff, including the claimant. He was formally notified of the continuing furlough situation in writing on a number of occasions, and told that he was furloughed – see, for example, bundle page 711. The claimant continued to be paid throughout the period and raised no issue about his position or furlough at the time.

89. On 12 June 2020, the respondent updated the claimant about furlough, and informed him that he could access the respondent's internal systems and "keep up to date with what's going on at work and access [his] payslips" (Bundle page 713).

90. On 10 July 2020, the respondent again updated the claimant about furlough and, on 2 November 2020, the respondent told the claimant that he remained on furlough when the UK Government scheme was extended. The Tribunal considered that the pandemic presented exceptional and challenging circumstances to the international travel industry and in those circumstance, the respondent was doing its best to keep its numerous employees informed of the situation despite continuing uncertainty and under UK pandemic regulations which changed from time to time.

91. In January 2021, the parties were in discussion about the claimant's return to work.

The applicable law

92. A concise statement of the applicable law is as follows.

93. The complaint of race discrimination was brought under the Equality Act 2010 ("EqA"). Race is a relevant protected characteristic as set out in section 9 EqA.

94. Section 39(2) EqA prohibits discrimination by an employer against an employee by dismissing him or by subjecting him to any other detriment. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.

95. The EqA provides for a shifting burden of proof. Section 136 so far as is material provides as follows:

> *(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.*

96. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

97. In *Hewage v Grampian Health Board [2012] IRLR 870* the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in *Igen Limited v Wong [2005] ICR 931* and was supplemented in *Madarassy v Nomura International PLC [2007] ICR 867*. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct discrimination

98. Section 13 EqA provides that 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. The relevant protected characteristics include race.

99. Section 23 EqA provides that on a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case. The effect of section 23 EqA as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person not of the claimant's race.

100. Further, the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including *Amnesty International v Ahmed [2009] IRLR 884*, that in most cases where the conduct in question is not overtly related to a protected characteristic, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, race) had any material influence on the decision, the treatment is "because of" that characteristic.

Harassment

101. Section 26 EqA provides:

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

(a) A engages in unwanted conduct related to the relevant protected characteristic, and
(b) the conduct has the purpose or effect of -
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

(2) A also harasses B if-
(a) A engages in unwanted behaviour of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1) (b).

(3) ….

(4) In deciding whether conduct has the effect referred to in subsection (1) (b) each of the following must be taken into account-
(a) the perception of B
(b) the other circumstances of the case
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are- … Race …

102. The concept of harassment under the previous equality legislation was the subject of judicial interpretation and guidance by Mr Justice Underhill in *Richmond Pharmacology and Dhaliwal 2009 IRLR 336*. The Tribunal has applied that guidance, namely:

> *"There are three elements of liability (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's race (or ethnic or national origins)."*

Victimisation

103. Section 27 EqA provides that 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 B has done or may do a protected act.

104. A protected act includes making an allegation (whether or not express) that A or another person has contravened the Act. Making a false allegation is not a protected act if the allegation is made in bad faith.

105. There is a helpful analysis of the previous similar provisions by Mr Justice Underhill in *Martin v Devonshires Solicitors UKEAT/0086/10* namely:

> *"The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner of the complaint."*

Jurisdiction – time point

106. The time limit for complaints of discrimination is found in section 123 EqA as follows:-

(1) Subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or
(b) such other period as the Employment Tribunal thinks just and equitable.

(2) ...

.

(3) For the purposes of this section –

(a) conduct extending over a period of time is to be treated as done at the end of that period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

107. A failure to do something is therefore to be treated as occurring when the person in question decided on it*, or does an act inconsistent with doing it,* or on the expiry of the period in which that person might reasonably have been expected to do it.

108. The case law on the application of the "just and equitable" extension includes *British Coal Corporation –v- Keeble [1997] IRLR 336*, in which the Employment Appeal Tribunal ("EAT") confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in *Keeble*:-

"that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –

(a) the length of and reasons for the delay;
(b) the extent to which the cogency of the evidence is likely to be affected by the delay;
(c) the extent to which the party sued had cooperated with any request for information."

109. In the course of submissions, the Tribunal was referred to a number of additional cases by representatives of the parties, as follows:

- Qureshi v Victoria University of Manchester UKEAT/484/95
- Driskel v Peninsula Business Services Ltd [1999] UKEAT/1120/98
- Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830
- Hendricks v Metropolitan Police Commissioner [2003} IRLR 96
- Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337
- Laing v Manchester City Council UKEAT/0128/06
- St Helens Borough Council v Derbyshire and others [2007] UKHL 16
- Woods v Pasab Ltd t/as Jones Pharmacy [2013] IRLR 305
- Osoba v The Hertfordshire Constabulary [2013] UKEAT/0055/13
- Efobi v Royal Mail Group Ltd [2017] UKEAT/0203/16
- Ayodele v Citylink Ltd and another [2017] EWCA Civ 1913
- Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640

The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

Submissions

110. The representative of the claimant tendered a written skeleton argument and made a number of detailed oral submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that:- the evidence of the claimant should be preferred because it was more detailed and consistent with the documents; the respondent's witness statements were light on detail and in some cases failed to deal with relevant matters, alternatively the witnesses were unable to recall events; the outcome letter of 20 December 2018 found no evidence of victimisation but contained 5 apologies; in cross-examination, when asked whether the claimant's treatment was because of discrimination or incompetence, Ms Abbott had replied "incompetence" and that the respondent had offered no other explanation for the claimant's treatment; the acts complained of constituted a continuing act and so the complaints were in time; and that the claimant had established facts from which the Tribunal could decide, in the absence of any other explanation from the respondent, that unlawful discrimination had occurred.

111. Counsel for the respondent presented written closing submissions and made a number of detailed oral submissions which the Tribunal has also considered with care and also does not rehearse in full here. In essence it was asserted that:- the claimant had not established a prima facie case in respect of each or any of the factual allegations nor has he explained how those allegations give rise to race discrimination; the respondent had in any event proved on a balance of probabilities that the treatment complained of was not on grounds of race; the claimant made serious allegations without foundation; the claimant's unjustified sense of grievance did not amount to a detriment; the respondent's witnesses were not challenged about what they had done as being on the basis of race or any protected act; there are long gaps between the instances of alleged discrimination/victimisation which operate to break any chain of acts or continuous act; the claimant accepted that a number of the respondent's employees had acted in good faith in respect of his job applications and his grievances; and that in fact the respondent's record on diversity was good as demonstrated in the unchallenged evidence of the respondent's senior managers.

