



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103484/2020

Held in Glasgow on 26, 27, 28 and 29 October 2021

Members' Meetings 1 and 22 November 2021

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Employment Judge: C McManus

Members: EA Farrell

R Taggart

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B Chiwara

**Claimant
In Person**

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Virgin Media Limited

**Respondent
Represented by:-
**Ms Stobart
(Advocate)****

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:-

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- The claimant's claim of unfair dismissal is unsuccessful and is dismissed.
- The claimant's claim of direct discrimination under section 13 of the Equality Act 2010 is unsuccessful and is dismissed.

E.T. Z4 (WR)

- The claimant's claim of indirect discrimination under section 19 of the Equality Act 2010 is unsuccessful and is dismissed.
- 5 • The claimant's claim of harassment under section 26 of the Equality Act 2010 is unsuccessful and is dismissed.
- The claimant's claim of victimisation under section 27 of the Equality Act 2010 is unsuccessful and is dismissed.

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REASONS

Background

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1. The claims are for unfair dismissal under section 98 of the Employment Rights Act 1996 ('the ERA') and discrimination under sections 13, 19, 26 and 27 of the Equality Act 2010 ('the Eq Act'). In his claims under the Eq Act, the claimant relies on the protected characteristic of race (his black African origin).

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2. The claimant was unrepresented before the Tribunal and is not legally qualified (although he did state that he has studied law). The respondent was professionally legally represented.

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3. Three Case Management Preliminary Hearings ('CMPH's) took place prior to this Final Hearing. The claimant was legally represented at the stage when his claim was presented to the Tribunal. His then representative submitted the ET1 with an extensive paper apart. That representative also set out the claimant's position in an amendment to the Agenda Schedule, sent on 13 November 2020 (JB44 – JB45). In that, the claims are set out as being in respect of direct discrimination (Equality Act 2010 section 13), indirect discrimination (Equality Act 2010 section 19), harassment (Equality Act section 26) and victimisation (Equality Act 2010 section 27). The claimant was Ordered to provide certain information on his claims by way of answering

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questions set out in an Annex to the Note following the CMPH which took place before EJ Robison on 2 August 2021. The claimant set out his response in his email of 30 August 2021 (JB54). The claimant's position on the basis of his claims, as set out in in JB44 – JB45 and in JB54 is summarised as follows:-

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Direct Discrimination

- (i) Craig Clarke's treatment of the claimant as set out in JB44 – 45, including in unfairly allocating 'doors' to him, against named comparators James Watson and David McGarrigle.
- 10 (ii) That the claimant's suspension, disciplinary investigation and dismissal were because of his race

Indirect Discrimination

Reliance on the PCPs of

- 15 (i) the 'management practices' Craig Clarke, in particular re the claimant being directed to continue to work in the Govan area of Glasgow
- (ii) The Grievance Procedure applied to him, in particular his suspension and inability to have a colleague at the meetings for the grievance process.
- 20 (iii) The Disciplinary Procedure applied to him, in particular his suspension and inability to have a colleague at the meetings for the disciplinary process

Harassment

25 Craig Clarke's treatment of the claimant as set out in JB44 – 45,

Victimisation – Treatment of the claimant by Craig Clarke following Craig Clarke having heard a grievance raised by the claimant in 2018, and the claimant appealing his decision.

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4. The respondent's position was that the reason for the claimant's dismissal was his conduct and that the dismissal was a fair dismissal in terms of section 98 of the Employment Rights Act 1996 ('the ERA'). The respondent denies any unlawful discrimination against the claimant on the grounds of his race.

5. In preliminary discussions at the start of this Final Hearing it was noted that in terms of the Equality Act 2010 ('the Eq A') 'race' includes national origin.
- 5 6. It had been agreed at the Case Management stage that the respondent's evidence would be presented first.
7. All evidence was heard on oath or affirmation. For the respondent, evidence was heard from Gordon Sneddon (Regional Service and Installation Manager for West of Scotland, who heard the claimant's Disciplinary Hearing), Brian Forrest (at the time, Technical Site Build Engineering Manager), who heard the appeal of the dismissal, Colin Rae (Head of MDU Build), who hear the claimant's grievance against Craig Clarke and the claimant's former line manager, Craig Clarke (Field Sales Manager). Evidence was heard from the claimant, who called no other witnesses.
- 10 15
8. A Joint Bundle was prepared for this Final Hearing. This Joint Bundle ('JB') is in two volumes, containing 266 documents and running to 808 pages. Documents are referred to in this Judgment by their page number (JB1 – JB808). Many of these pages were not referred to in evidence.
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Issues

9. The issues for determination by this Tribunal were:-
- 25 *Unfair Dismissal*
What was the reason for the claimant's dismissal?
Was that dismissal a fair dismissal in terms of section 98 of the Employment Rights Act 1996 ('the ERA')?
- 30 *Direct Discrimination*
Was there less favourable treatment of the claimant?
Was that less favourable treatment because of his race?

Did the respondent, by dismissing the claimant, treat the claimant less favourably because of his race, contrary to the provisions of section 13 of the Equality Act 2010?

5 *Indirect Discrimination*

Did the respondent apply the provision, criterion or practice ('PCPs') relied on by the claimant?

If so, to whom was/ were such PCP(s) applied?

10 Would the PCP(s) particularly disadvantage those who share the claimant's protected characteristic, compared with others?

If so, did that practice put the claimant at that disadvantage?

Was that practice a proportionate means of achieving a legitimate aim?

Harassment

15 Was there unwanted conduct?

Did that unwanted conduct relate to the claimant's protected characteristic?

If so, did that unwanted conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, offensive or humiliating environment?

20 Was it reasonable for the claimant to consider the conduct to have that effect?

Did the respondent take all reasonable steps to prevent that conduct?

Victimisation

Did the claimant do a protected act?

25 Was the claimant less favourably treated because he did that protected act?

Remedy

Is the claimant entitled to any remedy?

If so, what?

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Relevant Law

10. Equality Act 2010:-

Protected Characteristics

Section 4

5 *The following characteristics are protected characteristics –*

- age;*
- disability;*
- gender reassignment;*
- marriage and civil partnership;*
- 10 *pregnancy and maternity;*
- race;*
- religion or belief;*
- sex;*
- sexual orientation.*

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Section 9

(1) *Race includes -*

- (a) colour;*
- (b) nationality;*
- 20 *(c) ethnic or national origins.*

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(2) *In relation to the protected characteristic of race –*

- (a) a reference to a person who has a particular protected*
- characteristic is a reference to a person of a particular racial group;*
- 25 *(b) a reference to persons who share a protected characteristic is a*
- reference to persons of the same racial group.*

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(3) *A racial group is a group of persons defined by reference to race; and a*

reference to a person's racial group is a reference to a racial group into which

30 *the person falls.*

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(4) *The fact that a racial group comprises two or more distinct racial groups*

does not prevent it from constituting a particular racial group.

.....
Direct Discrimination (Section 13) -

5 (1) *'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'*

Indirect Discrimination (Section 19) -

10 (1) *'A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

15 (2) *for the purposes of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –*

(a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*

(b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

(c) *it puts, or would put, B at that disadvantage,*

(d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

(3) *The relevant protected characteristics are –*

age;

disability;

30 *gender reassignment;*

race;

religion or belief;

sex;

sexual orientation.

Harassment - section 26

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

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

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

(i) violating A's dignity, or

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

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

(a) the perception of B;

15 *(b) the other circumstances of the case;*

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

(5) The relevant protected characteristics are –

age;

20 *disability;*

gender reassignment;

race;

religion or belief;

sex;

25 *sexual orientation.*

Victimisation - section 27

'(1) A person (A) victimises another person (B) if A subjects B to a detriment because - -

(a) A does a protected act, or

(b) A believes that A 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 he or another person has contravened this Act.

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(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.

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

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

Burden of Proof - section 136

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(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 provisions concerned, the court must hold that the contravention occurred.

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(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

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(5) This section does not apply to proceedings or an offence under this Act

Code of Practice

In determining the claims under the Equality Act 2010, the Tribunal had regard to the Equality and Human Rights Commissions Code of Practice on Employment ('the EHRC') (2011).

5 Equal Treatment Benchbook

The Tribunal took into account the relevant guidance in Equal Treatment Benchbook (updated February 2021), in particular Chapter 1 re litigants in person and Chapter 8 re racism and cultural differences.

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In respect of steps taken in recognition of the claimant being a litigant in person, explanations of the procedure were given throughout the Final Hearing. In particular, the claimant was told that any matter which he intended to rely on in his evidence should be put to the respondent's relevant witness in cross examination questions, so that that witness can state their position on that matter. The Tribunal referred the claimant to guidance available on line from the Equality and Human Rights Commission and Citizens Advice Bureaux.

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The claimant's request for an extension of time to provide his comments on the respondent's representative's submissions was granted until the Member's Meeting on 22 November 2021.

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The Tribunal had regard in particular to paragraphs 290 – 292 Of Chapter 8:-

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290. 'Racism' is a term defined more by effects / outcomes than by motives: A racist action, or a person who acts in a racist way, is not necessarily racially prejudiced. However, the term is often used to describe a combination of conscious or unconscious prejudice and power to implement action which leads, however unintentionally, to disproportionate disadvantage for BAME people. People who use the term 'racist' to describe the actions of others may or may not mean that the other person is personally prejudiced.

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291. *'Unconscious bias' is a term now widely used in many workplaces as a way of drawing attention to the effects of unwitting stereotypical thinking about BAME people. It omits certain ways that racism can operate systemically.*

5 292. *'Institutional racism' is another term which is variously understood. Some people use it simply to describe an organisation where many people, especially those in power, have prejudiced attitudes. Others use it to describe an organisation where people, whatever their attitude, act in a racist way. Its deeper meaning is an organisation*
10 *which has a set of values, operating procedures, and priorities which, however unintended, lead to outcomes that disadvantage many minority ethnic people."*

Unfair Dismissal

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The law relating to unfair dismissal is set out in the Employment Rights Act 1996 ('the ERA'), in particular Section 98 with regard to the fairness of the dismissal and Sections 118 – 122 with regard to compensation in terms of Section 98(1) for the purposes of determining whether the dismissal is fair or
20 unfair it is for the employer to show –

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(a) the reason (or if more than one, the principal reason) for the dismissal, and

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(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

Section 98(2) sets out that a reason falls within this category if it –

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(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee, [(ba) is retirement of the employee]

(c) is that the employee was redundant,

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(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

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Where the dismissal is by reason of the employee's conduct, consideration requires to be made of the three stage test set out in **British Home Stores - v- Burchell 1980 ICR 303**, i.e. that in order for an employer to rely on misconduct as the reason for the dismissal there are three questions which the Tribunal must answer in the affirmative, namely, as at the time of the dismissal:-

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i. Did the respondent believe that the claimant was guilty of the misconduct alleged?

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ii. If so, were there reasonable grounds for that belief?

iii. At the time it formed that belief, had it carried out as much investigation into the matter as was reasonable in the circumstances?

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What has to be assessed is whether the employer acted reasonably in treating the misconduct that he believed to have taken place as a reason for dismissal. Tribunals must not substitute their own view for the view of the employer and must not consider an employer to have acted unreasonably merely because the Tribunal would not have acted in the same way. Following **Iceland Frozen Foods Ltd -v- Jones 1983 ICR 17** the Tribunal should consider the 'band of reasonable responses' to a situation and consider whether the respondent's decision to dismiss, including any

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procedure prior to the dismissal, falls within the band of reasonable responses for an employer to make.

5 Section 98(4) of the ERA sets out that where the employer has fulfilled the requirements of subsection 98(1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

10 (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

15 (b) shall be determined in accordance with equity and the substantial merits of the case.

This determination includes a consideration of the procedure carried out prior to the dismissal and an assessment as to whether or not that procedure was fair.

20 **Findings in Fact**

11. The following facts and those set out as primary facts under the sub heading 'Discussion and Decision' were facts admitted or found by the Tribunal to be proven:-

25 (a) The respondent is a provider of TV, phone and internet media services, employing approx. 13,000 employees throughout the UK. The claimant is of black African origin. The claimant was employed by the respondent as a Field Sales Agent from 12 January 2018 until 21 February 2020. The claimant was previously employed by the respondent as a Field Sales Agent in 2009, at that time based from the respondent's premises in South Gyle, Edinburgh.

5 (b) The claimant's role as Field Sales Agent required him to approach properties allocated to him ('doors') and seek to sell the respondent's services to the occupants of that property. The respondent services are mainly provided via cable connections. From 2015 the respondent has substantially invested in upgrading and expanding the cable network. The potential sales of services to properties which are able to access the upgraded network are referred to as 'Lightning' sales. The sales advisers also seek to sell to properties which do not yet have access to the upgraded ('lightning') cable network. Sales Agents prefer to be allocated lightning properties, as they are able to use the upgraded network as a selling point. The sales advisers receive commission on the amount of sales sold (known as 'booked') by them. 'Lightning' properties are considered to be easier to sell to than those properties to which the cables delivering the services have not been upgraded. Within the allocation of 'Lightening' properties there are properties which are new builds and existing properties where the cable connection has recently been installed or has been upgraded to Lightning. All Lightning properties are released to the Sales department from the Construction department once the cable connection is installed which enables services to run. The Field Sales Agents work under a Field Sales Manager.

20 (c) Within Sales, there is a Multiple Dwelling Unit ('MDU') sales section, dealing with sales to buildings containing more than one dwelling e.g. high rise flats. When Lightning sales are released for an MDU, selling to doors within that MDU is restricted for 7 days to the Sales Agents within the MDU team. A Field Sales Agent will receive the postcode for the MDU as part of their monthly allocation of doors, but will be restricted

from selling to a door within that MDU for 7 days from the release date.

5 (d) Within the Lightning sales, the Sales Agents consider prime allocation of doors to be 'fresh doors' i.e. those where no other Sales Agent has attempted to make contact to sell the services. The allocation of lightning sales to Sales Agents does not break the category down further into such 'fresh doors'. The allocation of doors and information held by the Sales Agent is viewed on 10 a company iPad. The Sales Agent receives a digital 'Walkcard' detailing all the doors which they have been allocated. From the information shown on a Walkcard, the Sales Agent will know whether there has been any prior interaction on each of the doors which they all have been allocated.

15 (e) There are a variety of workstreams of lightning doors, including new construction or new development (brand new housing). After the construction and activation stages, the doors are released to the sales teams, once deemed to be at the saleable stage and available for the sales Agents to sell the services. 20 The Field Sales Managers do not have prior knowledge of the release of these doors from construction.

25 (f) The Field Sales Agent is allocated postcodes on a monthly basis. Normally a particular area is worked for a month, before the Field Sales Agent moves on to seek to sell the services in another area. The claimant's previous Area Manager's system was to allocate particular six character postcodes to one Field Sales Agent. Other Area Managers, including Craig Clarke do 30 not allocate in that way. When the claimant moved to work in Craig Clarke's team, he was unused to the system of working used by him.

5 (g) When selling, the Sales Manager requires to input information, including a name, contact email address, contact phone number, bank account sort code and account number and details of how long the person has resided at that property. That process is known as 'on boarding' (o/b') and commits the sale to the system used by the respondent. The platform for customer relations management used by the Sales Agents to on board orders is called Salesforce. When the information is on boarded in Salesforce, that information automatically transfers to the customer services management system, which is called ICOMMs. ICOMMS is the primary management system which the respondent uses to manage its' customer database. The claimant was not familiar with the layout of information held on the ICOMMs system as this system is not accessed by the Sales Agents. The ICOMMS system holds the information which has been sent to it from the Salesforce platform.

20 (h) Once the sale is committed and installed, commission is paid on the sale. The services may then not be installed because of a failed credit check e.g. if there has been prior debt to the respondent by that account holder. 'Credit checks' are carried out based on the information which has been inputted by the Sales Agent. Where the Method of Payment ('MOP') is by direct debit, the there is a higher pass rate in the credit check. Where the occupier's time of residency at the property is less than one year, the check is affected by the time spent at a previous address. In certain circumstances, the Salesforce system will highlight to the Field Sales Agent that Proof of Residency ('POR') is required e.g. utility bill in the customer's name or driving licence. POR is not normally required where 25 30 the person has been resident at the property for less than a month but was resident at their previous property for a period of three years or more.

5 (i) The commission earned by Field Sales Agents is affected by the percentage of sales where the services are cancelled prior to the installation. This is recorded as a 'PIC rate' (Percentage of Installation Cancellation). The respondent recognises that there may be a number of reasons for the services being cancelled, including where the account holder has decided to stay with their existing provider and where the property dweller does not like the look of the way in which the cable services would enter the property. Another reason for cancellation may be where the individual's position is that they did not order the services. Installation of the services may be by self-installation (when the box provided by the respondent is sent to the address to be connected by the customer) or manual (installation by an engineer sent by the respondent). The named account holder does not require to be present at the address for the installation to take place, so long as an adult is present.

20 (j) There is a competition run by the respondent where the top selling Sales Agent, Area Manager, Regional Manager and Director are taken on holiday.

25 (k) Each Sales Agent has an agent number issued by the respondent. All orders are on boarded by Sales Agents using their agent number. That agent number is shown against the customer's account in various systems used by the respondent, including Salesforce (which is used by the Sales Agents when on boarding using the iPad issued by the respondent), ICOMMS which is an internal record in respect of the accounts and KANA which is the system via which the information is sent from Salesforce to ICOMMS.

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5 (l) The claimant first worked for the respondent in around 2009. In that period of employment the claimant was based at the respondent's head offices in Edinburgh. The claimant was employed as a Field Sales Manager. The claimant was aware of Craig Clarke but had no significant dealings with him in that period of employment. The claimant returned to work for the respondent as a Field Sales Agent in 2018. Initially, the claimant was based in Edinburgh. His line manager was Robert Fergusson. The claimant performed well within Robert Fergusson's team. He was the number 1 sales Agent in that team. He won various awards because of his level of sales. Robert Ferguson moved to work in the west of Scotland. He encouraged the claimant to move area to be in his team, despite the claimant living in Livingston. The claimant agreed to move because he believed that he would be moving to work in areas with a high proportion of lighting doors. The claimant believed that that was a good opportunity for him to sell, and earn resultant commission.

20 (m) In May 2019, due to a reorganisation the respondent reduced the number of Area Managers covering Scotland from three to two. Craig Clarke became the Area Manager for all of the respondent's west of Scotland area. The claimant became part of Craig Clarke's team. Craig Clarke had a different way of allocating doors to those in his team than the claimant's previous Manager, Robert Ferguson.

30 (n) The claimant's first dealings with Craig Clarke had been in 2018. At that time the claimant had raised a grievance against another employee. The claimant alleged that that employee had discriminated against the claimant on the grounds of his race. Craig Clarke was not the claimant's Line Manager at that time and was appointed to hear that grievance. Craig Clarke did not uphold the claimant's grievance. The claimant appealed

that decision. The claimant's appeal was partially upheld, to the extent that it was recognised that there had been a procedural flaw in the grievance process because the claimant had been invited to a meeting by email rather than by letter.

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(o) In July 2019, Craig Clarke spoke to the claimant about 3 accounts where the services had not been installed. The claimant's position was that he on boarded the information given to him by the individual at the properties. Craig Clarke accepted the claimant's position. Craig Clarke suggested that he visit the addresses with the claimant. Craig Clarke had taken that step with other Field Sales Agent over his considerable time as Field Sales Manager. The claimant was not happy about Craig Clarke accompanying him to these addresses. He made that clear to Craig Clarke. Craig Clarke had proposed that they visit the addresses in the same car. Rather than this , each went in their separate cars. They visited two of the addresses and got no reply at the doors. Craig Clarke recognised that the claimant was not happy with the situation and they did not visit the third address.

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(p) In August 2019, the Field Sales Agents in Craig Clarke's team, including the claimant, were allocated to work in the Govan area of Glasgow. There was a number of 'failed installations' following services having been on boarded for doors in that area. Craig Clarke decided that the team should leave the area before the end of the month, which is the normal time when Field Sales Agents move area. He decided this because of the low number of installations from attempt to sell in that area.

