EMPLOYMENT TRIBUNALS

Claimant: **Mr P Litobarski**

Respondent: **The Home Office**

Heard at: **London South Employment Tribunal**
Hybrid hearing (in person and CVP)

On: **21 to 24 March 2022**

Before: **Employment Judge Beckett**
Ms H Carter
Ms C Edwards

Appearances
For the Claimant: Ms Loraine, Counsel
For the respondent: Ms N Ling, Counsel

JUDGMENT

1. The unanimous decision of the Tribunal is that the claim in respect of detriment on grounds relating to union membership or activities is not well-founded and is dismissed.

CASE SUMMARY

2. The Claimant was employed by the respondent, as a Chief Immigration Officer (among other roles), from 2 October 2000 until 22 February 2020 when he accepted voluntary redundancy. Early conciliation started on 28 November 2018 and ended on 13 December 2018.

3. The first claim form 2300130/2019 was presented on 12 January 2019. The Claimant brought claims of detriment on grounds related to his union membership and activities under section 146 Trade Union and Labour Relations (Consolidation) Act 1992, direct age and race discrimination, victimisation and harassment under the Equality Act 2010. The Claimant withdrew his claims of age discrimination, race discrimination and harassment, which were dismissed by judgment dated 3 August 2019.

4. The Claimant issued a second claim, 2302493/2020 on 22 June 2020, claiming direct age discrimination. A third claim, 2302980/2020, was issued on 17 July 2020 claiming unlawful deductions from wages.

5. By email dated 9 November 2021 the Claimant withdrew his claims of age discrimination under claim 2302493/2020 and unlawful deductions from wages under claim 2302980/2020. These claims were dismissed upon withdrawal.

6. The Claimant is also involved in a group age discrimination claim, case number 2302215/2020. That claim is currently stayed.

The case

7. The list of issues (pages 80 to 81 of the Bundle) was agreed between the parties as per the document filed with the Tribunal on 6 August 2019, and confirmed in a hearing before EJ Keogh on 16 November 2021.

8. The factual allegations to be determined were listed at paragraphs 1 to 3, and are set out as follows:

    1. Did the following acts occur as alleged by C?

        (a) On 28 June 2018 Daniel Twynam threatening C with disciplinary action by telephone;

        (b) On 17 July 2018 Daniel Twynam threating C with disciplinary action by email;

        (c) On 31 July 2018 Daniel Twynam threatening C with disciplinary action by voicemail and telephone call;

        (d) On 1 August 2018 Daniel Twynam threatening C with disciplinary action;

        (e) On 30 August 2018 Sarah Wilford and Julian Gibson instigating disciplinary proceedings against C in a meeting;

        (f) On 30 August 2018 Sarah Wilford and Julian Gibson suspending C;

(g) On 4 December 2018 Sarah Wilford threatening C with dismissal by letter inviting him to a disciplinary hearing;
(h) On 20 December 2018 Sarah Wilford issuing C with an 18 month final written warning.

2. If so, did the above acts or any of them amount to detriments pursuant to s146 TULR(C)A?

3. Were the alleged detriments acts, or deliberate failures to act, for the sole or main purpose of:
   - (a) preventing or deterring C from being a member of an independent trade union, or penalising him for doing so (s146(1)(a) TULR(C)A);
   - (b) preventing or deterring C from taking part in the activities of an independent union at an appropriate time, or penalising him for doing so (s146(1)(b) TULR(C)A). In relation to the 'activities' referred to C relies on paragraphs 3 – 11 and 14 of his amended grounds of complaint.

The law

9. Section 146 of the Trade Union and Labour Relations Consolidation Act 1992 (TULR(C)A) provides:

"(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of-
(a) Preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
(b) Preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so…
...
(2) In subsection (1) "an appropriate time" means
…
(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union …;
And for this purpose, "working hours", in relation to a worker, means any time when, in accordance with his contract of employment… he is required to be at work.

10. Section 147 provides:

"(1) An employment tribunal shall not consider a complaint under section 146 unless it is presented –
(a) Before the end of the period of three months beginning with the date of the act an failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them, or
(b) Where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.
(2) For the purposes of subsection (1)-
(a) where an act extends over a period, the reference to the date of the act is a reference to the last day of that period;

(b) a failure to act shall be treated as done when it was decided on.

11. Section 148 provides:
"(1) On a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act.

12. Section 149 provides:
"(1) Where the employment tribunal finds that a complaint under section 146 is well-founded, it shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure complained of.
(2) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to the infringement complained of and to any loss sustained by the complainant which is attributable to the act or failure which infringed his right.

13. Under s146, the focus is on the purpose the employer was seeking to achieve by subjecting the employee to the detriment.

14. The question of the employer's 'sole or main purpose' is a subjective one, to be judged simply by enquiring into what was in the mind of the person or persons within the employer organisation who committed the act complained of; *University College London v Brown* [2021] IRLR 200, EAT.

15. The Tribunal must consider the nature of the acts or failures alleged. Guidance was provided by the EAT in *Yewdall v Secretary of State for Work and Pensions* UKEAT/0071/05/TM. The questions that the Tribunal must consider and decide are:

    i) Have there been acts or deliberate failures to act on the part of the employer?
    ii) Have those acts or omissions caused detriment to the Claimant?
    iii) Were those acts or omissions in time
    iv) In relation to those acts proved to be within the time limit, and which caused detriment, has the Claimant established a prima facie case that they were committed for a purpose prescribed by [section 46 as set out above]?

16. Once the Claimant has raised a prima facie case, if that is made out, the burden shifts to the Respondent. The Respondent must prove on the balance of probabilities that it had an alternative, proper purpose which was either its only purpose or at least an equally important purpose in making the offers; *Kostal UK Ltd v Dunkley and others* 2018 ICR 768, EAT.

17. It is entirely a question of fact for the Tribunal to consider whether or not any alleged detriment was applied on a prohibited ground; *Mrs J Ibekwe v Sussex Partnership NHS Foundation Trust* UKEAT/0072/14/MC. Cases under s146 are highly fact-sensitive.

18. The issue of jurisdiction arose in this case in respect of the first four alleged detriments. The burden of showing that it was not reasonably practicable to

present a claim in time falls on the Claimant. If the Tribunal finds that it was not reasonably practicable for the Claimant to present the claim in time, it must go on to consider whether the Claimant presented the claim within such further period of time as was reasonable thereafter.

The hearing

19. The hearing was listed for 4 days, starting on 21 March 2022. It had been listed as a hybrid hearing, to accommodate the witness Julian Gibson attending over CVP. By the time the hearing was reached, Mr Gibson was able to attend in person.

20. On the second day of the hearing, the Respondent advised the Tribunal that Ms Wilson could not attend in person the following day. She was able to finish her evidence over the CVP link, and therefore the hearing remained hybrid.

21. The Tribunal spent the morning of 21 March reading the witness statements and documents referred to in those statements and the chronology within the bundle. The bundle had been reduced by the parties from 1,200 pages to 949 pages.

22. However, during the course of the evidence further documents were added (the Attendance Management Procedure, Operating Procedures: Facilities for Trade Union Representatives and their Members). The further documents were not paginated.