Conclusions (including where appropriate any additional findings of fact)

112. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Direct discrimination because of race

113. The Tribunal examined the factual allegations upon which this complaint was based and reached the following conclusions.

114. The first allegation, 1.1, related to an application for the position of "Duty Manager". However, the claimant did not in fact apply for a position of Duty Manager. Mr Broomhead for the claimant confirmed during the hearing that this was an error and that the first allegation should have referred to Security Duty Manager. As that was not the issue to be determined, the Tribunal were concerned about this failure to identify with precision or at all the post contended for on the claimant's part. In any event, the Tribunal did not consider that the refusal to interview the claimant for the post of SDM amounted to less favourable treatment. The role was 2 tiers higher than an ASO and the claimant accepted in cross-examination that he did not get an interview or feedback about the SDM application for this reason. The claimant also agreed, in the course of giving evidence, that he did not think that the refusal to interview him for the SDM role was an act of discrimination by the respondent.

115. In relation to allegation 1.2, about the claimant's application for the post of Security Team Manager which was initially refused, the Tribunal found that HR called the claimant on 21 January 2015 to explain why his application had been rejected - due to the fact that the claimant had not addressed the requirements of the role in the information he gave. The respondent had provided a detailed job description for the STM role, including principal accountabilities, knowledge, experience, skills, values and core beliefs which the respondent was looking for from applicants for the role of STM. The claimant submitted a generic CV, listing jobs he had done, and a covering letter with only very brief details of the jobs he had done. He provided no context and did not tailor his applications to the role or its requirements. He did not address the knowledge and experience, skills, values and core beliefs which the respondent was looking for and so, unsurprisingly, he did not meet the shortlisting criteria. Under cross-examination, the claimant said that he now understood that his generic CV was not sufficient or specific for the posts he pursued. The Tribunal considered that the claimant's CV, in the bundle at pages 185-187, was lacking in the details that an employer would be entitled to expect. For example, the claimant had said that he had managed large teams but he provided the respondent with no evidence to support this statement and, when giving evidence to the Tribunal, he was not able to articulate what he meant, nor how or when he had in fact managed large teams, nor could he provide any dates or details to support what he claimed.

116. The Tribunal noted that the respondent's HR personnel had pointed out the inadequacies of his generic CV and applications to the claimant and had suggested that the claimant might benefit from training in CV building, but the claimant never pursued this. In addition, despite HR advice, there was no evidence that he had taken any steps to modify his CV or to tailor it to the

specifics of any post that he applied for. Instead, the claimant alluded to further applications based on the CV which appeared in the bundle. This suggested that the claimant had not listened to what HR were telling him about the recruitment process nor had he availed himself of help when it was offered to him. Further, the claimant admitted under cross-examination that he did not know the number of applicants who had applied or their backgrounds, nor did he have any idea why others had been rejected or who those others were.

117. Allegation 1.3 concerned the fact that, between March and July 2015, the claimant's application for a position as a Technical Training Coach was refused. Here, again, the claimant submitted the same generic CV regardless of the advice he had been given on that and without having taken up the training on offer when he had been told that his CV was inadequate on its own, and that he needed to address the requirements of the role applied for. In cross-examination, the claimant accepted that his CV did not reflect critical role requirements. He went on to say that it would have been nice to have been told that and he thanked the respondent's Counsel for pointing it out.

118. Allegation 1.4 concerns requests made by the claimant after July 2015 for training and development to help further his career which he says were ignored. This was clarified as relating to the claimant's request for Level 2 / Level 3 training. Mr Van Der Laan's evidence was that access to Level 2 training was restricted to and intended only for those employees in STM roles or those who had secured an STM role. It was not for ASOs, and Level 3 training was for SDMs only. Mr Van Der Laan had explained this to the claimant at the time. The claimant accepted under cross-examination that the position was as stated by Mr Van Der Laan. Whilst the claimant's request for Level 2 or 3 training was not granted, the Tribunal noted that he had been offered other training, for example training in CV building but he had not taken this up. In evidence, the claimant said that he appreciated Mr Van Der Laan's support and guidance and, when challenged, the claimant conceded that he did not think Mr Van Der Laan had discriminated against him.

119. Allegation 1.6 relates to the period following the claimant's return to work in September 2016. The claimant contended that a phased return to work which should have lasted for 8 weeks in fact lasted for 5 months, and that the claimant: was not supported in a number of ways and that Occupational Health guidance should have been applied to him by putting him on light duties. The evidence presented to the Tribunal showed a very different picture. At the claimant's return to work meeting on 14 September 2016, it was agreed that the claimant would work shifts from 7am – 12 noon, 4 days on/4 days off, on an 8 weeks' phased return and that the claimant would slowly building up his hours. The length of the phased return to work was not fixed but was subject to review and a further occupational health report.

The claimant was given a landside pass so he could come into work and the claimant was told that his training would start once he had his airside pass which had lapsed due to the length of the claimant's absence. During the period after the claimant returned to work in September 2016, he worked in the passenger preparation area, in effect doing light duties as recommended by occupational health, and he was supplied with a chair so that he could manage his back condition by varying his stance, standing or sitting as required. This was a flexible arrangement to assist the claimant's return to work. The claimant could not be vetted until he returned to work and then he was placed on agreed light duties so there was no point, at the time, in the respondent proceeding to vet him for other work. In the circumstances, the Tribunal considered that the claimant was not treated detrimentally. He was not pressured to return to his normal duties or full duties and, at the time, the claimant had not been concerned about this. The Tribunal also noted that the claimant said that, on occasion, he came to work to find that his chair had been moved or had disappeared, but the claimant did not take any action over this nor did he report it at the time. There was no evidence that the respondent was neglecting the claimant or ignoring him, as the allegation contends. The Tribunal accepted Mr Van Der Laan's unchallenged evidence that the 8 weeks' phased return period was an initial plan which could be built upon or modified. In any event, the claimant could not return to full ASO duties because of his back issues and, in the circumstances, the phased return was reasonably extended to accommodate him.