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(q) On 3 September 2019, Brett Crooks (Project Lightning Account Manager) sent an email to Derek Kirk (Field Sales Executive) asking that certain addresses in Govan be visited. That request

5 was passed on to Craig Clarke. Craig Clarke then forwarded this request to the claimant and two other Field Sales Agents in his team (David McGarrigle and Derek Hunter). Craig Clarke identified these three Field Sales Agents for this task because he recognised them as being good at selling. On 11 September 2019 the claimant emailed informing that he hadn't been allocated those addresses in the previous month but that he had '*managed to pull about 8 – 10 deals*' that month. That email trail is at JB178.

10 (r) During September 2019, when the claimant attended at the respondent's Uddingston offices, Craig Clarke carried out a vehicle check on the car supplied to the claimant by the respondent. Vehicle checks are carried out by Field Sales Managers on the Field Sales Agents' cars to ensure that they are in good condition. The check involves both an interior and exterior check. Craig Clarke found that the claimant had a large amount of clothes and personal belongings in a disordered state in the car, mixed with the respondent's materials. He did not consider the car to be in suitable state to be used by the claimant while he was representing the respondent. Craig Clarke's position was that the car required to be tidied and cleaned before being used by the claimant. The claimant was frustrated at that position because that would mean that time when he could be selling would be used tidying his car. Craig Clarke offered to get black bin bags for the rubbish. The claimant took this as a suggestion that his personal belongings be dumped. John Horspool was in the Uddingston office on that day. Craig Clarke asked John Horspool to come to the car park to seek to resolve the situation. John Horspool agreed that the car was not in a fit state. He suggested that the claimant return the following day, with the car cleaned. That course of action was followed.

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5 (s) On 23 August 2019 an individual contacted the respondent re an account which had been onboarded by the claimant. That person claimed that they had not ordered the services and did not live at the address where the services were being provided. That contact was recorded on the ICOMMS system. Following the individual providing proof of residency to the respondent, the respondent accepted that that individual did not live at the address where the services were being provided. On 10 October 2019 action was taken to remove the individual's details from the account and clear the debt on the account. The fact of that action having been taken was recorded on the ICOMS system.

15 (t) A separate complaint was made by another individual in respect of an account on boarded by the claimant to provide services to another property on the same street as the complaint which had been made on 23 August. That complaint was recorded in the ICOMMS system on 2 November 2019. The respondent's records showed that that order had also been on boarded using the claimant's agent number. That second complaint re an order on boarded under the same agent number triggered an investigation by the respondent's Fraud and Revenue Assurance department. The key findings from this initial investigation by Fraud and Revenue Assurance were- orders had been on boarded using the same agent number for three properties in that same street, all using the same bank details, and all on boarded within an hour on the same day (26 July 2019); that those orders were all on boarded by agent number 20087 (the claimant); that the related credit files in respect of those accounts showed that it had been agreed that ID theft had occurred in both of the instances of complaint; that the services provided by the respondent to the properties on those accounts were disconnected and the personal data of those who had complained had been removed from the accounts; re the third

of the accounts booked on that same street, although no-one connected with that account had complained of ID theft, the respondent had also disconnected the services and removed the personal data held on that account holder. That information gathered in this initial investigation was sent by Christopher Chapman (Fraud and Revenue Assurance Analyst (UK and Ireland) to the of the respondent's Fraud and Revenue Assurance Investigations department on 4 November 2019 (JB 210 – 211). That email was replied to by Karen Weston (Intelligence Manager in the Investigations Team of the respondent's Fraud and Revenue Assurance department) on 5 November 2019 (JB 210), as follows:-

"This was briefly discussed in this morning's call. In addition to the 3 cases Chris has sent through, I've checked PIC data and found 8 accounts where customers have cancelled due to not ordering services in the first place. These are dated between 27/6/2019 - 10/10/2019. I've also found 5 instances of duplicate bank details taken from sales in the last 3 months.

This agent was highlighted in a case earlier this year led by Ady (SC/0719/064) but we were looking at a team and had nothing on him individually.

I've put everything into one spreadsheet."

- (u) Further investigations took place. On 5 November 2019, a review of the claimant's PIC data identified 8 accounts where customers had cancelled claiming that they had not ordered the services and that there were 5 orders on boarded under the claimant's agent number where the same (duplicate) bank details had been used to place the order, all for accounts at different addresses (JB210) CHECK. On 9 November 2019, the investigations team requested and received from sales

compliance copies of POR submitted by the claimant in respect of the suspected accounts.

5 (v) On 11 November 2019 the claimant sent an email to Craig Clarke (JB 213) re the circumstances of a failed installation. Craig Clarke met the claimant to discuss the issues in this email. There was discussion on there being a number of occasions re accounts on boarded by the claimant where the engineer had not been able to install the services. The claimant's position was that the details had been given to him by the customer. Craig Clarke accepted the claimant's position. Craig Clarke arranged to visit the addresses with the claimant. Craig Clarke had done similar visits in the past with other Sales Agents in his team. Craig Clarke intended this to be supportive to the claimant. The claimant did not take this to be supportive. Of the three addresses which were intended to be visited, only two doors were visited. This was because Craig Clarke was aware that the claimant was not happy about being accompanied by him.

20 (w) On 23 November 2019 the claimant sent an email to Craig Clarke querying how his target had been adjusted to take into account holidays (JB220). He asked how it has been calculated. Craig Clarke spoke to the claimant about this and indicated that his adjusted target would be rectified by 26 November. On 27 November 2019 the claimant sent a further email to Craig Clarke chasing up the matter and asking that it be confirmed that his sales target should be reduced from 23 to 20 (JB222). On the same day, Craig Clarke replied to the claimant stating 'Yes, 23 is the correct target bud.' The claimant sent a further email to Craig Clarke querying how this had been worked out. Craig Clarke replied on the same day stating "The PA is showing your target is 18 now.". No explanation was given on how that was calculated.

5 (x) On 29 November 2019 there was an auto release of doors from
Central Housing Files ('CHF') to the Field Sales Agents in Craig
Clarke's team. This was in respect of doors in the G52
postcode. Craig Clarke did not know that this allocation was
being released. That allocation had been release in error and
the services were not ready to be sold to those doors. Those
doors were 'fresh lightening doors': they were highly valued by
the Field Sales Agents because no other sales Agent would
10 have first had the opportunity to sell the respondent's services
to those doors. The Salesforce system does not break down
lightning doors to the sub category of those which are 'fresh'
but 'fresh lighting doors' were recognised by the Field Sales
Agents and highly prized by them. Those doors were auto
15 allocated to members of Craig Clarke's team and then 'dropped
off' i.e. were removed from the Salesforce system and no longer
showed as being allocated. Craig Clarke was working in
Belfast on that day. He received a number of messages from
Sales Managers in his team informing him that doors in G52
20 postcode area which had been allocated to them had then
'*dropped off the system*'. This error applied to others in in Craig
Clarke's team as well as the claimant.

25 (y) On 5 December 2019 the claimant had an end of year review
meeting with Craig Clarke. At this meeting the claimant raised
issues in respect of the allocation of doors to him. Craig Clarke
sought to explain to the claimant how the allocation process
worked. The meeting lasted two and a half hours. By the end
of that meeting, Craig Clarke believed that he had explained to
30 the claimant the system of door allocation which he used in his
team, which was different to that which had been used by the
claimant's previous manager.

- (z) On 6 December 2019 the claimant sent an email to Craig Clarke (JB237). This email stated:-

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“Following after the end of year review meeting I had with you on 5 December 2019 at 1350 hours, we further discussed other issues that I had raised with you earlier in the week and you had advised me to raise the issues in the review meeting which I did in (sic) the end of the meeting.

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First and for most (sic) you had wanted to close the meeting very sharply without discussing matters that I had raised with you via email to which you had replied advising me that you would address these matters in the same meeting.

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Again as always I had to remind you of the matters that are seriously affecting my morale; earnings and ultimately my mental health.

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When I brought to your attention on Monday that I did not have fresh lightning doors at about lunchtime on Monday while others had fresh lightning from much earlier on the day and previous days, you eventually issued some non-workable in the use doors that had to be rested for seven days by which time they will be non-fresh lightning as the MDU staff will have attended to.

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I also got a token 10 LS doors which I got 2 sales from and the other workable doors were SD doors in G52. I was pleased to get these G 52 doors as fresh lightning doors I have had in months (sic) but the excitement was short lived as the sales from these cannot be processed before CHF release to LS and this seems backlogged with work as the files you sent away on Tuesday are still not back. The dilemma does not end there as I said to Miss installation points target as all the installation is set to go in January as things stand. This would have been

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available if this was the case for everyone but unfortunately it isn't. I am now certainly said to Miss my installation targets as I have nothing sold this month to be installed this month.

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The facts surrounding the door allocation for this month has paused (sic) a lot of questions about the unfairness in allocation.

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It has come to light that over the months only a selected few had some fresh lightning mostly towards the end of the month and hopefully the system will be failure to recognise me in the door allocation and these seem to be the same colleagues every month and these are the same colleagues that have the biggest share of LS in G52 and this seems too much of a coincidence.

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I was shocked to realise that some team members have enjoyed the benefit and unfair advantage of fresh lightning doors over me. When I wrote this to your attention your response was that you were not aware of this happening over the last months as the doors seem to drop on their Salesforce. I do certainly believe that this seems more of an active intention rather than a glitch on the system (every month doors drop for them and never to me).

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Why have I not had lightning doors for months while others had? This constitutes blatant discrimination and unfair treatment. I cannot wait for January for the system to change and hopefully the system will be fair to recognise me in the door allocation. This is unacceptable.

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This has and will cost me earnings this month too and this has to be resolved immediately. If the doors are issued in error why are those with the unfair advantage still sitting with the doors that are meant for everyone?

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Whilst the other issues that I have brought to your attention in the past and that I mentioned in brief I strongly believe that I have and continue to be treated unfairly.

5 *I believe the company has a policy of transparency and openness and you questioned why I had copied your line manager in the email to which I replied that it was the only way I was getting some response from you.*

10 *This also further unsettled me and increased my suspicion of the manipulation of door allocation to favour others while discriminating me (sic). I will now be looking retrospectively on all the months especially those I failed to achieve installation target or achieve target convincingly.*

15 *Whatever resolution you find, it has to reflect the site was disadvantaged.*

I will consider all options available to me to resolve this matter.”

20 (aa) Craig Clarke did not reply to or acknowledge that email. On 9 December the claimant sent a further email to Craig Clarke (JB241). The claimant forwarded that email to Leslie (Les) Owens (Regional Sales Manager) later on 9 December (JB242 & JB244). The claimant's email to Craig Clarke of 9 December
25 2019 was headed '*Unfair treatment*' and stated:-

30 *“I write to you again at the back of an email I sent on Friday, 6 December regarding the matter above but I have since then received no response. I expressed my views on certain practices that have been happening over the months and how it made me feel generally as part of your team. I am not sure if something is being done to resolve the issues that I brought to your attention or we just have to hope that the issues go away or*

5 *resolve themselves. There is some movement on my walk card in as far as doors are concerned, some possible token gesture of doors that are very old and has been worked several times. I am now not sure if this the(sic) attempt to try and resolve the issues I highlighted or it is just some normal issue of doors. I continue to be deeply disturbed by the matter in which this is being handled as I have not been informed of what and how if anything is being done.*

10 *I have brought the matter to your attention as my first port of call as my line manager but I seem to be getting the silent treatment. I asked questions that deserve answers whatever they might be. I am beginning to feel more compelled to bring these issues to you in more formal way (sic).*

15 *I have also noticed that the PA report you would normally publish to the team has disappeared or it is just not being sent to me. The PA would have massively expose (sic) the unfair advantage others have, I believe.”*

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(bb) On 10 December 2019, Les Owens sent an email to the claimant stating that he would like to meet him at the Bellshill office at 1pm on 13 December to discuss his forwarded email (JB244). The claimant replied on the same day asking how long the meeting would be likely to last so that he could plan his day.

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(cc) Also on 10 December 2019, the claimant emailed Craig Clarke about issues re the allocation of doors. His email ended ‘*Why does the system never allocate doors to me directly? Too many strange coincidences happening.*’ The claimant copied Les Owens in to that email (JB246). Craig Clarke replied to the claimant on the same day, also copied to Leslie Owens (JB246). His email stated “*Aston has already informed me of this. There has (sic) been some problems from CHF. I am*

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looking in to this.”. The reference to CHF was to Central Housing Files.

5 (dd) On 11 December 2019 the claimant emailed Craig Clarke about doors in the G52 postcode being allocated to him and then ‘dropping off’ the system. That email (JB247) ended “*A lot of movement happening with my doors in the background not sure if the computer glitch has gone into overdraft with me.*”. The claimant copied that email to Leslie Owens.

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(ee) The meeting arranged for 13 December did not take place. The claimant was delayed as he was held up in traffic. That meeting was not rescheduled.

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(ff) On 14 December 2019 the claimant sent an email to Les Owens (JB 249). In that email the claimant initiated a formal grievance against Craig Clarke. (JB249). The terms of that email are:-

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“As you know we were due to have a meeting on Friday 13th of December at your suggestion and on the back of emails I have sent to Craig. I appreciate that I was late. I did call to let you know I was running late but it seems perhaps you didn’t get the message. It’s a difficulty in matters having to be resolved during work time when I’m already at a disadvantage in terms of target/ sales. This has itself been a pattern, and there is no target reduction. I’m sure you will appreciate I have two spin plates such that I can facilitate my work/ customers but resolve this employment issue also.

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I am aware you said you’d rearrange the meeting so I await the new date and time. Meantime I was a little confused that you were unable to wait for my arrival when I got through traffic. You had originally said the

meeting would be as long or as short as I wanted as it was 'my meeting'. You then said you couldn't wait for me as you had another appointment. I'm aware Louise was meant to meet with you after me sometime and that you cancelled with her due to cracked ribs.

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I note that despite the lack of response from Craig to my emails there have been some developments. We received a message out of hours advising new doors would be available. I can only assume this is an attempt to correct matters and create some appearance of fairness compared to previous months now that I've raised the issue regarding the unfair allocation of doors and the detriment to me.

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I just want to make clear that regardless of that I do wish to raise a formal grievance with regard to Craig's treatment of me as far as the allocation of doors but moreover his unfair and detrimental treatment of me since joining his team.

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There are a number of issues which are long-winded and tedious but which I will raise during our meeting. These include unlimited and persistent criticism of me when I am doing my job competently and often on the instigation of the comments of others and without investigation."

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- (gg) The information gathered in the initial investigations following on from the customer contacts re possible ID theft was collated into two appendices and sent by Ady Pye (Investigations Manager in the Investigations Team of the respondent's Fraud and Revenue Assurance department) to Vicki Bate on 17 December 2019 (JB252 & JB296). Ady Pye's email states:-

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"As per our discussion, see attached appendices / evidence in respect of:-

- 3 x customer complaints relating to BC on/boarding customers at 3 addresses in the same street on the same day. The customers' accounts all share the same bank details (Appendix 1).
- I have also reviewed PICs for CH which have identified some customers who allege they never agreed to service (Appendix 3).
- A review of credit checks for BC has found 5 instances where the same bank details have been used for different customers at different addresses - in some instances 1-2 months apart (Appendix 2).

The investigation was referred to me by the Fraud Delivery team who identified the 3 customers - as per appendix 1 - who shared the same bank account details. I then requested further data to ascertain if there were other examples of duplicate use of bank details / customers o/b without knowledge.”

(hh) On 16 December 2019, Victoria Bates forwarded to Les Owens the email and attached appendices received from Ade Pye (JB296), with the email heading '*Confidential – Custom (sic) Complaint – BC*'. Les Owens appointed Marc Donaldson to deal with the disciplinary hearing against the claimant.

(ii) On 17 December 2019, Victoria Bates forwarded to Marc Donaldson the information which had been sent by Ade Pye (JB 252).

(jj) Also on 17 December 2019, Les Owens forwarded to Marc Donaldson the email and attachments which had been sent to him by Victoria Bates with the heading '*Confidential – Custom (sic) Complaint – BC*'.

(kk) The appendices attached to Ady Pye's email are referred to as AP1 (JB 283 - - 286), AP2 (JB) and AP3 (JB). AP1 sets out information in respect of the findings of the claimant having on boarded customers at three addresses in the same street on the same day, with the three customers' Virgin Media accounts all sharing the same bank details. The information is not set out in a format which the claimant would be used to looking at. The information shows that three sales were on boarded using the claimant's agent number on 26 July 2019 to three different properties on the same street. It shows the timing of these sales as 15.56, 16.20 and 16.54. It shows that the same bank details (account number and sort code) was used for all three of these sales, although the sales were purportedly to three different people at three different addresses. It states at JB 283 *"All 3 account holders claim they never requested services nor do they reside at the address where services have been applied / provided."* JB 284 shows the findings in respect of one of the properties in the street (number 18). That shows the information held by the respondent in respect of services provided to that property. It sets out that services have been provided four times to that property (i.e. the account numbers relating to that property end in numbers 01 to 04). It sets out that the email addresses registered in respect of three of those accounts at that property share the same surname. It sets out that the 04 account at that property was on boarded by the claimant at 15.56 on 26 July 2019; that the account holder ('ACH') reported to the respondent on 13 August 2019 that the account had been set up in her name but that the services were not provided to her address; that that was noted by the respondent as ID theft; that the bank account details on boarded for that account are the same as those used for accounts at two other doors in that street (21 and 25a) and that the dweller was registered as having resided at that address for one month and at a previous address for three years.

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5 (ll) Within AP1, JB 285 shows the information gathered in respect of the property at number 21 of that street. That sets out that two accounts had been registered in respect of services provided to that property (01 – 02); that the 02 account was on boarded by the claimant at 16.54 on 26 July 2019; that on 17 October 2019 the 02 account was closed due to non-payment; that on 2 November 2019 the account holder ('ACH') reported to the respondent that the account was registered to an address which was not his address and that he did not live at the premises had been set up in her name but that the services were not provided to her address; that that was noted by the respondent as ID theft; that the bank account details on boarded for that account are the same as those used for accounts at two other doors in that street (21 and 25a) and that the dweller was registered as having resided at that address for one month and at a previous address for three years.

20 (mm) Of the information shown within AP1, in three particular accounts shown to have been onboarded by the claimant, two of the three account holders made a complaint to the respondent of ID theft (i.e. that they did not reside at the property), in all three cases action had been taken by the respondent's Fraud department to remove the account holder's details.

25 (nn) In respect of the two of the accounts shown in Appendix 1 ('AP1'), where an individual had contacted the respondent and claimed that they were the victim of ID theft, the respondent required three forms of proof of residency ('POR') from those individuals, showing that they did not live at the address registered against their name, where the services were being provided. Once sufficient POR was provided to show that the

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5 individual did not live at the address held by the respondent against their name, the respondent accepted that ID theft had occurred and wiped the debt from those accounts. The respondent incurred losses of INSERT in respect of wiped debt from accounts on boarded by the claimant, where claims of ID theft were then made in connection with those accounts.

10 (oo) The respondent holds information on how many times their services have been provided to a particular address. This is recorded in the number in brackets after the account number e.g. in JB279, account number ICOMS 1053118(02) shows that that account is the second time that the respondent has provided its services to that address.

15 (pp) The documents which were in AP2 are at JB360 – JB361. These documents shows details of various accounts booked under the claimant’s agent number (20087). On a number of these accounts, the dweller is recorded as having been in residence in that property for less than a month and having
20 been resident at a previous address for three years. In those circumstances, the respondent system does not require that the dweller provides proof of residency. The same bank details (Account number and sort code) is shown against a number of accounts, including one in relation to a property in Edinburgh.

25 (qq) The documents which were in AP3 are at JB362 – JB363. This shows some accounts booked by the claimant which were cancelled before installation of the services (‘PIC’). These reason for cancellation is recorded. The reason for cancellation
30 on a number of these accounts is that the services were never ordered.

