CASE NO: 2601031/2020

EMPLOYMENT TRIBUNALS

Claimant: Ricardo Champayne
Respondent: University of Leicester Student Union

AT AN ATTENDED FULL HEARING

Heard at: **On: 19th, 20, 21st April and 10 June 2021**

Before: Employment Judge R Broughton
Members: Mr Aktar
Mr Purkiss

Representation
Claimant: In person
Respondent: Ms Aysha Ahmad of Counsel

JUDGMENT

This Judgment has been corrected under Rule 69

- The claim of victimisation pursuant to section 27 Equality Act 2010 is well founded and succeeds

- The Claimant is awarded compensation for injury to feelings of £950 plus interest of £98.90; a total award for injury to feelings of **£1,048.99**.

REASONS

A decision having been delivered orally at the hearing and written reasons having been requested by the Respondent

Introduction

1. The Claimant presented a complaint of victimisation pursuant to Section 27 of the Equality Act 2010 (EqA) against his former employer, Leicester University Student Union (The Respondent).

2. The claim was presented on 30 March 2020 following a period of Acas early conciliation from 11 March 2020 to 24 March 2020.

3. The Claimant was employed by the Respondent for only a short period; from 6 January 2020 to 11 March 2020.

The Claims and Issues

4. The Claimant confirmed at a case management hearing before Employment Judge Camp on 3 July 2020, that he was complaining of being subject to detriments pursuant to section 27 and section 39 (2)(d) Equality Act 2010 (EqA) and that he was not pursuing a complaint pursuant to section 39 (2)(c) EqA of dismissal (constructive). The Claimant had resigned from his employment on notice, on 4 March 2020. It is agreed between the parties that the effective date of termination is 11 March 2020.

5. The Tribunal was provided with an agreed file of documents and admitted a number of additional documents during the course of the hearing.

6. The Tribunal heard oral evidence from the Claimant and from Samantha Creese, Finance and HR Manager. Both witnesses gave evidence under oath and were cross examined.

7. At the start of the hearing and in agreement with the parties, the issues to be determined by the Tribunal were identified as follows:

6.1: It is not in dispute that the Claimant had done a Protected Act when sending an email dated 19 February 2020 timed at 9.25am to Ellen Rudge and Mr Kumaran (page 60) for the purposes of Section 27 (2)(c); "doing any other thing for the purposes of or in connection with this Act".

6.2: The Respondent does not concede that the email was a Protected Act for the purposes of Section 27(2)(d) namely; "making an allegation (whether or not express) that A or another person has contravened this Act".

6.3: The Claimant however complains that the email of the 19 February was a Protected Act for the purposes of Section 27(2)(c) and (d) and it is therefore for the Tribunal to determine whether it was also a Protected Act for the purposes of Section 27(2) (d).

6.4: The Respondent accepts that it carried out the following acts:

Suspending the Claimant.
Instigating a disciplinary investigation process against the Claimant.
Sending the Claimant a letter telling him what the initial findings were of the Respondent's investigations.

6.6: The Claimant complains that the above were detriments because he had done the Protected Act.

6.7: While the Respondent accepts that the above acts were carried out, it disputes that they were done on the ground of the Protected Act and therefore that is a matter for determination by the Tribunal.

6.8: By doing the acts complained off, did the Respondent subject the Claimant to a

detriment?

6.9: If so, was it because the Claimant did the Protected Act?

Remedy

6.10:What financial losses has the discrimination caused the Claimant?

6;11:The Claimant confirmed that he seeks compensation for injuries to feelings only and therefore it is for the Tribunal to determine what injury to feelings has this discrimination caused the Claimant and how much compensation should be awarded to that?

8. Given that the Claimant (although an HR professional), was without legal representation, the Tribunal confirmed with him that he was not pursuing a claim in respect of any alleged constructive unfair dismissal and that he was only seeking compensation for injury to feelings and not financial loss. The Tribunal explained to the Claimant that in a claim under section 27 EqA, a successful claimant can seek to recover compensation for financial losses flowing from the discrimination however, the Claimant was adamant that he was seeking an amount for injury to feelings only. We then proceeded to hear the claim and neither party at any point, sought to revisit the issues.

9. There was insufficient time to hear the evidence in this case and deliver judgment within the 3 days allocated. The Tribunal therefore heard the evidence and the parties returned for judgment to be delivered ex-tempore and remedy was then determined at that hearing. The Respondent made a request for written reasons. There was a problem locating the dictation of the judgment by the tribunal secretariat, hence the delay in the provision of this judgment, the recording of the judgment was however located.

Preliminary Issue - anonymity

10. At the end of the liability hearing, there was an application by the Respondent for an Order under Rule 50. That application was made in respect of two individuals who are employees of the Respondent, who had raised concerns regarding the Claimant's behaviour toward them. The Respondent also sought an order for a third individual, Ms Rudge who had complained about the Claimant but whose complaints were not of a sexual nature. The Claimant in response stated that he wanted to make an application of his own to keep his identify anonymous. No applications had been made by either party at any point prior to the conclusion of the Tribunal hearing on liability which had been conducted in public. There was insufficient time to deal with those applications and it was agreed to deal with them at the start of the reconvened hearing, before the Tribunal delivered its judgment.

11. On the morning of the reconvened hearing, on 10 June 2021, the Respondent stated that it was no longer seeking a rule 50 order in respect of Ms Rudge but was still pursuing the application in relation of the two individuals employees.

12. The Respondent requested an order that the two individuals would only be referred to by their initials in any written judgment. In support of that application the Respondent submitted that the two individuals concerned have some mental health issues recorded on their personnel files and that the Respondent considers them to be vulnerable. The two individuals are not parties to the proceedings and the Respondent submitted, they are innocent parties and to name them would be problematic for them in terms of future

employment but may also leave them vulnerable to sexual predators, if they are known to be susceptible and vulnerable.

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13. The Claimant did not object to the application however, regardless of the lack of opposition, rule 52 requires the Tribunal in considering whether to exercise the discretion to make a rule 50 order, to give full weight to the principle of open justice and to the convention right to freedom of expression.

Legal Principles.

14. The Tribunal considered the guidance of the EAT in ***British Broadcasting Corporation v Roden*** 2015 ICR 985 EAT where on appeal the EAT overturned the anonymity order that the Tribunal had granted, with Mrs Justice Simler observing that the principle of open justice was of paramount importance and that derogations from it can only be justified when strictly necessary in the interests of justice;

"22. The principle of open justice is accordingly of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice.

23. Where anonymity orders are made, three Convention rights are engaged and have to be reconciled. First, Article 6 which guarantees the right to a fair hearing in public with a publicly pronounced judgment except where to the extent strictly necessary publicity would prejudice the interests of justice. Secondly, Article 8 which provides the qualified right to respect for private and family life. Thirdly, Article 10 which provides the right to freedom of expression, and again is qualified.

24. Lord Steyn described the balancing exercise to be conducted in a case involving these conflicting rights in In re S (A Child) (identification: Restrictions on Publication) [2004] 3 WLR 1129 (at paragraph 17) as follows: "… What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test. …"

25. The paramountcy of the common law principle of open justice was emphasised and explained in Global Torch Ltd v Apex Global Management Ltd [2013] EWCA Civ 819 where Maurice Kay LJ referred to R v Legal Aid Board, ex parte Kaim Todner [1999] QB UKEAT/0385/14/DA -11- 966 at 977 and Lord Woolf MR's holding that the object of securing that justice is administered impartially, fairly and in a way that maintains public confidence is put in jeopardy if secrecy is ordered because (among other things): "… It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. … Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it."

15. Turning to the circumstances of these two individuals, the Tribunal considered very carefully the importance of the principle of open justice. The Tribunal also considered the specific circumstances of these two women, namely that they are not parties to the claim and further, have had no involvement in these proceedings. We have considered

that identifying them fully by name may amount to interference with their Article 8 rights and we have taken into account the nature of the allegations which they had made during their employment, which involve matters of a potentially sexual nature. We are told that they are vulnerable and both have had issues with their mental health. We have weighed up how important it is in terms of the principle of open justice, to identify these individuals by name in the context of these proceedings and the facts in the case.

16. On balance considering the competing interests, we consider that the names of these individuals should be anonymised under rule 50, and therefore in any written Judgment that goes on the public record, they will be referred to by their initials only; MP and BWE

17. The Claimant made an application himself to anonymise his name. This application was made in response to an application made by the Respondent, the Claimant initially stating that he was applying on the grounds of "consistency". At the reconvened hearing he then applied for an order anonymising his name on the grounds that he has young children and that it would be prejudicial to them for his name to be disclosed. The Tribunal considered however that the Claimant had been prepared to have the matters conducted by way of a public hearing without expressing during the course of that hearing, any concern about his identity being disclosed. These are proceedings which the Claimant has brought and the Claimant as far as the allegations, for example, made by MP are concerned, he continues to defend the 'innocence' of the content of the messages which he admits to sending to her. The Claimant's case is that he did not at the time consider those messages to be inappropriate or amount to harassment and he remains robust in maintaining that view of his conduct before this Tribunal.

18. In terms of the allegations concerning BWE which the Tribunal accept, also has the potential to cause embarrassment to the Claimant and his family; we are mindful that the Claimant during the course of his employment did not have an opportunity to answer to those allegations. He has had an opportunity to answer them during these proceedings and denies them in their entirety but in any event, the record of the proceedings, will make it clear that during the course of the internal proceedings the Claimant did not have the opportunity put forward his response to those allegations and we the Tribunal are not making a finding on whether or not the Claimant did what is alleged by BWE.

19. We were mindful that the publication of embarrassing material is not of itself a good reason to oppose privacy restrictions. Taking all the circumstances into account, we did not consider that an anonymity order should be made, and that the principle of open justice should be set aside to anonymise his name in these proceedings.

20. We considered that there is a clear distinction between the Claimant's application and an application made in respect of two individuals who have played no part in these proceedings, whether as parties or witnesses and have had no control over their names being disclosed and the internal complaints which they made regarding the Claimant's alleged inappropriate and sexual behaviour towards them.

21. The application by the Claimant was refused.

22. We now turn to the findings of fact in this case. Reference to page numbers relates to pages in the Tribunal bundle. Any findings of fact are made on a balance of probabilities.

Findings of Fact

23. The Claimant was employed by the Respondent as an HR and Payroll Co-ordinator, that job title is confirmed in the job description and person specification. It is also the title which appears at the foot of his work emails (page 59).

24. The main duties and responsibilities of the Claimant's role, as set out in the job description, include providing an effective HR administrative support, assisting in recruitment and selection activities, administering the yearly appraisal system, updating HR policies and liaising/advising line managers, maintaining staff records, co-ordinating training and development administration. The role is largely administrative. However, the Claimant's undisputed evidence is that he has been involved in disciplinary processes to the extent that he was asked about his views on a disciplinary matter. In terms of the general requirements of the role, the persons specification provides that the post holder will; -

    a. "*be required at all times to develop and maintain positive working relationships with colleagues, students, contractors, external stakeholders and all other individuals they come into contact with, in the course of their duties.*

    b. *Maintain at all times any confidential or sensitive information they are privy to in the course their duties this must not be shared with any unauthorised person unless expressly asked to do so. Conform at all times to LSU Policies and Procedures with close attention being paid to Equal Opportunities and Equality and Diversity".*

Contract of Employment

25. The Claimant's signed contract of employment (Contract) dated 19 December 2019 confirms his job title as HR and Payroll Co-ordinator and that his Line Manager is Ms Samantha Creese, Finance and HR Manager. Ms Creese in turn reports into the Chief Executive Officer, Gareth Oughton.

26. The Contract refers out to the Employee Handbook. The Contract states that a full statement of all Policies and Procedures is set in the Employee Handbook.

27. The Staff Handbook (page 52a (1) to 52a (39)) includes the following provisions; -

    "10.3 *Social Media*

    Individuals are prohibited from using social media and social networking tools for the purpose of making derogative, defamatory, offensive/slanderous or damaging comments about the organisation, colleagues, students, contractors or any other external stakeholder working with LSU.

    Any instances whereby an individual is unsure as to whether generating particular online content may lead to a breach of this policy, they should refer the matter to their Line Manager and/or HR in the first instance.

    When using social media, individuals are fully expected to use common sense and sound judgment when considering what constitutes a suitable online contribution. Inappropriate/discriminatory contributions reported regarding work colleagues may result in a formal investigation and disciplinary action if appropriate up to and including dismissal.

…..

For the purposes of our policy, social media is a type of interactive online media that allows parties to communicate instantly with each other or to share data in a public forum. This includes online social forums such as Twitter, Facebook and ***LinkedIn.*** *Social media also covers blogs and video and image sharing websites such as YouTube and Figure.*

…..

These are not to be considered an exhaustive list and additional websites and content will be reasonable identified at managerial discretion as being covered by this policy….

There is also a separate Grievance Policy and Procedure (page 32 to 52) the Grievance Policy includes the following provision; -
[Tribunal stress]

28. The Handbook also has a policy on Email and Internet use and provides that;

" Email is provided for Students' Union related purposes only . Use of the email facility during working hours for person reasons is prohibited… The internet is provided for your work and you are expected to use it sensibly…"

29. The Handbook sets out examples of gross misconduct which may include;

"*Sexual, racial or other harassment*
Sexual advance towards others
Pressuring others into intimate relationships , through any form of sexual harassment, coercive/ controlling or predatory behaviour…"

30. The Handbook also included a short section on whistleblowing (page 52 A(32));

" *Certain kinds of disclosure qualify for protection. These are disclosures of information which are made in good faith and which you reasonably believe tend to show one or more of the following matters …"* It goes on to the list 6 different types of malpractice as set out in section 43B Employment Rights Act 1996 .

31. The Respondent has a separate Grievance Policy and Procedure (para 32) which provides as follows;

"Raising a Grievance

Informal Stage

Employers wishing to raise a grievance should do so as soon as reasonable possible to the incident or action giving rise to the grievance.

It is the intention of this Policy that complaints or concerns are raised informally. This is referred to as the informal stage. If this is not possible there are two formal stages, stage one hearing and a stage two appeal hearing as detailed below.

