# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | | **Respondent** |
|---|---|---|
| Mr T Hackett | AND | Ministry of Defence |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT** Bristol **ON** 16 to 20, 23 to 25 and 31 May 2022
Members meeting 8 and 30 June 2022

**EMPLOYMENT JUDGE** J Bax
**MEMBERS** Mr K Ghotbi-Ravandi
Ms L Simmonds

**Representation**

**For the Claimant:** Mr T Hackett (in person)
**For the Respondent:** Mr J Edwards (Counsel)

**RESERVED JUDGMENT**

**The judgment of the tribunal is that:**

1. The claims of direct race discrimination are dismissed.
2. The claims of direct age discrimination are dismissed.
3. The claims of harassment related to race are dismissed.
4. The claims that there had been a failure to make reasonable adjustments are dismissed.
5. By consent the claim for accrued but untaken holiday/that there had been an unlawful deduction from wages in relation to the same was well founded and the Respondent is ordered to pay the Claimant the gross sum of **£971.20.**

**REASONS**

1. In this case the Claimant, Mr Hackett, brought claims of direct race and age discrimination, harassment related to race, a failure to make reasonable adjustments, unpaid wages and a claim for accrued but unpaid holiday.

## Background and issues

2. The Claimant notified ACAS of the dispute on 18 February 2020 and the certificate was issued on 18 March 2020. The claim was presented on 15 April 2020.

3. At a preliminary hearing on 28 July 2021, the Respondent conceded that the Claimant was disabled by reason of diabetes. After hearing evidence it was concluded that the Claimant was not disabled by reason of depression, anxiety and stress at the material times.

4. The Respondent accepted that its informal and formal performance management procedures (PIPs) were a provision, criterion or practice ("PCP"). In closing submissions it was accepted that the requirement to attend disciplinary hearings was a PCP.

5. The parties agreed that the Claimant was owed £971.20 gross (£666.21 net) in respect of accrued but untaken holiday, which was the basis for his unlawful deduction from wages claim. The parties agreed for a Judgment by consent to be entered for this claim.

## Preliminary matters and matters arising during the hearing

6. At the start of the hearing the Claimant applied to adduce in evidence, videos of two or three public figures being interviewed on television. In the interviews they used hand gestures. The Claimant sought to rely on them on the basis that the gestures were similar to his own during various instances relevant to the issues in the claim. The Claimant suggested that those people were not accused of being aggressive and sought to rely on that as evidence he was not aggressive. We did not know whether the individuals were later accused of being aggressive. The application was opposed on the basis there was no probative value. We have discretion as to whether to admit evidence. To be admitted, evidence must be relevant to the issues to be determined. It must also be necessary to fairly determine the claim. The Claimant would be giving evidence and he could demonstrate what he did and cross-examine the witnesses on that basis. We took judicial notice that some people use their hands expressively when communicating. The people in the video clips, would not be in the same circumstances as the Claimant and none of the people in them were involved in this claim. It was highly unlikely that the videos would be of any relevance and would not be able to assist with what the Claimant did or did not do. There would not be any probative value in the evidence and the application was refused.

7. The Claimant had also received a statement from a potential witness who had indicated they would answer written questions but had remained silent as to the proposal for evidence to be given by video, despite being chased by the Claimant. On 18 May 2022, discussion took place about the relevance of the evidence. The witness had referred to an incident not referred to by the claimant in his claim and witness statement. A suggestion was also made as to whether the Claimant had gone through something similar to them. The witness was not in the same team as the Claimant but worked on the same floor for 6 months. The Claimant was unable to say what evidence the witness could give in relation to the allegations he was making, apart from a general suggestion. The effect of a witness order was explained to the Claimant. The Claimant took time to reflect on whether he was pursuing the application, whilst the Tribunal discussed it. The Claimant confirmed that he was not pursuing the application. It was confirmed to the Claimant that even if he had pursued it, the application would have been refused on the basis that the evidence was of marginal relevance at best and it would have been disproportionate to force the attendance of the witness in such circumstances.