(rr) On 19 December 2019 the claimant was informed about the initial investigations. He was informed of the issue when at a work meeting: Craig Clarke told the claimant that '*something had come up*' and that Marc Donaldson wanted to speak to him.. The notes of that meeting are at JB 274 – 278. At that meeting were Marc Donaldson, the claimant and Bryan Duncan (Service Delivery Team Manager). Bryan Duncan typed these notes while the meeting was taking place. At that meeting the claimant was shown AP1. The claimant's position was that he could not remember the customers. The claimant was shown AP2. The claimant's position was that he could not explain the link between the customers. When questioned about these customers the claimant raised that he had gone to see customers with Craig Clarke in July and that he had taken a Grievance against Craig Clarke. The notes of that meeting record Marc Donaldson's position being '*We're not here to discuss the grievance*'. The notes of that meeting record Marc Donaldson noting when questioning the claimant that there were '*Details across several allegations. This is why this is a higher escalation.*' The claimant was suspended on full pay pending the investigatory stage of the disciplinary procedure. Marc Donaldson wrote to the claimant on 19 December 2019 confirming his suspension. This letter (JB287) stated "*I confirm that you are suspended without prejudice and on full pay pending an investigation into the allegations of gross misconduct made against you, in particular the alleged misuse of customer details in relation to loading media orders.*" The claimant was told that he should not contact work colleagues during his suspension, save for any Trade Union or work colleague representative and that contact re any necessary access to information should be via Marc Donaldson or Craig Clarke.

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(ss) Marc Donaldson asked Gordon Sneddon to 'pick up' the disciplinary hearing in respect of the claimant. Gordon Sneddon was asked to carry out the Disciplinary Hearing for the claimant in respect of this matter. Gordon Sneddon is the respondent's Regional Service and Installation Manager for the West of Scotland, and the 'counterpart' to Marc Donaldson's position in Sales. Gordon Sneddon had no direct line management responsibility for the claimant. Gordon Sneddon's part of the business is in respect of customer installations, service and repair. He has no role in sales, where the claimant worked. Gordon Sneddon was not aware of the claimant prior to his involvement in the disciplinary matter, although he had been copied into an email sent by INSERT. Gordon Sneddon was contacted by Gordon Sneddon was sent the notes of the investigatory hearing on 19 December and Appendices 1, 2 and 3. Gordon Sneddon asked for a copy of the customer complaints referred to. This was actioned by Marc Donaldson, in his email to Ady Pye on 6 January 2020 (JB299). Ady Pye's reply on the same date (JB299) was:-

"Appendix 1 refers.

The customer reported ID theft hence how they came to the attention of the Fraud team who reported this to me. Details of their complaint/ report were inputted in the relevant ICOMS accounts."

(tt) On 20 December 2019, Colin Rae (Head of MDU Build) wrote to the claimant inviting him to a meeting to discuss his grievance. That letter (JB290) referred to the claimant's 'formal grievance' being dated 9 December 2019. Prior to sending that letter, Clin Rae had had sight of the claimant's emails to Craig Clarke of 6, 9 and 14 December 2019. The meeting was arranged to take place on 7 January 2020. That meeting was scheduled to take place at the Bellshill office on 7 January 2020.

5 (uu) On 6 January 2020, Marc Donaldson sent an email to Ady Pye following on from the chain of emails initially sent by Ady Pye to Victoria Bates with attached appendices. That email (JB296) stated “*We are passing this case over to another manager for the disciplinary hearing and he has asked if we have copies of the complaints referred to below.*” Also on 6 January 2020 Marc Donaldson sent Gordon Sneddon the relevant information on the ICOMS accounts (JB303).

10 (vv) On 7 January 2020 the grievance meeting which was scheduled to take place that day was rescheduled after a short discussion. That meeting was rescheduled by Colin Rae because when the claimant had arrived at the Bellshill office he had seen a colleague and he felt uncomfortable with that venue and because Colin Rae accepted that the claimant had not had access to the respondent’s systems to allow him to prepare for the meeting. It was agreed that the meeting would take place in the Uddingston office. Later on 7 January Colin Rae sent an email to the claimant (JB339) confirming that the rearranged meeting would take place in Uddingston and that Debbie Kelly would be in touch with him re the available slot for his supervised access to the respondent’s iPad and systems. Also on 7 January, Colin Rae sent a third email to the claimant (JB320) including the notes from the brief meeting on that day. In that email, Colin Rae stated:-

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30 *“To clarify recent events, I received an email that was forwarded on by Mark Donaldson dated 6 January 2020 regarding your concerns due to suspension, which I wasn’t aware of beforehand, regarding a separate incident to which he responded for you to contact me direct. I also emailed you on 6 January 2020 asking you were attending the meeting to which I received no reply. However I received a voicemail message from a solicitor*

advising that they are acting on your behalf requesting me to call them. I will not be contacting your solicitor and will only deal with you as our employee.

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Whilst I understand you are suspended. Your email to Mark and Mark's response on the 6 January 2020 will not be in breach of your suspension if you contact me with regards to your grievance. It appears there are two separate processes and need to be dealt with as such."

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In that email, Colin Rae went on to propose that the claimant have supervised access to the respondent's systems between 11am and 12pm on 8 January 2020. He also sent the claimant forms to allow the process of a Data Subject Access Request.

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(ww) On 8 January 2020, Gordon Sneddon wrote to the claimant inviting him to attend a Disciplinary hearing (JB328 – 329). The claimant was informed that the outcome could be his dismissal and that he was entitled to bring a trade union representative or fellow employee with him to this Hearing. Enclosed with the letter was a copy of the Disciplinary procedure, the documents within AP1, 2 and 3 and the notes of the Investigation Hearing. This letter sets out that the purpose of the meeting is to discuss the claimant's conduct, in particular:-

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"The allegations of gross misconduct made against you, or in particular the alleged misuse of customer details in relation to loading media orders. Specifically you have manipulated customer data in order to pass credit checks by using several bank accounts that do not belong to the individuals or addresses that you booked the installs for.

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This falls under 'gross misconduct - doing or giving as reasonable grounds to think that you have done anything dishonest including theft, fraud or accepting

unauthorised commission' in our disciplinary and dismissal policy (copy enclosed). The allegations also constitute a breach of data protection."

- 5 (xx) Also on 8 January 2020, On 10 January the claimant replied to Colin Rae's email to him of 7 January (JB339). He stated:-

10 *"Given the circumstances that I am only getting supervised access to my iPad to retrieve relevant information for my grievance today, I feel there is not sufficient time to then go away and fully prepare before my submissions on Tuesday, 14 January. This is further complicated with the fact that I have a disciplinary meeting the very next day of Wednesday, 15 January. I therefore request for this meeting to be rearranged for at least a fortnight away to allow me time to prepare."*

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- (yy) Colin Rae replied to the claimant on 10 January, rearranging the grievance meeting to Tuesday 21 January (JB339).

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- (zz) Also on 10 January 2020, the claimant met Marc Donaldson who supervised the claimant having two hours' access to the respondent's systems. Sent an email to Marc Donaldson (JB340). The claimant stated:-

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"You are aware that I have only managed to access some of the vital information I need for both my grievance and the disciplinary hearing today Friday 10th of January 2020. This leaves me with very little time to prepare for the meeting scheduled for Wednesday, 15 January 2020.

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Regarding the accounts mentioned in the invitation, I would like to make a request for more details regarding the accounts to be more specific and clear regarding the

allegations. What is being alleged to have been done by myself and what exactly was done with each specific account including names and account detail address.

Given the nature of the allegations I would need time to seek legal advice on the matter.

I therefore request the hearing to be delayed by at least a fortnight to towards the end of January.”

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(aaa) Mark Donaldson replied to the claimant by email on 10 January 2020 stating:- *“Your disciplinary invite advises to contact Gordon Sneddon so please follow this letter and contact Gordon directly. Thanks.”*

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(bbb) On 13 January 2020, the claimant contacted Gordon Sneddon by email (JB343 & JB352). In this email the claimant stated:-

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“This is Brian Chiwara. I received a letter from you inviting me to a disciplinary meeting on Wednesday, 15 January 2020. The timeframe seen the letter and the scheduled meeting date is practically impossible for me to seek legal advice and then prepare adequately for the meeting.

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To assist me with the preparation, please provide with no specific details of the accounts and details including addresses and specific details of the the allegation separately for each account (sic).

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I do have another outstanding matter that I am dealing with at the same time. Please allow me ample time to seek advice and prepare. I suggest for the meeting to be delayed for at least two weeks while I await also the return of the my (sic) subject access request which has a lead time of up to 30 days.”

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(ccc) On 13 January 2020, Gordon Sneddon forwarded to Venessa Myall (HR Case Agent) the claimant's email of that date to him (JB343). In that email, Gordon Sneddon referred to the allegations against the claimant being '*very sketchy on investigation notes*'. He stated '*I think he is pushing his luck with the request for a two week delay.*'

(ddd) Also on 13 January 2020 Colin Rae sent an email to the claimant confirming the arrangements for the rescheduled meeting on 21 January and also sending those details by letter (JB342). The claimant was reminded of his right to bring a trade union official or employee representative. That letter was also sent by email (JB342). The claimant replied to Colin Rae on the same day (JB353). In this email the claimant stated:-

"In my request on 10th January for the meeting to be moved to at least a fortnight away, this was following on legal advice to allow adequate preparation time. I am still awaiting a subject access request from employee services and even the lead time on this is 30 days. I have had to do this and send away for it as I was not allowed to send emails on the brief access I had. I tried to point out that although Mark Donaldson supervised the two hour access, I was put under enormous pressure to rush through the files as he kept reminding me that he had other commitments else clear before even the two hours were up. This did not run as smoothly as we had technical glitches along the way and having to reprint some of the stuff. I managed to hurriedly obtain what I could within the timeframe while being constantly mindful that the supervisor had to leave. I was not allowed access to salesforce which I needed. I need a detailed PA report for my sales and time did not allow this. The request for at least fortnight delay is to at least

allow for all this things to be resolved (sic) and the preparation on my part. The 21st January date is still short of the fortnight request.”

5 (eee) Colin Rae replied to the claimant’s email on 14 January 2020 in the following terms-

10 *“I refer to your email 13 January 2020 requesting a further rescheduled date to hear your grievance which was sent by you on 14 December 2019 and have attached a letter confirming the rescheduled date.*

15 *With regards to the grievance process the hearing is for you to discuss the nature of your grievance and how this can be resolved. It is likely that I will need to carry out investigations following the hearing which may involve speaking with other employees and obtaining relevant information and / or reporting information relevant to your grievance. You reference sales point and a detailed PA report and to assist you if you let me know what information you need specifically for your grievance I am happy to request this information for you to avoid any further delays.*

20 *It’s really important that we deal with your grievance timely and if there are any further delays we may need to review how to proceed i.e. do we investigate with the information that we have.*

25 *Thanks,”*

30 (fff) On 14 January 2020, Colin Rae sent a letter to the claimant (JB355) agreeing to his request to again reschedule the grievance meeting. The meeting was rescheduled to 21 January to give the claimant more time to prepare. In that letter the claimant was reminded of his right to bring a trade union or work colleague representative with him to that meeting. Later

on 14 January, at the claimant's request, the meeting was rescheduled to take place in the Uddingston office on 30 January 2020. Email correspondence confirms that position (JB424).

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(ggg) Gordon Sneddon allowed the Disciplinary Hearing to be rescheduled from 15 January to 23 January. Normally any re-scheduled meeting is arranged within 5 working days of the original date. On 15 January 2020, Gordon Sneddon sent an email to the claimant informing him of this rescheduled meeting (JB350 – JB352). In this email Gordon Sneddon set out further details of the information on which the allegations of gross misconduct were based. He stated :-

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“Due to GDPR rules I am unable to send you in writing the full customer details, however I have added a bit more detail to the documents entitled AP2 and AP3 in order to help you. I have also detailed more thoroughly the allegations from documents AP1, AP2 which I have outlined below.”

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Gordon Sneddon then set out further information on the allegations. In respect of the three accounts booked for three properties in the same street (re the info contained in AP1, now referred to as ‘3 Virgin Media Accounts’). That information included the place where the two people who had complained of ID theft re these accounts lived, that those individuals’ details were used to check and that the fraud department cleared their records with the credit bureau involved. Gordon Sneddon set out that all three of these orders were loaded and credit checked using the same bank account details, which details were for a person residing in Clackton- on -Sea and that in all three accounts the named individual had contacted the respondent claiming that they never requested the services, with two complaining of ID theft. He set out that the person on-boarded for the property at no 18 of that street lives in Swansea, the person on boarded for the property at no 25A lives in

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Clackton on Sea and the person on boarded for the property at no 21 lives in Southend- on -Sea. The orders on boarded by a Field Sales Agent would normally relate to properties in the postcode being worked by them. Some sales in other areas may be on boarded as a result of 'family or friends' referral.

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In that email, Gordon Sneddon also set out further information in respect of the further instances of bank details being entered against more than one account (re the info contained in AP2, now referred to as 'Evidence of duplicate bank accounts'). He set out information in respect of four occasions where the same bank details were used for two separate orders. That information included details of the addresses where the same bank details were used, the dates that these orders were on boarded, and the addresses which the orders were in respect of. It was set out that the same bank details were used for an order at a street in Glasgow and a Square in Edinburgh; that the same bank details were used for an order at a street in Glasgow and a road in Cardiff; that the same bank details were used for an order at a court in Edinburgh and an oval in Paisley and that the same bank details were used for an order at a road in Croydon and an oval in Paisley. He stated that the person at the property at the Oval in Paisley had never paid for the services and was scheduled for a disconnect and that the person at the Road in Croydon had complained to the respondent re ID theft.

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In that email, Gordon Sneddon also set out further information in respect of cancelled orders (re the info contained in AP3, now referred to as 'Cancelled orders, uncontactable or customers claiming they never ordered'). That information listed details of the orders re 19 separate addresses in Glasgow, one in Croydon and one in Kilmarnock, stating the position re that order e.g. 'customer claimed they never ordered'. In that email Gordon Sneddon stated:-

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"As stated in your invite letter, the documents showing the account details will be available on the day of the meeting in advance, or alternatively you can come into the office 48 hours or more before the disciplinary hearing, where I can go through the evidence with you."

(hhh) One of the reasons why the claimant had requested a re-schedule of his Disciplinary Hearing was that he was also progressing his grievance. The claimant mentioned that fact in his request for reschedule of the disciplinary hearing. Gordon Sneddon knew that he claimant had raised a grievance but had no input to that process and did not know the subject matter . In his email to the claimant of 15 January, Gordon Sneddon said:-

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“I can’t comment on the other outstanding matter as I am purely dealing with the disciplinary process. I note you have put in a data subject access request but I can’t delay the disciplinary hearing for 30 days as the allegations are serious and need to be dealt with in a timely manner. If however during the disciplinary meeting you believe there is a piece of evidence you want to refer to, I can give you supervised access to your system to find it, and if I consider it relevant, I can adjourn the hearing to consider it.”

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(iii) Also on 15 January 2020 Gordon Sneddon wrote a letter to the claimant (JB358) confirming that the disciplinary hearing would take place on 23 January, and that the Disciplinary Policy allowed a hearing to be rescheduled with in a five working day period. It was confirmed that the offer of access to the systems stood. The claimant was reminded that he was entitled to be accompanied by a trade union representative or fellow worker. The claimant replied to that correspondence by email to Gordon Sneddon on 16 January 2020 (JB367). The claimant sought further time to consider the information now provided and asked for the disciplinary hearing to be again rescheduled. He stated:-

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“I do not accept your contention of enough notice given the detail now provided in the email of the 15/01. I also

do not accept that the allegations are clear in the invitation letter nor were they discussed in any detail at the investigation meeting with Marc Donaldson on the 19th December 2019. The only 'detail' in the letter of 8th January is a bold assertion that I have manipulated customer data to pass credit check.

You have now provided me with seven specific contracts that you refer to and twenty one other matters all of which require me to consider without the benefit of documentation relation to each matter. Whilst I appreciate that these matters should be dealt with as expeditiously as possible, that has to be balanced with my right to consider the allegations and the evidence presented and to formulate my position on each point. I do not believe that I will have time between now and the 23/01/2020. I will need access to the documentation on each matter you refer me to , to allow me to prepare properly. I leave that up to you how this can best be carried out given I am suspended and have no access to any documentation. Given the seriousness of the allegations, I would urge you to consider what I regard as a reasonable request."

(jjj) Gordon Sneddon acknowledged that email from the claimant on the morning of 17 January and sent a substantive reply later that day (JB366). He proposed that the claimant meet him to access the systems and discuss the allegations on 20 or 21 January and that the disciplinary hearing would not be further rescheduled and would proceed on 23 January. The claimant replied to this in his email to Gordon Sneddon of 20 January. His position was that the allegations were still not clear and that he needed time and more information. Gordon Sneddon replied to that email as follows:-

5 the evidence of the individuals living at an address other than
the one where the services were to be provided. His position
was that he could give no explanation for the circumstances
other than that he entered in good faith the information given to
him by the customers and could not remember these particular
accounts. The claimant maintained that he was not clear about
the allegations against him. At the end of the meeting, once it
had been arranged that the hearing would continue the
following week, the claimant stated that he was answering the
10 questions *'on speculation'*, that he had an outstanding
grievance and that he found it *'strange'* that Gordon Sneddon
was chairing the disciplinary hearing (JB599). The claimant's
position was that Gordon Sneddon was *'mentioned in part'*.
Gordon Sneddon said that he was unaware of that. The
15 claimant replied *'I Know. I'm not saying you did, just strange
you are chairing.'* The claimant said *'I would like to make a point
that the evidence is not here and you are setting the date of
next Thursday, I find the timescale unreasonable.'* It was
discussed that the claimant was a member of the
20 Communications Workers Union. Gordon Sneddon's position
was *'In my experience with the union they have always been
able to supply someone with a week's notice.'*

25 (nnn) Following the meeting on 22 January, Gordon Sneddon found
out who was dealing with the claimant's grievance. He then
spoke to Colin Rae. Colin Rae assured Gordon Sneddon that
he was not compromised in hearing the claimant's disciplinary
and that he was not named in the grievance raised by the
claimant. Gordon Sneddon did not see the grievance raised by
30 the claimant. When later viewing the papers for this Tribunal
Hearing, Gordon Sneddon became aware that he had been
copied in on some emails which were relied on by the claimant
in his grievance. These emails were in relation to missed
installations. Gordon Sneddon had been copied.

5 (ooo) Gordon Sneddon carried out some further investigations during the adjournment of the disciplinary hearing. He asked Leslie Owens about the Salesforce system, with a view to finding out if anyone else could have entered the information recorded against the claimant's agent number. JB411 is an email drafted by the respondent's Head of Commercial, Field Sales and forwarded to Gordon Sneddon by Leslie Owens on 24 January. That email explains the workings of the Salesforce system used by the Field Sales Agents. It states:-

15 *"Salesforce is a secure customer system, for a user to log in to a device for the first time it requires to factor authentication so rouge access is not possible. Orders launched from salesforce carried the user information into the automation system and when the order is completed automation writes back to salesforce creating an interaction that can be seen against the premise and or prospect.*

20 *Once an order is submitted via automation (launched from salesforce) the system will attempt to write the order to ICOMMs and if the order is 'Clean' the account and work order created for the customer. Orders requiring work ('Exceptions') are the worked by SOE and keyed using the details placed on automation. Once ICOMM's accounts are created the data flow (sic) through the systems populating all reports (PA, commissions etc.)'*

30 (ppp) From the further investigations, Gordon Sneddon understood that Salesforce was a secure system. He understood that for an agent to book onto the salesforce system they would first require to enter their secure ID and password. He knew that every employee has to complete security training every year, including training on the importance of having secure

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passwords, and not disclosing passwords to anyone. Gordon Sneddon understood that it was a statutory requirement for all of the respondent's employees to complete that annual training. The evidence in AP1, AP2 and AP3 indicated to Gordon Sneddon that agent number 20087 (the claimant) had logged on with his ID and password and entered the information on to the salesforce system. The claimant had not suggested that anyone else had entered the information but had asked for information to prove he was in the street when the orders were put on the system. The GPS records of the company iPad issued to the claimant were retrieved (JB774 – JB778). These records show that the iPad issued to the claimant was on the named street at the time when these orders were on boarded. Further investigation was also carried out on the information held re AP2. JB425 is an email forwarded to Gordon Sneddon showing the outcome of reports from the respondent's Equifax system showing the instances of duplication of bank details. Investigation was also carried out on the information held by the respondent showing that the various individuals were not listed as being resident at the premises where the services were booked. JB412 shows the email trail of this investigation. The claimant sent an email to Gordon Sneddon on 28 January requesting further clarity and evidence on the allegations. Gordon Sneddon replied to the claimant on 31 January with further details and stating:-

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"I am sorry this is taking me longer than first anticipated. As you will appreciate having access required to get the information you have requested and relying on this from other parties I have spent two days of my four days this week on the case and will be working on this again tomorrow."