23. We heard evidence from the Claimant on the afternoon of day one, and the morning of day two. He confirmed his witness statement and was cross-examined by Ms Ling. The Claimant also answered questions from the Tribunal and was re-examined by Ms Loraine.

24. The Respondent called 3 witnesses as follows:

    1. Sarah Wilford, the decision manager (SW);
    2. Julian Gibson, the Claimant's line manager from July 2018 to January 2019 (JG);
    3. Daniel Twynam, the Claimant's line manager from January 2018 to July 2018 (DT).

25. In light of witness difficulties, the Respondent called witnesses out of turn. Ms Sarah Wilford gave evidence on the afternoon of day two into the morning of day three. The Respondent then called Mr Julian Gibson and finally Mr Daniel Twynam.

26. Each witness for the Respondent confirmed their witness statements and were cross-examined by Ms Ling.

27. Both parties submitted written closing submissions, for which we were grateful, and supplemented those submissions orally on the final day.

Brief overview

28. The Claimant was employed by the Home Office. He was managed by various line managers between 2016 and 2019: Richard Bell (September 2016 to April 2017), Karen Goddard (April 2017 to January 2018), Daniel Twynam (January 2018 to July 2018) and Julian Gibson (July 2018 to January 2019).

29. During the time in which the Claimant was line managed by DT, he worked as a Chief Immigration Officer, based at the Becket House site. The Claimant was also the Branch Secretary of the Public and Commercial Services trade union (PCS), a post he had held since 2016.

30. The Claimant's case was that he had found it difficult since he was appointed to that post to get adequate time off to carry out his trade union activities. He also felt that there had been a shift in the attitude of his employer towards him. The Claimant stated that he was allowed to work 814 hours of facility time per year, which amounted to approximately 116 days.

31. His case in essence was that his line manager DT criticised his union activities on the basis that his performance at work was negatively impacted by those activities. This was, he said, the background to the eventual disciplinary proceedings commenced by DT.

32. The Respondent's case was that the Claimant did not suffer any detriments due to trade union activities, and that he had been subjected to a disciplinary investigation due to a failure to comply with a (repeated) reasonable management request.

Findings of Fact

33. We set out the following findings of fact, which we determined were relevant to finding whether or not the claim in respect of trade union related detriment was well-founded.

34. We have not sought to determine all issues disputed between the parties, simply those that we regard as relevant to determining the claim and the eight instances of alleged detriments identified and agreed by the parties. When determining certain findings of fact, where we consider this appropriate, we have set out the reasons for those findings.

35. In making findings of fact, we placed particular reliance upon contemporaneous documents within the bundle, such as emails, as an accurate version of events, when assessing the evidence. Witness statements and the evidence of each witness were considered alongside the caveat that memories fade and that the statements were drafted sometime after the events in question. They were also drafted to advance or defend the claim. We considered all these issues when assessing the weight of the evidence.

Background facts

36. The Claimant started working for the Home Office on 2 October 2000. In 2011 he joined the committee of the PCS Greater London Branch.

37. In or around 2016 the Claimant was elected Greater London Branch Secretary for the PCS Union. The Claimant was granted facility time, which entitled him to work in this capacity for up to 50% of his hours.

38. Farrah Chughtai (FC) was an employee of the Respondent. The Claimant was her line manager between September 2016 and 2nd October 2017. FC's previous line manager was Anthony Pownall-Jones (APJ). APJ had commissioned an occupational health report, which was received on 17 August 2016.

39. In his capacity as FC's line manager, the Claimant used the OH report to agree reasonable adjustments.

40. Later, from at least January 2018, the Claimant acted for FC, who was a PCS member. He provided advice and representation to her in respect of complaints of disability discrimination by the Respondent. At this time, the Claimant was no longer FC's line manager.

41. On 7 February 2018 the Claimant issued a grievance against Richard Bell (page 171). The nature of the grievance included matters related to the Claimant's activities as a Trade Union Representative.

42. On 22 April 2018 FC submitted a claim to the Employment Tribunal against the Respondent.

Daniel Tywnam as line manager

43. In January 2018 DT became the Claimant's line manager. The first correspondence between DT and the Claimant in the bundle was an email dated 25 February 2018, following an impromptu one to one meeting earlier that day.

44. We find that the tone of the email (pages 183 and 184 of the bundle) sent by DT was polite and supportive, he discussed performance and how to develop the Claimant to level 3*. He also recognised issues that the Claimant had raised regarding the completion of Quality Assurance Returns, and he explored how he could try to alleviate any additional pressure on the Claimant.

45. On 12 April the Claimant sent an email to DT with his facility requests for April 2017. DT responded the following day, agreeing all dates save for the 27th April. In respect of that date DT noted that the Claimant was rostered as the late CIO, and asked him to organise cover and resubmit (emails pages 187 and 188 of the bundle).

46. The Claimant responded, copying in Sarah Burton (ISED), Simon Parr (HR) and Chris Kelly (PCS). Part of the email referred to his concern that he was being

allocated too many duty shifts, and was being subjected to a detriment in carrying out his union activities as a result (page 187):

> "As regards the allocation of my 'duty' shifts I am aware that I am consistently allocated a disproportionate number of these and I have pointed this out to you previously, in the relatively brief period you have been taking responsibility for my PCS obligations. To that end, I believe I am being subjected to a detriment in carrying out my union duties as a result; as my manager I would expect you to oversee my rota where it shows such a disadvantage to discharge my responsibilities as a branch officer and I have also told you this several times, but clearly to no avail…
> Indeed I must currently confess to a number of concerns in respect of your oversight regarding my ongoing trade union duties within the Operation Nexus umbrella and whilst this may be allowable as inexperience in such matters, I clearly cannot expect this to continue indefinitely, my lime is under constant pressure as it is.
> To that end I have taken the liberty of copying in DD S.Burton on this occasion as I presently have outstanding issues to be resolved and I feel it is now time to escalate this issue before any more time elapses."

47. As a result of that email, DT responded and arranged a one to one meeting with the Claimant. DT stated that the meeting would be to put in place measures to ensure that the Claimant was given "adequate facility time balanced against the requirement to manage [his] team, cluster and undertake fixed points on the duty office".

48. The Claimant had a formal attendance meeting on the 19th of April 2018 with DT to discuss his sickness absence between 8 December 2017 and 8 January 2018. DT sent an email in respect to that meeting to the Claimant on 25th April 2018 (pages 197 and 198 of the bundle).

49. The end of year review meeting took place on the 23 April 2018. DT decided that the Claimant's performance was a 1* in many areas. He notified the Claimant in an email dated 23 April 2018 that HMI Scott Ronaldson had been appointed as a decision maker to consider poor performance action.

50. The Claimant responded stating that he found it "hurtful, insulting and deeply upsetting" that he had had no meaningful engagement with line managers over the previous year, and that this was the latest "punitive approach" to his line management. He stated that this was "another manifestation of an ongoing campaign of bullying, harassment, discrimination and victimisation, both in terms of [his] age, ethnicity and TU activities, with no attempt to disguise this fact". He stated that he felt extremely distressed and anxious which was solely attributable to his treatment at the hands of his employer (page 189 of the bundle).