120. In respect of the SAR and allegation 1.8, the Tribunal has found that, on 8 November 2016, the claimant sent the respondent his SAR and subsequently paid the £10 administration fee required. The fee is not an obstacle to an SAR. Employers are entitled by law to charge it. In the respondent's HR central services team, Ms Abbott was the individual tasked with the administration behind any SARs. Due to misunderstanding in the respondent's HR central services team, Mr McLaughlin, a temporary HR consultant, had told the claimant that he needed to put a formal request in writing rather than by email, and later the claimant was told to write again and to address his SAR to Ms Abbott directly. This confusion arose due to temporary HR personnel being unfamiliar with the respondent's procedures and individual responsibilities and did not amount to obstacles being put in place against the claimant or to impede him. In any event, the Tribunal noted that the allegation was worded as being about "*Obstacles … put in the claimant's way in trying to get a response to his SAR*" and about the response being incomplete when received on 29 December 2016. The Tribunal considered that any such obstacles as arose were during the period in November and early December 2016, when the claimant was trying to submit his SAR and did not relate to the response to his SAR.

121. On 29 December 2016, the respondent's SAR response was delivered to the claimant's home within the relevant time frame of 40 days, taking

account of the Christmas bank holidays. It consisted of in excess of 400 pages of documents. The claimant was expecting to see documents going back many years and, for that reason, contended that the response was incomplete. However, the Tribunal found that due to the respondent's data retention policy, data falling outside of that policy had been destroyed including a number of the claimant's appraisals and documents relating to his job applications in 2015 and early 2016. In addition, the respondent's data had been transferred to a new record system in 2016 and much prior data had then been cleansed. The Tribunal noted that the claimant had not kept his own copies of his applications and appraisal documents. In the circumstances the Tribunal considered that there was no deliberate attempt by the respondent to deny the claimant the documents he sought and indeed no evidence to support such an assertion. It is not realistic to expect an employer to retain data on every employee for so long particularly in light of the duties imposed by law on data controllers and processors such as the respondent employer. In evidence, the claimant said that he was not aware of this happening to anybody else, but he presented no evidence to support that assertion and also no evidence that his alleged treatment or the response to his SAR was because of race.

122. In respect of allegation 1.9, it was unclear precisely how many letters the claimant had in fact received, as opposed to letters having been generated and not sent, due to errors. In any event, when Ms Ellis wrote to the claimant on 20 January 2018 to invite him to a capability meeting, it was apparent that the claimant had, for reasons unknown, received 3 copies of the same letter. Ms Ellis' evidence was that she also telephoned the claimant and send him a text in an effort to correct the information he had been given. Ms Ellis apologised for the situation which arose, and she was clearly embarrassed by it. Ms Rigby also apologised for the respondent's inept way of dealing with this particular episode. However, the Tribunal found no evidence that anything done by the respondent's personnel was because of the claimant's race, noting that Ms Ellis had in fact been seriously ill at the time, a point which the claimant did not dispute. The claimant had failed the annual X-ray test twice and the Tribunal accepted that any employee who had done so would have been invited to a capability meeting to discuss those failures and the potential consequences.

123. The claimant's meeting with Tania Gonzalez on 15 August 2018 was an informal chat during which the claimant contends that he referred to 2 complaints that he had: about his STM role application in 2015; and about a lack of diversity in the respondent's Security section. There was no evidence to support either witness's account of what said during this informal conversation although it was accepted that the possibility of the claimant pursuing a grievance or going to an Employment Tribunal was discussed. In those circumstances, and in respect of allegation 1.10, the claimant's contention that Ms Gonzalez was to investigate his 2 complaints does not fit the narrative. In any event, Ms Gonzalez denied that she had left the

meeting with the intention of investigating any points discussed and denied that she had somehow waited 3 months to speak to anybody. The Tribunal accepted Ms Gonzalez's evidence on the matter, particularly as there was no follow-up email in the bundle to confirm what matters had in fact been discussed and/or whether a way forward had been agreed, and the claimant did not chase matters with her. In fact, on 20 August 2018, Ms Gonzalez advised the claimant that she had spoken to others about a number of matters – see bundle page 454. This was not in any sense an investigation but was in the manner of general enquiries to assist the claimant and Ms Gonzalez was reporting back to him. On 21 August 2018, Ms Gonzalez told the claimant that 2 individuals were happy to speak to him about the role of STM and she also told the claimant that the respondent had no plans to increase staffing in the Pass & Permits office. The end of the claimant's 6 months' secondment was looming, and the Tribunal considered that the claimant did not want to go back to being an ASO and so he was exploring other options including the possibility of staying in the Pass & Permits office. Thereafter, Ms Gonzalez provided a general update (bundle page 458) and on 10 September 2018, the claimant thanked her for all her support. He did not mention any investigation. Contemporaneous evidence of the communications between the claimant and Ms Gonzalez, such as was presented to the Tribunal, shows an ongoing conversation about roles for the claimant and not about diversity or discrimination. There is nothing to suggest that the claimant was pursuing a complaint through Ms Gonzalez, about his treatment nor about race discrimination.

124. In respect of the post of Security Performance Coordinator, allegation 1.11, the claimant had been told, on 26 September 2018, that the respondent had received so many applications (77) for the role that it had decided not to interview any more applicants. This meant that the claimant wouldn't be interviewed. There was no evidence that others who applied when the claimant did, had been treated any differently. The Tribunal considered the respondent's approach to be reasonable in the circumstances and was not related in any way to the claimant's race. In addition, the Tribunal noted Ms Gonzalez's unchallenged evidence that the claimant did not have right set of skills for that particular role.

125. In relation to allegation 1.12, there was a delay of just over a month in arranging a grievance meeting after the claimant lodged his grievance on 11 October 2018, the meeting taking place on 19 November 2018. The Tribunal examined the period in question and found that from 19 October 2018, the claimant was off work, sick, for 3 weeks due to work-related stress and anxiety. A grievance meeting had originally been arranged for 8 November 2018 but could not therefore go ahead. In addition, the claimant's trade union suggested that Ms Gonzalez should not handle matters due to her previous involvement with the claimant. The matter was then passed to Ms Rigby. Subsequently, the claimant's trade union representative was not available on the proposed alternative meeting dates. All of these matters led

to a delay in finding a date for the grievance meeting which all parties could attend but the situation was nobody's fault and had nothing to do with the claimant's race.

126. Allegation 1.13 concerned the respondent refusal of the claimant's request, through his union, for a temporary redeployment when his secondment to the Pass and Permits Office ended on 15 October 2018. It was contended that the proposed return to his substantive role of ASO caused the claimant to have a breakdown and sick leave due to stress and anxiety. Whilst the Tribunal was told the claimant went off sick for that reason, there was no medical evidence to support the claimant's contention nor to link such sickness to his possible return to an ASO role, whether enforced or otherwise. In fact, what happened was that, in early November 2018, the respondent said that the claimant could stay in the Pass and Permits Office whilst his grievance proceeded and, on 5 December 2018, the respondent confirmed in writing that, when the claimant was fit to return to work, he would remain in Pass and Permits administration while his grievance was dealt with.

