EMPLOYMENT TRIBUNALS

Claimant: Mr Iftekhar Ahmed

Respondent: Maritime and Coastguard Agency

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard by: Video (Southampton) **On:** 7 to 11 February 2022

Before: Employment Judge Gray
And Members: Mr Bompas and Ms Maidment

Appearances
For the Claimant: Mr B Frew (Counsel)
For the Respondent: Mr J Allsop (Counsel)

JUDGMENT

The unanimous judgment of the tribunal is that:

- **The complaints of unfair dismissal, direct race discrimination and victimisation, all fail and are dismissed.**

JUDGMENT having been delivered orally on the 11 February 2022, judgment then having been sent to the parties on the 16 February 2022 and written reasons having been requested by email from the Claimant dated 28 February 2022, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. BACKGROUND TO THIS CLAIM AND THIS HEARING

2. By a claim form presented on 9 June 2020 the Claimant brought the following complaints (as subsequently confirmed on the submission of further particulars by the Claimant's solicitors on the 15 July 2020);

   (a) Unfair dismissal; and

   (b) Discrimination on the grounds of race (direct and victimisation);

3. Following a case management preliminary hearing on the 2 March 2021, this matter was listed for a final hearing for five days (liability only).

4. It was then converted to this video hearing (via CVP) taking place on 7, 8, 9, 10 and 11 February 2022.

Hearing timetable

5. It was agreed that the time at this final hearing would be used as follows:

Day 1	AM	Tribunal reading and preliminary matters
	PM (to start 1:30pm)	Claimant's evidence
Day 2	AM	Claimant's evidence
	PM	Respondent's evidence
Day 3		Respondent's evidence
Day 4	AM	Respondent's evidence and then Closing submissions (45 minutes each)
Day 4	PM	Tribunal deliberations
Day 5		Tribunal deliberations
		Judgment
		Dealing with case management to then determine compensation or other remedies, if appropriate

6. Claimant's Counsel raised that he may be unavailable for a period of time on day two due to being required to give evidence in another case. It was agreed we would start at 10:30am on day two and make up the time through the day, with either a shorter lunch or sitting longer at the end of the day. In the end we started at 11am that day, but the above timetable was still met, having started at 9:30am on day three.

Documents for the hearing

7. We were presented with:

7.1 An agreed electronic bundle consisting of 655 pages with separate index.

7.2 A policies bundle (also electronic).

7.3 Respondent's opening note, chronology and cast list.

7.4 Subsequently by email an Occupational Health report dated 11 December 2018 (from the Respondent) which was paginated as pages 640 and 641.

7.5 At the start of the hearing Claimant's Counsel requested a copy of the Dispute Resolution Procedure referred to at page C158 (paragraph 9) of the policies bundle. After the reading adjournment Claimant's Counsel confirmed that the required document was at C111 of the policies bundle.

Witness statements

8. The following witness statements were provided:

8.1 The Claimant's.

8.2 On behalf of the Respondent:

8.2.1 Gwilym Stone ("GS") Grievance Decision Manager

8.2.2 Glenn Richardson ("GR") Grievance Appeal Manager

8.2.3 Fraser Heasley ("FH") Disciplinary Decision Manager (the vexatious grievance)

8.2.4 Ajit Jacob ("AJ") C's Line Manager / Disciplinary Decision Manager (the customer complaints)

8.2.5 Ashley Stehr ("AS") Disciplinary Appeal Manager (the customer complaints)

The Issues

9. The issues in this claim were confirmed at the start of the hearing and were in accordance with those agreed at the case management preliminary hearing before Employment Judge Gray on the 2 March 2021.

10. The liability matters between the parties which were therefore to be determined by this Tribunal are as follows;

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1 Was the Claimant dismissed? This is not in dispute; the Claimant was dismissed on the 26 February 2020.

2.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

2.3 Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?

2.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

2.5 The Claimant submits that the decision to dismiss was outside the range of reasonable responses as there was no foundation for disciplinary action (as referred to in paragraph 10 of the further particulars of claim, which says the Claimant believed the Respondent considered the matter to be a training issue) and the matters raised were not those an employee could be dismissed for (as referred to in paragraph 16 of the further particulars of claim, which says the Claimant denies serious misconduct).

2.6 Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in the following respects (as referred to in the further particulars of claim);

2.6.1 Paragraph 4 – the final written warning not being fair and had the Claimant been aware of further disciplinary proceedings being imminent he would have taken different steps;

2.6.2 Paragraphs 8 and 9 – the Claimant understood it was a training issue rather than disciplinary;

2.6.3 Paragraph 11 – delay in the process;

2.6.4 Paragraph 18 – unable to properly prepare the grounds of appeal.

2.7 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

2.8 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.

3. Direct race discrimination (Equality Act 2010 section 13)

3.1 As per the Claimant's further particulars he describes himself as a brown skinned man of South Asian origin.

3.2 Did the Respondent do the following things:

3.2.1 Deciding that the Claimant's grievance was vexatious on the 25 February 2019;

3.2.2 Reject the Claimant's appeal against the decision that his complaint was vexatious on the 28 June 2019;

3.2.3 Issue of a final written warning on the 24 January 2020;

3.2.4 Issue of a further final written warning that led to the dismissal of the Claimant as the cumulative sanction on the 26 February 2020.

3.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated. The Claimant has not named anyone in particular who they say was treated better than they were and therefore relies upon a hypothetical comparator.

3.4 If so, was it because of race?

4. Victimisation (Equality Act 2010 s. 27)

4.1 Did the Claimant do a protected act as follows:

4.1.1 Raise, by way of two letters dated 10 January 2018 and 26 January 2018, a grievance (which is asserted falls under section 27(2)(d));

4.2 Was that grievance in bad faith (section 27(3))?

4.3 Did the Respondent do the following things:

4.3.1 As set out as the four allegations of direct discrimination referred to in paragraph 3.2 above.

4.4 By doing so, did the Respondent subject the Claimant to detriment?

4.5 If so, was it because the Claimant had done the protected act?

11. THE FACTS

12. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

13. By a claim form presented on 9 June 2020 the Claimant complained of direct race discrimination and victimisation, and that he was unfairly dismissed.

14. The dates of the ACAS early conciliation certificate are 22 April 2020 until 11 May 2020. An act occurring on or after the 23 January 2020 will be in time.

15. In the Claimant's further particulars, he describes himself as a brown skinned man of South Asian origin. He relies upon a hypothetical comparator.

16. The complaints we are being asked to determine start with the Claimant's two letters to Sir Alan Massey, the first dated 10 January 2018 (pages 138 to 139).

17. In that letter the Claimant says he left the Respondent in 2013 due to the very long commute. He then describes his concerns when seeking to re-join the Respondent, in only being offered Aberdeen and he complains of the actions of the AOM about this. The Claimant then complains about the actions of the same AOM in 2016 stopping his recruitment. Then again of the same AOM (after an email the Claimant says he wrote to Sir Massey in 2017) of him influencing PSC inspections so that the Claimant could not undertake them, meaning he lost his PSCO accreditation. Further, that the same AMO did not approve the Claimant moving to Cardiff stating … "He did not approve the move and instead, let that MO to collapse due to shortage of trained surveyors.".

18. It is very clear from the letter that all of the “bad things” the Claimant complains about he links to the same AOM which subsequent to his letters to Sir Massey is confirmed to the Respondent as being Mr Heslop.

19. Later in the letter the Claimant says … “I am a victim of systematic bullying and feel tired. MCA is in great need of experienced PSCO to train new surveyors with inadequate or no shipboard/practical maritime industry experiences. I am sad and disappointed for losing my PSC accreditation, but I remain proud to have worked in MCA. Many staff in MCA received generous supports when needed and I only consider myself as most unfortunate and being bullied and easily harmed, as a vulnerable ethnic minority.”.

20. Further, … “I hope the peoples surveys bring positive changes and improve supports to the employees in need, especially to the ethnic minorities, who migrated to this country to enrich MCA with high levels of maritime operational expertise and to contribute to the society, as a British citizen.”.