8. At the start of the hearing the proposed timetable was discussed. The parties had unilaterally increased the bundle size and their witness statements were longer than originally permitted. Employment Judge Midgley granted extensions on 25 April 2022 for an increased bundle size and word limits for both parties' witness statements. The timetable provided that day 1 would be reading, days 2 and 3 for the Claimant's evidence. On day 3 there was scheduled 2 hours for the Claimant's witnesses, with the remainder for the Respondent's evidence, days 5 and 6 and 2 hours of day 7 were allowed for Respondent evidence, following which there would be closing submissions, deliberations and Judgment. Concern was expressed by the Judge, from the outset, about the need to carefully manage the time allowed. It was suggested to the Claimant that he wrote down questions he wanted to ask of each Respondent witness. It was explained that he could ask questions of the Respondent's witnesses which were closed, i.e. could be answered with yes or no. He was advised to ask short questions or break them up into parts. When giving evidence, the Claimant's answers tended to be ponderous and went off into tangents and there was a tendency to answer the question he wanted to be asked, rather than the one actually asked. As consequence the Claimant's evidence did not finish until 1445 on the 4th day. Before the Claimant started cross-examining he was asked if he had prepared questions and he confirmed he had. He was reminded that he did not have to ask open questions. When asking questions the Claimant generally sought to provide a lengthy narrative which was difficult to follow. Further on receiving an answer he generally made a lengthy comment as to why it was not correct. The Claimant was advised on many occasions that he needed to focus on the issues in the case and that he should ask shorter questions or split them into parts. He was also informed

that his comments after each answer were not evidence and that account would not be taken of them as matters of fact. It was explained to the Claimant on many occasions that making the comments and the length of the narrative for each question was taking up considerable time in his cross-examination and he was advised to refrain from making the comments and to focus his questions.

9. It became apparent that there would be insufficient time for deliberations and Judgment. It was raised with the parties that we could give a reserved decision and that the Tribunal wanted to conclude the evidence and submissions by the end of day 8, which would have given the Claimant nearly 4 days to cross-examine the Respondent's witnesses. The Claimant was reminded about the making of comments and the nature of his questions for each witness that gave evidence. On day 6 it was apparent that at best the evidence would be completed by the end of day 8 and it was suggested that the parties could provide written submissions. It was also canvassed whether the parties could attend for a further day of evidence.

10. At the start of day 7 there was an intention for the Respondent to call 3 witnesses. The claimant had said he needed about 2 ½ hours with Ms Ganfield, 2 hours with Ms Kehoe and 1 ½ hours with Mr Merrett. Ms Ganfield's evidence started at 0926. The Claimant either asked lengthy questions which were difficult to follow or he sat in silence for lengthy periods either looking at his questions or trying to find documents. The Claimant suggested that Ms Ganfield should have approached him about dropping down to a level 2. It was queried whether that was his case, because it appeared inconsistent with how he had been putting it to the witnesses and from the list of issues. The Claimant broke down and there was a break at 1045. After the break it was again explained that the question did not seem to fit with what he had been previously saying and the Claimant said that he had wanted to know why it had not been raised with him. The Claimant said he was OK to carry on. The Claimant then took lengthy periods of time to ask questions and he was encouraged to speed up because it was expected to hear from at least 2 witnesses that day. A further break was taken for the Claimant to reorganise himself.

11. On resumption it was explained that the timetable needed to be managed. He had been advised to write questions for witnesses, given extra time for asking questions of witnesses and a 9th day added to finish the evidence. He was reminded that it had been explained about the need to ask questions and not to make comments about the answers given on many occasions and that we needed to hear from the other witnesses. The Claimant had written questions and been given time to prepare, but progress needed to be made. The Claimant was informed that Ms Ganfield's evidence would need to be finished by 1330, which would have been 3 ½ hours cross-examination time. At about 1320 the Claimant wanted

to put to the witness points he did not agree with in her witness statement and the time was extended to 1345, at which point cross-examination stopped. Ms Kehoe then gave evidence from 1438 to 1705. A 9th day was added to the hearing and it was agreed that the parties would provide written submissions. The effect of this was that the Claimant had just over 5 days of cross-examination time for the Respondent's witnesses. Similar issues were encountered on the 9th day.

12. In the Respondent's closing submissions it was confirmed that a defence of justification to the age discrimination claim was not being relied upon.

13. The Tribunal had arranged to meet on 8 June 2022 in order to deliberate. On the morning of 8 June 2022, the Claimant applied for an extension of time to provide his reply to the Respondent's submissions. The application was on the basis that he was unwell. For the reasons set out in the order of the same date the Claimant was granted an extension until 1600 on 10 June 2022. The Claimant provided replies to the Respondent's written submissions and the Tribunal met on 30 June 2022 to deliberate.