127. At the grievance outcome meeting on 20 December 2018, the claimant's grievance was rejected. This formed the basis of allegation 1.15. The Tribunal considered that the respondent was entitled to reach a decision to reject the grievance. Ms Rigby's outcome letter is lengthy and reasoned, following a thorough and rigorous investigation process and there was nothing to suggest that the grievance was rejected irrationally. The claimant's admitted, under cross-examination, that he had no issues with Ms Rigby and the grievance process - see the Tribunal's findings about this in paragraph 77 above. It was the outcome he did not like. However, the claimant was unable to explain how the grievance outcome as set out in the outcome letter amounted to less favourable treatment nor was he able to explain how the outcome was because of race discrimination in line with this allegation, and the claimant was unable to point to any actual comparator. The Tribunal considered that the claimant's suggestion, that a hypothetical comparator not of the claimant's race would have had a similar grievance about recruitment upheld, to be fanciful and without foundation.

128. In respect of allegation 1.16, the Tribunal considered the timescale in which the respondent arranged a meeting to deal with the claimant's appeal against the grievance outcome which had been submitted on 26 December 2018. A number of events and communications are important. First, this was submitted during the Christmas and New Year holiday period when the respondent's managers were particularly busy and/or away from work. In his brief email of 26 December 2018, the claimant gave no details of the grounds for his appeal save to say "*I feel the issues that I highlighted in the stage one meeting … have not been fully investigated, are full of inaccuracies and discrepancies and those interviewed have not fully and honestly co-operated in the investigation conducted by Emma Rigby*." On 3

January 2019, the claimant asked Ms Rigby to send a copy of the grievance outcome letter to his trade union representatives. The respondent sent the grievance outcome letter the next day, as requested. On 20 January 2019, the claimant supplied further information setting out his thoughts on the grievance outcome and historic matters. The email which appears in the bundle at pages 622 – 625, is lengthy and detailed, covering events starting with the claimant's STM application in 2015 and onwards. The claimant apologised for the list of matters but said that his email was "not exhaustive". On 21 January 2019, the claimant returned to work from sickness absence which had commenced on 19 October 2018.

129. In February 2019, Mr Modha was appointed to hear the claimant's grievance appeal. He was already very busy in February and so he wrote to the claimant to propose meeting on 7 March 2019. The claimant replied that this date was not convenient and suggested that the meeting should take place after 14 March 2019. The claimant gave only 2 dates when he was available. This led to the appeal being arranged for 28 March 2019, which was the claimant's preferred date. In those circumstances, the length of time taken to arrange a meeting is explained by events and the claimant's availability. Throughout this period, the claimant remained assigned to and working in the Pass & Permits office. Given that it was the claimant's desire to stay in the Pass & Permits office, the Tribunal failed to see how the time taken to arrange the grievance meeting could be said to be detrimental. In any event, the Tribunal considered that the length of time it took to arrange the claimant's appeal against the grievance outcome, whilst unfortunate, was not deliberately protracted by any of the respondent's personnel, nor in any sense because of race.

130. In light of the Tribunal's findings above in respect of each of the factual allegations, the Tribunal concluded that claimant has not shown facts from which the Tribunal could find that the claimant had been treated less favourably. The Tribunal concluded that the respondent did not treat the claimant less favourably than it treated or would have treated others in not materially different circumstances and that the treatment complained of was not because of the claimant's race.

Harassment related to race

131. The Tribunal examined the factual allegations upon which this complaint was based and reached the following conclusions.

132. The first allegation, 4.2 in the list of issues under the heading of Harassment was, in essence, an allegation that, in August 2016, when the claimant was off sick, he was told that the respondent's Director of HR, Ms Palmer, was thinking about terminating his employment. The claimant contended that this was said at a meeting on 10 August 2016, by either Ms Ellis or Mr Grundy. Both witnesses denied that this had been said. There was a complete

conflict of evidence which the Tribunal resolved in the following way. The Tribunal noted that the meeting was to review the claimant's long-term sickness absence. The latest occupational health report had set no firm date or period in which the claimant might return to work. He had by then been off sick for approximately 12 months. The meeting had been called to discuss all options, including a phased return to work. There was a discussion about the claimant's future and all the possible options and outcomes, but no decisions were made. In those circumstances, the Tribunal considered, on a balance of probabilities, that the possible termination of the claimant's employment would have been included in discussions as one option, for example due to incapability or by medical retirement, if the claimant was going to be unable to return to work at some point in the foreseeable future. Ms Palmer did not have the power simply to terminate the claimant's employment; there were procedures to be gone through.

133. The mention of termination of employment might be seen as unwanted conduct but this was in the context, in this case, of a welfare meeting to discuss options for an employee on long term sickness absence. There was no evidence that the possibility of the termination of his employment was raised as a threat to the claimant or in order to put pressure on him in some way. Arguably, an employee on long-term sick is entitled to know all the options for their future. This will include options that they may not want to contemplate but all options need to be set out. It would not be reasonable to expect an employer to not mention termination of employment even though it was a possible option, merely because that might upset the employee. Likewise, it would be unreasonable for the claimant to perceive it as such without anything to support that perception. In any event, the Tribunal considered that the respondent's managers would have discussed the possibility of termination of employment with any employee who was off on long term sick and who appeared unlikely or unable to return to work and, in the circumstances of the welfare meeting, it was reasonable to do so.

134. Allegation 4.3 was that the claimant's phased return to work, from September 2016 onwards, should have lasted for 8 weeks but in fact lasted for 5 months, during which time the claimant was not supported or provided with light duties. The Tribunal considered this allegation above, at paragraph 119, in relation to direct discrimination and its findings there are relevant to the complaint of harassment. The Tribunal heard evidence that the 8 weeks' phased return period was an initial plan which could be built upon or modified, and subject to review and a further occupational health report. The Tribunal considered that the claimant was not treated detrimentally; arrangements were flexible, and the claimant was not pressured to return to normal duties. The phased return was reasonably extended because the claimant could not return to full ASO duties due to his continuing back issues - this did not amount to an act of harassment in the circumstances

and there was no evidence that the phased return was extended in order to harass the claimant because of race .

