



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4120678/2018**

5

**Held in Glasgow on 5, 6, 7, 8, 11, 12, 13, 14 and 15 November 2019**

**Employment Judge:  
Tribunal Members:**

**W A Meiklejohn  
Mrs P McColl  
Mr A McMillan**

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**Mr Mohammed R Binyameen**

**Claimant  
In Person**

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**H M Revenue & Customs**

**Respondent  
Represented by  
Dr A Gibson -  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous Judgment of the Employment Tribunal is as follows -

- (a) the claimant's claim of unfair dismissal does not succeed and is dismissed;  
and
- 30 (b) the claimant's claims of direct discrimination and harassment do not succeed  
and are dismissed.

**REASONS**

1. This case came before us for a Final Hearing on 5 to 8 and 11 to 15 November  
2019. We took 1 and 4 November 2019 as reading days. The claimant  
35 appeared in person and Dr Gibson appeared for the respondent.

**E.T. Z4 (WR)**

2. The claimant was pursuing claims of unfair dismissal and unlawful discrimination. In respect of discrimination, the protected characteristic was race and the claims were brought under sections 13 (direct discrimination) and 26 (harassment) of the Equality Act 2010 ("EqA").

#### 5 **Procedural history**

3. There had been six Preliminary Hearings on 21 November 2018 (EJ Meiklejohn), 15 February 2019 (EJ MacLean), 19 March 2019 (EJ Gall), 17 May 2019 (EJ Robison), 21 June 2019 (EJ Robison) and 22 August 2019 (EJ O'Dempsey).

10 4. The outcomes of these Preliminary Hearings, including matters addressed in correspondence, can be summarised as follows -

- The claimant provided further and better particulars of his discrimination claims.
- The respondent amended the grounds of resistance to answer these discrimination claims.
- The issue of time bar in respect of the claimant's discrimination claims, so far as relating to events which occurred more than three months before the claimant initiated ACAS early conciliation, was reserved to be determined at the Final Hearing.
- The witnesses were agreed to be those who did give evidence at the Final Hearing, with the attendance of Ms Lawson, Ms Jackson and Mr Bah being the subject of Witness Orders.
- It was decided that witness statements should be used.
- It was decided that the respondent should lead.

#### 25 **Issues**

5. These were agreed as follows -

***Unfair dismissal***

- 5
- (i) Was the dismissal of the claimant for the potentially fair reason of conduct?
- (ii) Did the respondent have a genuine belief that the claimant was guilty of the allegations which led to dismissal?
- (iii) Did the respondent conduct a reasonable investigation?
- (iv) Was the respondent's belief that the claimant had committed misconduct based on reasonable grounds?
- (v) Was the decision to dismiss within the band of reasonable responses?
- to (vi) Was the dismissal of the claimant by the respondent procedurally fair?
- (vii) If the claimant was unfairly dismissed is it reasonably practicable to re-instate or re-engage the claimant?
- (viii) If the claimant was unfairly dismissed and it is not reasonably practicable to re-instate or re-engage the claimant, what level of compensation, if any, should the claimant be awarded?
- 15

***Race discrimination***

- (i) In respect of each allegation of direct race discrimination (allegations 1-5 in claimant's specification document 28 January 2019):
- Were the claims brought in time?
- 20 And
- Did the respondent treat the claimant less favourably than the respondent treats or would treat others because of the claimant's race?
- (ii) In respect of each allegation of harassment (allegations 6-9 in claimant's specification document 28 January 2019):
- 25 Were the claims brought in time?

And

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

5        ***Claimant's allegations of race discrimination***

6.        The allegations of race discrimination set out in the claimant's specification document were summarised in the respondent's amended grounds of resistance in these terms -

- 10        (i)        Allegation 1 is that the claimant's line manager, Jane Fielding, discriminated against the claimant by excluding him from an opportunity that he wished to take part in, namely "Leading our Plan".
- 15        (ii)        Allegation 2 is that the respondent's Mr Crampshee discriminated against the claimant by singling him out at a Management Meeting.
- 15        (iii)        Allegation 3 - refers to claimant being subjected to a first written warning in relation to his performance (which resulted in his being temporarily unable to apply for civil service jobs) between 19 March 2018 and 26 April 2018.
- 20        (iv)        Allegation 4 is that the claimant was treated differently by Ms Fielding for being part of the respondent's Embrace programme and that Embrace was given no respect, recognition, care or time by Jane Fielding. There are no specific incidents or dates averred by the claimant
- 25        (v)        Allegation 5 is that the claimant "wasn't helped with" a Stress Reduction Plan.
- 25        (vi)        Allegation 6 is that Ms Fielding harassed the claimant due to his race by demanding to know the whereabouts of one of the claimant's team members during a meeting in December 2017.

- (vii) Allegation 7 is that Ms Fielding and Ms Harper harassed the claimant due to his race by becoming aggressive with him during a discussion regarding an attendance case in December 2017.
- (viii) Allegation 8 is that Ms Fielding and Ms Harper harassed the claimant due to his race by verbally abusing the claimant during a performance meeting in February 2018.
- (ix) Allegation 9 is a repeat of allegation 2 (ie that it amounted to harassment as well as direct discrimination).

### Applicable law

- 10 7. The right of an employee not to be unfairly dismissed is found in section 94(1) of the Employment Rights Act 1996 ("ERA") -

*"An employee has the right not to be unfairly dismissed by his employer. "*

8. Section 98 ERA provides as follows -

- 15 *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -*

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

*(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.*

20

*(2) A reason falls within this subsection if it -*

*(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,*

- 25 *(c) is that the employee was redundant, or*

(d) *is that the employee could not continue to be 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.*

(3)....

5 (4) *Where the employer has fulfilled the requirements of subsection (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*

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

9. Section 13(1) EqA provides as follows -

15 "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. "

10. Section 23(1) EqA provides as follows -

"On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case. "

20 11. Section 26 EqA provides as follows -

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

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

(b) *the conduct has the purpose or effect of -*

25 (i) *violating B's dignity, or*

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

(2)....

(3)....

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

(a) *the perception of B;*

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

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

10 12. Section 39(2) EqA provides as follows -

*“An employer (A) must not discriminate against an employee of A's (B) -*

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

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

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(c) *by dismissing B;*

(d) *by subjecting B to any other detriment. ”*

13. Section 123 EqA provides as follows -

20 *“(1) ....Proceedings on a complaint within section 120 [which confers jurisdiction on Employment Tribunals] may not be brought after the end of-*

(a) *the period of 3 months starting with the date of the act to which the complaint relates, or*

(b) *such other period as the employment tribunal thinks just and equitable.*

(2)....

25 (3) *For the purposes of this section -*

(a) *conduct extending over a period is to be treated as done at the end of the period....”*

14. Section 136 EqA provides as follows -

5 *“(1) This section applies to any proceedings relating to a contravention of this Act.*

*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

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

### **Evidence**

15. For the respondent we heard evidence from -

- Ms J Fielding, the claimant's line manager from November 2017
- 15 • Ms T Harper, involved with the claimant as Attendance and Management Lead
- Ms A Hunter, the claimant's grievance decision maker
- Mr A Ahmed, the officer within the respondent's Internal Governance Investigations Team ("IG") who dealt with the claimant's disciplinary investigation
- 20 • Mr M Warrilow, the claimant's disciplinary decision maker
- Mr A Crampshee, the manager tasked with the claimant's stress reduction plan ("SRP")
- Mr C Jones, the manager appointed to deal with the claimant's disciplinary appeal

25 16. For the claimant we heard evidence from -

- The claimant himself



- Ms J Lawson, appointed to act as the claimant's mentor
- Ms C Jackson, the claimant's line manager from April 2017 until November 2017
- Mr M Bah, a former work colleague and team member of the claimant

5 We had witness statements from all of the witnesses except Ms Lawson and Ms Jackson. There were supplementary questions put to all of the witnesses whose statements were taken as read.

17. We had a joint bundle of documents arranged in two ring binders, the second of which contained documents relating to the claimant's dismissal. We refer  
io to documents below by reference to the number of the ring binder (ie 1 or 2) and the page number, so that, for example, document 2:86 is found at page 86 of the second ring binder.

### **Findings in fact**

18. It is not part of the Tribunal's function to record every piece of evidence  
15 presented to us and we have not attempted to do so. We have sought to focus on the evidence we considered most relevant to the issues we had to decide. In making some of our findings in fact we have had to resolve conflicts in the evidence and we will explain later in our Judgment why we have reached certain decisions in doing so.

20 19. We found the following facts to be established or agreed.

#### *The respondent*

20. The respondent is a non-ministerial department of the UK Government responsible for the collection of taxes, the payment of some forms of state support and the administration of other regulatory regimes including the  
25 national minimum wage. It was established by the Commissioners for Revenue and Customs Act 2005.

21. The respondent has in the region of 56000 employees who are civil servants and therefore subject to the Civil Service Code (2:32-35). The Code includes the following -

5 *“As a civil servant, you are appointed on merit on the basis of fair and open competition and are expected to carry out your role with dedication and a commitment to the Civil Service and its core values: integrity, honesty, objectivity and impartiality. ”*

*The claimant*

22. The claimant commenced employment with the respondent on 15 June 2015. He worked initially as a Customer Service Representative in Personal Tax Operations (“PT Ops”) where he performed well. In October 2016 the claimant was promoted to the position of Temporary Team Manager for a period of five weeks.

23. In April 2017 the claimant secured promotion to the position of Front Line Manager (“FLM”) in Business Tax Operations (“BT Ops”). Ms Fielding was a member of the selection panel responsible for the claimant’s appointment. As FLM the claimant managed a team of AO band staff dealing with Option to Tax (“OTT”) involving Value Added Tax on commercial property transactions, an area where he had no previous experience. He succeeded Mr Crampshee as FLM of this team. There was another OTT team managed by Ms V Mathieson. Ms Jackson was line manager to the claimant and Ms Mathieson. Ms Lawson was the claimant’s mentor in his role as a newly appointed manager.

24. The claimant identifies as British Pakastani.

25 *Embrace*

25. The respondent offers a number of development programmes for staff. One of these is Embrace which the claimant described as a talent management programme for Black, African, Minority, Ethnic (“BAME”) staff. The claimant secured a place on the Embrace programme and participated between October 2016 and July 2017, ie he was participating in the Embrace

programme at the time he secured promotion and moved from PT Ops to BT Ops. This involved a time commitment away from his normal duties which we understood to amount to 20% and included attendance at a series of events, at least some of which were outwith Glasgow where the claimant was based.

5 26. The claimant perceived that his participation in Embrace was better supported when he was in PT Ops than when he moved to BT Ops. One of the grounds for this was the level of attendance, as perceived by the claimant, by managers at Embrace graduation events as compared with graduation events for other development programmes, the latter being viewed by the claimant  
10 as better supported.

27. Following his promotion to FLM, two members of the claimant's OTT team, Mr Bah and Mr U Kaka, secured places on the Embrace programme. The claimant asserted that Ms Fielding had been obstructive in relation to their participation. However there were a number of email exchanges between the  
15 claimant and Ms Fielding about his attendance at Embrace events in his capacity as Mr Bah's manager in November 2017 (1:118), February 2018 (1:138-140) and May 2018 (1:230-231) which record Ms Fielding as approving that attendance.

### *Upskilling*

20 28. When the claimant joined OTT there was a history of the department struggling to meet its Service Level Agreement ("SLA") targets, particularly with reference to the backlog of work. While the department might be within its SLA target at the start of the financial year, performance would slip over the summer months due to holiday and other absences and the fact that team  
25 members were able to undertake one type of work but not other types.

29. To address this, in or around April 2017 Ms Jackson tasked Ms Mathieson with preparation of a training plan with a view to upskilling the OTT teams. This involved (a) compiling a skills matrix to identify which team members required to be trained in which types of work and (b) organising when that  
30 training would take place, given that the day to day operation of the department needed to continue.

30. The claimant was on annual leave during the second half of May 2017. By the time he returned to work Ms Jackson had departed on annual leave. She returned to work in mid June 2017. Upon her return, Ms Jackson was disappointed to find that Ms Mathieson had not prepared a training plan. Ms Mathieson then asked to reduce her hours and this led to Ms R Grant being promoted to replace her as the other FLM in OTT. Ms Grant took up her post on 10 July 2017.

31. In the meantime the claimant had, in our view on his own initiative, organised for some training to start. This was "side by side" training where the team member would sit alongside another team member to learn the type of work being undertaken by the other team member. Although he was subsequently unable to produce a skills matrix, we were satisfied that the claimant spoke to his team and took steps to identify skills gaps. This was confirmed by Mr Bah. The claimant arranged training for Mr A Thomson who had earlier, in or around March 2017, commenced some training which had evidently been aborted. The claimant also arranged training for three other team members.