(qqq) On 30 January 2020 the claimant's grievance hearing was held. Present at this meeting were the claimant, Colin Rae (Head of MDU Business and the Senior Manager asked by the People Team to hear the claimant's grievance), Maureen Wallace (note taker) and Debbie Kelly (HR). The typed notes of this meeting at JB 426 – JB444. Colin Rae had previous experience in dealing with investigations, disciplinaries and grievance hearings for the respondent. Colin Rae was sent the claimant's emails to Craig Clarke of 6, 9 and 14 December 2019 and took these to be the basis of the claimant's grievance. At the start of the meeting the claimant confirmed that his grievance was in respect of (1) unfair allocation of doors and (2) unfair and detrimental treatment since joining Craig Clarke's team. The notes of the meeting reflect that the claimant confirmed that this was as set out in his letter to Les Owens but that '*there have been other events which I feel are linked to these and may touch upon them*' (JB426).

(rrr) Colin Rae investigated the matters raised by the claimant at the grievance meeting. As part of his investigation into the claimant's grievance, Colin Rae received and reviewed the documents in Joint Bundle from JB445 – JB452, and JB454 – JB461, inclusive. These were provided to Colin Rae by the claimant after the grievance meeting. These documents include print outs of Walkcards. The document at JB452 is a table in respect of all of the Sales Agents in Craig Clarke's team. It shows each person's employee number, Rep code, name (some anonymised), region, line manager (all Craig Clarke), total pay and customer target. This shows the claimant's earnings as being fifth highest in the team of 22. The claimant's customer number target is 32, which is the same as the majority of others in the team. One of the team members has a target of 18. One member of the team has a target of 42.

(sss) As part of his the investigations into the claimant's grievance, Colin Rae asked Debbie Kelly to contact John Horspool (Head of Field Sales) in respect of the issue re the car check. Debbie Kelly did so and on 3 February 2020 John Horspool sent an email to her in the following terms:-

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"I was asked by Craig Clarke to assist him with BC's vehicle check in Bellshill car park. Craig came into the office from his inspection of the vehicle in the office car park and specifically asked me to assist him with BC who he said was being unreasonable in relation to his vehicle check. I agreed to come down and met Craig and BC in the car park. Craig explained to me that he had explained to BC that his car was not in a suitable state for work. I looked inside the car boot and it was a complete mess, with Virgin Media collateral mixed in with many items of personal clothing as well as footwear. I therefore agreed with Craig's assessment that the car was not being maintained to the agreed VM standard and suggested to BC that he went home and tidied the company car up over the next 24 hours, before coming back into work for a further inspection. Both BC and Craig agreed with this course of action."

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(ttt) As part of the steps taken by Debbie Kelly following on from the meeting re the claimant's grievance, Debbie Kelly completed the necessary data request from to allow the claimant to access emails and documents relevant to the issues raised in his grievance (JB463).

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(uuu) The claimant was invited to the reconvened disciplinary hearing by letter from Gordon Sneddon dated 3 February 2020 (JB464 – 465). Further information was sent to the claimant with that letter (JB466 – JB541). These documents set out the

5 information and evidence held by the respondent in respect of the allegations against the claimant that he had misused customer details in relation to loading media orders. It set out the information on the dealings in the particular accounts in question, including where the named customer had reported ID theft; showed the account booking details as displayed on the ICOMMS system, together with notes on what each screen shot showed; listed the credit checks carried out at the particular addresses; showed the ICOMMS system screenshot of the bank details entered at point of sale ('POS'); showed the ICOMMS screenshot of records of calls made to register complaints in the particular accounts; set out further details of the allegations; showed the ICOMMS screenshot of the particular booking orders made against the claimant's agent number at the particular addresses in question, including and order summary and information on method of payment ('MOP'); showed the ICOMMS screenshot of the bank account details entered at the POS of the particular orders; the ICOMMS screenshots showing the record of attempts to contact particular customers on the numbers provided re orders booked by the claimant on the numbers provide and before cancellation of the orders for non-payment; listed the number of occasions when the same phone number was used by the claimant when entering the customer's contact details, with the ICOMMS screenshots showing those accounts; listed and produced credit check information obtained from Equifax re particular accounts booked by the claimant (doc at JB495 sets out what this information is); listed and produced credit check information from Equifax detailing the credit checks carried out by the claimant re. Certain addresses; showed the information held on ICOMMS and by Equifax re. Contact made with a customer re an alleged DPA breach and incorrect email address; ICOMMS screenshots showing where there was duplication of customer email address in various accounts booked by the claimant;

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ICOMMS screenshot showing details of non-pay disconnect for particular account on boarded by the claimant; listed locations where the same telephone number was used on all former accounts (01 – 05) for a particular address, where two of the accounts were booked by the claimant, under two different names. Included in those documents is a screenshot from the ICOMMS system showing a record from 23 August 2019 (JB469) stating as follows:-

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““***CUS***EQUIFAX ONLINE DISPUTE*****

Good afternoon,

Your original request stated that you have not requested Virgin Media Services. Therefore, before referring your details to our fraud team we required clarification whether you believed you were a victim of fraud.

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The email response we received from yourself confirmed that you were a victim of fraud but believed it may be a clerical error. We have viewed the account notes and the original sales application and our findings confirmed an error had not occurred.

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In order to investigate further, please confirm your residential address and we will forward your details to our fraud team for an in depth investigation.

Kind Regards.”

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(vvv) Gordon Sneddon sent this further information and evidence because the claimant had asked for more information to show that he had done the credit checks in question and that he was responsible for putting the various orders on the respondent systems. Much of the information which was provided had been provided previously to the claimant but was now been presented in different formats e.g. showing the screenshots of the ICOMMS system where the information was held . The further detail on the allegations set out in these documents was

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5 that the claimant had falsified information to book orders at particular named premises by inputting the same bank account details on multiple orders and processing credit checks for various people in order to meet the respondent's Conditions of Sale (set out in documents at JB503, JB512, JB526). The claimant was not familiar with the layout of the ICOMMS screenshots or Equifax reports.

10 (www) At no point during the investigations did the respondent take steps to visit the properties where its services had been installed and where there had been duplication of details entered. Telephone contact was attempted but was unsuccessful.

15 (xxx) As part of his investigations in the matters raised by the claimant at the grievance meeting, Colin Rae interviewed Craig Clarke on 5 February 2020. The notes of that meeting are at JB545 - JB 557. Colin Rae asked Craig Clarke to explain the allocation of doors to the field sales agents in his team. Craig
20 Clarke explained that the doors are automatically allocated by the Salesforce system. The notes of the meeting at JB546 reflect Craig Clarke's position. These state that he said:-

25 *"The doors are allocated by the system. The system we use for this is salesforce. This gives a fair allocation of doors. This is a tool to allocate doors and it is done using postcodes. This tool allocates doors, has maps and allows sales agent to log the contacts they make. I can give you a demo of the system to help you understand how this works. We had a strategy for contacting all
30 doors, however they (sic) business changed and we now follow lightning doors. We also get a release tracker that now allows us to track doors that are about to be released and this allows us to get in early to a site. On*

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salesforce all sales agents are listed alphabetically running from Alan to Tom. This means that Brian is the fourth agent on the list. It is allocated as equally as possible. The system is loaded by postcode. There could be 30 doors or 5 doors on a postcode. It is what we call the postcode lottery. It then gets allocated alphabetically and the agents get roughly the same number of doors. It is done on an alphabetical split for example G52 9AB, then G52 9AC, G52 9AD, etc. We have to use salesforce as the team can then capture the KCAP's. When the regional managers go to their meetings, we can see the number of doors knocked and attempts made."

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And

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"I think it is the way that Les works in John Horspool's area, when we use this, and perhaps a customer calls in six months later, we can track back to see if they were already spoken to by one of our team. I guess it is a way of the business showing how successful we are being as they are investing all of this money and want to show that it is a success. They are spending so much money on the infrastructure."

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And

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"... Brian's other manager, Rob did not allocate like this. He would allocate each read to an area, but the feedback I got from sales agents was that this was not fair and they prefer my way of allocating doors."

And

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"The culture that Brian came from within his old team was that his manager allocated a full postal area. This is not my preference as it does not allocate the number of doors evenly and leaves the sales agents in isolation"

And

“... I was trying to allocate this fairly and Brian was used to having an area and I don't think this new way sat well with him.”

And

5 *“Going back to your question about new releases. This can happen 2 ways. You can get a brand-new release of postcodes which is easy to see and assign or you can get new addressees within a postcode that has already been assigned. This is more difficult to manage. If it is*
10 *an existing area, I would need to go into CMS to see what new addressees had been released. It is impossible to split these addressees as that postcode would already be allocated to a sales rep through the system. You can't split a 60 address into 2 x 30*
15 *addresses. You would have to manually carve these up and do (sic) that you would need to send out an email with the allocation.*

And

20 *“... It is very painful if you are trying to allocate 40 or 50 doors. It is so hard to do. If you do it by postcode you could give one person 75 and the next person six. I always try to divide it up evenly.”*

And

25 *“yes, would just assign the doors to the sales rep if they already had that postcode allocated. This could happen on the last few days of the month depending on when they were released. Then that sales rep got the benefit. Traditionally new homes are released at the end of the month. If Brian was talking to another sales rep he could*
30 *say, I have just been allocated new doors, because there had been a release in that postcode. Brian's previous manager had given him a full area and he would have had auto assigns if there were releases in that area at the end of the month. This could mean that a sales agent*

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could have two or four days in a new area before the end of the month. You might have four or five in your team who have won a watch. They would never come and say Craig should we be working them? They would naturally take advantage. I had told the team not to touch these new ones until the next branch meeting. CMS is about two days behind so I would not know these had been allocated until later.”

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Craig Clarke was asked about the claimant’s sales performance before and after joining his team. The notes reflect that he said:-

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“January 117%

February 125%

March 137%

April 106%

May 100%

June 137%

July 152%

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August 86% this can sometimes happen that a sales rep has aided but he was still above the minimum so received payment.

September 103%

October 124%

November 161%

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December 68%

Agents can sometimes have debts and crashes right after a really good month Brian’s performance did not drop within my team there were reasons why it did in December due to the number of days worked and then he was suspended.”

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He showed a demo of how the doors are allocated within Salesforce. Craig Clarke told Colin Rae that that system differed from the way of allocation used by the claimant’s manager, who had allocated a full postal area to a particular

field sales adviser. Craig Clarke's position was that that is not his preference as it does not allocate the number of doors evenly and leaves the sales agents in isolation. Craig Clarke explained to Colin Rae the situation when he would manually change the allocation of doors to particular sales agents.

5 This method involved Craig Clarke taking allocated doors away from some members of his team and re-allocating them to other members of the team, including the claimant. In the period when the claimant worked in Craig Clarke's team, the claimant was one of the members of that team who did not receive an auto allocation of lightening doors, and who were therefore

10 manually allocated doors by Craig Clarke, those doors being taken away from other members of the team. Craig Clarke received notice of how the automatic allocation had been made 24 hours after the doors had been automatically allocated to the Field Sales Agents by CHF. In the period between that automatic allocation and Craig Clarke becoming aware of how

15 the allocation had been made, the Field Sales Agents had the opportunity to try to sell to the doors they had been automatically allocated. When doors were re-allocated by Craig Clarke, they were not then fresh doors as a Field Sales Agent had had the opportunity to work on them.

20 At this interview, Craig Clarke was asked about the email the floor to claimant had sent him on 12 December. The notes reflect his position in this as being:-

"Brian sent this this (sic) and then came in and we had an informal chat. He said a lot of things were getting on top of him like the failed

25 *installs. I was getting piles of emails from AFMs saying when they went out to install they were getting a lot of 'not at homes'. I asked Brian about these and he said, why would they give me all of the details if they did not want the service . I believed him. We went out to the field to try and help him. I suggested going to see the customers as if*

30 *they could confirm that they had requested the services I could feed that back to install. Brian took this the wrong way. We visited two and they were not in. We just left the third. I just let it be."*

At this meeting Craig Clarke set out what he believe had initiated the issue which the claimant was raising re-his allocation of doors. Craig Clarke said (JB 549):-

5 *"I think I know where this started from. There was a system error at the end of November when we started to get a release in the J 52 area. It was our best ever release. It was just at the end of November these doors were released and this is what probably kicked this off. It was just before the weekend and all of these doors were released. I think*
10 *it was Thursday 28th of Friday 29th. They released G52 and I went on to Salesforce and auto assigned these to the team. I didn't know they were coming and had assigned the team to another area in Gourock. I assigned these to give the guys a head start on the Friday which meant the guys could go out and start on the Saturday. The guys went*
15 *out and I started to get calls to say they could not load the orders on. Then one guy went on and called me to say that his 30 doors had gone and he was back to 0. All of the doors went away. Brian was involved but would not have noticed this till the Monday as he does not work on a Saturday. I flew to Belfast on the Monday and got a lot of calls from*
20 *the team saying the doors had fallen off the system. They were taken off and did not come back until mid December. There were two things here. 1. I was in Belfast and did not see what was happening and 2. Brian was in Gourock and was not aware that the doors had fallen off. He thought this had been done deliberately. This was not the case."*

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(yyy) In relation to the issue of the claimant being asked to continue to work in Govan, the notes of the interview reflect Craig Clarke's position as follows:-

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"Brian had a location the same as Derek and David as they were at the top of the list on the postcode allocation. Brian did not stop working in the area until I pulled him out. He was still getting calls. When this happens an agent will go back and while you are there you will chart

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the other doors to make it worth your while being in that area. You would not lose time by driving to another area. This then generates more callbacks which keeps you going back to the area. This way of working is what Brian was used to when he was allocated a full area. This was the culture in Rob's team, that once you were in an area you did not have to travel."

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(zzz) In relation to the end of year review meeting, the notes of the interview reflect Craig Clarke's position as follows:-

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"It was exhausting. It was very demanding and training. Eventually we spoke about all of the issues regarding the doors and compliance. I had an answer to all of his questions. It was a good meeting and I explained the reasons for the J 53 issues and that this had not just impacted him. I felt 2.5 hours was a log (sic) time."

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(aaaa) Some of the investigations in respect of the grievance raised by the claimant were carried out by Debbie Kelly HR case manager on behalf of Colin Rae. As part of these investigations, information was obtained on the percentage of lightening doors which were allocated to Marc Donaldson's and Craig Clarke's team (JB542). Colin up Rae understood that Craig Clarke's team were issued a '*slightly higher percentage*' of lightening doors i.e. doors where the occupants at the address '*had never had the opportunity to take (Virgin Media's) services before.*

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(bbbb) On 11 February 2021 Debbie Kelly interviewed Leslie Owens (Regional Sales Manager). The typed notes taken that meeting are at JB585- JB588. During that meeting, Les Owens was asked about the outcome of the claimant's appeal of his grievance raised in 2018, which had been heard by Craig Clarke. The Notes record Les Owens as saying:-

5 “I’ve heard that he said that I upheld his grievance appeal in March 2019 and I didn’t uphold it, I partially upheld it. Outcome would be no contact with GM. Then I had to merge the teams into one when Rob Fergusson left. Brian was offered if he was uncomfortable with the change he could move to Marc Donaldson’s team as he was living near that area and he refused.”

10 (cccc) On 11 February 2021 the claimant’s then instructed solicitors sent an email to Gordon Sneddon (JB582 – JB583). These questions were asked and observations made on the documentation which had been sent to the claimant. The letter stated:-

15 *“It was not clear to our client as to what was being alleged and whether he was being accused of falsifying information on a lesser charge of failing to properly carry out regular checks. We appreciate that has now been clarified but only recently.”*

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Further time was requested to review the documentation provided.

25 (a) The reconvened disciplinary hearing continued on 6 February. The typed note reflecting the discussions on that date are within the Disciplinary Hearing notes, at JB59d9 – JB600. After a short discussion, it was agreed that the meeting would reconvene on 13 February 2021. The typed note reflecting the discussions on that date are within the Disciplinary Hearing notes, at JB600 – JB616.

30 The commencement of the hearing on that day it was noted that the claimant again and no representation the notes reflect the claimant’s position being as ‘no representation due to timescales’. Prior to the reconvened disciplinary hearing the claimant had been sent the type written notes of the hearings to date. Gordon

Sneddon went through the documentation which had been sent to the claimant. The claimant's position was that he took down the information which the prospect at the address given and only good down for the individual told him. Gordon Sneddon asked the claimant how it is possible that someone in Croydon could have given the same information as someone in Paisley. The claimant did not offer any explanation for the duplication of information.

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- (b) On 18 February the claimant sent an email to Gordon Sneddon again stating some concerns, in particular in relation to there being 'still some missing vital evidence' (JB625).. That email ended:-

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"Due to the various faults with the process that I pointed out to you I strongly feel that I do not have confidence in the way the whole process was carried out nor its fairness to conclude impartially."

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- (c) Gordon Sneddon took the decision to dismiss the claimant . The claimant was dismissed with effective date of termination of employment being 21 February 2019. In making his decision to dismiss the claimant. His letter to the claimant of 20 February 2021 setting out his decision and the reasons for his decision is at JB626 – JB635. The reasons set out in that letter accurately reflect the reasons for the claimant's dismissal. It is a long and detailed letter and set out Gordon Sneddon's summary and conclusions in relation to each of the matters. This letter sets out:-

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*"At the meeting we discussed the following:
the allegations of gross misconduct made against you, in particular the alleged misuse of customer and individuals details in relation to loading media orders. Specifically you have manipulated customer data in order to pass credit checks by using several bank accounts that do not belong to the individuals or addresses that you put the installations for."*

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This falls under “gross misconduct - doing or giving us reasonable grounds to think that you have done anything dishonest including theft or fraud or accepting an authorised commission’ in our disciplinary and dismissal policy. The allegations also constitute a breach of data protection.”