> ***In the first instance the Claimant or concern should be resolved informally through discussion with the employees' Line Manager (if the complaint involves their direct Line Manager then this should be raised with next level manager or with Human Resources).***
>
> *(Tribunal stress)*
>
> *Mediation*
>
> *As part of the informal process towards resolving any issues the employee maybe be experiencing, they may wish to consider mediation. This is a process by which an impartial person helps others to resolve their difficulties."*

32. With respect to the grievance process, the policy provides that;

> *"Investigation*
>
> *If an investigation is deemed appropriate, the manager will appoint an investigating officer….*
>
> *The results of the investigation will be provided to the manager in the form of an investigation report, This report will also be made available to the employee raising the grievance and any employee(s) named in the grievance. ."*
>
> *Outcome*
>
> *Based upon the investigation report and the findings from any further formal meetings held, the manager will determine the outcome of the grievance…."*

LinkedIn Message: 15 January 2020

33. MP, a female colleague of the Claimant, approached Ms Creese on 16 January 2020. MP raised with Ms Creese a message that she had received by email, via the social media platform, LinkedIN, from the Claimant.

34. The Claimant does not dispute having sent the LinkedIn message to MP.

35. It is not disputed that this was a private email to MP via the LinkedIn platform. It is not in dispute between the parties that MP had sent a LinkedIn request to connect with the Claimant prior to the Claimant sending this message.

36. It is also not in dispute that MP had during January, on about 3 occasions, left some chocolates for the Claimant on his desk at work. The chocolates, the Claimant does not dispute, were singular chocolates from a sharing box/tin gifted to the team in which MP worked.

37. The first message the Claimant sent on 15 January (page 53) is as follows; -

> "*Good Morning, my favourite work colleague.*
> *I hope you are well.*
> *Thanks for the connection"*

38. This message of itself, on the face of it, objectively the Tribunal find, is fairly innocuous, it is however somewhat over familiar and given his role in HR, to express favouritism, even if not intended to be taken seriously, is perhaps rather unwise, not least given he had just started in the role. However, the Tribunal accept that despite referring in this message to MP being his *"favourite"* work colleague, it is common between the parties that they did not have any contact outside of work and rarely spoke to each other in work.

39. The Tribunal therefore accept the evidence of Ms Creese that MP told her that she felt uncomfortable about the tone of the message.

40. Further, the Claimant held a position within HR and therefore had access to personnel information about MP. He may well have been a person that MP would need at some point to contact, whether to raise workplace concerns, discuss sickness absence or perhaps personal issues effecting work and given that context, it is objectively even more understandably we find, that MP felt discomforted by its over familiar tone.

41. We accept the evidence of Ms Creese that MP, although she told Ms Creese that she thought the message was 'weird', she did not want to raise any complaint or grievance at that point. Had it not made her feel uncomfortable, the Tribunal find on a balance or probabilities, that she would not have raised it so promptly with Ms Creese.

42. Ms Creese did not keep a record of her discussion with MP on 16 January. However, for reasons which we shall come on to, the documentary evidence we find supports Ms Creese's account of this discussion taking place.

43. Ms Creese's evidence is that MP wanted to give the Claimant the 'benefit of the doubt' at this stage and thought that perhaps, he was just being friendly. As a result, Ms Creese did not raise the matter with the Claimant. Ms Creese it is not disputed, did however raise her concerns with the Chief Executive Officer, Mr Oughton as recorded in her note of the 18 February 2020 (Page 61B).

Performance review

44. Ms Creese then held a performance review meeting with the Claimant on 7 February 2020 (page 56 and 57). The document which appears in the bundle is signed by the Claimant and includes his comments. He refers to it being a *"great environment".* In terms of areas for improvement, he noted *"be mindful of tone of email – Ellen style guide".* It is not in dispute that there was an issue with the Claimant using capital letters in his email communications.

45. It is not in dispute the reference to "Ellen style guide" is a reference to a document produced by Ms Rudge about communication styles.

46. There is a friendly exchange between the Claimant and Ms Creese on 7 February 2020 following this review, where the Claimant thanks her for letting him know what is going well and what needs improving (page 58).

47. There was then an email exchange between the Claimant and Ms Creese on 13 February 2020 (page 59). In the subject header he writes the subject title in capital letters .Ms Creese in response states in her email as follows; -

"…following on from our one to one last week and softening your approach, the

content of your emails are really coming across as much softer which is great, I have had a few comments about capital letters in your email subjects coming across as a bit harsh, if you could change the title of your emails to lower case in line with Ellen's style guide for writing emails they will come across perfectly."

48. Ms Creese sends the message with a smiling emoji.

49. The exchanges between the Claimant and Ms Creese were clearly professional and friendly at this stage.

Second LinkedIn email: 17 February 2020

50. It is not in dispute that the Claimant despite having no response from MP to his LinkedIn email on 15 January 2020, then sent a further LinkedIn email message to MP on 17 February 2020, which MP raises again with Ms Creese on 18 February 2020.

51. Other than on occasions when MP left chocolates on his desk and sent him a LinkedIn request, the Claimant does not allege that MP had indicated that she wanted any contact with him other than in a professional capacity and despite having no responses to his previous message, he sent the following message on 17 February which reads as follows: -

"Hi, how are you?
I keep telling myself you are the most sincere person I have ever met.
I would love to have you as a friend outside of work". (page 59b).

52. In response to a question from the Tribunal, the Claimant informed the Tribunal that he saw no distinction between the social medial platforms of LinkedIn and Facebook. The Tribunal have taken judicial notice of the fact that LinkedIn is often used by people to connect with work colleagues and that it is generally considered to be a different type of platform than Facebook. While Facebook is often used to connect socially, LinkedIn is primarily used for professional networking and career development opportunities. The Claimant however, according to his own evidence, did not appear to distinguish between the two platforms, he stated that they had a common purpose and that he had got jobs via both platforms.

53. There is an email from Ms Creese to MP on 18 February 2020 at 11.00am (page 59a). The Tribunal find that it is evident from this email, that Ms Creese considers that these messages from the Claimant are not appropriate and action should be taken. She states in her emails as follows;

"Hi MP
Please send a screen shot as I feel this needs to be ***addressed straightaway****"*

(Tribunal stress)

54. The Tribunal find, that MP was still considering whether to formalise any complaint, this is the Tribunal find, evident from her response on 18 February at 11.11am stating as follows;

"Hi Sam, I have attached it.
I don't know if it is just me over reacting/over thinking it".

55. Ms Creese, the Tribunal accept, was clearly concerned about the Claimant sending these messages to MP because she immediately seeks advice from the Respondent's Legal Advisors, Croners, later that day on 18 February 2020. The Respondent has disclosed a log kept by Croners of call advice which confirms advice provided to Ms Creese from an Advisor called Ms Patel on 18 February 2020 at 14:02, which includes the following; -

"General Notes – Only advise Samantha Creese on this case:

Been here 1 month and been couple of incidents where he has sent messages to staff.
***On social media platform on LinkedIn** – using inappropriate language.*
Sent same person a message – saying he wants to be friends outside of work.
Potentially another member of staff he may have messaged".
[Tribunal Stress]

56. It is clear that Ms Creese explained that the connection was via LinkedIn.

57. The call log includes the following comment; -

> *"- investigation and gather evidence - then decide whether to progress the disciplinary could potentially be deemed sexual harassment".*

58. The call log includes a note of further, more detailed advice and includes the following (page 157); -

> *"potential disciplinary procedure as this could potentially be deemed sexual harassment. Sexual harassment is unwanted behaviour of sexual nature …. following the investigation meeting, if there is any indication that harassment has occurred, I would advise the employee to be suspended with full pay pending the disciplinary hearing – "*

59. It is clear to the Tribunal therefore, that at that stage on 18 February Ms Creese was sufficiently concerned about the messages to seek legal advice and that the legal advice she was given was that this could potentially be sexual harassment, that she should carry out some investigation and she should suspend the Claimant if there is an indication harassment has occurred.

60. There is then an email from Ms Creese the following day on 19 February at 11.45am attaching with it a note she has made recording her conversation with MP on 16 January and 18 February, she states in the covering email (page 61a).

> *"Hi MP, I have attached some notes regarding our meeting yesterday, please can you confirm that you wish to raise a formal grievance regarding the complaint. I will need to have a meeting today if possible, to enable me to make the arrangements to investigate further".*

61. The evidence of Ms Creese is that MP had indicated to her in their conversation the previous day on 18 February that she wished to raise a formal grievance. The Tribunal however find on balance of probabilities, that MP had not confirmed that she wished to pursue a formal grievance on 18 February because in the email of 18 February at 11.11am (page 59a) MP is clearly considering whether "*she is overthinking*" it and does not refer to a formal grievance. The letter sending the notes to her on 19 February from Ms Creese (page 61a) does not confirm that Ms Creese has told her that she wishes to

raise a grievance but asks her to confirm whether she wishes to do so. Further, the note that is prepared and attached to the email of 19 February (page 61b) seeks to record the main points of their conversation on 18 February and the notes are as follows

> *"On 17 Jan MP received a further message which she came and showed to me, which went a step further than the previous message and made MP feel uncomfortable.*
> *MP also mentioned that another member of staff had made comments about Ricardo that they had raised with their Line Manager, however, I have had no complaint from this staff member or their Line Manager as yet.*
> *I have attached a screenshot below.*
> *I have expressed my concerns to MP over the messages and asked her if she wishes to formalise the complaint.*
> *have also expressed my concern to GO and AK and are in agreement that the messages are inappropriate and need to be addressed".*

62. The record refers to Ms Creese asking the Claimant if she wishes to formalise the incident, it does not capture MP's response and the Tribunal find that on a balance of probabilities, that is because at this stage MP had not confirmed her intention to raise a grievance formally, hence the request from Ms Creese when she sent those notes on 19 February, asking her to confirm that she wished to do so.

63. That email from Ms Creese is responded to by MP on 19 February later that afternoon at 1.45pm (page 61d). MP confirms the accuracy of the record both in terms of it capturing their conversation about the 17 February LinkedIn in message and also the earlier LinkedIn message on 15 January that they had discussed on 16 January. Within her response MP states; -

> *"Thanks for this. Only one small comment, the date of the second message was February not January. Other than that, I am happy with the statement and with you raising this formally".*

64. The Tribunal therefore accept Ms Creese's evidence, as supported by this email from MP confirming the accuracy of her record of the conversation with her on 16 January and the 18 February, about what was discussed. The Tribunal find however, that MP had not confirmed her intention to raise a grievance until 19 February 2020.

65. The Tribunal are satisfied that by 18 February Ms Creese was of the view that this was a serious issue and had received advice that it is potentially sexual harassment and she should be looking to suspend the Claimant potentially.

66. The reason why the Tribunal stress their findings in relation to how seriously Ms Creese viewed this LinkedIn message on 18 February, is because the Claimant made his protected act the following day on 19 February. He complains in part, that the decision to suspend him because of the messages to MP, conduct a disciplinary investigation into those messages, and the part of the outcome letter that related to the grievance by MP, was because of the protected act.

Protected Act – 19 February 2020

67. We then turn to the events of 19 February 2020.

68. Ms Ellen Rudge is a Senior Manager. Ms Rudge sent out an email on 14 February 2020

asking for suggestions for names of individuals who could officially open a new Student Union building (page 61). The content of Ms Rudge's email was as follows; -

> *"I am looking for suggestions for notable public figures the University could approach to officially open the new SU/Percy Gee Building in September.*
>
> *I have been very vocal about the need for the person to reflect diversity i.e.* ***not another white middle aged man****….."* (Tribunal Stress)

69. The Claimant's case is that he believed that the language used in that email was discriminatory. It certainly identifies a particular colour (i.e. white), age (i.e. middle aged) and gender (i.e. male) of individuals, that Ms Rudge is effectively seeking to exclude from consideration.

70. It is not alleged by the Respondent that the Claimant was acting in bad faith and did not hold a genuine belief that the language in this email was discriminatory.

71. The Claimant gave evidence before this Tribunal, which was not disputed, about his personal experience of discrimination and how strongly he feels about diversity and we accept that evidence.

72. The Claimant sent an email to Ms Rudge on 19 February 2020 timed at 9:25am, a copying in Mr Kumaran. The Claimant incorrectly believed at this stage, that Mr Kumaran was Ms Rudge's Direct Line Manager, in fact it was the CEO, Mr Oughton. The email was as follows; -

> *"Dear Ellen,*
>
> *I write in regard to your email seeking nomination for representative to SU.*
> *I have set the matter as needing urgent attention.*
> *With all respect, I am bound by personal and legal principles to object the [sic] tone of your email.*
> *It is not right to speak in a derogatory way against anyone.*
> *I must highlight that diversity can be represented by any race of class.*
> *I am conscious that recipients of this email potentially were offended".*

73. The Respondent accepts that this email amounts to a protected act although it does not accept that it amounts to the making of an allegation (whether or not expressed), that a person has contravened the EqA.

74. The email, identifies a person, namely, Ellen Rudge, and refers to diversity; within the email the Claimant objects to the *"tone"* of the email from Ms Rudge and that it is not right to speak in a derogatory way about anyone and goes on to refer to race and class (albeit there is no express reference to 'class' in Ms Rudge's email). The Claimant also states that recipients "*potentially were offended*".He also refers to ' legal principles' which implies a belief that the email from Ms Rudge has contravened some legal principle, which on any natural reading of the email would be the EqA given the reference to diversity.

75. Ms Creese under cross examination gave evidence that Ms Rudge was upset in part because she believed the Claimant was accusing her of being racist; that was Ms Rudge's perception of that email and what the Claimant was alleging within it.

76. Ms Rudge replies shortly after the Claimant's email stating as follows; -

> *"If you can please highlight to me who was offended by my email, I would be happy to take it further".*

77. It is not clear what she means by 'taking it further' and the Tribunal note that Ms Rudge had responded initially directly to the Claimant in response to his email.

78. The Claimant then responded to her email promptly stating; -

> "*Please re-read what I said in the email".*

79. Ms Rudge, was clearly upset about receiving this email from the Claimant and she contacts Ms Creese on the same day, on 19 February.

80. The evidence of Ms Creese is that Ms Rudge came to speak to her in the morning and they had a discussion on the balcony about 11.00am and she then emailed a summary of what they had discussed to her. Within the bundle is an email from Ms Creese to Ellen Rudge on 19 February 2020 timed at 11.24am (page 116). It refers to their earlier meeting and attaching notes of the meeting and states;

> *"if you wish the complaint to a formal grievance and to take it further I will need to do a grievance meeting with you so that I can document your complaint…."*

81. There is a screenshot showing that the document was created on 19 February at 10.40am which would indicate that their meeting had taken place around 10.00am, which fits in with the last email from the Claimant which was on 19 February at 9.49am.