**The evidence**

14. We heard from the Claimant. For the Respondent we heard from, Mr Coxon, Ms Ashby, Ms Smith nee Simmonds, Ms Martin, Ms Maddox-Bolton, Ms Porter, Ms Ganfield, Ms Kehoe, Mr Vercoe, Mr Merrett, Mr Heath, Mr Seton-Mead and Mr Short. We were also provided with a bundle of 1874 pages and any reference in square brackets within these reasons is a reference to a page in the bundle.

15. A significant dispute between the parties was whether the Claimant was aggressive in his interactions with some colleagues. The Claimant denied shouting/raising his voice or making aggressive hand gestures/pointing whilst doing so. During the course of his evidence the Claimant raised his voice in response to a question in cross-examination and shouted whilst pointing his finger at counsel, which was consistent with some of the allegations made against him.

16. The Claimant also sought to ask one of the witnesses the date something very distressing happened to them. The date and the event were not relevant to the issues in the case and it greatly upset the witness. With the witness absent, discussion took place with the Claimant about the relevance of the question and the Tribunal concluded it was not relevant and should not be asked. The Claimant continued to say it was relevant. After a break for reflection the Claimant said he did not want to ask the question and later apologised to the witness. The Claimant did not appear to be aware of the effect the question might have on the witness.

**The facts**

17. There was a degree of conflict on the evidence. 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.

18. The Claimant was disabled by reason of Type 1 Diabetes, at all times material to the claim, which he controlled by insulin injection. The Claimant needed to check his blood sugar levels regularly and could have episodes of hypoglycaemia. Most of the time he recognised the symptoms and could take action by taking sugary drinks or food. The effect of stress made it more difficult to control the effects of his diabetes.

19. Prior to starting his employment, the Claimant had passed his ACCA accountancy exams in 2002 and had 15 years' experience in various accounting functions and work. The Claimant had knowledge of software such as Microsoft Excel and Shared drive systems. He had also used various operating systems before joining the MOD. The Claimant was not a member of ACCA.

20. The Claimant's evidence was that he was assertive, had a loud tone of voice and used his hands to emphasise things he was saying. The Claimant asserted that this was a cultural trait. The Claimant, during the hearing, tended to have an average tone of voice and on occasions he did move his hands when speaking. On one particular occasion he raised his voice and shouted, whilst pointing his finger, at counsel for the Respondent. We accepted the evidence of the Respondent's witnesses that the Claimant had an average tone of voice and made average gestures. However, when he became frustrated or angry he raised his voice, would sometimes shout and his body language would become intimidating, it was likely that the effect would be greater in a small room. We accepted that his colleagues found his behaviour towards them aggressive and intimidating. We did not accept that this was a cultural trait.

21. The Respondent's Improving Performance Procedure included:

    (a) "When there is a dip in the performance level expected, in relation to either what the employee is delivering or how the individual is performing in relation to the DE&S behaviours, and the employee's performance is a cause for concern, the DM or FDO must address this at the earliest opportunity through informal management and feedback…"
    (b) Initiating this informal action as soon as performance concerns arise allows for feedback 'in the moment' and ensures that issues are dealt with in a timely manner and, in many cases, can also prevent the need for escalation to the formal procedure. When a dip in performance is

identified the DM/FDO should meet with the employee to raise and discuss concerns in a timely manner.

(c) If following the informal management action, performance still does not meet the required standard, this should be referred to the primary DM to initiate the formal Improving Performance procedure without delay.

(d) In the unlikely event that an assignment is due to come to an end during the Improving Performance period the primary DM will engage with the CFM/DFM to reach a pragmatic decision about whether the assignment is extended or not. The aim will be to ensure the individual is supported to improve their performance. It is expected that in most cases this will result in the assignment being extended during this period.

(e) DM means primary Delivery Manager and is responsible for monitoring and assessing the employee's overall performance against expectations and objectives set. They are responsible for dealing with performance concerns

(f) FDO means Function Development Officer, who is responsible for discussing and reviewing function objectives providing regular in the moment feedback on performance against objectives. They will offer support when required and provide regular feedback relating to function and personal development objectives

(g) the formal PIP process should be invoked in the following circumstances:

  (1) Where the employee's performance has not improved to the required level despite informal management action being taken;

  (2) Where previous concerns have been raised regarding the employee's performance, either in terms of delivery outputs or behaviours linked to the DE&S behaviours;

  (3) Where performance is causing significant safety, reputational risk, or operational concerns;

  (4) Where the employee has failed to maintain an essential qualification or registration for the role profile.