21. And … “The bullying is more widespread than what I have described. In some marine offices, the local bosses use their authorities as a “Monarch”, ignoring MCA guideline and civil service values.”.

22. Finally, … “All individual MCA jobs done, must be reviewed/closed out, at least by another colleague or line manager, to stop poor performances and wrong practices.”.

23. It is also noted from the email that sent the letter to Sir Massey (pages 140/141) that he says … “I wrote you a strictly confidential email on 18.05.2017 regarding threats and unacceptable bullying experienced from a senior member of staff… After sending the email to you, I have I suffered from further systematic bullying, discrimination and serious disappointments. When I look at the “Peoples campaign”, I find it hard to believe that, MCA is sincere, about “making an effort” to minimise Bullying, Harassment & Discrimination (BHD).”.

24. From the contents of the letter and the accompanying email it can be inferred that the Claimant asserts he has been subjected to race discrimination. However, there is no express link by the Claimant to say that the “bad things” he attributes to Mr Heslop are done by him because of the Claimant’s race. The letter suggests the motive as being Mr Heslop … “placing personal ego before MCA business needs.”.

25. This lack of specificity of the serious allegations he makes about Mr Heslop’s conduct and whether they are linked to his race or not then remains a constant through the subsequent process.

26. In the Claimant’s follow up letter to Sir Massey (pages 142 to 143) dated 26 January 2018 the Claimant makes no reference to race or ethnicity. He reiterates his complaints about protracted recruitment, the loss of his PSCO qualification and not going to Cardiff, again asserting that … “personal ego superseded the MCA business needs.”. Further, that … “I believe that the MCA recruitment

process is twisted by personal influence and I believe that many recruitments are more personal preferences and not competence based.”.

27. Prior to the Claimant sending his letters to Sir Massey it is not in dispute that from the 15 September 2003 to the 8 April 2013 the Claimant was previously employed by the Respondent.

28. There is then the transition period into new employment with the Respondent which the Claimant complains about in his letters to Sir Massey.

29. In the cross examination of the Claimant he was challenged about the way he describes the email correspondence that passed between him and Mr Heslop over the Aberdeen role. The Claimant accepted that there was nothing wrong with the language of the emails sent on the 26 and 27 March 2015 (pages 85 to 88). The Claimant also accepted that the April 2015 email was not threatening (see page 83), which includes an email in reply from the Claimant which says … “Many thanks for your kind email”. The Claimant clarified that his focus was on the May 2015 email (page 92).

30. With this oral clarification by the Claimant there seems to be no reason for him to have included the critical reference he has in his witness statement at paragraph 7 about the April 2015 email.

31. The Claimant was re-employed by the Respondent from 3 February 2016.

32. The Claimant says his role was as a Marine Surveyor (S) **and** Examiner of Engineers (see paragraph 4 of his statement).

33. In cross examination the Claimant accepted that his job role was as Engineer Examiner (also see page 99) and that it did not change in status following a change of role in 2017 to “Marine Surveyor ‘S’ Level – Examiner of Engineers (see page 110). The Claimant accepted that the “-“ between the named roles meant it was a grade of Examiner Engineer, rather than he was an Examiner Engineer **and** Marine Surveyor as his witness statement seemed to suggest.

34. About the recruitment process in 2017 the Claimant appeared to accept in cross examination that it may not be a decision of Mr Heslop, confirming that it maybe him but he did not know.

35. About the PSCO issue the Claimant accepted in cross examination that this was not a necessity for his role but would be helpful to him and his line manager if he did maintain his accreditation.

36. It is then by letter dated 10 January 2018 that the Claimant raises the allegations he relies upon as his first protected act (see pages 138 to 139) which he asserts falls under section 27(2)(d)) of the Equality Act … “making an allegation (whether or not express) that A or another person has contravened this Act.”.

37. In paragraph 19 of his witness statement the Claimant says … “On 10 January 2018 I sent another email and letter to Sir Massey, complaining that I had been

mistreated in relation to the recruitment processes and losing my PSCO accreditation (p138-139). I pointed out that I felt that I might have been treated differently as an ethnic minority, as I felt that either conscious or unconscious bias might have played a part. I received an email in response to my letter from Sir Alan Massey on 15 January 2018 (p140-141) in which he advised me that he believed my complaint was serious in nature and should be considered as a grievance. He asked for my permission to send the complaint to the Respondent's HR team to deal with."

38. In cross examination the Claimant agreed that the first paragraph of his letter is completely about Mr Heslop. Also, he accepted that he does not use the words difference due to ethnic minority or unconscious / conscious bias as referred in paragraph 19 of his witness statement. He did not accept though that the second paragraph of the letter was all about Mr Heslop. The Claimant explained that it was not the person he was pointing at, but that he was the authorised person.

39. In our view though the second paragraph is still directed towards the actions of Mr Heslop.

40. The Claimant receives an email from Sir Massey, the CEO dated 15 January 2018 (see page 140) in which he says to the Claimant … "So I am advising that if you wish the matter to be investigated further, the most appropriate way to do this would be through our formal grievance procedures.". He asks the Claimant how he would like to proceed.

41. The Claimant replies to Sir Massey by letter dated 26 January 2018 (see pages 142 to 143) which he also relies upon as a protected act which he asserts falls under section 27(2)(d)) of the Equality Act … "making an allegation (whether or not express) that A or another person has contravened this Act.".

42. In paragraph 20 of his witness statement the Claimant says … "I sent a further letter to Sir Alan Massey on 26 January 2018, expanding on my allegations of bullying, harassment and discrimination (BHD) and stating that I was pleased he considered my complaint to be worthy of further investigation (p142-143). Many of those were not related to Mr. Heslop.".

43. We have considered this letter and as noted the Claimant reiterates his complaints about protracted recruitment, the loss of his PSCO qualification and not going to Cardiff, again asserting that … "personal ego superseded the MCA business needs.". Further, that … "I believe that the MCA recruitment process is twisted by personal influence and I believe that many recruitments are more personal preferences and not competence based.".

44. It is not apparent, contrary to what the Claimant asserts in his witness statement, that any of these matters are not related to Mr Heslop. He does not refer to any other AOM in either letter.

45. Matters do then proceed to a formal grievance. As the Claimant explains in his witness statement at paragraph 21 … "Gemma Billany was appointed as the investigating officer for my grievance. I attended a formal meeting with Ms. Billany,

on 05 April 2018, in which I was asked to set out the reasoning behind my complaints. I told her that my only intention was to improve the work atmosphere by stating the bullying, harassment and discrimination suffered by me. It was not against any particular person and my intention was to highlight this to the Respondent's management, to improve work atmosphere as they had launched an "anti-bullying, harassment and discrimination" campaign realizing a need for that. Majority of my incidences did not involve Mr. Heslop. Ms. Billany ignored most of those and concentrated of the incidents with him.".

46. The Claimant's assertion is therefore that as at the 5 April 2018 he is expressing to Ms Billany that he did not want the grievance to focus on Mr Heslop.

47. But we note at paragraph 22 of the Claimant's statement that … "During the meeting I explained I felt that part of the reason I wasn't treated the same as other surveyors, who were British born, was because I am an ethnic minority, and that I felt Mr. Heslop had played a particular part in derailing my attempts at finding a suitable surveyor's position. I said during the meeting that my complaint "wasn't about Mr. Heslop as a person", but that I considered my treatment unacceptable. I felt that my treatment resulted from systemic issues within the Respondent which I believed allowed Mr. Heslop to place so many obstacles in the way of me finding the ideal job for me."

48. From the Claimant's own witness evidence, he does seem to be placing the focus on Mr Heslop … "… I felt Mr. Heslop had played a particular part in derailing my attempts at finding a suitable surveyor's position." And … "I believed allowed Mr. Heslop to place so many obstacles in the way of me finding the ideal job for me.".