82. The email from Ms Creese to MP asking her to confirm whether she wants to raise a formal grievance is on 19 February at 11.45am. This email to MP was sent therefore after the email which is sent to Ellen Rudge on 19 February 2020 at 11.24am asking her whether she wants to raise a formal grievance. The Tribunal have taken into consideration however, that Ms Creese had already indicated the day before on 18 February, that she considered the issue concerning MP to be serious in the email she sent to MP and she had already contacted Croners who had the day before advised her that they considered that it may be sexual harassment. The Tribunal, therefore, do not find that Ms Creese had only taken action consistent with treating the incident involving MP to be serious, *after* Ms Rudge had complained about the protected act email (i.e. the email of the 19 February 2020 to Ms Rudge).

83. The meeting notes taken by Ms Creese(page 164) refers to Ms Rudge being upset "*regarding the **content** of some emails that Rico sent to her and the tone he is using;*

- *email regarding body positivity.*
- *email regarding the reference request.*
- *email regarding SU representative"*

[Tribunal stress]

84. She feels like he is *"telling her off"* and using a tone that she deemed as inappropriate and makes her feel uncomfortable. Ms Creese however clearly records the complaint relating not only to tone but content.

85. Ms Rudge also mentions to Ms Creese another incident regarding her sick leave, when the Claimant had spoken to her in the open plan. It is not in dispute between the parties that this incident had taken place on 16 January 2020. The Claimant had incorrectly inputted sick leave dates into the ER calendar and Ms Rudge had emailed him privately to explain that she had not used the first week of her sick note. It is not in dispute that the Claimant in front of others in the open plan office had spoken to her about this and commented that those who are sick should not be at work. She felt at the time that he had "*reprimanded"* her in front of others. Later, when realising that the sick leave related to the death of her father, he apologised in an email.

86. Although the Claimant had raised this issue about sickness and Ms Rudge felt that he was reprimanding her in public, Ms Creese (although she would mention this during the disciplinary investigation with the Claimant) did not take that matter further. In response to questions from the Tribunal, she said that she did not take that matter further and take any disciplinary action because *"they had sorted it*". The Claimant had apologised so she "*felt it was okay*". Ms Creese went on to say that if Ms Rudge had complained about him and made a formal complaint she would have dealt with it. When asked how seriously she considered that issue to be, her evidence was that it could potentially be 'gross misconduct'. However, we shall see when we come on to the grievance meeting with the Claimant, she did raise this incident with him and it is not alleged that Ms Creese indicated to Ms Rudge (as she had been prepared to do with MP) that it was a serious issue and should be addressed with him.

87. The Tribunal find on a balance of probabilities that Ms Rudge viewed the protected act email as an allegation that she was 'racist', which is about the content of the email, and that this perceived allegation was very much at the heart of why she felt so upset by the email, why she complained and why Ms Creese in turn treated the matter so seriously. It may be natural to feel upset and affronted at such an allegation and the Tribunal do not find it credible, that what she saw as an allegation that she was racist, was not a significant factor in her decision to complain about the protected act email.

88. The Tribunal also take into consideration the difference in how Ms Creese reacted to being told of the incident concerning the sick leave and the protected act email, whose subject matter Ms Rudge felt, contained an allegation of racism.

89. The response of Ms Rudge and Ms Creese to the protected act email we also compare to the way in which they both reacted to an email the Claimant had sent about a reference request. Ms Rudge also raised a complaint about an incident in early February 2020. Ms Rudge had emailed the Claimant asking him for an employee start and finish date for reference request on 31 January 2020. The Claimant had on 3 February asked Ms Rudge to provide him with a copy of the reference for the employee's file. To reinforce what the Respondent's policy is the Claimant had then on 6 February sent an email to all the managers with the following heading;

"*STANDARD PRACTICE – SENDING EMPLOYMENT REFERENCE"*

90. The content of the email was as follows; -

> *"Good Morning,*
>
> *I notice some of the Seniors are responding to employment reference requests in different styles/format to the SU standard. I am asking that references are completed using SU templates. The templates are designed to protect SU from*

future liabilities. Please also always send copies of completed references to HR to file on employees file. This is necessary to comply with legislation.

Thank you for your understanding".

91. The email the Tribunal find is both professionally and objectively a reasonable email, setting out what the standard practice is and is polite in its tone. It is difficult to see what, objectively speaking, is objectionable about that email however, Ms Rudge felt that this email was aimed at her and a rebuke, and as she would assert to Ms Creese in an investigation meeting on 27 February, she felt "*embarrassed and again undermined and shamed by this email"* . However, despite the strength of her feeling, she did not raise a complaint at the time. Further, Ms Creese did not take any action. This did not form part of the reason for the Claimant's suspension despite the alleged reprimanding tone of this email which the Claimant had sent direct to Ms Rudge and the other managers, but which Ms Rudge felt was aimed specifically at her.

92. The protected act email was not circulated more broadly than to Ms Rudge and the person the Claimant believed to be her line manager. We are satisfied that the reaction of both Ms Rudge and Ms Creese was influenced in a material respect, by the subject of the email. Ms Rudge felt it questioned her *"integrity*", and the Tribunal find she felt her integrity was being called into question because she felt she was being accused of being a racist.

93. The grievance and disciplinary policy does not state that disciplinary action will be taken for a failure to raise a grievance or a complaint, strictly in accordance with the grievance policy.

94. Ms Rudge does not complain within her email response to the Claimant on 19 February, that he should not have contacted her directly but responds to him, questioning who was offended by her email.

Disciplinary Investigation earing

95. Ms Creese then held a disciplinary investigation with the Claimant on 20 February 2020.

96. The notes of that meeting (pages 62 to 67), are not dated however there is no dispute regarding the date of the meeting nor any dispute regarding their content.

97. Ms Creese explains to the Claimant that there are two separate complaints from two different staff members which has made it necessary to carry out an investigation into those complaints.

98. Ms Creese then deals firstly with the complaints from Ms Rudge.

99. Ms Creese starts this meeting, stating that; "*a complaint has been made regarding the tone of emails that you recently sent to a staff member and also an incident involving sick leave and the way it was dealt with at the time which I wasn't aware of".*

100. Despite Ms Creese stating that Ms Rudge did not want to raise a grievance about sick leave, it is quite clear the Tribunal find, that she addresses it as a complaint within this meeting and she goes on to deal with it in further detail. She asks the Claimant about the conversation with Ms Rudge about her sick leave in December and whether he spoke to her privately or in the open plan office. The Claimant however refers only

to communicating with Ms Rudge about her sick leave by email and Ms Creese states *"okay that's fine".* Ms Creese later in the meeting when this issue is returned to, explains that Ms Rudge has complained that she had to inform the Claimant that her father had passed away, in the open place office, that she was upset and that Ms Rudge felt it should have been dealt with in private.

101. What Ms Creese does not say during that discussion about this communication over sick leave, is that Ms Creese considered that the Claimant had addressed that issue in anyway outside of normal policy. She does not counsel him according to the notes, about how he had dealt with this situation, despite the fact that during this Tribunal hearing she asserted that she considered that the way he had behaved was so serious, that potentially it would have constituted gross misconduct, she did not however tell him that. It appears inconsistent to this Tribunal, with how serious Ms Creese alleged she considered his behaviour to be, that she neglects to explain to him the seriousness of his actions, even if she has decided not to take action on this occasion. The Tribunal find on a balance of probabilities, that Ms Creese did not consider his conduct to be as serious as she maintained to the Tribunal and that her reason for doing so, on a balance or probabilities, was to suggest consistency with how seriously she treated the protected act email because of the manner in which he had raised those concerns..

102. The meeting then moves on to discuss the email of 19 February 2020. Ms Creese starts by stating *"You sent an email to Ellen regarding a message, the tone of the email you sent to Ellen how do you think this came across?".*

103. The Claimant suggests that they do not focus on the tone but the content of the email and refers to what Ms Rudge has said has being; "*quite racist".* He goes on to explain his view that it appears from that email that white men or middle aged are not welcome and that he had found it offensive hence he had written to her; …*"initially I was just going to keep it for Gareth for him to take it up formally because it's serious matter and shouldn't be overlooked but I want to know who picked up it so far. So, I've sent the email to Ellen copying Kumaran into it, that what she said was wrong and I do have the email here".*

104. The Claimant goes on to explain he had copied in Mr Kumaran believing that he was Ms Rudge's Line Manager, however, Ms Creese informs him that Gareth Oughton is her Line Manager and not Mr Kumaran, however, she clearly does not consider that to be an issue in itself, stating; *"it's an easy mistake to make so that's fine".*

105. Ms Creese then states however, *"do you think the concerns regarding your email should have* ***perhaps*** *been first discussed with Gareth her Line Manager?" [Tribunal stress]*

106. The Claimant goes on to explain that he was trying to keep it informal and that he could have made a formal complaint because it is quite racist. He also explains that when he told her to re-read his email that was because he did not want to get into an argument with her. Ms Creese goes on to say, *"she's made a complaint about the tone of the email and the way it's come across to her, she feels it would be better coming from Gareth her Line Manager".*

107. Ms Creese states; *"if you disregard the actual email, she complained about the tone of it".* However, when the Claimant defends the tone of the email, that he was not rude but defends the tone he used arguing that it was respectful, he asks what was

wrong with the tone (Page 64), Ms Creese does not explain, she provides no response other than; " *we will move on to the next complaint from the next person."*

108. Ms Creese then deals with the second complaint from MP.

109. The Claimant refers to MP sending him a LinkedIn request and for the duration of January; *"every morning she put a bounty chocolate on my desk"* and he thought it was very kind of her and he also refers to the fact that she is a Cypriot like his partner, so he suggested that they could be friends.

110. When asked, however, about his relationship with MP inside of work he states; *"normally I don't speak personally to her just hello, she's just a normal employee".*

111. He also confirms that he does not think that MP replied to his LinkedIn messages.

112. Within this meeting he states that he believes that this is not a work matter, that it is separate to work and that he had not contacted her in a work capacity. He goes on to state that she had gone out of her way to be friendly to him giving him chocolates every day, but he did not think he had said anything rude or "*try and talk to her in a sexual way".*

113. The Claimant alleges in his evidence in chief that MP had only raised her complaints to support her "*friend and manager*" Ms Rudge. The Claimant does not assert any direct evidence to support this claim. This we find is mere conjecture on his part and we find that MP raised these LinkedIn messages with Ms Creese before Ms Rudge raised her concerns over the protected act email on 19 February 2020. The timings alone do not therefore support the Claimant's accusation.

Suspension

114. At the close of this meeting Ms Creese informs the Claimant that she considers it appropriate to suspend him on full pay pending an investigation.

115. In terms of why she suspended him, in response to questions from the Tribunal, her evidence was that she had considered it appropriate to suspend because of the messages concerning MP and also the complaints from Ms Rudge. It is clear, therefore, that the reason for suspension related to both complaints. She went on to explain; *"I was concerned there would be friction – protecting the Claimant as well as MP and Ms Rudge – did not want there to be friction, didn't want the Claimant to be subject to any issue".*

116. Ms Creese went on when asked further about the reason for his suspension, to say that; *"it was mainly due to the MP complaint".*

117. Even if mainly due to the messages he sent to MP, by her own admission, the protected act email of 19 February was still a factor, although according to her evidence, not the main reason for suspending. She was however concerned not only about friction between the Claimant and MP but the Claimant and Ms Rudge.

118. The letter confirming suspension from work dated 20 February (page 69) makes it clear that both the complaints are the reason for suspension.

"*I refer to our conversation of 20 February 2020 in which I suspended you from your employment pending investigations into private messages sent to a work colleague* ***and*** *also email sent to a Manager". [Tribunal Stress]*

119. Ms Creese confirmed that the reference to a email sent to a Manager, is a reference to the protected act email sent to Ms Rudge on 19 February.

120. The letter goes on to state that alternatives to suspension had been considered but it does not explain what alternatives nor indeed why they were not considered appropriate.

121. Ms Creese's evidence in response to questions from the Tribunal, is that although the Claimant could have worked from home, he would have continued to have access to staff files and therefore she did not feel that this was an appropriate option. She was not sure however, that she had explained to him the reason why she did not consider that homeworking was appropriate and indeed the notes of the disciplinary investigation do not record any discussion at all about this as a potential alternative to suspension and/or why it was not appropriate. Ms Creese gave evidence to the Tribunal that she could have explained *"it better to him*". Ms Creese refers in her evidence in chief to it being difficult to separate the Claimant from others in the office, because of the open plan arrangements, there is however no reference to any consideration about homeworking. Her evidence, which is not disputed and which is accepted by the Tribunal, is that she had made the decision during the meeting to suspend, although Croners had advised her prior to the meeting about suspension.

122. The Tribunal find on a balance of probabilities, given the absence of any mention that homeworking was something she considered within her evidence in chief and the absence of any reference to a discussion about this in the notes or consideration of this option in the suspension letter, that she did not in fact apply her mind to this as a possible alternative. We find that Ms Creese only considered the feasibility of the Claimant remaining in work but working separately from the complainants. Having continued access to staff files the Tribunal find, is not a satisfactory explanation given that she did not explain why access remotely could not be restricted and other suitable work provided as an interim measure. The Tribunal find on a balance of probabilities, that Ms Creese simply did not apply her mind to working remotely as an alternative to suspension.

BWE email

123. The following day, on 21 February 2020 Ms Creese received an email from Mr Clark, Deputy Support Development Manager, forwarding an email from BWE dated 17 January 2020 (page 70 and 71). He explains that he received the email from BWE on 17 January 2020 and had agreed not to take it further at that stage but had since received a further email on 20 February asking him to pass this message on to Ms Creese.

124. The message from BWE of 17 January 2020 states the following; -

"*I wanted to raise to your attention that I have had a couple of interactions with our new HR rep that I feel were unprofessional.*

A couple of times now he has winked at me and commented on my looks, today

(17/01/2020) he asked me to show him around Leicester while I was walking past the bathroom, I did not feel completely comfortable. I told him to ask one of the other people in the office and he responded it would bring him great please "to do it with me" and was walking towards me I did not know how to respond and felt uncomfortable so I just walked away.

I do not wish to take this further although I am aware I am not the only female in the office who has had an experience like this, I am aware [MP] in particular has an actual paper trail of similar interactions with this individual (although it is up to her to share that in her own time). I just wish to have a paper trail of my own to record these occurrences as I experience them. I also do not wish to talk about this any further unless absolutely necessary".