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- (d) In respect of each of the matters set out in appendix AP1 – AP3 and subsequent information provided, Gordon Sneddon noted the claimant’s position in respect of the information gathered by the respondent and set out his summary and conclusion. Gordon Sneddon believed that the claimant had used another person’s details to load orders at the stated addresses in order to pass the credit check, to avoid the order being abandoned and to make financial gain from the commission received. He took into account that the entry into the accounts in question had been entered using the claimant’s agent number and on his company iPad He took into account that the actions caused a breach of data protection which required to be dealt with by the respondent and be cleared on the credit bureaus system (Equifax). He took into account that the claimant did not provide an explanation as to why there was duplication of bank account details on various orders booked by him. He noted that it could not be proved who those bank details belong to. In making his decision, Gordon Sneddon considered it to be significant that the time frame within which the three orders on the same street were booked with duplication of details was 58 minutes, that the surnames on the email addresses attached to those orders were the same and that the bank details were the same. In relation to a number of the matters, Gordon Sneddon considered it to be significant that the claimant provided no explanation for the duplication of bank details on a number of accounts on boarded against his agent number. He took into account that GPS records had showed that the iPad issued to the claimant was at those addresses at the time the orders were booked under the claimant’s agent number. Gordon Sneddon did not accept the claimant’s explanation that he merely took down the information provided by the individual ordering

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the services. On the basis of the information collated in the investigation, and the claimant's lack of explanation on duplication of information in orders by him, Gordon Sneddon formed the belief that the claimant had, in respect of the various stated orders, knowingly used the same bank account details for more than one order. He considered it to be significant that two individuals had reported to the respondent ID theft in respect of the details on these accounts. On the basis of the information collated in the investigation, and the claimant's lack of explanation on duplication of information in orders by him, Gordon Sneddon formed the belief that the claimant had misused customer details when loading orders, to his advantage. He took into account that the claimant had received commission totalling £1016.41 on these orders and that the respondent had required to write off debt on the orders totalling £2393.32. He considered it to be significant that the accounts in question showed patterns of information being entered e.g. re time of residency at address. He took into account that there had been contact by individuals recorded on the respondent's systems re these accounts where the individual's position was that they did not live at the address and did not order the service. He took into account that the common factor in respect of the various issues was the claimant's agent number booking the orders. Gordon Sneddon considered that it would be '*highly unlikely*' that people would be giving the same bank account details and that the coincidence of that happening on the number of occasions in question was '*very unlikely to have occurred*'. Gordon Sneddon believed that the evidence before him showed that details which were not the details for the person to whom services were being provided were entered by the claimant so as to pass the respondent's credit checks and achieve the sale. The respondent's credit check process would not allow a sale of services to a person who had previously incurred debt with them. On the basis of the evidence before him and the claimant's position, Gordon Sneddon formed the belief that the claimant had acted in gross misconduct, with regard to the respondent's disciplinary policy, as set out in his letter to the claimant of 20 February 2021. Gordon Sneddon

understood that only one of these accounts had not been automatically transferred from Salesforce to the ICOMMS system (it being an 'exception' as detailed in JB411), and that the installation had not gone ahead on that account. He understood that in all the other accounts the information on boarded had been transferred automatically to ICOMMS from Salesforce, without any additional information being required to be entered.

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- (e) In making his decision to dismiss, Gordon Sneddon took into account that the claimant benefited from the sales made, particularly in respect of commission, and that the respondent had suffered a financial loss because of clearing debt incurred on the accounts. At the time of making the decision to dismiss, Gordon Sneddon understood that where the services were cancelled before installation, no commission would have been paid to the claimant. Craig Clarke had explained to Colin Rae at the investigating meeting in respect of the claimant's grievance that there would be a benefit in logging false sales because a sales agent would then make their 'gate' for commission, meaning that all of their sales were then paid a higher commission rate. This is recorded in the meeting notes at JB553 as follows:-

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"He would make his gate for commission which means all of his sales are paid at a higher rate. When they achieve their sales target they can achieve an accelerated rate, so four additional sales could get him there. It is worthwhile doing this even with the callback as they are paid for the rest of their sales at a higher rate. It is manipulating the figures for commission but this is very hard to prove. How can you prove that it is not a genuine sale?"

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- (f) At the time of making his decision to dismiss the claimant, Gordon Sneddon was not aware of the impact of sales figures on commission rate and that aspect did not form part of his reasoning of his decision to dismiss the claimant. Neither the fact that the claimant was

progressing a grievance, nor the substance of the grievance had any impact on the decision to dismiss the claimant for gross misconduct.

5 (g) The level of the claimant's PIC rate was not part of the reason for dismissal. The information within AP3 in respect of such cancellations was included because of the linkage with the particular customer also shown in AP2.

10 (h) The team which the claimant had been in prior to moving to be part of Craig Clarke's team had been looked at by the Investigation team. Issues had been raised in respect of the team as a whole, but there was no evidence to implicate any particular person. This was noted in the email at JB 210. That previous investigation was not considered by Gordon Sneddon and was not part of his decision to dismiss the
15 claimant.

(i) The claimant was offered the right of appeal in respect of his dismissal. The claimant sent an email to Gordon Sneddon on 27 February setting out that he did wish to appeal. He gave no indication that he
20 considered the reason for his dismissal was his race. That email (JB646) stated:-

25 *"I do wish to appeal. Given the detail in your letter and amount of issues I require to cover,, I will require a further 10 days to lodge details of the grounds of my appeal.*

*Nevertheless please note my grounds of appeal are in general terms that you failed to properly investigate the matter, that you arrived to unwarranted conclusions, that you failed to consider properly matters that I raised and that you arrived at conclusions before investigating
30 certain matters.*

You failed to follow a fair procedure.

In addition given the delay between allegations and the point you raised the issue with me, I believe the allegations you make, you were prompted by the grievance procedure that I had inserted (sic).

Further, I am in the process of checking the notes you have sent me for the 23rd January, six and 13th February. During this process I have discovered several inaccuracies and I require further time to finish the process and exhibit to my conclusions on these notes.

Please acknowledge receipt of this letter and revert to me on the points I have raised above.”

- (j) Gordon Sneddon replied by email on the same day (JB646) acknowledging receipt of the claimant’s email and stating that he would ‘*make arrangements for someone not connected with this case to hear your appeal*’. The decision in respect of the appeal was made by Brian Forrest (then Technical Site Build Engineering Manager). Brian Forrest had never encountered the claimant prior to this appeal process. Brian Forrest’s involvement with the respondent is in network strategy, engineering and technical innovations. He is not involved in the sales function of the business .Debbie Kelly asked Brain Forrest to deal with this appeal because he was the most appropriate senior manager in the area. Prior to this involvement, Brian Forrest has dealt with a number of disciplinary and grievance hearings. This was the first appeal that that he had dealt with. Prior to the appeal hearing, Brian Forrest viewed the guidance on dealing with appeals in the respondent’s Case Management Portal, which refers to guidance issued by ACAS. He understood that in his role he required to have no pre-determined judgment and that he required to ensure that the process was ‘*as per the policies and fair*’. He understood that it was important that he remain impartial and that his role was not to re-investigate, but to consider if the process had been fair and the decision had been ‘*within the reasonable band*’.

- (k) Brian Forrest viewed all of the notes and information from the disciplinary hearing stage. On 5 March 2020 Brian Forrest sent a letter

to the claimant inviting him to an appeal hearing on 12 March 2020 at the respondent's offices in Uddingston (JB647). The claimant was informed of his entitlement to bring a fellow employee or trade union representative to this meeting. On 10 March 2020 Brian Forrest sent an email to the claimant (JB648) informing him that unfortunately due to unforeseen circumstances he needed to reschedule the meeting due to be held on Thursday 12th March to Tuesday 17 March. An invitation letter was sent in respect of that rearranged meeting (JB650). The claimant replied to Brian Forrest by email on 10 March as follows (JB649) :-

"I am in hospital and I cannot open your secure envelope messages. If I am out of hospital by Thursday then I would attend the meeting in Edinburgh.

I continue to receive communications from your customers, please have this stopped immediately.

I have had time to consider the practice ratified by virgin media to the effect that customers data was to be held on personal phones. I am concerned this may be a breach of GDPR. Please let me have your GDPR policy and your views on this within the next seven days.

I am also concerned with the fact that Gordon Sneddon in my disciplinary questioned the referral to address prospectus to check previous customer details and virgin media ratifies the practice as information about previous customers is readily available to any salesman in view of GDPR. Please me your view on this as well within the next seven days."

- (I) Brian Forrest spoke to the claimant following that email. Brian Forrest didn't think that the GDPR Policy was relevant to the claimant's appeal. The claimant confirmed to Brian Forest that his concern was re Virgin Media customers contacting him while he was suspended. Steps were taken to stop that. On 16 March Brian Forrest sent an email to the claimant (JB655) informing that due to the business response to the Corona Virus pandemic, the meeting on 17 March would not be

conducted in person. Later on that day an email was sent with details of how to join the meeting by WebEx (the respondent's internal video communication system) (JB656).

5 (m) At the conclusion of the meeting on 17 March, the claimant raised that he had not received a reply re his GDPR request. The same day, Debbie Kelly sent an email to Sphoorti Desai (659) seeking an update on that request. That request was dealt with by the respondent's Employee Services Team. Debbie Kelly and Sphoorti Desai had email
10 communication about this 18 March 2019 (JB666). It was noted that the documents had been sent by email to the claimant's work email address after the claimant's date of termination of employment of 21 February 2019. Debbie Kelly passed on the claimant's personal contact details for the documentation to be sent to him. The claimant
15 emailed Brian Forrest on 18 March in respect of customers contacting him and re the his data subject (DSAR) request and again requesting a copy of the GDPR Policy (JB669). Brian Forrest replied on the same day (JB669). He informed the claimant of the contact details for Employee Services, the DPO team and the Information Commission
20 Office, should he wish to make a complaint about any breach of GDPR or DSAR. The documents were sent in the post to the claimant by Royal Mail Special Delivery but were later returned as undelivered (JB671).

25 (n) Also on 17 March, Brian Forrest emailed the typed notes of the Appeal Hearing to the claimant (JB660). Those notes are at JB661-JB665). When sending the notes, Brian Forrest asked the claimant to highlight any proposed adjustments and return to him by 23 March. He informed that he would look into the matters discussed that week.

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(o) The notes of the appeal record that Brian Forrest asked for confirmation that the claimant was happy to proceed without a representative, that the claimant stated that he was not aware that Debbie Kelly would be present, that it was confirmed to the claimant

that that had been set out in the invitation letter and that the claimant asked for clarification that Brian Forrest was not the Brian who had been the notetaker at the previous hearing. Brian Forrest summarised his understanding of the claimant's appeal points as being re.

5 (1) inaccuracies in the notes of the disciplinary hearings; (2) failure to properly investigate; (3) failure to consider matters raised by the claimant and (3) that the delay between the allegations and the disciplinary process being taken against the claimant suggested that the disciplinary process was stated because the claimant had raised a

10 grievance. There was discussion on the claimant's position in relation to each of these appeal points, as set out in those notes. Brian Forrest took *'in good faith'* the claimant's position that he did not receive the notes of the adjourned disciplinary meetings until after the 13 February meeting. In relation to points (2) and (3), the claimant's position was

15 that he believed there was a lack of 'support evidence', in particular the email confirmation of sales which he had asked Gordon Sneddon for and was told that they could not be produced. These are the emails automatically generated on the respondent's KANA system and sent to the ICOMMS system when the salesperson enters the

20 customer's details onto the iPad and the order is booked on. The claimant was familiar with the layout of these KANA emails but was not familiar with the layout of information in the ICOMMS system. The claimant's position was that the confirmation of sales report from the KANA system and verification of the orders, by visiting the addresses

25 or otherwise, would have changed the outcome of the disciplinary hearing. In relation to point (4), the claimant relied on him having raised a grievance against his manager on 6 December 2019 and the being suspended on 19 December 2019. The claimant also relied on having objected to Gordon Sneddon's involvement in the disciplinary.

30 The claimant's position to Brian Forrest was that he had raised that issue with Marc Donaldson.

- (p) Brian Forrest took in good faith the claimant's position that his access to the documents from the KANA system was pivotal to his case. Brian

Forrest took steps over the course of the next three weeks to contact the right person to enable access to the KANA system. He then produced to the claimant the documentation requested by him from this system (JB741 – JB743). Once he had recovered these documents, Brian Forrest cross referenced the information contained within them against the Equifax and ICOMMS documents which had already been sent to the claimant. He found that all of the info in the requested KANA documents had already been sent to the claimant in the different formats. Brian Forrest considered that it was appropriate for him to carry out some further investigations in respect of the claimant's appeal.

(q) Brian Forrest sent the typed notes of the Appeal meeting to the claimant by email on 17 March (JB660). The claimant sent to Brian Forrest a copy of the typed notes of the disciplinary and appeal meetings with handwritten amendments (JB713 – JB740). On 26 March Brian Forrest replied confirming receipt of these and that as agreed he would then begin his investigations (JB684). The claimant replied to that email on the same day, in respect of the outstanding subject access request and customers contacting him (JB684). On 27 March 2020 Brian Forrest sent an email to Gordon Sneddon asking him some questions about the disciplinary hearing, in particular with regard to the accuracy of the notes of the disciplinary hearings. Gordon Sneddon replied on 27 March (JB680). His position was that the notes were accurate and that the claimant had been given the opportunity to comment on these and had no substantive changes. Gordon Sneddon provided Brian Forrest with his comments on the amendments to the notes suggested by the claimant (JB681 – JB682). Debbie Kelly carried out some of the investigations after the appeal hearing, on behalf of Brian Forrest and due to his other work commitments. Debbie Kelly contacted Ady Pye and Chris Chapman (Fraud and Revenue Assurance Analyst). Ady Pye had told her that Chris Chapman had carried out the initial investigations which led to the disciplinary proceedings. The email correspondence between

Debbie Kelly and Chris Chapman is at JB 685 – JB687. Questions were asked and answered in respect of the bank accounts involved, the system searches, the proof of residency required, the process when a customer complains of ID theft, if visits to the properties are usually done and why the police were not contacted.

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(r) On 12 May 2020 Brian Forrest emailed Marc Donaldson to check if the claimant had raised with him any concern re Gordon Sneddon's involvement in the disciplinary process (JB696). Marc Donaldson replied that he had kept the emails from the claimant. Sending these to Brian Forrest and confirming that the claimant had not mentioned Gordon Sneddon in these (JB696).

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(s) Brian Forrest carried out investigations re the claimant appeal point (4). He contacted Ade Pye, who had been involved in the initial investigations and asked him to give him a breakdown of the timeline of events. This was provided and is set out by Brian Forrest in his letter to the claimant informing him of the outcome of the appeal (JB 710). Brian Forrest's decision was to uphold the decision to dismiss the claimant. The reasons for that decision are as set out by Brian Forrest in his letter to the claimant of 14 May 2020 (JB701 – 712). Brian Forrest noted that the KANA automated email confirmation of the sales, which the claimant had said would have made a difference to the outcome, contained the same information which had been presented to the claimant in different formats and did not provide any additional information. Brian Forrest was satisfied that the evidence showed that the claimant was responsible for the various on booked orders where there was duplication of details, etc. This was set out in his letter (at JB706 and JB709). His position was that the information from the KANA system would not have changed the outcome and "*In fact the confirmation emails now show that you did unquestionably on board the customers, using the names and bank details as detailed throughout this process.*" Brian Forrest was satisfied that the decision

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to dismiss was fair and based on reasonable grounds. This was set out in his letter (JB707) as follows:-

5 *"I believe that had this been a one-off isolated incident he may have reached a different outcome i.e. a lesser sanction. However, given that other complains were made by customers relating to identity theft, each of these with different addresses using shared bank and telephone details yet all with you as a commonality, it is reasonable that the investigation into these matters was passed to disciplinary. It*

10 *is also my view that although the coincidence is possible, it is highly unlikely that multiple different people can provide you with exactly the same bank details or telephone numbers months apart in different cities. Furthermore, this apparent coincidence is repeated several times across the accounts that have been on boarded by you and*

15 *reviewed as part of the process.*

Furthermore, from the evidence I have reviewed it is my belief that you know the Virgin Media credit checking criteria and how the result can be manipulated to prevent being denied a sale and commission. In the vast majority of your orders reviewed the individual you have credit

20 *checked has recently moved into the address and has resided at a previous address for three years. In nine of the 11 orders that I have reviewed from your sales order entry report emails the individuals have all recently moved into the address and have a previous address history of three years....*

25 *I do have an observation on the last account Gordon Sneddon has detailed in his bullet .7. In my view this is perhaps the most concerning regarding you and your behaviour relating to the deliberate manipulation of data entered to circumvent the virgin media credit check process. The facts, as detailed by Gordon Sneddon, pertaining*

30 *to you knowing the previous debtor, as you were also the salesman involved on the previous account being created really leaves you without any defence. The similarities in the phone numbers, passwords and email addresses all link the new account to previous accounts at the same address. From the evidence and information I*

5 *have I believe that used bank account details that were used for another customer at a different address in a different city. The commonality in the orders on boarded as you. However this account specifically despite the other details being similar. Once again another*
different person has just moved in with a previous address in a different part of the UK. On this particular account I it's reasonable for you to the situation given that you had also on boarded the previous account. The identity of the person and time residing at the onboarding address appears to be insignificant providing you can get a previous
10 *address and name of March to secure the credit banding. By using any direct debit details I believe you have managed to avoid the requirement for upfront payments to be taken. This behaviour is demonstrated as a trend across the accounts listed.*

15 *In summary I have read through all of the minutes and associated appendices in relation to the disciplinary decision. I have found Gordon Sneddon's investigations to be thorough and fair. I concur with his decision to summarily dismiss you. I find that this decision is reasonable based on the volume of commonality relating to the accounts detailed. Accounts have been created by you resulting in*
20 *three claims of identity theft including using the same bank details and telephone numbers and at different addresses by different people living in different cities. The one consistent factor is your rep ID 20087. I don't believe that is a coincidence and I have reasonable belief that you have deliberately manipulated data to circumvent the sales credit check process and as a result have benefited financially through*
25 *increased sales and commission paid. I regard your conduct as a breach of trust and that the decision to summarily dismiss was fair and reasonable as it's deemed as gross misconduct in line with virgin media disciplinary policy."*

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- (t) The matter had been passed as a 'high level complaint' because of there being multiple (more than one) claims of identity theft.

- 5 (u) The KANA documents (referred to at JB706) were sent to the claimant with the appeal decision letter from Brian Forrest dated 14 May 2021 (JB701 – JB712). That letter accurately sets out the investigation steps taken by or on behalf of Brian Forrest re the claimant’s appeal and the reasons for his decision to uphold the decision to dismiss.
- 10 (v) At no point during the claimant’s disciplinary process or disciplinary appeal process did the claimant allege that he was being treated differently because of his race, or that his race was a factor in the treatment he was or had been receiving.
- 15 (w) On 24 February 2020, Colin Rae wrote to the claimant setting out his decision on the claimant’s grievance against Craig Clarke. That letter is at JB637 – 645. It sets out full details of the reasons for his decision not to uphold the claimant’s grievance, in respect of all of the various matters. Tables are included in respect of the claimant’s performance compared with others in Craig Clarke’s team, in respect of commission earned, PIC rate and percentage of lightning doors allocated. That letter accurately sets out the reasons for Colin Rae’s decision.
- 20 Mediation between the claimant and Craig Clarke was offered ‘*as an opportunity to move forward*’. At the time of making his decision, Colin Rae was unaware of the outcome of the disciplinary process against the claimant.
- 25 (x) The claimant has obtained alternative employment since his dismissal.

Respondent’s Submissions

12. The respondent’s representative made full written submissions which will not be repeated here. In respect of the unfair dismissal claim, the respondent’s representative relied upon British Home Stores V Burchill [1980] ICR 303 and submitted that all three stages of the test set out there had been passed. Further reliance was placed on:-

Lees V The Orchard [1978] IRLR 20, EAT

Clark V Civil Aviation Authority [1991] IRLR 412

Trust Houses Forte Leisure Ltd V Aquilar [1976] IRLR 251

Essop and ors V Home Office (Uk Border Agency) and another 2017
ICR 640, SC

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13. Where the respondent's representative's submissions are accepted, that is commented on in the decision section below.

Claimant's Submissions

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14. There were a number of matters which the claimant set out in his submissions and his comments on the respondent's submissions on which evidence was not heard. The Tribunal required to determine the case based on the evidence heard. Guidance was given to the claimant during the hearing that it was important that he ensure that his case was put to the respondent's witnesses. It was not put to the respondent's witnesses that the reason for their treatment of the claimant was because of his race.

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15. The claimant's submission in respect of his unfair dismissal claim was that the respondent failed to carry out a reasonable investigation and a fair and proper procedure or to have a genuine belief in the claimant's guilt. The claimant further submitted that on the facts and circumstances prior to the disciplinary hearing an inference should be drawn that the motivation on the part of the respondent was as a result of his ethnicity, race and/or colour.

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16. In relation to the claim for unfair dismissal the claimant's position (as set out in JB26 – JB27 and in his submissions) was that:

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- the allegations were not clear,
- that the respondent failed to carry a reasonable procedure by not delaying further to clarify matters,
- that the disciplinary and appeal notes are not accurate reflections of what was discussed,
- failure to check who the bank accounts belonged to,
- failure to check when the installations were carried out,

- failure to properly investigate the individuals at the various addresses,
- failure to notify the police,
- failure to cross check the names to see if the individuals were colluding to defraud the respondent,
- 5 • failure to check if all the contracts related to the claimant,
- that the appeal was not a re-hearing and failed to cure the above,
- failure to consider the claimant's good disciplinary record and character,
- failure to assist the Claimant in relation to his subject access request, and
- failure to hear the grievance prior to the dismissal.