49. The Claimant was asked in questions from the Panel to explain his belief / perception about the actions of Mr Heslop that he complains about. The Claimant confirmed that he thought Mr Heslop did what he did because he was angry the Claimant didn't agree to go to Aberdeen and because his name was then mentioned in the grievance report (although what the Claimant was aggrieved about in his written grievance would of course pre-date that, we note that the Claimant in his letter of 10 January 2018 suggests it was his email to Sir Massey on 18.05.2017). The Claimant confirmed that he did not think the motive was the colour of his skin or his ethnic origin.

50. The grievance process continues as described by the Claimant at paragraph 23 of his statement … "On 15 August 2018, I received an email from Ms. Billany confirming that she had completed her investigation and that she was in the process of drafting a report (p199-200). The email also attached a copy of the note of the interview she had conducted with me on 05 April 2018 (p147-148).".

51. Then at paragraph 24 … "On 17 August 2018, I replied to Ms. Billany, raising concerns that I did not believe the notes sufficiently reflected my concerns and that I would provide a formal response regarding the same in due course. Ms. Billany wrote back to me on 28 August 2018, requesting the amended notes and asking me whether there was anything I wanted to add or include in my grievance. On 10 September 2018, I provided a written document to Ms. Billany, providing further information about my complaints, including specific instances of Mr.

Heslop's negative treatment of me and providing some amendments to her notes of the meeting (Emails at p198-199, additional grievance document and amended notes at p149-153).".

52. The Claimant is providing further information about his complaints, including specific instances of Mr Heslop's negative treatment of him.

53. At paragraph 25 of the Claimant' statament … "On 11 September 2018, Ms. Billany and I corresponded about the basis of my complaint. Ms. Billany asked me to confirm whether it included a complaint against Mr. Heslop for bullying and harassment, as she had taken my comment that my complaint wasn't about Mr. Heslop "as a person" as meaning that I didn't intend for the grievance to be made against Mr. Heslop. I responded to Ms. Billany's email twice the same day, confirming that my complaint was about my treatment which included complaints of bullying, harassment and widespread discrimination against Mr. Heslop, and how he had been given the opportunity and support to act in this way by the Respondent's senior management (p201-203)."

54. It is clear from the Claimant's own evidence that he is directing his complaint against Mr Heslop.

55. We have considered the emails dated 11 September 2018 (at pages 202 and 203). In cross examination it was put to the Claimant that the way Ms Billany frames his position is accurate, and the Claimant appeared to accept this, but suggested that the focus on Mr Heslop was generated by Ms Billany and that she ignored many other things.

56. We do not find this based on the Claimant's own witness statement and it not being clear what the many other things are, particularly when the Claimant's correspondence to Sir Massey are considered and his email in reply to Ms Billany (see page 202 the Claimant's email dated 11 September 2018).

57. In his email to Ms Billany (page 202) the Claimant refers to his sickness absence recording (paragraph A) but mainly focuses on Mr Heslop (paragraph B) suggesting it is Mr Heslop abusing the system. The Claimant also accepted in cross examination that he had ramped up the allegations against Mr Heslop with his reference to "Master and Slave attitude". The Claimant acknowledged that he did not now stand by the master and slave comments in response to Panel questions.

58. It is then on the 26 September 2018 that there is a Grievance Investigation Meeting with Claimant and Ms Billany (see pages 204-209).

59. About this meeting the Claimant says (at paragraph 26) … "On 26 September 2018, I attended a grievance hearing, chaired by Ms. Billany (notes at p204-209). James Rapson was also in attendance as notetaker. In the meeting Ms. Billany explained that she was now acting solely as the Investigation Manager and Gwilym Stone, Assistant Director Ship Standards would be the Decision Manager. I did not complain about Mr. Heslop as a person. It was a general grievance of bullying/harassment/discrimination on several areas, involving different people,

including him in some cases. This included Mr. Heslop's involvement in the recruitment processes, Ms. Billany in her report had ignored most of the facts and only focused on Mr. Heslop. I did not want to name anyone and said that the evidence of the facts, show the persons involved. She said the recent incidents involved Mr. Heslop and she asked me whether she could name him, for the sake of investigation purposes. I agreed in the second meeting, to name him if it is absolutely necessary.".

60. Then at paragraph 27 of the Claimant's statement … "On 03 October 2018, I received an email from Ms. Billany, attaching summary notes of the grievance meeting, on 26 September 2018, and asking me to confirm that the contents accurately reflected the discussions. I responded the same day requesting more time to respond due to work commitments, I was unable to provide my responses to her. Ms. Billany and I corresponded afterwards to agree the minutes and they were finally agreed on 20 November 2018 (p215-223). The minutes of the meeting are included in the bundle and include a statement in italics, which I added after discussing with Ms. Billany.".

61. In answer to Panel questions the Claimant confirmed that he did not ask for it to not name Mr Heslop. We would observe here that the amended meeting notes record that the Claimant maintains his complaints about the actions of Mr Heslop including in the statement he adds in italics (see pages 208/209).

62. We would also observe at this point that the Claimant's evidence on meeting notes is inconsistent. At paragraph 82 of his witness statement he says … "Throughout the events I have described above the meeting notes in all meetings were twisted and fabricated. Those were not what were discussed. I requested that meetings be recorded to remedy this but was either ignored or told that this was not the Respondent's policy.". This is a serious allegation against the Respondent which appears to be without foundation based on what he describes at paragraph 27 of his witness statement to agreeing the grievance meeting minutes. In cross examination the Claimant did not identify any specific examples of twisting or fabrication when taken to the various meeting notes. For example, about the notes from the 14 January 2020 meeting (see page 459) when asked if those notes were accurate, he said that he did not agree or disagree, he assumed they were okay.

63. It is then by letter dated 24 December 2018 that the Claimant is invited to a Disciplinary Investigation Meeting by Mandy Macdonald in respect of customer complaints received by AJ (see pages 232.1-232.2) … "I am writing to advise you that I have been appointed to investigate three complaints from customers where you have carried out a course approval audit." … "It has been alleged that you behaved in a manner considered to be disruptive to both instructors and students whilst observing course delivery and I should like to interview you so that I can find out what happened.".

64. On the 23 January 2019 the Investigation Report is produced by Gemma Billany into the Claimant's Grievance and is sent to GS (see pages 233-244).

65. The conclusion from the report is (page 244) ….

"60. There is no evidence to support the allegations and I recommend that the grievance complaint is not upheld.

61. I would recommend that HR DfT and MCA procedures be reviewed to ensure that for recruitment campaigns where a location is to be agreed; appropriate steps are taken to agree a location with the candidate and HR follows up cases to ensure action is taken by the hiring manager in a timely manner and the Campaign has been closed out."

66. A copy of the report was supplied to the Claimant on the 4 February 2019 (see page 274).

67. By email dated 11 February 2019 the Claimant writes to GS … "To me it appears that the report is written to match a pre-determined decision and the facts are largely avoided, to protect powerful individuals. I repeatedly insisted that the discussion with Gemma to be recorded instead of choosing suitable areas and word those in support. I do not want to gain anything personally, anymore. MCA campaign of workplace harassment and bullying encouraged me to bring this matter to the management. The investigation was not at my request, it was initiated by our previous CEO, Sir Alan.".

68. What we would observe from this is that the Claimant is asserting that the grievance investigation was not at his request.

69. About the report, the Claimant makes two main challenges (as well as him saying it has been pre-determined):

    69.1 That the focus was wrongly placed on Mr Heslop; and

    69.2 It had not considered all the evidence or issues as he sets out in his email dated 15 February 2019 (page 267) … "I do not feel that her reports sufficiently revealed the facts of my concerns. Some areas of her reports show fact findings but the conclusions ignored the findings. Looking at her report my intention was to indicate, where I may view differently or have more to add. The size of her reports would require at least 4 weeks for me to review and place my comments. It would be pointless for me to attend your meeting, without fully reviewing Gemma's report and comments prepared to pass to you.".

70. About this we would observe that the substance of the Claimant's grievance started with the "bad things" done by Mr Heslop, and they remained the key focus of the Claimant in substance, and he subsequently confirmed Mr Heslop should be named.