22. The Respondent's bullying and harassment policy, noted that bullying and harassment are among the offences likely to constitute gross misconduct under the Standards, Conduct and Discipline Policy [p1822]. It further detailed that "Summary dismissal on the grounds of misconduct is the usual penalty for allegations that have been substantiated as gross misconduct. A penalty other than dismissal will only be given in substantiated cases of gross misconduct cases in the most exceptional circumstances." [p1835]

23. The Claimant started his employment on 15 January 2018 as a level 3 within the Bespoke Trading Entity ("BTE") team within the FRET team in DE&S. It took a long time for DE&S to obtain funding, select and appoint a candidate to the role. There are 5 grades from level 1 to 5. Level 1 is an entry level grade and we accepted Mr Coxon's analogy that it was like riding a bicycle with stabilisers. Level 2 was more independent and likened to not having

stabilisers but with someone running alongside the bicycle and level 3 was independent. We accepted when an employee was new to the MOD in a level 3 role, in order to give them confidence, they would often go through levels 1 and 2 tasks so that they had full understanding when they started the level 3 work.

24. The Claimant had not worked in the public sector before and there were many new processes he needed to learn, however they were based on standard international accounting standards. The Claimant needed to use profit and loss accounts and balance sheets in the same way as any other business. The terminology used was different. The Claimant asserted that the methods were very different and that for journals dealing with accruals the Respondent did not input the debit first and the credit second. We accepted Mr Coxon's evidence that this was not the accounting concept. The standard accounting concept for accruals is that it is double entry and that both credits and debits are entered and that the entries should be of an equal value. We accepted that the way accounts were undertaken was not fundamentally different in the MOD as it was in any other business.

25. The Claimant's role was as a level 3 Financial Reporting Accountant and which involved supervising a level 2 staff member.

26. The Claimant's management structure was as follows: Mr Coxon was head of Financial Accounting in DE&S and his deputy was Ms Maddox-Bolton. The Claimant was line managed by Mr Moist, level 4, who reported to Ms Maddox-Bolton. The Claimant line managed Ms Porter, Senior Technician Finance Level 2. Ms Martin was a level 3 in the team, performing a different role to that of the Claimant. Ms Ganfield, senior professional level 5, was the Claimant's Functional Delivery Officer for the whole of his employment.

27. At the start of the Claimant's employment, Mr Coxon discussed the role with him and set out and his expectations. Mr Coxon hoped that the Claimant's 15 years of experience would stand him in good stead, notwithstanding he was new to the MOD.

*Training*

28. The Claimant's training was given in similar manner to any other new employee. We accepted that it was similar to that Ms Maddox-Bolton received when she joined the department. It was based on the information provided in his CV, which said he had 15 years' experience and passed his ACCA exams. When the Claimant started work he was assigned a 'buddy', Ms Carnell, who was also a level 3.

29. The Claimant was provided with training videos by Ms Salmond, a level 2 who had been temporarily covering the Claimant's role and she also gave

him training on journals and the PSS workbook. The Respondent required the permanent incumbent in the Claimant's role to be a qualified accountant; Ms Salmond was not a qualified accountant.

30. Ms Porter, who had been a level 2 for 9 months, gave the Claimant training on work up to level 2. She could not provide training on level 3 work, which was provided by Ms Martin and Ms Carnell. The Claimant would be required to supervise the work of those below him and to provide advice as to how to undertake that work. It was therefore essential that the Claimant understood how those employees undertook work on the journals and workbooks so that he could provide such advice. Therefore he needed to learn and understand what the level 1 and 2 employees did. Ms Porter started by going through everything to create and review a journal, although it was basic it was the foundation for other more complicated tasks. She spent many hours going through the basics and going through individual journals with the Claimant. By the end of February 2018 Ms Porter was giving the Claimant tasks on the journals, however he was not undertaking the tasks correctly and was missing errors in the information received by the department and she started to become concerned.

31. Ms Martin was also giving the Claimant further on the job training, however when Ms Martin would ask the Claimant to read back what he had done and explain it, he would refuse to do so.