125. Ms Creese then receives an email from the Claimant on 22 February 2020 (page 70A). He has not been sent a copy of the email from BWE. He refers in this to challenging Ms Rudge's discriminatory behaviour in line with the policy. In relation to the MP messages, he talks about this contact being via a none work platform, in his own time and concerning a none work related matter and that he did this as a sign of friendship and that the message was not sexual.

26 February 2020

126. Ms Creese then met with MP on 26 February 2020. The notes appear at (page 74 to 76) , they are not dated but there is no dispute regarding the date. Within this meeting MP states that she had given the Claimant chocolates on two or three occasions when someone from the University had given MP or the team in which she works, a box of chocolates for Christmas. She refers to gestures she had made to other members of staff to make them feel welcome. She also denied ever having a discussion with the Claimant that she was Cypriot and that she was not aware that his partner was Cypriot. She also informs Ms Creese that there is no friendship between them inside or outside of work.

127. On 26 February Ms Creese informs BWE that in relation to the email received on 20 February, her complaint will now be dealt with under the formal grievance procedure. Still at this point, however, the Claimant has not been made aware of the complaint from BWE.

27 February 2020

128. There is then a further meeting on 27 February with MP (page 78 -82). Within this meeting MP discusses further the messages from the Claimant. She refers to receiving his first message only 1 week after he had started, which she feels made his 'favourite work colleague' comment even more unusual. She states that out of some leftover chocolates in a box given as a present she handed out some leftover ones including to the Claimant, she believed this happened on two occasions. She referred to his behaviour making her feel unconformable because he then did not speak to her or acknowledge the message with her at work after sending it.

129. MP referred to the second message she had received from the Claimant as 'cringey' , that it was ' weird' that he would write such things and yet they did not speak at work that was not during a meeting with the whole office. She also states that after sending the message to her, the Claimant did not even say good morning the next day and that made her uncomfortable; "*it isn't just the fact that it made her uncomfortable at*

work, it's the position of our desks and him being HR was what [sic]had made it weird".

Grievance meeting BWE

130. There is then a grievance meeting with BWE on 27 February 2020 (page 83 to 86). The notes record BWE asking if she can remain anonymous. BWE confirms the information provided in her email in January and confirms that there has been no other incidents since.

131. BWE describes that before the incident set out in her email, there were a few occasions when the Claimant had winked at her but that she had brushed it off thinking that he was like that with everyone, however a couple of colleagues mentioned that they considered that he was staring at her inappropriately. There was then the incident on 17 January when he was walking along the corridor, the Claimant asked her if she would accompany him around Leicester, he persisted when she declined and said that he would really like her to show him around. She felt he was getting closer to her and she managed to leave the situation. She described keeping her distance from him since and being 'cold towards him' and the notes record that; *" BWE stated that it has definitely made her feel uncomfortable and wouldn't feel comfortable talking or approaching him regarding any personal things as he is meant to be the HR rep, doesn't feel she could go to him about anything because of his actions.."*

132. The Tribunal do not find that there is any evidence to support the Claimant's assertion that the issue with BWE was 'resurrected' because he sent the protected act email. We find that BWE had raised concerns prior to the 19 February (albeit she had not at that stage wanted to formalise her concerns). The Tribunal consider it reasonable for the Respondent in circumstances where there is concern about behaviour which may amount to sexual harassment in the workplace, to extend the investigation to a previous incident where the employee has come forward in circumstances where they are aware that a colleague has complained of more recent and similar treatment.

Grievance hearing with Ms Rudge

133. There is then a grievance hearing with Ellen Rudge on 27 February 2020 (page 91 – 100).

134. With regards to the incident about the sickness she gives her account of events and explains how she finds it quite upsetting having to explain again about the circumstances regarding her bereavement. The notes do not record her saying she does not want to make a formal complaint about it.

135. In relation to the emails regarding the reference and the SU policies she refers to receiving a *"barrage of patronising emails, telling her about HR process but had never been explained to her in 2.5 years at the SU".* She referred to the exchange as being" *incredibly frustrating"* as it was a simple request. She refers to the email having a subject heading in capital letter and that although her name was not explicitly mentioned, she felt it was clearly 'calling her out' on this incident. (Page 94)

136. There is then a discussion about another email on 6 February, again with a header in capitals stating; "A POLITE NOTICE" in which the Claimant asks that everyone refrains from commenting on individuals figures or shapes. She complains about this email because the subject header is in capital letters, because there was no

context to the email and it insinuated that people had been commenting negatively about other people's bodies open in the office. She refers to staff members in her team who sit close to the Claimant, commenting to her that it made them question whether they had said something to prompt it and colleagues may think they had been talking negatively about them in the office. Ms Creese takes no action in connection with that email either.

137. The conversation then turns to the email of 19 February 2020.

138. Ms Rudge states that she had been in a meeting with University Colleagues discussing who would be best to open the new Student Union building and that names of middle-aged white men had been put forward. She requested that they try to think of people who reflected diversity whether they be BAME or non-male or any other liberation group. She refers to never being told not use this phrase and being encouraged to question the norm.

> "*Therefore, the tone of the email I received from Ricardo (dated 19 February 2020) in response to an all staff internal email asking for suggestions for a none white male high profile celebrity to open the building [sic] left me feeling once again shocked, attacked, reprimanded, shamed and also questioned my own integrity. I was left feeling confused and generally upset by the thought that this could have caused offence to my colleagues and that I could find myself in trouble by this".*

139. Ms Rudge, however, states that *"in hindsight perhaps I could have used a different term or phrase, however, I feel it would have been much more appropriate for Ricardo to raise any concerns about my language to my Line Manager, Gareth, who could have had a conversation with me about this and would have handled it in a much more effective way, as we have forged a good working relationship over the past few years". [Tribunal Stress]*

140. The notes of the meeting record Ms Creese and Ms Rudge further discussing the 19 February email and when asked to expand on the response she got from the Claimant, Ms Rudge states; "*ER felt that it was a disciplinary email and he insinuated that it could be a disciplinary matter, RC said it was of urgent importance, saying that ER was being derogatory, saying that ER was judging people by class and race which is clearly not ER's intention in her email. ER had not mentioned class, nobody else seemed to get that from it – ER feels that she was doing the opposite for this in trying to encourage diversity in the suggestions that were given. ER felt like she was being reprimanded and attacked by RC". And;*

"*ER felt that coming in reading the email from RC after a difficult few months personally ER felt like she was attacked and made her question her* ***ability and integrity****". [Tribunal Stress]*

141. In response to questions from the Tribunal about Ms Creese's view on what it was about the 'tone' specifically which was problematic, her evidence was that the issue with the tone was; *"possibly not mine".* However, she went on to explain that Ms Rudge felt the tone was reprimanding and that she understood that she felt this was because the email had been sent to her when it should have been for her line manager to address it with her. However, Ms Rudge had been upset by the 'reference' email and Ms Creese had consider its tone a problem. Something other than Ms Rudge's perception of the ' tone' the Tribunal find, was at play when it case to the protected act

email and the Tribunal consider that it was its subject matter. However, Ms Creese also accepted that the Claimant was himself upset by Ms Rudge's email and that he had a right to be upset. She does not allege that the Claimant was not genuinely upset by Ms Rudge's email or that he was being malicious or mischievous in raising his concerns in an email to her.

142. Ms Creese's evidence was if the same email had been sent to her or Gareth, she would personally have had no problem with the 'tone' of it.

143. Ms Creese gave evidence that the Claimant should have come to her first and she would have told him to *"hold fire"* and ask him to let her talk to Gareth Oughton first and then he could have made a formal complaint *"..he had not spoken to me, he had gone over his authority".*

144. In terms of the extent to which the subject matter was relevant, Ms Creese denied that it was the content of the email itself, however, when she was asked why Ms Rudge was complaining about her *integrity* being called into question and what Ms Creese understood that to be a reference to, if the content of the email was not relevant, she replied; *"she felt that by him saying she was using derogatory language, - that is how she felt –because he was offended by it, it made her question herself".*

145. When asked by the Tribunal whether the subject matter of the email itself was a reason for Ms Rudge being upset by it, Ms Creese stated;

"yes, she thought he felt she was racist, she said I am not racist, I'm the opposite I want to showed diversity, she thought he thought she was racist when in using what he said was racist and derogatory language".

Claimant's grievance

146. The Claimant then himself raised a grievance on 26 and 27 February against both MP and Ms Rudge (page 105 - 114).

147. The Claimant sent an email on 26 February 2020 submitting a formal grievance relating to Ms Rudge for breaching policies by discrimination against white middle age men (page 105) .

148. The Claimant also raised a grievance against MP on 27 February 2020 (page 108) alleged that her actions ; " *are cruel*" and that she led the Claimant to; " …*believe she wanted to be a friend through her offering of chocolates and connection on LinkedIn. She then turned nasty when I endorsed her initiation of friendship*." He referred to her actions as slanderous.

149. In cross examination the Claimant stated that MP had given him chocolates on at least 3 occasions which is consistent with the evidence given by MP during the investigation (although during the investigation meeting on 20 February the Claimant referred to being given a chocolate daily (Page 66)) . The Tribunal find on a balance of probabilities, that it was only on circa 3 occasions that chocolates were left for him.

150. During a meeting with the Claimant on 28 February 2020 his grievances were discussed. With respect to MP he reiterated his belief that MP had been instigating a friendship by leaving chocolates for him and contacting him on LinkedIn and considered

her comment about him them watching her to be slanderous. He referred to recognising he could not have a friendship with MP in work because of the job and that it would be a distraction but it would be ok out of work.

151. The Claimant did not reflect during this meeting whether his reading of the situation may have been ill judged and the wording of his LinkedIn messages overfamiliar and presumptious, in the context of being sent to someone he had barely spoken to. The Claimant continued to show no self-examination during the course of this Tribunal hearing either about his behaviour. The Claimant maintained that he was not responsible for escalating the contact with MP because he did not instigate the chocolates that had been left on his desk. The Tribunal was left with the firm impression that the Claimant appeared to have read something more significant into the leaving of a few leftover chocolates than was objectively, reasonable. He referred to them during his cross examination as being " *secretly given to me*" because they had been left for him on his desk but then when asked how he knew who they were from if they had been left in secret, he stated he knew because " *I am ways at my desk",* which made little sense. He also made a rather unusual observation that seemed to indicate a view that the nature of the gift was of no relevance to its significance;

" …the chocolate was a gift, it could have been a gold chain, it is a gift"

152. The Tribunal found it difficult to understand what exactly the Claimant perceived the conduct of MP to indicate to him. If a colleague were to give an expensive or personal item as a gift, it may be reasonable to interpret that as being more significant than a few leftover chocolates. The Claimant appeared to have read something more significant into the leaving of the chocolates and a connection request on LinkedIn than it was objectively reasonable to do and his messages, we find, were disproportionate in terms of their sentiment to the working relationship he had by that stage developed with MP.

153. The undisputed evidence of Ms Creese is that she paused her investigation to conduct an investigation into the complaints that the Claimant had made about MP and Ms Rudge.

154. Ms Creese then met with Ms Rudge's Line Manager, Gareth Oughton on 3 March (page 115). He states that as a middle-aged man he was not offended by Ms Rudge's email but recognises that this does not mean that anyone else was not and he recognises that others could have been.

155. Ms Creese then meets with Ms Rudge on 3 March 2020 and discusses the Claimant's grievance.

156. The Claimant's grievance does not include the way his grievance was dealt with and he does not complain that the grievance was itself a protected act.

Disclosure of further potential complainant to the Claimant

157. The Claimant was sent a copy of the grievance investigation report on 2 March (page 104) to which he added some comments shown in red (page 113/114) including that MP had commented in a discussion with others present, that she thought the Claimant was younger than he is (she had guessed he was 28 when he is almost 65) , that he had been suspended while Ms Rudge had not been despite her breaching the

policies on reference and equal opportunities, that he had been expecting the investigation report on 26 February regarding the allegations against him and he requested the policies that it was alleged he had breached. The Claimant does not dispute the accuracy of the notes.

158. The grievance investigation report accidentally included a statement from MP which referred to MP stating that another staff member may have an incident to report about the Claimant, the individual concerned was BWE however she was named in the written statement included within the report. . The Claimant states with his evidence in chief that; "*I realised that I was being victimised".* It is not in dispute that there were nothing in any documents from the Respondent to the Claimant, which identified the other person as BWE.

Grievance - victimisation

159. The Claimant then raised a victimisation complaint (page 122).The Claimant does not complain that this was a further protected act. He relies only on the treatment he received because of the 19 February 2020 email.

160. The victimisation complaint is an email sent to Ms Creese stating that he was being subject to victimisation. He refers to the complaint that he had raised against Ms Rudge and that;

1. *I was then referred to as an HR Administrator.*
2. *I was criticised by the managers for raising the complaint.*
3. *I was suspended as a result of raising the complaint.*

161. Ms Creese accepted in her evidence before this Tribunal that the reference to criticism by the Managers she understood to be a reference to her . Ms Creese had also taken the decision to suspend. Therefore this complaint of victimisation was very much directed at Ms Creese's conduct towards the Claimant .In response to that victimisation complaint Ms Creese responded on 3 March (page122) denying the allegations. She points out that his job description is HR & Payroll Coordinator, that she is not aware of any criticism for the Claimant raising a complaint and;

" *you were suspended due to the nature of a separate complaint"*

162. Despite the fact that the complaint of victimisation received on 2 March, related to the conduct of Ms Creese, she continued to conduct the disciplinary investigation herself. Ms Creese considered that this victimisation grievance was separate from the other complaints and she passed the victimisation complaint to Ms Lorraine Heria to investigate. Ms Creese continued to deal with the disciplinary investigation because it was almost concluded. Her undisputed evidence is that she took some advice from Croners who said that she could conclude the investigation. It is not disputed the Respondent is a small organisation with only about 30 permanent staff and only 6 or 7 Managers.

163. The Claimant had of course been put on notice by receiving the extract of the interview with MP, that there was someone else who was going to raise a complaint, although he had not been informed of who this was.