135. Allegation 4.5 has also been considered above, at paragraph 122, in relation to direct discrimination and the Tribunal's findings are also relevant to the complaint of harassment. The claimant had, for reasons unknown, received 3 copies of the same letter. Ms Ellis had sought to correct matters by a telephone call and a text, to ensure the claimant had the correct information. The claimant accepted that Ms Ellis had been seriously ill at the time. In addition, the claimant was given an undertaking by Ms Gonzalez at the time, that she would speak with Ms Ellis about getting letters right before sending them, in future. The Tribunal therefore considered that the respondent took notice of this matter when it occurred, HR told the claimant that it should not have happened and apologised, and the respondent was seen to be taking remedial steps. Taking into account the context, the Tribunal found no evidence that anything done, whether erroneously or otherwise, by the respondent's personnel was deliberate or because of the claimant's race, and the letter errors did not constitute an act of harassment.

136. In light of the Tribunal's findings above in respect of each of the factual allegations, the Tribunal concluded that the respondent did not harass the claimant in the manner(s) contended for, and that the treatment complained of was not because of the claimant's race.

Victimisation

137. The Tribunal examined the protected act(s) contended for (numbered as "PA…" in the list of issues) in respect of this complaint and reached the following conclusions.

138. PA1 comprised the grievance letter dated 14 June 2015 and comments made the claimant during the grievance hearing on 21 July 2015. The claimant accepted in evidence that his letter did not refer to any form of discrimination and it is not clear from the letter what the claimant was complaining about – see also paragraph 25 above. Nevertheless, the respondent sought clarification, in response to which the claimant provided further details on 19 July 2015, including "*the lack of diversity in managerial roles*" and "*the percentage of staff from ethnic minority backgrounds in security and MAG departments, compared to management*." The Tribunal considered these statements to amount to a protected act. In addition, at the end of the meeting on 21 July 2015, the claimant produced a list of employees in security, on computer-based training (CBT) sheets and raised the issue of diversity across the respondent's organisation.

139. PA2 was the claimant's Stage 2 grievance of 11 November 2016. The Tribunal has found that this grievance was referring to the claimant's Stage 1 grievance and the diversity issues raised at the end of the grievance

meeting. The Tribunal considered this to be a protected act in those circumstances – see paragraph 42 above.

140. PA3 was the verbal discussions with Ms Gonzalez on 30 March 2017 – see paragraph 50 above. The respondent has accepted that this conversation amounted to a protected act for the purposes of the victimisation complaint and the Tribunal has found that the claimant was raising issues of diversity.

141. PA4 was the verbal discussions with Ms Wright on 6 April 2017 – see paragraph 51 above. The respondent has accepted that this conversation amounted to a protected act for the purposes of the victimisation complaint and the Tribunal has found that the claimant was raising diversity issues.

142. PA5 relates to verbal discussions with Helen Kenny on 18 February 2018 during a capability meeting - see paragraph 58 above. The notes of the meeting show that the discussion focussed on the claimant having failed the X-ray tests and the consequences of further failure. They do not record that the claimant raised discrimination at any point. Paragraph 194 of the claimant's witness statement suggested there had been discussion of "all the issues leading up to" the capability meeting but does not specify any issues of race discrimination which would ordinarily be irrelevant to a capability meeting and the Tribunal considered, on a balance of probabilities, that nothing was raised or discussed which might amount to a protected act in the circumstances.

143. PA6 concerned the verbal discussions with Ms Gonzalez on 15 August 2018 – see paragraph 63 above. The Tribunal was unable to ascertain, from the evidence presented, precisely what was discussed at this informal meeting and, in those circumstances, did not find that a protected act is made out in that regard.

144. PA7 related to the grievance of 11 October 2018 which appears in the bundle at pages 474 – 475. Whilst the letter is stated to be a grievance "on the grounds of race discrimination" it provides absolutely no allegations or details or facts pertaining to such. It says that the grievance is about "*the way in which I have been treated by [the respondent] ever since I was unsuccessful in applying for promotion in 2015 which I challenged via the grievance procedure*" and "*I feel as a direct result of these ongoing, unresolved issues I am experiencing Bullying, Harassment and intimidation*." The claimant goes on to say that he will be able to provide full details, examples and dates but he does not make any precise allegation(s) nor did he set anything out in his letter of grievance which might explain how his grievance is on the grounds of race discrimination or about such, and he provides no supporting evidence or information. Notably, in the course of the grievance meeting with Ms Rigby, the claimant corrected his reference to bullying and harassment, telling Ms Rigby that the reference was wrong and that "*what I should have said was victimisation*." In addition, at the end of

the letter, the claimant says "*given my Grievance relates to MAG Security, I do not believe it would be appropriate for me to return to that Area. I have been working in the Pass Office for several months and would request that whilst my Grievance is ongoing, I either remain in the Pass Office or be redeployed elsewhere*." The Tribunal noted the respondent's concession that this letter amounted to a protected act but disagreed. In light of the contents of the letter and the surrounding circumstances, the Tribunal considered the claimant's letter of 11 October 2018 to be a tactic to ensure the claimant did not return to the role of an ASO and either stayed in the Pass and Permits Office or worked elsewhere. The Tribunal considered that the claimant resorted to raising, once again, a grievance which he had already pursued through 2 stages of the respondent's grievance process in previous years, as a means to another end, namely as a tactic to ensure he stayed in the Pass Office. In those circumstances, given that the letter is couched in unspecific terms, save where it relates to the request to stay in the Pass Office, the Tribunal considered that the grievance letter was submitted in bad faith and that it did not constitute a protected act. Nevertheless, the respondent dealt with the claimant's grievance under its procedures appropriately, such that the Tribunal could find no detrimental treatment flowing from it – see in this regard paragraphs 160-164 below.

145. PA8 is the claimant's ET1 form submitted on 15 February 2019, which includes his claim of race discrimination. The Tribunal accepts that this is a protected act.

146. The Tribunal has found that the acts numbered 1, 2, 3, 4 and 8 are protected acts for the purposes of the victimisation complaint. The Tribunal then went on to consider the factual allegations which the claimant contended was detrimental treatment because of his protected acts, as follows.