32. When Ms Grant became FLM, Ms Jackson asked her to produce a training plan and Ms Grant did so. Ms Jackson described this as being colour coded (which the claimant confirmed) and involving (a) not only the OTT teams but also staff at Cumbernauld and (b) the participation of an O band employee to deliver some of the training. By November 2017 this plan had been successful insofar as the OTT teams were achieving their SLA targets.

#### *Change of line manager*

33. In November 2017 Ms Fielding replaced Ms Jackson as the claimant's line manager. At that time the respondent had a performance management system in place which required managers to rate their team members as either "exceeded" or "achieved" or "development needed". At his half yearly review for 2017/18 Ms Jackson gave the claimant an indicative marking of "development needed". Ms Jackson told us that there was a requirement, with which she disagreed, that she should mark 10% of her team as

*"development needed"*. The system had subsequently changed so that these ratings were no longer used.

34. There was no formal handover between Ms Jackson and Ms Fielding but they did discuss the team members and so Ms Fielding was aware from the time she became his line manager that the claimant had been assessed as *"development needed"*. According to her evidence Ms Fielding *"addressed this at subsequent performance meetings by putting support in place to address areas which had been highlighted as requiring development"*.

*Meetings between Ms Fielding and claimant*

35. Partly in the context of his having been assessed as *"development needed"* and partly as a matter of routine, Ms Fielding held a series of meetings with the claimant. Some of these were identified as performance management review ("PMR") meetings while others were not. Some were attended by Ms Harper who had been brought in by Ms Fielding to provide support to the claimant (from January 2018 and not March 2018 as stated in Ms Harper's witness statement) and Ms Grant as recently appointed managers. Minutes of these PMR and other meetings were included in the joint bundle -

- 24 November 2017 - 1:119-120
- 19 January 2018 - 1:121-122
- 25/29 January 2018 - 1:123
- 30 January 2018 (only Ms Harper) - 1:124-125
- 1 February 2018 (with Ms Harper present) - 1:126-127
- 5 February 2018 (only Ms Harper) - 1:128
- 7 February 2018 - 1:129-130
- 12 February 2018 (with Ms Harper present in part) - 1:131-133
- 13 February 2018 - 1:134-137
- 16/19 February 2018 - 1:141-143

- 27 February 2018 (only Ms Harper, conducted by telephone) —1:144-146

36. Following each of her meetings with the claimant Ms Fielding emailed a copy of the meeting note to the claimant. Ms Harper also prepared notes of her meetings with the claimant - she emailed these to Ms Fielding in her capacity as the claimant's line manager. The claimant did not question the content of Ms Fielding's notes at the time but subsequently produced a document (1:257-261) in which he challenged the accuracy of the notes prepared by both Ms Fielding and Ms Harper. Ms Fielding and Ms Harper's position in evidence was that their notes were accurate.

37. The claimant's view was that Ms Fielding was always negative towards him. Ms Fielding's position was that she was supporting the claimant and seeking to address areas where his performance was below the required standard, and that the claimant was reluctant to accept her support. We do not consider it necessary to record in detail what was discussed at these meetings apart from (a) the meeting on 1 February 2018 and (b) other specific matters about which the claimant has made allegations, and we deal with these below.

38. The relationship between the claimant and Ms Fielding was not good. What was intended by Ms Fielding to be support for the claimant was perceived by him as criticism. Both the claimant and Ms Fielding found the other to be a stressor and matters deteriorated to the point where the claimant described their relationship as "dead".

#### *Attendance case meetings*

39. Ms S Jeffrey was a member of the team of which the claimant was FLM. Ms Jeffrey was a PCS trade union representative and spent some of her working time on PCS duties. Her attendance record was not regarded as satisfactory (and we understood that there were also performance and conduct issues but had no details of these). As her FLM the claimant was expected to deal with attendance management of Ms Jeffrey. In his grievance - with which we deal below - the claimant referred to three meetings relating to Ms Jeffrey.

40. The first meeting took place in or around the week of 14-18 November 2017 or possibly a little later. The claimant met with Ms Fielding and Ms Harper (the latter, we understood, in her capacity as attendance champion) to discuss Ms Jeffrey's unsatisfactory attendance. According to the claimant, he was  
5 *"verbally assaulted"* by Ms Fielding and Ms Harper for *"about 2 hours"* and was *"told I must give a No Further Action decision"*. He alleged that he had been spoken to *"in a vicious manner"* and *"like a little child"* and had been *"told that I wasn't allowed to make the decision"*.
41. According to Ms Fielding and Ms Harper, they were supporting the claimant  
10 in dealing with a *"complex"* attendance case. The claimant wanted to refer Ms Jeffrey to a decision maker (ie to progress towards dismissal) but there had been errors in the prior handling of the case and Ms Fielding and Ms Harper, while acknowledging that it was the claimant's decision to make, advised against dismissal. They denied that they had raised their voices or  
15 behaved aggressively towards the claimant.
42. The second meeting took place on 21 December 2017. This was a managers' meeting at which, according to the claimant, Ms Fielding had tried to embarrass the claimant by asking questions as to Ms Jeffrey's whereabouts when the claimant had previously been told by Mr D Torz, the Grade 7 officer  
20 for the department, to give Ms Jeffrey some leeway as she tended to raise complaints with senior staff. The claimant alleged that Ms Fielding had *"publically humiliated"* him by bringing other managers into the discussion.
43. Ms Fielding denied that this had happened in the way the claimant was alleging. She said that the claimant had not handled Ms Jeffrey's case well.  
25 He had spoken to Ms Jeffrey in a way which was unreasonable and had upset her. It had been important that the claimant knew where Ms Jeffrey was for staff welfare reasons and in her capacity as a trade union representative.
44. The third meeting was a subsequent managers' meeting - no date was given - where Ms Jeffrey's case was discussed. According to the claimant, Ms  
30 Fielding had asked him why he had given Ms Jeffrey a *"No Further Action"* decision *"to make it look like it was my decision when she had forced me to*



do this". There had been discussion about whether Ms Jeffrey's absences should be viewed over a rolling 12 month period (as the claimant believed) or only from November 2017 due to Disability Trigger Points (as Ms Fielding asserted). The claimant said that he had checked with Ms Harper after the meeting and had been told that he had been correct. This was, according to the claimant, Ms Fielding making a mistake and blaming it on him.

45. We return to this below when we deal with the claimant's grievance.

*Meeting on 1 February 2018*

46. At their meeting on 29 January 2018 Ms Fielding told the claimant that he should prepare a Performance Improvement Plan ("PIP") based on her feedback from his PRMs. She said that she would also devise a PIP for him and that they would meet with Ms Harper on 1 February 2018 *"to discuss and draw up the final PIP"*. Ms Fielding emailed a blank PIP form to the claimant.

47. At the start of the meeting on 1 February 2018 Ms Fielding asked the claimant for his PIP. The claimant said that he had prepared this but *"it had been deleted"*. Ms Fielding then reviewed the PIP she had prepared. She identified three areas where improvement was needed -

- Engagement with team and colleagues
- Time management
- Implementing attendance management procedures

Ms Harper's note of the meeting concluded, after referring to her supporting the claimant in 1-2-1 meetings and showing him how to plan his time effectively -

*"Mo agreed this would be helpful and was happy to accept any support offered. "*

48. The claimant's version of what took place at this meeting was rather different. He alleged that he was *Verbally abused*" and *"repeatedly called selfish"* for not being at work before his team. This was a reference to the previous



weekend during which the claimant, having volunteered to do so, had relocated the OTT team from the second floor to the ground floor at Portcullis House. He had transferred their belongings which had been boxed, set up computer terminals and desks and installed OTT software. There was a seating plan so staff would know where to go when they started work on the Monday.

49. The claimant was on flexi-time and his normal working pattern was to start between 9.30 and 10.00am and finish between 6.00 and 6.30pm. He would sometimes attend the gym before starting work. The other FLM (Ms Grant) also utilised flexi-time to accommodate her childcare requirements. Both the claimant and Ms Grant arrived after their team members on the Monday after the relocation.

50. The claimant said that he had been criticised for not being in before his team on their first day in their new location. There had been no criticism of Ms Grant. The claimant described the criticism as *“highly stressful, distressing and demotivating”*. Our view of this was that the circumstances of the claimant and Ms Grant on 1 February 2018 were different. It was the claimant who had undertaken the work to relocate the OTT team members. It was not unreasonable of Ms Fielding and Ms Harper to take the position that the claimant should have been present when staff attended for work in the new office location for the first time.

51. Ms Harper described the discussion of this matter in these terms -

*“There had been feedback received from his team that he disappeared a lot and he was not there for them. There was a desk re-organisation and the Claimant had gone in over a weekend to make the changes. But he had not been there on the Monday morning to explain the changes to them. I asked him whether, with hindsight, he thought it might have been better to be there on the Monday to explain the new arrangements. Jane said that she had been there and it was just as well because staff were unsettled. The Claimant disagreed that it would have been reasonable for him to be there.”*

*Job application*

52. In February 2018 the claimant submitted an application for the position of RIS Production Team Leader (HO band) (the "RIS job") using the Civil Service Jobs ("CSJ") portal (2:86-93). This bore the date/time of "2018-02-12 23:44:15" and we were satisfied that this reflected the date and time of the online submission of the claimant's application, ie 11.44pm on 12 February 2018. The claimant asserted that he had discussed this with Ms Fielding before submitting it but the documentation which he subsequently produced during his appeal against dismissal cast doubt on this, and we found that the claimant had not discussed with Ms Fielding the leading and communication competency which he included in his RIS job application. The claimant had applied for quite a number of jobs and would have been aware that Ms Fielding did not consider that he was ready for promotion.

53. In the CSJ online application certain fields were pre-populated reflecting information input by the claimant when he registered with CSJ, or as subsequently updated by him. One of these pre-populated fields was the name of the claimant's line manager. Because this had not been updated the name which appeared in the claimant's application for the RIS job was Ms K Devlin who had been his line manager when he worked in PT Ops.

54. When completing his application for the RIS job the claimant had to provide four competency examples - Leading and communicating, Building capability for all, Changing and improving and Delivering at pace. His Leading and communicating example was expressed in these terms -

*"Upon joining the Option To Tax department as a manager I joined a department that had failed to meet its targets 13 years in a row.*

*My task was to turn around a failing department*

*Analysing caseworker data highlighted each caseworker was only trained on 1 type of casework meaning prolonged leave/absence could lead to backlog as no casework cover was available. I drafted an upskilling plan to train up staff on all casework to eliminate/minimise impact of leave/absence. I ran my*

detailed plan past my Manager gaining approval to proceed. I delivered a meeting to staff announcing my plans, to diffuse the negativity my plan was met with I highlighted the critical need for this, I was honest about this being the only solution to the long running problem, emphasising the positive benefits to caseworkers of this plan. I shared the upskilling/training plans via the Google Drive so everyone had access, weekly I discussed upskilling at meetings to ensure engagement, understanding and to allow for input. I sent my manager regular updates to keep her informed of progress/problems encountered. I learned to do some of the caseworkers work too, to show solidarity. At a leaders event we presented what our department was doing to raise awareness of our positive steps/actions. At Christmas I treated all caseworkers to Pizza to say "thanks" for all their hard work.

*Result - department well on track to meet targets for the first time in 13 years and staff much happier due to being multi-skilled. "*

55. The jobholder for the RIS job was Mr K Henry. While engaged in a sift of the applications he did a spot check which disclosed that the line manager validation email had gone to Ms Devlin rather than Ms Fielding. Ms Jackson was also involved in the sift and she expressed concern that the leading and communicating competence provided by the claimant was something that had been completed by another member of staff.

56. When this matter was brought to Ms Fielding's attention she sought advice from an HR caseworker on how to proceed and was told that it was potential gross misconduct and therefore required a referral to IG. Ms Fielding completed the appropriate form (2:67-74) and submitted this to IG on 6 March 2018.

#### *Meetings on 6 March 2018*

57. As a follow-up to the third meeting at which Ms Jeffery's attendance was discussed (see paragraph 44 above) the claimant and Ms Fielding exchanged emails on 5 March 2018 (1:147-148) relating to the interaction of the rolling 12 month period for absence management and the operation of Disability Trigger Points. The claimant then spoke with Ms Harper on 6 March 2018.

He was critical of Ms Fielding, describing her (according to Ms Harper's note of the meeting at 1:149-150, the accuracy of which we found no reason to doubt) as "dishonest" and stating that he felt he was "being set up to fail".

58. Ms Harper's note recorded the claimant as saying that Ms Fielding treated her female FLMs differently from him -

*"He also said that he feels treated differently because he is a male."*

The claimant told Ms Harper that he did not want to work with Ms Fielding any more and that he believed Ms Fielding's behaviour towards him had been unacceptable and that he wanted to address this. Ms Harper advised the claimant that support was available to him from a range of sources.