Resignation

164. The Claimant sent in an email on 4 March, 12.15pm (Page 123) submitting his resignation and referring to racism and victimisation regarding his treatment in respect of his email of the 19 February 2020, the failure by Ms Rudge to comply with the reference policy, the suspension and what he described as MP joining with Ms Rudge to make false accusations. He complains about the suspension;

" I received the suspension letter by email after I was sent home. It highlighted that I was suspended for sending an email to Ellen, this is the said email where I highlighted that it was wrong to discriminate against a group of people.

This was not the first I have been treated unfairly at work…" (page 123)

165. The Claimant also in this letter complains about the response to the protected act email and the treatment of Ms Rudge;

"I also made Samantha aware of what Ellen has done, But instead of addressing the issue she criticised for the tone of my email. Yet I was not disrespectful to no one in the email."

166. It is clear the Tribunal find that the Claimant was aggrieved about the suspension and the way the Respondent has reacted to the protected act email and the criticisms he had been subjected to.

167. The Claimant gave 1 week notice confirming that his last day of employment will be 11 March 2020.

Further disciplinary investigation – 4 March 2020

168. By letter of the 4 March 2020 (page 124) the Claimant was invited to an investigation meeting on 9 March in respect of a further complaint made by a staff member; " *regarding an incident at work which made them feel uncomfortable."* The Claimant complains that he was unwell and unable to attend. The meeting was rescheduled to the 11 March however, he was also unable to attend that meeting due to sickness.

169. During cross examination, the Claimant denies the allegations made by BWE and could not recall whether or not he had received the 4 March 2020 invitation to the disciplinary investigation meeting before he had sent in his resignation letter. The Tribunal do not consider that it is credible that he could not recall something as important as whether or not he received a letter about another complaint before or after he had resigned . The Tribunal consider that given the timings, and the fact that the Claimant professed not to recall whether he had received the letter of the 4 March before he resigned or not, that on a balance of probabilities, he probably had received it and this may well have been the final straw that led him to resign.

170. The Claimant was invited to an investigation meeting on 6 March, 9 March and 11 March 2020, the Claimant complained that he was unwell, and did not attend any of the meetings.

Outcome of Claimant's February grievance

171. Ms Creese concluded the investigation into the Claimant's grievances of the 26

and 27 February 2020. Ms Creese's investigation report is dated 5 March (page 138 and 144). The outcome was communicated to the Claimant by letter of the 5 March 2020. The complaints were not upheld.

172. Ms Creese's evidence is that she took advice from Croner with regards to the email from Ms Rudge and was advised that this would constitute an occupational requirement and would be acceptable under the Equality Act but that the wording could have been "*a little different"*. Her report is dated 4 March 2020 . In relation to the grievance against Ellen Rudge, she concludes that as there was an occupational requirement that the person who the SU building was to be named after, should reflect the diverse population of Leicester, she concludes that Ms Rudge was not discriminating against a particular group of people as; "*Whilst I understand that Ricardo was upset by the wording used, the requirement was correct and therefore there is no misconduct by Ellen Rudge on this basis, Ellen has apologised in a statement relating to another complaint about the wording, …".*

173. The Tribunal do not consider that 'occupational requirement' is applicable however, the Tribunal accept that Ms Creese took legal advice and that she genuinely believed the advice she received/

174. With regards the complaint against MP, she did not uphold the allegations of slander because MP had not made any public statements. Regarding the Claimant and the allegation that she had been cruel and malicious was unfounded as this was the Claimant's opinion with no factual evidence to support this claim and is based on a statement from MP that was sent to the Claimant in error.

Grievance investigation – victimisation and racism complaint

175. On 5 March Ms Heria contacts the Claimant, sending him a copy of the grievance procedure and asking him to complete the grievance report form and refers to having provisionally arranged a grievance hearing to deal with his complaint of victimisation, on 10 March. In the event, the Claimant would not attend a grievance hearing and the Respondent therefore did not proceed with its investigation.

Outcome letter – disciplinary proceedings : 6 March 2020

176. Ms Creese wrote to the Claimant informing him of the outcome of the investigation into the grievances against him, by letter of the 6 March 2020.

177. The conclusion as set out in the letter, in relation to the complaints by MP, is that LinkedIn is a professional work platform and the wording of his messages were inappropriate, made MP feel uncomfortable and she concludes that this is potentially sexual harassment.

178. With regards to the complaint against Ellen Rudge, she states that the Claimant had breached the grievance policy by sending the email because the Informal stage of the policy provides that in the first instance the concern should be resolved informally through discussions with the employee's line manager. Further, the letter refers to the Claimant recording this incident on Ms Rudge's personal file which breached the Respondent's policy as Ms Rudge had not been subject to any disciplinary hearing and the Claimant went above his authority level.

179. This issue regarding what was put on Ellen Rudge's disciplinary file is something the Claimant does not dispute. We were shown a screenshot of where he had included on her electronic disciplinary/performance management folder a note of the allegation around the 19 February email and refers to it as Ms Rudge *"using derogatory language".* The Claimant's evidence is that this was his normal practice before he joined the Respondent. The Respondent accepts that this allegation was never put to the Claimant and only appears in the outcome letter and the investigation report.

180. It is also important to stress, that the Claimant did not meet with the Respondent and therefore the allegations by BWE were not put to him and he did not therefore respond to them at the time. Before this Tribunal, he denies those allegations. That complaint was not part of the outcome letter.

181. Ms Creese refers in his outcome letter to his actions amounting to gross misconduct;

> *"…your actions **did amount** to gross misconduct and a disciplinary hearing would have been arranged if it was found that you had breached Equality Act 2010 and breached Student Union Grievance Policy.*
>
> *Your action where tantamount to an act of gross misconduct, the full weight of the Company Disciplinary Procedures would have applied which may have rendered you liable to Summary Dismissal".*
> *[Tribunal stress]*

182. Ms Creese's evidence in response to questions from the Tribunal, was that on reflection she could have worded the letter differently because she accepted that as worded, it appeared that the Respondent had made a decision that his actions were gross misconduct, however, under their policy, there would have to be a disciplinary hearing first and it would not have been her decision to determine whether the offences should be treated as gross misconduct.

183. The Tribunal find, that the letter as worded does indicate that a decision had been made that the Claimant's actions, in respect of the protected act email, the LinkedIn messages to MP and the placing of the note on Ms Rudge's record, all amounted to acts of gross misconduct.

184. The letter goes on to state that the; "*full weight of the Company disciplinary procedures would have applied"* which strongly implies that dismissal would have been the outcome. The Claimant complains that the wording was "*intimidating*".

185. It was unclear from this letter which of the offences precisely were being treated as gross misconduct, whether separately or collectively. Ms Creese's evidence in response to questions from the Tribunal, is that the messages sent to MP, she considered separately to amount to gross misconduct. With regards to the email of 19 February, her evidence is that; *"I would have thought it had potential for gross misconduct for not following the correct procedure".* Further, she gave evidence that she considered putting the entry on Ms Rudge's disciplinary file about the email of 19 February was also separately serious enough to amount to an act of gross misconduct.

186. Although not pleaded as a whistleblowing complaint, the protected act email could potentially have amounted to whistleblowing complaint under the Employment

Rights Act 1996. The Tribunal note there is a very brief section on whistleblowing within the Respondent handbook, and it does not prescribe who the concerns are to be raised with.

187. Specifically, in terms of the Grievance Policy paragraph 11.3 (document 52a) (31) it states that that "*the Union recognises from time to time employees may wish to seek redress for grievances relating to their employment. In this respect it is our policy to encourage* ***free and open communication*** *to ensure that problems can be resolved quickly and fairly taking into account the needs of all involved". [Tribunal stress*]

188. Nowhere in the Grievance Policy or Disciplinary Policy does it provide that a failure to comply strictly with the reporting process set out in the grievance procedure and in particular the informal process, would be amount to an act of gross misconduct.

189. Although, Ms Creese's evidence is that it was legitimate for the Claimant to raise his concerns about Ms Rudge's email and despite Mr Oughton accepting that people could be offended by it, she considered the Claimant's email should be treated as gross misconduct potentially leading to his summary dismissal. His offence being that he had raised his concerns direct with Ms Rudge. Ms Creese considered that the Claimant had been acting outside of his authority, and regardless of the seriousness or legitimacy of the complaint he was raising, such 'communication' , would be in breach of the grievance policy and warrant dismissal.

190. The Tribunal has considered just how slavishly the Respondent, adheres to its policies. Ms Creese had raised within the outcome letter, a serious issue regarding the Claimant having included something on Ms Rudge's disciplinary file and yet she had never raised this with him and gave him an opportunity to respond. That is a breach of the Respondent's disciplinary policy. It is also the case that Ms Creese accepts that the wording of her outcome letter indicates that the decision had already been taken that his actions amounted to gross misconduct without there being any disciplinary hearing and that she did not have the authority to make this decision, a further and serious breach of the disciplinary policy. Such behaviour does not suggest an organisation which places great store on strict adherence to following its policies.

Legal Principles

191. The relevant statutory provisions is set out in section 27 and 39 of the Equality Act 2010 (EqA) which provides that;

Section 27:

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

(2)Each of the following is a protected act—
a)bringing proceedings under this Act;
(b)giving evidence or information in connection with proceedings under this Act;
(c)doing any other thing for the purposes of or in connection with this Act;
(d)making an allegation (whether or not express) that A or another person has contravened this Act.

(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4)This section applies only where the person subjected to a detriment is an individual.

(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

39 Employees and applicants:

(4)An employer (A) must not victimise an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

[Tribunal stress]

192. This is a three-stage test as follows:

- Did the alleged victimisation arise in any of the prohibited circumstances covered by the EqA?
- If so, did the employer subject the claimant to a detriment?
- If so, was the claimant subjected to that detriment because he or she had done a protected act, or because the employer believed that he or she had done, or might do, a protected act?

Step 1 : Protected Act

193. The Respondent concedes that the email of the 19 February 2020 from the Claimant qualifies as a protected act pursuant to section 27 (2) (c) 2010 and therefore this is not an issue for the Tribunal to determine. However, it is in dispute whether section 27 (2)(d) EqA also applies.

194. It is not necessary that the EqA is actually mentioned in the allegation or even envisaged as coming into play however, the asserted facts must, if verified, be *capable* of amounting to a breach of the EqA. In ***Beneviste v Kingston University EAT 0393/05***: His Honour Judge Richardson put it thus;

" *…the legislation requires an allegation of an act which would amount to a contravention of the legislation. The allegation does not have to allege a contravention, still less identify the legislative provision contravened, but what is alleged must amount to a contravention. It is not the purpose of the legislation to afford protection to employees for every allegation they make, but only for allegations which amount to contraventions of discrimination legislation"*

Step 2 : Detriment

195. Detriment as per section 27 (1) EqA is not defined by the EqA but is a familiar concept in discrimination law and it covers a wide range of conduct and treatment.

196. The Tribunal has reminded itself of the guidance in the EHRC Employment Code, which contains a summary of treatment that may amount to a 'detriment':

'*Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage"*

197. A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously such as threat of dismissal .

198. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment': paras 9.8 and 9.9.

199. Although suspension has been traditionally viewed as a neutral act if can amount to a detriment. **: *Bhebbie v Birmingham Community Healthcare NHS Trust ET Case No.1304678/11*** the employment tribunal found that a reasonable worker would have perceived the suspension of the employee, after she had made a protected disclosure, as detrimental because it involved her being removed from her place of work wholly unexpectedly, being deprived of the opportunity to work and being completely isolated.

Step 3 : was the real reason for the treatment the protected act?

200. Victimisation claims under the EqA are subject to the 'shifting burden of proof' set out in section 136 of the Act.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

201. The initial burden is on the claimant to prove facts from which the tribunal could decide, in the absence of any other explanation, that the respondent has contravened a provision of the Act , what is called a 'prima facie case'.

202. The burden then passes or 'shifts' to the respondent to prove that discrimination did *not* occur. If the respondent is unable to do so, the tribunal is *obliged* to uphold the discrimination claim.

203. In many cases the establishment of a prima facie case of victimisation will rely on inferences drawn from the primary facts and circumstances found by the tribunal to have been proved on the balance of probabilities.

204. To succeed in a claim of victimisation the claimant must show that he or she was subjected to the detriment ***because*** he did a protected act

205. Where there has been a detriment and a protected act but the detrimental treatment was due to another reason, e.g. misconduct, a claim of victimisation will not succeed.

206. The essential question in determining the reason for the claimant's treatment is always the same: what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment?

207. In the majority of cases, this will require an inquiry into the mental processes of the employer. If the necessary link between the detriment suffered and the protected act can be established, the claim of victimisation will succeed.

208. The test is not precisely one of causation. In ***Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL*** The House of Lords rejected the 'but for' approach to victimisation. While it was true that the reference in that case was withheld by reason that the employee had brought the race discrimination claim in the strict causative sense, Lord Scott said that the language used in S.2(1) RRA was not the language of strict causation. Rather it required the tribunal to identify the ' reason, the causa causans, the motive', for the treatment.

209. As Lord Nicholls indicated in ***Nagarajan v London Regional Transport 1999 ICR 877, HL*** (a race discrimination claim), if protected acts have a '*significant influenc*e' on the employer's decision making, discrimination will be made out.

210. Nagarajan was considered by the Court of Appeal in ***Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA*****,** (a sex discrimination case) where Lord Justice Peter Gibson clarified that for an influence to be *'significant'* it does not have to be of great importance; "*A significant influence is rather 'an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial."*

211. The EHRC Employment Code, notes that the protected act need not be the only reason for detrimental treatment for victimisation to be established (see para 9.10).

212. Employees may lose the protection of the anti-victimisation provisions because the detriment is inflicted not because they have carried out a protected act but because of the *manner* in which they have carried it out. An approach that distinguishes between a protected act and the manner of doing that act was endorsed by Mr Justice Underhill, then President of the EAT, in ***Martin v Devonshires Solicitors 2011 ICR 352*****, EAT.** He recognised that the distinction made is subtle but maintained that such fine lines have to be drawn 'if the anti-victimisation provisions, important as they are, are to be confined to their proper effect and not to become an instrument of oppression'.