51. The Claimant further raised the issue of allocated union time in an email on 30 April 2018 to DT, copying in Chris Kelly (union representative – CK) amongst others. Within that email he stated that the lack of hours allocated to him for his

TU duties was a deterrent to him, which would be the subject of determination at an Employment Tribunal" (pages 193 to 195 of the bundle).

52. DT responded, as a formal attendance management procedure had commenced, which was being dealt with by Scott Robinson, the nominated decision manager. We find that the emails sent by DT were courteous. The tone of the emails sent by the Claimant was argumentative.

53. At the end of May 2018 DT ran a report on Metis, the relevant Home Office system, and discovered that the Claimant had yet to carry out any end of year reviews for the employees that he managed. He set that out in an email to the Claimant on 23 May 2018. The Claimant responded citing lack of training on the system, issues in respect of the hours allocated to him to undertake facility time and his concern that he was "being set up to fail" by management.

54. The Claimant further asked DT how long he would be expected to continue as a line manager to 4.6 FTE staff given that he was in effect only full 50% FTE as a result of his TU duties. He repeated his claim that he was being allocated a disproportionate amount of duty contact shifts compared to his colleagues which detracted from his essential official duties. The Claimant indicated that he would raise those concerns at the one-to-one meeting scheduled with DT on 7 June 2018.

55. DT responded, stating that he would address those concerns in the one-to-one meeting. He also indicated that he would like to come to an agreement regarding the Claimant's duties in order to have incorporate any reasonable adjustments, facility time and management responsibilities. End of year reviews for all staff, metis report run by DT showed the Claimant had not completed any.

56. Within the bundle there are emails between DT and the Claimant throughout June which discuss ways for the Claimant to improve his performance. DT also set out his decision that the Claimant would be allocated one cluster shift, one duty office shift, two facility time shifts per week, allowing the fifth working shift to be flexible. We find that this was a reasonable and fair decision, and it was explained to the Claimant in clear and appropriate terms.

57. DT also set out the relevant policy in respect of facility time, and that the Claimant had been allocated up to 792 paid facility time whilst he held his TU role. He also reminded the Claimant that, under the relevant policy, the line manager had to ensure that the needs of official work were also met (emails pages 214 to 217).

58. It is clear from the evidence in the bundle that DT was trying to manage the Claimant, improve his performance within his role as line manager, and assist in ensuring the Claimant was given adequate facility time. DT reasonably requested that the Claimant use the appropriate spreadsheet to request facility dates. However, he explained that as the Claimant had provided no evidence that he had undertaken "basic management activities "to improve his performance, DT needed to ensure that the Claimant had adequate time to improve his performance whilst conducting official duties (emails in bundle dated between 15 and 19 June 2018, pages 213 to 217).

59. The issue as to facility time continued throughout the period in which DT was managing the Claimant.

60. The Claimant insisted that he should be given 50% of his hours as facility time; DT stated that the Claimant was entitled to up to 50% of his hours as facility time, and that any such time would be accolated according to business need.

The request for FC's OH reports

61. As noted above, the Claimant managed FC from September 2016 until September 2017. During that time, an OH report was made available to the Claimant in his role as line manager, in order to consider reasonable adjustments for FC.

62. As a result of FC's complaint to the ET, those reports were required by the Respondent.

63. On 26 June 2018, Caroline Fofie, a lawyer in the Government Legal Department (GLD), sent an email to Michelle McNicholas (HR case manager, MMN) urgently requesting copies of FC's OH reports. The reports had been previously requested on 6 June 2018 (email page 237). That email confirmed that the response to FC's claim, the ET/3, was due to be submitted to the Tribunal by 2 July 2018.

64. It is clear that enquiries were then made as to who had managed FC during the time at which OH reports were commissioned. Information is given to MMN that the relevant line manager was Martyn Webber. On 27 June 2018 at 12.24 MMN sent an email to Michele Louden (Assistant Director, Nexus Custody, JOC and Counter Terrorism at the Home Office) which stated "Ok, thanks, I was told it was Paul Litobarski and I emailed him. Is he a former manager?". It was subsequently confirmed by ML that the Claimant was FC's former manager.

65. DT was asked by ML on 27 June 2018 to obtain the reports (email page 234). Various emails were sent to DT, who was told that the issue was "very urgent", and the report was needed that day.

66. Disclosure guidance was provided to DT, who in turn sent it to the Claimant.

67. DT telephoned the Claimant on 27 June, and left a voicemail on the Claimant's work phone, requesting the report. We find that he honestly believed that the Claimant had a copy of that OH report, and that he was being asked to obtain it in his role as the Claimant's line manager.

68. DT received five emails on the morning of 28 June 2018 requesting the report to be obtained from the Claimant. It is clear that DT formed the view, reasonably on the evidence, that the report was needed as a matter of urgency, in order to make representations in the Tribunal claim.

69. In an email sent on 28 June 2018 MMN stated (pages 229 to 230): “Dan, the solicitor has rang again and stressed that she needs the OH reports this morning. This could significantly jeopardise the case. If they refuse to provide the OH reports despite being informed of their obligations, you will need to look at disciplinary action”.

70. DT telephoned the Claimant on 28 June 2019 to request the OH report.

71. In his evidence, the Claimant stated that the telephone call on 28 June 2018 was not threatening per se. DT gave evidence that he was simply passing on the information that he had been given, as outlined above, that disciplinary proceedings could be considered.

72. We find on the balance of probabilities that DT’s manner during the telephone call on 28 June 2018 was not threatening. DT had become under increasing pressure to obtain the OH report. He had been told that the Claimant had the report, and that the Claimant could lawfully provide it for the ET proceedings relating to FC.

73. Further, we find that DT advised the Claimant that a refusal to follow a reasonable management request could result in disciplinary action. This was not meant as a threat; it was simply a way of explaining the serious nature of the request. The Claimant in cross-examination stated that the call had not been threatening per se, but that it had been unwarranted and unwanted. He added that DT had been “arsey”. He added that it was the repeated nature of the requests that was “unwelcome”.

74. The Claimant said that he had told DT that “it didn’t mean Jack”, that is that it was not pertinent or relevant, “it doesn’t mean jack all that you should have it at this stage”.

75. After the telephone call, DT sent an email to MMN stating that he had spoken to the Claimant, and advised MMN that “Paul point-blank refused to provide the OH report. He stated that he doesn’t want to get involved and that if a court order would compel him to provide the information, then that would have to happen”. He stated that he would email the Claimant (pages 229 to 230).

76. Within two hours of the telephone call, DT sent an email (page 223) to Sarah Burton in which he gave further details regarding the content of the telephone call, and stated that the Claimant’s tone was rude and disrespectful.

77. It is agreed between the parties that on 28 June 2018 Martyn Webber provided the Respondent with FC’s 2017 OH report, and that Richard Bell provided the Respondent with FC’s 2015 OH reports.