71. The Claimant has not articulated and still hasn't what specific conclusion of the report was wrong due to a particular piece of evidence (save for in our hearing particular reference being placed on the email from Mr Heslop in May 2015 at page 92 of the bundle) or was not determined.

72. The email at page 92 was raised with GS in cross examination and he explained that in his opinion it was an expression of frustration by Mr Heslop following a number of previous emails from the Claimant repeating the same question that had already been answered. GS also explained that repeating the same question was something he believed the Claimant had done in the grievance investigation process.

73. We then arrive chronologically at the first alleged act of direct race discrimination, and/or victimisation, that is **deciding that the Claimant's grievance was vexatious on the 25 February 2019.** This complaint is potentially out of time**.**

74. On the 25 February 2019 GS issues a Decision Letter not upholding the Claimant's grievance and concludes that the grievance is vexatious (see pages 282 to 284).

75. The Claimant refers to this letter in paragraph 35 of his witness statement and we note that he doesn't himself say that this outcome was discrimination or victimisation. We also note that it was only put to GS in cross examination that it was victimisation and not race discrimination. GS denied it was victimisation.

76. In the outcome letter GS confirms that he does not uphold the Claimant's grievance and … "In the context of recruitment the investigation Campaign DFT/399/16/MCA, report does recommend that MCA procedures should be reviewed to ensure that for recruitment campaigns where a location is to be agreed appropriate steps are taken to agree a location with the candidate and that HR ensures this is completed in a timely manner. I have informed the MCA Resourcing Lead of this recommendation.".

77. The letter goes on to say … "After making my decision, I have also considered whether your complaint was vexatious.". GS then quotes from the Respondent's policy (quoting from the policy at page C157) …

"The MCA identifies a number of characteristics of vexatious complaints which I feel are applicable, namely cases where the employee:

• seeks to prolong contact by continually changing the substance of a complaint or by continually raising further concerns or questions whilst the complaint is being addressed

• fails to clearly identify the substance of a complaint, or the precise issues which may need to be investigated despite reasonable efforts by the manager to assist them

• makes excessive contact with the manager or seeks to impose unreasonable demands or expectations on resources, such as responses being provided more urgently than is reasonable or necessary.

Having considered the investigation report and the evidence of your interaction with the Grievance process, in line with the points made above, it is my conclusion that this complaint is vexatious. Therefore, the matter will now be investigated

under the disciplinary procedure. I will refer this to your line manager to take forward."

78. GS explains his actions in paragraph 9 of his statement … "I had decided that the Claimant's grievance was vexatious. It was clear to me from the investigation report that numerous inconsistencies, constantly changing focus of the allegations combined with the later addition of TH as an alleged perpetrator of bullying behaviour led me to believe that, although not with malicious intent, the Claimant was actively trying to keep the grievance process in action for as long as possible. It seemed to me that the Claimant had named TH as he perhaps considered that this could make his grievance more credible at the late stage in the investigation. This view was compounded by the Claimant's e-mail to me prior to my decision on 13 February 2019 where he stated: "I want to remind you that I did not want to name anyone and wanted to inform the MCA management…I only agreed to include Tony Heslop, when Gemma mentioned that for the purpose of the investigation, he needs to be named for his particular actions".

79. Then at paragraph 10 … "I had considered the Respondent's policy at [C/157-C/159]. In my view, the Claimant had disagreed with the decisions made and instead had chosen to make rather grave allegations, particularly against TH with no substantial evidence to support his view. I therefore found that it was "without foundation", "repetitive" and "unwarranted". I also found that the Claimant's assertion that GB had somehow coerced him into naming TH was extraordinary, particularly that on my reading of the documents, the Claimant had made detailed and passionate allegations.".

80. We can understand and accept how GS could form this view about the naming of Mr Heslop based on our own fact find as set out above.

81. In cross examination GS confirmed that it had been HR that had pointed him to the policy and he then looked at it. He was asked who first raised the issue of vexatious, and GS explained that after the decision to not uphold it, he had a conversation with HR and expressed his frustration that it had wasted the Respondent's time and in his judgment there was a mismatch in the allegations where the evidence didn't go any way to support the allegations.

82. Also, at paragraph 11 of GS' statement about race not playing a part … "I do not recall the Claimant's race playing an explicit part in his grievance. I had merely understood the Claimant's use of the term "discrimination" in the wider sense of the word, to mean treating him less favourably than other employees generally, rather than based on any particular protected characteristic.".

83. We find that this is consistent with the way the Claimant has described to us his view of Mr Heslop's motives.

84. We observe here that the decision GS reaches is by applying the Respondent's existing policy against his understanding and opinion of the Claimant's conduct through the grievance investigation process. GS decides it meets the Respondent's policy definition having reviewed that policy and believing that the Claimant was actively trying to keep the grievance process in action for as long

as possible, naming TH (who we have noted wasn't named in the letters to Sir Massey) as he perhaps considered that this could make his grievance more credible at the late stage in the investigation.

85. This is different to a finding that raising the matters with Sir Massey was vexatious.

86. On the 1 March 2018 the Claimant appeals GS Grievance Decision (see pages 289 to 290). At paragraph 36 of the Claimant's witness statement he says … "I appealed against Mr. Stone's decision in an email on 01 March 2019 (p289-290). I was asked to reframe my grounds for appeal in a response by Jo Hackwell and I responded with a letter outlining my appeal. My concerns included that Ms. Billany's report was misleading and didn't provide a reasonable summary of the evidence. I complained that it was unreasonable that my grievance had been found to be vexatious and I was worried I was being punished for making a legitimate complaint.".

87. The Claimant is appealing the totality of GS' decision, including the finding that it was vexatious.

88. It is then on the 6 March 2019 that the Disciplinary Investigation Report in respect of the three customer complaints is issued by Ms Macdonald (see pages 291 to 305).

89. The summary of outcome of the report says (at page 292) … "There is a discrepancy between the customer's expectation of how a course approval should be conducted and their experience in terms of behaviours whilst observing and the level of interaction with the instructor and delegates. For this reason, I believe there is a case to answer to reduce the risk of further complaints and to provide assurance to MCA. I would suggest Iftekhar is accompanied for a period when carrying out course approvals to enable him to demonstrate he can operate within the expected boundaries of his role and in a manner that is provides the expected level of service to customers and is compliant with ISMS. To be followed by monitoring to ensure the appropriate behaviours are maintained.".

90. The report does say there is a case to answer.

91. Our focus was then drawn chronologically to a Formal Attendance meeting with the Claimant, AJ and HR on the 12 June 2019 (see pages 338 to 339).

92. The Claimant says at paragraph 42 of his witness statement … "On 12 June 2019 I attended a formal attendance meeting with my line manager, Ajit Jacob, as I had more than 28 days continuous sickness absence. Jo Hackwell of HR was also in attendance and Lauren Bailey was notetaker. During the meeting I explained that the ongoing proceedings, including the grievance appeal and disciplinary allegations, were affecting my ability to work (notes at p338-339).".

93. The Claimant and AJ were cross examined about this meeting as there is a factual difference.

94. In cross examination of the Claimant he suggested there had been two meetings that day, one in the morning (being his attendance meeting) and then one in the afternoon (about the disciplinary processes). This is not what his witness statement says but in re-examination we were referred to an email dated 12 June 2019 from the Claimant (at page 341) where he writes … "As you and Jo stated in the meeting, I feel relieved that the investigation did not notice anything negative and only recommends closer monitoring for future works..." and the Claimant explained that he understood he had no misconduct to explain, but he needed training and monitoring and in his opinion it ended there.

95. AJ denied there were two meetings and denied that the understanding the Claimant asserts was relayed to him was conveyed to him.

96. As AJ is consistent with the meeting notes, whereas the Claimant's oral evidence is inconsistent with his own written statement and the report which says there is a case to answer we prefer the evidence of AJ on this matter.

