**Reserved Judgment**

**Case No. 2411207/2019**
**Code V**

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr U Iwelu

**Respondent:** HMRC

**Heard at:** Remotely by CVP **On:** 4 to 8 January
31 August ,1 to 3 September
and 27 September 2021

**Before:** Employment Judge Holmes
Mr D Wilson
Mr M Stemp

**REPRESENTATION:**

**Claimant:** In Person
**Respondent:** Mr Lewis, Counsel

# RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1.The claimant was unfairly dismissed.

2. The Tribunal considers, however, that had a fair procedure been followed the claimant would have been dismissed in any event, and it makes a reduction to the compensatory award of 100%.

3. The claimant is entitled to a basic award, which the Tribunal does not propose to reduce. He had four complete years of service at the date of his dismissal. The relevant cap on a week's pay is £525. The parties are invited to agree the appropriate basic award. In default they are to notify the Tribunal by **18 March 2022** whether any remedy hearing (which may be conducted by written submissions, and by the Employment Judge sitting alone, if the parties agree) is required to determine the correct basic award.

3. The claimant's dismissal was not an act of race discrimination, and this claim is dismissed.

4. The claimant's other claims of race discrimination were presented out of time, and it would not be just and equitable to extend the time for their presentation. They are dismissed.

# REASONS

1. The claimant was employed by the respondent ("HMRC") from February 2015 to 30 June 2019. He was dismissed with notice following the conclusion of a capability procedure. Mr Iwelu identifies himself as being black British. He alleges that he suffered prejudice and bias on the grounds of his race, and that this prejudice tainted the capability procedure and, ultimately, his dismissal.

2. The complaints pursued were for unfair dismissal and discrimination on the grounds of race. The issues were identified at a preliminary hearing on 27 November 2019 as being :

***Unfair dismissal***

*What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's capability.*

*If the dismissal was for a potentially fair reason, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?*

***Equality Act 2010, section 13: direct discrimination because of race***

*Has the respondent subjected the claimant to the following treatment:*

*i. a colleague, Maurice McCabe, making an adverse comment about the claimant's food in October 2017 ("the food comment");*

*ii.a colleague, Judith Read, "commanding" the claimant to give up his desk for her in October 2017 ("the desk comment");*

*iii.managers, Paul Pinnington and Mark Brewin, failing to properly pursue or investigate the claimant's grievance into the food comment and the desk comment;*

*iv.a failure/refusal to offer the claimant PRINCE 2 training;*

*v.placing him on a performance improvement plan on several occasions from October 2017;*

*vi.between early 2018 and the end of employment, Paul Pinnington refusing to move the claimant to another team;*

*vii.applying its "Managing Poor Performance" process to him from December 2018, including the various warnings that were issued under that process;*

*viii.dismissing him.*

*Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on two actual comparators in respect of the PRINCE 2 training; Boniface Seword and Gurpeet Chohan. He relies on hypothetical comparators in respect of all allegations.*

*If so, was this because of the claimant's race (and/or because of the protected characteristic of race more generally)?*

***Equality Act 2020 section 26: harassment related to race***

*Did the respondent engage in conduct as follows:*

*The claimant relies on the conduct set out at (i) and (ii) above, and:.*

*A manager, Kim Houghton, speaking to him on the phone in a threatening and aggressive manner on two occasions in around late 2018, including using terms such as "do you know who you are talking to?" and "Do you know I am a manager, you had better mind what you say?"*

*If so was that conduct unwanted?*

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

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

***Equality Act 2010 , section 27: victimisation***

*Did the claimant do a protected act? The claimant relies upon the following:*

*His written grievance in respect of the food incident and the desk incident;*

*A verbal complaint to Paul Pinnington regarding Kim Houghton's conduct as described above. The claimant says he made this complaint in a 1:1 meeting in late 2018, about a week after the incident.*

*Did the respondent subject the claimant to any detriments as follows:*

*The claimant relies on the matters at points (iv) to (viii) above as detriments.*

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

***Time limits / limitation issues***

*Were all of the claimant's discrimination complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred; whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis.*

3.The Tribunal commenced the hearing on 4 January 2021, and continued on 5, 6, and 7 January 2021 . It could not be completed, and resumed part heard on 31 August, and 3 September 2021. After a further adjournment, during which further enquiries were made by the respondent into alleged "missing " emails, the Tribunal received the parties' closing submissions on 27 September 2021.All hearings were conducted by CVP. The Tribunal apologises for the delay in the promulgation of this judgment, occasioned in part by the volume of material that the Tribunal had to consider, the disjointed nature of the hearing and the deliberations, and the involvement of the Employment Judge in a substantial 70 day hearing that has limited time available for completion of this judgment. The parties are thanked for their patience.

4.The respondent called Judith Read, Maurice McCabe, Paul Pinnington, Ian McNeill, Kim Houghton, Mark Brewin and Sian Owen .The claimant gave evidence and called Boniface Seworde as his witness. There was an agreed bundle. Having heard the evidence , having considered the documents in the bundle, and the closing submissions of both parties, the Tribunal unanimously finds the following relevant facts:

4.1 On 23 Feb 2015 the claimant started his employment with the respondent, in a call centre role. He then became a Higher Officer (HO) (Data Analyst) in Risk and Intelligence Services (RIS). It was from this position that he made an application to work in the Technology Management Team on the Enterprise Data Hub (EDH) data migration and data design . This was managed by Paul Pinnington , a Grade 7 (G7") manager, who reported to a Grade 6 manager , Mark Brewin. He worked alongside another G7, Kim Houghton, and her team. This initially included Tony Payton but he left and was replaced by Gurpreet Chohan in June 2017. Boniface Seworde joined Kim Houghton's team in January 2018. Tony Payton, Gurpreet Chohan and Boniface Seworde were Senior Officers (SO) within their respective teams.

4.2 Paul Pinnington joined the team in July 2016, and interviewed the claimant for promotion to Senior Officer in November 2016. He was successful at the interview, but due to accumulated leave, he did not start in the team until 16 January 2017.

4.3 During discussions with his previous line manager between November 2016 and

January 2017, Paul Pinnington became aware that the claimant had failed a one-year probation period to become an established Higher Officer in RIS and was due to revert back to his original grade of Administrative Officer in December 2016. He was advised by HR that this should not affect the outcome of the promotion board, as his competency examples were mainly based on evidence he provided about his previous employment to HMRC.

4.4 On 16 January 2017 , after a period of leave, the claimant started his new role in Paul Pinnington's team. He was the claimant's line manager between January 2017 and July 2019. The claimant was a Senior Officer working initially in the EDH Data Migration team (later the Data Design team), within KAI Analytical Environment and Development. This later reverted back to being part of the wider KAI Technology Management Team. They had a good working relationship at first, and this only started to become strained during April to November 2018, when Paul Pinnington began to suggest that further development was needed.

4.5 Paul Pinnington provided the claimant with a draft document setting out the difference in expectations between Higher and Senior Officer in April/May 2017. This was updated and circulated again to all KAI DSaT staff, including the claimant, in September 2017 by Adrian Tuff , Head of the Data Science team, another part of KAI DSaT. A copy of this is at pages 113A – B of the bundle.

4.6 Paul Pinnington had some initial concerns with the claimant's written communications, in April and May 2017. This became evident when he sent out email requests which were difficult for the recipients to follow. This issue persisted and he raised it formally at his Mid-Year Review (MYR) assessment in September/ October 2017, a copy of which is not in the bundle. This was the time when the main feedback on his performance was provided.

4.7 The claimant raised a verbal complaint on 2 November 2017. He left Paul Pinnington a message asking him to ring him back, which he did , having consulted HR, on 3 November to discuss this . He encouraged the claimant to lodge a written complaint. The claimant submitted his written complaint on 6 November 2017, a copy of this is at page 130. It reads:

*"On 2nd November 2017 Judith Read (along with Shevonne Radcliffe) approached me at my desk. I wasn't sure why two persons approached me suddenly. Judith started off by stating that I will be on hot-desking as I was absent from work a good number of times. This came as a shock —bewildered and trying to get my head around what was happening and what she just said. I queried why I have been singled out for this as we are all operating desk booking at the moment—but Judith stated everyone will be hot desking in the future. This was clearly a discrimination against me.*

*I responded stating I use my desk as booked except I am on leave or working from home (which is barely once forthrightly) like any other person. I added that I was away for about 17 days in October, as she may be referring to then. She repeated again that I am scarcely at work on my desk. She was becoming confrontational and*

*bullish. This was quite a harassment and bullying as there was no justification for her comments. I asked her to cite instances of her accusation but she couldn't. It was when I objected asking why I was being singled out for this exercise that Judith came up with another excuse of new team members starting soon, so fewer available seats. I then stated that the system in place of booking seats was still operational (which I fully perform), so why am I being singled out for hot desking. Judith could not give an explanation. She concluded by stating I will be moved anyway even if 1 had DSE requirement of raised desk and seating by the window due to natural light need. It was clear Judith came over to pass a decision rather than dIscussing her proposal. Also, she couldn't explain why she picked on me nor provide cogent reasons.*

*While all this was happening I felt intimidated. There was no obvious reason for coming along with a third party to discuss confidential issues with me without prior notification. Moreover, issues as such should have been discussed privately rather than in the open (where colleagues could clearly hear all being discussed, especially with my DSE info being brought up for discussion). This was a clear breach of my confidentiality. This was a clear violation of my confidential rights and disrespect of my dignity. I am quite distressed with this turn of event, feeling less of a staff. Boniface Seworde and Tayah Wood witnessed the event.*

*At about 1pm on same day (2nd November 2017) Maurice McCabe made a remark regarding my lunch which was quite distressing and unfortunate. This was witnessed by Boniface Seworde. After about three minutes of preparing my lunch in the midst of Maurice McCabe and Boniface Seworde, Maurice asked me blurting —"What is that "!? Referring to my just prepared lunch and pointing. He had been uncomfortably staring at me and my just prepared lunch for a while. I was totally taken aback and managed to respond — "it is food and you won't know it even if I tell you the name". Immediately I said that Maurice uncontrollably laughed aloud for about 15/20 seconds. This was a clear mocking laughter and quite disturbing to me. I am still trying to fathom and come to terms with the rationale behind his act. This was clearly an offensive act of harassment and discrimination."*

4.8 Paul Pinnington then spoke with both Judith Read and Maurice McCabe about the complaints he had received. He then discussed the matter with HR and relayed his initial findings. He was advised that these complaints could be handled by local management action, rather than by formal grievance procedures.

4.9 Paul Pinnington , from his discussions with Judith Read considered that the hot-desking complaint related to the way the message about the allocation of dedicated seating was handled by her. She explained to him that her decision not to allocate the claimant a dedicated desk was based on the DSE assessment form he had completed, in which he formally raised no reasonable adjustments as being required.

4.10 From his discussions with Maurice McCabe, he appeared to be genuinely shocked that he had caused any offence to the claimant , and he took it upon himself to apologise by e-mail. Maurice McCabe followed up the discussion by then sending

the claimant an apology by email (on his own initiative), a copy is at pages 117 to 118 of the bundle.

4.11 Paul Pinnington wrote to the claimant on 8 November 2017 to inform him what he had done, and explained the position as discussed above. A copy of this email is at page 131 of the bundle.

4.12 He explained that he had set aside time the following morning if the claimant wanted to discuss the matter further or add any further concerns. He explained in his email to the claimant how he should try to let people know if they were doing or saying something that he was unhappy about, if at all possible. If that failed, then he should tell them that if they continued, he would report this to his line manager (or another member of staff). He stated this because it was evident that neither Judith nor Maurice had realised the extent to which they had upset the claimant.

4.13 The claimant normally arrived in the office at 7am, so he set up a meeting for 9am on 9 November. However, on that particular morning, the claimant arrived into the office at 9.30am. Due to other team meetings, he was unable to reschedule it for that day. He therefore arranged a time for the following day 10 November 2017.

4.14 During the meeting, the claimant insisted he wanted a full apology from both Judith Read and Maurice McCabe, an admission from both to their wrongdoing, and a formal investigation. He explained that he would need to consult further on what action to take.

4.15 After the meeting Paul Pinnington liaised with two G6 Senior Managers, Mark Brewin and Ben Follows. The latter suggested that he consider offering mediation to The claimant to help clear the air. He put this to the claimant on 13 November, who then rejected it by email, which does not appear in the bundle.

4.16 Following further consultation with CSHR Casework and the two G6 Senior Managers, Paul Pinnington arranged to meet with the claimant on 20 November to have a further discussion and encourage him to consider mediation again. However, he was not willing to do so, or to meet with Judith or Maurice , or any of the support groups. He advised the claimant to reflect on what been said and to come back to him within the week if he was still unhappy. He reminded him that the offer of mediation was still available to him. He was also advised he could speak to Workplace Wellness or KAI safe haven's contact for impartial advice.

4.17 Paul Pinnington subsequently heard nothing further from the claimant. He therefore assumed the matter was closed and he was not aware of any further incidents arising.

4.18 Paul Pinnington had spoken to a few people in the Manchester office, and agreed that the claimant could sit in a particular seat, on the days he worked in the office. This was shortly after the incident with Judith Read, when she had started to implement the new hot-desking arrangements. He also had a few discussions with

Kim Houghton (and others) and identified which desk the claimant preferred to use and Judith agreed to raise it.

4.19 Paul Pinnington subsequently completed a Grievance Checklist – Manager's Review into the complaint (a copy of which is at pages 114 – 121 of the bundle). This summarised the complaint, what the employee was seeking as part of a resolution, details of any investigation and possible witnesses, and confirmed his assessment of the complaint (page 119 of the bundle ). This considered whether there were any allegations of discrimination (which , he considered, there were not), whether the allegations were likely to lead to disciplinary action (which he concluded was not the case) and led him to determine that it was appropriate for local management action.The Review also detailed where he had sought advice from others, including Mark Brewin and CSHR Casework (page 120), and set out the chronology and his decision.

4.20 Paul Pinnington proceeded to send the Grievance Checklist to CSHR, copying in Mark Brewin on 16 November 2017 (page 126 of the bundle) . Mark Brewin expressed himself content with the managerial decision. On 20 November 2017 Paul Pinnington met with the claimant , and they discussed his complaints. He repeated his offer of mediation, and his decision that there was no further action to take. He sent the claimant an email later that day, setting out this discussion (page 128 of the bundle).

4.21 Paul Pinnington continued to line manage the claimant. Between January and April 2017, the claimant's performance was deemed acceptable on the basis he was new to the role and grade. He did what he was asked to do. However, when Paul Pinnington gathered feedback about this performance for his EYR (End of Year Review) in April issues came to light about the quality of his written communication, notably that email requests for information were unclear. He offered support with this and mentioned about stating requests in plain English and asking others to check the content before sending requests to numerous people. He responded that others had a poor vocabulary.

4.22 The concerns with the claimant's written communications had been discussed more formally at the MYR (Mid-year Review) in September 2017. The claimant confirmed that he was happy with the submission of his assessment that he was 'borderline' achieved on 9 October 2017. However, the DSaT Senior Officer mid-year consistency check meeting on the afternoon of 16 October 2017 decided that, based on the evidence that Paul Pinnington had presented and the feedback received from G6s and G7s present at the meeting, the claimant was not achieved and needed further development. This decision was explained to the claimant at his final MYR session on 30 October, along with the explanation of why the indicative marking had been changed. As part of this, Paul Pinnington confirmed there was a 'development need'; however, if his performance improved (as set out in the Performance Improvement Plan (PIP) that would follow) he could still be assessed as 'achieved' by the end of March 2018. Following the 'development needed' rating, the claimant was placed on a PIP from 21 November 2017, a copy of which is at pages 155 – 159 of the bundle. The intention was to address the areas where he needed to improve,

so his performance would improve back to an acceptable level by the end of the reporting period (EYR). A completion date was therefore set for 31 March 2018. The claimant accepted the need for the PIP and said that he understood why it was being put in place.

4.23 Paul Pinnington had a number of monthly performance review meetings with the claimant in December 2017 (page 135), January 2018 (page 136), February 2018 (page 142) and March 2018 (pages 146 – 147) to report back on progress against the PIP and provide advice about how to improve.

4.24 The claimant had wanted to be put through for the PRINCE Foundation Certificate training. He raised this in autumn 2017 (for example, in an email of 30 November 2017, page 134 of the bundle). PRINCE 2 training is expensive , and Paul Pinnington formed the view that it was not appropriate for the role which the claimant was doing at the time , or would be doing in the near future. This contrasted to two other members of staff, Boniface Seworde and Gurpreet Chohan, who worked under a different manager, Kim Houghton, and where it was deemed that PRINCE 2 training would be beneficial to their roles at the time.

4.25 PRINCE 2 is a project management set of standards – a way of working. It is a sort of “language” for project managers and people working on projects to use to quickly and efficiently work together to manage the overarching project. Paul Pinnington’s view was that it is possible to work within a project and never need to understand or complete PRINCE 2 qualifications. A project can be run using generic project management training and materials (like the “KAI ways of working” training) as long as the project has simplistic governance, phases, funding etc without needing to know PRINCE 2. To manage a large project, however, or a complex project, or to interact with complex project governance there was, Paul Pinnington considered, no need to understand the PRINCE 2 language. PRINCE2 is essential for Project Management Professionals and is extremely common for DDAT (IT) professionals. Gurpreet Chohan, a Civil Service DDAT professional, and Boniface Seworde , both worked on projects that required them to engage directly with PRINCE 2 project management processes and governance run by others. PRINCE 2 was an extremely common qualification for DDAT IT professionals, especially for those working in the Product Management area . Boniface Sewoarde was a Government operational research (GORS) professional, where PRINCE 2 is recognised by the GORS profession as a useful qualification that supports their own project management requirements. Kim Houghton had authorised his PRINCE 2 training as she considered he would require it, as he was receiving change requests, gateway agreements, commercial agreements that referenced PRINCE 2 processes and language as well as attending stakeholder calls with these groups that involved the PRINCE 2 processes. Kim Houghton was expecting him to be involved with even more with large programmes directly using PRINCE 2 in the future.

4.26 The claimant, however, worked within a small part of a very large programme of work that used PRINCE 2 and Agile methodology. He did not engage directly with PRINCE 2 Project Management processes or governance. He had access to the KAI project management training materials, which were appropriate for supporting him to

manage the small scale, simple projects he ran. The claimant accordingly was offered a range of training that would specifically benefit his role, including ITIL, Pentaho, KAI in-house Project Management, VBA and SAS training.