147. Allegation 9.1 was that requests made by the claimant after July 2015 for training and development to help further his career were ignored, namely he requested Level 2 / Level 3 training. The Tribunal rejected this allegation as being factually incorrect. In fact, the evidence was that the request for Level 2 and 3 training was made before July 2015; it was made on 21 February 2015. At the time, Mr Van Der Laan had replied promptly to the claimant to explain that Level 3 training was for STMs who were in post and that Level 2 training was for those ASOs who had secured an STM role. The claimant was not eligible for Level 2 or Level 3 training – see paragraph 20 above. Mr Van Der Laan also suggested that the claimant look at joining the model lane teams, or the Matrix training team in order to enhance his experience for future applications. The claimant's request was not therefore made after July 2015 but before that date and it was not ignored. In addition, as the Tribunal has found, at the grievance hearing on 21 July 2015, the claimant was asked about the CV building training which the respondent had previously offered to him. The claimant had not availed himself of this

training because, he suggested, he "did not get any dates". However, the claimant did not chase this aspect and did not include a request for, nor a complaint about training in his grievance. The Tribunal therefore considered that the claimant was not treated in any detrimental way as regards a request for training made after July 2015. There was no evidence of such a request at the material time and no evidence that the claimant had pursued any of the training opportunities which were brought to his attention or offered to him, such as joining the Matrix training team.

148. Allegation 9.2 was about the grievance process triggered by the claimant's letter dated 14 June 2015 being delayed, and not heard until 21 July 2015. This is dealt with at paragraph 27 above and does not amount to detrimental treatment. The respondent had proposed a date within 4 days of receipt of the grievance and the hearing was eventually arranged for a date which was convenient date for all concerned, after the claimant's annual leave. Despite being an allegation of detrimental treatment, this matter was not covered in the claimant's witness statement at paragraph 34 nor in evidence in chief. In cross-examination, the claimant conceded he had no criticism of the delay which the claimant accepted was due to his own availability and that of the respondent's manager, Simon Brooks. An email in the bundle, at page 208, shows that the claimant stated he could not attend a meeting on 25 June 2015 and not until after 6 July 2015. In reply, the respondent proposed further dates and it was the claimant who was not then available until 21 July 2015.

149. It is correct to say that the outcome to the claimant's grievance of July 2015 was delayed for 15 months - he did not receive the outcome letter dated 18 September 2015 until 8 November 2016: allegation 9.3. The claimant had been absent from work, sick, from 10 September 2015 to 13 September 2016 and did not chase the outcome during his absence, and neither did his trade union do so on his behalf as might be expected, until after the claimant's return to work. The Tribunal noted that the claimant made no complaint about the delay at the time and, further, the outcome letter was discussed in the grievance hearing on 21 November 2018, but no allegation of delay or detriment was made at that time. During the grievance hearing on 21 November 2018, the claimant stated that he was not able to complete his grievance at the meeting on 21 July 2015 and that Mr Brooks had only investigated the first part. However, the claimant did not state that part of his complaint was about delay, only stating that "I feels (sic) like resolution should be faster". In those circumstances, the Tribunal did not accept the claimant's contention about delay to be made out and did not consider such to be detrimental to the claimant, noting that there had been no suggestion that the claimant had been concerned about it, or disadvantaged or prejudiced until this allegation was included in the list of issues.

150. Allegation 9.4 was that, in August 2016, having been on long-term sick leave, the Claimant was informed that Annie Palmer was thinking about

terminating his employment as there was no return-to-work date envisaged. The Tribunal considered this factual allegation above at paragraphs 132 and 133. The Tribunal has found that this matter did not amount to an act of harassment and further considered that the treatment was not detrimental to the claimant in the context of discussions about his future options, termination being one potential option/outcome. The matter was canvassed because the claimant had been off sick for 12 months and not because of any protected act.

151. Allegation 9.5 concerned the claimant's phased return to work in September 2016, which lasted for five months. The Tribunal considered this factual allegation above at paragraphs 119 and 134. The Tribunal has found that this matter did not amount to less-favourable treatment or harassment. In addition, the Tribunal considered that the claimant was not treated detrimentally but quite the opposite; arrangements surrounding his phased return were flexible and subject to review and the claimant was not pressured to return to full duties due to his continuing back issues.

152. Allegation 9.6 related to the claimant's grievance of 11 November 2016 which is a protected act - number PA2. The claimant contended that his grievance was not properly addressed and, instead, he was called in to 2 meetings with the respondent's HR Business Advisor, Stephen McLaughlin, with no notice of either meeting. The claimant also contended that he had been intimidated and bullied by Mr McLaughlin telling him that there was no evidence and that his grievance would be thrown out.

153. The Tribunal considered the events following submission of the grievance carefully and the respondent's response to it in terms of the conduct of Mr McLaughlin. The Tribunal was told that Mr McLaughlin was an experienced HR professional. However, he did not organise a formal Stage 2 grievance meeting in accordance with the respondent's procedures and what he did instead was detrimental to the claimant. The evidence, which the Tribunal heard and accepted was that Mr McLaughlin sought out the claimant on 17 November 2016 and in effect demanded that the claimant attend a meeting about his grievance, at a moment's notice and without regard for the claimant's right to representation. Mr McLaughlin described the meeting as an "investigation meeting" but it was nothing of the sort. Mr McLaughlin was accompanied by Ms Ellis who took notes which appear in the bundle at pages 321 – 325 and are headed "investigation notes" and also "Hearing for Stage Two Grievance". It is recorded that the claimant did not want things to be dealt with "*unofficially like this*". When the claimant mentioned his trade union, he was met with highly prejudicial and intimidatory statements such as "*I won't be dominated by Unite union*" and "*The union create chaos over nothing*" and the claimant was unable to access union representation despite being entitled to do so. The Tribunal considered that the meeting was an attempt by Mr McLaughlin to get the claimant to drop his stage 2

grievance and that Mr McLaughlin's attitude at this meeting can be characterised as 'let's stop this now'.