97. On the 17 June 2019 the Claimant meets with GR for the Grievance Appeal Meeting (see pages 363 to 367).

98. We then arrive chronologically to the second alleged act of direct race discrimination, and/or victimisation, that is **rejecting the Claimant's appeal against the decision that his complaint was vexatious on the 28 June 2019**. This complaint is potentially out of time.

99. By letter dated 28 June 2019 GR issues an Appeal Decision Letter in respect of the Grievance, and the Claimant's appeal is not upheld (see pages 358 to 359).

100. The Claimant refers to this letter at paragraph 45 of his witness statement. He does not say that this outcome was race discrimination or victimisation. This was not put to GR in cross examination either, which is understandable as the Claimant confirmed in cross examination that he did not think that GR was influenced by his colour of skin or origin.

101. We also note here that the Claimant confirmed in cross examination, when asked if he could have issued an ET claim after the grievance and appeal outcome, that he could do a lot of things. We therefore have no direct evidence from the Claimant to say why he could not submit his claim before he did.

102. GR explains in his witness statement (at paragraph 16) how he did investigate the MZH matter raised by the Claimant at the appeal, finding, and which was not disputed, … "On investigating this, it transpired that MZH moving into that role was related to a different situation, where MZH was at risk of redundancy [359]. MZH has the same protected characteristic relied upon by the Claimant in this claim and I could not understand how the Claimant was therefore asserting this is discrimination of the type he now alleges in this claim.".

103. The findings of GR on the substance of the Claimant's grievance as he sets out at paragraph 17 of his statement were not challenged … "On 28 June 2019, I wrote to the Claimant with my decision [353] and [358-359]. I considered carefully

the decision reached by GS and in the absence of any evidence or coherent submissions from the Claimant as to the reasonableness of GS' decision, I upheld GS finding on the grievance. Other than the oblique comments in the Claimant's original letters to Alan Massey [138-139] and [142-143] and post-Appeal meeting e-mail to me, I had no substantial evidence upon which discrimination against the Claimant could be inferred.".

104. As to the vexatious grievance GR agrees with GS setting out his reasons in paragraph 18…

"18. As to the vexatious nature of the grievance, I was also in agreement with GS' decision:

a. Within my own interactions with the Claimant above, he had continued to ask for recordings of meetings, despite GS' decision that this amounted to vexatious conduct towards GB **[367]**;

b. Although I accept the Claimant was on sick leave, his engagement over arranging an Appeal Meeting as described above, was chaotic. The Claimant effectively refused to engage on the basis of my e-mails and advice from OH. I explained this to Alec Keep in respect of the later disciplinary investigation **[448-449]** and

c. That the allegations against TH which were introduced later in the investigation, were without foundation, even on the Claimant's own admission **[364]** "*IA said that his allegation was not against TH*"."

105. The vexatious grievance allegation then moves to a disciplinary. There is an investigation report by Mr Keep, the final version of which is dated 26 November 2019 and is at pages 430 to 452. It concluded that there was no case to answer. The Claimant's belief is that Mr Keep was being pressured to change this decision, but he accepted in cross examination, as do we, after being directed to the surrounding emails (pages 390, 428 and 428.1), that what Mr keep was being asked was to reach a decision on whether or not there was a case to answer.

106. FH is appointed to deal with the disciplinary and sets out in his witness statement (paragraph 6) … "On or around 26 November 2019, I received the final version of AK's investigation report [430-452]. It is correct that I did not agree with AK's suggestion that there was no case to answer or his interpretation of the policy. It was within my decision making powers to disagree with this as paragraph 89 states "if the decision maker agrees that there is no case to answer" [C/33]. I had considered the report in detail and on 9 December 2019, I invited the Claimant to a disciplinary meeting [453-454]. The meeting took place on 14 January 2020 and I refer to the minutes at [459-462]. The meeting was rather strange and it was difficult to elicit direct answers from the Claimant – this was primarily because the Claimant would go off at tangents and I could not establish what he was trying to say.".

107. We observe here that the Claimant was accompanied by his union representative at this meeting.

108. In cross examination FH explained that he disagreed with the way that Mr Keep had interpreted what vexatious was. He explained that was Mr Keep's own interpretation which didn't align with the interpretation of GS and GR, which they had agreed and discussed with HR colleagues. He confirmed that he skewed to the interpretation of GS and GR. However, FH denied this meant he had made a decision before the hearing and it was highlighted from the meeting notes that it was made clear exactly what he was doing and why (see page 459) … "The Investigation manager decided that there was no case to answer. FH explained that this would normally result in the misconduct issue being dropped however as the decision manager and appeal manager in the grievance decided it was vexatious, FH's role was to decide if vexatious or not and apply any appropriate penalty. FH also clarified that his view would be based on his interpretation of policy. FH explained that this was IA's opportunity to present any mitigation and why his grievance was not vexatious.".

109. It is clear from the notes that the Claimant has opportunity to present his case.

110. The decision is made by FH to issue the Claimant a final written warning (see paragraph 9 of his statement), which in cross examination FH clarified through the letter dated 24 January 2020 (pages 466 and 467) and the copy minutes (pages 459 to 462), the decision and reasons were made clear to the Claimant. The Claimant is informed of his right of appeal (see page 467).

111. It is the **issuing of this final written warning** that the Claimant alleges as his third complaint of direct race discrimination and or victimisation.

112. At paragraph 52 of his statement the Claimant says … "On 24 January 2020 I received the outcome letter from Mr. Heasley, attached to an email (p463-467). The letter confirmed a finding of serious misconduct and a final written warning. I was shocked this decision has been reached despite Mr. Keep having determined that there was no case to answer against me. I felt that the Respondent had a pre-arranged outcome to punish me for making a complaint relating to discrimination, and for complaining about Mr. Heslop.".

113. Despite the Claimant holding this view he does not appeal the outcome. As FH records in his witness statement (at paragraph 12) … "I see that the Claimant did not appeal my decision **[474]**, although he was dissatisfied with the outcome **[475-476]** he eventually concludes that he trusts "*the MCA management has decided on this matter and concluded. I look forward with a positive view*" and "*I honour the decision given by Mr Heasley*" **[476]**. I also refer to the Claimant's TU representative in "*GL said that he agreed with this and they had felt the decision taken by Fraser was fair, so they did not appeal*" **[627]**.".

114. The Claimant appeared to initially assert that had he been aware of further disciplinary proceedings being imminent (being the customer complaints) he would have taken different steps. The Claimant was referred in cross examination to paragraph 5 of the further and better particulars at page 21 of the bundle, where it is suggested that the Claimant did not appeal the vexatious grievance disciplinary because he was not aware that the other disciplinary was imminent.

115. This was explored in cross examination and with reference to what the Claimant says in his witness statement at paragraph 53. Considering the letter dated 3 February 2020 (see pages 470 to 473), informing of the customer complaint disciplinary, the Claimant's email dated 8 February 2020 (page 472), referring to receiving that letter on the 5 February 2020, and the decision to not appeal being confirmed by the Claimant on the 7 February 2020 (page 474), this is not a factually sustainable position by the Claimant.

116. As to the reasons for FH issuing a final written warning, he explains at paragraph 11 of his statement … "My understanding of the definition of what a vexatious complaint is under the policy **[440]** and **[C/157]** is that as well as a complaint pursued regardless of its merits, solely to harass, annoy or subdue somebody, it can either/or be "unreasonable, without foundation, frivolous, repetitive, burdensome or unwarranted". In this case the Claimant had effectively admitted it was without foundation against TH in our meeting and the Claimant's requests and contact with the various individuals involved had been repetitive. At the time of the disciplinary, TH was a Surveyor in Charge at our Plymouth Office and was responsible for overseeing survey and inspection activities in the South-West of England, a post he had held for several years prior to this. The policy is clear at **[C/157]** that the complaint may be regarded as vexatious in circumstances where the five examples are set out. However, I decided the most applicable were point 2, 3 and 5 **[C/157-C/158]**.".

117. It was only put to FH in cross examination that he did what he did to victimise the Claimant, which he denied. It was not put to him that he did what he did due to the Claimant's race.