213. The Claimant argues that treating the messages he sent to MP as a disciplinary matter was not reasonable, because it was not conduct done in the course of employment. In ***Jones v TowerBoot Co Ltd 1997 ICR 254, CA*****,** the Court of Appeal expressly rejected the proposition that the common law principles of vicarious liability are to be imported into anti-discrimination legislation and on what is meant by the course of employment concluded that the;

"The tribunals are free, and are indeed bound, to interpret the ordinary, and readily understandable, words "in the course of his employment" in the sense in which every layman would understand them. This is not to say that when it comes to applying them to the infinite variety of circumstances which is liable to occur in particular instances — within or without the workplace, in or out of uniform, in or out of rest-breaks — all laymen would necessarily agree as to the result. That is what makes their application so well suited to decision by an industrial jury. The application of the phrase will be a question of fact for each industrial tribunal to resolve, in the light of the circumstances presented to it, with a mind unclouded by any parallels sought to be drawn from the law of vicarious liability in tort".

Submissions

214. We have considered the parties submissions in full and set out a summary of those submissions.

Respondent's submissions

215. Counsel for the Respondent pointed out that the Respondent is Charity with around 30 employees and 6 or so Managers. It is a small organisation. It is submitted that the Claimant put himself forward as a seasoned HR professional. Counsel referred to Ms Creese being a Finance Manager who had overseen the HR function since January 2020 but that on the Claimant joining, he was the only actual HR qualified professional for staff to go with their HR queries and issues, which would have included potentially allegations perhaps about sexual harassment.

216. Counsel submits that section 27(2)(d) EqA in terms of the type of Protected Act, does not apply because it is not clear within the 19 February 2020 email that the Claimant is alleging discrimination and Counsel submits that a lay person would understand the email as '*political correctness'* rather than alleging discrimination. Counsel expanded no further on that point.

217. Counsel argues that the Respondent did not subject the Claimant to the detriments *because* of the content and the subject matter of the protected act email, which really goes to the 'nub of this case'. Counsel submits that the manner in which the Claimant expressed himself was contrary to the Grievance Policy and against the advice he had been given by Ms Creese when they had their review meeting earlier in the year. Counsel refers to Ms Creese during the 20 February 2020 investigation meeting, reminding the Claimant about what had been discussed in their one to one review meeting about 'softening his approach', and counsel submits that this shows what was on Ms Creese's mind. The Tribunal is reminded by Counsel of the evidence of Ms Creese, in terms of what was operating on her mind, when she gave evidence namely that she did not understand why he had not raised his concerns with her first.

218. In terms of the act of suspension, counsel submits that the procedural matters which may be relevant to determine the fairness of a dismissal in the context of an unfair dismissal claim, are not relevant to this claim. Counsel submits that the protected act email, in effect got '*rolled up'* with the very serious issue concerning the LinkedIn messages to MP. Counsel submits that the reason for not offering mediation to the Claimant was not because the Claimant had complained that he was offended by Ms Rudge's email but because by that date on the 19th February 2020, the Respondent was already investigating issues with MP and the investigation was going to proceed

anyway.

219. Counsel refers to the advice that had been given by Croners about the suspension and that Ms Creese was not happy with the explanations that had been put forward by the Claimant when she met with him and discussed the LinkedIn messages with him. Counsel submits that the Claimant at this meeting, continued to justify what he had done and showed in counsel's words "*no inkling of being apologetic for it".* It submitted by counsel that given the advice that Ms Creese had received from Croners with regard to the LinkedIn email she would have suspended him, even if the protected act email l had not been raised with her and refers to the LinkedIn emails to MP as '*logically far more serious'*. Counsel submits that the Respondent's position is that the 19 February email played no part at all in the decision to suspend and that Ms Creese would not have suspended if it was just the protected act email. It is submitted that the LinkedIn emails were the 'primary driver'. Counsel referred to the open plan environment where the employees worked and the need for suspension in the circumstances and referenced that MP was a '*young girl in that environment'* and that what the Tribunal is concerned with is finding the subjective reasons why the suspension took place.

220. In terms of the investigation; counsel submits that the disciplinary process would have happened anyway because of the serious nature of the messages to MP and the prospect of the complaints from BWE, therefore the investigation would have happened regardless of the protected act.

221. Counsel referred to the case of ***Page v Lord Chancellor /Secretary of State for Justice and Lord Chief Justice of England and Wales*** UKEAT/0304/18/LW where the EAT commented on the authority of ***Martin v Devonshire Solicitors*** and cited the words of Underhill P (as he then was) in paragraph 29:

"*In our view there will be in principle cases where the employer has dismissed an employee (or subjected him to some of the detriment) in the response to the doing of the 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 be properly be treated as separable. The most straightforward example is where the reason relied on is that manner of the complaint. Take the case of an employee makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible…"".*

222. Counsel argues that the case before is just such a case envisaged by Underhill P in ***Martin v Devonshire Solicitors*** in that the Respondent took a reasonable view that it was the manner in which the email had been raised which was the problem. The Respondent was allowed to separate the content from the way he had raised his concerns. Counsel argues that the evidence shows that Ms Rudge felt like she had been 'told off' and the tone made her feel uncomfortable, it was very much about style.

223. We then turn to outcome of the investigation and counsel referred to Ms Creese's evidence that without the protected act, the outcome would have been the same and she would have sent the same letter. In terms of the wording of the letter of the 6 March 2020, Counsel submits that the Tribunal should not be concerned with making findings in terms of fairness and further in terms of the wording, the Tribunal should not concern itself with the reference to the protected act l as an act of gross misconduct, that this description of it is irrelevant because Ms Creese would not have been the one conducting the disciplinary proceedings in any event. Counsel argues that the Claimant

is 'splitting hairs' when complaining about the reference in the letter to gross misconduct because he knew which of those offences were in fact the most serious.

224. Counsel refers to the conduct of the Claimant in relation to the MP LinkedIn messages and she contends that is ***the*** reason why Ms Creese acted as she did.

225. Counsel accepts that Ms Creese in her words *"dropped the ball*" in relation to the outcome letter of the 6 March 2020 not putting to the Claimant the allegations about placing a record on Ellen Rudge's personnel file and that Ms Creese had accepted that procedurally that was incorrect however, Counsel referred to a lack of training and again argues that it had nothing to do with the protected act. The Claimant argues that there was no connection between the LinkedIn emails to MP and his employment with the Respondent, and that the real reason why the issue over these LinkedIn messages was being pursued was only because of his Email.

226. Counsel referred to the EAT case of ***Mr O Forbes v LHR Airport Limited UKEAT/0174/18DA*** and the reference within it at paragraph 20 to the case of ***Chief Constable of Lincolnshire police Stubbs & Ors [1999] IRLR 81***. The Stubbs case was concerned with a social gathering which was held to be closely connected to work and the conduct of the male officer in that case was therefore held to be done in the course of employment. Counsel argued that given the nature of the LinkedIn forum, which she described as a safe space for women to network, the Claimant's behaviour in sending private messages to a female colleague of the sort he sent to her, was '*predatory'* and that he saw the initial contact from the Claimant as a '*green light'* for this behaviour. Counsel therefore argues that the connection with work and the decision by the Respondent to take action in connection with, it should be seen in that context.

Claimant's submissions

227. The Claimant had prepared a closing statement and augmented that with oral submissions. We have considered both his written statement and oral submissions in full and set out here only a summary.

228. The Claimant submits that he had not asked for the initial contact from MP and the fact that MP had initiated the contact was not he argues, taken sufficiently into consideration by Ms Creese. The Claimant considers that the fact MP has initiated the contact was both very important and very relevant. MP had initiated the contact both in terms of leaving chocolates on his desk but also via the LinkedIn contact request and that when Ms Creese was considering whether he had committed harassment she had failed to consider the actions of MP in leaving chocolates on at least 3 occasions and sending a connection request on LinkedIn .

229. The Claimant argues that the Respondent's Social Media Policy does not specifically cover this sort of situation and the emails which he sent were private emails to MP. Further, they were not sent during working hours. Thus he argues that the Respondent had no jurisdiction to take any action in respect of them and that needs to be taken into consideration in terms of why they did what they did i.e. what was their genuine motive. Further, he submits that Ms Creese did not receive a formal grievance from MP on 18 February as she alleges, because she asked her whether she wanted to formalise her grievance on 19 February 2020, after the Claimant had sent the email. The Claimant submits that Ms Creese ' pushed' MP to formalise her complaint because of the protected act.

230. The Claimant submits that he had asked what policy he was being investigated under and that no policy was provided by the Respondent. He refers to (page 52A) which he submits does not cover this situation in that its purpose is to address comments employees post on social media websites rather than emails. The policy that deals with emails, is limited he submits to the SU/Respondent's email account page (page 52A (13.1) and thus the Claimant argues that the Respondent had no jurisdiction to address this in the manner in which they did.

231. The Claimant in his written submissions refers to a failure by Ms Creese to consider alternatives to suspension such as working from another location such as home or mediation. He alleges that Ms Creese used leading questions when speaking with MP about the LinkedIn emails, forcing MP to say she felt uncomfortable and that she pushed MP to formalise a grievance. He also refers to the there being a breach of the Acas code in sharing the investigation report with him before deciding on a sanction and that had he not sent the protected act email, he would not, the submits have been subjected to the suspension , disciplinary investigation and a bias disciplinary report/outcome. The Claimant submits that the outcome letter caused him stress because of the potential impact on future references.

232. The Claimant referred to the case of ***Forbes v LHR Airport Limited*** a case where a colleague of the claimant, Ms S, had posted an image of a golliwog on her private Facebook account with the caption' " *Let's see how far he can travel before Facebook takes him off".* The image was shared with her Facebook friends and one such friend showed it to the claimant who complained of harassment by Ms S. The EAT held that the Tribunal did not err in law in concluding that Ms S's act of posting the image on her Facebook page was **not** done in the course of employment, it was a private Facebook account and the image was shared amongst her Facebook friends one of whom happened to be a work colleague. That work colleague BW had took the subsequent step of showing the image to the claimant at work. The EAT commented that the outcome of the complaint may have been different if BW had been the target of that harassment complaint as his subsequent act of showing the offensive image to the claimant was done in the workplace, it might then have been said to have been done in the course of employment. The Claimant submits that the messages he sent privately on the LinkedIn social networking site are akin to the messages sent in that case, via Facebook.

233. The Claimant referred to the case of ***CJD v Royal Bank of Scotland 2014 IRLR 25 Ct Sess (Inner House)***: the claimant was dismissed after he had a domestic altercation with his girlfriend, another of the respondent's employee, which resulted in him being charged with assault and breach of the peace. The dismissing officer accepted that the claimant had acted in self-defence however, he decided that he should be dismissed because he presented a risk to the respondent, its employees and its property. The employment tribunal, held that the claimant had been unfairly dismissed in that RBS failed to show a potentially fair reason for dismissal. The Court of Session agreed stating the EAT had made it clear in ***Thomson v Alloa Motor Company Ltd 1983 IRLR 403, EAT*****,** that 'conduct' within the meaning of S.98(2)(b) ERA means 'acting of such a nature, whether done in the course of employment or out with it, that reflect in some way upon the employer-employee relationship'. The Court held that was difficult to see how the action of an employee, acting in self-defence, in a domestic situation could be such as to reflect upon the relationship between that employee and his employer.

234. The Claimant submits that it was a close knit group of people working at the

Respondent and he felt that he had disrupted the status quo and they did not like that he was challenging things. He argues that during the investigation he was not listened to and was not treated fairly, and the investigating officer was not impartial. At one point in his submissions, he submitted that the Respondent wanted him *'out'* because they did not like him *'personally'*. He referred to Ms Creese referring to the tone of the email and yet she was not able to point to exactly what he had done wrong in terms of the content of that email.

Analysis Conclusions

Step 1 : Protected Act

235. It is conceded that the Email qualifies as a protected act pursuant to section 27(2) (c) EqA.

236. We have considered whether it also falls within section 27 (2)(d) EqA.

237. It is not accepted by the Respondent that the Claimant was making an 'allegation' that the Respondent or another person, had contravened the EqA.

238. We have considered the content of that 19 February email which is clearly making express reference to the content of Ms Rudge's email; " *I write in regards to your email seeking nomination for representative to SU".* While context is not determinative, it is a factor that can be taken into account and in this case, that would include what the email is in response to, amely an email where Ms Rudge seeks to exclude from consideration, the names of white middle-aged men. The Tribunal are satisfied that it would objectively be reasonable for a person to consider that the wording of Mr Rudge's email prima facie discriminates against individuals based on their race, more precisely in this case, their colour (i.e. white).

239. It is not in dispute that the Claimant at the time he had written the email was not aware of any advice from Croners about its view on the lawfulness of that language.

240. The Claimant within the Email objected to the email from Ms Rudge, he referred to it not being right to speak in a derogatory way against anyone and he goes on to state; *" I must highlight that diversity can be represented by any race or class".* If we consider the content of the email so far, it refers to diversity, it refers to race and class and it states that it is not right to speak in a derogatory way against anyone. That diversity is a reference to equality and thus discrimination, objectively we consider is clear. It was sufficiently clear to Mr Rudge we find, who felt that she was being called a racist'. It is not necessary that the EqA. is mentioned or even envisaged : ***Beneviste v Kingston University EAT***.

241. It is we find , clear from the email itself and the context when considering the email from Ms Rudge and her response to it, that both the Claimant and the recipient, Ms Rudge, understood that what the Claimant was alleging was that her conduct was in breach of the EqA in that what she was saying, (by excluding white middle aged men), was derogatory about people based on their race.

242. Additionally, the Claimant goes on to state that recipients of the email potentially were offended.

243. An allegation that Ms Rudge had engaged in unwanted conduct related to a

relevant protected characteristic, and the conduct has the *purpose or effect* of creating an intimidating, hostile, degrading, humiliating or offensive environment would be an allegation of harassment, an offence under section 26 EqA. The Claimant does not identify however what type of discrimination he was referring to however, the Tribunal do not consider that this is necessary.

244. Section 26 applies if the conduct has the purpose of creating such an environment whether or not it does so, or it has the effect of creating such an environment.

245. The Claimant is an HR professional and he makes reference in that email to being bound by, as well as personal principles, legal principles, indicating a legal aspect to the complaint that he is raising.

246. On balance, therefore, taking into account all those factors, we find that the content of the email was an 'allegation' that Ms Rudge had contravened the EqA for the purposes of section 27(d) and that is what she in any event *believed* him to be alleging and what it appears the Respondent *believed* he had done. The Tribunal do not therefore accept counsel for the Respondent's argument that a lay person would see it as 'political correctness' and that hence it is not a protected act. If we are wrong on that, the Respondent has in any event conceded that the email fails within section 27 (2)(c) EqA and is a protected act within the meaning of section 27 (1) (a). That the email is a protected act is therefore not an issue between the parties in any event and not much therefore turns on whether it also qualifies under section 27 (2)(d).