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17. At the stage of written submissions, the claimant asked the Tribunal to accept that there were commonly held beliefs, stereotypes, fears and assumptions about him by his colleagues, based on his race and colour. Further, he asked the Tribunal to conclude that such commonly held bias was the case for the

15 'micro behaviours and aggressions which were to his detriment and which caused a domino effect such that he faced disciplinary action which was carried out and concluded in a way that was unfair and unreasonable'. He suggested that in appointing Craig Clarke to hear the claimant's first grievance and in other ways the respondent showed disregard for the claimant's

20 grievance and discrimination matters. That position was not put to any of the respondent's witnesses.

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18. At the stage of his written submissions, the claimant's position was that the reason he did not raise in his grievance that he had been discriminated against

25 because of his race was '*due to his personal experience any such issue raised overtly could compound any difficulties*'. Although those words were set out in the paper apart to the claimant's ET1 (at para 16) there was no evidence before the Tribunal in respect of that position. The Tribunal placed weight on the fact that in his disciplinary proceedings and at the outset of his grievance

30 it was not the claimant's position that he had been discriminated against on the grounds of his race.

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19. In his submissions, the claimant's position was that he ought to be able to rely on the grievance he raised in 2018. The circumstances of that grievance were

not included in the ET1 submitted by the claimant's then legal representative on his behalf. That grievance in mention in para 2 of the paper apart to the ET1, only in the context of Craig Clarke having heard that grievance, which are the circumstances relied upon in the victimisation claim (under section 27 of the Equality Act 2010). The provisions in relation to the time period for raising a claim before the Employment Tribunal are set out in the Equality Act 2010. The Tribunal heard no evidence on the substance of the claimant's grievance raised in 2018, other than as set out in the Findings in Fact. The substance of that 2018 grievance were not part of the claimant's claim before this Tribunal. That is clear from the further particulars provided by the claimant in response to the Order. The claimant stated in his submissions that the 2018 grievance was 'inextricably linked' to his disciplinary and that 'without evidence relating to it, which provides the background, the respondent could have presented a very skewed picture.' The Tribunal could only hear the case before it and determine the legal issues from the evidence heard. On the evidence before the Tribunal, it was found that the disciplinary proceedings were not linked, either to the grievance raised by the claimant in 2018 , or his grievance raised against Craig Clarke. The disciplinary proceedings were triggered by the investigations, which in turn were triggered by the customer contacts, as set out in the findings in fact.

20. In the claimant's submissions, he stated

"The whole case which has been brought by the claimant is about a wider context and the company having a culture of ignorance of and also acceptance of discrimination, contrary to their no tolerance policy."

That position was not part of the claimant's evidence before the Tribunal and was not put to any of the respondent's witnesses. There was no evidence before the Tribunal to support this position. The claimant's position in his submissions was also that it should be within judicial knowledge that '*there is a general suspicion of black men as a threat or to be feared / mistrusted*'. The Tribunal could not accept that as a general (racist) view within the

respondent's organisation. There was absolutely no evidence before the Tribunal to support that position, or from which an inference of that could be drawn. The Tribunal considered it to be significant that the claimant had worked for the respondent in 2009 and had chosen to return. Craig Clarke had also worked for the respondent at that time, although had had no direct involvement with the claimant.

The claimant relied on the case of Miss N Lomana Otshudi v Base Childrenswear Ltd 3200907/2016. In that case, the claimant had proven facts from which an inference of race discrimination could be drawn.

Comments on Evidence

21. The Tribunal heard evidence for the respondent from Gordon Sneddon, Brian Forrest, Brian Rae and Craig Clarke. Where there were typos, spelling or grammatical errors in the documents in the Joint Bundle these are replicated and shown by '(sic)'.

22. The claimant clearly has a very strong work ethic and it was important to him to be the number one sales agent, with the benefits and awards which that attracts. The claimant was not content to be performing well: he wanted to be number one in the team. The claimant's evidence was '*I was a top performer, not number 5. I wanted to be top. I was not able to be because of things controlled by someone else*'. The claimant was clearly motivated to work and earn and frustrated that on moving to Craig Clarke's team he was no longer the number one performer in the team. It appeared from the claimant's cross examination questions to Craig Clarke that a factor in the claimant placing significance on being number one was the awards which he would then achieve, including a holiday.

23. The Tribunal placed significant weight on the tables and performance information set out in the decision letter re the claimant's grievance. That information was not contested by the claimant. That decision letter, together with the letter setting out the reasons for dismissal and the reasons for

upholding that decision on appeal, were comprehensive and set out in detail the reasons for the conclusions reached by the decision makers. The Tribunal took the terms of those letters to be indicative of the conscientious approach of those decision makers, which was consistent with the impression given by those decision makers in their evidence before the Tribunal.

24. The Tribunal considered it to be significant that the claimant's earnings since moving to Craig Clarke's team had increased. The claimant's position in respect of that was that he had to work harder than before to earn this. It was considered significant that the way lightning doors were allocated by the claimant's previous manager was different to the system of allocation by Craig Clarke and the other Area Sales Manager in Scotland. It was not disputed that the system applied by Craig Clarke was applied to the other Sales Agents in his team. There was no evidence to suggest that this system was applied to the claimant differently because of his race. The claimant did not dispute Craig Clarke's evidence that after the automatic system allocation of doors at the end of the month, the claimant and others in the sales team were allocated doors which had been automatically allocated to other sales agents. The claimant did not dispute the respondent's witnesses' position that the system did not show a breakdown of allocation of lightning doors to those which had had no interactions by the respondent at all. The claimant did not dispute the figures in the grievance decision letter with regard to the allocation of lightning sales. The claimant did not dispute Craig Clarke's evidence that the claimant was '*one of the ones*' who had not received an automatic allocation of lightning doors during the period when the claimant was a member of his team, and so had received a manual allocation, on Craig Clarke's manual re-distribution of those doors within the team.

25. Much of the claimant's cross examination sought to focus on questioning how he would have accessed the information which was used in duplication on the various accounts. The respondent did not have to prove how the claimant accessed the information or details used. For the unfair dismissal claim, the respondent required to show that the reason for the claimant's dismissal was

his conduct and that they had a reasonable belief that the claimant was guilty of misconduct. They did not have to prove that the claimant was guilty of misconduct.

5 26. The claimant criticised the respondent for not having visited the addresses where there had been duplication of details. The respondent's position was that telephone contact had been attempted. A respondent does not require to take all possible steps in an investigation prior to dismissal. The steps taken in investigation should be reasonable in the circumstances. The Tribunal was
10 satisfied that in the circumstances set out in the Findings in Fact the investigation carried out by the respondent was reasonable.

27. In his cross-examination of Craig Clarke, the claimant suggested that at the time when he was based in Edinburgh, working under Robert Fergusson,
15 Craig Clarke referred to the claimant as '*Chief*'. That then changed to the allegation that Craig Clarke had been aware of the claimant being called that. There had been no prior notification to the respondent of that allegation. Following an adjournment to allow the claimant time to consider his position and prepare a proposed amendment to his ET1, if he wished to do so, the
20 claimant confirmed that he recognised that the respondent had not had notice of that aspect and did not wish to pursue that matter.

28. The Tribunal attached significant weight to the terms of the claimant's email to Craig Clarke of 6 December 2019 (JB237). It was noted that in that email the
25 claimant alleges that he has been '*discriminated against*'. It was considered significant that in that email the claimant does not allege that all other members of Craig Clarke's team received a more favourable allocation of doors than him. The claimant refers to '*some team members*'. The claimant was the only black person in Craig Clarke's team. It was the claimant's position that two particular
30 (white) members of Craig Clarke's team were given favourable allocations of doors by Craig Clarke, not that all others in the team with the exception of him. That was very significant with regard to the race discrimination case.

29. It was noted that Craig Clarke did not acknowledge that email or substantively reply to either it or most of the subsequent emails from the claim re his issues. Craig Clarke's explanation for that was that he was busy with work pressures and that had caused him to also fail to reply to emails from other members of his team. He referred to Les Owens having sent him an email asking why members of the team were copying him into their emails. The claimant did not dispute Craig Clarke's evidence that his work pressures meant he was not fully replying to emails from other members of the team as well.

30. In respect of the vehicle check incident, the Tribunal considered it to be significant that the claimant accepted that his car was messy, with a lot of personal clothes, that John Horspool had agreed that the car was messy, that it was not contested that Craig Clarke carries out regular vehicle checks on all members of his team, that this was the first vehicle check carried out since the claimant had joined Craig Clarke's team, that Craig Clarke had given the claimant the opportunity to clean his car rather than fail the vehicle check, and that subsequent car audit carried out by Craig Clarke on the vehicle issued to the claimant were passed. It was also considered to be significant that the claimant did not appear to recognise the importance of keeping the vehicle in a suitable condition. It was noted that it was the claimant's position during the hearing that the vehicle check incident was not part of his claim before the Tribunal. This incident was however considered to be significant in respect of showing that Craig Clarke had sought to proceed in a way which avoided the claimant failing the vehicle check but that the claimant was unhappy with what was suggested by Craig Clarke as it would mean him losing selling time while he tidied the car. The claimant's concern at work matters impinging on his selling time was a consistent theme.

31. The Tribunal did not accept the claimant's submission that Craig Clarke's evidence re his process of allocating doors was not in line with his position as reflected in the notes of his meeting with Colin Rae as part of the investigation into the grievance. Craig Clarke's position was that Salesforce automatically allocates the doors among the team and then he would manually re-allocate some where there had been an unfair spread. His position was that the

claimant, and others in his team, had had doors allocated to him by this manual process. In the notes of from the grievance investigation meeting (at JB547 – JB548), it is reflected that Craig Clarke describes a system of manual allocation.

5 32. The claimant's initial position before this Tribunal was that he had been selected
to stay to work in the Govan area because of the high refugee population in that
area, and that that had been done because of the claimant's skin colour and
ability to speak another language (although not a language commonly spoken
by occupants in that area). Craig Clarke denied that. The claimant's position
10 changed from alleging that Craig Clarke had made him stay in Govan for this
reason, to that Craig Clarke knew that comments were made by others that the
claimant's skin colour and ability to speak another language. The claimant did
not dispute Craig Clarke's evidence that he would have had follow up contacts
in Govan. The email trail at JB178 was considered to be very significant. That
15 email showed that Craig Clarke had selected three members of his team to
work on particular doors, which were in the Govan area. Given the terms of
that email trail, the Tribunal accepted Craig Clarke's position that that the three
team members who had been selected (including the claimant) were selected
because they were known to be good at achieving sales and there had been
20 an issue with those doors. In respect of the claimant's race discrimination claim,
it was very significant that he was one of three team members selected by Craig
Clarke to work on those doors. Craig Clarke's position was that the claimant
would have had follow up calls from having worked in the area previously and
may have chosen to work on those follow ups while in the area. The claimant
25 didn't dispute that position. For these reasons, the Tribunal did not accept that
the claimant had been directed to remain to work in Govan because of his race.
It was noted that there was a dispute as to whether the claimant used a paper
or digital diary (Craig Clarke's evidence was that the claimant had shown him
his paper diary with several details which he intended to follow up in Govan,
30 while the claimant's position was that all work information was held on the ipad).
The Tribunal considered it to be significant that the claimant did not dispute that
the he had a note of follow ups and that he would have taken the chance to call
on them when he was working in the area. The Tribunal considered it to be
very significant that in his grievance the claimant did not mention that he had

been told to stay working in Govan. In all these circumstances, the Tribunal concluded that the claimant and 2 other team members had been directed to work on certain doors in Govan and while he was in that area the claimant sought other sales in the area. The Tribunal did not accept that the claimant was directed to work in Govan after all others were directed to leave the area because of his race. The Tribunal considered that if the claimant had believed that at the time then he would have stated that in his grievance. The Tribunal accepted the respondent's representative's position that the claimant's change of position affected his credibility.

33. The Tribunal concluded from the evidence that the claimant was unused to the system of allocating doors which was used by Craig Clarke, which was different to the system used by Rod Fergusson, and that the claimant felt disadvantaged by that system. There was no evidence to suggest that the claimant was disadvantaged in respect of the allocation of doors compared to all the white members of the team. That was not the claimant's position. It was the claimant's position that he was disadvantaged compared to 3 particular other members in his team. There was no evidence that the claimant's race had any influence on the allocation of doors.

34. The Tribunal did not accept the claimant's position that Craig Clarke had 'no option' other than to give him a strong assessment at the end of year review. Matters other than sales figures could have been taken into account. The fact that the claimant had failed a vehicle inspection could have been taken into account. The Tribunal considered it to be significant that Craig Clarke did not visit all three addresses with the claimant, because he was aware that the claimant was not happy about being accompanied and so '*let it be*'. The claimant did not dispute Craig Clarke's position that he had visited addresses with other team members in the past. The Tribunal considered it to be significant that Craig Clarke had accepted the claimant's position that he had entered the details given to him by the individuals. All of these factors went against drawing an inference of discrimination. The Tribunal took into account that the claimant was the only member of Craig Clarke's then current team that he accompanied on a visit. That fact alone, taken together with the undisputed

evidence that Craig Clarke had visited doors with team members in the past, that only 2 doors of the three were attempted to be visited because Craig Clarke recognised that the claimant was not happy about the situation, and Craig Clarke's evidence that he believed the claimant's position re taking down what the occupant had told him, was not enough to draw an inference of race discrimination by Craig Clarke.

35. It was clear from the claimant's evidence that he was disappointed that his move to the west had not been as fortuitous as he had hoped. The claimant's evidence was

"I really enjoyed my time in Edinburgh. I went to Uddingston on the persuasion of Rob Ferguson. He said there would be new fresh lightning doors and we were going to make a lot of money. He said he would start a new team, working under me. I bought it. In Edinburgh there was not much new business so I came over to Uddingston where I was reunited with a couple of faces."

36. The Tribunal noted the claimant's evidence that his 'first formal interaction (with Craig Clarke) as a manager' was when Craig Clarke was appointed to chair the claimant's grievance which he raised in 2018. The claimant was clearly upset that he required to have time away from selling to attend meetings re his grievance, and that his targets were not varied to reflect that. He said *"I had to come to the office then go to the patch. There was three or four meetings the same month. I was taken off my patch and had no target reduction. I said have you spoken to the defendant"*. The claimant clearly felt that his grievance should have been progressed without him having to state his position at various meetings. This was consistent with the clear impression that the claimant is a hard worker and wanted to spend his working time selling so that he could achieve and exceed his targets. Craig Clarke's evidence was that the claimant had not 'fully engaged with the grievance'. The claimant denied that. The Tribunal accepted the claimant's evidence that *'the notes are there and there is no suggestion whatsoever of me pausing or refusing to engage. I just said can you give me specifics? There is evidence there that I engaged. I co-operated with him.'* The Tribunal considered that Craig Clarke may have formed the

impression that the claimant did not want to engage because the claimant felt that there was no need for the meetings to take place as an initial step to the progression of his grievance. The claimant's believed that he had written his position down and that it should then be progressed. The claimant's frustration at having to be away from sales time to attend meetings was exacerbated because there was an error in the invitation sent to the claimant and so it was decided to send another invitation.

37. The substance of grievance which the claimant had raised previously against another of the respondent's employees was not part of the claimant's claim before this Tribunal. We did hear evidence on the fact that Craig Clarke had determined that grievance, that that decision had been appealed by the claimant and that that appeal had been partly upheld, in respect of there having been an error in the process carried out in dealing with the grievance. At the stage of the process re the claimant's grievance against Craig Clarke, the respondent sent out two invitation letters to the claimant. It appeared that the effect of two letters being sent out frustrated the claimant as he then required to attend two investigatory meetings, with subsequently more time spent away from his sales work. The Tribunal concluded that the respondent may have been over-mitigating in order to be sure to follow proper process, given the criticism on the process followed in the claimant's first grievance.

38. The Tribunal considered it to be significant re the vehicle check that Craig Clarke's position was that he was trying to offer a solution which would mean that the claimant would not have a failed vehicle check. However, that proposed solution would mean that the claimant was off sales time while he cleaned the car, and that was not acceptable to the claimant. That was consistent with the consistent, and understandable, theme in the claimant's evidence that he was concerned when working time was used for dealing with matters other than seeking to sell to potential customers. The claimant was frustrated when, as he saw it he was taken off sales time to deal with other matters, e.g. vehicle checks, meetings re grievance.

39. The Tribunal considered it to be very significant that Craig Clarke had given the claimant 'the benefit of the doubt' and that he had accepted that the claimant had just taken down what the occupant had told him (re the accounts which then had failed installs). Although the claimant did not accept that Craig Clarke had no part in the initiation of investigatory or disciplinary proceedings, the was no evidence to support the claimant's position on that. Given the chain of evidence before the Tribunal with regard to investigations done by a separate team, in the absence of any evidence linking Craig Clarke to the decision to investigate or the decision to instigate disciplinary proceedings, and given Craig Clarke's position that he had believed the claimant's position that he had inputted the information given to him, the Tribunal accepted that Craig Clarke was not involved in the investigatory or disciplinary proceedings. The claimant did not dispute that the decision to dismiss him was made by Gordon Sneddon alone.

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40. The Tribunal did not accept the claimant's submissions on the credibility and reliability of the respondent's witnesses. No witness sought to avoid questions and all answered in a straightforward manner.

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41. Some information, including the first numbers of the bank account and sort code details referred to in the disciplinary process, were blanked out in the documents before the Tribunal. The Tribunal was satisfied on the basis of the numbers shown that some bank account numbers were duplicates. That was the evidence of Gordon Sneddon and that position was not contested by the claimant.

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42. The Tribunal did note the terms of the ICOMMS record at JB469, which was relied on by the respondent as initiating the investigations which led to the disciplinary process against the claimant. It was noted that although that ICOMMS record mentioned email correspondence, that email correspondence was not itself shown to the claimant or included in the productions before the Tribunal. This was in line with the claimant's position throughout the internal process that the respondent did not show evidence other than their internal

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records. There was no evidence to suggest that those internal records were not accurate or had been doctored in any way so as to lead to disciplinary proceedings being taken against the claimant. It was considered to be significant that the investigations were initially carried out by the separate Fraud and Investigations Department and concentrated on the particular accounts where complaints had been made by individuals that they had not ordered the services. It was as a result of these investigations that it was discovered that the 'common denominator' (Gordon Sneddon's words) in the various accounts was that they were booked under the claimant's agent number. It was the respondent's position that that then led to the disciplinary process being initiated in respect of the claimant. There was no direct evidence on who made the decision to initiate the disciplinary process. The claimant relied on the disciplinary process being initiated shortly after he had raised his grievance against Craig Clarke. The Tribunal was satisfied that at the time of Ade Pye's collation of the evidence gathered in the initial investigations and sent as appendices to his email of 16 December, the fact that the claimant had raised a grievance was not a factor. The Tribunal accepted this because Brian Forrest was considered to be an entirely credible and reliable witness. The Tribunal did not accept the claimant's reliance on Brian Forrest being unable to give his job title. Brian Forrest explained this in terms of his job title just having been changed. Brian Forrest gave straightforward, full answers to questions put to him and did not seek to avoid questions. The Tribunal found Brian Forrest to be an impressive witness. His account of the steps he took to investigate the matters raised by the claimant and the factors he considered in making his decision were plausible, credible and demonstrative of his conscientious approach. He was not evasive and answered directly all questions put to him. He made concessions, for example that he didn't know how the claimant would have obtained some of the information on boarded in the suspect accounts. When questioned on the account details at JB284, his evidence was "*If that was the only account that you said I only entered what the customer told me it would be reasonable to assume that the customer had given you false information but this was multiple times. On that basis it was reasonable to believe that you had perpetrated commission fraud. I'm not saying that you have or not.*" In respect of his decision not to uphold the appeal, his evidence was that he considered

the 'level of repetition' and formed the view that *'In my opinion it was highly unlikely that different people in different parts of the country gave you the same information'* His evidence on his conclusions was *"I concluded that the information had been manipulated to allow the services to be provided at the address and you to gain commission."* When it was put to him by Mr Taggart (Tribunal Member) that there may have been benefit in sending the KANA reports to the claimant prior to sending the decision letter, rather than being included with it, his evidence was *'That's a valid point but the details in the report were not anything that he didn't already have. If it was significant I would have reviewed to another sanction.'*

43. Brian Forrest sought to investigate the issues raised by the claimant before him. His position was *'I really appreciated that he said <the KANA documentation> was vital to his ability to defend himself. I had a duty of care to investigate to the best of my ability. Gordon Sneddon was not able to get the information. I was perhaps more persistent. Initially I was told I couldn't get them but I tracked the right person down. At this stage I was not judging anything. I needed to be fair and give him the benefit of the doubt. I didn't know what they would prove. Just that he wanted them. I was trying to be fair and provide them'* In respect of the claimant's reliance on the disciplinary process being started after he had raised his grievance, Brian Forrest's evidence was *"I took it seriously . I said I would look at the timeline of events."* Brian Forrest set out the timeline of events in his outcome letter (JB710 – JB711). His conclusion on the timeline was that *'The investigation into orders on boarded by you started in November and was passed to Les Owens in (sic) the 16th December. The investigation would've progressed irrespective of any grievance that was raised.'* The Tribunal accepted that conclusion.