118. It is then on the 24 February 2020 that the disciplinary about the customer complaints takes place (see pages 483-486 / 481-482). The Claimant attends with his union representative.

119. This then results in the Claimant **being issued a further final written warning that then leads to the dismissal of the Claimant with 5 weeks' pay in lieu of notice as the cumulative sanction on the 26 February 2020** (see pages 494 to 495). This is the fourth complaint of direct race discrimination and / or victimisation.

120. AJ in his witness statement at paragraph 4 explains …

> "The three customer complaints were received about the Claimant in the space of 9 months in 2018:
>
> a. In February 2018, I received an e-mail from a Dr Kumar (who had been hired by a University to improve/teach a marine engineering course and ensure it was approved by the Respondent) who was very critical of the Claimant's treatment of him in front of his university client **[145]**.
>
> b. On 18 July 2018, we received a very serious complaint that the Claimant had attended a Maritime Academy, in order to inspect a course for approval, and

behaved inappropriately. This was accompanied by two letters from their employees. **[177-179]**.

c. In early October 2018, I received a formal complaint from Solent University about the Claimant's conduct in relation to course approvals **[210-211]**."

121. Then paragraphs 15 and 16:

"15. I had a genuine belief that the Claimant had conducted himself poorly and the complaints were substantial. My understanding was that the Claimant was of the view that the complainants had misinterpreted his behaviour rather than denying the interactions had happened at all. I had considered alternatives to dismissal, as I fully understood the Claimant had an existing final written warning. The Claimant did not provide any adequate mitigation as against the real reputational risks that existed had the Claimant been permitted to continue in his role. The Claimant has suggested this option was not open to me as it was not mentioned in the investigation report, however there is no policy that enables the investigation manager to assess the level of misconduct.

16. Under the policy at **[C/153]**, serious misconduct is defined as "either repeated minor offences or significant breaches of the standards expected". I felt that I had found three instances of minor misconduct and that as a whole the customer complaints were sufficiently serious enough to merit a final written warning. In respect of training, it would have been difficult to train or retrain the Claimant. We did not have the resources to shadow the Claimant on attending every assessment where the issue was not actually his technical competency but his poor attitude. Prior to the matter reaching a formal disciplinary hearing, we had discussed the complaints in our 1-2-1s and that an independent investigator would look into the matter."

122. And at paragraph 20 … "Although the investigation made recommendations relating to training, it did not preclude me from considering, or conclude that I could not consider a range of disciplinary sanctions.".

123. It was not put to AJ in cross examination that his decision to issue a final written warning which then resulted in the Claimant's dismissal was victimisation or discrimination.

124. The Claimant then completes an appeal process which was dealt with by Mr Stehr.

125. It was acknowledged by the Claimant in cross examination and in the submissions made to us by Claimant's Counsel that there is no issue with Mr Stehr or the appeal process.

126. About the delay in the process the Claimant complains about, he accepted in cross examination that the summary of why there were delays in the case as recorded by Mr Stehr in his appeal outcome letter (pages 622 and 623), appeared accurate:

"
- Case opened in HR on 5 November 2018.
- Investigation and Decision Manager appointed 11 November 2018.

- IA investigation meeting scheduled for 27 November 2018.
- IA signed off sick for 30 days with effect from 27 November 2018.
- Investigation meeting rescheduled for 17 January 2019.
- IA unable to attend so investigation meeting rescheduled for 12 February 2019.
- Investigation meeting was further rescheduled to 25 February 2019.
- Early in March 2019 IA was signed off sick until 1 April 2019 initially, but did not return from sick leave until early June 2019. The case was placed on hold during this time, whilst Occupational Health advice was obtained, attendance management meetings were held, and an ongoing grievance appeal case was concluded.
- Following the outcome of the grievance appeal, a separate disciplinary case against Iftekhar opened which was linked to the grievance, meaning this case was further placed on hold until the other disciplinary case was concluded.
- On 24 January 2020, the other disciplinary case concluded, and this case continued. Decision meeting was scheduled for 24 February 2020 and decision outcome was issued 26 February 2020."

127. Further, when asked if he accepted that there was no prejudice to him, the Claimant explained that he was just confused, it didn't matter much, but he wanted to query what is the delay. It was very stressful, but there were other stresses also. His issue was he felt it was a pre-determined case.

128. As to the assertion that he was unable to properly prepare the grounds of appeal it was confirmed that the Claimant submits his appeal on two basis being it was against the findings of the Investigator Ms Mcdonald and he had not had a response from Mr Jacob (see page 515). In cross examination the Claimant confirmed that he does not say in his appeal that the decision was pre-determined, saying that he can't prove that, he only feels it.

129. In cross examination the Claimant agreed that he was not hindered on the presentation of his appeal and that he had fair opportunity to present his case in the appeal hearing.

130. <u>THE LAW</u>

<u>Unfair dismissal</u>

131. Pursuant to s.94 Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by their employer. Whether or not an employee has been unfairly dismissed is determined in accordance with s.98 ERA 1996:

(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…

…(b) relates to the conduct of the employee, …

(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.

132. It is for the Respondent to prove on the balance of probabilities, the sole or principal reason for dismissal. In considering fairness the burden is neutral.

133. In conduct cases, when considering whether or not the dismissal was reasonable the Tribunal must have regard to whether, at the time of dismissal, the employer:

    a. genuinely believed that the employee was guilty of misconduct;

    b. had reasonable grounds on which to base that belief;

    c. at the time it had carried out as much investigation as was reasonable in the circumstances (***British Home Stores Ltd v Burchell [1978] IRLR 379***).

134. The Tribunal must be careful not to substitute its view for that of the employer and should consider instead whether the employer acted within the range of responses available to a reasonable employer when considering both whether dismissal was reasonable and all other aspects of fairness, for example whether the investigation was reasonable (***Sainsbury PLC v Hitt [2003] ICR 111*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439***).

135. There is a high bar facing employees who seek to impeach the earlier warning. They must satisfy the Employment Tribunal that the final warning was (1) not issued in good faith, (2) there were no *prima facie* grounds for following the final warning procedure; and (3) it was manifestly inappropriate to issue the warning. See further: ***Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374*** at paragraphs 20-24.

136. Further, where the employee has not exercised a right to appeal, it is submitted that it is only in exceptional circumstances that the Employment Tribunal should go behind the earlier written warning and in effect re-open the disciplinary proceedings. See further: the observation of Beatson LJ at paragraph 38 in ***Davies***.

137. We have also considered the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code"), although no breach of the ACAS code has been alleged.

Direct Discrimination

138. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges direct discrimination and victimisation.

139. The protected characteristic relied upon is race as set out in sections 4 and 9 of the EqA.

140. As for the claim for direct discrimination, under section 13(1) of the EqA 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.

Burden of proof

141. s.136 EqA 2010:

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

142. The issue of the burden of proof under s.136 EqA 2010 was recently addressed by the Supreme Court in ***Efobi v Royal Mail Group Ltd [2021] IRLR 811***. In particular:

> (a) The introduction of s.136 EqA 2010 and its change in wording from the predecessor legislation did not eliminate the need for the Claimant to prove facts on the ordinary civil balance of probabilities, from which the inference of discrimination could properly be drawn. Along with the facts that the Claimant

adduces in support of its case, the Employment Tribunal must also take into account any facts proven by the Respondent which would prevent any inference from being drawn. (See paragraphs 29-30);

(b) It was observed at paragraph 28 (in relation to the employer's explanation at the second stage of the burden of proof) that the employer's explanation did not have to satisfy some objective standard of reasonableness or acceptability. It did not matter that the employer had acted for an unfair or discreditable reason as long as the reason had nothing to do with the protected characteristic; and

(c) It was observed at paragraph 38 that it was important to not make too much of the burden of proof provisions where the Employment Tribunal is in a position to make positive findings on the evidence, one way or the other.