4.27 Paul Pinnington explained the position on training to the claimant in an email dated 21 February 2018, see pages 144 to 145 of the bundle. He confirmed the focus should be on the initial ITIL modules which would provide the claimant with a good grounding on the IT side, and that some of the more advanced modules would be helpful for him to focus on. He also summarised why he did not consider formal PRINCE 2 training would be useful. He explained the team was generally not exposed to this type of large project planning, so the KAI/CoDE Project Management training and some Agile training would seem more appropriate. He explained that Kim Houghton had already provided him with an introduction to Agile , and that he would keep an eye out for any formal CDIO sponsored training on this. He confirmed he had put him down for the KAI/CoDE Project Management training.

4.28 Paul Pinnington also took the opportunity in this email to raise a slightly bigger question as to where the claimant saw himself in a few years' time, what type of role. His message to the claimant him was that he needed to decide which of the areas to focus on, so that he would be able to support him getting there, within the constraints of his current role. The claimant replied on 21 February 2018 (page 144 of the bundle) to indicate that he saw himself more in a general project management role, side-by-side IT related project management roles. Whilst the claimant again referred to wanting to do some more formal general management training (such as PRINCE 2), as stated above, the team generally worked on small IT projects, which ran alongside larger IT projects run by the HMRC CDIO. These larger projects were being run using Agile and so Paul Pinnington believed that Agile was more appropriate training than the more general PRINCE 2 project management training.

4.29 Paul Pinnington continued to provide the claimant with training and advice that supported his current role, but found that he did not adopt these good working practices when planning the quite small pieces of work he was asked to deliver. As work moved forward, his failure to demonstrate effective project management of small projects cast doubt in Paul Pinnington’s mind on his ability to potentially manage much larger projects which had a greater risk of failure.

4.30 Paul Pinnington completed the claimant's end of year review on 4 April 2018. He emailed comments to the claimant on 5 April 2018 (see pages 148 to 150 of the bundle). He also updated the online HR records with this information.

4.31 The note at pages 149 to 150 of the bundle outlines what had been agreed as the claimant's agreed list of items from the end of year consistency check, summarising his key deliverables for the year, the wider and corporate contributions, and his progress against development objectives. Paul Pinnington provided a number of comments in respect of these (page 149 of the bundle). During the discussions he highlighted to the claimant some points that he had made to him previously about the different expectations for a SO , compared to HO level. In particular, there would be further opportunities for him to behave more independently

and influence good practice across KAI and CoDE. The finalisation of his work on undocumented feeds and WMF storage was important. He confirmed that he would summarise and compile the comments and observations from the claimant's previous reviews into his PIP , and share this with him separately.

4.32 He explained that he proposed to position the claimant on the wave diagram (used for moderation) across the line into the lower part of the “Achieved” zone with achieved behaviours and achieved outcomes. This would mean it was likely the claimant would have his PMR discussed at the DSaT Consistency meeting scheduled for 24 April 2018 , and would have his final performance marking determined at this meeting.

4.33 A copy of the claimant's PIP is at pages 155 to 159 of the bundle. This outlined that at the Consistency Meeting it was confirmed the claimant's behaviours (the 'Hows') were achieved, following continued improvements in his performance since his mid-year review. However, the claimant's outputs had fallen short of the standard for an SO grade. It was outlined that one of the key development points going forward was that recommendations should be supported with costings, or appropriate evidence, as deemed appropriate. The claimant's reports should have enabled senior managers to make decisions based on his recommendations, rather than having to ask for further information, for example, on costings. Paul Pinnington explained that he would set up a new PIP to monitor his development on outputs on a monthly basis until the SO standard was reached. A copy of the discussion note from 26 April 2018 is at page 160 of the bundle.

4.34 Paul Pinnington accepted that some progress had been made on the first two elements of the claimant's work (approach to work and communication) but the key project outputs had still not been delivered by the extended deadline of March 2018. He therefore agreed to close the PIP with the claimant having met objectives 1 and 2, but falling short on objective 3. A new PIP was to be set up for the following 3 months, with a revised objective covering the quality of his output. This was mainly set up on 9 May 2018 to run until 15 August 2018 , and with a focus on the final delivery of 2 reports (which had been due to be delivered before the end of March 2018). The revised PIP document is at pages 178 – 180 of the bundle. The claimant did not contest the extension of the PIP at that time.

4.35 Paul Pinnington continued to have monthly performance reviews on 10 May 2018 (page 161), 7 June 2018 (page 163), 4 July 2018 (page 168), 15 August 2018 (page 176) and with a further PIP review on 24 August 2018. The conclusion was there were still development needs.

4.36 Paul Pinnington went on leave , and on his return he heard that there had been a disagreement in meetings between Gurpreet Chohan and the claimant, and Kim Houghton (who was covering Paul Pinnington’s role) and the claimant. He asked the claimant about this at a catch-up meeting in August , but the claimant dismissed it as a misunderstanding at that time. There was nothing raised by him to indicate there was a potential grievance arising from this incident.

4.37 A further new PIP was put in place for the period 20 August – 20 November 2018, (pages 181 – 186 of the bundle). The claimant was put on notice that if he was still not performing satisfactorily by 20 November 2018, then he would be subject to the formal managing poor performance process. He was not ,in the view of Paul Pinnington , performing effectively at Senior Officer level. He confirmed he would be continuing to provide regular feedback and advice to help get his performance back on track.

4.38 It was Paul Pinnington's view that the claimant progressively started to ignore management advice and support, and that , by the time of the formal managing poor performance process , his behaviour was becoming more uncooperative. This was mentioned in some of his discussions with HR in the later stages, as he considered that the claimant was not responding to reasonable management requests. He also was of the view that the claimant did not acknowledge his shortcomings , and largely ignored suggested ways of improving the quality of his work. Only straightforward tasks were completed, such as sending an e-mail or setting up a meeting. He added little additional value through his own research or investigation.

4.39 Paul Pinnington also believed that the claimant failed to engage effectively with his stakeholders , and did not build effective working relationships with colleagues in CDIO. Over the course of many months working on several different pieces of work, he repeatedly failed to deliver outputs on time that were acceptable to his "customers".

4.40 Paul Pinnington continued to try and support the claimant. Monthly performance review meetings with him took place on 4 September 2018( the notes of this are at pages 187 – 188) and 2 October 2018 (pages 191 – 193 of the bundle).

4.41 During discussions on 2 October 2018 the claimant indicated he wanted to leave the team and transfer to another as a Senior Officer. Paul Pinnington responded by saying he might be willing to agree to a transfer, but not with the claimant as a Senior Officer, given that there were these ongoing performance concerns. He explained to the claimant that he had had a PIP in place since 21 November 2017 , and they had regularly discussed and reviewed performance in relation to objectives in those PIPs. The claimant had made , he considered, limited progress against these objectives during the 10 month period. He made it clear to the claimant that if he failed to reach an acceptable level of performance at SO level (as outlined in his PIP) by 20 November 2018, then he would follow the formal Managing Poor Performance process. He provided the claimant with details of this, together with the additional support available to him (pages 191 to 193 of the bundle).

4.42 Following the discussions on 2 October 2018 , the claimant confirmed he wanted to raise a grievance, see pages 189 – 190 and 191 of the bundle. The claimant submitted his complaint on 31 October 2018 without using the Model letter template. He was asked to re-submit his complaint using the formal model letter, which he did on 5 November 2018, a copy of which is at pages 453 to 455 of the bundle.

4.43 In the grievance the claimant made a number of complaints including: allegations of bullying and unfair treatment by a manager (Kim Houghton); a complaint about his performance management assessment (informally referred to internally as 'PMR') scoring; reference to having had some complaints by two members of staff that had been made the year before (2017) disregarded by management; performance concerns in his role as SO; and reference to being remotely assessed by Kim Houghton who he claimed was not his manager. He stated that his grievance was one of bullying, harassment and/or discrimination and he made reference to race discrimination. In terms of outcomes, the claimant confirmed he was looking to have his PMR reviewed, and that he wanted to be redeployed to another team as soon as possible. He also made reference to wanting his current work and project activities to be assessed by an independent reviewer. He indicated having tried to resolve his concerns informally with his manager but that this had been unsuccessful.

4.44 Sian Owen, Lead in Making Tax Digital, acknowledged receipt of the grievance on 8 November 2018 (page 456 of the bundle) .She wrote to the claimant to invite him to attend a grievance meeting on 15 November 2018, (page 457 of the bundle) . He was reminded of his right to be accompanied to this meeting by a trade union representative or work colleague.

4.45 Sian Owen held an investigation meeting with the claimant on 15 November 2018, as arranged. Sonya Courtney attended to take notes. The claimant was not accompanied. She went through the matters that the claimant wanted to raise in his grievance. A copy of the final notes of the meeting are at pages 458 to 463 of the bundle. The claimant went through all his issues.

4.46. In summary, the claimant claimed he felt he had received unfair treatment, bias and discrimination because of his race. He stated that he had mentioned this to his line manager around two months ago. He felt the way he was treated was because of his race, but there had not been any direct reference made to this as an issue up to this point. In terms of areas where the claimant felt he had not been treated the same as other people, these included: his line manager asking for feedback on his performance running workshops, in order to feed into the PMR; a report on the potential savings, which met with the G7 expectations but was then "trashed" by the G6; the complaint made regarding two members of staff with witnesses which was not taken forward; the way Kim Houghton spoke to him in an allegedly threatening manner; and the "flimsy excuses" he had received regarding the PMR rating. The claimant also made reference to having received a comment that he was not fit to be a Senior Officer, and was working at the level of a Higher Officer. He claimed this had started around a year previously, with the PMR since October 2017. He added that Kim Houghton and Mark Brewin seemed to be the people he needed to impress, rather than Paul Pinnington. He did not understand why, he felt he was being judged by managers he did not have direct dealings with and did not know what they wanted or how they felt about him.

4.47 Whilst Sian Owen was progressing the claimant's grievance, Paul Pinnington continued to manage the claimant's performance. A monthly performance review

took place on 9 November 201 (pages 194 – 195 of the bundle). On 20 November 2018, there was a further review of the claimant's progress (pages 202 – 203 of the bundle). The claimant was informed that Paul Pinnington intended to follow the Managing Poor Performance ("MPP") process. He offered the claimant a right of appeal. A copy of the PIP document is at pages 209 – 214 of the bundle.

4.48 A new PIP was agreed on 21 November 2018, with an anticipated completion date of 31 March 2019. A copy of this is at pages 204 – 208 of the bundle. This detailed the claimant's new objectives. Paul Pinnington made it clear what he expected to be delivered (repeated at regular catch-up meetings), and he stressed the importance of the claimant delivering some good results by March 2018.

4.49 The claimant was subsequently signed off for a period of absence between 22 November and 4 December with "stress at work" (page 289 of the bundle). Meanwhile, in order to investigate the grievance, Sian Owen met with Paul Pinnington on 20 November 2018 . A copy of the notes are at pages 470 to 476 of the bundle. He responded to each of the points that had been raised by the claimant in the grievance.

4.50 Sian Owen then held a meeting with Mark Brewin on 30 November 2018. A copy of the notes are at pages 477 to 479 of the bundle. The meeting focussed on two particular areas, namely the report the claimant had produced on the potential cost saving in May/June 2018 ,and also the treatment of a complaint the claimant had made against two members of staff in the wider KAI team.

4.51 On 18 December 2018, Sian Owen met with Kim Houghton, a copy of the notes are at pages 483 to 484 of the bundle. She discussed with her the various matters that the claimant had raised which related to her, and got her responses.

4.52 On 21 December 2018, Sian Owen asked Paul Pinnington to provide her with documentation of the management action he had taken in response to the claimant's complaint against two members of staff, see page 485. Paul provided her with a response on 3 January 2019 (on the same page). The Grievance Checklist – Manager's Review is at pages 114 to 121, together with an email trail at pages 126 to 127 of the bundle.

4.53 The claimant returned to work on 5 December 2018 and was invited to attend a poor performance meeting on 19 December 2018, a copy of this is at page 215 of the bundle. He was reminded of his right to be accompanied to this meeting.

4.54 A copy of the notes that Paul Pinnington used at the return to work meeting on 5 December is at page 220 of the bundle. This was a checklist of the matters covered. A copy of the extended PIP which was issued on 5 December 2018 and intended to cover the first review period (up to 21 January 2019) is at pages 264 – 265 of the bundle.

4.55 The claimant went off sick again the following day.

4.56 Paul Pinnington prepared documents in advance of his next meeting with the claimant , which are at pages 216 – 219 and 221 of the bundle, having reflected on his performance. These notes were more of a prompt or reminder of the points Paul Pinnington needed to make , and the claimant had the opportunity to present evidence to contest them.

4.57 The first formal meeting took place on 19 December 2018 as arranged. Paul Pinnington was accompanied by Tom Whitehead, who took a note of the meeting, a copy of the notes are at pages 222 – 225 of the bundle. The claimant was unaccompanied.

4.58. At the start of the meeting, Paul Pinnington explained this was the first formal meeting under the Managing Poor Performance procedure. He discussed by way of background that this position had been the claimant's first posting as a Senior Officer and he had been in the role for approximately 20 months. He stated the reason why the procedure had been instigated was due to both the quantity and quality of the claimant's work. A PIP had been in place since 21 November 2017. This , he said, had provided ample opportunity for the claimant to respond to concerns over poor performance , and also make full use of the support that had been given to him. The intention was the review period would continue until 21 January 2019 , when the claimant would be expected to improve the quality and quantity of his work. He confirmed he would continue to provide the claimant with support and advice. He explained the purpose of the meeting was for the claimant to provide evidence to explain why the procedure should not be used.

4.59 The claimant responded that Paul Pinnington had been his manager for approximately 22 months and that all of his work had been undertaken with his involvement and engagement. He expressed his opinion there was no need to present again what was already known by Paul Pinnington . The claimant stated his longstanding disagreement to his assessment of his performance under the PMR process , and that he was looking for an independent review.

4.60 Paul Pinnington confirmed that, if necessary, the claimant had the right of appeal and that a manager, Anthony Rourke, a Grade 7 Team Leader, had offered to conduct an independent formal appeal process. The likely timescales if any appeal was required were discussed. The claimant repeated his desire to have an independent review of Paul Pinnington's assessment of his performance under the PMR process. All staff were given the opportunity to dispute their PMR assessment on the system at the time the markings were entered by their line manager.

4.61 Paul Pinnington started to summarise the reasons for instigating the MPP procedure, and proceeded to refer to his notes, summarising the points he had made. The claimant interrupted , and asked if he would refrain from doing so, as he was familiar with them and he did not believe anything was going to change. The claimant claimed that he had already provided his evidence at the regular one-to-one meetings. Paul Pinnington considered that he had in fact provided no evidence to counter any of the observed aspects of poor performance. He had merely stated that he disagreed with his assessment and that his performance was good. He was not

willing to provide Paul Pinnington with any evidence to try and counter the points he was making to him.

4.62 Paul Pinnington confirmed that the claimant would be sent the notes and chronology that he had been using in the meeting, together with any other appropriate documents. He confirmed this was a formal process and that dismissal was a possible outcome. The claimant expressed the view that the meeting was pre-determined , after he had said this. The HR guidance for managers , however, instructed him to say this. It was important , he was advised, to ensure that the jobholder is aware of the serious nature of what is happening. However, there was no suggestion that this outcome could not be avoided by a sustained improvement in performance and this was entirely the case with the claimant.

4.63 The meeting then developed into a detailed review of 3 pieces of work undertaken by the claimant; this is outlined at pages 223 – 225 of the bundle. In terms of what Paul Pinnington discussed, and his findings, the first project output related to a project that was originally commissioned in December 2017. Despite a delay to the start to avoid the autumn Budget and the Christmas period, the requests for information went out in January 2018. The response was poor and there was some confusion as to what was required. A further reminder e-mail was sent out in February, and mainly nil returns were received. By March 2018 only one response of note had been received , and the suggestion that this be investigated further became the next part of the project relating to the National Tax Credits (NTC) report. By the end of March deadline there was only partial information available about the only data feed identified.

4.64 The second, the undocumented feeds project , consisted of collecting information from all G6 teams across KAI about any data feeds they may have which were not currently included within the scope of the EDH data migration. These were likely to be rare , as the data would be loaded by the teams concerned on an ad hoc basis. This work was initiated in November 2017 , but the e-mail out to teams was suspended until January 2018 due to Budget activity and Christmas. As most teams had nil returns, as expected, it seemed reasonable for the project to be able to report back its findings before the end of March 2018. In the end, only one team reported they had this type of data feed.

4.65 Initial feedback from the undocumented feeds project resulted in another project, the NTC report, to investigate options for reducing the NTC data storage requirements. As this involved further collaboration with just one team, a completion deadline of the end of March seemed reasonable to Paul Pinnington .

4.66 The third piece of work assessed, for the final PIP before the formal MPP started, related to gathering information about the datasets held within the EDH data warehouse. Some information was already available and it was more about checking that KAI data contact information was up-to-date and capturing any useful information the claimant could from these data users. The claimant , Paul Pinnington considered, had failed to scope this project correctly , as he focussed on just two data users, and did not act upon some of the key feedback from the project

stakeholders. In particular he was asked to just provide a simple mock-up of what the data catalogue should look like, before populating it.

4.67 Paul Pinnington started to bring the meeting to a close by explaining next steps. He explained he would provide the claimant with a copy of the notes of the meeting for him to review. He would send the claimant the required documentation and the letter with the conclusions of the meeting as soon as possible. The claimant commented again that he believed the outcome of the meeting had been pre-determined. Paul Pinnington summarised that the claimant had not met the required standards , both in terms of the amount of work undertaken, and the presentation of the work. The claimant disagreed.

4.68. Paul Pinnington had the overriding impression that the claimant seemed to be under the illusion that his performance was good, despite all of the advice given to him to the contrary. He assured the claimant that any future appeal would be independently managed by Anthony Rourke. He confirmed he would follow HR policies regarding the provision of the information to the Appeal Manager.

4.69 Paul Pinnington subsequently confirmed the issuing of a written warning to the claimant dated 28 December 2018, a copy is at pages 226 – 227 of the bundle. This confirmed what had been discussed, and the claimant was considered not to be performing effectively at Senior Officer grade after more than 20 months in the grade in terms of what and how he was delivering, in particular concerning the quantity and quality of work produced.