154. Despite the claimant telling Ms Ellis that he would not attend a grievance meeting until he had the notes from the previous meeting, Mr McLaughlin again approached the claimant on 21 December 2016, and called him into another meeting, without notice. Mr McLaughlin was again accompanied by Ms Ellis who took notes - bundle pages 344 – 347. Mr McLaughlin is recorded as having made statements including "*there is no grievance*" and "*there is no evidence*" and "*are we looking at diversity and equality? … I need the info if you are being treated differently*." The Tribunal considered that this to be a renewed attempt by Mr McLaughlin to intimidate the claimant into dropping his grievance. The Tribunal was provided with no evidence that the claimant's grievance was investigated, and no outcome was ever produced. In submissions, Counsel for the respondent described Mr McLaughlin's approach as "unorthodox" (which the Tribunal considered to be putting the conduct at its highest) and it was suggested that he was trying to help the claimant. The Tribunal disagreed that Mr McLaughlin's conduct could in any sense be described as helpful nor in fact was it helpful to the claimant. It was unprofessional and wrong for Mr McLaughlin to speak about the respondent's recognised trade union in the way he did. The Tribunal took the view that Mr McLaughlin would not have done so had the trade union been in attendance. When asked about the meetings, Ms Ellis' did not deny what had taken place, but she continually said she did not recall. The Tribunal discounted her evidence as unreliable and concluded that the meetings did take place as described by the claimant and corroborated by Ms Ellis' notes. The Tribunal considered that Mr McLaughlin was trying to shut down the claimant's grievance and that, in all the circumstances, the respondent's approach to the grievance, a protected act, through the conduct of its HR consultant was oppressive, detrimental to the claimant and an act of unlawful victimisation.

155. Allegation 9.7 was that the investigation of the claimant's grievance in November 2016 was carried out so badly that it had to be postponed and it was never resumed. The Tribunal has concluded that there was no investigation of this grievance, despite the notes of the 2 meetings described above being headed "investigation notes". However, the Tribunal noted that the claimant did not pursue this matter at the time nor chase things up. Following the intervention of the claimant's trade union, the matter did not proceed as a formal grievance. Instead, the respondent appointed Ms Gonzalez to handle matters and ultimately she arranged for the claimant to meet with Fiona Wright. The claimant confirmed in evidence that he had been content with this approach which was not detrimental to him. In addition, the claimant had by then changed tack and presented an SAR to the respondent which he then pursued. It was not until late 2018, during the grievance hearing with Ms Rigby, that the claimant raised a

concern about the handling of his grievance in 2016 but he did not then link it to any protected act.

156. Allegation 9.8 was that obstacles had been put in the claimant's way in trying to get a response to his SAR and that the response was incomplete. The Tribunal has considered this factual allegation above at paragraph 120. The Tribunal has found that this matter did not amount to an act of less favourable treatment or detriment. The Tribunal concluded that no obstacles were put in the way of the claimant getting a response and that, whilst the response itself was not what the claimant had expected, there was a reasonable explanation for what documentation had been provided, in light of the respondent's data retention policy and obligations and the changeover of systems that had taken place beforehand.

157. Allegation 9.9 about the claimant receiving many similar letters from Ms Ellis, in error, has been considered above at paragraphs 122 and 135. The Tribunal has found that this matter did not amount to an act of direct discrimination or harassment and further considered that the treatment was not detrimental to the claimant. Ms Ellis had sought to correct matters by a telephone call and a text, to ensure the claimant had the correct information. The claimant accepted that Ms Ellis had been seriously ill at the time and that Ms Gonzalez was to speak with Ms Ellis about getting letters right before sending them, in future. The Tribunal has found no evidence that anything done in respect of these communications, whether erroneously or otherwise, by the respondent's personnel was deliberate nor was it because of any protected act.

158. Allegation 9.10 has no basis – see paragraph 123 above. There was no investigation; the claimant did not expect one and did not chase the matter with Ms Gonzalez. The Tribunal has found that the claimant had been exploring options to avoid returning to his ASO role and, on 10 September 2018, the claimant thanked Ms Gonzalez for all her support with such.

159. It is correct to say that on 26 September 2018 the claimant was informed that he would not be interviewed for the post of Security Performance Coordinator - allegation 9.11. The Tribunal has considered this matter above at paragraph 124. The Tribunal considered the respondent's approach to a large number of applicants to be reasonable in the circumstances and was not related to any protected act by the claimant, who was not the only applicant affected.

160. Allegation 9.12 was of a delay in arranging a grievance meeting on 19 November 2018, more than a month after the claimant lodged his grievance on 11 October 2018. The Tribunal considered this matter at paragraph 125 above and found that the original date had to be changed due to the claimant's sickness absence and other matters. The situation was nobody's

fault and was not detrimental to the claimant who had not been well enough to attend the meeting sooner.

161. Allegation 9.13 concerned the respondent's refusal to grant the claimant a temporary redeployment when his secondment to the Pass and Permit Office ended on 15 October 2018. The Tribunal considered that the claimant had no entitlement to redeployment. The respondent was entitled to require the claimant to return to his substantive post when his secondment ended. That situation had always been known to the claimant. He did not like the prospect of returning to ASO duties, but this was not a detriment. In addition, it was contended that the proposed return to his ASO role caused the claimant to have a breakdown and sick leave due to stress and anxiety. However, the claimant has produced no medical evidence to support this contention nor anything to link his sickness to the possible return to an ASO role, whether enforced or otherwise. In fact, in early November 2018, the respondent said that the claimant could stay in the Pass and Permits Office whilst his grievance proceeded and, on 5 December 2018, the respondent confirmed in writing that, when the claimant was fit to return to work, he would remain in Pass and Permits administration while his grievance was dealt with. On the basis of the evidence before it, the Tribunal considered that this matter was not detrimental to the claimant – see also paragraph 126 above.

162. Allegation 9.15 related to the rejection of the claimant's grievance on 20 December 2018. The claimant made only a brief reference to this in his witness statement and could not explain in evidence why he believed the outcome was either race discrimination or an act of victimisation. There was no evidence that the grievance outcome was arrived at because of any protected act. Ms Rigby's outcome letter is lengthy and detailed, following a thorough investigation. The claimant simply did not agree with the outcome without being able to point to any particular aspects of it with which he disagreed. In respect of the direct discrimination complaint, the Tribunal noted the claimant's suggestion, that a hypothetical comparator not of the claimant's race would have had a similar grievance about recruitment upheld, and the Tribunal had found this suggestion to be without foundation – see also paragraph 127 above.

163. Allegations 9.16 and 9.20 are about the fixing of a grievance appeal meeting in early 2019. The Tribunal has considered the reason for the delay at paragraphs 128 and 129 above. Events in the festive period and new year combined with the claimant's sickness absence and provision of further particulars led to delays. Mr Modha, who was appointed to deal with the matter was busy in February 2019 and several dates he proposed in March 2019 were not convenient for the claimant. The appeal was eventually set up for the claimant's preferred date. Throughout this period, the claimant remained in the Pass & Permits office which was his preference. In those circumstances, the Tribunal failed to see how such was a detriment.