143. It is not sufficient to merely assert a difference in status and a difference in treatment. In order for the Respondent to be required to show that it has not committed an act of discrimination it is necessary for there to be some material before the Employment Tribunal from which it 'could properly conclude' that on the balance of probabilities the Respondent had committed an act of unlawful discrimination.

Victimisation

144. s.27 EqA 2010:

(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.

145. We were referred to Paragraph 9.6 of the EHRC Services Code which provides an example of the protected act not having to explicitly refer to the Equality Act 2010.

146. As per s.27(3) EqA 2010, a protected act can be impugned if the information or allegation underpinning it is made in bad faith. The central question is whether the employee has acted dishonestly in giving the information or making the allegation. A collateral motive can be relevant to the Employment Tribunal's determination of this issue, see ***Saad v Southampton University Hospitals NHS Trust [2018] IRLR 1007***, per Eady J at paragraphs 49-51.

147. If there is a protected act causation and detriment must be established. In this regard, causation will only be established if the protected act had a significant influence on the putative discriminator *vis a vis t*he alleged detriment. See further, **Chief Constable of Greater Manchester Police v Paul Bailey [2017] EWCA *Civ 425*** at paragraphs 10-14.

148. As with direct discrimination, victimisation need not be consciously motivated. If A's reason for subjecting B to a detriment was unconscious, it can still constitute victimisation pursuant to ***Nagarajan v London Regional Transport [1999] IRLR 572***.

149. It has been established by ***Martin v Devonshires Solicitors [2011] ICR 352*** that it is permissible in an appropriate case to assert and find that the reason for dismissal (or the subjecting to detriment) was not a protected act but some feature of it which is properly separable, such as the manner in which the complaint was brought or pursued. The issue is whether the protected act was a significant cause of the act of detriment that was complained of.

Time limits

150. Of relevance to the question of time limits are the provisions of s.123 EqA 2010.

151. Section 120 of the EqA 2010 confers jurisdiction on claims to employment tribunals, and section 123(1) provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

152. The Employment Tribunal has jurisdiction to extend time on a just and equitable basis. The discretion to extend time is wide, see, ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** at paragraphs 18-19, although factors that will almost always be relevant to consider in this context are (a) the length of, and reasons for the delay and (b) whether the delay has prejudiced the Respondent.

153. Section 123(3)(a) EqA 2010 provides for conduct that extends over a period to be treated as being done at the end of that period. The burden of establishing this rests on the Claimant - ***Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA***. It can be established in several ways, such as by separate acts of discriminatory treatment as a result of a policy, rule or practice that was in place at the relevant time. Alternatively, there can be separate acts that are linked in some way as evidence of a discriminatory state of affairs. However, it is not sufficient to rely on an alleged overarching or floating discriminatory state of affairs without that state of affairs being anchored by discrete acts of discrimination. See further: ***South Western Ambulance Service NHS Trust v King [2020] IRLR 168*** at paragraphs 21-23 and 35-36 per Chaudhury P.

154. THE DECISION

155. When making our decision the logical place to start in our view is with ***the protected acts***.

156. In our view both letters to Sir Massey and the cover email with the first letter assert concerns of discrimination and the first letter refers to the Claimant being an ethnic minority.

157. His first letter (dated 10 January 2018 at pages 138 to 139) says for example … "Many staff in MCA received generous supports when needed and I only consider myself as most unfortunate and being bullied and easily harmed, as a vulnerable ethnic minority.". Further, … "I hope the peoples surveys bring positive changes and improve supports to the employees in need, especially to the ethnic minorities, who migrated to this country to enrich MCA with high levels of maritime operational expertise and to contribute to the society, as a British citizen.".

158. In the email that accompanied the letter to Sir Massey (pages 140/141) the Claimant says … "I wrote you a strictly confidential email on 18.05.2017 regarding threats and unacceptable bullying experienced from a senior member of staff… After sending the email to you, I have I suffered from further systematic bullying, discrimination and serious disappointments. When I look at the "Peoples campaign", I find it hard to believe that, MCA is sincere, about "making an effort" to minimise Bullying, Harassment & Discrimination (BHD).".

159. The second letter then expands on matters he raises in the first letter and the email.

160. The correspondence does not expressly allege a breach of the Equality Act, but section 27(2)(d) does not require this.

161. The Claimant has a perception of unfairness which he articulates to Sir Massey in response to the Equality campaign.

162. As to the question of bad faith, we accept the submissions of Claimant's Counsel about this. As he notes in his written submissions, giving false evidence or information, or making a false allegation, is not a protected act if done in bad faith (Section 27(3)). Firstly, and simply, is the evidence, information or allegation

false? And secondly, if it is false, was it given, or made, in bad faith? Just because the evidence, information or allegation was false does not mean it was given, or made, in bad faith. The primary question in an enquiry into bad faith is the employee's honesty: did the employee act honestly in giving the evidence or information, or in making the allegation, that is said to be a protected act?

163. We do not find that the Claimant was dishonest in giving the information he did in his correspondence to Sir Massey. As we have noted in our fact find GS does not find that it was malicious. We have also not found that there was a collateral motive as considered in the ***Saad*** decision.

164. It is very clear from the first letter that all of the "bad things" the Claimant complains about he links to the same AOM, however it is subsequent to his letters to Sir Massey that it is confirmed to the Respondent as being Mr Heslop.

165. From the contents of the first letter and the accompanying email it can be inferred that the Claimant asserts he has been subjected to race discrimination. However, there is no express link by the Claimant to say that the "bad things" he attributes to Mr Heslop are done by Mr Heslop because of the Claimant's race. The letter suggests the motive as being Mr Heslop … "placing personal ego before MCA business needs.".

166. This lack of specificity of the serious allegations he makes about Mr Heslop's conduct and whether they are linked to his race or not then remains a constant through the subsequent process.

167. Considering the Claimant's second letter to Sir Massey (pages 142 to 143) dated 26 January 2018, the Claimant reiterates his complaints about protracted recruitment, the loss of his PSCO qualification and not going to Cardiff, again asserting that … "personal ego superseded the MCA business needs.". Further, that … "I believe that the MCA recruitment process is twisted by personal influence and I believe that many recruitments are more personal preferences and not competence based.".

168. It is not apparent, contrary to what the Claimant asserts in his witness statement, that any of these matters are not related to Mr Heslop. He does not refer to any other AOM in either letter.

169. Matters do then proceed to a formal grievance process.

170. It is the Claimant's assertion that as at the 5 April 2018 he is expressing to the Respondent that he did not want the grievance to focus on Mr Heslop.

171. However, from the Claimant's own witness evidence, he does seem to be placing the focus on Mr Heslop … "… I felt Mr. Heslop had played a particular part in derailing my attempts at finding a suitable surveyor's position." And … "I believed allowed Mr. Heslop to place so many obstacles in the way of me finding the ideal job for me.".

172. The Claimant was asked in questions from the Panel to explain his belief / perception about the actions of Mr Heslop that he complains about. The Claimant confirmed that he thought Mr Heslop did what he did because he was angry the Claimant didn't agree to go to Aberdeen and because his name was then mentioned in the grievance report (although what the Claimant was aggrieved about in his written grievance would of course pre-date that, we note that the Claimant in his letter of 10 January 2018 suggests it was his email to Sir Massey on 18.05.2017). The Claimant confirmed that he did not think the motive was the colour of his skin or his ethnic origin.

173. Through the grievance process the Claimant provides further information about his complaints, including specific instances of Mr Heslop's negative treatment of him. It is clear from the Claimant's own evidence (see paragraph 25 of his witness statement) that he is directing his complaint against Mr Heslop.

174. We do not find that the focus on Mr Heslop was generated by Ms Billany and that she ignored many other things. We find this based on the Claimant's own witness statement and it not being clear what the many other things are, particularly when the Claimant's correspondence to Sir Massey are considered and his email in reply to Ms Billany (see page 202, the Claimant's email dated 11 September 2018).