59. The claimant also met with Ms Fielding on 6 March 2018. Ms Fielding's note of this meeting (headed "Regular Performance and Development Discussion Template") was at 1:151-153. When Ms Fielding opened the meeting by asking the claimant how things had been going he replied "pass". The claimant said that both Ms Fielding and Ms Harper were "picking on him and turning things round and taking things out of context and generally not providing him with any support". After further discussion which reflected the claimant's distrust of Ms Fielding, she told him that as there had been no improvement in his performance, matters would require to progress to a formal Poor Performance process. There would be a meeting, scheduled for 13 March 2018. Ms Fielding wrote to the claimant on 6 March 2018 to invite him to this meeting (1:154-155).

60. Ms Fielding then advised the claimant that she required to refer him to IG as she had reason to believe that the leading and communicating example he had used in his RIS job application might be false. The claimant's reaction to this was to say that "he had done all that he had said in the example".

*Claimant's email of 10 March 2018*

61. The claimant sent an email on 10 March 2018 (1:164-165) to Mr Torz, Ms L Neil (Ms Fielding's line manager) and Ms K McGarrigle (a senior manager) in which he complained about-

- The discussion notes which accompanied Ms Fielding's letter of 6 March 2018 - he said that *"the majority of these notes have never been shown to me"* and *"pretty much 90% of these have false and inaccurate information on them to make me look bad"*.
- 5
- Bullying and harassment by Ms Fielding and Ms Harper - he said *"I beg that you help end this misery for me"*.
62. The claimant was correct in saying that he had not seen the notes prepared by Ms Harper until these were sent to him with Ms Fielding's letter of 6 March 2018. Ms Harper's notes of her meetings with the claimant had been sent by her only to Ms Fielding as the claimant's line manager.
- 10
63. The claimant alleged that the respondent did nothing in response to his email of 10 March 2018. This was contradicted by some of the content of the "Grievance checklist - manager's review" (1:247-256) completed by Ms Neil after the claimant submitted a grievance on 16 April 2018 (he had made reference to his intention to do so in his email of 10 March 2018).
- 15
64. In her manager's review Ms Neil stated (at 1:249) -
- "Mohammed initially approached the senior management team to raise his concerns. I have had informal discussions with him and offered to help resolve things in-house, such as mediated meetings between him and Jane (as per guidance) which he did not want to explore. A stress reduction plan has also been offered to Mohammed (with an independent manager) as part of his performance management but this has not been pursued (sic)."*
- 20
65. Ms Neil also stated (at 1:251) -
- "In my early discussions with Mohammed, he raised that he feels he may be treated differently due to being the only male manager in his immediate team/peer group. However, in his formal complaint document, he does not raise at all this so please note that I have considered his complaint to meet the 'bullying and harassment with no discrimination' criteria. "*
- 25

66. We found that, contrary to the claimant's assertion, the respondent did take action in response to the claimant's email of 10 March 2018 as referenced in Ms Neil's manager's review. This led to the claimant being offered a SRP as described below.

5 *Poor performance plan*

67. Ms Fielding met with the claimant on 13 March 2018 to discuss his performance. The claimant was accompanied by Ms Devlin. Mr D Scott was the minute taker and the meeting note was 1:166-171. We had no reason to doubt the accuracy of this. The note records Ms Fielding referencing various shortcomings in the claimant's performance and the claimant's responses to these.

68. The outcome of the meeting on 13 March 2018 was Ms Fielding's decision to issue the claimant with a first written warning. She completed a Decision making - manager's record dated 16 March 2018 (1:176-177) setting out the rationale for her decision.

69. Ms Fielding wrote to the claimant on 19 March 2018 (1:178-180) giving him a first written warning because his *"work performance was not at a level that is acceptable to the Department"*. She identified 17 points of criticism of the claimant's performance under various subject headings -

- Time management
- Following management instructions and appropriate guidance
- Engagement with team and colleagues
- General behaviour

70. Ms Fielding's letter advised the claimant that he required to demonstrate improvement in these areas by -

- Improving time management skills by using an appropriate tool
- Following management instructions and appropriate guidance



- Showing visible engagement with team and colleagues and increased participation in all meetings and workshops
- Sit with team to improve knowledge of the team's work
- Display more positive role model and leadership behaviours

5 71. Ms Fielding's letter also advised the claimant that his work performance would be reviewed during the period between 26 March and 25 April 2018. A PIP was put in place (1:189-190) which set out actions to be taken in the areas where improvement was required.

10 72. Review meetings were held between Ms Fielding and the claimant on 12, 20 and 26 April 2018. The claimant was accompanied by Ms Lawson on 12 and 20 April 2018 and by Mr E McGonnell on 26 April 2018. Ms C McCallum was the note taker at all of these meetings and again we had no reason to doubt the accuracy of the notes (1:198-204, 1:208-211 and 1:219-222 respectively). The first review meeting was put back from 5 April 2018 because the claimant  
15 had emailed Ms Fielding on 29 March 2018 (1:191) stating that he did *"not agree with many points on the PIP"* and requesting a meeting at which he would be accompanied by a colleague.

20 73. The outcome of the PIP, as recorded in the note of the meeting on 26 April 2018 (at 1:221), was Ms Fielding's decision *"not to progress to the next step"* and that the claimant would *"now move to a 12-month sustainment period from 26/04/2018 - 25/04/2019 during which time he should sustain the improvements made"*.

#### *Claimant's appeal against first written warning*

25 74. A consequence of the claimant being placed on a PIP was that he was unable to submit applications for jobs within the respondent (in terms of the respondent's guidance HR53011). There was an exchange of emails between the claimant and Ms Neil on 19/21 March 2018 (1:181-183) in which the claimant stated his intention to appeal against the first written warning. He did so by letter to Mr D Millar (undated - 1:187-188).

75. Mr Millar met with the claimant on 23 April 2018. Mr M McGuire attended as note taker. The notes of the meeting were at 1:214-217 and once again we had no reason to doubt the accuracy of these.

76. Mr Millar wrote to the claimant on 26 April 2018 (1:223-224) rejecting his appeal against the first written warning. In his letter Mr Millar identified 11 areas where he found that the claimant had agreed with points of criticism of his performance.

*Stress reduction plan*

77. On 29 March 2018 Ms Neil asked Mr Crampshee to act as the claimant's SRP manager. This was the day before the Easter holiday weekend. Mr Crampshee spoke with the claimant on 3 April 2018 and asked him to complete the SRP form which we understood could be accessed online.

78. Mr Crampshee's evidence was that this was the appropriate procedure as the claimant needed to identify his stressors before Mr Crampshee could implement the SRP. This conflicted with the evidence of (a) Ms Lawson and Ms Jackson who said that they would firstly speak to the person suffering from stress to identify the problem and what they might do to assist and (b) the claimant when he described his own actions in helping one of his team members, Mr A Thomson.

79. Our view of this was that the difference in approach was explained by the fact that Ms Lawson, Ms Jackson and the claimant were referring to team members known to them and with whom they had regular contact. In contrast, Mr Crampshee did not work with the claimant and did not have any personal insight into what might be causing the claimant to feel stressed.

80. The claimant did not revert to Mr Crampshee with a SRP following their conversation on 3 April 2018. The next Mr Crampshee heard from the claimant was an email of 14 June 2018 (1:268) requesting that they "*get together asap and do this stress reduction plan*". Mr Crampshee replied on the same date reminding the claimant of what he had said in April and confirming his willingness to meet the following day.



81. On 15 June 2018, not having heard further from the claimant, Mr Crampshee approached the claimant and they had a discussion. Mr Crampshee made a record of this (1:269). Their conversation was curtailed when the claimant had to leave to go to his second job. Matters were left on the basis that the claimant would read the relevant guidance (HR62320) and prepare a rough version of his SRP and revert to Mr Crampshee. The claimant did not do so and Mr Crampshee chose not to approach him as he did not want himself to be a source of stress to the claimant.

*Claimant's grievance*

82. On 16 April 2018 the claimant submitted a grievance (1:205-207). The grievance itself was undated but the date of submission was confirmed in Ms Neil's Grievance checklist - manager's review (at 1:248) (see paragraphs 63-65 above). In his grievance the claimant identified seven matters -

(i) The attendance case meeting in November 2017

(ii) The attendance case meeting in December 2017 and a subsequent meeting with Mr Torz

(iii) The managers' meeting at which the attendance case was discussed

(iv) Ms Fielding and Ms Harper making up things about him

(v) Being "*verbally assaulted*" by Ms Fielding and Ms Harper at the meeting on 1 February 2018

(vi) "*Anything I say they say I'm wrong*"

(vii) Being accused of not engaging with his team

83. Mr M Fulton was appointed as investigation manager and Ms Hunter was appointed as decision maker. Mr Fulton met with claimant on 22 May 2018 with Ms M Thomson-Moyes as note taker. The notes were at 1:234-243 and again we had no reason to doubt their accuracy. The notes record that Mr Fulton went through each of the seven allegations with the claimant. It was noted that allegations 4 and 6 were broadly the same.

84. Mr Fulton then met with Ms Fielding on 5 June 2018 (notes at 1:338-348), Ms Harper on 7 June 2018 (notes at 1:352-359), Mr Torz on 15 June 2018 (notes at 1:335-337) and Ms Jeffrey also on 15 June 2018 (notes at 1:349-351). Three different note takers were involved; again we had no reason to doubt the accuracy of the notes. These notes of Mr Fulton's meetings with Ms Fielding, Ms Harper, Mr Torz and Ms Jeffrey were produced by the respondent in the course of the Hearing and added to the bundle at the claimant's request in the course of Ms Hunter's evidence but he did not ask any questions arising from them.
85. Mr Fulton produced a Grievance Investigation Report (1:309-330). This included a chronology covering the period from 24 April 2018 when Mr Fulton had been asked to act as investigation manager to 15 June 2018 when he conducted the final interviews and agreed the minutes of these with Mr Torz and Ms Jeffrey (at 1:311). The start of Mr Fulton's investigation was delayed due to the claimant being on annual leave. We were satisfied that Mr Fulton conducted a thorough investigation and produced his report within a reasonable timescale.
86. Mr Fulton's report concluded with three recommendations (at 1:330) namely that-
- The complaint of harassment should not be upheld because the claimant had failed to explain how the unwanted conduct he alleged was relevant to any protected characteristic.
  - The complaint of bullying should not be upheld because, on the balance of probabilities and in the absence of almost any substantial evidence, Mr Fulton did not believe that any behaviour that could reasonably be described as bullying had occurred.
  - The claimant's management should consider investigating whether the complaint by the claimant was vexatious and malicious.
87. Ms Hunter as decision manager wrote to the claimant on 28 June 2018 (1:331-332) enclosing a copy of Mr Fulton's report and inviting the claimant to

a meeting to be held on 5 July 2018. At this meeting the claimant was accompanied by Ms Lawson. The note taker was Mr R Martin and once more we had no reason to doubt the accuracy of the notes (1:289-307).

5 88. The notes of Ms Hunter's meeting with the claimant disclosed (a) confirmation of the seven allegations and (b) a comprehensive discussion of each of these allegations (with the claimant recorded as agreeing that allegation 6 was a duplication of allegation 4). There was a conflict in the evidence as to how long this meeting lasted. Ms Hunter recalled it had lasted for three hours. The claimant asserted that it had lasted for 35 minutes. Ms Lawson thought  
10 it had been about an hour.

89. The meeting started at 1.00pm. Ms Lawson told us that she normally left the office at 3.00pm to catch a train and she had been back at her desk in time to do so. While we did not regard the point as particularly significant, we came to the view that the claimant had underestimated and Ms Hunter had  
15 overestimated the length of the meeting. Ms Lawson's recollection appeared to us to be the most reliable as it was linked to her normal time of leaving the office. However, given the length of the notes, we thought it more likely than not that the meeting had lasted rather more than an hour.

90. Ms Hunter wrote to the claimant on 12 July 2018 with the grievance outcome  
20 which included her Decision manager's deliberation document (1:277-285). Her decisions on the claimant's allegations of bullying and harassment mirrored Mr Fulton's recommendations. She wrote -

*"The basis for the decision is that I believe that you were subject to firm and fair management. There is evidence of continuous support offered to you  
25 from both Jane as your manager and Tracey in her support role. The support offered has not been taken up. In your role as a manager I would expect that you will be aware of the need for managers to support jobholders which can include giving advice and challenging decisions and that there will be times when managers and jobholder disagree which can lead to difficult  
30 conversation. I do not believe that you were subject to unacceptable*

*behaviour and you have not been able to provide substantive evidence to support the use of such emotive language throughout the grievance. "*

91. Ms Hunter set out five action points to implement the outcome of the grievance -

- 5                   • The claimant to be redeployed to a new manager.
- A SRP to be set up.
- Another form of support to be put in place for attendance management cases.
- 10               • Disciplinary Action to be considered on the basis that the claimant's grievance was vexatious and malicious.
- The claimant to be proactive in putting in place a development plan with his new manager to help upskill himself; the recommendation that the claimant uses all facilities available to help with his stress and depression; and that this could include making contact with Workplace  
15               Wellness and discussion of a possible referral to Occupational Health.