4.70 Key examples included his draft and final NTC report which had failed to provide evidence of any in-depth research that he had undertaken, nor had he presented the final recommendations very well; and tasks that he had been asked to deliver relating to documenting EDH data services had not been delivered as requested nor in a timely fashion. The claimant had been subject to a performance improvement plan since 21 November 2017 and had been given ample opportunity and support in order to respond to performance issues identified. The letter set out an expectation the claimant would improve both in terms of quantity and quality of work produced over the next month and to deliver what the EDH data users and his managers required. The letter also set out expectations in terms of the claimant taking on and delivering some work items relating to SAS or RStudio testing and roll-out as required. The letter explained the expectation was for the claimant to project manage his work and liaise with me and other stakeholders as appropriate. Paul Pinnington would provide him with the support and advice.

4.71 The claimant's work performance would be reviewed during the period which commenced on 20 December 2018 and ended on 21 January 2019. Paul Pinnington explained that they would informally meet during the review period every week, commencing on 8 January 2019 to discuss progress. The claimant was warned that if his performance fell below the expectations required in the review period, then he would move to the next stage of the managing poor performance policy which could ultimately lead to his dismissal.

4.72. The claimant was invited to meet with Paul Pinnington at the end of the review period on 22 January 2019 to discuss his work performance during the review period. He was reminded of his right to be accompanied. He was advised of his right of appeal and the details to follow in this regard. A copy of the letter, with which were enclosed the notes of the meeting, is at pages 226 – 227 of the bundle.

4.73 The claimant appealed the written warning by email dated 20 December 2018, a copy is at page 234 of the bundle. The claimant's grounds of appeal were not specified, he simply said that he wished to oppose and appeal the decision.

4.74 A copy of the claimant's subsequent correspondence with the Appeal Manager, Anthony Rourke, a Grade 6 , is at pages 232 – 234 of the bundle . Mr Rourke advised the claimant about the appeals process and sought further clarity on the grounds of appeal.

4.75 Separately, the claimant raised a number of concerns directly with Paul Pinnington , in an email dated 31 December 2018 (page 228 of the bundle). Paul Pinnington had an informal weekly review meeting with the claimant on 8 January 2019, which he used to address some of the concerns raised by the claimant. A summary of the discussion is set out in the email sent to him on the same day, a copy of which is at page 230 of the bundle.

4.76 During the discussions, the claimant said that his stress was relating to the actions of the management team, rather than workload. They discussed the EDH Data catalogue project and 'agreed to differ' in terms of the viability of it. Paul Pinnington explained to him that the management team (himself, Mark Brewin and Kim Houghton) had always focused on what he was able to deliver by November 2018, rather than his March 2019 timescale. They had reviewed the original data catalogue and determined a list of points to be addressed. He explained they had expected to see some mock-up designs (for a simple example dataset) for sign-off by key stakeholders over the summer of 2018. However, instead of seeking engagement from a wide range of users, the claimant had chosen to focus on some comments from just 2 EDH users, which were primarily applicable to their use of the EDH data and were unlikely to benefit the other/ new EDH users. When Paul Pinnington challenged him further on why he had not developed this further, the claimant said that he had dealt with all but “some superficial comments” and that he should not be doing this work anyway as it was CDIO’s responsibility.

4.77 Paul Pinnington made it clear to the claimant what he expected in terms of the items moving forward, namely an outline plan for the new work items that he would be delivering for EDH Data Services with potential timescales; evidence of what work he had completed each week; and regular updates on progress, not just at weekly one-to-one and fortnightly team updates, which should include setting up meetings to discuss issues arising and copying him in to all project emails. He confirmed that he would review the latest version of the EDH Data catalogue. He also explained his view that his performance had not improved during the first part of the review period, particularly as there had been no evidence of any planning or preparation for the new work items which had been provided so far. He also urged him to co-operate

and be proactive, particularly if he was coming across blocking issues, such as the availability of EDH. He confirmed that he was happy to provide feedback on anything the claimant provided.

4.78 Paul Pinnington's view was that the claimant had only made changes that were easy to make , using information that was already available, and, regardless of whether the team was doing it because another was not resourced to do it, he had spent a few months working on this , and had not provided what the major customers wanted. The claimant had worked over the Christmas period, but there was a lack of any evidence of planning or preparation work during this timeframe. Paul Pinnington expected him to produce a project plan in early January , and to start to scope what was required. He had not organised a handover meeting with Gurpreet Chohan as yet, and therefore had no plans to share with Paul Pinnington about how he was going to take forward and complete some of Gurpreet's outstanding projects, the majority of which were close to completion. Gurpreet , as a member of Kim Houghton's team at that time , had completed most of the preparatory work for this work area up to November 2018. Paul Pinnington had agreed with Kim Houghton, Gurpreet and the claimant in November 2018 that this work could move across to the claimant from Gurpreet, in order for Gurpreet to work on another large project.

4.79 Meanwhile , the claimant was invited to attend an appeal hearing on 17 January by Anthony Rourke. A copy of the invitation letter is at page 231 of the bundle. Paul Pinnington received a brief update from Anthony Rourke on 10 January 2019, a copy of this email is at page 235 of the bundle. As part of this, he asked if Paul Pinnington could provide him with various documents and to check he understood the process that had been followed. Paul Pinnington proceeded to send him copies of various information, which can be seen at pages 236 – 244 of the bundle.

4.80 On 17 January 2019 Anthony Rourke met with the claimant to consider his appeal. The notes are at pages 253 to 256 of the bundle. The claimant raised his issues, largely as he had done in his discussions with Paul Pinnington . He refuted that his performance was not satisfactory. He referred to timescales for delivery of projects being changed, and they had taken longer. He maintained that he had met the objectives set for him, but these had then been changed.

4.81 They discussed in particular the topics of NTC B&C weeding of data, Undocumented Feed and EDH Data Catalogue.The claimant disagreed with the allegations made against the timeliness of his work. All of these three projects overlapped each other in terms of their start or expected completion dates.

4.82 In addition to the issues with the project work above, the claimant suggested he felt he had been the victim of prejudice and bias. The evidence the claimant cited suggested that his current line manager had spoken to his previous line manager (with whom the claimant had a history of disagreement) in order to form a part of his PMR review. He felt as though the involvement of his previous line manager had influenced his current line manager's decision on his PMR review, as he felt he was performing well in his role at the time.

4.83 There was an additional suggestion that the claimant had been subject to victimisation. Following a complaint that the claimant made about his manager, he suggested he had not been treated fairly. Since this complaint was made, the claimant said that his manager's attitude to him had become irrational, including unreasonable requests for projects to be delivered in very short spaces of time. His grievance meeting was in November 2018. Anthony Rourke suggested that this accusation of victimisation may not fit within the scope of this appeal and may need a separate investigation.

4.84 A lot of the refutations made by the claimant related to deadlines set for projects, which the claimant felt he had delivered correctly, and to the correct scale. The reasoning for the decision against him suggested that these projects could have been done more quickly , and with greater depth. Project plans were communicated verbally to line managers through team meetings and 1-1 meetings, not written down. Therefore, this decision was currently based only on conflicting opinions - what the claimant thought, and what his line manager thought. Anthony Rourke suggested that , fundamentally , this was a disagreement on the length of time it can take to deliver work, and the quality and depth of that work when it was delivered. The claimant agreed with this sentiment.

4.85 After the meeting Anthony Rourke then considered his decision, which he sent to the claimant by letter of 24 January 2019 (pages 267 to 268 of the bundle). He rejected the appeal. His reasons for doing so were expressed thus:

***"Regarding the Decision***

*You presented no additional evidence that was not available and considered at the first formal meeting on the 19t" December 2018, and you agreed when we met that your appeal was fundamentally a disagreement on the length of time that the work should have taken and the quality and quantity of work that has been produced.*

*Therefore, I have considered:*

*The outputs of the three projects that you provided to assess the quantity and quality of the work*

*• The details that you provided in our meeting to assess how you approached the work; and*

*• The Performance Improvement Plans to assess how long the work took*

*I find that I agree with the original decision.*

*Given that each of the projects took between 4 and 6 months to deliver,I would expect to see either evidence of substantial issues that the projects*

*took to deliver and so will face to take forwards with recommendations as to how these could be tackled or evidence of supporting and/or delivering other substantial projects. I could see neither from what was presented to me.*

*You disputed that any additional detail would not add value to the projects. However, given that the primary customers for at least two of the projects were your management team, your management team were well placed to understand what they required from the projects.*

*In addition, you acknowledged that with at least one of the projects, it was not clear to you who the primary customer was until the end of the project. As an SO, I would have expected you to have established this at the start of the project and to take more ownership in establishing their requirements.*

***Regarding the Process***

*Again, you presented no additional evidence*

*I have reviewed the details and timings of the Performance Improvement Plan meetings, the invitation to the Poor Performance Meeting and the Poor Performance Meeting itself. These all follow the proper process.*

*You mentioned in our meeting that you felt your first PMR rating in your current team was inappropriately affected by your current manager discussing your performance with your previous manager. However, as your PMR rating covered your time in both posts, this appropriately followed the guidance under the old performance management process.*

***Victimisation***

*Finally, you indicated that you felt that you were being treated unfairly since you raised a grievance recently. As (advised when we met and HR have confirmed, a claim of victimisation is out of the scope of this appeal process. This would need to be raised as a separate complaint."*

4.86 By letter dated 15 January 2019 the claimant was invited to attend a poor performance meeting on 22 January at 2 pm, a copy of the letter is at page 250 of the bundle. He was reminded of his right to be accompanied. Paul Pinnington also encouraged him to prepare for the meeting and to bring any evidence he wished to discuss . He was also reminded of the additional support available to him through the Employee Assistance Programme.

4.87. On 16 January 2019, Paul Pinnington had a catch-up discussion with the claimant, a copy of the note is at pages 251 – 252. As part of this, he discussed the evidence of the delivery of EDH Services work so far. He provided feedback on the project plan in its current form and indicated that this was not acceptable; more detail was required as it was unclear what actual work was being delivered in the coming weeks and whether there were any dependencies. He also needed to know which

stakeholders were being consulted. He highlighted that according to the current plan, only one work item was being delivered before March 2019 and this was not acceptable. He set out what he saw as the priority order for delivery. As part of the discussion, the claimant cited stress at work due to management (he referred to Paul Pinnington as his line manager) and said he wanted to leave the team. Paul Pinnington had already explained that he would consider a managed move at a lower grade , but he could not sanction a managed move at the same grade whilst he was under the formal poor performance process. He repeated this position to him. He also explained that stress issues could only be actioned (in the context of reasonable adjustments) if there was an Occupational Health referral. The claimant said that he wished to follow this process.

4.88 The claimant wanted to take some annual leave by the end of January, and mentioned this. Paul Pinnington explained that this needed to be factored into the project delivery plan timings. He explained that in terms of what he had seen so far, there was no evidence to suggest there was improved performance. However, he was prepared to extend the review period in order to take account of the claimant's booked leave.

4.89 The first review period ran until 22 January 2019 and he was proposing to arrange the formal review meeting the same day. The planned second review period was agreed to run from 4 February to take account of annual leave in late January. Paul Pinnington confirmed he would continue to provide feedback on any outputs provided and advise on next steps on request.

4.90 Following the weekly performance review on 16 January, Paul Pinnington confirmed that the next review meeting would be scheduled for 22 January 2019, and that the claimant had the right to be accompanied. He also reminded the claimant that he had offered him an Occupational Health referral on his return to work on 5 December and completed the ACC1 form accordingly. He provided everything by email – all completed for him. However, he received no response, so he raised this with him in a subsequent review meeting on 11 February. He explained that as part of the process for lodging an Occupational Health referral, Paul Pinnington would need to answer certain questions. He asked the claimant to confirm whether he wished him to proceed with the referral , and then he could set up a meeting to answer the questions. A copy of this email is at page 262 of the bundle.

4.91 On 17 January 2019, Sian Owen invited the claimant to attend a formal grievance meeting on 7 February 2019, a copy of the invitation is on page 486 of the bundle. She also provided him with a copy of her findings in the investigation. A copy of the report is at pages 489 to 497. In terms of the findings of the investigation, the document at pages 489 to 497 provided (amongst others) a summary of the investigation, the details of the complaint and set out the summary of all the investigation meetings. The report ended with her considerations.

4.92 With reference to the complaint of bullying relating to the phone call with Kim Houghton on 30 July, her investigation findings referred to the investigation

meetings . Based on the evidence provided, Sian Owen did not have enough information to support the claim of bullying. In relation to the second complaint of unfair treatment and discrimination relating to the performance management process, in particular how feedback from other members of the management team (Mark Brewin and Kim Houghton) fed into the process and how Paul Pinnington (as his line manager) sought feedback independently on the claimant's performance, she found that a significant aspect related to projects the claimant undertook for Mark Brewin and Kim Houghton up to August 2018. Feedback from these projects fed into performance discussions between the claimant and Paul Pinnington, including his progress against his Performance Improvement Plan.

4.93 Sian Owen found that the evidence presented was in line with standard management practice. As this was standard management practice, which would apply to all employees as appropriate, there was nothing to suggest there was a case to answer in respect of the complaint of unfair treatment and discrimination.

4.94 In relation to the wider evidence going back before these projects, whilst this was out of scope , it was noted the claimant was made aware of the right of appeal against the PMR rating and did not do so.

4.95 In respect of the third element of the complaint , relating to unfair treatment in the handling of the previous complaint in November 2017, whilst this was formally out of scope, Sian Owen had investigated this after receiving advice from HR casework. The departmental process had been followed, including seeking advice from HR casework and there was no evidence of unfair treatment or discrimination in the decision not to pursue a formal grievance in respect of this complaint. She accordingly did not uphold any aspect of the claimant's grievances.

4.96 The review meeting called by Paul Pinnington did not proceed on 22 January 2019, as the claimant had to go home immediately due to a domestic crisis . The meeting was rescheduled for his return from leave to 11 February 2019.

4.97 On 24 January 2019, Anthony Rourke provided the claimant with his decision on the appeal. A copy of the cover email is at page 266 and the decision letter is at pages 267 – 268. He confirmed that he had carefully considered all of the information and had decided to reject the appeal against the Department's decision. He agreed with the decision to issue the claimant with a written warning on the grounds of poor performance. He explained the reason for this decision was that the claimant had presented no additional evidence that had not been available and considered at the first formal meeting on 19 December 2018. The claimant had agreed when they had met that his appeal was fundamentally a disagreement on the length of time that the work should have taken and the quality and quantity of work that had been produced. Anthony Rourke had considered the outputs of the 3 projects the claimant had provided to assess the quantity and quality of the work, and the details that he had provided in the meeting to assess how he had approached the work, and the Performance Improvement .

4.98 Anthony Rourke confirmed that given each of the projects took between 4 and 6 months to deliver, he would expect to see either the evidence of substantial issues that the projects took to deliver and so would face moving forwards with recommendations as to how these could be tackled, or evidence of supporting and/or delivering other substantial projects. However, he could see neither from what had been presented to him. He acknowledged that the claimant had disputed that any additional detail would not add value to the projects. However, given the primary customers related to the projects were his management team, the management team were well placed to understand what was required from the projects. He also acknowledged that with at least one of the projects, it was not clear to the claimant who the primary customer was until the end of the project. As a Senior Officer, Anthony Rourke would have expected the claimant to have established this at the start of the project , and to take more ownership in establishing the customer's requirements.

4.99 With regard to the process, the claimant had not presented Anthony Rourke with any additional evidence. Anthony Rourke had reviewed the detail and timings of the Performance Improvement Plan meetings, the invitation to the poor performance meeting and the poor performance meeting itself. He confirmed they had all followed the proper process. He acknowledged that the claimant had mentioned in their meeting that the claimant had felt his first PMR rating in his current team was inappropriately affected by his Manager , Paul Pinnington , discussing the claimant's performance with his previous Manager. However, as the PMR rating covered the claimant's time in both posts, this appropriately followed the guidance under the previous performance management process.

4.100 The claimant's allegations of victimisation were considered, and Anthony Rourke made reference to the claimant indicating that he felt that he had been treated unfairly since he had raised a grievance . This was deemed to have been out of scope for the appeal process and would need to be raised as a separate complaint.

4.101 Anthony Rourke confirmed that his decision was final and he included a copy of the notes of the discussions with the letter.

4.102 On 4 February 2019, Sian Owen wrote to the claimant to attach the formal notes of the investigation meetings. A copy of the email chain is at page 498 of the bundle.

4.103 On 7 February 2019, the day Sian Owen was due to meet up with the claimant to talk through her decision on the grievance, she received an email from him declining to attend (page 500 of the bundle). She acknowledged this (email at pages 499 to 500 of the bundle) , explaining that the purpose of the meeting was to make sure she had all of the facts before making a decision on the grievance. It was therefore an opportunity for him to add anything further to the complaints he had made. She offered the claimant a further opportunity to confirm he would attend. However, he did not take this up.

4.104 A copy of the grievance decision and deliberation document is at pages 501 to 504 of the bundle, dated 27 February 2019, sent to the claimant by email on 28 February 2019, with the decision letter of the same date (pages 505 to 507 of the bundle). Sian Owen's decision was the grievance was not upheld. After setting out her findings, Sian Owen then set out the proposed resolution, namely what the claimant was seeking and what the decision relating to this would be. He was seeking a review of the PMR process and a move to another team. As the final grievance meeting had not taken place, she noted she had not had the opportunity to discuss this with the claimant . In terms of action to be taken to implement the outcome of the grievance, she said that no action was to be taken. She advised that the claimant had the right of appeal.

4.105 Following the claimant's return from annual leave, the formal performance review meeting took place on 11 February 2019 as proposed. Paul Pinnington attended with Mark Thomas to take notes. The claimant was not accompanied. A copy of the notes are at pages 269 – 271 of the bundle.

4.106 During the discussions, the claimant's performance since the last meeting on 19 December 2018 was reviewed. Paul Pinnington initially discussed the offer to refer the claimant to Occupational Health, and additional assistance through a stress reduction plan. He noted that the claimant had not responded to this offer. The claimant confirmed that he did not feel the stress reduction plan would help, as he did not feel the plan related to the cause of his stress. He also confirmed the same with respect to the Occupational Health referral, declining both options. Paul Pinnington confirmed that both options would remain available, should he change his mind.