175. In his email to Ms Billany (page 202) the Claimant refers to his sickness absence recording (paragraph A) but mainly focuses on Mr Heslop (paragraph B) suggesting it is Mr Heslop abusing the system. The Claimant also accepted in cross examination that he had ramped up the allegations against Mr Heslop with his reference to "Master and Slave attitude". The Claimant acknowledged that he did not now stand by the master and slave comments in response to Panel questions.

176. In answer to Panel questions the Claimant confirmed that he did not ask for his grievance to not name Mr Heslop. We would observe here that the amended meeting notes record that the Claimant maintains his complaints about the actions of Mr Heslop including in the statement he adds in italics (see pages 208/209).

177. As we have observed the Claimant's evidence on meeting notes is inconsistent. At paragraph 82 of his witness statement he says … "Throughout the events I have described above the meeting notes in all meetings were twisted and fabricated. Those were not what were discussed. I requested that meetings be recorded to remedy this but was either ignored or told that this was not the Respondent's policy.". This is a serious allegation against the Respondent which appears to be without foundation based on what he describes at paragraph 27 of his witness statement to agreeing the grievance meeting minutes. In cross examination the Claimant did not identify any specific examples of twisting or fabrication when taken to the various meeting notes. For example, about the notes from the 14 January 2020 meeting (see page 459) when asked if those notes were accurate, he said that he did not agree or disagree, he assumed they were okay.

178. We have observed that the substance of the Claimant's grievance started with the "bad things" done by Mr Heslop, and they remained the key focus of the Claimant in substance, and he subsequently confirmed Mr Heslop should be named.

179. The Claimant has not articulated and still hasn't what specific conclusion of the grievance investigation report was wrong due to a particular piece of evidence (save for in our hearing particular reference being placed on the email from Mr Heslop at page 92) or was not determined.

180. That email at page 92 was raised with GS in cross examination and he explained that in his opinion it was an expression of frustration following a number of previous emails from the Claimant repeating the same question that had already been answered. GS also explained that repeating the same question was something he believed the Claimant had done in the grievance investigation process.

181. Turning then to the four alleged detriments. It is not asserted that the four alleged things cannot be detriments and we find that the allegations made against the Claimant that he was vexatious and the final written warnings, culminating in his dismissal, would be to his detriment.

182. Turning then to causation. As summarised in the submissions of Respondent's Counsel … "Causation will only be established if the protected act had a significant influence on the putative discriminator vis a vis the alleged detriment.".

183. The protected act is the correspondence to Sir Massey.

184. Considering each ***detriment*** in turn we find as follows:

185. ***Deciding that the Claimant's grievance was vexatious on the 25 February 2019***. Based on our findings of fact the decision GS reaches is by applying the Respondent's existing policy against his understanding and opinion of the Claimant's conduct through the grievance investigation process. GS decides it meets the Respondent's policy definition having reviewed that policy and believing that the Claimant was actively trying to keep the grievance process in action for as long as possible, naming TH (who we note wasn't named in the letters to Sir Massey) as he perhaps considered that this could make his grievance more credible at the late stage in the investigation.

186. This is different to a finding that raising the matters with Sir Massey was vexatious.

187. The protected act is the correspondence to Sir Massey, the detriment is deciding the Claimant's grievance was vexatious in line with the Respondent's existing policy. So, are the letters to Sir Massey the significant influence for GS making this decision?

188. We do not find that they are as we accept the reasoning and explanation of GS as to why he decided what he decided.

189. What we have observed is the Claimant is asserting that the grievance investigation was not at his request. The Claimant does evidence in his conduct

someone who wanted to raise a matter, but then let others deal with it, after all he did not start the process as a formal grievance, but in response to the equality campaign. He also does not name Mr Heslop in those letters to Sir Massey.

190. If that is all that had happened the vexatious issue as defined by the Respondent's policy may never have arisen. After all the Respondent did recommend that MCA procedures should be reviewed to ensure that for recruitment campaigns where a location is to be agreed appropriate steps are taken to agree a location with the candidate and that HR ensures this is completed in a timely manner. There is no evidence before us to suggest that this recommendation would have happened had the Claimant not raised the matter.

191. However, the grievance investigation does take place and concludes with no evidence to support the allegations, which were particularly focused on Mr Heslop and of a very serious nature against him.

192. We observe therefore that there appears to be a mismatch between what the Claimant thought he was doing versus what the Respondent did. In our view it may have been naive of the Claimant to think allegations can be raised and then upheld without investigation, but we do not find that the Claimant writes his letters to Sir Massey to be vexatious. The Respondent does not find this, GS himself acknowledges it was not done with malicious intent. We have not found it was done in bad faith.

193. The Claimant (and we would observe with support of his union through-out the process) did ultimately partake in the process that by writing his letters to Sir Massey he may not have initially intended to do. It is then GS' perception of the Claimant's conduct in the investigation process meeting the definition of vexatious in the Respondent's policy, that results in that allegation. In our view therefore this is clearly distinct from the allegations the Claimant makes in his correspondence to Sir Massey.

194. As to the other alleged detriments, ***rejecting the Claimant's appeal against the decision that his complaint was vexatious on the 28 June 2019; issuing of a final written warning on the 24 January 2020; and issuing of a further final written warning that led to the dismissal of the Claimant as the cumulative sanction on the 26 February 2020***.

195. We have found that the reason of GS doing what he did is not significantly influenced by the correspondence the Claimant wrote to Sir Massey. The decision of GS then sets the course of what then happens to the Claimant in respect of the appeal and the final written warning issued on the 24 January 2020.

196. It is also distinct from the further final written warning about the customer complaints that led to the Claimant's dismissal. As we have found factually, the Claimant has not proven on the balance of probability, us having preferred the evidence of AJ on this matter, that it is confirmed to him that there is no case to answer in relation to the customer complaints.

197. Further, the Claimant appeared to initially assert that had he been aware of further disciplinary proceedings being imminent (being the customer complaints) he would have taken different steps. This was explored in cross examination and with reference to what the Claimant says in his witness statement at paragraph 53. Considering the letter dated 3 February 2020 (see pages 470 to 473), informing of the customer complaint disciplinary, the Claimant's email dated 8 February 2020 (page 472), referring to receiving that letter on the 5 February 2020, and the decision to not appeal the warning for the vexatious grievance being confirmed by the Claimant on the 7 February 2020 (page 474), this is not a factually sustainable position by the Claimant.

198. We accept the reasoning and explanation provided by GR, FH and AJ as to their actions. We do not find the other alleged detriments were significantly influenced by the correspondence the Claimant wrote to Sir Massey. The Claimant's complaint of ***victimisation*** therefore fails.

199. Turning to the complaint of ***direct race discrimination***. Based on the facts we have found we do not find that the Claimant has proven on the balance of probability some material from which we 'could properly conclude' that on the balance of probabilities the Respondent had committed an act of unlawful discrimination.

200. With these findings it is not necessary for us to determine the time limit jurisdictional matters.

201. As to the complaint of ***unfair dismissal*** it is not in dispute that the Claimant was dismissed on the 26 February 2020.

202. We find in view of all the matters we have set out above that the reason for dismissal was the Claimant's conduct.

203. The Claimant has not proven any procedural unfairness as he alleges. He has not proven unreasonable delay causing him prejudice, nor that he was hindered on the presentation of his appeal, instead confirming that he had fair opportunity to present his case in the appeal hearing.

204. He has not proven that the first final written warning was issued in bad faith. Therefore based on the combination of that live warning and what AJ genuinely believed, based on what we consider to be reasonable grounds after a reasonable investigation as presented to us by AJ in his evidence, the decision to dismiss with pay in lieu of notice does not fall outside the band or range of reasonable responses.

205. For these reasons it is our unanimous judgment that the Claimant's complaints all fail and are dismissed.

206. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 10; the findings of fact made in relation to those issues are at paragraphs 12 to 129; a concise identification of the relevant law is at paragraphs 131 to 153; how that law has

been applied to those findings in order to decide the issues is at paragraphs 155 to 205.

Employment Judge Gray
Date: 8 March 2022

Judgment sent to parties: 22 March 2022

FOR THE TRIBUNAL OFFICE