*IG investigation*

92. Following submission by Ms Fielding of her Discipline checklist - manager's review (2:67-74, see paragraph 56 above) Mr Ahmed was appointed as the investigation officer in March 2018. He carried out an investigation, the main  
20               features of which we describe below, and produced a comprehensive report (1:1-135 and 145-217).

93. Mr Ahmed's report included references to a number of the respondent's policies and other relevant documentation, as follows -

- HR22002 Conduct: Policy overview (2:31 )
- 25               • The Civil Service Code (2:32-35)
- HR22003 Conduct: Your Conduct and Behaviour at Work (2:36)
- HR22007 Conduct: Honesty and Impartiality (2:37-39)

- HR53002 Filling vacancies: Policy overview (2:40)
- HR53010 Filling vacancies: Apply for a vacancy (2:41-53)
- HR5301 1 Filling vacancies: Eligibility and suitability (2:54-55)
- HR5301 3 Filling vacancies: Apply using Civil Service Jobs (2:56-61 )
- 5 • HR23007 Discipline: How to: Assess the level of misconduct (2:62-66)

Mr Ahmed made reference to the relevant sections of these policies etc in his report (2:12-15).

94. Mr Ahmed exchanged emails with Ms Fielding on 9/10 April 2018 (2:81-82). Ms Fielding told Mr Ahmed that the claimant had *“had tried to pass off the [competency] example as work that he had done but was done by a colleague”*.  
10
95. Mr Ahmed exchanged emails with Mr Henry on 12 April 2018 (2:78). Mr Henry confirmed what his line manager spot check on the claimant’s application for the RIS job had disclosed (see paragraph 55 above).
- 15 96. Mr Ahmed also exchanged emails with Ms Jackson on 10 April 2018 and 26 April 2018 (2:79-80 and 2:185-187 respectively). The latter exchange followed Mr Ahmed’s meeting with the claimant to which we refer below. Ms Jackson responded to Mr Ahmed’s email of 10 April 2018 by quoting from the claimant’s leading and communicating competency in his RIS job application and commenting on what the claimant had said.  
20
97. Ms Jackson did not agree that it had been the claimant’s task to *“turn around a failing department”*. She said that *T/?e teams were achieving objectives when Mo took over”* although she acknowledged that the OTT teams went into backlog from June - November 2017. Her evidence to us was that it was  
25 Ms Jackson herself rather than the claimant whose job it had been to turn round a failing department.

98. Ms Jackson commented on the claimant's statement that his involvement in the claimed competency had included *"analysing caseworker data"* by saying *"Mo may have done this however showed no evidence to me"*.
99. Ms Jackson did not agree that the claimant had *"drafted an upskilling plan"* and *"ran my detailed plan past my Manager gaining approval to proceed"*. Her comment was *"Other FLM in team did this - Mo supported and was present in meetings however had little input into plan"*.
100. Ms Jackson did not agree that the claimant had delivered a meeting to staff to diffuse negativity etc. Her comments were *"I saw other FLM leading meetings and explaining...."* and *"Mo may well have had other conversations with team however I did not witness them the main ones I saw was other FLM have group discussion with Mo supporting"*.
101. Ms Jackson did not agree that the claimant had *"shared the upskilling/training plans via Google Drive...."* Her comment was *"other FLM did this. Mo may well have updated the plans while other FLM was on annual leave however initial set up was with other FLM"*.
102. Ms Jackson's comment on the claimant's statement that he had sent her *"regular updates to keep her informed of progress/problems encountered"* was *"I had weekly meetings with both Mo and FLM - other FLM led meetings and provided updates and issues - no updates were sent to me by Mo"*.
103. Ms Jackson did not agree that the claimant had delivered a presentation at a leaders' event. Her comment was *"Don't recall Mo having presentation at leaders event - other FLM provided updates at Managers meeting and updates during quarterly review meeting with G7"*. The "G7" was Mr Torz.
104. Mr Ahmed conducted a tape recorded interview with the claimant in Glasgow on 24 April 2018. He was accompanied by Mr N White, another IG officer. The transcript of this interview was included in Mr Ahmed's report (2:96-135 and 145-181). His report included a detailed *"summary of response"* relating to this interview (2:16-23). In the summary section of his report Mr Ahmed recorded (at 2:23-24) that the claimant did not accept that he had falsified his

RIS job application, that he had breached the respondent's conduct guidance, that he had been dishonest, that his actions had the potential to bring the department into serious disrepute nor that he had failed to adhere to the Civil Service Code's core values of honesty and integrity.

- 5 105. On 27 April 2018 the claimant emailed Mr Ahmed (2:188-207) attaching a number of documents which were intended to show that he had organised training for OTT team members prior to Ms Grant becoming a FLM in OTT on 10 July 2017. He described these as *"evidence of me controlling workplan and training going out to agents"*.
- 10 106. Some of the evidence sent to Mr Ahmed by the claimant comprised emails which we understood to be from the claimant to his own team - the email dated 14 June 2017 (2:189) was an example. We noted similar emails dated 19 June 2017 (2:197-198), 20 June 2017 (2:199-201) and 21 June 2017 (2:201-202). The email addresses of the recipients had been redacted but  
15 took up a similar amount of space - 10/11 lines.
107. One of the emails sent by the claimant to Mr Ahmed, dated 16 June 2017 (2:191-192), had a considerably longer list of recipients (also redacted) extending to 25 lines. The claimant explained that this had been sent to various people outwith his own and Ms Grant's teams.
- 20 108. Page 2:193 was an example of a workplan - this was confirmed by Ms Jackson. A workplan would reflect OTT team members' anticipated work activity for a particular week. It was not a training plan but might reflect activity covered by a training plan. The sending of a workplan by the claimant to his team was in the nature of *"business as usual"* rather than indicative of the  
25 claimant implementing a training plan which he had drafted.
109. The claimant was keen for Mr Ahmed to speak to Ms Jackson again. To quote him from near the end of the interview with Mr Ahmed/Mr White (at 2:180) -  
*"...my main thing is if you can just speak to Cat Jackson and just confirm dates that'll back up what I've said here and certainly the documentation  
30 which I've evidence she'll be able to back up. But I do believe a lot of her*



*comments have come off the back of her thinking that I'm talking about that this has started from July 10 when Rachel has got involved and because she is very vocal and she's maybe been accredited to all of it."*

110. This led to Mr Ahmed's further exchange of emails with Ms Jackson on 26 April 2018 (2:185-187). In response to questions from Mr Ahmed about who had responsibility for the upskilling plan for the OTT teams and how implementation was monitored, Ms Jackson said -

*"I asked both Victoria and Mo for a training plan and to commence upskilling in the middle towards the end of May as saw potential risk to business during the summer months. I went on leave 28/05/2018 and returned 19/06/2018. When I returned I was disappointed to find that only 1 person was being trained and this person's training had actually commenced march 2017 and had been suspended due to Business Needs and this had been resumed in June. I believe emails were sent to 3 people to start training, however I was expected [sic] a training plan for full unit. At this time Victoria asked for a reduction in hours which meant that she would be working a 4 days week. I took this opportunity to move Victoria over to casework and bring Rachel in. My remit to Rachel was that training had been a trickle and in order to meet our business objectives I needed whole unit upskilled on all casework, admin duties and telephones. "*

111. Ms Jackson confirmed in evidence to us that Ms Grant had produced a training plan which had been rolled out not only to her and the claimant's OTT teams but also to staff in Cumbernauld. She told Mr Ahmed (at 2:186) -

*"The main project commenced July 17 - Rachel asked for meeting with Natasha Burton and myself (Unit heads) and she had done a training plan incorporating all casework and admin and telephone duties, she had done this plan at home...."*

112. Mr Ahmed asked Ms Jackson about the claimant's assertion that he had asked staff regarding their skills and capabilities and that had prepared an upskilling matrix in May 2017 and had run a spreadsheet past Ms Jackson. Her response was recorded as *"Mo may have done this but I do not remember*



*seeing one*". She referred to a skills matrix having been completed by the previous manager of which the claimant might not have been aware. She also said that Ms Grant was not aware that another skills matrix had been done.

5 113. There was an exchange of emails between Mr Ahmed and the claimant on 29  
May 2018 (2:208-209) when Mr Ahmed sent to the claimant Ms Jackson's  
responses to his (Mr Ahmed's) further queries. The claimant's reply included  
the statement that he had returned from two weeks' annual leave on 30 May  
2018 (ie after Ms Jackson commenced her annual leave) and the instruction  
10 to prepare a training plan might have been given to Ms Mathieson in his  
absence. Ms Jackson's evidence to us supported this - notwithstanding what  
she had said to Mr Ahmed, her expectation was that Ms Mathieson alone  
should prepare the training plan.

114. Mr Ahmed decided to contact two of the people whose names (or rather email  
15 addresses) had been provided by the claimant. He chose Mr A Thomson  
because he (Mr Thomson) had been mentioned by the claimant as someone  
in his team who had received training. He also chose Ms C Crichton at  
random. Ms Crichton was not a member of the claimant's team and it seemed  
to us probable that Mr Ahmed had chosen her from the longer list of email  
20 addresses supplied by the claimant (see paragraph 107 above).

115. Mr Ahmed emailed both Mr Thomson and Ms Crichton asking questions about  
skills training in May - June 2017, whether they recalled a skills matrix being  
completed and, if so, by whom and about team meetings and what was  
discussed (2:208-214). Their replies were not particularly helpful.

25 116. Mr Ahmed had a further exchange of emails with the claimant on 21 June  
2018. Mr Ahmed asked the claimant if any of his documents showed the  
upskilling matrix and for details of the claimant sharing documents on Google  
drive. The claimant said in reply that he could not provide a copy of his matrix  
- *"not sure what I've done with the document"* - and that he was *"having*  
30 *issues"* finding the Google drive document

117. Mr Ahmed then completed his report. He considered that the claimant had exaggerated and/or falsified the leading and communicating competency and provided suggested wording for a disciplinary allegation -

5 *"You applied for a R/S Production Team Leader role on 12 February 2018 under reference number HMRC 5162466. You falsified this application by using a competency statement that you have not completed the substantive role on. I consider this to be a serious breach of HMRC's conduct guidance and an act which reflects poorly on you as an officer of HMRC."*

*Disciplinary hearing and outcome*

10 118. Mr Ahmed sent his report to Mr Warrilow on 3 July 2018. Mr Wardlow had earlier been appointed by Mr Torz as the decision maker. Mr Warrilow held a disciplinary meeting with the claimant on 17 July 2018. The claimant was accompanied by Ms Lawson. Ms R Jones-Marshall was the note taker. The notes were at 2:218-225 and again we found no reason to doubt the accuracy  
15 of these.

119. The disciplinary allegation against the claimant was amended from the wording suggested by Mr Ahmed. It now read -

20 *"You applied for a RIS Production Team Leader role on 12 February 2018 under reference number HMRC 5162466. You falsified this application by using a competency statement (Leading & communicating) for work where you have not completed the actions described. I consider this to be a serious breach of HMRC's conduct guidance HR22002, HR22003, HR22007, and HMRC's filling vacancies guidance HR53002, HR53010, HR53011 & HR53013."*

25 120. The notes record that Mr Warrilow asked the claimant questions about what was alleged and the areas where there was a conflict between what the claimant was saying and what witnesses, particularly Ms Jackson, had told Mr Ahmed. Mr Warrilow asked the claimant about -

- Whether he had produced an upskilling plan

- Whether he had run this past his line manager.
- Whether he gave regular updates to his line manager.
- Whether he gave a presentation at a leaders event.
- What he had led (in the context of upskilling).
- What he had achieved before Ms Grant was appointed.

5

121. Towards the end of the meeting Mr Warrilow told the claimant that he should *“get anything that could evidence, skills matrix, conversations with manager”* adding that there was *“not a lot of evidence at present”*. Mr Warrilow also told the claimant that he was departing on annual leave on 20 July 2018 and that he would issue the decision by then.

10

122. The claimant urged Mr Warrilow to speak to *“as many people as possible”* and said that he would email a list of names. The claimant said that *“the AO questioned was in poor health and would struggle to remember what happened last June”* (this was a reference to Mr Thomson). Mr Warrilow suggested to the claimant that he should speak to IT and also to members of his team to see if they had anything (eg evidence of a skills matrix prepared by the claimant) to support his competency statement. Ms Lawson also encouraged the claimant to do so.

15

123. Mr Warrilow had a telephone conversation with Mr Ahmed on 19 July 2018 (2:226). Mr Ahmed confirmed how the two witnesses (Mr Thomson and Ms Crichton) had been selected (reflecting his evidence to us - see paragraph 114 above). Mr Warrilow asked why Ms Grant had not been asked for a statement and Mr Ahmed's reply was that (a) her role was not in question, (b) the evidence confirmed the claimant had played a supporting role and (c) a statement from Ms Grant was not necessary.