44. The Tribunal accepted Brian Forrest's account of his discussion with Ade Pye. On the facts, it was found that the initial investigations which led to the disciplinary process were initiated before the claimant raised his grievance against Craig Clarke. The Tribunal accepted that the reason for the initial investigations by the Fraud and Investigation team was the trigger of more than one customer complaint of possible ID theft. The Tribunal accepted that that

initial investigation arose from matters separate to the fact of the claimant raising a grievance. The claimant did not dispute Gordon Sneddon's evidence that the process had been initiated "*From people who phoned in to say their information had been used at an address they didn't reside in and their credit history had been affected.*" That position was confirmed in Debbie Kelly's investigations on behalf of Brian Forrest at the appeal stage.

45. There was no direct evidence on why the decision was taken to move from that initial investigation stage to the initiation of disciplinary proceedings against the claimant. The Tribunal carefully considered whether any inference of race discrimination could be drawn from the primary facts.

46. The Tribunal applied the guidance given by the EAT in *Ms A Joseph v Brighton & Sussex University Hospitals NHS Trust* [2015] 4 WLUK 272 and approached this case on the basis that it was entitled to treat documents included in the Joint Bundle which had not been referred to or addressed in evidence under oath or affirmation or supplemented with any detail and '*attach such weight to it as it thought proper in those circumstances.*' The Tribunal approached this matter with careful regard to the overriding objective, as set out in Rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('the Rules'), to deal with a case fairly and justly. The Tribunal then noted that included in the Joint Bundle were certain Policies, which were not referred to in evidence. Without any evidence on the implementation or effect of these policies, no more weight could be placed than the fact that they are in place within the respondent's organisation. Very little weight was then attached to those policies being in place.

47. There was no evidence before the Tribunal of the diversity of the respondent's Field Sales Agents or other employees, other than that the claimant was the only black person within Craig Clarke's team.

48. The Tribunal did not hear evidence from Ade Pye, Les Owens or Marc Donaldson up in respect of the timing of the investigations or when / why the decision was made to start disciplinary hearings against the claimant. It was

noted in particular the Tribunal did not hear from Les Owens, who as Head of department had knowledge of both the grievance and the disciplinary matters in respect of the claimant. There was no direct evidence from Les Owens as to why the claimant's meeting with him did not go ahead and / or why Les Owens had not met with the claimant or seek to resolve the issues he had raised. Although it was the respondent's position that Les Owens had appointed Marc Donaldson to hear the disciplinary process, there was no direct evidence on who made the decision that the claimant should be invited to an investigatory meeting as part of the disciplinary procedure. The Tribunal carefully considered whether an inference of race discrimination and / or victimisation could be drawn from the primary facts.

49. The claimant did not dispute that it was Gordon Sneddon who made the decision to dismiss him. The Tribunal was satisfied that the reason for the dismissal was Gordon Sneddon's belief that the claimant had acted in gross misconduct. It was not part of the claimant's case that Gordon Sneddon had dismissed him because of his race. The Tribunal accepted that Gordon Sneddon's position was that other than that the claimant being responsible, he *'couldn't see any other conceivable explanation'* for the number of accounts booked under the claimant's agent number where there was duplication of bank details, similar email addresses, a pattern of residency of one month proceeded by a year, individuals reporting that their ID had been used without their consent and that they did not live at the place the services were being provided. The Tribunal accepted that Gordon Sneddon's conclusion that the claimant's explanation that he only took down / inputted what the individuals told him was *'very unlikely given all the circumstances'* was reasonable.

50. The claimant relied upon the respondent not having referred the matters to the police. The Tribunal accepted Gordon Sneddon's position that the respondent's policy is to deal with allegations of ID theft as an internal matter and to leave it to the individual to report the matter to the police, if they chose to do so. The Tribunal accepted that and attached very little weight to the fact that the respondent did not refer the matter to the police.

51. The Tribunal attached significance to the number of times the disciplinary hearing had been allowed to be reconvened and to the extent of investigation carried out both by Gordon Sneddon and Brian Forrest. Both Gordon Sneddon and Brian Forrest appeared to the Tribunal to take their role in the disciplinary process seriously and to undertake their tasks conscientiously. This was particularly shown in the lengthy letters setting out the reasons for dismissal and on the appeal and in the steps taken by Brian Forrest to investigate matters at the appeal stage and obtain the information from the KANA system. The Tribunal considered that these steps would be inconsistent with a finding that the reason for the claimant's dismissal was because of his race.

52. The Tribunal considered it to be very significant that at no time during the disciplinary process, did the claimant suggest that the disciplinary process was being undertaken against him because of his race. The Tribunal was satisfied that the reason for the claimant's dismissal was the respondent's reasonable belief that the claimant had acted in gross misconduct. The Tribunal noted that it was only at the disciplinary appeal hearing stage that it was the claimant's position that the disciplinary process was being taken because he had raised his grievance against Craig Clarke. In his cross examination of Gordon Sneddon, the claimant's position was that he '*strongly believed they were interlinked because of the timing*'. Gordon Sneddon's reply was that that was '*never covered in the Disciplinary Hearing*'. That position was not challenged by the claimant. The Tribunal considered those aspects to be particularly significant because from the terms of the email communication which the claimant did send to the respondent re the disciplinary process it is clear that the claimant was able to raise with the respondent and set out matters which he was unhappy with or felt had led to him being unfairly treated. It was then particularly significant that even at the appeal hearing the claimant did not raise that his dismissal was because of his race (distinct from having raised a grievance against Craig Clarke). It had been noted by Brian Forrest that the claimant had put forward his position on perceived unfairness. Brian Forrest's evidence was that at the appeal stage he had asked the claimant why he had not previously raised his issue with Gordon Sneddon's possible involvement in his grievance '*as <the claimant> was very forthright in his understanding to*

ensure that I was not involved in the previous process” (re the clarification that that Brian Forrest had not been the previous notetaker).

53. It was noted that the claimant did not have Trade Union representation at any point in the disciplinary or grievance process, although his position was that he was a member of a Trade Union. His position was that it had been difficult to obtain a TU representative because the dates of meetings were changed with little notice and because of the Covid pandemic. The Tribunal did not find that position to be entirely credible given the timeline of events as set out in the Findings in Fact and that Covid restrictions in the UK took effect in March 2020.

54. It was noted that the claimant refused to make any concessions in his evidence e.g. he did not accept that the respondent took steps to accommodate his requests for delaying the hearing (further, in his comments on the respondent’s submissions, the claimant relied on those delays not being in order to assist him). The claimant gave the impression of being entrenched in his own position. He was very focussed on his own situation, his belief that he was losing out on lightening doors and that his sales time was being affected by having to deal with other work related matters. There was no evidence that the claimant was in fact disadvantaged compared to others in Craig Clarke’s team. The claimant did not dispute the evidence on his performance as set out in JB452 and in JB546. The claimant appeared in the mid/ upper section of the performance table. There was no evidence to support the claimant’s position that he had to work harder than everyone else to achieve those sales figures.

55. Another theme in the claimant’s cross examination was that he had not been given proper access to information and that he had not received the documents requested by him in his subject access request (‘SAR’). It was noted that there was a record of the claimant being sent a parcel by recorded delivery, which was said to be that response, but that that parcel had been returned. There was no evidence of any steps taken by the respondent to seek to deliver the parcel to the claimant after it had been returned. Neither the claimant nor the legal representative who had first represented him in these proceedings had

made a request or an Order for any document from the respondent as part of these Tribunal proceedings.

56. The Tribunal considered it to be significant that the claimant's evidence was that he was 'very happy' working for the respondent in the previous period, which ended in 2009 and with his Line Manager before he moved to Craig Clarke's team. The claimant accepted that the way Craig Clarke (and other managers) allocated doors to the Field Sales Agents in their team was different to the system used by the claimant's previous Line Manager. The Tribunal attached weight to that. The Tribunal considered it to be significant that Craig Clarke had spent considerable time with the claimant (two and a half hours) after the End of Year meeting to try to explain the system of allocation to him. It was also considered to be significant that Craig Clarke believed the claimant's position that he just inputted the information given to him, that he tried to offer a solution which would mean that the claimant would not fail the vehicle check, although his car was very messy, and that he rated the claimant 'strong' in the End of Year review. The Tribunal did not accept the claimant's position that based on his sales figures Craig Clarke had no other option than to rate him highly. Craig Clarke could have taken into consideration the failed vehicle check.

57. The Tribunal concluded from the evidence that there was a change in management style and working practices between Ron Ferguson and Craig Clarke. These changes, coupled with the fact that the claimant was no longer number one sales person in the team, caused frustration to the claimant. There was no direct evidence that the claimant was treated differently from all of the other members of Craig Clarke's team. Taken at its' highest, the claimant's position was that he and other members of the team were treated less favourably in respect of allocation of doors. There was no direct evidence that the claimant was treated less favourably than others in the team because of his race. It was the claimant's position in his comments on the respondent's submissions that any re-allocation of doors to him by Craig Clarke was only as a result of the claimant having raised the matter. That was not put to Craig Clarke. The claimant did not challenge Craig Clarke's evidence that he had

regularly re-allocated doors after the auto allocation and that the claimant was 'one of the ones' he would re-allocate to. Significantly, the claimant did not challenge Craig Clarke's evidence that there were others on the team who also missed out in the 'postcode lottery' of the auto allocation and so were manually allocated doors by him.

58. Brian Forrest's evidence was that his understanding was that the grievance was raised by the claimant on 14 December 2019, that he had got that information either from the Case Management system or from Les Owens, that he had not seen the email at JB249 and that the 'formal process' in respect of the grievance started on 17 December 2019. In his cross examination the claimant put to Brian Forrest that his grievance was started on 6 December 2019 (when the claimant sent the email to Craig Clarke which is at JB237). When asked why he had concluded that there was no link between the having raised his grievance and the instigation of the disciplinary proceedings, Brian Forrest's evidence was "*From the conversation I had with Ade Pye. His position was that it was a coincidence that the grievance came in when the investigation started.*" Brian Forest's evidence was '*Ady Pye said that because there was multiple ID theft on the same day by the same rep that triggered to look at it in more depth*'. That was a reference to the three accounts being on boarded in the same street within an hour on 29 July 2019.

The Tribunal accepted Brian Forrest's evidence that he had spoken to Ady Pye and that Ady Pye's position was that it was coincidence that both the investigations and the grievance were being dealt with at the same time. The Tribunal carefully considered the timeline of events. The Tribunal was satisfied that as at 16 December, the fact that the results of the initial investigations had been collated into various appendices and sent to Victoria Bates was a separate process which was initiated by the customer contacts alleging ID fraud. The Tribunal was satisfied that the fact that the claimant had raised a grievance had no impact on and did not trigger those initial investigations. The Tribunal concluded this because on the basis of the timeline of the investigations, as set out in the Findings in Fact and because it accepted the credible and reliable evidence of Brian Forrest in respect of his conversation with Ady Pye, which

was consistent with the position in the other investigations carried out on Brian Forrest's behalf by Debbie Kelly.

59. The Tribunal considered Colin Rae to be a credible and reliable witness. He answered questions without avoidance. His position was consistent. It was clear that he had a conscientious approach to dealing with the claimant's grievance. Colin Rae's evidence on what he understood his role in hearing the grievance was to *"let the person explain the issue, for me to look at the context, investigate and undertake appropriate action. If the decision is to uphold the grievance a recommendation is made or if there is no evidence to uphold I state my individual view on what the issue is."* Significance was attached to the fact that Colin Rae was happy to rearrange the date and location of the meeting which had been arranged to take place on 7 January 2020. The Tribunal accepted Colin Rae's evidence that the grievance process and the disciplinary process were separate and there was no discussion between him and those deciding on the disciplinary matter. When asked why he was not aware of the claimant's suspension, his evidence was *'It's a separate process. We don't discuss.'* The claimant did not challenge that evidence. The fact that Colin Rae offered mediation as an outcome of the grievance was consistent with his position that in dealing with the grievance he had no awareness of the disciplinary process or its outcome.

60. The Tribunal accepted that Colin Rae's conclusions on what had occurred was reasonable, and that a reasonable level of investigation had been done prior to him reaching those conclusions. The Tribunal considered it to be very significant that Colin Rae offered mediation between the claimant and Craig Clarke and that at the time of issuing his grievance decision, Colin Rae was unaware that the claimant had been dismissed.

Discussion and Decision

Unfair Dismissal

5 61. The claimant did not dispute that it was Gordon Sneddon who made the decision to dismiss him. At the stage of his written submissions, it was the claimant's position that he did not accept that the reason for his dismissal was conduct. At the stage of his submissions, the claimant's position was that the reason for his dismissal was '*systemic racism, the outcome of unconscious bias*
10 *by Mr Clarke which was then perpetuated by other staff members within Virgin Media*'.

15 62. On the basis of the Findings in Fact and on their assessment of the credibility of Gordon Sneddon, the Tribunal was satisfied that the reason for the dismissal was Gordon Sneddon's belief that the claimant had acted in gross misconduct. The Tribunal accepted that Gordon Sneddon's position was that other than that the claimant being responsible, he '*couldn't see any other conceivable explanation*' for the number of accounts booked under the claimant's agent number where there was duplication of bank details, similar email addresses, a
20 pattern of residency of one month proceeded by a year, individuals reporting that their ID had been used without their consent and that they did not live at the place the services were being provided. The Tribunal accepted that Gordon Sneddon's conclusion that the claimant's explanation that he only took down / inputted what the individuals told him was '*very unlikely given all the*
25 *circumstances*' was reasonable. There was no evidence that Craig Clarke had any involvement in either the decision to commence investigatory proceedings against the claimant or in the decision to dismiss and that was not the claimant's position in his evidence.

30 63. The Tribunal accepted the respondent's representative's submission in respect of the information provided to the claimant for the disciplinary process.

64. The claimant's dismissal was by reason of his conduct. Conduct is a potentially fair reason for dismissal in terms of the ERA section 98(2)(b). At

the time of making the decision to dismiss Gordon Sneddon did genuinely believe that the claimant had acted in gross misconduct. Gordon Sneddon made the decision to dismiss the claimant. There were at that time reasonable grounds for him holding the belief that the claimant had acted in gross misconduct, as set out in the Findings in Fact. The steps taken in investigation are as set out in the Findings in Fact. The investigations carried out by the respondent prior to the decision to dismiss was within the reasonable range.

65. The decision to dismiss meets all three stages of the *Burchell* test and was within the band of reasonable responses. The decision to dismiss was made on the grounds of the claimant's conduct. It was made following a fair procedure and a reasonable level of investigation. The reason for the claimant's dismissal was Gordon Sneddon's genuine belief that the claimant had acted in misconduct. This belief was based on the extent of duplication of information on a number of accounts booked by the claimant and the claimant's lack of explanation for that extent of duplication. The test in a criminal court is beyond reasonable doubt. The respondent did not require to show beyond reasonable doubt that the claimant had committed any act of fraud. The respondent's disciplinary policy specifically sets out that an employee may be dismissed where there are reasonable grounds to believe that they have acted in gross misconduct. On the information before Gordon Sneddon, as set out in the Findings in Fact and for the reasons set out in the dismissal letter, Gordon Sneddon genuinely believed that the claimant had acted in gross misconduct. That belief was reasonable in all the circumstances and was not dependant on the respondent requiring to prove how the claimant accessed the information or details used. The test applied is not that of a criminal charge.

66. The decision to dismiss was within the reasonable band of responses. It was not a decision which no reasonable employer would have taken. In all the circumstances of the case, the respondent acted reasonably in treating the reasons they found as a sufficient reason to dismiss.

67. The dismissal was a fair dismissal in terms of section 98 of the Employment Rights Act 1996. The claim for unfair dismissal is unsuccessful and is dismissed.

Race Discrimination

5 68. The Tribunal approached its considerations of the claimant's claims under the
Equality Act in terms of the Burden of Proof provisions as set out in s136 of
Equality Act 2010 and the Barton Guidelines as modified by the Court of Appeal
in *Igen Ltd. (formerly Leeds Careers Guidance) and ors. –v- Wong and others*
2005 ICR 931, CA (as approved by the Supreme Court in *Hewage –v-
10 Grampian Health Board* [2012] IRLR 870). As stated by the respondent's
representative in her written submissions, the initial burden of proof lies with the
claimant to demonstrate his case and prove facts from which, absent a
reasonable explanation, the Tribunal can conclude discrimination has occurred.
If the claimant is able to show on the face of it that there has been treatment
that could amount to discrimination, then the burden of proof shifts to the
15 respondent. At that stage, the respondent must prove on the balance of
probabilities that its treatment of the claimant was in no sense because of his
protected characteristic.

20 69. The Tribunal considered its findings in facts. The Tribunal took into account the
evidence, its assessment of the credibility and reliability of witnesses and the
parties' representatives' submissions on the findings in fact that should be
made. In respect of the claimant's claim that his treatment by the respondent
and his dismissal were discrimination under section 13 of the Eq A, the primary
facts were:-

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- (1) The claimant is of black African origin.
- (2) The claimant was the only person of black African origin in
the Sales team managed by Craig Clarke.
- (3) There were other individuals who are not of the same race
30 as the claimant who were employed by the respondent,
whose Line Manager was Craig Clarke and who were
distributed 'doors', including 'lightning doors' in the same
way as the claimant, including not receiving a lighting door
allocation via the automatic system allocation and steps

being taken by Craig Clarke to manually allocate lightning doors to them.

5 (4) The claimant and two other Field Sales Agents in Craig Clarke's team were asked to work on particular addresses in the Govan area after the rest of the team had moved on to a different area.

10 (5) The claimant's position in his grievance was that he received unfair allocation compared with two particular team members, not in comparison to all the other members of Craig Clarke's team.

(6) All Sales Agents in Craig Clarke's team were affected by an error in allocation of doors in the G52 postcode.

15 (7) Craig Clarke manually re-allocated doors in his team to take into account that some team members received a higher automatic allocation from the Salesforce system. The claimant and other team members were manually allocated doors in this way.

20 (8) The investigations carried out by the Fraud department which led to the disciplinary proceedings being taken against the claimant began because of two received complaints of ID theft by individuals sold services on boarded under the same sales agent number. Those investigations commenced prior to the claimant raising his grievance against Craig Clarke.

25 (9) The claimant did not provide an explanation to the respondent for the duplication of details in orders booked under his agent number, other than that he entered the information given to him.

30 (10) The claimant earned commission on the sales of the orders where there was duplication of details.

(11) The respondent required to wipe debt incurred on the accounts where there was duplication of details .

(12) The timeline of events is as set out in the findings in fact.

(13) The claimant's position in his grievance was not that he was being discriminated against on the grounds of his race.