78. The Claimant refused to provide the 2016 OH report. On 6 July DT held a meeting with the Claimant and Julian Gibson, who was to take over as line manager of the Claimant. The Claimant referred to this meeting as a “1-2-2” as there was only him, and two managers, and raised issues that he had two line managers who were taking an active interest in his work and progress. He also referred to being “managed by committee”.

79. On 12 July 2018 Julian Gibson took over as the Claimant's line manager. On that date JG sent an email to the Claimant following on from a meeting that date, giving the Claimant further information about him and his background and experience, and asking for a summary of his cluster, staffing, area covered and any issues (page 239). The Tribunal found that this was a positive email, with a view to forming a good working relationship.

80. Later that date, the Claimant sent an email to DT, copying in JG, James Cox and Chris Kelly (PCS representative) replying to an issue raised about excess hours. The Claimant complained that he had excess hours due to being allocated "a disproportionate number of official duty hours, over and above the number" he would normally have expected. He referred to his union duties, and stated that he was "surprised" that DT had simply quoted the excess to "cause [him] to suffer a detriment for my union duties" (page 246 of the bundle).

81. DT sent an email to Claimant (page 248) regarding union facility time, and setting out again that he had failed to perform to the required standard as a manager. We found that it was not appropriate for him to send the Claimant that email, as he was no longer the Claimant's line manager. We noted that he did copy JG into the email.

82. Later that day, at 16.12 DT sent JG an email, entitled "Paul Litobarski Handover", and attaching various documents. The first issue raised by DT within that email was under the heading "Disciplinary/ Grievance". DT then went through the Claimant's performance issues and his sickness absences. Within his performance section, DT noted the following:

> "Paul consistently claims that his workload should be reduced by 50% compared to his colleagues however I do not accept this, 1) because he is measured against his own goals and not that of his colleagues, 2) he has no additional work streams, unlike many of his colleagues, 3) he shares management for three small clusters (North and South-West, and Berks and Surrey) with another CIO, for which he undertakes no stakeholder engagement or effective management and 4) he is permitted to UPTO 50% of his working hours a facility time, as long as this is justified and meets business needs".

83. DT then set out further observations under a separate heading "Trade Union":

> "Paul is PCS London Branch Secretary and is entitled to UPTO 50% of his time as Facility Time, to use for PCS duties. However he interprets this as 50% of his time, whether it is required or not by the PCS, and thus should have 50% less work than the his Nexus colleagues, 50% less staff to manage, 50% less duty shifts etc. This is a significant sticking point as he states that last year he exhausted his hours undertaking more official duties than he should have been allocated, to the detriment of his union work.

However he has failed to provide any evidence of what he was doing as a line manager, nor what detriment this excess of official time had on his union work."

84. We found that it was helpful for DT to set out the issues that JG would need to be aware of in order to manage the Claimant. However, it is clear from that email that DT had little positive to say about the Claimant. We found that the final paragraph headed summary was inappropriate, as it could have had a significant influence on JG's initial impression of the Claimant, in light of the strong descriptive terms used:

"In my opinion Paul is currently ineffective as a CIO and as a line manager and has resisted all attempts to help him improve his performance. He has taken no responsibility at all for his current situation and appears to be trying to 'beat the system' through any channels available, whether it be grievance, trade unions, sickness or simply confusing the various issues that he is involved in. He has been disruptive at management meetings and has little to offer that is of constructive value to resolving his, or the team's, ongoing issues."

85. We appreciated that the paragraph was prefaced with "in my opinion", however it could have had a detrimental effect on JG's view of the Claimant, prior to any meaningful interaction with him. In his evidence, JG rejected the proposition that he had formed such a view. We find that, in particular in light of the emails sent by JG at the outset of his management of the Claimant, that the email did not influence JG (email at pages 250 to 251 of the bundle)

86. On 17 July DT made a further request for the OH report in an email. During the hearing, the panel was informed that the exact message was not in the bundle, but that the draft email sent by DT for approval to MMN was provided (page 265). In fact, the email sent does appear at pages 287 to 288, and one paragraph of the draft was removed. The email actually sent was in the following terms:

"Paul,
On 28th June 2018 we had a telephone conversation where I asked you to provide a copy of Farrah Chughtai's OH report from 2016. I explained that you are obliged to do so under the Disclosure rules however you refused to comply.

I wrote to you on the 17th July 2018 to inform you that if you fail to provide a copy of the report, disciplinary action would have to be considered. You read this email on 24th June 2018.

I wrote to you again on 29th July 2018 to inform you that because you had been on annual leave, the deadline was now set to the 31st July 2018. You read this email on 31st July 2018.

I called you on the 31st July 2018 and left a message; you returned my call at approximately 14:15 hours. During our conversation you again refused to provide a copy of the report.

Please note that disciplinary action is now being considered for failure to follow a reasonable management request.
I have attached a copy of the Disclosure rules which confirm you are obliged to provide this information. Please ensure you do so by close of play 3rd August 2018 and forward to Julian Gibson who is your current line manager.

Regards,
Daniel Twynam"

87. The email referred back to the telephone conversation that they had had on 28 June 2018.

88. In cross-examination the Claimant accepted that the email was "moderate" in tone. The tribunal finds as a fact that the request was made in good faith by DT, and that it was a reasonable managerial request for C to provide the OH report. Within that email, DT set out that the report should be provided to the Claimant's new line manager, JG.

89. The Claimant was asked to provide the report by "close of play on Thursday 19 July 2018". DT noted that the Claimant had been off-line since Sunday (15 July), and that he had a Trade Union Facility day that date (17 July 2018), and he was on leave on Wednesday and then had an "away day" on Thursday where staff would not need to log into emails (page 264).

90. The preliminary hearing of FC's claim at the ET was due to take place on 25 July 2018. In readiness for the hearing, MMN also asked whether the Claimant had provided his dates of availability prior to that hearing (email on 23 July 2018, page 263).

91. The Claimant was on annual leave from at least 23 July to 31 July 2018. He did not respond to the email from DT before that period of leave.

92. On 29 July DT requested the report in a further email, to be provided by 31 July, noting that the Claimant had been on leave.

93. In cross-examination, the Claimant accepted that the tone of the emails was not rude or indeed threatening. He told the Tribunal that it was the repeated nature of the requests that was unwelcome.

94. On 31 July DT telephoned the Claimant, who did not answer the call. DT left a voicemail requesting the OH report. DT telephoned the Claimant later, at 2.15pm. He again requested the report.

95. Following on from that telephone call DT sent an email advising Claire Shacklock (CS) and MMN that the Claimant and he had spoken at length and the Claimant was not willing to release the OH report unless the Home Office indemnified him against the DPA 2018, on the basis that the employment tribunal was not yet at the disclosure stage. He stated that the Claimant had advised him that he was not legally able to provide the personal information and that if the solicitor wished to speak to him directly then he would explain that to them. The Claimant was described in the email as being adamant that the Home Office had the disclosure position wrong and that he had found DT's email threatening. The Claimant further stated that if disciplinary action was taken against him, he might lodge an employment tribunal claim himself.