4.107 Turning to the claimant's performance, Paul Pinnington said that he had not received appropriate evidence to show any improvements in this. The claimant disputed this, but Paul Pinnington explained he had not , for example, received any evidence of project planning before the 7 and 10 January handover meetings with Gurpreet. The handover meetings were an opportunity for the claimant to ask Gurpreet questions about anything he did not understand within any handover information that had been shared previously. In terms of the evidence that had been provided, there was , Paul Pinnington said, very little to show for what was effectively 20 working days' work. The claimant had only provided a basic project plan with timescales outside the timeframe expected. There was little else in terms of work items completed. He therefore gave the claimant an opportunity to provide this evidence at that time , and also to explain any external factors that might have impacted on his output.

4.108 The claimant stated he had been providing evidence via emails both direct to Paul Pinnington , and also indirectly. He believed he was progressing with the work on his project plan to an acceptable standard. He commented he felt he had explained all of this in prior formal meetings and that the communications between them had broken down, which was affecting the outputs of the formal performance review meetings.

4.109 Paul Pinnington disagreed with the claimant's comments. He was still setting up regular meetings with the claimant and asking him to include him in his project meetings with stakeholders. They were still on speaking terms. He disagreed that communications had broken down. His view was that the claimant, however, was becoming less receptive to his advice and expectations of what he should be delivering. He was still maintaining that his outputs were either good or great.

4.110 The claimant claimed that working within the current team and under his current management chain was a major cause of the stress he was currently under. He did not believe his work was being appreciated or evaluated correctly , and felt a decision regarding the process had already been taken. He referred to having asked to be moved from his current management chain to another in order to overcome his stress, in the belief that it would resolve the performance issue. He reiterated that his stress was related to the management team.

4.111 Paul Pinnington asked the claimant what he believed would be a reasonable request of the management team to resolve the issues causing stress. The claimant responded by explaining that he had requested a move several times but the management team had not approved this. Paul Pinnington responded by saying that whilst a member of staff was under a formal review period, they could not be moved to another team , and elaborated that this guidance had come verbally from HR.

4.112 The claimant commented that he was unhappy working with the current management team , and believed he was expected to deliver "100%" which he felt was an undefined amount of effort. Paul Pinnington responded by explaining that what was expected of him was covered by an agreed project plan and that what had been provided so far in evidence was insufficient. He responded by saying that what he was delivering was what he could , and that this is what he had been asked for. He claimed that what was expected was an undisclosed amount of work and was not detailed on the project plan. Paul Pinnington disputed that.

4.113 Paul Pinnington ended by saying that the outcome of this meeting would be the issuing of a final written warning and that there would be a further review period between 11 February 2019 and 11 March 2019 with weekly reviews. The claimant appeared to accept the outcome of this meeting , but believed that the outcome had been made in advance , and prior to reaching this stage in the process. He claimed that Paul Pinnington and others within the management chain had already made a final decision on the outcome of the formal performance review process. Paul Pinnington emphasised that if the claimant demonstrated improved performance, then dismissal could be avoided. Paul Pinnington just wanted to see evidence of him delivering some (not even all) of the work items at that time.

4.114 The claimant went on to say that he may be on leave during the review period. Paul Pinnington replied by saying that he was not aware of this, and had not been notified of any leave. The claimant explained that the leave period would be from 7 March – 27 March 2019. He was also planning to work from home on 6 March. The HR advice received was that Paul Pinnington was able to discount the claimant's leave from the one month review period.

4.115 The claimant had, and was reminded of, the right to appeal the outcome of the meeting and that the Appeal Manager would be Mark Scott.

4.116 The claimant had also requested a change in work pattern and this was to be discussed after the meeting. Prior to concluding the meeting, Paul Pinnington asked if the claimant would like to mention anything else. The claimant commented that the appeal process did not provide him with confidence that he would be able to revoke the outcome , but he would consider it further after the meeting. He commented that he did not feel like he had received any support from Paul Pinnington , despite his best efforts to improve. Paul Pinnington disagreed with this. He had offered advice that the claimant either disagreed with, or simply had not acted upon. In his view he did not think he needed to improve and felt his performance was good. He repeatedly refused offers of help and support.

4.117 The claimant repeated that he believed anything he said now did not matter, and that he felt a decision had already been made at this point and that any request to move team in an effort to resolve the matter would be denied. Paul Pinnington referred to the advice from HR, and the guidance he had received .The claimant commented that he felt he was being victimised by the management team. Paul Pinnington explained how, when applying for a job internally, there was a provision stating that staff could not apply for roles whilst on a managing poor performance. Staff applying to move teams, whether using a standard application form or an Expression of Interest form, would need to declare that they were subject to managing poor performance. The claimant asked for a copy of this guidance in writing. However, Paul Pinnington explained the guidance he had received from HR had been given verbally.

4.118 A copy of the letter detailing the outcome of the meeting is at pages 272 – 273 of the bundle. It confirmed that the claimant was being issued with a final written warning because his work performance remained below a level that was acceptable to the Department. The key issues regarding the performance were summarised as follows:

limited evidence of project planning and the claimant's slow take up of background activities to support the project;

limited evidence of a proactive approach to project management; and

limited evidence of any outputs, relating to the EDH Services work area or other project work items, including some examples of inaccurate communications.

The letter confirmed the intention to further review the claimant's performance in the period 11 February – 11 March 2019. The intention was to continue to informally meet during the review period every week to discuss the claimant's progress. Paul Pinnington explained that he would work with him and provide all the support he could in order to take full advantage of this review period and help him to improve his performance.

4.119 The claimant was warned, however, that if his performance fell below the expectations required in the review period, he would move to the next stage in the managing poor performance policy, which could ultimately lead to his dismissal. The letter confirmed the intention to meet at the end of the review period on 11 March 2019 , and he was reminded of his right to be accompanied for this meeting. The letter also confirmed that the claimant had the right of appeal against the final written warning and that this should be sent to Mark Scott.

4.120 The claimant did not appeal the decision to issue him with a final written warning.

4.121 On 7 February 2019, the claimant requested a change in work pattern, so that he was able to work from home in the afternoons from 18 February 2019 onwards. The reason for this was related to childcare , and that he would have sole responsibility and commitment to pick up the children from school in the afternoon. A copy of the initial request is at page 277 of the bundle. Paul Pinnington acknowledged receipt of the request for a change in work pattern on 12 February 2019 following their meeting , and asked him to provide confirmation whether this was intended to be a short term or long term commitment. He set out the processes the claimant would need to follow. The claimant replied on the same day to confirm he was requesting the change in work pattern under the statutory right to request flexible working and provided further information, see page 276 of the bundle. Paul Pinnington then discussed the request in a meeting with the claimant on 15 February 2019. After discussion, Paul Pinnington agreed to put what he termed “a reasonable adjustment” in place from 18 February until early April as a temporary arrangement , as requested, and that there would be a review then.

4.122. The claimant continued to make it very clear he wanted to leave the current team as soon as possible. Taking this into account, together with the fact the claimant did not know exactly how long he might need this arrangement in place, it was agreed that this temporary arrangement would cover the remaining period within the team , and that he would hold off pursuing a statutory request for flexible working. The claimant's agreement with the proposal is detailed at pages 275 to 276 of the bundle.

4.123 The claimant submitted a leave request on 14 February for the period 7 March – 29 March 2019, see page 274 of the bundle. This was granted and Paul Pinnington agreed to extend the review period to accommodate this.

4.124 On 18 February 2019, the claimant provided Paul Pinnington with an update on some of the activities he would be advancing that week and the following one. Paul Pinnington acknowledged receipt of this and commented that he was pleased he had started to provide more detail about the work items that he had been progressing. He then picked up on some of the things discussed earlier that week. A copy of the email exchange is at pages 278 and 279 of the bundle.

4.125 He also discussed the issue of the HR advice about a managed move not being appropriate. He confirmed he had spoken to HR again and that the primary

issue was the likelihood of finding a new Manager who was prepared to accept the claimant whilst he was undergoing poor performance management. He reminded the claimant he had made a suggestion back in October 2018 at the time he had first requested a move that he would be prepared to consider a managed move at a lower grade. However, he would need the claimant's permission in order to do so. The claimant had not been willing to agree , so it had not been actioned any further. He also explained a managed move was a possible outcome of the current managing poor performance review process, if he could demonstrate sustained improved performance.

4.126 He continued by saying that he would need updates on the other outstanding work items for the EDH Services project. The claimant would need to progress all the work items in order to hand over these services in April. However, it was evident the claimant had not factored in his planned leave for March, nor DEDG's (Data Engineering) processing time for dealing with any requests he had made. Having re-examined the plans produced by Gurpreet for this work area back in November, it did not seem like some of the items requiring the most effort had been progressed. Instead, the claimant had only attempted to process the easier work items. Paul Pinnington explained that in particular he would like to see the EDH Data catalogue ready for handover to Data Engineering as soon as possible. Ideally this work needed to be scheduled into their quarterly LID (work allocation process), so it might not happen until the first quarter of 2019/20 (April to June).

4.127. He also stressed that the claimant needed to maintain appropriate dialogue with another G7 in Mark Brewin's team, Miriam Stratton (to whom the EDH Services were to be handed over), himself and Mark, as well as Data Engineering and the EDH users. He was aware the claimant intended to hold weekly meetings with Miriam to check that handover plans were on track. He explained the claimant would need to include him (and/or Mark Brewin) in these meetings as appropriate.

4.128 He invited the claimant to send him meeting invites in addition to their usual weekly review meetings. He would set up additional slots in his calendar to provide more support if the claimant did not actively request these. He suggested that the claimant consider keeping EDH users informed via a regular newsletter, rather than only using formal updates when things happen. He also reminded the claimant that he needed to keep other shareholders informed there were potential EDH users or non-KAI users of EDH.

4.129 The claimant was told that Paul Pinnington was aware he intended to leave the issue of import/ export process instructions to Miriam's team. It was essential he demonstrated to Paul Pinnington that he was producing an acceptable amount of output during his review period. If he negotiated to drop or transfer items of work, then Paul Pinnington expected him to progress other items faster or to actively seek additional work allocations from him. The amount and quality of output, and the rate at which work was being produced, remained a concern for him.

4.130 Paul Pinnington liaised with HR about the proposed date for the next formal review meeting, given the claimant's leave in March. He confirmed that he intended

to conduct this on 9 April , if this was acceptable to him. A further weekly update was held on 25 February 2019, and an additional short project update on 28th February. A copy of the summary from these discussions and follow-up actions is at pages 280 to 281of the bundle. The claimant confirmed that 9 April was an acceptable date for the formal review meeting.

4.131 Paul Pinnington also highlighted during these meetings his concerns at the lack of progress against the claimant's original project plan. In his view there was not enough output , and he was conscious they were rapidly approaching the end of what he considered was a fairly generous project delivery date. The current plan took no account of the claimant's planned leave for March , and did not prioritise actions concerning items requiring a request to DEDG sufficiently. He reminded the claimant that these were extremely time critical if he wanted them delivered in time.

4.132. He also commented that he was pleased the claimant had started to engage with stakeholders. The weekly meetings with Miriam was a good idea and involving Mark Brewin , and himself as appropriate, was sensible, if he wanted to receive feedback and support at key stages. He did express a concern about what quality assurance was being undertaken, as the claimant's Change Request for SRS system changes contained errors. He suggested that he liaise with Data Engineering more closely to smooth the passage of these Change Requests, as personnel and policies could change over time. He considered that it was good that the claimant had started to provide detailed work updates and that he should comment on progress against all of the work items under the EDH services work area within these for completeness.

4.133 The claimant confirmed during the meeting his new working pattern was not impacting on his performance or his ability to undertake his work.

4.134 Paul Pinnington also noted the claimant had commented that the handover of the EDH Data catalogue had not been factored into his project yet , and this looked unlikely before his return from leave in April. In addition, import and export guidance should be added to the EDH guidance "in due course" but would not be shared with users until after handover. Paul Pinnington was unclear whether what he was proposing was likely to meet user requirements in the coming weeks or months, and it appeared he had chosen to defer a substantial part of the EDH services project delivery into April and beyond. Paul Pinnington reminded him this would not reflect well at his formal review on 9 April, as it was absolutely vital he was seeking to progress all work items as fully as possible in the remaining weeks of his review period, to demonstrate an acceptable level of performance in terms of both the volume of outputs and their quality.

4.135 Paul Pinnington then set out his comments with regard to the quarterly performance review, which are detailed at page 281 of the bundle. He had a further weekly performance review with the claimant on 4 March 2019. A copy of the summary of the discussions is at pages 282 – 283 of the bundle.

4.136 During this period the claimant changed his working pattern to finish at 1pm due to childcare reasons, however, he did so without informing Paul Pinnington on several of the days (1, 7 and 8 March) and he had to contact him to find out why. His normal hours of work had been 7am to 3pm.

4.137 Paul Pinnington enquired whether the claimant had considered using the Employee Assistance Programme. The claimant commented that he did not think it was appropriate for him. The claimant felt that the cause of his stress was the management team (including Paul Pinnington ) and that a job move would resolve the issue. The claimant confirmed during the discussion that the SRS request was "going great" on the basis that it was ahead of timescale, although he acknowledged there were some challenges. The claimant had become aware of some errors in the documentation , but claimed they were someone-else's fault. The claimant did not accept he should have done more thorough checks before submitting the documents. He had incorrectly competed the form (using the wrong cost centre cost with no funding agreed) and attached the wrong version of the information originally prepared by Gurpreet.

4.138 Paul Pinnington enquired whether a work handover had been planned before he was going on leave. The claimant indicated that it was his intention to simply refer all EDH data access enquiries to the IT Helpdesk. However, Paul Pinnington had concerns that this had not been agreed with Data Engineering and the claimant had not notified the potential EDH Users of any change in the procedure.

4.139 He confirmed to the claimant that he was still concerned about his lack of output . The claimant indicated that he did not need to copy him in to all emails and that he had been working closely with Data Engineering behind the scenes . Paul Pinnington replied that he was not seeing any progress against some of the project work items, just a few select ones. The claimant replied he should not expect to see progress until the project was finished. Paul Pinnington pointed out to the claimant his current project plan did not include his March leave period , and it still stated that the project would be completed during March. Despite this, most of the work items would not be delivered until April at the earliest. The claimant commented he did not see this as a problem, as "there was no pressing need". Paul Pinnington reiterated that during his review period, it was vital that he demonstrated he was producing sufficient outputs. The claimant commented that no-one else was required to do this. The claimant then hung up (this was by telephone) before he could respond to this.

4.140 In the view of Paul Pinnington , all staff were accountable to their managers, and they needed to provide evidence that the work they have completed is to an acceptable standard on a regular basis. At this particular time, he also managed 3 other Senior Officers (Mike, Gurpreet, and Boniface) and had monthly reviews with each of them, in addition to regular work catch-ups. He never had cause to doubt that they were progressing work items and delivering acceptable outputs. They all copied him into key e-mails and asked him to check outputs before wider sharing. However, this was not the case with the claimant.

4.141 He also sought to clarify whether the claimant had ITIL training booked for 8 and 10 April, conscious that they had pencilled in the review meeting on 9 April. If he did, he confirmed he would re-schedule the meeting to 11 April, which is what he proceeded to do.

4.142. The claimant was then on leave between 7 and 29 March. On his return there were some project catch-up meetings on 1 and 8 April 2019.

4.143. The review meeting took place on 11 April 2019 , as arranged. A copy of the notes are at pages 284 – 287 of the bundle . Paul Pinnington was accompanied by Laura Galligan, who took the note of the meeting. The claimant was not accompanied.

4.144 Paul Pinnington explained the purpose of the meeting and to discuss how the review period had gone. He added that he would also take into account projects that had been going on over both review periods.

4.145 He initially went through some of the chronology of the recent meetings that had taken place, which included a meeting on 1 March 2019 to discuss SRS role changes. He explained that the meeting, which had been set to discuss the handover arrangements with Miriam, and what the claimant needed to do before handover could take place, had been good. There had then been a meeting on 5 March 2019 but the claimant had not ensured the key attendees from Data Engineering had been able to attend, and the meeting was unable to advance without them. After sending the meeting invitation, he should have checked acceptance and re-scheduled if necessary, to avoid wasting the other attendees' time. The meeting was re-scheduled for 22 March 2019, which coincided with when the claimant was on leave. He had raised concerns there had been a lack of progress since the previous weekly work update meeting. There was also concern about the lack of relationship building with CDIO and Data Engineering. It was part of the role of the Senior Officer to develop these relationships. The claimant's performance had been below the standard for a Senior Officer , and he invited the claimant’s comments.

4.146. The claimant indicated he did not have much to say. He indicated he had been copying Paul Pinnington into emails, and he was unsure what was meant by people not being at the meeting. He indicated that all relevant people had been invited but had failed to turn up at the last minute. In terms of relationship building, he had made phone calls and sent emails , but people had not responded to the emails. He felt he had done everything he could. He indicated he had asked Paul Pinnington to escalate when emails had not been replied to.

4.147 Paul Pinnington expressed his opinion that the claimant had not gone far enough in trying to build relationships. There had been too much emphasis on emails. He explained that due to the claimant having been on holiday, he had picked up the meeting on 22 March. He explained that for the purposes of this meeting, he had spoken to some of the attendees in advance so that they knew what they needed to do prior to the meeting. Sending one email was not sufficient. He

explained Skype could be used to determine who was online , and when to speak to people. The claimant was responsible for building relationships for EDH services. In his view, the claimant should have made more effort to collaborate with those from Data Engineering to get the job done. His escalation in stepping in to do the work for the claimant should have been the last resort after all else had failed. He had ended up doing this by running the 22 March meeting whilst he was on leave. This meeting went ahead as planned , and was successful in agreeing the changes required.

4.148 The claimant challenged his comments , and said it was not normal practice to contact meeting attendees . He said Paul Pinnington had only done so because they had not turned up the first time. He acknowledged that using Skype might be an avenue to explore. He also claimed to have made several calls, not just one. He also claimed to have sent two emails which should have been responded to. He claimed he had asked Paul Pinnington to escalate. He commented he felt he had done everything reasonable , and that the issue should have been escalated to CDIO. He felt that some of the blame should have been apportioned, whilst some was his own fault, some was the fault of CDIO.