20

25

124. Before issuing his decision Mr Warrilow discussed matters with the HR caseworker. He completed his Decision manager's deliberations (2:230-234). He recorded that the claimant did not admit the allegation and maintained that he had done nothing wrong. He came to the view that the claimant had not

completed a skills matrix and training plan nor discussed it with Ms Jackson nor given a presentation at a leaders event. Mr Warrilow stated that after their meeting the claimant had sent him a calendar invitation from the claimant to Ms Jackson with the subject "weekly catch up" but no further details were available.

125. Mr Warrilow recorded his decision in his deliberation document in these terms

—  
*I have decided that the penalty should be dismissal. The allegation is extremely serious. Mohammed [h]as breached the Civil Service Code & HMRC conduct guidance. I have considered the matter of honesty and trust between the employer and employee and consider it has broken down. The penalties available for proven gross misconduct are dismissal without notice and 2 year final written warning. With no mitigation or admittance I feel that this misconduct is so serious that I am left with no option other than dismissal. There is no prospect of rehabilitation due to Mohammed's failure to accept responsibility for his actions.*

126. Mr Warrilow wrote to the claimant on 20 July 2018 (2:227-228) confirming his decision. He advised the claimant of his right of appeal to Mr Jones. He also advised the claimant that details of his dismissal would be sent to the Cabinet Office for inclusion on their database of civil servants dismissed for internal fraud. The effect of this was that the claimant would be banned from employment in a "participating department" for a period of five years.

127. Following his dismissal the claimant was escorted off the premises. He alleged that his team had then been brought together and told not to speak to him. We believed on balance that this had happened.

128. The claimant also alleged that Mr Crampshee had made a comment to him during a meeting shortly before his dismissal "Are you sure you'll be here next week Mo?" Mr Crampshee denied saying this and also said that while he had been aware that there was an ongoing disciplinary process involving the claimant he was not aware at that time what stage it had reached. We did not

believe that Mr Crampshee had any prior knowledge of the outcome of the claimant's disciplinary process.

*Claimant appeals*

5 129. The claimant exercised his right of appeal. His letter of appeal was added to the bundle during the hearing (1:362-366). At the start of his letter the claimant addressed the issue of allegedly not having discussed his application for the RIS job with Ms Fielding as his line manager. He attached copies of two file notes which bore to be dated 16 and 19 February 2018 *"which back up that we did discuss the role before I submitted the application and that it*  
10 *was also spoken about after submission"*. This did not sit comfortably with the evidence that the claimant's application had actually been submitted at 11.44pm on 12 February 2018 (2:86).

15 130. Mr Jones was appointed to the role of appeal officer by Mr Torz on 16 July 2018. Mr Jones made a point of not contacting Mr Warrilow on the basis that he should *"look at and consider the information without input from the original decision maker"* so as to be *"independent and fair"*. Mr Jones wrote to the claimant on 4 September 2018 (2:237) inviting him to an appeal hearing on 10 September 2018.

20 131. At the appeal hearing the claimant was again accompanied by Ms Lawson. Mr C Macrae attended as note taker. The notes of the appeal were at 2:238-245. We found no reason to believe that these notes were not accurate.

25 132. At the appeal the claimant's position remained that he had produced the upskilling plan to which his leading and communicating competency referred. The claimant's appeal points were summarised in Mr Jones' Appeal manager's deliberation template (at 2:247) as follows (the claimant's Christian name appeared to have been misspelt throughout so we have corrected this)

—  
*"He had discussed his applications for HO posts with his manager. A written record of meetings with his manager acknowledging this was produced with*  
30 *his written submission.*

*Mohammed contends that the team he joined, Option to Tax, had historically failed their target due to problems incurred during the period June to Aug which impacted the whole year.*

5 *Mohammed contends that his team had started training in June, and a plan was on going from that point in time.*

*Mohammed contends that he had regular chats with his manager.*

*Mohammed made every effort to retrieve documents that had been lost and contacted IT service centre in an effort to obtain them.*

10 *Mohammed contends that IT service centre informed him that there were a number of reasons why documents could not be retrieved.*

*Mohammed wasn't happy that the two people who were interviewed in respect of this were not appropriate as one of them suffered from mental health issues and the other didn't work for him.*

15 *On the point of presenting to the SLT it was contended it wasn't a presentation in the sense of a powerpoint but rather information that was presented at a quarterly business meeting. "*

133. During the appeal hearing the claimant requested that Mr Jones should speak to his team. This is recorded in these terms -

20 *"He believes if you talk to the team they would back up the points. It's a reasonable request to speak to the team he doesn't understand why they have not spoken to the team. "*

25 *Later in the notes the claimant is recorded as saying "the fair thing to do would [be to] speak to the team". Towards the end of the appeal in response to the claimant again asking him to speak to his team, Mr Jones "explains he cannot speak with his [ie the claimant's] team this would be internal governance". When the claimant pressed the point Mr Jones is recorded as responding "Explains he cannot make comment".*



134. The claimant was critical of the selection of Mr Thomson and Ms Crichton as the two employees with whom Mr Ahmed had made contact -

*“...one[s]he never worked alongside or under him, the other one had mental health issues”*

5 The claimant was critical of the selection of Ms Crichton from the recipients of a seating plan. She was at O band, not AO (the grade of the claimant's team members). She and the claimant had never worked side by side nor had Ms Crichton worked under the claimant.

10 135. Mr Jones wrote to the claimant on 21 September 2018 rejecting his appeal (2:246). He enclosed a copy of his deliberations (2:247-249) and the appeal notes. His *“appeal summary”* (at 2:248-249) recorded that -

- There was no contention that procedures had not been followed.
- All evidence was considered properly. Mr Jones was dismissive of the claimant's assertion that Mr Thomson was not a credible witness.
- 15 • There had been new evidence to refute some of the issues peripheral to the case but no new evidence to support the appeal against the actual decision.
- As it was gross misconduct one of the sanctions open to the decision maker was dismissal which Mr Jones considered appropriate and not  
20 excessive.

*Claimant's allegations of race discrimination*

136. We turn now to the claimant's allegations of unlawful discrimination (as set out in paragraph 6 above). We have already made findings in fact in respect of some of these allegations which we will not repeat. We will however also  
25 deal with a number of matters not covered above.

137. The claimant's allegations 1-5 are of direct discrimination under section 13 EqA. His allegations 6-9 are of harassment under section 26 EqA. We deal with them in that order.

*Allegation 1*

138. Allegation 1 was that Ms Fielding had discriminated against the claimant by excluding him from an opportunity that he wished to take part in, namely "Leading our Plan". According to Ms Fielding this event took place on 18, 22 and 25 June 2018. The claimant's comparator was Ms K Nash who was chosen to participate. We understood that Ms Nash was British and white.
139. Ms Fielding's evidence was that she was not responsible for organising this event. She said that the event was led by Ms N Jones and Mr K Lynas. Her involvement was to issue an email asking for volunteers which she did on 4 June 2018 (1:245) and then pass on the names of those who had volunteered. Ms Fielding issued a further email on 11 June 2018 (1:246) thanking those who had volunteered. The claimant was on the circulation list for both emails. The claimant volunteered but was not invited to participate. Ms Nash did participate. We had no evidence that it had been Ms Fielding's decision to choose Ms Nash to participate in preference to the claimant (or, indeed, that it had been her decision at all).
140. Ms Lawson's evidence indicated that Ms Fielding had been more involved in the organisation of the "Leading our Plan" event than merely sending out emails in relation to volunteers but we preferred the evidence of Ms Fielding. We found Ms Fielding's evidence to be credible; it was supported by the emails referred to above and she was better placed than Ms Lawson to know the extent of her own involvement.
141. In his further and better particulars of his discrimination claims the claimant asserted that he had *"asked on various occasions for opportunities to develop between November 2017 and July 2018 but these were constantly ignored"*. He alleged that Ms Fielding would *"happily give white managers whichever opportunities they wish from leading on events to opportunities to work with other departments"*. He subsequently identified Ms S Butterfield, Ms N Jones and Ms Grant as comparators, as well as Ms Nash.
142. The only example given by the claimant to support this wider assertion was the one relating to the Leading our Plan event. It seemed to us that, in relation



to the claimants development, Ms Fielding's focus had been on his achieving improved performance in his current role. That was consistent with his having been assessed by Ms Jackson as "*development needed*".

143. There was a conflict between the evidence of the claimant and Ms Fielding as to where the responsibility lay for identifying development opportunities. Ms Fielding said that opportunities were advertised and it was for team members, including the claimant, to come forward with ones in which they wanted to participate. The claimant believed that it was for Ms Fielding as his line manager to identify suitable opportunities. Our view was that development opportunities could be identified either by the employee himself or herself or by the line manager. Given Ms Fielding's focus on the claimant achieving improved performance in his current role, it was perhaps not surprising that the claimant's perception was that she was not encouraging him towards other development opportunities.

15 *Allegation 2*

144. This was that Mr Crampshee had embarrassed the claimant by calling him out of a managers' meeting and announcing that he had made a mistake and later the same day, in a meeting with all team managers and senior managers, singling the claimant out by drawing attention to his mistake and embarrassing him. The claimant alleged that a couple of days later in a management meeting another colleague had made a mistake and Mr Crampshee had brushed it under the carpet saying "it's fine we all make mistakes" and "At least it's not Mo making more mistakes". The claimant's comparators were Ms A Fitzcharies, Ms Jackson, Ms M McLauchlan and "most other managers". Ms Jackson is British and white; we understood that Ms Fitzcharies and Ms McLauchlan were also British and white.

145. The background was that Mr Crampshee was responsible for uploading data relating to the respondent's Planning for Work ("PFW") systems. The claimant, in common with other managers, was required to submit data onto the PFW systems to enable Mr Crampshee to do this. On the occasion to which the claimant was referring, he (the claimant) had according to Mr

Crampshee *'left his desk without checking his entries balanced'*. Mr Crampshee said that he had to "search three floors in the building" to locate the claimant

146. Mr Crampshee had called the claimant out of a meeting and asked the claimant to accompany him *"to rectify his errors"* Mr Crampshee accepted that he had been *"frustrated"* and referred to the claimant as a *"repeat offender"* in relation to PFW data. We considered that Mr Crampshee probably had given his reason for requiring the claimant to come out of his meeting, and so others attending the meeting would have been aware.
147. Mr Crampshee also accepted that he had raised the matter at the subsequent meeting with team managers/senior managers. He said that he had done so *"for the purpose of awareness/best practice to ensure managerial staff were aware of them"*. He denied the quotes which the claimant had attributed to him at the meeting a couple of days later.
148. The claimant said that Mr Crampshee could have checked his whereabouts in the building by reference to his electronic diary. The claimant did not identify which (if any) of his comparators had been treated differently in relation to making a mistake at the meeting a couple of days later.

### *Allegation 3*

149. This was that Ms Fielding had failed to follow the correct procedure when she had put the claimant on a Poor Performance Plan ("PPP") without first putting him on a PIP. The claimant had been on a reserve list for a Higher Officer ("HO") band role having previously applied unsuccessfully for an HO job based in Manchester. He alleged that Ms Fielding had put him on a PPP *"so she could get me removed from the reserve list"*. The claimant asserted that with anyone else the correct procedure was followed of *"the personal improvement plan before the official poor performance process so again I was treated differently because of my skin colour"*.

The claimant's comparator was *"any member of staff that's been put on a poor performance plan"*

150. We have already set out our findings in fact in respect of the claimant's PPP at paragraphs 67-73 above. We also refer to paragraphs 46-47 above. While the only PIP within the bundle was the one introduced in the context of the claimant's PPP (1:189-190) we accepted the evidence of Ms Fielding that she had produced an earlier PIP following the meeting on 1 February 2018. If the claimant was correct in his assertion that the correct procedure required there to be a PIP before a PPP, then that is what happened in his case. We had no evidence of the claimant being treated differently from anyone else in this regard.

10 151. We found nothing in the evidence to support the claimant's assertion that the Ms Fielding's purpose in putting him on a PPP was to have him removed from a reserve list. The claimant was on the PPP for only a short period of time and it had been Ms Fielding's decision to move him to a 12 month sustainment period. This was not consistent with the purpose alleged by the claimant.

15 *Allegation 4*

152. This was that the claimant had been treated differently by Ms Fielding for being on the Embrace programme. The claimant asserted that employees who participated in a development programme were, both during the programme and after graduation, "*supported to develop their new found learning and skills*" He said that whenever he mentioned Embrace, whether in respect of himself or the two members of his team who participated (Mr Bah and Mr Kaka) Ms Fielding became very negative, whereas she had no problem supporting other development programmes. The claimant's comparators were Ms Nash, Ms K Horner and Ms K Kennedy, all British and white.

153. The claimant contended that the negative attitude of Ms Fielding and other members of the respondent's management was reflected in their failure to attend Embrace graduation events in contrast with their support for graduation events for other development programmes (such as the one referred to in the next paragraph). The claimant also contended that Ms Fielding had refused

to allow Mr Bah and Mr Kaka to use the 20% of their time which was allocated to their development programme.