96. As a result of that the MN provided further guidance to DT. She advised that the GLD had already given legal advice, and that it was not a breach of the DPA and further, that FC's consent was not required to release the report. She advised that the cooperation of the Claimant was a reasonable management request (page 316).

97. In evidence the Claimant accepted that the tone of emails and calls were the same. As the Tribunal has been able to review the emails, we are satisfied that DT was not threatening or discourteous. In addition, disciplinary action was a potential consequence of the Claimant's refusal to comply with a reasonable management order, and we find that it was proper for DT to advise the Claimant of this aspect.

98. During the hearing, the panel was informed that the exact message was not in the bundle, but that the draft email sent by DT for approval to MMN was provided (page 265). In fact, the email sent does appear at pages 288 to 289, and one paragraph of the draft was removed. The email actually sent was in the following terms:

> "Paul,
> On 28th June 2018 we had a telephone conversation where I asked you to provide a copy of Farrah Chughtai's OH report from 2016. I explained that you are obliged to do so under the Disclosure rules however you refused to comply.
>
> I wrote to you on the 17th July 2018 to inform you that if you fail to provide a copy of the report, disciplinary action would have to be considered. You read this email on 24th June 2018.
>
> I wrote to you again on 29th July 2018 to inform you that because you had been on annual leave, the deadline was now set to the 31st July 2018. You read this email on 31st July 2018.

I called you on the 31st July 2018 and left a message; you returned my call at approximately 14:15 hours. During our conversation you again refused to provide a copy of the report.

Please note that disciplinary action is now being considered for failure to follow a reasonable management request.
I have attached a copy of the Disclosure rules which confirm you are obliged to provide this information. Please ensure you do so by close of play 3rd August 2018 and forward to Julian Gibson who is your current line manager.

Regards,
Daniel Twynam"

99. We find that the email was reasonable, and that DT had tried to remove himself from the requests by stating that the report should be sent directly to JG. This was appropriate as there was clearly tension between DT and the Claimant by that stage.

100. The Claimant responded to DT, without copying in JG, again stating that it was not a reasonable management request as to provide the report would breach his obligations under data protection and consent (pages 287 and 288).

The disciplinary investigation and grievance

101. The Claimant was then notified by email on 2 August 2018 that JG had formally started disciplinary action (page 286 of the bundle).

102. In evidence, all witnesses agreed that it had in fact been DT who had started the proceedings, and that JG had merely been used to pass on the information. It was clear from the evidence that DT was the driving force behind the decision to start the action.

103. Sarah Wilford (SW) was appointed decision maker on 2 August, but then had a period of pre-booked leave, so only started looking at the case on 22 August.

104. On 2 August the Claimant lodged a grievance against DT, in respect of "an ongoing campaign of bullying, harassment, discrimination and victimisation to provide information" which the Claimant believed that he could not lawfully disclose.

105. Within that grievance the Claimant stated that he did not accept that he could provide the OH report, as it would be in breach of the DPA and that the subject of the report, FC, had directly stated that she did not agree to those reports being disclosed.

106. We find that the Claimant's grievance was properly lodged, as it was based on an on honestly held belief, with backing of the TU (grievance at pages 271 onwards of the bundle). The Claimant now accepts that he could lawfully have provided the document, however that was not his understanding at the time.

107. On 22 August SW appointed ZDS as the Investigation Manager in the disciplinary investigation. SW also sought clarification with JG as to how it was known that the Claimant had a copy of the report and in what capacity he held the report. Within that email SW raised that she was going to have to make decision in respect of whether suspension was necessary. On the same date SW also raised the possibility of being able to access the Claimant's inbox or find a way via the knowledge information unit as to how the report could be obtained in a different way (emails at pages 321 to 322).

108. On 29 August 2018 JG sent the Claimant an email at 10.51 which advised the Claimant that he was required to attend Lunar House the following day for a meeting. JG stated in the email that he would attempt to call him later on that day to confirm the time of the meeting. Only evidence of both JG and the Claimant, it is clear that the phone call which followed was heated. Each emailed the other following on from the phone call, both complaining about the tone or manner of the other, and the content of the call itself (pages 349 and 350 of the bundle).

109. In evidence JG accepted that he had known that the Claimant would be suspended at that meeting prior to telephoning him (as is evident from an email he sent on 29 August to ML). It is agreed that he was not under an obligation to advise the Claimant of this, although JG agreed that in fact in deciding not to do so he caused the Claimant to become upset and angry. Following on from the telephone call, JG sent an email to the Claimant on 29 August at 11.35am, setting out that he was required at Lunar House at 13.00 the following day, in respect of an HR matter, and that he could bring a union representative with him (page 334).

110. In any event the meeting took place on 30 August 2018. SW was chair in the meeting, JG attended as the Claimant's line manager, and the Claimant had CK present as his union representative. At that meeting the Claimant was advised that he would be suspended from his duty. In the letter subsequently sent by SW to the Claimant (at pages 358 and 359 of the bundle), the Claimant was told that suspension was necessary for the following reasons:

    - there has been a serious breakdown in the relationship between you and the department;
    - there is a risk that you may tamper with evidence required for the investigation and/ or influence witnesses;
    - suspension is considered to be in the best interest of you to protect you from any accusations of tempering with the evidence or influencing witnesses about the case.

111. SW sent a further letter dated 30 August 2018 advising the Claimant that he was to be investigated in respect of a "repeated failure to follow a reasonable management request, namely failing to provide a copy of an OHS report … as evidence for an employment tribunal". The Claimant was advised within the letter that Zena Da Silva (ZDS) would be in touch with him to arrange an interview date.

The decision to suspend the Claimant

112. Following the meeting, the Claimant was given a formal "Notice of Suspension" letter (pages 358 and 359 of the bundle). The letter was drafted by SW and set out that the suspension was "pending an investigation into allegations of your failure to follow a reasonable management request and with serious implications in regards to an employment tribunal. This is a precautionary measure and not a discipline sanction".

113. SW added that she felt suspension was necessary for three reasons. Firstly, there had been in her view a serious breakdown in the relationship between the Claimant and the department. Secondly, she stated that she found there was a risk that she that the Claimant may tamper with evidence required for the investigation and or influence witnesses. Finally, she stated that suspension was considered to be in the best interest of the Claimant to protect him from any accusations of tampering with the evidence or influencing witnesses about the case. The Claimant was advised that he would be paid during his suspension, that he may be required to attend interviews or hearings and therefore must be contactable during normal working hours, and that he needed to return any official identification documents and any Home Office property or equipment to his line manager.

114. On the same date SW sent a formal letter entitled "Notification of Discipline Investigation" to the Claimant. Within that letter she informed the Claimant that she had received details of an allegation concerning misconduct relating to a repeated failure to follow a reasonable management request, namely failing to provide a copy of an OHS report for FC, as evidence for an employment tribunal".

115. The Tribunal finds that the Respondent was entitled to instigate a disciplinary investigation in light of the facts available at that time. We do not accept the submission made by counsel for the Claimant at 16f of her outline submissions, that the refusal ought not have been dealt with as misconduct at all. However, we do accept her further submission, that the potential level of misconduct was minor, in accordance with the Respondent's relevant policies.