4.149 Paul Pinnington explained to the claimant that the bottom line was that there had now been two review periods where the claimant had failed to deliver on work items. He explained there had not been an instance where the claimant could , hand on heart , say that he had finished a project. There was not anything tangible in terms of finished project work items. The claimant replied by saying the success on a project was not just about it being complete, there were other things that made it successful too. He commented that he was not going to repeat his views about this, as he felt Paul Pinnington knew his views.

4.150 One of the examples of the claimant's continuing poor performance related to the way in which he dealt with the request to change the approval process for EDH access. Gurpreet Chohan had informed Paul Pinnington that he had provided clear instructions on what the claimant needed to do by e-mail on 17 January 2019. He asked the claimant whether he thought his performance was acceptable. He confirmed he felt it was "absolutely acceptable" and claimed what Paul Pinnington was using to score his performance was not feasible. He claimed whatever he said would not change his view. Paul Pinnington replied by saying that he would consider his view if more evidence was provided. The claimant said that he had provided this. The claimant said that his performance had been good, and did not put forward any mitigation for why it may have been poor. Paul Pinnington disagreed with him. He explained the next stage in the process was stage 3, which could lead to dismissal. He also explained that in exceptional circumstances, there could be a possibility of being downgraded and a managed move. He said he would try to give the claimant a decision within 5 working days , and this would have to take into account leave and Easter holidays. He would make his recommendations to Mark Brewin, who would be the decision maker. The aim was for a decision by 17 April. The claimant would then have a right of appeal against the decision. The claimant stated there was nothing else he wished to add, as he did not believe it would make a bit of difference. He did agree that Paul Pinnington had been flexible in allowing him to work from home.

4.151 The day after the meeting, Paul Pinnington sent a formal note of the meeting to the claimant for review (see pages 323 – 324 of the bundle) and drew his attention to some of the support that was available. The claimant responded on the same day, 12 April 2019 (page 323 of the bundle) , to provide some comments and proposed amendments to the note. In particular , he stated that his stress at work was due to the management team.

4.152 Paul Pinnington subsequently made a referral to the Decision Manager, Mark Brewin, with a recommendation for dismissal; a copy is at pages 289 – 294 of the bundle. He did have a query about how he could recommend a managed move to a Higher Officer role (rather than dismissal) using the form. HR advised that he should recommend dismissal , but that Mark Brewin as the Decision Manager could consider a managed move at a lower grade as an alternative sanction (considered under exceptional circumstances). He was informed that Mark Brewin would need to offer it and seek the claimant's agreement to it first.

4.153 Mark Brewin received a copy of the "Referral to Decision Manager with Recommendation Dismissal" form from Paul Pinnington, together with its enclosures on 12 April 2019. It was sent by Paul Pinnington under cover of an email dated 12 April 20219 (pages 324A and 324B of the bundle). In the first section of the form, Paul Pinnington detailed the management case in relation to the claimant's performance case and the nature of the concerns, together with the dates and informal action taken (page 290). There was also a section on Occupational Health advice and where any discussions about Occupational Health referrals had taken place (pages 290/ 291 of the bundle). The form also provided for any concerns with regard to sickness absence to be detailed (pages 291 – 292 of the bundle). There was then a detailed chronology and a summary of events which had led up to the recommendation, which is detailed at pages 292 – 294. It was then the job of the decision Manager, Mark Brewin, to review the evidence and make a decision on the recommendation. A copy of the form is at pages 289 to 309 of the bundle. At this stage Paul Pinnington had only completed 'Section 1' of the form.

4.154 Section 1 set out a brief summary of the concerns that had been identified with the claimant's performance, details of the occupational health advice that had been obtained, a section on sickness absence and then provided reference to a chronological summary of events with all the relevant documentation. His role was to check he had everything he needed, before he made his decision. After gathering additional evidence from Paul Pinnington , and other sources involved in the process that he deemed necessary to fully inform his decision, he completed Section 2 of the form and set out his decision. Based on the evidence provided, he confirmed that he had decided to offer an alternative sanction of downgrading to a Higher Officer position.

4.155 No meeting was held with the claimant prior to Mark Brewin making his decision, nor was a copy of the referral document sent by Paul Pinnington to Mark Brewin supplied to him.

4.156 The evidence from Paul Pinnington that Mark Brewin reviewed indicated, he concluded , that the quality and quantity of outputs delivered by the claimant during the formal performance review period was below that expected of a Senior Officer. This included evidence provided by the claimant for the first appeal against the decision made at Stage 1. However, on balance there was sufficient evidence within the period covered under the earlier PIPs to indicate performance was acceptable at the lower grade of Higher Officer in a suitable role.

4.157 In terms of his review of the evidence which led to his decision , he noted that this was a complex case where the claimant and his line manager, Paul Pinnington, had not agreed on the assessment of performance over the past 15 months, covering both PIPs and the formal MPP process. This disputed assessment covered both quality and quantity of output and deliverables. Mark Brewin reviewed the evidence provided by Paul Pinnington against the formal HR process. He noted there was one omission, namely that the standard letter had not been issued ahead of the final Stage 3 formal meeting (11 April 2019). However, based on the content of correspondence ahead of this meeting, formal notes covering questions and responses concerning mitigating factors in the meeting, the correct issuing of previous letters at (earlier) stages and discussion on mitigating factors covered in Stage 1 and Stage 2 meetings, meant that the content of this letter had been covered several times. His conclusion was that the omission of this letter had, on balance, no material impact on the evidence presented at the final meeting by the claimant and therefore no impact on evidence upon which to make the decision. Overall, he was content with the process that had been followed by Paul Pinnington.

4.158. Mark Brewin considered that Paul Pinnington had identified and described a number of projects during both the PIPs and the formal MPP periods that were deemed below that expected of a Senior Officer with around one to two years' experience. Specific projects identified in the evidence before Mark Brewin included (although were not limited to) those covering rationalising NTC datasets and the EDH Data Services catalogue, both of which were delivered late and lacked real insight to inform future decisions or quality. The NTC dataset project required options to be considered to help reduce storage costs across large analytical environments whilst still allowing analysts to still conduct their work. The objective was to provide high-level feasibility of those options and cost/ benefits associated with the options. The claimant’s role was to work with a small number of analysts with expertise in the datasets and produce a paper outlining options and high-level cost/ benefits to take forward.

4.159 The main objective for the claimant for the EDH Data Catalogue was to develop a useful inventory of data sets and services held in a new analytical data warehouse (EDH) which could be developed and expanded over time. Mark Brewin noted from more formal meetings notes that the claimant disagreed with Paul Pinnington’s assessment of the quality and timeliness on much of his work and in particular these reports and outputs. On the evidence on timings and delivery of the "NTC Project" from the PIPs and meeting notes, this was initially requested to start in February 2018, with a draft report delivered in June 2018 and finalised sometime in July 2018 following feedback. Paul Pinnington noted this was a substantial elapsed

period of time for those types of reports and he indicated the quality was also not that expected of a Senior Officer in terms of new insight, conclusions or presentation. The Stage 1 appeal had come to the same conclusion.

4.160 The assessment of the quality of the claimant's work and output by Paul Pinnington had been continually disputed by the claimant throughout the formal MPP period and within latter periods of the PIPs. Alongside these disputes, the claimant requested an independent review of the quality of his work and outputs. In order to aid Mark Brewin's assessment of these claims from both parties and to inform his decision, he requested information from the Appeal Managers and Paul Pinnington to ascertain whether an independent or peer review on quality and quantity of outputs had been conducted. Based on evidence provided by the Stage 1 Appeal Manager (Anthony Rourke) covering three projects provided by the claimant and reviewed as part of that appeal, he was satisfied an appropriate independent review of the quality and quantity of the claimant's work had taken place. As noted in the appeal decision letter of 24 January 2019 (pages 267 – 268 of the bundle) the Appeal Manager rejected the claimant's appeal against the department's decision to issue a written warning on the grounds of poor performance. This provided evidence supporting Paul Pinnington's assessment that the quality and quantity of The claimant's work was below that of a Senior Officer. No evidence to the contrary had been provided since. He also noted that the claimant had made no appeal against the process or evidence supporting the decision that Stage 2 surrounding quality and quantity of work and outputs.

4.161 In terms of management support to improve performance, Mark Brewin found that there was solid evidence of regular and frequent (weekly and monthly) support and work review meetings between the claimant and Paul Pinnington, as detailed in the documentation, and equally supported by write-ups and information within the PIPs. The content of the supportive manager (mentoring or review) meetings was catalogued in the PIPs and formal meeting notes and the advice, support and range of options that were discussed, as documented, were in line with the typical supportive manager and staff relationship. In some cases, the usefulness of advice and support provided by Paul Pinnington was challenged by the claimant, and this was more prevalent in the latter stages of the formal MPP process. He concluded this indicated a breakdown in the working relationship at those final stages of the process. However, on balance, the evidence indicated the managerial advice provided by Paul Pinnington to try to improve the claimant's performance over the PIP and MPP periods was appropriate, directed and supportive.

4.162 In terms of other key points, Mark Brewin considered evidence covering other potential mitigating circumstances before reaching his final decision. He noted the claimant had had one notable phase of stress related absence between 22 November 2018 and 4 December 2018. Paul Pinnington had stated he offered the claimant an occupational health referral, which was disputed by the claimant. However, the offer was recorded in the formal notes in January (page 269) and subsequently rejected. Secondly, Paul Pinnington had provided the claimant with the option to pursue a Stress Reduction Plan via an occupational health referral, but this offer had also been declined. Thirdly, further offers of support for the stress the

claimant was experiencing and occupational referrals were offered in formal settings, but always declined by the claimant. Fourthly, during the meeting on 11 February, the claimant reiterated his request (made previously) to move teams to reduce his stress at work. Paul Pinnington made his position clear that his poor performance would need to improve first within the formal process, and he would support him to improve. He also re-offered the occupational health referral.

4.163 Based on those facts, and the lack of other evidence being provided by the claimant during the formal meetings, he concluded that there were no mitigating circumstances that Paul Pinnington was aware of, or could have been expected to be aware of, that would have explained in continued poor performance.

4.164 He also noted the statements in the notes of the formal meetings that the claimant believed the decision had already been made by the management team, which Paul Pinnington denied. No evidence was provided by the claimant to substantiate this assertion.

4.165 Finally, Mark Brewin noted from the Stage 2 formal notes on 11 February 2019 that the claimant claimed he was being victimised by Paul Pinnington and the management team. He considered *HR20508 – How to: Recognise and deal with bullying, harassment and discrimination* (pages 96 to 103 of the bundle) and the *'Firm and Fair Management'* sub-section. The timings of this victimisation statement overlapped with an ongoing grievance case with the claimant and wider management team. He concluded these issues were dealt with via the formal grievance procedure, which ended in early March 2019.

4.166 Having concluded that Paul Pinnington's assessment of the claimant's performance was correct, and that dismissal may be warranted, Mark Brewin went on to consider any alternative sanction. In terms of the evidence supporting the alternative sanction of downgrading to Higher Officer , this was mainly based on the periods covered by the PIPs. In particular, during the PIP November 2017 to March 2018, Paul Pinnington had stated that during the end of year validation, the claimant's behaviours were deemed to be those expected at Senior Officer level, but his deliverables were still below that expected for a Senior Officer. Whilst the claimant's performance was not maintained for a sustained period based on evidence in the PIPs, it demonstrated a level of competency that could be expected to be sustainable at Higher Officer grade. In addition, progress on tasks and projects where the scope was clearly set and defined even during the PIPs (for example, on undocumented data feeds in November 2017 to March 2018) were generally assessed more positively by Paul Pinnington . The level of performance described on these types of well-defined tasks was more comparable to expectations of performance of a Higher Officer and, Mark Brewin considered, demonstrated a competency at that grade which could be sustained.

4.167 For these reasons, and based on the evidence provided by Paul Pinnington and the formal meeting notes, and after consultation with Jonathan Barry of HR, Mark Brewin offered the claimant the alternative sanction, with specific conditions as

outlined below. The claimant was, however, also offered the right to appeal this decision of an alternative sanction.

4.168 Mark Brewin set out in a letter dated 7 May 2019 his decision, and a few reasons supporting his decision for an alternative sanction (or dismissal), namely that: (1) the quality of several key outputs and deliverables over an extended period of time: (2) the quantity, planning and timeliness of outputs during the MPP period; and (3) the quality assurance of outputs during the MPP period; these were all consistently assessed as being below that expected at Senior Officer grade. In the outcome letter (pages 333 and 334 of the bundle) Mark Brewin made reference to the claimant being a non-analyst working within a non-analytical team in HMRC's core analytical Directorate (KAI) following advice from Civil Service HR Casework and based on HMRC policy, he decided on downgrading. The lack of a suitable, vacant Higher Officer post within the current team or Directorate in the location (Manchester) meant the alternative sanction to downgrade to Higher Officer in the existing team which would be limited to a reasonable timeframe before the claimant must transfer to a suitable, permanent Higher Officer role. The move to a suitable, permanent Higher Officer role was part of the alternative sanction. He set out a conditional time limit of around 3 months for this to be implemented, which he considered was reasonable. He explained that Paul Pinnington would be able to support the claimant moving to a Higher Office vacancy outside of KAI. The claimant would also be able to pursue vacancies himself at Higher Officer grade if he accepted the alternative sanction. Downgrading "in-situ" within his existing KAI team was an interim arrangement and the alternative sanction only ended when the claimant moved to an alternative, permanent post before 31 July. The decision to downgrade was not straight forward to implement, as Mark Brewin had to ensure he could provide the option before confirming my decision was possible to even offer. Mark Brewin then had to work with HR colleagues and the management chain to establish how a downgrade to HO would work in practice within KAI.

4.169 As part of this, the HR Business Partner confirmed post-sanction that the claimant would no longer be under MPP. However, if the claimant did not move to a suitable, permanent role before 31 July 2019, he would be dismissed on the grounds of poor performance, effective on 31 July 2019. On 1 May 2019, Mark Brewin wrote to Mark Scott (page 332 of the bundle) to update him , and ask whether he had any information or evidence from any appeal by the claimant (i.e against Paul Pinnington's referral) , which he could consider as part of his overall review of the claimant's performance and the process being followed. He was advised by Mark Scott that no appeal had been raised by the claimant at that stage of the formal performance management process, and therefore there was no additional evidence for him to consider when making his final decision.

4.170 On 7 May 2019, Mark Brewin met with the claimant to inform him of his decision and the reasons for it, which he also provided to him in the letter of the same date (pages 333 to 334 of the bundle) . Whilst there were some enclosures (including a document, at page 335 of the bundle) setting out the implications upon pay and other conditions of service of the downgrading, if accepted) with the letter, a copy of Paul Pinnington's report , which was Section 1 of the Form, was not,

however, included. A copy of the invitation to the meeting is at pages 332A – E of the bundle. He advised the claimant that, based on the evidence he had reviewed, he had decided to offer him the alternative sanction of downgrading to Higher Officer instead of immediate dismissal. He explained that if he wished to accept the downgrading to Higher Officer, this would be with immediate effect.

4.171 This meeting was the only one that Mark Brewin held with the claimant , and its purpose was solely to inform him of the outcome. The deadline for the alternative sanction being offered was set out in the formal decision letter. In the decision meeting Mark Brewin also provided the claimant with the guidance on raising his concerns if he wished to , and as the claimant had stated his issues were with his 'management team', he referred him to the CS&TD Save Havens Group, which provides informal access to mentors in HMRC to support staff and discuss and raise concerns they feel they are unable to within their immediate or wider team.

4.172 The alternative sanction of downgrading was open for acceptance by the claimant within a five working day period. If it was not accepted, then dismissal (immediate or at the end of the five working day period) would be the only option left.

4.173 He advised the claimant that he did not currently have any substantive Higher Officer roles in his team that were a suitable match to his current skill set. He therefore proposed that the deadline for him to take up a suitable, permanent Higher Officer role would be 31 July 2019. If there was no suitable alternative role for him that commenced during this timeframe, then he would have no option but to terminate his employment on the grounds of poor performance. His dismissal in this circumstance would be effective on 31 July 2019. He went on to confirm that there would be discussion of the support that the respondent might be able to offer him in finding another role before 31 July 2019 and the work he would undertake in the short term, in lieu of a permanent Higher Officer position. He asked the claimant to confirm within 5 working days (by 5 pm on Tuesday 14 May) whether he was prepared to accept the alternative sanction of downgrading to Higher Officer, along with the implications on pay, pension and terms and conditions.

4.174 The claimant was advised of his right of appeal against this decision, including where new information or evidence had become available that might have changed the outcome of the original decision or where he felt the procedure had not been applied correctly. If he chose to appeal, he should do so within 10 working days after the deadline of 14 May, in order to respond with his decision whether to accept downgrading as an appropriate sanction. Any appeal should be sent to Iain McNeill who was the nominated Appeal Manager in this case. It was confirmed that a Trade Union representative or work colleague could help him to prepare any appeal.

4.175 In the outcome document of 7 May 2019 , Mark Brewin included a copy of a note of the claimant’s final discussion with Paul Pinnington with the letter, together with other evidence .

4.176 During the meeting on the 7 May the claimant asked if Mark Brewin would extend the deadline for accepting the downgrading as he would be on flexi-leave for

part of the 5 working days before the deadline. He responded that afternoon to confirm he had extended the deadline to 5pm on 17 May for accepting (pages 334A to B of the bundle). Whilst he had been advised by HR that he did not need to take into account annual or flexi-leave during the 5 working-day period, he was willing to agree a small extension. He confirmed also that the deadline for accepting any appeal would be extended to 10 working days after 17 May (page 337 of the bundle).

4.177 During the meeting, the claimant asked two questions. Mark Brewin addressed these in his response (pages 336 to 337/ 334 A to B of the bundle). These related to the date for take up of the alternative role, and confirmation of the retention of the right of appeal if the claimant did so.

4.178 The claimant was working, and then on flexi-leave between 8 and 13 May 2019. On 14 May the claimant emailed Paul Pinnington to inform him that was self-certifying himself sick. He advised Paul Pinnington that he was 'best disposed [to] communicate on email' at the time and that 'communicating on phone to [Paul] or other HMRC staff might aggravate [his] illness' (pages 337A to E of the bundle).

4.179. Mark Brewin heard nothing directly from the claimant by 17 May about whether he wished to accept the downgrade or not. The claimant was signed off as not fit for work from 22 May 2019 until 5 June 2019 for "stress at work", a copy of the fit note is at page 365 of the bundle. The claimant provided this to Paul Pinnington on 22 May 2019 , a copy of the cover email is at page 366 of the bundle.