154. The claimant referred to a Talent Programme which had operated across both the respondent and the Department of Work and Pensions ("DWP") in February - May 2018. Ms Horner and Ms Kennedy had been selected for this. They had been supported and both had subsequently secured promotion.
155. Ms Fielding denied that she was negatively disposed towards Embrace. She pointed out that line managers (of participants) attended Embrace workshops and that the claimant had done so (in respect of employees line managed by him) while she was his line manager. She referred to her email exchanges with the claimant of 2-10 November 2017 (1:118), 14-15 February 2018 (1:1 38-1 40) and 14 May (2018 (1:230-231) which disclosed her approving the claimant's attendance at Embrace events. She had wanted to publicise Mr Kaka's graduation on a success register but the claimant had asked her not to do so - Ms Fielding described this as ""worrying" Mr Bah's success on Embrace had been celebrated in this way.
156. Ms Fielding said that the issue which arose with Mr Bah and Mr Kaka in relation to time allowed for Embrace was a request for additional time over and above the 20% entitlement, and that was why she had refused. She said that business needs would sometimes impact on the respondent's ability to allow time away from normal duties for development activity but this would be made up later.
157. Ms Fielding said that Ms Horner and Ms Kennedy had gained admission to the DWP/HMRC Talent programme following an assessment day, ie in open competition with others.
158. We found nothing in her evidence nor in the content and tone of her email exchanges with the claimant to indicate that Ms Fielding was negatively disposed to Embrace. She had been on the panel which promoted the claimant to become a FLM in BT Ops and this had occurred at a time when he was himself participating in the Embrace programme.

*Allegation 5*

159. This was that the claimant had not been helped with his SRP *“to help me cope with the bullying I was suffering despite my plea for help while I battled stress and depression caused by Jane Fielding and Tracey Harper”*. The claimant  
5 alleged that Mr Crampshee *“told me to go do it myself and didn’t help”* and that this was not the correct procedure. The claimant’s comparators were Ms N Burton, Ms G Anderson and Mr A Thomson, all British and white.

160. Our findings in fact in relation to this matter are set out in paragraphs 77-81 above.

10 *Allegation 6*

161. This was substantially the same as the claimant’s second head of grievance and related to the second attendance case meeting (see paragraphs 42-43 above) where the claimant alleged Ms Fielding had demanded to know the exact whereabouts of Ms Jeffrey. The claimant said that Ms Jeffrey *“was  
15 notorious for playing games with management hence I had been advised by my grade 7....not to ask this agent in too much detail about her Union work and that knowing the city of her whereabouts was fine”* He alleged that Ms Fielding had *“made a big scene about knowing exactly in which building this person was despite her knowing about the brief from the grade 7”*. The  
20 claimant asserted that Ms Fielding had done this *“to degrade and embarrass me, to make me look stupid in front of everyone”*.

162. The claimant asserted that this treatment was related to his race because Ms Fielding had *“never done this to her preferred white managers”*.

163. Ms Fielding denied that what was alleged by the claimant had happened, at  
25 least as described by the claimant. She said that the way the claimant spoke to Ms Jeffrey *“was one of the reasons for his overall performance warning”*. She alleged that the way the claimant spoke to Ms Jeffrey was *“unreasonable”* and caused Ms Jeffrey *“a lot of upset”*. According to Ms Fielding, Ms Jeffrey had complained that the claimant *“treated her like a 2-yr old”*.

164. Ms Fielding accepted that she had asked the claimant about Ms Jeffrey's whereabouts and our view was that she had wanted more information than the claimant had felt able to give in light of Mr Torz's instruction to him to give Ms Jeffrey some leeway.

5 *Allegation 7*

165. This was substantially the same as the claimant's first head of grievance and related to the first attendance case meeting (see paragraphs 40-41 above). In his grievance the claimant referred to this meeting taking place in November 2017 while in his further and better particulars he said it was in  
10 December 2017; we did not regard this as material.

166. The claimant alleged that *"This sort of behaviour wasn't given to anyone else but me, again as I was seen as an easy target to both ladies due to my skin colour"*. The claimant said that he had sat in attendance meetings before and *"this has never happened in my knowledge to a white person"*. He said  
15 that Ms Fielding and Ms Harper had *"singled me out for being brown/Pakistani"*. The claimant said that this had been *"degrading and humiliating"* and that *7 was treated like something in [on?] the bottom of their shoe, I wasn't allowed to make a decision about a member of MY team. "*

167. The responses from Ms Fielding and Ms Harper were as recorded at  
20 paragraph 41 above.

*Allegation 8*

168. This was substantially the same as the claimant's fifth head of grievance and related to the meeting between Ms Fielding/Ms Harper and the claimant on 1 February 2018. We refer to our findings in fact at paragraph 46-51 above.  
25 The claimant said this in his further and better particulars - *"No white member of staff in the same position again was labelled as selfish for starting later than staff so again I was singled out due to my skin colour. This was an extremely intimidating and stressful situation for me"*.

169. We deal below with the conflicts in the evidence, including the meeting of 1  
30 February 2018.



*Allegation 9*

170. This was the same as Allegation 2 - see paragraphs 142-146 above. In Allegation 2 the claimant was alleging that Mr Crampshee subjected him to less favourable treatment because of his race; in this Allegation he was asserting that this treatment also constituted harassment. The claimant said  
5 *"This was related to my race as no white manager was treated like this despite them all making mistakes yet I was disgustingly treated like this. \* Referring to his white colleagues the claimant said "there was never a public shaming".*

171. There was a conflict in the evidence between the claimant and Mr Crampshee  
10 as to when the events described in this allegation occurred and we deal with this below.

*Loss of earnings*

172. At the time of his dismissal the claimant had a second job with Teleperformance Ltd. We understood that this was in a call centre where the  
15 claimant worked 20 hours per week. After his dismissal the claimant increased this to around 40 hours per week. The claimant provided a schedule of loss (1:87-90) which detailed his earnings until March 2019. The claimant said in evidence that his employment with Pertemps Payroll Services Ltd as from February 2019 had involved an agency position working for the  
20 Scottish Government.

173. The claimant had become a direct employee of the Scottish Government on 9 September 2019 (earning £25500 per year gross) but this employment had ended on 4 October 2019 when the claimant had been dismissed (against which the claimant was pursuing an appeal). Had it been necessary to do so  
25 we would have found that any compensation to which the claimant might be entitled should be calculated only up to 4 October 2019 as any loss thereafter was attributable to the claimant's dismissal on that date and not his earlier dismissal by the respondent.

174. The respondent had prepared a revised version of the claimant's schedule of  
30 loss (1:91-92) in which the claimant's gross and net weekly pay with the



respondent were stated as £467.69 and £386.32 respectively. We agreed with these figures. The calculation of loss of earnings in the claimant's schedule of loss was incorrect as it did not give credit for his increased earnings with Teleperformance Ltd post-dismissal. Had it been necessary for us to do so we would have preferred the calculation in the respondent's schedule of loss.

*Injury to feelings*

175. The claimant did not provide any independent medical evidence but did tell us about the way in which his health had been affected. He had consulted his GP because he felt stressed and had been prescribed medication, which he had not in fact taken. He spoke of suffering from stress and depression from October 2017 onwards and described having negative thoughts and struggling to sleep.

176. The claimant said that his mental health had reached a low point in December 2018 when he would spend all but three hours each day in bed. He referred to having suicidal thoughts on a daily basis.

177. In July 2019 the claimant had developed an abscess which his GP indicted was stress related, and he required to undergo an emergency operation. He was still struggling with his mental health and his sleep pattern continued to be disturbed.

*Reinstatement or re-engagement*

178. The claimant's preferred remedy if his unfair dismissal claim was successful was to secure an executive officer role with the respondent. The respondent's witnesses were against this, citing a loss of trust in the claimant. We were satisfied that these witnesses held a genuine belief that the claimant was not trustworthy.

179. We were told that the claimant had been replaced and so there was currently no vacancy for a FLM in OTT in BT Ops.

**Comments on evidence**

180. As we had witness statements for all of the witnesses apart from Ms Lawson and Ms Jackson, the bulk of the evidence we heard was under cross-examination. Ms Fielding's evidence was given robustly and there was clearly a degree of continuing antipathy between her and the claimant. There was a tendency for one to speak over the other without waiting for the question or the answer to be completed. We suspected that, to some extent at least, this reflected how meetings between them had been conducted.
181. The other witnesses for the respondent gave their evidence in a measured way and were all credible. Where there were conflicts - such as (a) the length of the grievance decision meeting attended by Ms Hunter, Ms Lawson and the claimant and (b) the extent of Ms Fielding's involvement in the Leading our Plan event - we did not consider that this tainted the overall credibility of the witness whose evidence we chose not to prefer.
182. The claimant faced some fairly hostile questioning by Dr Gibson where his honesty was challenged. While the claimant strove to maintain the position that he had done nothing wrong and generally acquitted himself quite well in what was a completely unfamiliar environment for him, there were times when the weight of other evidence made us doubt whether the claimant's recollection of events was accurate. That is reflected in the following paragraphs where we deal with a number of conflicts in the evidence.
183. The claimant disputed that he had received all the notes prepared by Ms Fielding following their meetings. We preferred the evidence of Ms Fielding that these had been emailed to the claimant after each meeting. There would have been no logic in Ms Fielding sending only some of the meeting notes to the claimant and we decided that, on the balance of probability, all of these notes had been sent shortly after the meeting to which they related.
184. The claimant disputed the accuracy of the meeting notes prepared by Ms Fielding and Ms Harper. He asserted that they were "*making up things about him*" as alleged in his fourth head of grievance. Our view of this was that the claimant had a high regard for his own abilities and did not like being subjected

to criticism. He had been unwilling to take advice from Ms Fielding and Ms Harper and viewed their meeting notes through the prism that these were a deliberate attempt by Ms Fielding and Ms Harper to obstruct his career. We found no substance in this and were satisfied that Ms Fielding and Ms Harper, despite the claimant's contrary perception, were trying to help him. It was simply not credible that they would make things up when their notes could be subject to external scrutiny-which was exactly what had happened when the claimant's grievance was investigated.

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185. The claimant alleged that Ms Fielding and Ms Harper had raised their voices and been "*extremely aggressive*" towards him. However, when this had been investigated as part of his grievance, the claimant had not provided any detail of what he was alleging. Ms Hunter's view was that the claimant had been subject to "*firm and fair management*" and we believed that this was a reasonable conclusion to reach and one with which, on the basis of the evidence presented to us, we would concur. In particular we found the evidence of Ms Fielding and Ms Harper, supported as it was by the grievance investigation and outcome, more credible than that of the claimant as to what happened at the meeting on 1 February 2018 (see paragraphs 46-51 above).

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186. The claimant alleged that the respondent had not taken action in response to his email of 10 March 2018 (1:164-165). Our findings in fact in relation to this are set out at paragraphs 62-65 above. The respondent may not have taken the action the claimant wanted which was to be "*protected*" from Ms Fielding and Ms Harper but they did take action as recorded in Ms Neil's manager's review (1:247-256), a document prepared a few weeks after the claimant's said email.

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187. There was a conflict in evidence as to when the meeting had taken place at which Mr Crampshee had made reference to the claimant's failure to submit accurate PFW data. The claimant believed it was in May 2018 whereas Mr Crampshee said it was likely to have been in April 2018. In his further and better particulars the claimant had stated "*April/May 2018*". We decided that, with the Mr Crampshee saying that it was April 2018 and the claimant at the time he submitted his further and better particulars in January 2019

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acknowledging that it might have been April 2018, on the balance of probability it had been during April 2018.

### Submissions

188. For the respondent Dr Gibson provided us with a written submission which he supplemented orally. As the written submission is available in the case file we will not rehearse its terms here. We will however list the authorities to which Dr Gibson referred and the points he drew from these -

- **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23** - the "*band of reasonable responses*" approach also applies to the conduct of investigations.
- **Hendricks v The Commissioner of Police of the Metropolis [2003] ICR 530** - the appropriate test for a "*continuing act*" is whether the employer is responsible for "*an ongoing situation or a state of affairs*" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents.
- **Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434** - the burden is on the claimant to persuade the Tribunal that it is just and equitable to extend time.
- **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194** - there are two factors which are "*almost always relevant*" when considering the exercise of any discretion to extend time - (a) the length of, and the reasons for, the delay and (b) whether the delay had prejudiced the respondent.
- **Apelogun-Gabriels v London Borough of Lambeth and another [2002] ICR 713** - there is no general principle that it will be just and equitable to extend the time limit where the claimant is seeking redress through an ongoing internal procedure.
- **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283** - the merit of the claim is a factor that should be considered when

determining whether or not it is just and equitable to extend time for bringing a claim.