116. We do not find that SW's decision to suspend the Claimant was reasonable in the circumstances as there was no evidence to support it. We found that in her evidence SW was not in fact able to give reasons to justify her decision, she simply repeatedly referred to her report.

117. We agree with the submission made on behalf of the Claimant that suspension is only really appropriate for a gross misconduct investigation. This is in accordance with the Respondent's policy. It might well have been thought by the Claimant that suspension was used as a way of punishing him.

118. On 31 August ZDS sought to clarify the level of misconduct that the Claimant was being investigated for. She sent an email to SW in which she had copied and pasted the relevant part of the policy setting out the descriptions and examples of minor misconduct, serious misconduct and gross misconduct. On 3 September SW replied that she was considering the matter as serious

misconduct, but added that "depending on the investigation this may change" (page 375).

119. Within the given examples for serious misconduct, the policy includes "failure to follow reasonable instructions with serious consequences, for example, damage to property where the value is not significant". Failure to follow a reasonable instruction is classed as minor misconduct in the policy.

120. We find that the Claimant ought to have disclosed his potential conflict of interest to the Respondent at an earlier time. At the time that the requests were made, the Claimant was acting as an advisor for FC in her tribunal claim. This was a vital consideration as the Respondent wanted the OH report to defend a claim being brought by the Claimant's client. However, he did not disclose this until later in the investigation.

121. The issue as to the grievance the Claimant had against DT was raised with SW a number of times. It was urged upon her by CK that the grievance be dealt with either before the disciplinary investigation or alongside it (page 414).

122. ZDS conducted a formal investigation interview with the Claimant on 17 September 2018 at 10am. The meeting took place at Lunar House, and the Claimant's union representative CK was present, along with a note taker. The notes of the meeting are at pages 504 to 511 of the bundle.

123. When asked if the Claimant had received a copy of the relevant OH report he said, "yes I may have done, Martin Webber might have it". He was then asked whether he still had the report and replied, "Don't know, have been suspended so don't have access to my laptop". Finally, in respect of this aspect, he was asked if he had the report. The note taker's note of the response was "don't know, think I did". The Claimant added an amendment to that answer, to say "no".

124. The Claimant said that management had asked him three times for the report. He was asked whether, at the time he was asked for the report, if he had it. He replied, "don't know, but the person who requested it should not have it due to data protection", and said it was an unreasonable request.

125. When asked if there were any witnesses that the Claimant wanted ZDS to interview, the Claimant said no. He did not raise any issues relating to his Trade Union activities, or his role as FC's advisor in the meeting.

126. His union representative CK advised ZDS that the investigation should be suspended while the grievance the Claimant had against DT was dealt with as the grievance related to "bullying and harassment over the requesting of the report".

127. The Claimant told ZDS that there had been "one report requested more than once". ZDS said "you were asked to provide a report" to which the Claimant responded, "other letters say otherwise". He then cited "GDPR, article 6" saying that the process should be lawful and "if data controller says don't give something then I don't".

128. He confirmed that it was a policy reason, and that it was an unreasonable request. The Claimant said he did not know why DT wanted the report, that he had asked him for it after he had left the unit and was no longer the Claimant's line manager and that he had no right to have the report. He later said that DT wanted the report for the employment tribunal, but he added that the tribunal claim was not a reason for him to provide it.

129. The Tribunal finds that the Claimant was obstructive in the interview. He did later add comments to the notes of the interview, in bold, and again he did not add anything about his Trade Union role.

130. ZDS completed her investigation report on 24 October 2018. The report was included in the bundle at pages 542 to 553. ZDS found that there was a case to answer, and that the Claimant had a copy of the relevant report. She further found that three requests had been made by management and that the Claimant's attitude towards operation Nexus was "quite negative". The Claimant had said that management were just being nosy and that they had no legal basis to have the report. She therefore found that there was a case to answer in respect of failing to follow a reasonable management request. She added the comment in respect of that that it was "a failure to follow a reasonable manage request in the full knowledge that this was high priority and was for an employment tribunal".

131. She considered whether or not there was any mitigation. She found that there was no mitigation for the Claimant not to provide the report. She also found that "there was no mitigation for the outcome of the investigation to be suspended while the grievance against DT was concluded". She did not explore that aspect at all during the report itself.

132. In respect of the report itself, we find that it was unfair to have included "character trends". However, the findings, made based on the evidence that she had from Claimant himself, seem reasonable as the Claimant did not give any mitigation, and appeared at times antagonistic during the interview.

133. The report was sent to SW on 28 October 2018. On 30 October 2018 SW emailed ZDS raising 16 separate issues, asking for clarification or further details. In respect of some of those ZDS expanded them and explained in the report. However, in respect of some questions she indicated that she had deleted those particular points from her report. We do not have a copy of the initial draft.

134. It is our view that the grievance and disciplinary proceedings should have been dealt with together. They dealt with the same issues and the investigation of one would have assisted the investigation (and findings) of the other.

135. We find that the Claimant suspension was not reviewed properly during the relevant period. It was mentioned by SW in an email dated 8 November (at page 562 of the bundle). However, there was no formal review with appropriate reasons given.

136. On 14 November 2018 Brian Ruggles (BR), HR Case Manager, emailed SW stating that he believed the grievance was "so closely linked with the disciplinary

the two should be heard together. If it was to continue as currently planned, the grievance will take place, Paul would then have the opportunity to appeal the grievance outcome. Then the disciplinary would take place and then a possible appeal. All of this additional work for what is in reality the same issue".

137. Within the email BR confirmed that he had spoken to his colleague who was advising on the grievance, who had informed him that the investigation had not been completed and there was thereafter going to be a delay. He stated:

"I feel the business needs to make a decision as to whether to stop these separate process now and roll them into one discipline hearing as the points raised by [the Claimant] within his grievance are mitigation which should be heard at the disciplinary rather than a separate grievance" [sic].

138. On 15 November 2018 Louise Harvey-Smith (LHS) emailed Paul Barker (PB) and SW regarding the grievance investigation. She stated that she had spoken to SW that day and that she and SW had decided that "as the grievance and disciplinary are so linked … it was proper and right that two separate investigations took place, however when it comes to the decision the grievance and the disciplinary should be dealt with together" (page 578 of the bundle). LHS stated the SW would act as the decision maker for both.

139. SW sent an email later that same day to CK, informing him as follows:

"I can confirm that I have now received the investigation report into the disciplinary matter, however, after looking into the grievance that Chris notified me of, I understand that both are interlinked together and therefore do not intend to share the investigation report until the grievance is concluded and both reports can be shared at the same time. I want to reassure you that I have not seen the grievance or am party to the investigation, this is being treated entirely separately and at this time has a separate decision manager. This decision manager is also aware of the discipline matter, but not party to this matter either. Both are/ have been investigated separately. I hope you agree that this is the right way forward to allow Paul to have both cases investigated thoroughly" [sic] (at page 579).