4.180 The claimant was subsequently signed off again on 6 June 2019, a copy of the fit note is at page 373 of the bundle, together with the cover email at page 377. The claimant was signed off until 28 June 2019. On 6 June, Paul Pinnington also recommended to the claimant that he should have a KIT meeting every Friday at 10 am . The claimant subsequently confirmed he would like this and Shevonne Radcliffe in KAI DSaT Manchester office agreed to take on this role. She provided support over the final weeks of the claimant's employment, including with the return of office equipment and passes, and completion of the leaver's form checklist for HR purposes.

4.181 Having sought advice on the lack of response from the claimant to the offer of downgrading, his recent self-certification of sick leave and the context of the discussions to-date, as well as his ability to appeal the outcome, Mark Brewin's view, taking into account these points, and the fact this was a MPP case and not an attendance one, was that the appropriate response was to proceed on the basis the claimant had not replied to the offer, and was therefore not interested in accepting a downgraded role. He therefore proceeded to finalise a letter which would confirm this, together with the decision to now dismiss.

4.182 A copy of the letter confirming the decision to dismiss is at pages 363 – 364 of the bundle, and was sent on 22 May 2019. This confirmed that the claimant had not responded before the extended deadline of 17 May 2019 , that Mark Brewin was therefore taking it that he did not wish to pursue the alternative sanction of downgrading, and that he would be dismissed from the department on the grounds

of poor performance. The letter confirmed that the claimant was entitled to 5 weeks' notice and that he was therefore dismissed with effect from 30 June 2019, which would be his last day of service. He confirmed that the respondent did not expect him to attend the office or carry out his duties during this notice period but that he would be required to return all HMRC equipment and passes to his office before 30 June 2019.

4.183 The claimant was advised of the support that was available to him, including Workplace Wellness (formerly known as the Employee Assistance Programme) and the letter also advised of his right to appeal the decision, which would need to be made within 10 working days to Iain McNeill, who would act as the Appeal Manager in this case. Mark Brewin also updated Paul Pinnington on the decision and provided him with a copy of the letter, in case the claimant contacted him (pages 364A to 364B of the bundle). He also wrote to Iain McNeill to advise him that a dismissal letter had been issued , and that a right of appeal had been offered (page 369 of the bundle).

4.184 The claimant exercised his right of appeal against Mark Brewin's decision, the letter appeal being received on 25 May 2019 (page 370 of the bundle) . Iain McNeill, Deputy Director , Tax Administration, was nominated as the Appeal Manager.

4.185 The claimant outlined his grounds of his appeal, namely that he had not been in a position to respond to the options given to him by Mark Brewin by 17 May , due to him being off sick due to stress at work. He claimed that Mark Brewin had not taken into account his medical circumstances , or shown any sympathy and his stress at work had been caused by Mark and his management team. He cited a grievance that he had raised before , but which he claimed had been maliciously dismissed. In addition, he disagreed with the decision of the management team to classify his performance as below standard , and claimed that it had always been of good quality and acceptable standard. He again alleged this was a malicious decision on the part of the management team. Lastly, the claimant referred to a belief that he was entitled to redundancy pay if dismissed on the grounds of poor performance. The claimant ended his email by referring to having suffered institutional racism , and that he hoped the department would review its attitude to people of different race. .

4.186 Upon receipt of the appeal, Ian McNeill asked Mark Brewin if he could provide him with access to the relevant papers and let him know the names of the HR Case Workers (page 369 of the bundle). Mark Brewin duly responded on the same day to provide the paperwork (pages 367 – 368 of the bundle). He then forwarded a copy of the appeal to both Mark Brewin and the HR Director (Dan Coughlin) for information, advising that he would be in contact if he needed any further information (page 370 of the bundle).

4.187 On 3 June 2019, Ian McNeill invited the claimant to attend an appeal hearing on 11 June 2019 (page 372 of the bundle). He reminded the claimant of his right to be accompanied by a Trade Union representative or work colleague and advised that this was an opportunity for him to give him further information that would help

him to reach a decision on his appeal. He was aware that the claimant had been signed off sick until 5 June 2019.

4.188 On 6 June 2019, he reissued the letter inviting the claimant to attend an appeal hearing (page 376 of the bundle), as the original letter had been dated incorrectly. He also updated the name of the colleague who would attend in order to take notes in the meeting, as the original note-taker was now no longer available.

4.189 Ian McNeill carried out a number of enquiries for the purposes of the appeal. He met with the HR Caseworker, Jonathan Barry, on 6 June 2019, (the notes are at pages 439 – 440 of the bundle, and incorrectly refer to 6 July 2019, which is a typo.) On 7 June 2019, he had a Skype meeting with Mark Brewin (a copy of the notes are at pages 380 – 383 of the bundle). On 7 June 2019 he had a Skype meeting with Naya Acheampong, who was a HR business partner (a copy of the notes are at pages 384 – 386 of the bundle). On 11 June 2019, Ian McNeill met with Dan Coughlin, the HR Director (a copy of the notes are at pages 391 – 392).

4.190 Ian McNeill's enquiries were extensive. He questioned the whole process, and Mark Brewin's decision. He wanted HR advice on the (exceptional, as it was said to be) offer of downgrading, and the timescale that the claimant was given in which to respond, and what would happen if no vacancy could be identified. He also went into the claimant's claim (not pursued in these proceedings) that he was entitled to compensation in the circumstances that led to the loss of his post. He also raised with Naya Acheampong the reference by the claimant to institutional racism as part of his appeal. The guidance he had read indicated that he should not get too involved in any other process , but that if it was raised as part of the appeal, then he could get involved. He asked if there was any other advice she could give him in this area that he needed to take into consideration. Naya Acheampong responded that she was made aware of a single grievance put forward by the claimant. She did not advise on it, as HR business partners do not usually get involved in cases. He then enquired whether there was any other information he needed to know. She advised him to contact the HR Caseworkers as the Appeal Manager, and request information on the advice given in relation to the claimant.

4.191. Ian McNeill did not interview Paul Pinnington for the purposes of the appeal.

4.192 The claimant did not attend the appeal meeting arranged for 11 June 2019. Ian McNeill had no advance warning that he was not going to be attending. He emailed him to ask why he had not attended and providing an invitation for him to attend a re-arranged meeting on 19 June, see page 388 of the bundle. A copy of the invitation letter is at page 393 of the bundle.

4.193 The claimant responded on the same day to advise that he would prefer to receive the decision based on the information he had provided and past history of his previous complaints. He indicated he was on sick leave due to stress at work (a copy of the email is at page 388 of the bundle).

4.194 On 17 June 2019, Ian McNeill wrote a letter to the claimant to request some further information (pages 401 – 402 of the bundle) . He noted his comments about not being able to attend the meeting on 11 June. However, as he had asked him to take into account information from his past history on his previous complaints, he asked the claimant if he could provide him with details of what these previous complaints were and give him further information that he could take into account. He also wanted him to provide details of how he believed he had suffered institutional racism , and any evidence he would like Ian McNeill to consider. He asked if he could provide this information by 21 June 2019. He said that depending on the information he provided, he may need to investigate matters further. He updated the claimant in terms of timings , and said that he would send his decision in writing. He reminded him of the support that was available in terms of Workplace Wellness. The claimant acknowledged receipt on the same day (the email chain is at page 403 of the bundle).

4.195 The claimant proceeded to send some further information on 17 and 18 June, which was acknowledged (pages 676 to 763 of the bundle). Ian McNeill set aside 4 hours on 19 June to examine this.

4.196 Ian McNeill first listed and sorted the voluminous material, which variously covered a formal grievance, End of Year performance review, request for training, a discrimination complaint, a personal performance plan and warning letter. He then read the content of each of the documents.

4.197 On 21 June 2019 he sought advice from HR Caseworker Linda Wright asking for an initial view on his draft decision letter , how he had completed the Appeal Manager section of the review form, and advice on what additional papers to send with the decision letter. Separately, he acknowledged receipt of the further information the claimant had supplied. He explained he was not at work the following week but that he would expect to be able to inform him of the decision in the week commencing 1 July (page 409 of the bundle).

4.198. On 27 June 2019 Linda Wright wrote to Ian McNeill with some further advice. Following Ian McNeill's return from leave , Linda Wright asked if he had seen all of the regular weekly/monthly performance discussions and one-to-one conversations with the claimant's manager, Paul Pinnington, which at that stage he had not. She recommended Ian McNeill review all of these, which he requested from Mark Brewin.

4.199 On 1 July 2019, the claimant asked for an update on when he would receive a response to his appeal, and was subsequently kept updated, as Ian McNeill needed further time in order to review all of the further documentation (pages 441 – 442 of the bundle).

4.200 On 5 July 2019, Mark Brewin sent across some further information, copies are at pages 414 – 415 of the bundle. Ian McNeill requested sight of all the one-to-ones and reviews listed in the Referral Form "event and summary". He read through this further information before finalising his decision. The details of Ian McNeill's appeal investigation were documented in the appeal process section of the referral

document at pages 289 – 309 of the bundle , in particular pages 300 – 309. This details the chronology of the appeal investigation, together with an outline of Ian McNeill's decision making.

4.201 By letter dated 18 July 2019, Ian McNeill wrote to the claimant and advised him on the outcome of his appeal. He apologised for the time that this had taken. A copy of the appeal outcome letter is at pages 448 -449 of the bundle.

4.202 Ian McNeill made reference to the claimant having declined his invitation to meet to discuss his appeal and his request for the decision to be based on the information he had provided and the past history of previous complaints. He confirmed that he had now carefully considered all of the information and had decided to reject his appeal against the department's decision that he should be dismissed on the grounds of poor performance. He confirmed that he made this decision because he considered there was evidence to support the Manager's assessment of performance, and that the decision to dismiss fully took account of all of the available evidence, including formal appeals.

4.203 Ian McNeill also confirmed that he had considered the claimant's statement that he was not in a position to respond to the offer of an alternative sanction of downgrading made on 7 May by 17 May, as he was by that time off sick. He was aware that Mark Brewin had already extended the time to respond from 14 May to 17 May and that the decision to dismiss letter was not issued to him until 22 May. He found that Mark Brewin did give consideration to what would be a reasonable period, and that he did take into account the claimant's absence and illness.

4.204 He confirmed that he also considered the information the claimant had supplied on previous complaints, grievances and disagreements over the assessment of his performance. He was satisfied these had all been properly investigated and concluded. The claimant had provided no new information or evidence in relation to these complaints or in support of his statement that he had suffered institutional racism.

4.205 In relation to the ground of appeal regarding the issue of entitlement to redundancy pay if someone is dismissed on grounds of poor performance, he confirmed this was not a redundancy. Employees are ineligible for compensation under the Civil Service Compensation Scheme if dismissal is for poor performance only and did not include any evidence that it related to an underlying ill health condition. As there was no evidence of an underlying health condition, compensation was not appropriate in the claimant's circumstances. Ian McNeill apologised this had not been made clear in the original decision to dismiss letter. He confirmed this decision was final.

4.206 Ian McNeill updated Mark Brewin and Dan Coughlin (and copying in Paul Pinnington and Naya Acheampong), with the outcome of the appeal (page 452 of the bundle) .

4.207 The respondent in dealing with the claimant's performance issues followed its Managing Poor Performance guidance, a full copy of which is at pages 48 to 59 of the bundle. Section 10 reads as follows:

*10. Stage 3 — Dismissal Decision*

*10.1. Prior to moving to stage 3 dismissal, the manager must have had a meeting with the employee to ensure that they are aware that their performance has not met the required standard. Employees will move to stage 3 of the procedure if they fail to improve their performance after a final written warning, or fail to maintain their performance during the Sustained Performance Period following a final warning. The manager must meet with the employee and make a decision as to whether to dismiss.The manager can then make a recommendation which goes to a decision maker.*

*10.2. In exceptional circumstances the manager may consider and offer an alternative to dismissal, for example downgrading. However, it should only be considered if there is a role available and the manager feels the employee will be successful in the role. Managers must ensure that the employee understands that the post is offered as an alternative to dismissal and the employee must expressly consent to the alternative sanction being offered. The effect of downgrading on pay, pension and other terms and conditions must be explained.*

*10.3. Where employees have been unable to demonstrate the required improvement in performance through stages 1 and 2, there is an expectation that they should normally be dismissed at stage 3 but due consideration should be given to all evidence provided by an employee throughout the different stages before a dismissal decision is made.*

*10.4. Decisions to dismiss an employee will normally be taken by the manager who must be a Higher Officer or above and at least one grade higher than the employee. If for any reason this is not possible then the decision must be taken by a manager in the line management chain who satisfies these conditions (normally the manager's manager). As part of this process complete the Manager's Referral Form.*

*.*

*10.5. Notify the employee of the decision in writing, within 5 working days of the meeting. The notification should include*

- *the reasons for the decision;*
- *the date on which the decision becomes effective*
- *the appropriate period of notice, if relevant;*
- *the employee's right of appeal; and the name of the Appeal Manager.*

*10.6. If the decision is to dismiss, your HR Director will make a decision on compensation. In cases of dismissal for inefficiency on the grounds of poor performance, employees are ineligible for compensation under the Civil Service Compensation Scheme if dismissal is for poor performance only and doesn't include any evidence that is related to an underlying ill-health conditions.*

*10.7. If there is evidence of an underlying medical condition, the HR Director will use the information in the Managers Referral Form to decide on whether to award compensation and how much the award should be. The HRD can use the compensation table in the guidance on efficiency departures to help determine the percentage to be awarded.*

*10.8. The dismissal date is effective only when communicated to the employee. In most cases this will be the date it was communicated face to face. There are occasions when this will not be possible and when dismissal will be communicated in writing. In these cases the effective date of dismissal is the date the employee read the letter or had reasonable opportunity of reading it. It is not the date the decision was made or the date the letter was written, posted or delivered.*

Also relevant is HR71002 – Managing Poor Performance – Procedure, a full copy of which is at pages 76 to 82 of the bundle.

Stage 3 of this document provides:

*Stage 3 —Dismissal Decision*

*A jobholder will move to stage 3 of the procedure if they fail to improve their performance after a final written warning, or fail to maintain their performance during the Sustained Performance period following a final warning. Decisions to dismiss or downgrade a jobholder will normally be taken by the manager. The manager must be:*

*• a Higher Officer or above; and*

*• at least one grade higher than the jobholder*

*If not, then the decision must be taken by a manager in the line management chain who satisfies the conditions above, normally the countersigning manager. The manager or, where applicable, the countersigning manager, will meet with the jobholder and make a decision as to whether to dismiss the jobholder. In exceptional circumstances the manager may consider and offer an alternative to dismissal, for example downgrading. However, the manager must make sure that*

*• there is a role available and the manager feels the jobholder will be successful in the role*

*• the jobholder understands that the post is offered as an alternative to dismissal and they must expressly consent to the alternative sanction being offered -they will be dismissed unless they agree to a downgrade.*

*• they explain to the jobholder the effect of downgrading on their pay, pension and other terms and conditions*

*Decisions to dismiss or downgrade a jobholder will normally be taken by the manager. However, if the manager is not a Higher Officer or above or is not at least one grade above the jobholder, such as in peer management situations, then the decision must be taken by a manager in the line management chain who satisfies these conditions, normally the countersigning manager. In addition to the points raised in the section on `Meetings', managers chairing stage 3 meetings will need to:*

*• inform Civil Service HR Casework (CSHR Casework) if the meeting is likely to lead to dismissal*

*• inform the jobholder that their case is under consideration of various sanctions, including dismissal and downgrading.*

*The manager should notify the jobholder of their decision in writing, within 5 working days of the meeting. The letter should include: the reasons for the decision; the date on which the decision becomes effective; the appropriate period of notice, if relevant; the jobholder's right of appeal; and the name of the Appeal Manager.*

*If the decision is taken to dismiss the jobholder, the manager must also read the guidance on Managing Poor Performance: Dismissal and Civil Service Compensation Scheme.*

5. Those then are the relevant facts. This was not a case in which the credibility of the witnesses was central, save perhaps in relation to the race discrimination claims, where the motives and reasons for the actions taken on the part of the respondent's witnesses were relevant. The Tribunal had no reason to conclude that any of the witnesses before it did anything but tell the truth as they saw it, and had no reason to doubt the veracity of any witnesses. The claimant's credibility was not in issue, but in terms of accuracy and reliability, the Tribunal did find his evidence less compelling, with a tendency to generalisation and sweeping statements, that were unsupported by the documentary evidence.

***The Submissions.***

6. The parties made submissions. Mr Lewis had prepared a written document, the claimant , who was unrepresented , nonetheless did also produce a written Closing Submissions/Argument document , which appeared to have some legal input, as statutory provisions and caselaw are referred to. It is not proposed extensively to rehearse the submissions further here. The claimant's submissions contain a confusing reference to the respondent failing to comply with the "statutory dismissal procedures", which appears to be a reference to the now repealed provisions of the Employment Act 2002. This is doubtless an error on the part of the claimant , or whoever was providing him with legal advice.

7. In general terms, the claimant submits that his dismissal was unfair because the respondent had not provided him with any formal or adequate training, including PRINCE2 training . Tis is a different position from that which the claimant adopted

throughout the MPP process, in which he consistently refused to accept that his performance was less than adequate.

8. The submission is also made that the respondent failed to hold a "disciplinary hearing" with the claimant before dismissing him. Reference is made to the failure to follow "standard dismissal procedures" , again an apparent reference to the repealed provisions.

9. The submissions go on to contend that the respondent had failed to deal with the claimant's formal grievances , and that all its decisions, grievances and appeals were "wrong". Paul Pinnington is accused of misleading and being partial. It was also contended that the claimant's dismissal was pre-determined, biased, and a reasonable investigation had not been carried out.

10. In relation to the race discrimination claims, the claimant's submissions rehearse the alleged incidents with Maurice McCabe and Judith Read in 2017, and Kim Houghton in July 2018. Criticism is made of Paul Pinnington's dealings with the claimant's complaints, and the placing of the claimant on the MPP process is alleged to be an act of direct discrimination, or victimisation. The failure to provide the claimant with PRINCE2 training is likewise said to be direct race discrimination, or victimisation.

11. The claimant's written submissions, however, unfortunately do not address the time limit issues that arise in respect of the race claims that pre-date April 2019.