164. Allegations 9.18 and 9.19 relates to the claimant's grievance submitted on 11 October 2018 and its handling in the period from October to December 2018. The Tribunal has made findings of fact at paragraphs 71-77 above, about events in this period, and the conduct of Ms Rigby, who stepped in following the claimant's objection to Ms Gonzalez dealing with the matter. The allegation of delay was about 5 weeks. Given the number of witnesses interviewed, the fact that the claimant was off sick at the material time, and the fact that the outcome was produced within a month after the grievance hearing, the Tribunal considered that the grievance had nevertheless been dealt with expeditiously and timeously, the investigation had been thorough (see paragraph 77 above) and that the alleged delay of 5 weeks was not a detriment as contended for. The Tribunal also noted that the claimant did not seek to argue that any swifter or different process would have produced a different outcome.

165. Allegation 9.21 concerned events in March – October 2020, to the effect that while on furlough, the claimant alleged that he had not been advised of and/or did not know what his status with the respondent was. Despite how this allegation was put, the claimant confirmed in cross-examination that he in fact always knew he was still employed by the respondent and that he was on furlough. He then changed his position to say that he did not know his workplace. The Tribunal took this to mean that the claimant did not know whether he was assigned to the Pass and Permits Office or if he was an ASO. The Tribunal took into account the exceptional circumstances caused by the global pandemic, the almost complete shut-down of air travel and the consequent pressures on the respondent which had furloughed the vast majority of its staff, including the claimant. There was ample evidence in the bundle to show that the respondent had kept the claimant informed of the situation at the Airport and the continuing need to furlough staff, as it had done with other employees. There was no evidence to suggest the claimant had been treated any differently to his colleagues nor was there any evidence to suggest that the claimant had suffered a detriment by being furloughed. The decision to furlough the claimant was not because of any protected act.

166. The claim, ET1 was presented on 15 February 2019. Although the Tribunal claim of race discrimination is a protected act for the purposes of a complaint of victimisation, the claimant has not pleaded any acts of detriment following its submission, save for allegation 9.20 about failing to deal with the claimant's 2nd stage grievance expeditiously and in a timeous manner in arranging the 2nd stage to be heard, and allegation 9.21 concerning his furlough status. The Tribunal has dealt with these matters at paragraphs 163 and 165 above and considered that there was no evidence of any detriment flowing from the claimant bringing these proceedings.

167. Having made its findings of fact, and having considered each particular allegation the Tribunal also stood back to look at the totality of the circumstances about which the claimant complained, to consider whether, taken together, they may represent an ongoing regime of race discrimination at the respondent but the Tribunal has concluded that they do not represent such. In oral evidence and cross-examination of the respondent's witnesses, and in submissions, the claimant's representative asserted that the respondent's organisation and structure demonstrated that there was race discrimination in recruitment and promotion. The claimant's contention was that the ASOs were ethnically diverse but that the respondent's management was not, the suggestion or implication being that the claimant had not been appointed to any of the roles he applied for, or promoted by the respondent because of his race and discrimination. This is a very serious allegation. However, the claimant has provided no evidence to support his suggestions; he has not for example produced any workforce profile or data, as he was entitled to seek through disclosure and/or written questions to and/or an order for information from the respondent pursuant to rule 31. In addition, and in the absence of evidence to the contrary, the Tribunal accepted what the respondent's witnesses said in rebuttal of the claimant's representative's questions and assertions about the ethnicity of the respondent's workforce and in response to unsubstantiated allegations of institutional discrimination.

Jurisdiction – time point

168. The Tribunal has determined that the complaints of direct discrimination and harassment are not well-founded and has concluded that only allegation number 9.6 of the victimisation claim is made out – see paragraphs 152 - 154.

169. The factual events upon which allegation 9.6 is based took place in November and December 2016, being Mr McLaughlin's meetings with the claimant and the reaction to the claimant's second grievance. Mr McLaughlin left the respondent in January 2017. This was an isolated matter comprising 2 meetings amounting to acts of victimisation, by an HR consultant who left the respondent in January 2017. There was no repeat of such conduct by any other employee of the respondent and no basis to conclude that the victimisation was part of an ongoing or continuous course of discriminatory conduct. The complaint which comprises allegation 9.6 has been presented outside of the relevant time limit of 3 months for so doing. Any claim about the meetings with Mr McLaughlin should have been presented, at the latest, by 20 March 2017.

170. In those circumstances, the Tribunal considered whether it would be just and equitable to extend time and decided that it would not, for the following reasons. The meetings with Mr McLaughlin, the conduct and statements made were shocking. It was apparent from the documents and oral

evidence that the claimant was fully aware of how bad things had been. In the claimant's further particulars of grievance dated 20 January 2019 (bundle page 624), the claimant states that he had made Ms Ellis aware of his view of Mr McLaughlin's behaviour at the time of the meetings, which he had described as intimidating and an act of victimisation and, in evidence, the claimant questioned why Ms Ellis had not addressed the matter for him or reported it at the time. However, the Tribunal was aware that the claimant was advised by his trade union throughout the period 2016 – 2017. He alerted his trade union to what had gone on with Mr McLaughlin. In his witness statement, at paragraph 98, the claimant states that he had a meeting with his trade union on 24 November 2016 when they looked at the meeting notes and expressed surprise at the contents. The claimant's evidence was that his trade union had then advised him not to attend any further meetings with Mr McLaughlin. The claimant had a further meeting with his trade union in January 2017. The Tribunal was therefore concerned as to why the claimant had not pursued any complaint at the time, when he was in receipt of advice and support and was aware of the possibility of bringing a claim. He either took an informed decision about whether to pursue a complaint and chose not to, or he was expecting others to do the work. In those circumstances the Tribunal took into account the claimant's inertia at the relevant time, when he had identified Mr McLaughlin's conduct as victimisation, and the prejudice to the respondent of allowing an extension of time of over 2 years without any reason being given by the claimant for such delay. In those circumstances, the Tribunal declined to exercise its discretion to extend time on a just and equitable basis.

171. In all the circumstances, the Tribunal concluded that the acts of victimisation committed in November and December 2016, in response to the claimant's Stage 2 grievance of 11 November 2016, are out of time and that it would not be just and equitable to extend time. The complaint of victimisation therefore fails for lack of jurisdiction. The complaints of direct discrimination and harassment also fail for the reasons given in this Judgment.

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Employment Judge Batten
15 October 2021

JUDGMENT SENT TO THE PARTIES ON

28 October 2021

FOR THE TRIBUNAL OFFICE