140. LHS completed her report into the grievance on 3 December 2018. She sent her report to PB (email at page 583, report at pages 584 to 587). She detailed that the Claimant's allegation originally covered three areas. The first related to repeated demands that he disclosed a document which "he considered that he was under a legal obligation to not share". Secondly, he raised the age and inexperience of DT. Finally, he stated that there was undue and inappropriate inquiry and challenge into his use of trade union facility time.

141. LHS concluded that DT's behaviour in seeking the OHS report in the Claimant's possession did not constitute bullying, harassment or discrimination. She found that DT had been instructed to secure the report and had sought clarity when that request was challenged. She found that the language used by DT in his

emails was “factual, firm and fair”. She stated it was “not immoderate or threatening” and that the Claimant had confirmed that.

142. In respect of the age and inexperience allegation, the Claimant did not wish to continue that allegation by the time of the interview. She therefore found there was no case to answer in respect of that aspect.

143. LHS found that DT’s enquiries into the Claimant’s trade union activities related to his availability as a Nexus CIO and found that “wires had apparently been crossed in terms of the detail that DT was seeking”. She stated that the extent to which DT pursued the point was unclear and since there was “no sign of a sustained pressure” by DT on the Claimant to disclose his union activities there was no case to answer in regard of that grievance.

144. It is clear from her report that LHS considered those three aspects entirely separately and that the Claimant had not raised any issues in respect of trade union activities when complaining about DT’s repeated requests for the OHS report.

145. The report was sent by PB to SW on 4 December 2018, for her to make a decision. She received the report and the records of the interviews with the Claimant and DT by email at 09.06am.

Charge amended to gross misconduct

146. At 11.50am on 4 December SW emailed BR in the following terms:

> “I am a little bit concerned about whether to do this via serious of gross misconduct. The discipline investigation was serious, but on receipt of this and the grievance, I think there should be consideration of gross misconduct. How do I phrase this in the letter?” [sic] (at page 612 of the bundle).

147. On the same date SW sent a formal letter entitled “Discipline Hearing Invite” to the Claimant. She proposed a meeting for a combined hearing of the disciplinary investigation and the grievance against DT, on 17 December 2018. Within the body of the letter, she repeated that it would be a “combined hearing” including the consideration of his grievance against DT “as the grievance is specific to the discipline matter” (pages 618 to 620 of the bundle).

148. SW cited the allegation again, which was repeated failure to follow a reasonable management request in respect of not providing the OH report. She added that if proven it may constitute gross misconduct under the Discipline Policy. She further stated that this might lead to dismissal and if gross conduct gross misconduct was found dismissal would be without notice or payment in lieu of notice.

149. In evidence SW said that the allegation had been amended from serious to gross misconduct on the basis that there had been no case to answer in respect of the grievance and SW therefore considered it could be vexatious.

150. We agree with the Claimant that the increase of the charge to gross misconduct in the circumstances was unfair and unreasonable. The finding made by SW that the grievance was in fact vexatious was without any evidential foundation and was unfair. In evidence in the tribunal SW was unable to justify how she came to that decision on the facts.

151. The meeting took place as planned on 17 December, at Fleetbank House at 13.00. SW chaired the meeting, BR was present as the HR case manager , there was a note taker and the Claimant had CK with him as his union representative. CK asked at the outset why the allegation had been increased to gross misconduct. He added that ZDS had sent him a letter stating that the investigation was into minor misconduct.

152. SW stated that the matter was being had been investigated as serious misconduct but that she found the grievance was perhaps vexatious and that was the reason she moved it to gross misconduct. The notes of the meeting run to 26 pages. During the course of the meeting the Claimant said that he genuinely did not know whether he had a copy of the relevant OH report as he had not checked. He confirmed that he would have had it in 2016 when it was sent to him. He told SW that if he had had the report and if the correct person had asked, and given him the correct legislation to cover him he would have sent it to them.

153. However, the Claimant stated that as it was DT asking it was not appropriate. He complained that the solicitors had not contacted him directly. He was unable to say why he did not check to see if he had the report. He told SW that DT had not approached him on a personal level and that the tone of his demands became increasingly bullying. He said that he wondered why DT wanted the report sent to him directly and he decided not to do it as it was “not kosher”.

154. Following on from the meeting, on 19 December SW telephoned the Claimant and left him a voicemail. She then sent him an email confirming the contents of that voicemail. She stated that although she had not completed her decision in respect of his case, she had found that it did not meet the threshold for gross misconduct, and he was therefore not no longer suspended.

155. SW sent her formal outcome letter on 20 December 2018. The letter was 6 pages and attached relevant documentation. SW found that the Claimant had failed to follow a reasonable management request. She found that it was reasonable for management to conclude that the Claimant had the relevant report. She found that the Claimant had failed to disclose the report.

156. SW then considered whether the request for the OH report to be sent to DT was a reasonable request. She noted that the Claimant had accepted the requests was made but that it was not reasonable on the basis of GDPR provisions. She found that DT had made the proper inquiries with HR in respect of the Claimant’s concerns. He also provided a copy of relevant disclosure rules to the Claimant. SW stated that in the Claimant’s position as a PCS representative he would have had more knowledge than others regarding procedures and what can and cannot be disclosed under GDPR. She found that the information given to the

Claimant by DT was reasonable and he ought to have provided the report to him as his line manager.

157. In respect of the Claimant's grievance, she found that it was vexatious in nature. She noted that there had been no case to answer in respect of the three complaints made by the Claimant. SW stated the following:

"I note that the grievance investigator does not make any findings on vexatious or malicious submission of the grievance within his report. However, when I review your grievance against the disciplinary investigation report I do find that the two are inextricably linked in nature which has led me to believe that it is a vexatious grievance. I however do not intend to pursue this matter as a separate investigation and therefore will not take this into account in making my decision".

158. SW concluded that the request made to the Claimant to provide the OH report was a reasonable request, that it was made in good faith and with evidence provided to satisfy the Claimants concerns regarding data protection breach. She found that the Claimant's actions amounted to serious misconduct as the reasonable request was made on more than one occasion, in good faith, with potentially serious implications for the employment tribunal noting that the government legal department to make their case and decide what was relevant.

159. SW therefore decided that the appropriate sanction was a final written warning which would last for 18 months.

160. Vexatious complaints are dealt with within the Home Office HR policy and guidance document entitled "Grievance Resolution Policy and Procedure". That document appears at the bundle at pages 850 to 880. At page 871 there is guidance as to how a vexatious or malicious concern or grievance can be identified. The policy states the following:

"A false grievance is one which is not true and where the person making the allegation knows it is not true. A vexatious grievance is one which is brought, regardless of its merits, solely to harass or subdue another person. A malicious grievance is one made with the intention of causing harm. Raising false, vexatious or malicious grievances is a serious disciplinary offence".

161. The policy continues:

"A vexatious concern or grievance is one that is pursued for improper purposes, regardless of its merits, solely to harass, and you annoy or subdue somebody; Something that is unreasonable, without foundation, frivolous, repetitive, burdensome or unwarranted".

162. It is clear to the tribunal that the Claimant had received advice that he was not able to disclose the OH report without either the consent of FC, or under data protection. Although he was incorrect in this belief, we find that it was a genuinely held belief. In those circumstances, the grievance could not have been vexatious as the Claimant used it as a last resort following repeated requests for a document that he believed he could not disclose.