12.For the respondent , a 25 page document of submissions was produced, which will not be rehearsed or summarised here. Suffice it to say that it addresses the meaning of harassment, direct and victimisation discrimination claims under the Equality Act 2010, and the relevant time limits for such claims. The evidence is reviewed, and submissions made as to the facts that the Tribunal should find. The respondent invites the Tribunal to dismissal all the race claims on their merits, if the Tribunal finds that it has jurisdiction to hear them. Similarly, it is submitted that the dismissal was fair in all the circumstances, but the respondent would seek a ***Polkey*** reduction in any compensatory award if the Tribunal were to find. otherwise.

## ***The Law***

13. The statutory provisions on the law on unfair dismissal, and those of the Equality Act 2010, which relate to the race claims , are set out in the Annexe to this judgment.

14.Additionally, reference was made in both parties' submissions to caselaw. The Tribunal will address the relevant authorities in the course of its findings below.

15.In relation to the race claims, time limit issues arise, and the relevant provisions of the Equality Act 2010 in this regard are also set out in the Annexe.

## ***Discussion and Findings***

***A.The race discrimination claims.***

16. As there is a serious issue as to time limits in respect of the claimant's claims of race discrimination, it is necessary firstly to determine whether any of his claims of race discrimination were presented within time, or , put another way, whether the claimant has successfully established that he was subjected to race discrimination (be it direct of victimisation) in respect of any matters the claims for which would be in time. This is because, if the claimant has made any successful, in time, claims of race discrimination, he can then seek to have the Tribunal determine earlier, otherwise out of time, claims of discrimination, on the basis that they formed part of a course of conduct extending over a period of time, pursuant to s.123(6) of the Equality Act 2010, ending with the in – time claims. In short, establishing any in – time discrimination claims, can potentially "save" earlier claims to make then potentially in – time.

17. It is therefore necessary to consider the last claim of alleged discrimination which is in time. As the claim form was presented on 30 August 2019, and the claimant commenced early conciliation on 19 July 2019, getting a certificate on 15 August 2018, the earliest matters which could be in time must have occurred no earlier than 19 April 2019. The claimant was dismissed (i.e he was told he was to be dismissed) on 22 May 2019. Although his dismissal did not take effect until 30 June 2019 , for the purposes of any discrimination claim, the date upon which that decision was taken, and communicated to the claimant, would be the date from which any relevant time period would run.

18. There is no issue but that the claim for unfair dismissal was presented within time (though that time limit runs from the date of termination) or that any race claim arising out of the decision to dismiss on 22 May 2019 would be in time.

***(i)The Dismissal – discrimination.***

19. The Tribunal commences with this claim as it is clearly in time, and falls to be considered quite separately from the other race discrimination claims. It is appreciated that the claimant contends that his dismissal was an act of race discrimination, but this, if proved, (perhaps surprisingly to lay persons) does not render it unfair in itself. To some extent the issues of unfairness and discrimination will overlap. In each it will be necessary for the Tribunal to establish the reason for the treatment, in this case the dismissal. In the unfair dismissal the burden is upon the respondent to show a potentially fair reason for dismissal. There is no such burden in respect of the claim of direct race discrimination, where the Tribunal has to have regard to the burden of proof provisions in s.136 of the Equality Act 2010, which provides that the reversal of burden of proof applies 'to any proceedings relating to a contravention of this Act'. It is expressly set out in the explanatory notes to the Act that in any claim where a person alleges discrimination, harassment or victimisation under the Act, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation, point to a breach having occurred, in the absence of any other

explanation, the burden shifts onto the respondent to show that he or she did not breach the provisions of the Act. The Court of Appeal in ***Greater Manchester Police v Bailey [2017] EWCA Civ 425*** held that 'It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act: see ***Madarassy v Nomura International [2007] ICR 867*** per Mummery LJ at paras. 54-56 (pp. 878-9).' This two stage test has recently been reaffirmed in the Supreme Court in the case of ***Royal Mail Group v Efobi [2021] UKSC 33, [2021] 1 WLR 3863***.

20. In terms of what the 'something more' needs to be , Sedley LJ in the judgment of the Court of Appeal in ***Mr S Deman v The Commission for Equality and Human Rights [2010] EWCA Civ 1279*** at para. 19 said this:

*"We agree with both counsel that the "more" which is required to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non – response, or an evasive or untruthful answer , to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."*

Thus, it is not sufficient for the claimant to contend that she had the protected characteristic , and then suffered unfavourable treatment. He has to show "something more" to raise a prima facie case that the latter was because of the former.

21. In terms of the discrimination claims, the Tribunal has to determine the reason why the claimant was treated in this way. Was the decision to dismiss him taken because of his race (direct discrimination) or as retaliation for his having done a protected act , such a grieving about prior alleged acts of race discrimination (i.e victimisation)?

22. Whilst the enquiry into whether the dismissal was fair, and that into whether the reasons for it were discriminatory, do not involve identical issues, they inevitably overlap. It is possible for a respondent to have potentially fair reason for dismissal, but for that reason to be tainted by discrimination. The Tribunal for both purposes has to determine the real reasons for the treatment, and then consider whether those reasons were influenced by any discriminatory or victimisatory considerations.

23. In terms of the reason for the decision to dismiss the claimant , the Tribunal is quite satisfied that it was for the potentially fair reason of capability, i.e his performance. That is well established on the extensive evidence adduced by the respondent. In the race discrimination claims, however, to reverse the burden of proof, the claimant needs to establish a prima facie case that his dismissal was an act of discrimination. The Tribunal as examined whether he has done enough to do so. Whilst he clearly disagreed with the assessment of his performance, what is the something else that the claimant can rely upon to reverse the balance of proof?

24. In the case of Paul Pinnington , it is appreciated that the claimant also contends that he had previously failed to treat his complaints about the incidents involving

Morris McCabe and Judith Read as acts of race discrimination. The Tribunal notes that, and agrees that, perhaps with insufficiently considered advice from HR at the time, Paul Pinnington did fail to treat what were in fact complaints of race discrimination raised by the claimant as they should have been. The Tribunal has considered that , but failure to deal with allegations of race discrimination allegedly committed by others is not necessarily, of itself, an act of race discrimination on the part of the manager who so fails. The Tribunal takes into account that Paul Pinnington was acting on HR advice as well at the time, and whilst his failure to treat the claimant's complaints as ones of race discrimination was regrettable, he was not solely responsible for that approach, and the Tribunal is not satisfied that there was any racial motive in his failure to deal with these issues properly. The Tribunal, however, accepts that this amounts to the "something else" required to reverse the burden of proof.

25. Dealing with the victimisation claims, the first problem that the claimant has is that Paul Pinnington first raised concerns about his performance, and indicated that a PIP would be instigated in a mid -year review meeting on 30 October 2017. The claimant's first formal grievance was raised on 6 November 2017. There is thus ample evidence that Paul Pinnington's concerns over the claimant's performance had already been formed before he did any protected act. The history thereafter could be seen as something of a ping – pong of performance issues and grievances – each allegedly being a response to the other.

26. Be all that as it may, the decision to dismiss was, in any event, not that of Paul Pinnington alone. Whilst he provided the information upon which the decision to dismiss was then taken by Mark Brewin, it was not Paul Pinnington's decision. Further, Paul Pinnington's prior warning given to the claimant under the procedure was reviewed independently by Anthony O'Rourke. Finally, the decision to dismiss was confirmed on appeal by Ian McNeill. The claimant has adduced no evidence whatsoever to suggest that the decisions taken by Mark Brewin, Anthony O'Rourke or Ian McNeill were in any way influenced by the claimant's race, or the fact that he had raised any previous allegations of discrimination. As the caselaw makes clear, absence of a good reason for treatment will not , without more, be enough to reverse the burden of proof. Absence of a good reason, however, may lead the Tribunal to require very little more as constituting the "something else" that the claimant must show in order to reverse the burden of proof.

27. The Tribunal considers that , save for the failure of Paul Pinnington to deal with the claimant's previous complaints of discrimination, there is no other "something else" in this case to reverse the burden of proof on the race claims. The burden of proof having passed, however, for the limited reasons above, the Tribunal finds that the respondent has discharged the burden of proving that the dismissal was not because of the claimant's race, or any prior complaint of race discrimination, as the Tribunal is satisfied that for the purposes of both the unfair dismissal claim, and the race discrimination claims, the reason for the decision to dismiss (or conditionally dismiss) the claimant was, and solely was, the respondent's belief that he was under – performing in his role.

28. That the respondent did not immediately dismiss the claimant , but offered him the chance to remain in employment , but at a lower grade , is further evidence which is at odds with any racial motivation. The respondent need not have gone to such lengths to keep the claimant in employment, which was, on all accounts, an exceptional outcome. That it did so (and Paul Pinnington was the originator of this idea) is further evidence, if any were needed, that none of the respondent's actions were motivated by the claimant's race. There are also other indications, such as Paul Pinnington's agreement to allow the claimant to have informal flexible working when he asked for it, which are counter – indicators of any motivation on the part of Paul Pinnington to disadvantage the claimant for any reason, let alone by reason of his race.

29. The claimant's claims that his dismissal was because of his race (direct discrimination) or because he had done any protected act (victimisation) are accordingly dismissed.

***(ii) The remaining race discrimination claims.***

30. The claimants other race discrimination claims all ante – date the date of the dismissal. As observed above, with the claimant having started early conciliation on 19 July 2019 , the earliest date for any claim to be in time would be 19 April 2019.

31.The claimant's remaining claims , and the dates upon which they arose , are:

*i. a colleague, Maurice McCabe, making an adverse comment about the claimant's food in October 2017 ("the food comment");*

*ii.a colleague, Judith Read, "commanding" the claimant to give up his desk for her in October 2017 ("the desk comment");*

*iii.managers, Paul Pinnington and Mark Brewin, failing to properly pursue or investigate the claimant's grievance into the food comment and the desk comment;*

*iv.a failure/refusal to offer the claimant PRINCE 2 training;*

*v.placing him on a performance improvement plan on several occasions from October 2017;*

*vi.between early 2018 and the end of employment, Paul Pinnington refusing to move the claimant to another team;*

*vii.applying its "Managing Poor Performance" process to him from December 2018, including the various warnings that were issued under that process;*

These are relied upon as acts of direct discrimination, or victimisation.

Further the claimant complains of harassment in resect of allegations (i) and (ii) above, and :

*A manager, Kim Houghton, speaking to him on the phone in a threatening and aggressive manner on two occasions in around late 2018, including using terms such as "do you know who you are talking to?" and "Do you know I am a manager, you had better mind what you say?"*

***The just and equitable extension.***

32. This raises the issue of whether it would be just and equitable to extend the time for presentation of these claims. In deciding whether to exercise our discretion , we take into account the guidance upon how we should approach this task set out in ***British Coal Corporation v.Keeble [1997] IRLR 336*** . In the event that any of the claims as presented, are out of time, the Tribunal has to consider whether to extend time under , on the basis that it would be just and equitable to do so. This discretion, of course, is the same as conferred by several other discrimination statutes, and caselaw has evolved as to how a Tribunal should approach the exercise of its discretion. One of the leading cases is ***Robertson v. Bexley Community Centre t/a Leisure Link 2003 [IRLR] 434*** ,a judgment of the Court of Appeal. Of particular note is the judgment of Auld L J, who made it clear that there was no presumption of extension, but rather the converse was the case, extension was the exception, not the rule, and an out of time claimant had to convince a Tribunal why an extension should be granted.In terms of the principles upon which a Tribunal should approach the exercise of the discretion, the EAT in ***Chohan v. Derby Law Centre [2004] IRLR 685*** endorsed the approach taken in ***British Coal Corporation v. Keeble*** to the effect that Tribunals should consider the factors listed in s.33 of the Limitation Act 1980 , which applies to the exercise of discretion to extend time in personal injury claims before the civil courts. Those factors are:

*The length of and reasons for the delay;*

*The extent to which the cogency of the evidence is likely to be affected by the delay;*

*The extent to which the party sued had co-operated with any requests for information;*

*The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action;and*

*The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.*

33. Those factors, whilst useful, must not, however, be regarded as a checklist, or exhaustive. In ***London Borough of Southwark v. Afolabi [2003] ICR 800*** the Court of Appeal held that the s.33 factors were of utility, but that as long as no significant factor was left out of consideration, a failure to follow the express provisions of s.33 would not be a error of law. In that case, delay of 9 years was, exceptionally, not fatal to the application to extend time.

34. The Tribunal must therefore consider the factors set out in the caselaw above in turn, in relation to each claim that is out of time.

*(i).The length of and reasons for the delay.*

The length of the delay varies, of course, in respect of each claim. The shortest is in respect of the complaint that Paul Pinnington putting the claimant on performance management from December 2018, going back then through the alleged incident of Houghton saying “do you know who I am?” to the claimant , which is alleged to have occurred in late 2018. The other two incidents involving Morris McCabe and Judith Read are considerably older, and date back to November 2017.

35. The claimant issued his claims on 30 August 2019. The time limit for the presentation of claims of discrimination is three months from the date of the act of discrimination. Thus, allowing for any extension of time from the early conciliation process, which the claimant commenced on 19 July 2019, for any act of discrimination to have been in time, the latest date that would render it in time would be 19 April 2019, as the claimant must start the early conciliation process within the initial three month time limit. The Managing Poor Performance process was started on 19 December 2018, with the final written warning being issued on 14 February 2019. For any claim arising from that warning to be in time, the claimant would have to have started early conciliation by 14 May 2019.

36. Thus any claims relating to the managing poor performance process are between two and four months out of time. The earlier claims, relating to Kim Houghton’s comment on 30 July 2018, and the desk and food comments go back to November 2017. There are other claims , between those dates, but the net effect is that all the claims , other than those arising upon dismissal are between 3 months and 19 months out of time. That is a significant period of time,

37. In terms of reasons for this delay, the claimant not really advanced any. He mentions none in his witness statement, but in his oral evidence when asked about his reasons for not presenting his claims sooner, he stated that he feared for his employment if he brought Tribunal proceedings whilst still employed by the respondent. He adduced no evidence in support of this fear, and the Tribunal notes that he called as his witness Mr Seworde , a work colleague, who is still employed by the respondent, and who also supported him in his grievance without any apparent fear of reprisal, nor, indeed, without suffering any.

38. The claimant grieved, of course, twice, in fact, but his grievances were unsuccessful. The second one , which related to some matters which were already of some age, was dismissed on 28 February 2019. He could, and indeed, should then, at the latest, have presented his other Tribunal claims of race discrimination. He did not do so. He did not even commence ACAS early conciliation until 19 July 2019, almost 5 months after the grievance outcome had been notified to him.

*ii)The extent to which the cogency of the evidence is likely to be affected by the delay.*

39. The Tribunal accepts, as the hearing demonstrated, that this was not a material factor, largely because the matters at issue were well – documented. As has been seen, however, witnesses have had also to rely upon memory, and this has been impeded to some extent by the delay in presenting the claims.

*iii)The extent to which the party sued had co-operated with any requests for information.*

40. The claimant does not say, nor could he, that he had been unable to present these claims because the respondent failed to supply any information that he had requested from it.

*iv)The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action.*

41. The claimant did not, in the view of the Tribunal, act with promptness. He was aware of the matters that he alleges amounted to acts of race discrimination against him early on, and indeed raised them in his grievance. He did not, however, act promptly to bring any claims in relation to them.

*v)The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.*

42. The claimant has not told the Tribunal of any steps to obtain advice that he took once he knew of the possibility of taking action.

***Conclusion on the just and equitable extension.***

43. Whilst there has been no , or little, forensic prejudice to the respondent in these out of date claims being considered, absence of prejudice is not in itself enough to warrant the granting of an extension of time. As observed in ***Robertson*** cited above, extension of time is the exception, not the rule, and a party seeking one must establish the good grounds for granting one. The Tribunal considers that this claimant has failed to do so. It is hard to avoid the impression that, having decided to leave the employment of the respondent, and pursue a claim for unfair dismissal, and discrimination in relation to that dismissal, this was his main concern, and he has sought to add in these additional, and largely historic, claims. This has added to the complexity and length of these proceedings, and has prejudiced the respondent in that regard. Taking all the factors rehearsed above into account, the Tribunal does not consider it just and equitable to grant the extension of time sought for these claims, and they are dismissed.

44. For completeness, and in the alternative, had the Tribunal considered it could have determined the out of time claims of discrimination, they would not have succeeded. The Tribunal was not satisfied that the claimant's treatment , in any aspect , was influenced by his race. It was, however, regrettable, to say the least, that the claimant's complaints to Paul Pinnington about the incidents with Maurice

McCabe Judith Read in 2017 , were not recognised as complaints of race discrimination, when they clearly were (a black man complaining of “discrimination” need hardly have to use the word “race” to raise the possibility that this is the nature of his complaint). That does not, however, make that failure , in itself, an act of discrimination, but even if it was, any such claim is out of time.

***B .The unfair dismissal claim.***

45. The Tribunal now turns to the unfair dismissal claim. As ever in such cases where the claimant has, as here, the requisite qualifying service, the first issue for the Tribunal to decide is what was the reason for the dismissal? In terms of what “reason” means in this context it is defined thus:

*''A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'.'*

(see ***Abernethy v Mott Hay and Anderson [1974] IRLR 213***)

46. It is important that it is the knowledge or belief of the employer that matters. In determining the reason for the dismissal, the Tribunal is not determining whether the knowledge or belief of the employer was correct, it merely determines whether that knowledge or belief operated upon the employer’s mind in arriving at the decision to dismiss.

47. Here the respondent contends it was the potentially fair reason of capability. The burden of proving the reason rests with the respondent, but the burden of proving that any potentially fair reason was actually fair in all the circumstances is neutral. Capability is defined as '*capability assessed by reference to skill, aptitude, health, or any other physical or mental quality*'. The Tribunal has no hesitation in finding that the reason for the claimant’s dismissal was indeed his capability, in terms of his performance. No other reason has been suggested (save for the claimant’s race, which the Tribunal does not accept), and there is more than ample evidence of the respondent’s belief that he was not performing to a satisfactory level in his Senior officer role.

48. Turning now to fairness, Lord Denning MR in ***Taylor v Alidair Ltd [1978] IRLR 82*** enunciated the basic test which should be applied in deciding whether or not a capability dismissal was fair:

*''Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent'.'*

Sir Geoffrey Lane LJ said in the same case that the function of the Tribunal was to decide *'whether the employers honestly and reasonably held the belief that the employee was not competent and whether there was a reasonable ground for that belief*'.