- 5 • **Madarassy v Nomura International plc [2007] IRLR 246** - the fact that a claimant has been treated less favourably than an actual or hypothetical comparator is not sufficient to establish that direct discrimination has occurred unless there is "*something more*" from which the court or tribunal can conclude that the difference in treatment was because of the claimant's protected characteristic.
- 10 • **Nagarajan v London Regional Transport [1999] IRLR 572** - the correct test is "*what was A's conscious or subconscious reason for treating B less favourably?*"
- 15 • **Nothman v London Borough of Barnet (No 2) [1980] IRLR 65** - "*anyone who believes that they are a victim of conspiracy, and particularly by their employers, is not likely to be a satisfactory employee in any circumstances if reinstated or re-engaged*".
- **Central & North West London NHS Foundation Trust v Abimbola UKEAT/0542/08** - the claimant's evasive and dishonest conduct during the remedy hearing should have been material to the tribunal's consideration of whether to order reinstatement.

20 189. The claimant structured the first part of his submission around his allegations of race discrimination, as follows -

- 25 • Allegation 1 - the claimant alleged that he had been given no assistance with development opportunities in contrast with his comparator, Ms Nash, who had participated in the Leading our Plan event.
- Allegations 2 and 9 - the claimant asserted that the date he had been singled out by Mr Crampshee was 18 May 2018. This had not been respectful and had not happened to anyone else. The claimant asserted that he had been treated this way because of his skin colour.

- 5 • Allegation 3 - the claimant alleged that Ms Fielding had put him on a PPP purely to get him off the reserve list. Ms Jackson had confirmed that there had been a requirement of managers to assess 10% of their team "*development needed*". She also acknowledged that the claimant's performance had improved. The claimant asserted that Ms Fielding had treated him differently because of his skin colour. Ms Fielding had not been in a position to judge the claimant's engagement with his team and should have consulted with Ms Jackson about this.
- 10 • Allegation 4 - the claimant referenced (a) his less favourable treatment in terms of Ms Fielding's attitude to Embrace and (b) her treatment of Mr Bah in relation to reduced hours which contrasted with her treatment of white colleagues, her being difficult regarding his notice period when Mr Bah was leaving the department and a remark he alleged Ms Fielding had made to Mr Bah about "*security checks*" in relation to his new job (something which Ms Fielding denied).  
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- Allegation 5 - the claimant alleged that the respondent should have been more supportive after receiving his email of 10 March 2018, and also that Mr Crampshee had not acted correctly regarding his SRP.
- 20 • Allegation 6 - the claimant referred to the statement given by Mr Torz during the investigation of the claimant's grievance which, he alleged, was inconsistent with the evidence of Ms Jackson (about giving leeway to Ms Jeffrey).
- 25 • Allegation 7 - the claimant sought to explain Ms Lawson's evidence contradicting his assertion of raised voices on the part of Ms Fielding and Ms Harper by asserting that "*people would not get caught out*" and that Ms Fielding and Ms Harper had raised their voices to him when noone else was present.
- 30 • Allegation 8 - the claimant in effect asked us to prefer his evidence of how he alleged he had been treated by Ms Fielding and Ms Harper at the meeting on 1 February 2018. He also referred to emails which

confirmed that Ms Grant had worked beyond 7.00pm - he had been criticised for doing so whereas she had not.

190. Turning to his unfair dismissal claim, the claimant submitted that if Mr Ahmed and Mr Warrilow believed that Ms Grant wrote the training plan, they should have spoken to her. Ms Jackson's evidence that training under the plan had started in July 2017 was contradicted by the evidence of Mr Bah who said that he had attended a meeting about training in June 2017, at which the claimant had told him what he was to do. Mr Bah had, the claimant submitted, corroborated the existence of the claimant's upskilling plan.
191. The claimant argued that Mr Ahmed's investigation had not been fair. He had chosen two people to speak to at random - Ms Crichton was an O band officer for whose training the claimant was not responsible and Mr Thomson had, the claimant alleged, mental health issues. Mr Warrilow had asked the claimant to provide a list of the AOs in his team but had done nothing with this. He had also not followed up with the respondent's IT department despite the claimant giving him the reference number.
192. In relation to the date of his online application for the RIS job (12 February 2018) and the dates of the documents recording his conversations with Ms Fielding (16 and 19 February 2018), the claimant suggested that the latter dates could be wrong. He played down the reference to his former PT Ops line manager in his RIS job application by pointing out that Ms Jackson had previously helped him with his application for the Manchester job, which resulted in his being placed on a reserve list, despite not receiving the line manager's email. Further, he had already made Ms Fielding aware of his difficulty with changing his line manager on CSJ.
193. Addressing the time bar issue, the claimant argued that the matters in respect of which he was claiming unlawful discrimination were clearly linked. It had been the same people, similar acts and the same victim. Acknowledging that he had not mentioned race at the time (something confirmed by Ms Lawson in her evidence) the claimant said this had been due to the culture of fear in



the department and his own mental health issues. He had not raised his Tribunal claim earlier because he had not been aware of the process.

194. The claimant disagreed that the outcome of his grievance meant that it was likely that he would have faced further disciplinary action for making vexatious and malicious allegations. He asserted that the respondent had "*covered up*" and that Mr Torz had lied in his grievance investigation statement.

195. Turning to injury to feelings, the claimant alleged that the treatment to which he had been subjected had had a "*massive impact*" on him both during his employment and since it ended. He had felt "*rubbish*" and "*haunted*". He had been unable to sleep. There had been a period when he could barely get out of bed. He had contemplated suicide because of how he had been treated. He argued that an appropriate award for injury to feelings would be £20000.

196. But for his unfair dismissal, the claimant submitted, he would have secured promotion to an O band position with the respondent and would have been earning a salary of around £30k gross (excluding earnings of around £8k in his second job). His reputation had been damaged and this had hindered his efforts to secure a new job.

197. We invited Dr Gibson to respond and he reminded us that we were not deciding if Mr Bah had been treated unfavourably. The fact that the claimant had managed to get a job with the Scottish Government contradicted his assertion that his reputation had been damaged. Dr Gibson criticised the claimant's discrimination claims as a gross abuse of process and accused the claimant of subjecting Ms Fielding, Ms Harper and Mr Crampshee to serious, hurtful and unwarranted allegations just to get money from the respondent.

## 25 **Discussion and disposal**

### *Unfair dismissal*

198. We deal firstly with the claimant's unfair dismissal claim by reference to the agreed list of issues.

***Was the dismissal of the claimant by the respondent for the potentially fair reason of conduct?***

199. In his report Mr Ahmed had referenced a number of the respondent's policies and procedures including HR 23007 Discipline: How to: Assess the level of  
5 misconduct (2:62-66) which contained a "comprehensive, although not  
exhaustive, list of examples of offences which may be considered gross  
misconduct". This list included "Deliberately plagiarising any aspect of the  
application process including the competency examples when applying for a  
vacancy". This was why the claimant was dismissed and we were in no doubt  
10 that it was a reason relating to the claimant's conduct for the purpose of  
section 98(1) ERA.

***Did the respondent have a genuine belief that the claimant was guilty of the allegations which led to the dismissal?***

200. The information which Ms Jackson provided to Mr Ahmed in the course of his  
15 investigation made clear that she believed it had been Ms Grant and not the  
claimant who had done what the claimant was stating he had done in the  
leading and communicating competency in his application for the RIS job. As  
the line manager of both the claimant and Ms Grant at the relevant time, Ms  
Jackson was well placed to have an awareness of this. Indeed, it had been  
20 Ms Jackson who had picked this up at the stage when applications for the RIS  
job were being sifted. Mr Ahmed had no reason to doubt what Ms Jackson  
was saying. Based on this, we were in no doubt that the respondent had a  
genuine belief that the claimant had been guilty of the allegation of misconduct  
(as set out in paragraph 119 above).

25 ***Did the respondent conduct a reasonable investigation?***

201. Mr Ahmed's investigation was careful and thorough.

202. The claimant was critical of Mr Ahmed's selection of Mr Thomson and Ms  
Crichton as the employees to question but we believed that this criticism was  
not entirely fair. The selection of Mr Thomson was logical as the claimant had  
30 referred to his receiving training in June 2017. The selection of Ms Crichton

was random and made from information the claimant had provided. Her selection was unfortunate in the sense that Ms Crichton was not a member of the claimant's team and was an O band, as opposed to AO band officer, although there was evidence that she was training on AO band work at the relevant time (2:226).

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203. Viewed objectively and with the benefit of hindsight Ms Crichton was perhaps not the best person to comment on what the claimant had stated in his leading and communicating competency. However, her name (or rather her email address) had been chosen by Mr Ahmed from information supplied to him by the claimant. The claimant complained that Mr Ahmed had chosen Ms Crichton from the list of recipients of a seating plan rather than from the list of recipients of emails to his own team, but that was not a distinction that the claimant had highlighted in his ten emails to Mr Ahmed of 27 April 2018 (2:188-207) after their meeting on 24 April 2018. Only the email from which Ms Crichton was selected appears to have had a wider distribution list than the claimant's own team but it was in our view unfair to criticise Mr Ahmed in this regard.

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204. At the heart of Mr Ahmed's investigation was the information Ms Jackson provided in her email of 10 April 2018. He chose to go back to Ms Jackson on 26 April 2018 to seek her comments on what the claimant has said at interview on 24 April 2018. That is what we would have expected a reasonable employer to do. We found that the respondent had conducted a reasonable investigation.

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***Was the respondent's belief that the claimant had committed misconduct based on reasonable grounds?***

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205. In our view the claimant was given a reasonable opportunity to provide evidence which countered the allegation of misconduct. We have already referred to his emails to Mr Ahmed of 27 April 2018. What is significant is what the claimant did not provide - there was nothing to demonstrate that he had prepared a training/upskilling matrix or a training plan. The claimant was critical of the respondent for not having interviewed Ms Grant but perhaps the

most persuasive evidence the claimant could have produced during the disciplinary process would have been an acknowledgement from Ms Grant that it had been the claimant and not her who had prepared, or at least initiated, the training plan. He had not done so.

5 206. We were satisfied that the need to speak to Ms Grant was considered during Mr Ahmed's investigation. Mr Warrilow raised this with Mr Ahmed in their telephone conversation on 19 July 2018 (2:226) and Mr Ahmed's answer was that Ms Grant's *"role was not in question"*. Another employer might have chosen to speak to Ms Grant but as highlighted in **Sainsbury's**  
10 **Supermarkets Ltd v Hitt** the band of reasonable responses approach applies to the conduct of investigations. Only if it could be said that no reasonable employer would have decided not to speak to Ms Grant would that decision be outwith the band of reasonable responses; in our view it was clearly not outwith that band.

15 207. Once again, the key element was the information provided by Ms Jackson. She identified the claimant's claimed competency as the work of Ms Grant. That constituted reasonable grounds for the respondent's belief of the claimant's misconduct.

**Was the decision to dismiss within the band of reasonable responses?**

20 208. We refer to paragraph 199 above. *"Deliberately plagiarising"* a competency example when applying for a vacancy was in the list of examples of gross misconduct. Given the emphasis in the Civil Service Code on honesty (see paragraph 21 above) we had no difficulty in finding that the dismissal of an employee found to have plagiarised a competency in a job application was  
25 within the band of reasonable responses open to the respondent in this case.

**Was dismissal of the claimant by the respondent procedurally fair?**

209. In addressing this issue we had regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the "Code"). The Code identifies the *"Keys to handling disciplinary issues in the workplace"* in these  
30 terms -

- Establish the facts of each case
- Inform the employee of the problem
- Hold a meeting with the employee to discuss the problem
- Allow the employee to be accompanied at the meeting
- 5 • Decide on appropriate action
- Provide the employee with an opportunity to appeal

210. The respondent had complied with each of these steps. The claimant had not been accompanied at the investigative meeting on 24 April 2018 but the transcript of this recorded (at 2:96) that the claimant had confirmed that he was happy to proceed without being accompanied by a trade union representative or a work colleague.

211. We did consider that there were steps which the respondent might have taken but chose not to. Mr Warrilow could have spoken to additional members of the claimant's team and could have made some enquiries of the respondent's IT department. Also, while we appreciated that he had spoken to Mr Ahmed about Ms Grant, the fact that Mr Warrilow did so suggested that he thought it might have been appropriate for her to be interviewed as part of the investigation. We had a degree of suspicion that Mr Warrilow had not pursued these matters because he was about to go on holiday and wanted to issue his decision before he departed.

212. Similarly, when the claimant urged Mr Jones to speak to his team, it would have done no harm for him to speak (or to arrange for IG to speak) to at least one or two members of the claimant's team to address the claimant's criticism of the choice of those spoken to by Mr Ahmed.

213. However, it could not in our view be said that no reasonable employer would have declined to take these steps. What the respondent did was within the "*band of reasonable responses*" and to require more of the respondent would have been an impermissible substitution of our own view. Accordingly, we

found no reason to decide that the claimant's dismissal was not procedurally fair.