163. The decision made by SW did not properly take into account the Claimant's mitigation. Had SW taken this into account, it may well have less lead to a less serious outcome.

Findings in respect of the list of issues

164. We therefore make findings in respect of the relevant alleged detriments, which I repeat below for ease:

(a) On 28 June 2018 Daniel Twynam threatening C with disciplinary action by telephone;

(b) On 17 July 2018 Daniel Twynam threating C with disciplinary action by email;

(c) On 31 July 2018 Daniel Twynam threatening C with disciplinary action by voicemail and telephone call;

(d) On 1 August 2018 Daniel Twynam threatening C with disciplinary action;

(e) On 30 August 2018 Sarah Wilford and Julian Gibson instigating disciplinary proceedings against C in a meeting;

(f) On 30 August 2018 Sarah Wilford and Julian Gibson suspending C;

(g) On 4 December 2018 Sarah Wilford threatening C with dismissal by letter inviting him to a disciplinary hearing;

(h) On 20 December 2018 Sarah Wilford issuing C with an 18 month final written warning.

165. We find that DT did not threaten the Claimant with disciplinary action during telephone calls or emails sent in June, July or August 2018. DT had made a reasonable request for the Claimant to provide a document that DT reasonably believed the Claimant was in possession of. The requests were repeated by DT following emails chasing DT, which became increasingly urgent in tone.

166. As found above, DT did not threaten the Claimant with disciplinary action. He did state that it was a possible outcome of the failure to provide the document. DT did so after being advised that this was a possibility. In evidence the Claimant accepted that the tone of emails was moderate, and that DT had not in fact been rude or threatening, but, in his words, "arsey".

167. We find therefore that acts a to d did not occur as alleged.

168. In light of those findings, we do not need to consider the point in respect of the time limit. The Claimant accepted that those were outside the time period, however had submitted that the acts were one continuous action from the request to provide the reports, through to the investigation and onwards. Whilst

there was some force in that argument, we did not need to make a decision in respect of jurisdiction.

169. In respect of acts e and f, SW and JG instigated disciplinary proceedings against the Claimant and suspended him in a meeting on 30 August 2018. The facts as we found them are set out in detail above. By the time of that meeting, SE had received advice from MMN that the alleged failure to follow a reasonable management request was serious misconduct which could result in a written warning. In those circumstances, an investigation into potential misconduct was warranted.

170. We have found that it was not reasonable to suspend the Claimant in light of the facts known to the Respondent at the time. The Respondent ought to have taken the facts and submissions made by the Claimant in his grievance into account at an earlier stage, as CK was encouraging them to do. However, suspension was not appropriate in this case. There was no evidence to support the contention that the Claimant would destroy evidence or tamper with witnesses. He was already acting as FC's representative and had agreed that he had been sent the report when he had been acting as FC's line manager. There were no potential witnesses on whom the Claimant could have placed any pressure. The Claimant refused to provide the report. The Respondent could have obtained the report from other sources, for example during the disclosure process in the Tribunal itself. SW was not able to justify the reason for suspension in evidence. The Respondent's failure in considering the contents of the grievance alongside the disciplinary investigation resulted in an extended period of suspension.

171. In respect of the letter sent by SW on 4 December, SW explained that she had amended the charge from serious to gross misconduct on the basis that she considered the Claimant's grievance was vexatious. She had done so in a very short period of time as set out above. We find that there was no basis upon which SW could have considered the grievance vexatious. There was therefore in our view no basis upon which the allegation could have been raised to amount to gross misconduct, which could then warrant dismissal.

172. If SW had genuinely believed that that the Claimant's grievance had been vexatious, or if she had had any evidence to support that belief, that would have amounted a serious disciplinary offence under the relevant policy. The fact that SW chose not to investigate supports our finding that she did not in fact have any basis upon which to decide the Claimant's grievance was vexatious.

173. Having concluded that the Claimant's behaviour amounted to serious misconduct, SW issued him with a final warning. This was the most serious sanction available to her, in light of her decision.

174. We find that acts f, g and h could amount to detriments.

175. However, we must then consider whether or not any such detriment was for the "sole or main purpose" of preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so, or preventing or deterring him from taking part in the activities of an

independent trade union at an appropriate time, or penalising him from doing so" in accordance with s146(1) TULR(C)A.

176. In fact, SW had explored whether or not the Claimant could continue his union activities whilst suspended. She was advised that a suspension would not prevent the Claimant from undertaking such duties but that she did not need to facilitate that unless he made a specific request to do so.

177. In our view, the decision to suspend the Claimant was not made for the main or sole purpose preventing or deterring him from taking part in the activities of an independent trade union at the appropriate time. The main reason appears to have been a breakdown in the relationship between the Claimant and the Respondent, with SW giving further reasons relating to the Claimant tampering with evidence or witnesses, or being protected from accusations of such conduct.

178. SW amended the charge to gross misconduct as set out above, and therefore advised the Claimant in the relevant letter that if found proven, the Claimant could be dismissed. This decision was made after SW had formed the view that the Claimant's grievance could or did amount to a vexatious complaint. Whilst SW was not able satisfactorily to explain her reasoning behind this decision, it appears on the facts to have related to the poor picture painted by DT in respect of the Claimant's performance as a manager, the findings made by PR that the points within the Claimant's grievance were not upheld and the negative findings of the investigation by ZDS.

179. The Claimant himself adopted an unnecessarily abrupt and discourteous approach when dealing with the investigators and management throughout the process, which did not assist him. Again, we find that the detriment of being told that the Claimant could be dismissed was not applied to him for the sole or main purpose of preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so, or preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him from doing so" in accordance with s146(1) TULR(C)A.

180. Finally, the Claimant was given a final written warning following the disciplinary investigation. The purpose of that final warning was, we find, a reflection of SW's belief in the gravity of the conduct of the Claimant in refusing a reasonable management request in circumstances where the refusal could have had an impact on the Respondent's ability to defend a claim in the Employment Tribunal.

181. SW further believed that the Claimant had acted vexatiously in lodging a grievance immediately after finding out that he was going to be subjected to a disciplinary investigation. Whilst we find that her belief was not based on any evidence and was as such unfounded, it was clear that she found that the Claimant had acted in a dishonest way in light of the fact that his grievance was not upheld. We are satisfied that the Claimant was not subjected to a detriment of a final warning for the main or sole purpose of preventing or deterring him from being or seeking to become a member of an independent trade union, or

penalising him for doing so, or preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him from doing so in accordance with s146(1) TULR(C)A

182. In fact, we find that his Trade Union activities and facility time, whilst they were an issue that arose between the Claimant and DT, which could not be resolved, were not considered to be factors of any substantial weight in assessing the investigation or outcome of the disciplinary action.

183. In those circumstances, the claim is not well-founded and is dismissed.

.....
Employment Judge Beckett
London South
Dated: **17 May 2022**

Date sent to the parties
07 June 2022

For the Tribunal Office