49. There are three main factors relating to the assessment of reasonableness of a capability dismissal. These are:

the evidence necessary to establish that the employer has reasonably concluded that the employee is incompetent;

the procedures adopted; and

the question of to what extent the employer should seek alternative employment for the employee.

50. The views of the employee's superiors about the incompetence of the employee to do the job may themselves provide evidence that the dismissal was fair, providing those views are honestly held. Where the nature of the job is such that it is difficult to produce clear evidence of incompetence, considerable weight may be attached to such evidence. This was made clear by the decision in ***Cook v Thomas Linnell & Sons Ltd [1977] IRLR 132*****,** a case where a depot manager was dismissed, after having been given warnings and advice, because the employer was not satisfied with the standard of his work. During the course of his judgment Phillips J said:

*"A central theme in [counsel for the employee's] submission was that although there was plenty of contemporary evidence to show that the employers had lost confidence in the ability of the employee as a manager there was no hard factual evidence of a particular kind to support that judgment. Criticism and exhortation, he submitted, however strong, do not by themselves provide evidence of incapacity. It amounts to no more than the assertion of an opinion. It seems to us that this goes too far, although we accept that there is something in the point. When responsible employers have genuinely come to the conclusion over a reasonable period of time that a manager is incompetent we think that it is some evidence that he* is *incompetent. When one is dealing with routine operations which may be more precisely assessed there is no real problem. It is more difficult when one is dealing with such imponderables as the quality of management, which in the last resort can only be judged by those competent in the field. In such cases as this there may be two extremes. At one extreme is the case where it can be demonstrated, perhaps by reason of some calamitous performance, that the manager is incompetent. The other extreme is the case where no more can be said than that in the opinion of the employer the manager is incompetent, that opinion being expressed for the first time shortly before his dismissal. In between will be cases such as the present where it can be established that throughout the period of employment concerned the employers had progressively growing doubts about the ability of the manager to perform his task satisfactorily. If that can be shown, it is in our judgment* some *evidence of his incapacity. It will then be necessary to look to see whether there is any other supporting evidence'.*

51. Next, in terms of fairness of procedure , as Sir John Donaldson delivering judgment for the NIRC in ***James v Waltham Holy Cross UDC [1973] IRLR 202*** said*:*

*"An employer should be very slow to dismiss upon the grounds that the employee is incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity to improve his performance."*

The procedural stages therefore require three steps:

(1) The employer should carry out a careful appraisal of the employee's performance and discuss his criticisms with the employee.

(2) He should warn the employee of the consequences of there being no improvement.

(3) He should give him a reasonable opportunity to improve.

52. Turning to the facts of this case, the Tribunal has no hesitation in finding that the respondent complied with all these requirements. There were numerous appraisals and meetings where the claimant's performance was assessed . In addition to Paul Pinnington , Andrew O'Rourke independently reviewed the claimant's performance, and found it wanting. He was clearly warned of the consequences of failure to improve, and was given reasonable opportunity to improve.

53. Further, it has to be observed that, apart from the lack of PRINCE 2 training, the claimant did not seek to explain or excuse any under – performance on his part. Indeed, his position throughout has been that he was not underperforming. There was thus nothing to explain or excuse. He simply disagreed with Paul Pinnington's, (and others', to a lesser degree) assessment of his performance. As noted above, it is not the Tribunal's function to determine whether the claimant was, or was not under-performing, its function is to decide whether the respondent genuinely, and upon reasonable grounds, after a reasonable procedure ,and reasonable opportunity to improve, believed that he was. The Tribunal is quite satisfied that it did.

54. In some circumstances, however, it may be reasonable for an employer to investigate the possibility of alternative employment where the employee has been dismissed for capability. In ***Bevan Harris Ltd (t/a Clyde Leather Co) v Gair [1981] IRLR 520*** the company dismissed a foreman of eleven years standing for failing to carry out his duties in a satisfactory manner. He was 61 and had been given four warnings. The Tribunal held that a reasonable employer would have demoted rather than dismissed the employee, but the EAT upheld the company's appeal. The EAT commented that there was not the same duty on the employer to seek alternative employment in capability cases as there was in a redundancy context. Furthermore, any such duty was to a great extent influenced by the size and administrative resources of the undertaking. In this case the company was small and would have been justified in refusing to demote the employee even if a suitable job had been available.

55. There is a stronger case for saying that a reasonable employer has a duty to look for alternative employment for a promoted employee who fails to make the grade, despite being given adequate supervision and training. There is, of course, no general right for an employee to return to his old job if the promotion proves unsuccessful. Sometimes his contract or the terms of his promotion will provide for this, though even then the courts might be reluctant to hold the employer to this obligation if the relationship between the demoted employee and his successor would be unlikely to operate successfully **(*White v London Transport Executive [1981] IRLR 261*)**. But even where no right exists, a dismissal may be unfair if the employer does not at least seek to discover whether there is suitable alternative employment available for the employee, or put him back into his old job if it is still available **(*Draper v Kraft Foods Ltd [1973] IRLR 328*).**

56. Finally it is possible that the duty is more onerous where the employee is promoted in circumstances where the employer has doubts whether he will make the grade. That may have been the case here, once Paul Pinnington had discovered that the claimant had in fact been subject to queries as to his performance in his previous role, before his promotion. This was the view of the Nottingham Tribunal in ***Kendrick v Concrete Pumping Ltd [1975] IRLR 83***. However, there is clearly no duty on the employer artificially to create an extra job for the employee to do.

57. In this case, of course, the respondent did indeed seek to retain the claimant in employment, by offering him another role as a Higher Officer. He declined that offer. If there was any doubt as to the fairness of the dismissal, the Tribunal would take that into account as being highly relevant to the reasonableness of the respondent's decision.

58. The Tribunal , for all these reasons, would therefore have concluded that the dismissal was fair in all the circumstances. There are , however, two mattesr which has made it pause and consider whether it can and should so find.

59. The first matter is the absence of any meeting being held by Mark Brewin with the claimant before the decision was taken (provisionally) to dismiss him. That was a decision taken solely on a consideration of the papers provided to Mark Brewin by Paul Pinnington. Whilst the claimant had had a meeting with Paul Pinnington, which he was advised was a final meeting in the process, and could result in the recommendation that he be dismissed, he was not offered any meeting with Mark Brewin before decision was taken.

60. This was, the Tribunal accepts , probably in accordance with para. 10.1 of the Managing Poor Performance Guidance, a full copy of which is at pages 48 to 59 of the bundle, which reads as follows:

*"10. Stage 3 — Dismissal Decision*

*10.1. Prior to moving to stage 3 dismissal, the manager must have had a meeting with the employee to ensure that they are aware that their performance has not met the required standard. Employees will move to stage 3 of the procedure if they fail to*

*improve their performance after a final written warning, or fail to maintain their performance during the Sustained Performance Period following a final warning. The manager must meet with the employee and make a decision as to whether to dismiss. The manager can then make a recommendation which goes to a decision maker."*

That is the process that Paul Pinnington and Mark Brewin followed in this case. The Guidance, however, is silent upon what steps the Decision Maker should then take. There is no requirement in this Guidance for the Decision Maker to hold a meeting with the claimant.

61. Also relevant, however, is HR71002 – Managing Poor Performance – Procedure, a full copy of which is at pages 76 to 82 of the bundle. Stage 3 of this document provides:

*"Stage 3 —Dismissal Decision*

*A jobholder will move to stage 3 of the procedure if they fail to improve their performance after a final written warning, or fail to maintain their performance during the Sustained Performance period following a final warning. Decisions to dismiss or downgrade a jobholder will normally be taken by the manager. The manager must be:*

*• a Higher Officer or above; and*

*• at least one grade higher than the jobholder*

*If not, then the decision must be taken by a manager in the line management chain who satisfies the conditions above, normally the countersigning manager. The manager or, where applicable, the countersigning manager, will meet with the jobholder and make a decision as to whether to dismiss the jobholder. In exceptional circumstances the manager may consider and offer an alternative to dismissal, for example downgrading."*

62. This is somewhat contradictory, as it suggests that the Manager, or the Countersigning Manager, should hold a meeting with the employee, prior to dismissal. This section contains no reference to the position in relation to a "Decision Maker".

63. The implication of this part of the procedure is that there should be a meeting with the employee before any decision to dismiss is taken, whether that be by the Manager , or the Countersigning Manager. The position of the Countersigning Manager appears comparable with that of the Decision Maker.

64. Whether strictly required by the respondent's procedure or not, the Tribunal , in determining the fairness of the dismissal has to consider the procedure adopted, and whether it was, in all the circumstances, fair. In doing so, of course, the Tribunal

applies the test of the range of reasonable responses , as required by the caselaw such as ***Foley v Post Office*** and ***Midland Bank v Madden [2000] ICR 1283*** .

65. The Tribunal has also taken account of the ACAS Code of Practice. As it states, the Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace. In the introduction, the Code says this:

*"Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted."*

Its requirements include the following:

***"Inform the employee of the problem***

*9.*

*If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*

*10.*

*The notification should also give details of the time and venue for the disciplinary meeting and*

*advise the employee of their right to be accompanied at the meeting.*

***Hold a meeting with the employee to discuss the problem***

*11.*

*The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.*

*12.*

*Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be*

*given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this."*

66. No such meeting was held in this case. In effect , the last meeting that was held with Paul Pinnington became the dismissal meeting, but it was not. Paul Pinnington was not making the decision to dismiss the claimant , he was merely making a recommendation. Mark Brewin then would make the decision, but he would do so without affording the claimant an opportunity to attend a meeting before he made his decision. Whilst the Code is silent upon who the employee should meet with, the logical inference must be that the meeting should be between the employee and the person who is to take the decision.

67. That did not, of course, happen in this case. Mark Brewin did not have any meeting with the claimant , other than at which he announced his decision. The Tribunal considers that it was unreasonable of the respondent not to hold such a meeting with the claimant. It was arguably also a breach of the respondent's procedure , although that is, as observed, somewhat contradictory. Whilst the claimant had a meeting with Paul Pinnington , which was expressed to be a final meeting, this was one of a series of meetings under the MPP procedure , which the claimant was warned may lead to his dismissal, Paul Pinnington was only making a recommendation, and the claimant may well have had a reasonable expectation that he would have another meeting before the decision was taken. Whether he did or did not, the Tribunal considers that in not affording the claimant an opportunity to meet with Mark Brewin ahead of him taking any decision to dismiss him the respondent's procedure , fell outside the range of reasonable responses in procedural terms, and renders the dismissal unfair.

68. The second, though less serious, matter is the absence (as it seems) of the material which was provided by Paul Pinnington to Mark Brewin for his decision making , i.e the information which went into Section 1 of the Form that he completed being also provided to the claimant. That does not appear to have been provided, in that form, to the claimant at that stage, or indeed, subsequently. That said, the claimant was familiar with the performance issues that had been raised with him, and he was provided with copies of notes of the meetings at which his performance had been extensively dismissed.

69. That is not, however, the end of the matter, as the claimant had, and exercised, his right of appeal. The question then arises of whether that saves the dismissal, and renders it fair. It can be the case that , if an appeal hearing is sufficiently comprehensive , it is capable of remedying earlier defects in the disciplinary process. Whether or not the appeal process is sufficiently comprehensive to redress any earlier procedural defects will be a question of fact for the employment tribunal (see ***Taylor v OCS Group Ltd [2006] IRLR 613***, following ***Whitbread & Co plc v Mills [1988] IRLR 501***). However this will not depend upon an analysis of whether or not the relevant appeal was by way of rehearing or simply a review. Indeed the Court of Appeal in ***Taylor*** specifically commented that the terms rehearing and review should not be used in this context. What is necessary is for the Employment Tribunal to

consider the disciplinary process as a whole when assessing the fairness of the dismissal. In ***Khan v Stripestar Ltd UKEATS/0022/15*** the EAT stated that there was no limitation on the nature and extent of the deficiencies in a disciplinary hearing that could be cured by a thorough and effective internal appeal.

70. In this instance, whilst Ian McNeill conducted a very thorough enquiry into various aspects of the process, he did not interview Paul Pinnington . rather, he reviewed the decision made by Mark Brewin, which was itself based upon documents provided by Paul Pinnington . He had invited the claimant to attend the appeal meeting, who did not attend. He did not make it clear, however, if indeed this was to have been the case, that he would have been able to go through and challenge all of Paul Pinnington's conclusions and findings as to his poor performance. Taking everything into account, the Tribunal does not consider that the appeal did remedy the unfairness of not holding a dismissal meeting with the claimant , and finds that the dismissal was unfair.

***Remedy.***

71. That , however, does not mean that the claimant is necessarily entitled to an award of compensation. The respondent argues, in the alternative, that is there was an unfair dismissal, particularly if that is because of any procedural defects, then the Tribunal should reduce any award of compensation on the grounds that a fair procedure would have made no difference, applying the principle in ***Polkey v A E Dayton Services Ltd [1987] IRLR 503.***

72. The law on this topic is well summarised by Elias J in ***Software 2000 Ltd v Andrews [2007] IRLR 568*** from Elias, then the President, where he said this:

*"(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.*

*(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)*

*(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.*

*(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.*

*(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.*

*(6) [Now irrelevant following repeal of s 98A(2) ERA ] ……..It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.*

*(7) Having considered the evidence, the Tribunal may determine*

*(a) That if fair procedures had been complied with, the employer has satisfied it—the onus being firmly on the employer—that on the balance of probabilities the dismissal would have occurred when it did in any event. ……...*

*(b) [N/a]*

*(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the* ***O'Donoghue*** *case.*

*(d) Employment would have continued indefinitely.*

*However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."*

73. Thus it is clear that the range of options open to a Tribunal is considerable. It may make a 100% reduction in an appropriate case, a lesser reduction if it thinks the chances of the claimant being fairly dismissed are less than 100%, or may make none.

74. Should any such reduction be made to the compensatory award in this case? In the Tribunal's view , overwhelmingly, yes, it should, and to the extent of 100%. The respondent had assembled compendious evidence to support its view that the claimant was underperforming. As the claimant would not accept that, there was little scope for any continuation in his role, as he was not likely to improve if he did not

consider that he needed to. He could have remained employed, but would not accept a lesser role, so there was no alternative but to dismiss him. A fair procedure, including providing the claimant with Paul Pinnington's Section 1 of his referral form, would have made no difference, and he would have been dismissed in any event. Given the length of time he was given to accept a lesser role (without prejudice to his right of appeal) , and the appeal process, the Tribunal does not consider that this is a case where following a fair procedure would have been likely to have delayed the dismissal , so as to require the Tribunal to make a compensatory award to reflect any extra period of employment that following a fair procedure would have been likely to have procured for the claimant . A reduction of 100% is accordingly just and equitable.

75. It is also important to note that whilst the basic award should not normally be reduced on the basis of ***Polkey*** , that is in circumstances in which it is designed to compensate the dismissed employee for a failure to pay a redundancy payment (see ***Taylor v John Webster, Buildings Civil Engineering [1999] ICR 561***).Here, it was said by Lindsay J. that '[counsel for the employer] accepts that no authority can be found for a ***Polkey*** reduction of a basic award.' This observation was made after the judge had considered the above five grounds upon which basis a basic award may be reduced. As was said by HHJ Langstaff P in ***Grantchester Construction (Eastern) Ltd v Attrill UKEAT/0327/12*** *)*:

*"the basic award, … is not affected by the* ***Polkey*** *deduction except in the exceptionally rare case where such a (fair) dismissal might have taken place virtually contemporaneously with the unfair dismissal which actually occurred."*

76. Here, the appeal outcome was sent to the claimant on 18 July 2019. His dismissal was to have taken effect on 31 July 2019. In fact, by Mark Brewin's letter of 22 May 2019 (pages 363 to 364 of the bundle) his actual last day of service was 30 June 2019, but he was paid 5 weeks' notice. Thus, the Tribunal is satisfied that had a fair procedure been followed, either in Mark Brewin holding a meeting with the claimant on or about 7 May 2019, and the claimant attending any appeal hearing (which was his choice) before the date that his employment was due to end, it would may have ended in any event, when it in fact did. The decision, however, might have been delayed, even if the effect of it may not have been.

77. The Tribunal in these circumstances accordingly does not find that this is one of those rare instances where the same reduction should be made to the basic award as is made to the compensatory award. The claimant was deprived of a hearing with the decision maker before the decision was made, and that should, the Tribunal considers, entitle him to a basic award, and the Tribunal will make one.

78. Whilst there appears a slight dispute as to the start date of the claimant's employment, he appears to have had 4 complete years of service, and given that the cap upon a week's pay will apply, calculation of the basic award should be capable of agreement. If it is not, the Tribunal will carry out that exercise, once notified by the parties of the need to do so.

Employment Judge Holmes
Dated : 11 February 2022

RESERVED JUDGMENT SENT TO
THE PARTIES ON 15 FEBRUARY 2022

FOR THE TRIBUNAL OFFICE

## ANNEXE

THE RELEVANT STATUTORY PROVISIONS

***Employment Rights Act 1996***

***98 General***

*(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.*

*(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,*

*[N/A]*

*(3) In subsection (2)(a)—*
*(a) 'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

*(b) 'qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*

*(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)—*

*(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.*

***122 Basic award: reductions***

*(1) [N/a]*

*(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*

*(3) [N/a]*

***123 Compensatory award***

*(1) Subject to the provisions of this section and sections 124[, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

*(2) The loss referred to in subsection (1) shall be taken to include—*

*(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and*

*(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.*

*(3) [N/a]*

*(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.*

*(5) [N/a]*

*(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

***Equality Act 2010***

***13 Direct discrimination***

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

***26 Harassment***

*(1) A person (A) harasses another (B) if—*

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

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

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

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

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

*(a) the perception of B;*

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

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

*(5) The relevant protected characteristics are—*

*race;*

***27 Victimisation***

*(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

*(a) B does a protected act, or*

*(b) A believes that B has done, or may do, a protected act.*

*(2) Each of the following is a protected act—*

*(a) bringing proceedings under this Act;*

*(b) giving evidence or information in connection with proceedings under this Act;*

*(c) doing any other thing for the purposes of or in connection with this Act;*

*(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

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

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

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

***123 Time limits***

*(1) Subject to section 140B, proceedings on a complaint within section 120 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.*

*[N/A]*

*(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;*

*(b) failure to do something is to be treated as occurring when the person in question decided on it.*

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

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

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

---