***If the claimant was unfairly dismissed is it reasonably practicable to reinstate or re-engage the claimant?***

5 ***If the claimant was unfairly dismissed and it is not reasonably practicable to reinstate or re-engage the claimant, what level of compensation, if any, should be awarded?***

214. In view of our decision that the claimant was not unfairly dismissed we do not require to answer these questions. However, had it been necessary for us to  
10 address the matter of remedy for unfair dismissal, we would not have considered it reasonably practicable for the claimant to be reinstated or re-engaged by the respondent. The respondent believed that the claimant had been dishonest. There was a reasonable basis for that belief. The Civil Service Code emphasises the core values of integrity and honesty. The  
15 respondent was entitled to believe that the claimant had failed to adhere to these values.

*Decision on race discrimination*

215. The agreed list of issues next deals with the claims brought under sections 13 and 26 EqA by reference to (a) time bar and (b) the actual claims brought by  
20 the claimant under these sections.

*Time bar*

216. The only claims of race discrimination which specifically referred to something which occurred within three months of the claimant initiating ACAS early conciliation on 24 August 2018 (per the early conciliation certificate - 1:17)  
25 were (a) Allegation 1 which related to events occurring on or around 4 June 2018 and (b) Allegation 5 which, in part, related to events occurring on 14/15 June 2018. The claimant's race discrimination claims were not time barred insofar as they related to these allegations.



217. Allegation 1 was a complaint of unlawful discrimination by Ms Fielding. Allegations 3, 4, 6, 7 and 8 were also allegations of unlawful discrimination against Ms Fielding. These related to alleged discrimination on or around 19 March to 26 April 2018 (Allegation 3), between November 2017 and July 2018 (but without any actual dates being specified) (Allegation 4), December 2017 (Allegations 6 and 7) and 1 February 2018 (Allegation 8). Ms Harper was included in Allegations 7 and 8.
218. We considered whether this was conduct extending over a period for the purposes of section 123(3)(a) EqA. Was this an ongoing situation or state of affairs (per *Hendricks*)? Not without hesitation, we decided that it was. The claimant was complaining about his treatment by Ms Fielding, and sometimes by Ms Fielding and Ms Harper, over a period of time commencing in November 2017 and extending until on or around 4 June 2018. The claimant had not expressly pled that this had been conduct extending over a period, but we did not consider that this precluded us from reaching this conclusion based on the evidence before us. The claimant did not have the benefit of legal representation and it was consistent with the overriding objective in Rule 2 contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 that we should decide this point although not expressly pled.
219. Our view was that Allegations 1, 3, 4, 6, 7 and 8 had a common thread which was the strained relationship between the claimant and Ms Fielding/Ms Harper. The claimant was complaining about the way in which he had been treated by Ms Fielding and Ms Harper across a series of alleged instances of discriminatory behaviour on their part. We decided that this should be regarded as conduct extending over a period with the consequence that it required to be treated as done on the date of the last act complained of, ie on or about 4 June 2018. Accordingly these allegations were not time barred.
220. Allegations 2, 5 and 9 related to treatment of the claimant by Mr Crampshee. Allegations 2 and 9 related to the claimant being singled out for criticism about PFW data. The claimant asserted this had been on 18 May 2018. Mr Crampshee's position was that it had been at a meeting in April 2018. We



preferred the evidence of Mr Crampshee. The claimant had initially accepted that this had occurred in April/May 2018 (per his further and better particulars - 1:24) but had changed his position by the time of his submission to us. We believed that the claimant did this to counter the time bar issue and this did not count in his favour in our assessment of his credibility. In any event, even if we accepted the date of 18 May 2018 this part of the claim was still out of time.

221. Allegation 5 related to the manner in which Mr Crampshee had treated the claimant in relation to a SRP. This covered events between 3 April 2018 and 14/15 June 2018. These related to treatment of the claimant by the same person in relation to the same issue and we decided, with rather less hesitation, that this had been conduct extending over a period and should be treated as occurring on 15 June 2018. The part of this allegation which related to events prior to 25 May 2018 was accordingly not time barred.

222. Finally we considered whether it would be just and equitable to extend time in respect of allegations 2 and 9. We decided that it would be just and equitable to do so. The claimant had not had the benefit of legal advice and addressed himself to the issue of whether he had a statable claim to the Tribunal only after his dismissal. He was dismissed on 20 July 2018. Early conciliation began on 24 August 2018 and ended on 29 August 2018. The claim was presented on 22 September 2018. The claimant did not appear to have an awareness of time limits for the purposes of alleged unlawful discrimination until the respondent took the point in their response to his claim. He had not delayed unduly in pursuing his claim.

*Direct discrimination*

***Did the respondent discriminate against the claimant because of his race by treating the claimant less favourably than the respondent would have treated others?***

223. We considered each of the claimant's allegations of direct discrimination and came to the following conclusions -

- 5 (i) In respect of Allegation 1, we did not believe that the claimant had been treated less favourably than his comparator, Ms Nash, in relation to development opportunities because (a) the claimant was complaining about his treatment by Ms Fielding and we had no evidence that it had been Ms Fielding who had chosen Ms Nash to participate in the Leading our Plan event in June 2018 and (b) in terms of the claimant's development, Ms Fielding's focus was on the claimant achieving improved performance in his FLM role as opposed to development for possible career progression. This indicated a material difference between the circumstances of the claimant and his comparator (we also had no evidence to suggest that Ms Nash had been assessed as "development needed").
- 10
- 15 (ii) In respect of Allegation 2, we believed that Mr Crampshee had been frustrated at the claimant's failure to input PFW data correctly in April 2018. We found that Mr Crampshee had acted in the way described in paragraphs 146-147 above. We accepted his evidence that he had not made the comments alleged by the claimant. The claimant's, as we found it to be, inaccurate recollection of when these events took place tipped the balance of probability in Mr Crampshee's favour. We did not consider that Mr Crampshee would have behaved differently towards a British white FLM who had similarly failed to input PFW data correctly.
- 20
- 25 (iii) In respect of Allegation 3, we had no evidence of how "*any [other] member of staff that's been put on a poor performance plan*" had been treated and so we considered how a hypothetical comparator would have been treated. Given that all of the claimant's actual comparators were British and white, we proceeded on the basis that the hypothetical comparator was a British white FLM who had been assessed "*development needed*". We were satisfied that, on the balance of probability, such a comparator would have been treated in the same way as the claimant had been treated.
- 30

(iv) In respect of allegation 4, we refer to our findings in fact at paragraphs 152-158 above. There was some force in Dr Gibson's submission that the claimant had not averred any "specific discriminatory treatment" nor had any "specific date" been referred to. The evidence before us did not indicate that Ms Fielding had a negative attitude towards Embrace. We did not believe that she had been unsupportive of the claimant attending Embrace events as the manager of Mr Bah and Mr Kaka nor that she had treated Mr Bah and Mr Kaka unfavourably in respect of time off for the Embrace programme. The evidence about managers attending Embrace and other development programme graduation events was vague. We did not find that Ms Nash, Ms Horner and Ms Kennedy had been treated more favourably. We have already referred to Ms Nash at sub-paragraph (1) above. Ms Horner and Ms Kennedy secured admission to the HMRC/DWP talent programme on the basis of open competition.

(v) In respect of allegation 5, we had little or no evidence of how the claimant's comparators - Ms Burton, Ms Anderson and Mr Thomson - had been treated. The claimant said that he had dealt with Mr Thomson, in his capacity as his line manager, in the same way as Ms Jackson and Ms Lawson had described - see paragraphs 78-79 above. The difference in the approach taken by Mr Crampshee was explained by the fact that he was not the claimant's line manager and did not know the claimant in the same way as a line manager would know a member of his or her own team.

## 25 Harassment

***Did the respondent engage in unwanted conduct related to the claimant's race which had the purpose or effect of violating his dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?***

30 ***If yes, did the respondent take all reasonable steps to prevent its employees from doing any discriminatory act or from doing anything of that description?***

224. We next considered each of the claimant's allegations of harassment and came to the following conclusions -

- 5 (i) In respect of Allegation 6, we believed that the claimant found himself faced with a conflict between the information Ms Fielding was seeking about Ms Jeffrey's whereabouts and the instruction he had been given by Mr Torz to allow Ms Jeffrey some leeway in relation to her Union duties. We were satisfied that Ms Fielding had asked the claimant about Ms Jeffrey's whereabouts but not that she had done so to embarrass the claimant nor to "*publicly humiliate*" him. This matter had been investigated by Mr Fulton in the context of the claimant's grievance and we found no reason to depart from his conclusion that this complaint was not well founded. Mr Fulton's investigation had been carried out relatively soon after the events to which the claimant's grievance related, when those involved might be expected to recall matters better than at the date of the Tribunal hearing.
- 10
- 15
- (ii) In respect of Allegation 7, this matter had also been investigated by Mr Fulton in the context of the claimant's grievance and again we found no reason to depart from his conclusion that this complaint, that Ms Fielding and Ms Harper had behaved aggressively towards the claimant, was not well founded.
- 20
- (iii) In respect of Allegation 8, we refer to paragraphs 46-51 and 185 above. The consequence of our preferring the evidence of Ms Fielding and Ms Harper was that there was no evidential basis for the claimant's allegation that he had been verbally abused at the meeting on 1 February 2018.
- 25
- (iv) In respect of Allegation 9, given our finding in relation to Allegation 2 that Mr Crampshee had not made the comments alleged by the claimant, there was again no evidential basis for this allegation of harassment.
- 30

*Our view of the direct discrimination claims*

225. We considered that the claimant faced a number of difficulties with his direct discrimination claims. In relation to Allegation 1, even if we set aside the point that it had not been Ms Fielding who chose Ms Nash, the circumstances of Ms Nash were materially different from those of the claimant in that we had no evidence that she had been assessed “*development needed*”. Having regard to section 23(2) EqA she was not an appropriate comparator.
226. In relation to Allegation 2, we did not accept that the statements which the claimant attributed to Mr Crampshee had been made by him. This meant that the claimant had failed to persuade us that the act of discrimination of which he complained had actually occurred.
227. In relation to Allegation 3, the claimant was arguing that he had been treated differently from any other employee who had been put on a PPP in that there should have been a PIP first. However our finding In fact was there had been a PIP put in place following the meeting on 1 February 2018 (see paragraph 150 above). There was therefore no difference of treatment.
228. In relation to Allegation 4, we did not find that there had been more favourable treatment of the claimant's comparators.
229. In relation to Allegation 5, we had evidence only about how Mr Thomson (and not Ms Burton and Ms Anderson) had been treated and again the claimant faced the difficulty that there was a material difference between his comparator and himself. Mr Thomson was a member of the claimant's team and the claimant was therefore his line manager. Mr Crampshee was not the claimant's line manager.
230. If we had found that the claimant had shown a difference of race and a difference of treatment in respect of Allegations 1-5, we would still have been unable to identify the “*something more*” required to shift the burden of proof to the respondent (per **Madarassy**).
231. Approaching matters per **Nagarajam** and assuming that we were persuaded that there had been less favourable treatment of the claimant, we would

require to ask what was the respondent's conscious or subconscious reason for that treatment. In the case of Ms Fielding and Ms Harper, our answer would have been their wish to see the claimant's performance improve so that he was no longer assessed as "*development needed*". In the case of Mr Crampshee, it would have been his need to have accurate and timely PFW data (Allegation?) and to deal with the claimant's SRP appropriately (Allegation 5).

232. We did not consider that the treatment of the claimant, alleged by him to constitute direct discrimination, by Ms Fielding, Ms Harper and Mr Crampshee was in any way because of his race. Ms Lawson who, as recorded above attended various meetings with the claimant, told us that the claimant made no reference to his treatment being on account of his race until after his dismissal. The direct discrimination claims could not succeed.

#### *Our view of the harassment claims*

233. The claimant also faced difficulties with his harassment claims. We reminded ourselves of section 26(4) EqA. We had to take account of the claimant's perception of the unwanted conduct, the other circumstances and whether it was reasonable for the conduct to have the alleged effect.

234. In relation to Allegations 6 and 7, while we acknowledged the claimant's perception of how he believed he had been treated, the other circumstances included the investigation of his grievance within a relatively short period after the alleged conduct said to constitute harassment. While Mr Fulton dealt with matters on the basis that the claimant was alleging harassment and bullying - and discounted harassment because there was no link in his grievance to a protected characteristic - it was the same conduct as that contained in Allegations 6 and 7. Mr Fulton did not believe that "*any behaviour that could reasonably be described as bullying had occurred*" (see paragraph 86 above). Ms Hunter as decision maker agreed. We came to the same conclusion. It was not reasonable for the conduct to have the alleged effect.

235. In relation to Allegations 8 and 9, our conclusions as recorded at paragraphs 223(iii) and (iv) above were fatal to the claimant's case on these points.

**Decision**

236. For the reasons set out above, we decided that the claimant's complaints of unfair dismissal and unlawful discrimination did not succeed and should be dismissed.

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Employment Judge: W A Meiklejohn  
Date of Judgment: 10 December 2019  
Entered in register: 13 December 2019  
and copied to parties

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