Step 2: Detriments

247. It is not in dispute that Claimant was suspended, that there was an investigation into grievances raised against the Claimant and that he was sent an outcome letter which referred to him carrying out acts which would constitute gross misconduct.

Suspension

248. The Tribunal is satisfied that the Claimant was genuinely aggrieved and upset that he had been suspended and that he considered himself at a disadvantage because of the act of suspension . Following the meeting of the 28 February 2020, he complained about his suspension, comparing his treatment to Ms Rudge who remained in work in circumstances where Ms Rudge had in his opinion, breached the EqA . He later referred to the act of suspension in his letter of the 4 March 2020 in the context of alleging that he has been subject to racism and victimisation.

249. Ms Creese asserts that she had considered homeworking as an alternative, however her evidence which we do not accept, is that it was not feasible because he would have had access to staff files. Ms Creese did not provide any other reason why remote working could not have been an option. Her evidence is that she had considered it and thus we are satisfied that subject to her one stated reservation about access to staff files, this could have been an option which the Respondent was able and otherwise, willing to provide. The Tribunal do not accept however, that she applied her mind to this option and are not satisfied with her explanation around why a period of remote working could not be accommodated.

250. We are satisfied that the Claimant felt that in the circumstances that the act of suspension placed him at a disadvantage.

251. Although not argued by the Respondent, even if it were the case that the suspension in relation to the LinkedIn emails was justified such that it would not be reasonable for the Claimant to feel aggrieved about being suspended for that alleged conduct, his suspension we have found, was not only because of the LinkedIn emails to MP but because of the protected act, that is clear from the letter of suspension itself. His complaints about the suspension are aimed at the protected act and the difference in treatment between him and Ms Rudge, and we are satisfied that it is objectively reasonable for the Claimant to feel aggrieved if one of the reasons for the suspension is a reason which he considers to be an act of victimisation, further there was an alternative to suspension which the Respondent failed to consider, in circumstances where it alleges it did so.

252. The Tribunal conclude that the Claimant was subject to a detriment when he was suspended because he had send the 19 February email/ the protected act.

The disciplinary investigation

253. The Claimant we are satisfied felt upset and aggrieved about the disciplinary investigation. He was upset both about the investigation into the LinkedIn emails and the grievance by Ms Rudge and the accusation that he had not raised this in the correct manner.

254. The Claimant alleges that MP was either supporting Ms Rudge or had been coerced by Ms Creese to formalise her complaints because of the protected act.

255. Regardless of the complaints by MP, and whether it was reasonable to investigate that situation, we are satisfied that the Claimant was aggrieved and upset about the investigation into the protected act. In his letter of the 4 March 2020 (page 123) the Claimant is clearly aggrieved at the way the Respondent has investigated his conduct in terms of the 19 February email and compares this to the treatment of Ms Rudge. As he puts it in his email of the 2 March 2020 (page 122) he feels that he is being " *criticised by the managers for raising the complaint".* That email is concerned with the treatment he has received for raising the complaint, not the separate MP issue.

256. The Tribunal is satisfied that he considered that he was subject to a disadvantage and the Tribunal conclude that it was objectively reasonable for him to consider that he was. The Tribunal conclude he was subjected to a detriment when he was subjected to the disciplinary investigation for sending the protected act email.

Outcome letter

257. We have considered whether it was reasonable for the Respondent to send the letter to the Claimant in the terms in which it did. If it was, it may not amount to a detriment in circumstances where it was unreasonable for the Claimant to consider that it gave rise to an any disadvantage.

258. However, Ms Creese accepted that it appeared from the outcome letter that a decision had been made in respect of all of the allegations. Ms Creese accepted that the Respondent's policy would have required a disciplinary hearing before someone other than herself, before that decision could have been made. As that did not happen, the Tribunal conclude that it was not reasonable to send a letter in those terms.

259. The Tribunal accept that the Claimant felt that the terms of the outcome letter, put him at a disadvantage, that he felt intimidated by it and that he felt he would be disadvantaged in terms of what may be stated in a reference, the letter having set out clearly that a finding had been made in respect of all three allegations. Objectively, it was reasonable for the Claimant to consider that the outcome as stated in the letter, changed his position for the worse or put him at a disadvantage and therefore amounts to detriment.

Step 3 : was the real reason for the treatment the protected act?

260. The Tribunal has reminded itself that the relevant question is whether the protected act had a significant influence on the decision making of Ms Creese when it came to whether to suspend the Claimant, the carrying out of disciplinary investigation and the outcome letter.

261. Counsel for the Respondent argues that the Claimant would have been subject to the same actsin any event because of the LinkedIn emails and thus there can be no claim. The Tribunal do not accept that that is the correct approach but consider that the correct approach is to determine what motivated Ms Creese, and if a significant part of that motivation (in the sense of being an influence which is more than trivial), was the protected act, than discrimination will be made out.

262. The Respondent is inviting the Tribunal to apply a ' but for' test however, as made clear in **Chief Constable of West Yorkshire Police v Khan**, the test is not strictly one of causation.

263. If these acts complained of, suspension etc would have happened in any event, that is a factor the Tribunal consider it must take into account in what compensation it may be just and equitable to award.

264. The Claimant asserts that there was some pressure brought to bear on MP by Ms Creese and /or Ms Rudge to formalise a grievance and that this was because of the protected act. We have not found that to be the case.

265. With respect to the MP LinkedIn messages, after MP reported the first message on 16 January 2020, we find that Ms Creese was concerned about the content of the message, so much so that she mentioned this to the CEO at the time.

266. After MP raised the second LinkedIn message with Ms Creese on 18 February 2020, (before the protected act), Ms Creese was so concerned that she sought external legal advice from Croners. At this point there was no reason for Ms Creese or Ms Rudge to want to influence MP in how she wants this situation to be addressed.

267. The Claimant asserts that there was some pressure or influence brought to bear by Ms Creese on MP . We are satisfied that there was a degree of encouragement to formalise the complaint, in that in the letter of 18 February 2020 (page 59a) Ms Creese informs MP that she considers it needs to be addressed straightway while MP initially appears to be wavering about what to do. However, in the circumstances, the Tribunal do not consider that it is unreasonable, given how serious we accept Ms Creese considered those messages to be, and specifically given the role that the Claimant had in HR, to encourage MP to formalise her complaint so that the Respondent could investigate it.

268. The timeline does not support, the Claimant's allegation that MP was influenced by Ms Creese to formalise her complaint because of the protected act, rather than because she genuinely believed the situation to be serious. The timeline also does not support the Claimant's allegation that MP raised these issues in support of Ms Rudge following the protected act.

269. The Claimant argues that there was no link between the MP emails and his workplace and therefore the LinkedIn messages do not amount to conduct done in the course of employment. Thus he argues it was not reasonable for the Respondent to treat this as a misconduct issue. It is open to this Tribunal to draw inferences from the primary facts, and circumstances which we have found proven on a balance of probabilities. We have therefore considered whether it was reasonable to treat it as misconduct and if not, whether it is reasonable to draw an inference from the fact the Respondent did.

270. The Claimant refers to the email and social media policy not applying because the social media policy is not concerned with private emails but posting messages on social media and the email policy is concerned with work emails.

271. The legal position, in terms of what conduct may be deemed to be done in the course of employment is not straightforward, it is very fact specific as recognised by the Court of Appeal in ***TowerBoots*** . In **Forbes** the EAT recognised the difficulty in deciding what is or is not done within the course of employment and applying those rules to a virtual landscape, is increasingly problematic for employers.

272. An employer in deciding whether to take disciplinary action, would have to consider whether there is a sufficient connection between the activity carried out on a social media platform and the individual's employment. In the **Forbes** case the EAT commented that if the account was used for purposes related to work, it might well be open to consider that there was a sufficient work connection.

273. The LinkedIn emails were sent outside of working hours and we accept that the emails were sent between the Claimant and MP's private email accounts on LinkedIn. The Respondent's Email Policy is concerned with the Respondent's own email and therefore is not applicable. However, the Social Media policy although it does not cover this specific sort of communication (i.e. private emails on social media platforms) and is more concerned with online contributions, it does address generally the need for employees to use their common sense when using these platforms.

274. Regardless of whether or not the policies as drafted expressly cover what is in effect private emails via this sort of platform, the Claimant's position within the organisation has to be considered. The Claimant worked in an HR capacity, he was trained and qualified as an HR professional. The Claimant was therefore in a better position than most employees to make the sort of sensible judgment about appropriate communications with colleagues. The Claimant's only connection with MP was through work. He had no friendship or contact outside of work. In his HR role, the Claimant was in a position of some authority over MP. If MP needed to raise personal issues with HR, whether health related, grievances about colleagues, issues at home affecting her work for example, she may have needed to raise these with the Claimant.

275. Given the Claimant's role in HR and his access to personal information about staff and given that his only contact with MP was through work, the Tribunal consider that it

may be reasonable for an employer in those circumstances to consider that there was a sufficient connection between the emails he sent to MP and his work, to take action. Whether there was an express policy or not, if someone, particularly someone in an HR role, is considered to be sexually harassing an employee outside of work, a Tribunal may consider that it would be reasonable for an employee to take disciplinary action, whether on the grounds of misconduct or because they are concerned about the person's suitability for an HR role, which may fall within 'some other substantial reason' or performance as a potentially fair reason .

276. We do not conclude therefore that the behaviour of the Respondent in treating the messages to MP as potentially a disciplinary matter, to be irrational. Further, we do not consider that it would be appropriate to draw any inference in any event because it is clear that regardless of whether or not the Social Media policy explicitly covered this situation, Ms Creese, who does not have HR qualifications, took the responsible step of taking legal advice and it is clear that she has explained to Croners that the messages were via LinkedIn. The advice did not raise any issue about whether the conduct may or may not be considered to be carried out in the course of employment, the advice was clear and robust and it was reasonable for her to act on it .

277. The Tribunal therefore do not consider that it is appropriate to draw any inference that the suspension, the disciplinary investigation or the outcome letter, as far as that treatment related to the LinkedIn messages sent to MP, was *because* of the protected act.

278. However, we then look at the protected act email itself and whether or not that formed part of the decision to suspend. Counsel for the Respondent argues it formed no part of the decision to suspend however, we do not find that on the facts. Ms Creese's oral evidence was that the decision to suspend was mainly due to the MP emails. It is clear from our findings of fact that two reasons were operating on her mind at that time; the LinkedIn MP emails and 19 February email. They were the two reasons as set out in the letter of suspension. The oral evidence of Ms Creese was that she thought there may be tension between the Claimant Ms Rudge and MP.

279. The second argument put forward by the Respondent is that even if the suspension was significantly influenced by the protected act, it was not the actual content of the email but the manner in which the complaint was raised: ***Martin v Devonshires Solicitors.***

280. The Respondent asserts that the Claimant had overstepped his jurisdiction and he had not complied with the Informal Grievance Policy, in that he had not raised the complaint about Ms Rudge's email in the proper way, through the informal process, namely direct with her Line Manager.

281. We have found that there is no policy which provides that a failure to follow the Informal Grievance Policy will be treated as a disciplinary matter, let alone a gross misconduct offence.

282. The Claimant it is not suggested, was ever spoken to about the proper way of dealing with concerns or grievances. There were previous occasions when Ms Rudge had not been happy with the manner in which and content of emails that the Claimant had sent and which she thought were reprimanding in tone. The issue about the references, was that an email was sent from the Claimant to all managers which she felt was aimed at her. Ms Rudge complained about feeling reprimanded however there

was no disciplinary action taken against the Claimant, even though that was still a fairly recent incident (6 February).

283. The incident about the sickness absence took place only a few weeks previous on 16 January 2020, and although Ms Creese states that the way the Claimant managed this could constitute gross misconduct, no action was pursued in respect of that alleged misconduct either. Ms Creese did not consider that sufficiently serious to even mention it in the outcome letter or take forward as part of the recommendation for disciplinary action.

284. We also take into account the findings that we have made in terms of Ms Creese's evidence about how she personally viewed the tone of the emails in that she personally did not have an issue with the tone the Claimant had used. Ms Creese also considered that the Claimant was upset by Ms Rudge's email and she clearly felt it was legitimate for him to feel that way. The Claimant did not circulate his email beyond Ms Rudge and who he thought was her line manager. It appears to this Tribunal a disproportionate response, rather than counsel the Claimant about how to raise concerns, to treat it as potentially gross misconduct in circumstances where it was not alleged by Ms Creese that his complaints were not justified or were malicious.

285. At the outset when Ms Creese first met with Ms Rudge about the protected act email, (Page 164) Ms Creese refers to Ms Rudge being upset by both the tone and the content. For the reasons set out in our findings, the action taken in respect of the protected act, in terms of the influence this had on the suspension, the investigation and the content of the outcome letter, was not we conclude, simply about how he had raised his concern but it was the subject matter.

286. Ms Creese understood that Ms Rudge felt that the Claimant was calling her a racist, that is not about 'tone', that is about subject matter. The Tribunal conclude that the content of the protected act email was a significant reason why Ms Rudge was so upset and a significant reason why Ms Creese treated it so seriously, as an act of gross misconduct.

287. It was the offence caused by the nature of the complaint, which coloured the Respondent's view of how to deal with it and how seriously to treat it.

288. We conclude that the allegation of discrimination was a significant reason behind the decision to suspend, the decision to carry out the disciplinary investigation into the protected act and to treat is as gross misconduct.

289. However, the messages to MP we are satisfied, were reasonably considered to be serious and potentially sexual harassment and that on a balance of probabilities, the suspension, the disciplinary investigation and the decision that the Claimant had committed gross misconduct would have happened, regardless of the protected act.

290. We have considered the issue about the record that was put on Ms Rudge's file and the fact that this was mentioned in the letter even though it had never been raised with the Claimant. This was bundled together with the other two serious allegations because they had already been investigated and Ms Creese felt in a position to present her findings. The protected act was therefore also a significant influence we conclude, on the decision to include that additional allegation within the outcome letter because it was one of the two matters Ms Creese had decided amounted to gross misconduct and led her to 'bundle' up with those allegations the additional allegation.

Remedy

291. The Claimant gave evidence under oath and after giving judgment on liability, the parties made separate submissions on remedy.