5 (14) The claimant's position was that he received less favourable treatment than two particular members of Craig Clarke's team, not in comparison to all of the other members of the team.

(15) Gordon Sneddon allowed the disciplinary hearing to be rescheduled, as set out in the Findings in Fact.

10 (16) The decision to dismiss was made by Gordon Sneddon and for the reasons set out in the dismissal letter.

(17) The decision at the appeal of the dismissal was made by Brian Forrest and for the reasons set out in his decision letter.

15 (18) The decision on the claimant's grievance was made by Colin Rae and for the reasons set out in his decision letter. Colin Rae allowed the grievance hearing to be rescheduled on two occasions.

(19) Mediation between the claimant and Craig Clarke was offered as an outcome to the grievance.

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70. The Tribunal considered whether the claimant's race was an influence (which was more than trivial) on the respondent's decision making. The Tribunal applied the principle of significant influence as indicated by Lord Nicholls in *Nagarajan –v- London Regional Transport* 1999 ICR 877, HL, and applied by the EAT in *Villalba –v- Merrill Lynch & Co. Inc. and ors* 2007 ICR 469, EAT and in *Garrett –v- Lidl Ltd* EAT 0541/08. The Tribunal noted the requirement that the detriment be 'because of the protected act. The reasons or causes of the claimant's dismissal was that more than one complaint of ID theft had been made to the respondent involving accounts on boarded by the claimant, which triggered a wider investigation. There was no evidence that those who carried out the initial investigation knew the race of the agent against whose agent number the accounts had been on boarded, or the claimant in particular. The claimant's race was not a part of the reason why these initial investigations took place. The reason for the dismissal was because of the extent of evidence of issues in respect of accounts on boarded by the

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claimant, as set out in the findings in fact, and the claimant's lack of explanation for these issues other than his position being that he entered the information he was told. The Tribunal was satisfied that the claimant's race was not an influence on the decision to dismiss. The test is whether the protected characteristic was a significant influence. The initial investigations showed issues which were sufficiently serious to lead to disciplinary proceedings. The Tribunal concluded, on the balance of probabilities and on the basis of the credible evidence of Gordon Sneddon and the reasons for dismissal as set out in the dismissal letter that the claimant's race was not a significant influence on the decision to dismiss.

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71. In respect of the allocation of doors aspect of his direct discrimination claim, the claimant relied on his comparators as being David McGarrigle and James Watson (two other members of Craig Clarke's team). It was not the claimant's position that he was treated less favourably than all of the members of the team who did not share his protective characteristic of race. The claimant did not dispute Craig Clarke's position that others in his team were in the same position as the claimant in respect of not being automatically allocated lightning doors in the period when the claimant was in the team, and doors having been manually re-allocated to them, which were not then fresh in the sense that another sales agent had had the opportunity to sell to those doors. That was very significant and did not support the claimant's position that his allocation was because of his protected characteristic. Further, the tables re sales performance and the claimant's performance did not support the claimant's position that the treatment was less favourable. The tables show that there were other team members who did not achieve as many sales as the claimant and that the claimant's performance was better than some other team members. In those circumstances, no inference of race discrimination could be drawn in respect of the system of allocating doors. Following *Madassy –v- Nomura International* [2007] IRLR 246, there requires to be evidence from which the Tribunal could draw an inference that race was the reason for the difference in treatment. There was no evidence from which the Tribunal could draw an inference that the claimant's race was the reason for different treatment, nor any evidence that the claimant was treated differently from all of the other members of the team.

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72. Separately, the Tribunal concluded from the Findings In Fact that neither Gordon Sneddon's decision to dismiss, nor Brian Forrest's decision at the appeal were influenced by the claimant's race and that they did not subconsciously permit the claimant's race to determine or influence their treatment of the claimant. Both set
5 out clear reasons for their decisions and the Tribunal accepted those as the genuine reasons. The reason for the claimant's dismissal was not because of his race. By dismissing the claimant, the respondent did not treat the claimant less favorably because of his race, contrary to the provisions of section 13 of the Equality Act 2010.

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73. It was not put to any of the respondent's witnesses that their actions towards the claimant were motivated, subconsciously or otherwise, by the claimant's race.

74. It was not part of the claimant's case that he was discriminated against in respect
15 of the outcome of his grievance against Craig Clarke. The Tribunal concluded from its Findings in Fact that Colin Rae's decision in respect of the grievance was not influenced by the claimant's race and that he did not subconsciously permit the claimant's race to determine or influence his treatment of the claimant. He also set out clear reasons for his decision and the Tribunal accepted those.

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75. Further, it was significant that in respect of the allegations of discriminatory treatment re continued work in Govan, the claimant did not challenge the respondent's position that he was one of three Field Sales Agents in Craig Clarke's team who were asked to work particular doors, and that that was because a
25 particular request had been made (JB178) and those three were considered by Craig Clarke to be good sales agents. The claimant's changing position in respect of this aspect of his claim, as set out in the 'Comments on Evidence' section, was taken into account. The claimant was then one of three people who were directed to continue to work in the Govan area after others in the team had been 'pulled' to
30 work in another area. The claimant did not dispute Craig Clarke's position that when working in the area, the claimant would take the opportunity to follow up on previous contacts.

76. There was no direct evidence that the respondent's treatment of the claimant was because of his protected characteristic. There was no evidence that Gordon Sneddon had criticised the claimant. There was no evidence that the disciplinary or grievance processes were unfair or unreasonable. The claimant has not proven
5 facts from which an inference could be drawn that the respondent treated the claimant less favourably than it treats or would treat others who did not share the claimant's protected characteristic. On the basis of the findings in fact and in all the circumstances, there was no evidence from which the Tribunal could conclude that the claimant's treatment and/ or the claimant's dismissal were because of his
10 race. The burden of proof did not move to the respondent.

77. For these reasons, the claimant's claim of direct discrimination under section 13 of the Eq A is unsuccessful and is dismissed.

15 78. In respect of his claim of indirect discrimination, in his submissions the claimant relied upon there being a provision, criterion or practice ('PCP') is 'management practices', as set out at JB54. He relies on being required to work in Govan. For the reasons set out under the heading 'Comments on Evidence', the Tribunal did not accept that the claimant was required to stay to work in the Govan area
20 because of his race.

79. The claimant also relied upon being not able to bring a witness to his disciplinary or grievance meetings. There was very little evidence on that aspect of the claimant's case. It was not disputed that the claimant was advised of his right to
25 bring a trade union representative or work place colleague with him to those meetings. The claimant's position was that he was not close enough to any work place colleague to bring one to these meetings. There was no evidence before the Tribunal that that was because of the claimant's race. The claimant could have been accompanied to the meetings by a trade union representative. The claimant's
30 position in respect of trade union representation was as set out under the heading 'Comments on Evidence'.

80. In respect of the claimant's reliance on 'management practices', the claimant has not identified a PCP. If Craig Clarke's management of the Field Sales Agents in his team was a PCP, there was no evidence that the application of his management would particularly disadvantage those who shared the claimant's protected
5 characteristic, compared with others. The table at JB452 showed that there were others within Craig Clarke's team who earned less than the claimant and whose allocation of lightning properties was less than the claimant's.

81. The respondent did apply the terms of its grievance procedure and disciplinary
10 procedure to all employees. That includes the PCP that an employee under investigation for gross misconduct be suspended and not be allowed to contact work colleagues. That is a provision, criterion or practice ('PCPs') which is relied on by the claimant. That PCP applied to all employees suspended for gross
15 misconduct. There was no evidence that that PCP(s) particularly disadvantaged those who share the claimant's protected characteristic, compared with others. The claimant has not shown any particular disadvantage from what he relies on as being PCPs. He has not discharged the burden of proof. The claimant had the option of being accompanied by a trade union representative. The PCP was a proportionate means of achieving a legitimate aim.

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82. For these reasons, the claims of indirect discrimination under section 19 of the Equality Act 2010 are not successful and is dismissed.

83. The treatment of the claimant by Craig Clarke which was alleged to be harassment
25 was:-

- (i) The allocation of fresh lightning doors
- (ii) Adjustment to the claimant's sales target to reflect holidays taken by the claimant in November 2019.
- 30 (iii) The circumstances of the vehicle audit / check
- (iv) Going with the claimant to visit doors where the services had a failed installation

- (v) That Craig Clarke had spoke to another team member, Rob Allan, about the claimant.
- (vi) That Craig Clarke had asked the claimant if he wanted to go back to Edinburgh.

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84. Craig Clarke was considered to be a credible witness. The Tribunal did not accept the claimant's submissions in that respect. Craig Clarke did not seek to avoid questions and answered in a straightforward and open way. The Tribunal accepted Craig Clarke's evidence that the only discussion with the claimant about returning to work from Edinburgh came from Les Owens, at the conclusion of the claimant's first grievance. The claimant did not give evidence on his position about the circumstances of Craig Clarke having suggested to him that he return to Edinburgh. He did not put any particular circumstances of that alleged conversation to Craig Clarke in cross examination. For these reasons, the Tribunal accepted that Craig Clarke did not have a conversation with the claimant about returning to Edinburgh. The Tribunal accepted that that conversation was with Les Owens at the outcome of the claimant's grievance, as referred to by Les Owens in the meeting as part of the grievance.

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85. The Tribunal considered its Findings in Fact in respect of the evidence of Craig Clarke's treatment of the claimant. The primary facts with regard to the harassment claim are:-

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- (i) The doors were automatically allocated to Field Sales Advisors .
- (ii) The claimant was among those in Craig Clarke's team who, in the period when the claimant was in that team, did not receive an automatic allocation of fresh lightening doors.
- (iii) Craig Clarke was not aware of how the allocation had been done until 24 hrs after the automatic allocation.
- (iv) In that 24 hour period, the Sales Agents who had been allocated fresh lighting doors had the opportunity to try to sell to them.

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- (v) Once Craig Clarke became aware of how the system had allocated doors, he manually re-allocated them to seek to ensure fairness among all the members of his team.
- (vi) The claimant and others in the team were manually re-allocated doors by Craig Clarke after the automatic allocation.
- (vii) The doors re-allocated to the claimant and other in the team were not 'fresh lightning doors' as the sales agents who had been automatically allocated them had had the opportunity to work on them.
- (viii) The Salesforce system does not sub categorise lightning doors to those which are 'fresh' lightning doors.
- (ix) The claimant was the only person of black African origin in Craig Clarke's team.
- (x) Craig Clarke did not allocate postcodes to his Sales Agents in the same way that the claimant's previous Manager had.
- (xi) The claimant's allegation of discrimination against him in respect of the allocation of doors was in respect only of his allocation compared to two particular other members of Craig Clarke's sales team (James Watson and David McGarrigle).
- (xii) There were other members of Craig Clarke's sales team who did not share the claimant's protected characteristic and who were also not one of those automatically allocated fresh lightning doors during the period when the claimant was in Craig Clarke's team.
- (xiii) Craig Clarke's email replies to the claimant about the change in his target were short.
- (xiv) Craig Clarke delayed in replying to emails from the claimant and other Sales Agents in his team.
- (xv) Les Owens asked Craig Clarke why some Sales Agents in his team were telling him that Craig Clarke was not replying to emails.

- (xvi) Craig Clarke's delay in email communication was due to his workload.
- (xvii) Craig Clarke viewed the claimant as a very good sales agent.
- 5 (xviii) Craig Clarke chose the claimant and two other sales agents to work on particular addresses in Govan, as shown in JB178.
- (xix) The claimant's sales target was adjusted to take into account his holidays in November 2019.
- 10 (xx) Craig Clarke did not provide an explanation to the claimant as to how the adjustment had been calculated, although asked by the claimant in 2 separate emails.
- (xxi) The adjustment was to a lower sales target than the claimant had expected (from 23 to 18, rather than from 23 to 20).
- 15 (xxii) Vehicle audits / checks were carried by Crag Clarke on every Sales Agent in his team.
- (xxiii) It was not in dispute that when Craig Clarke carried out the vehicle audit / check on the claimant's company vehicle, the car had an untidy interior.
- 20 (xxiv) Craig Clarke suggested a solution which would mean that the claimant did not fail the vehicle check / audit.
- (xxv) The solution suggested by Craig Clarke would have meant that the claimant would have to spend time cleaning out the car when
- 25 (xxvi) Craig Clarke's assessment of the claimant at the 2019 End of Year review was very favourable toward the claimant.
- (xxvii) At the end of 2019 Craig Clarke had a meeting with the claimant where he spent two and a half hours seeking to explain to him how doors were allocated in his team.
- 30 (xxviii) The claimant's allocations and performance were as set out in the grievance decision letter.
- (xxix) Craig Clarke suggested that he visit doors with the claimant where there had been failed installations.

(xxx) Craig Clarke had visited doors with members of the team in the past, although not in the period when the claimant was in his team.

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(xxxi) Craig Clarke recognised that the claimant was not happy with him visiting the doors with him and so only tried to visit 2 of the intended 3 addresses.

(xxxii) Craig Clarke gave the claimant the 'benefit of the doubt' re his position that he on boarded the information given by individuals at the properties.

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(xxxiii) Craig Clarke had no involvement in the instigation of investigations against the claimant.

(2) Craig Clarke had not involvement in the decision to dismiss the claimant.

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86. The Tribunal considered whether this conduct was conduct related to the relevant protected characteristic of the claimant's race, in terms of section 26(a)(b) of the Equality Act 2010. There was no evidence or allegations of any overt racism by Craig Clarke. There was no direct evidence that the Craig Clarke's conduct towards the claimant was related to the claimant's protected characteristic. The Tribunal considered whether an inference could be drawn from these primary facts and concluded that no inference could be drawn. There was no evidence that the reason for Craig Clarke's treatment of the claimant was anything other than his managerial style. The claimant did not dispute Craig Clarke's evidence that others in the team in addition to the claimant were '*unlucky*' in the '*postcode lottery*' of the automatic allocation of doors and that those others, as well as the claimant would then be manually allocated doors by Craig Clarke. There was no evidence from which the Tribunal could properly draw an inference that the reason for the treatment was the claimant's race.

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87. In respect of his claim of victimisation in terms of section 27 Eq A, the claimant relied on having brought a grievance in 2018. The Tribunal did not hear evidence on the details of that grievance but the respondent did not dispute that it concerned allegations of race discrimination by another employee of the respondent (not

named in these proceedings). That grievance was then a protected act in terms of section 27((2)(d). In his submissions, the unreasonable conduct which the claimant relied upon in his victimisation claim was in respect of (1) the vehicle check (2) Craig Clarke having gone with him to re-visit certain doors (3) the allocation of doors to him when working in Craig Clarke's team (4) the disciplinary process.

88. The primary findings in fact in respect of the victimisation claim were then those set out above in respect of the harassment claim under section 26 Eq A, the findings in fact re the disciplinary process and the following:-

- (i) The claimant's first dealings with Craig Clarke had been in 2018, when Craig Clarke had heard the claimant's grievance against another employee.
- (ii) That grievance was in respect of the claimant's allegations of racial slurs having been made against him by another team member.
- (iii) At the time of hearing this grievance, Craig Clarke was not the claimant's Manager.
- (iv) Craig Clarke did not uphold the claimant's grievance.
- (v) The claimant appealed that decision.
- (vi) The claimant's appeal was partially upheld, to the extent that it was recognised that there had been a procedural flaw in the grievance process because the claimant had been invited to a meeting by email rather than by letter.
- (vii) Craig Clarke had no input to the disciplinary proceedings against the claimant.
- (viii) Craig Clarke did not make the decision to dismiss the claimant.

89. On the basis of the Findings in Fact, and on application of section 136 of the Equality Act 2010, the claimant has not shown that he was treated less favourably because of having done the protected act. The Tribunal accepted the respondent's representative's reliance on Craig Clarke position in his

evidence. The Tribunal found that Craig Clarke was straightforward in his position in evidence that that the claimant had the right to appeal and that he had no problem with the claimant appealing his decision. The Tribunal accepted the respondent's representative's reliance on Craig Clarke's evidence being
5 that he had realised that he had made a mistake and had sought advice from HR, that he had rectified the flaw in the procedure (inviting the claimant to a meeting via email rather than by letter) early in the procedure, as soon as he realised there was an issue. The Tribunal accepted the reliance on that having occurred in 2018 and the first complaint by the claimant against Craig Clarke
10 being re the July 2019 compliance issue, when Craig Clarke sought to visit with the claimant 3 properties where there had been failed installations.

90. In his submissions, the claimant's position was that Craig Clarke's decision in the 2018 grievance was 'founded on unconscious bias which then continued in
15 the less favourable treatment the claimant received when he complained about said process and outcome. The outcome of the 2018 grievance was not part of the claimant's claim before this Tribunal. The Tribunal was satisfied from the findings in fact that no inference of race discrimination could be drawn in respect of Craig Clarke's treatment of the claimant.

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91. The claimant's position in his evidence was that he believed that the disciplinary proceedings against him were linked to him having raised a grievance against Craig Clarke. The claimant was asked if he accepted that Craig Clarke had no influence in the outcome of the disciplinary proceedings.
25 The claimant's evidence was that he did not accept this because of the *'timing of the way each event unfolded'*. The claimant relied on Craig Clarke telling him in a business meeting that *'something had come up'* and he then had to go to see Marc Donaldson for the investigatory hearing.

92. The Tribunal considered whether an inference of race discrimination could be
30 drawn from the primary facts. On the basis of the Findings in Facts, and in particular the evidence in respect of what was the trigger to the investigatory

process which led to the claimant's dismissal, and the reasons for dismissal, no inference of race discrimination could be drawn.

5 93. Following the decision being taken to initiate the disciplinary process, there was no direct evidence to suggest that the decision to dismiss was influenced by the claimant's race or by him having initiated a grievance. There was no evidence of any collusion between the decision makers in the disciplinary process and the grievance process. The Tribunal considered it to be significant that mediation between the claimant and Craig Clarke was offered
10 as an outcome of the claimant's grievance, despite the fact that the claimant had been dismissed by the time of that outcome letter. That supported the respondent's witnesses' position that the disciplinary and grievance process were entirely separate and one did not influence the other. It did not support the claimant's position that the respondent dismissed him because he had
15 raised this grievance and because of his race.

94. In applying the relevant law as set out above the Tribunal took into account the claimant's submissions that the respondent's actions had been motivated by his race and his position that he had not raised that during the internal
20 processes because of possible repercussions. That had not been the claimant's position in his evidence. That position had not been put to the respondent's witnesses. It was not put to the respondent's witnesses that their actions had a subconscious bias or racist motivation. The claimant had been directed that he should not seek to introduce new evidence at the stage of
25 submissions. The Tribunal considered it to be significant that at no point during the disciplinary process did the claimant allege that his race was a subconscious motivation for the instigation of the disciplinary process. That is considered to be significant, particularly as the claimant did raise other matters with the respondent.

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95. For the reasons set out above, it was not accepted that unwanted conduct related to the claimant's protected characteristic of race. There was no direct evidence of that. The Tribunal considered whether an inference of discrimination could be

drawn from the primary facts. For the reasons set out above, the Tribunal concluded that no inference of discrimination could properly be drawn from those primary facts. For the reasons set out above, the claimant's claim under section 26 of the Eq A is unsuccessful and is dismissed.

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96. For the reasons set out above, it was not accepted that the claimant was subjected to a detriment because he had done the protected act. There was no direct evidence of that. The Tribunal did not find that Craig Clarke subjected the claimant to any detriment either because of his race or because the claimant had done the protected act. The reasons for the disciplinary proceedings against the claimant were not because the claimant had done the protected act. The reason for the claimant's dismissal was not because the claimant had done the protected act. The Tribunal considered whether an inference of discrimination could be drawn from the primary facts. The Tribunal concluded that no inference of discrimination could properly be drawn from those primary facts. For the reasons set out above, the claimant's claim under section 27 of the Eq A is unsuccessful and is dismissed.

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97. As none of the claims succeed, the claimant is not entitled to remedy.

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Employment Judge:	C McManus
Date of Judgment:	24 December 2021
Entered in register:	29 December 2021
and copied to parties	