Claimant's evidence

292. At the end of his evidence in chief, the Claimant gave evidence about the impact of the victimisation; he referred to struggling to sleep at night, that he felt forced to leave his role and he no longer feels confident in the workplace. He refers to feeling that he has been treated unfairly and that he will become lost in thought and that he lost his appetite.

293. With regards to the disciplinary investigation he referred to asking himself why he was going through it when he had not done anything wrong. He asserts that when suspended he lost his motivation and energy and became a 'coach potato' and that he had always been very active but has still not returned to training at the gym. He is a father of 6 children and complains that he still does not have the energy to look after them. He has had to apply for universal credit. With regard to the outcome letter, he referred to the Respondent reaching a decision when there had been no disciplinary hearing and gave evidence that he worries about what reference the Respondent may give him. He has since been provided with a reference from the Respondent and there was a section which the Respondent did not complete, however that reference gave him some comfort, albeit he still has concerns because some employers 'push for further details'.

294. Under cross examination, the Claimant accepted that that he had found the litigation process stressful. It was also put to the Claimant that the gym was closed for a year due to Covid in any event however, while he did not dispute this, he referred to being runner and not being as active as he was.

295. The parties made submissions on remedy after judgment on liability was delivered;

Claimant's submissions

296. The Claimant complains that he remains affected by the treatment, that it has affected the energy he has to spend with his children and that he has lost confidence . He asserts that his confidence has been significantly damaged. He refers to not being himself, that he was always well groomed and taken care with his presentation but he no longer does. He gave evidence that he was athletic and enjoyed running and going to the gym but since the acts of victimisation, he no longer does . He alleges that all the acts of victimisation "all played a part "and that he thinks about all of them , that they all equally affected him however, he then went on to state that the outcome letter was the most impactful because of the potential impact on his career.

297. He submits that his case falls within the middle Vento band and he seeks between £18,000 to £20,000. He referred to this sum being an amount which would enable him to make things up to his family and make up for the time he has missed with them and that with this money he could take his family to see his family in Jamaica; " *it would be nice to see them and it would help to clear things from my mind*".

Respondent's submissions

298. Counsel for the Respondent invites the Tribunal not to make any award or if the Tribunal is minded to make an award, to award the very low end of the bottom Vento band.

299. Counsel submits that the Claimants hurt and upset relates to what he believes to have been a conspiracy. Counsel refers to his evidence in chief (para 8 w/s) where he refers to the emails to MP predating the email to Ms Rudge and that he was not spoken to about the MP LinkedIn messages until after he addressed what he refers to as the ' discrimination issue' with Ms Rudge. Counsel submits that all the Claimant's anger was around MP being the initiator of the contact and that was why he was upset; he was

upset because MP had raised a complaint and because he believed she had been encouraged to formalise her grievance because of the email to Ms Rudge.

300. Counsel also referred to the investigation hearing where the Claimant complained that Ms Rudge had breached the equality policies by discriminating against white middle aged men yet senior managers, he alleged had turned a blind eye to it. What he was upset about was what he saw as a breach of the Respondent's policy.

301. Counsel also refers to his resignation letter (page 123) on 4 March, and the last 2 sentences where he alleges again that ; " *Ellen joined with Mariana, who made false allegations against me after I endorsed a friendship that she initiated inside and outside of work."* That counsel submits is what he is most upset about, that MP made what he alleges to be false allegations against him and counsel argues that he should not be compensated for those hurt feelings.

302. Counsel refers to the period being short, the detriments took place from suspension 20 February to the outcome letter on 6 March, a period of only 12 days.

303. In terms of the outcome letter, counsel submits that the Claimant was not in fear of losing his job, he had taken the step of resigning,

304. Counsels accepts the Tribunal's findings about the reference in the outcome letter to the Claimant putting a record on Ms Rudge's disciplinary file being in breach of the disciplinary policy, however, counsel submits that the Claimant is an HR professional and he knew that he had done this, there was nothing factually incorrect in what was said about this in the letter, that he would have realised that this was gross misconduct and counsel invites the Tribunal consider how much of his upset and hurt feelings, relates to this act, which he carried out and knew to be a serious offence.

305. Counsel refers the Tribunal to the notes of the meeting with him on 28 February 2020 (page 108) where he refers to MP's actions as " *cruel"* and " *she led me to believe she wanted to be a friend through her offering of chocolates and connection on Linking."* Again counsel argues that his hurt and upset, is mainly aimed at the behaviour of MP and the Tribunal has not found that the behaviour of MP is because of the protected act. Counsel argues that the Claimant is upset at being " *called out for his seriously predatory behaviour",* that his ego has been "*bruised*" and he should not be awarded compensation in those circumstances. Counsel also argues that all 3 incidents; suspension, investigation and outcome letter would have happened in any even and he has suffered no additional injury to feelings,

306. Counsel submits that his outrage is really about what he sees has collusion of management and that he was "*looking down the barrel of 2 women*" bringing complaints and his claim is 'opportunistic'. Counsel reminded the Tribunal that compensation is not punitive and submits that there should be no compensation because all these acts; suspension, investigation and the outcome later , would have taken place in any event.

Findings of Fact - remedy

307. This is a case where we have found that the Claimant was subject to victimisation in that the decision to suspend him was influenced by the protected act, he was subject to the disciplinary investigation for the doing of a protected act (as well as the MP emails) and the outcome letter referred to his acts, which included the protracted act, amounting to gross misconduct.

308. We have also concluded that the Claimant would have been suspended in any event for the MP emails, he would have been subject to an investigation in connection

with the MP emails and he would on a balance of probabilities, have received the outcome letter asserting that he had committed an act or acts of gross misconduct. While superficially counsel's argument that he should not be awarded any compensation for injury to feelings in those circumstances because he would have suffered the same injury to feelings anyway, is attractive, we are satisfied that the Claimant did feel aggrieved and affronted at the treatment he received for sending the 19 February email. He protested at the meeting with Ms Creese on 20 February 2020 about being offended by the email sent from Ms Rudge and the way he was being treated;

(page 64)

" I wasn't rude in the message if that's what you are trying to say, I was not rude I never said anything, …in my reply I have not rude or derogatory, sexist or racist or anything…"

309. In his email of the 22 February 2020 (page 70C) he complains about MP but also the treatment in connection with the 19 February email;

"… *I am concerned no one did anything about Ellen's conduct, given the gravity of what she sent to all the staff, I stand by my words, SU is inclusive and everyone is welcome, regardless of sex, status, age , etc, There is no place for discrimination. I will always challenge such behaviour, in and out of work".*

310. The Claimant also added a comment to the notes of the 28 February 2020 meeting that he is; " *concerned that I was suspended yet Ellen was kept at work after reaching the reference and equality policies*".

311. When the Claimant sent the email complaining of victimisation (page 122) on 2 March 2020, he lists why he considers he has been victimised and refers to raising the complaint about Ms Rudge and that he was criticised for raising the complaint and suspended.

312. In his letter of 4 March 2020 (page 123) he complains about MP raising false allegations but he starts the letter by referring to the 19 February 2020 email and complains about being suspended " *for sending an email to Ellen , this is the said email where I highlighted that it was wrong to discriminate against a group of people*".

313. However, ee find that the Claimant was more aggrieved and upset about the grievance from MP. He protests that she initiated the contact and his language about MP is more impassioned then the language he uses about the incident involving Ms Rudge. In the notes of the of the 28 February 2020 (page 112) he is recorded as saying;

"…t*his is the one that has caused him lots of stress and its quite hard to take in and is quite baffled, what she did, he did not pursue her he did not ask her for her friendship and he didn't ask her to give him chocolates and he did not tell he [sic] to look him up on LinkedIn, RC states she did all of that and that she instigated this friendship and he tried to endorse this friendship and then she turned and to make it out that he is some danger to female [sic] and its not pleasant." And;*

" RC states that MPs action is cruel as she instigated the friendship and slanderous …"

314. The language he uses in respect of the MP issue, it is much stronger and the expression of hurt feelings the Tribunal find, much greater. He expresses a greater sense of grievance against MP and of course the ramifications particularly for someone in his field, of a finding of sexual harassment would be much more significant than a finding that he had he not complied with a grievance policy or exceeded his authority in sending an email to a colleague expressing concern about what he viewed as discrimination.

315. We therefore find on a balance of probabilities, that he was aggrieved and affronted by the treatment he received because of the protected act, but the impact as he described it, we find was mainly a consequence of the allegations concerning MP and what he also saw as collusion between the managers and MP, which he alleges in his claim form and in his evidence in chief but which we find, did not take place.

316. The Claimant's evidence regarding the impact of the alleged victimisation, was not otherwise challenged in the main by the Respondent , other than in respect of the impact of Covid on his ability to attend the gym and the impact of the litigation process itself and the stress which he accepted, it had caused. We therefore accept his description of the impact on his health and life while taking into account that the litigation process itself will have contributed to some extent.

Legal Principles

317. Pursuant to section 119 Equality Act 2010;

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

318. The Tribunal is required to focus on compensating the claimant rather than on punishing the wrongdoer: ***Corus Hotels plc v Woodward and anor EAT 0536/05***.

319. The onus is on the claimant to establish the nature and extent of such injury**:** ***Murray v Powertech (Scotland) Ltd 1992 IRLR 257, EAT*****.**

320. The size of the award for injury to feelings depends on the facts of each case and the degree of hurt, distress and humiliation : ***Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318, CA***

321. Lord Justice Mummery identified three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury:

- a top band of between £15,000-25,000: to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.
- a middle band of between £5,000-15,000: for serious cases that do not merit an award in the highest band, and
- a lower band of between £500-5,000: appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence

322. These bands have been updated to reflect inflation and the decision reached in the personal injury case of ***Simmons v Castle 2012 EWCA Civ 1288, CA***

Presidential guidance

323. The Presidential guidance the Second Addendum takes into account changes in the RPI All Items Index released on 20 March 2019. In respect of claims presented on or after 6 April 2019, the Vento bands shall be as follows: a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.

324. In considering awards in other cases, we had regard to the following case as set out in an extract from the IDS Employment Law Handbook vol 7 : "*Tribunals usually award a global sum by way of injury to feelings covering all the detriments that form the basis of the complaint subject (assuming they are proved). However, in* ***Pavlovic v Bettercare Keys Ltd ET Case No.2700386/15*** *the employment tribunal adopted the somewhat unusual approach of awarding a specific sum by way of injury to feelings for each of the detriments to which the claimant had been subjected. It awarded him £550 for not being given the opportunity to check the accuracy of the pre-existing notes used at a disciplinary hearing, £1,200 for a further procedural failing in connection with the disciplinary hearing and £3,000 in respect of the embarrassment caused by the claimant's unjustified suspension from work for 13 days. The first two of these sums was increased by 10 per cent following application of the 'Simmons v Castle uplift'…"*

325. The Judicial Studies College Guidelines for the assessment of general damages for personal injury (15th edition) provides that for moderate psychiatric injury to appropriate awards is between £5,500 to £17,900.

326. As counsel invited the Tribunal to make no award, we have considered the case of is ***Pinches v Sopranos Pizza Ltd ET Case No.1300824/10*****:** The claimant brought claims of , racial harassment and sex discrimination. The racial harassment claim centred on P being called an 'English idiot', which the employment tribunal found involved a specific reference to nationality and, although it did not particularly offend the claimant, it did amount to a detriment. The sex discrimination complaint was more serious and involved sexual harassment. The Tribunal did not think the racial harassment element warranted an injury to feelings award, having regard to the fact that the claimant did not particularly take offence. The tribunal considered that its declaration of unlawful conduct should suffice as a remedy in this regard.

Conclusions – remedy

327. We are mindful that compensation awarded for injury to feelings must not be punitive and that it is for the Claimant to establish the nature of the hurt feelings.

328. We have considered counsel's submissions that the Tribunal should not make an award of compensation in this case because the Claimant would have received the same treatment because of his conduct in connection with the LinkedIn messages to MP. Thus counsel argues he has suffered no additional hurt feelings in connection with the acts of victimisation.

329. We are satisfied that a significant element of the Claimant's hurt feelings, relate to the incident surrounding MP as we have set out above in our findings on remedy . However, we are satisfied that the Claimant did suffer some hurt feelings in connection with how he was treated over the 19 February email.

330. We have also considered, and counsel has invited to consider, that this is a case where no compensation would be appropriate. However, unlike the ***Sopranos Pizza*** case, this is not a case where we have made a finding that the Claimant was not upset by the detriments.

331. We considered the ***Bettercare Keys Ltd*** case albeit it was only a first instance decision. The treatment complained about took place over a similar period, in that case it was 13 days and in this case we are concerned with events over a period of 12 days. The treatment in that case related to procedural failing in terms of the disciplinary process and embarrassment caused by what was held to be an unjustified suspension. The award in total was £4,750.

332. In determining the impact on his life, we have taken into account that there is no evidence that it has led to any medical condition, although he refers to suffering a loss of confidence. The Claimant complains that he continued to suffer as a result but accepts that he has found the litigation process itself stressful. It was a job we accept he enjoyed however in determining the impact, we also take into account that he was only in the role for just over 2 months and just over 1 month before he was suspended, this was not therefore a job he had enjoyed for any significant period of time.

333. In assessing the level of hurt and humiliation we have first assessed what to award based on his description of the impact on his life of the suspension, investigation and outcome letter before then assessing how much of that is attributable to the victimisation. We consider that the award falls within the lower Vento band and that a reasonable assessment of compensation for the impact on the Claimant would be a sum of £4,750. However, we have then gone on to consider what proportion attaches to the Claimant's hurt feelings in connection with the acts of victimisation rather than in connection with the grievance/allegations raised by MP.

334. For the reasons set out above, we have found that a significant proportion of the Claimant's hurt feelings were caused by the MP issue. The Claimant still vehemently denied during the course of this hearing, that there was anything inappropriate about his behaviour and still maintained that there had been collusion. We conclude that a significant proportion of his hurt feelings and the impact he describes on his life, is caused by the allegations made by MP. He clearly still feels a burning sense of injustice that MP had initiated or made overtures about a 'friendship' and then made the allegations about his conduct. We have assessed that 80% of the impact he describes, relates to the MP issue.

335. In all the circumstances we conclude that it would be just and equitable, to make an award of 80% of the £4,750, namely a sum of £950. We have added interest at the rate of 8% from the date of suspension, which equates to £98.90. A total award for injury to feelings of **£1,048.99.**

Employment Judge R Broughton

Date: 22 October 2021

JUDGMENT SENT TO THE PARTIES

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