32. Mr Coxon expected that picking up the basics of journal posting would normally take about 4 weeks, however the Claimant struggled with this and by May 2018 he was still unable to properly enact a journal. It appeared to Mr Coxon, that the Claimant did not have a basic understanding of accounting, because the same errors were repeatedly made. Given the Claimant's accounting experience, Mr Coxon expected him to quickly understand the level 1 and 2 work and start on the level 3 work.

33. On 13 March 2018, the Claimant was informed during that week they would concentrate on the HR side of things, including policy and his role as delivery manager for Ms Porter. The training involved running through how the civil service worked and activities required to be done as delivery manager. There was much background reading he would have to do in order to inform his own approach for him and Ms Porter [p170].

34. Due to concerns with the amount of progress made by the Claimant, Mr Moist, with the assistance of Ms Carnell, started to develop a new training tool, which they called an accelerated training plan. It was devised to try and train the Claimant more effectively and improve his outputs. It was necessary to do this in order to help the department meet its objectives and to assist the Claimant at the same time.

35. The Claimant, in March and April 2018, asked to be trained on 'SV and Trans <£1k workbooks' which were being used on the 2017/2018 accounts. He was told by Mr Coxon, that they were being phased out and it was a waste to train him on them. We accepted that this was because the workbooks were becoming obsolete and because the Claimant was struggling to get to grips with other work it did not make sense to train him in relation to them. When Ms Simmonds joined the team in May 2018, she was trained on the SV and Trans workbooks because her role required her to produce to 2017/2018 accounts and was leading on the audit. Ms Simmonds, therefore needed to know how to use those workbooks. Ms Martin trained the Claimant in relation to the new workbooks which were being used on the 2018-2019 accounts.

36. The Claimant needed to use a PSS workbook. Ms Porter demonstrated aspects to the Claimant, including the construction of the workbook. Mr Coxon accepted that Claimant might not have been shown how to send information back to the domains and how to attach backing data. We accepted the Claimant's evidence that he was not given all the information. The Claimant said this was deliberate to make him look like he could not do the job, we rejected that assertion and accepted that Ms Porter was trying to provide sufficient training to the Claimant.

37. The Claimant was working hard and undertaking long hours, however we accepted that he struggled to pick up the concepts and often made the same mistakes. We accepted that the Claimant was provided with significantly more training that new employees normally would receive. He received more 1:1 training than any other employee Mr Coxon could remember. The Claimant's colleagues spent a significant amount of time at his desk to answer his questions, which was over and above the work that they were expected to carry out. This was a particular issue for Ms Porter, who on some occasions spent up to 6 hours a day with the Claimant. She experienced a situation in which she would spend half an hour with the Claimant and then 30 minutes later he would ask for assistance again, which meant she had to work late in order to complete her own tasks. At the end of March 2018 it was agreed that the Claimant would speak to her between 1400 and 1500 each day, in order to enable Ms Porter to undertake her own work.

38. It was accepted by the Respondent that learning how the MOD works takes time and that there are many acronyms to learn. On 15 April 2018, at a probation review meeting the Claimant was told that he was on track. He had completed 98% of his mandatory MOD training.

*Other events which took place between January and May 2018*

39. In February and March 2018, the Claimant and Ms Porter focussed their work on journal processing and returning journals with errors back to their domains. The department process was to send e-mails in relation to journals from a multiuser account. This was because personal e-mail accounts had a limited capacity and the journal files were very large. The multiuser account was used to avoid personal e-mail accounts becoming clogged up and things being missed. On 2 occasions the Claimant asked Ms Porter to copy him in on all outgoing e-mails, in relation to the S&CC domain. Ms Porter explained to the Claimant that everything was in the multiuser account and that he needed to click on BTE and he could see everything there and that it was not feasible to copy in e-mails involving journals from the account. Ms Porter otherwise generally copied the Claimant into e-mails. The Claimant asserted that Ms Porter's refusal was because of his race on the basis that he had replaced Ms Salmond, a white woman, and Ms Porter did not take kindly to a black man replacing her manager; Ms Porter did not accept this. Other than referring to the allegations generally the Claimant was unable to provide a specific example of how it was racially motivated.

40. On 1 May 2018, Ms Carnell, as the Claimant's 'buddy', e-mailed Ms Maddox-Bolton about the output of the training exercises. It was recorded at the end of February they had raised concerns with Mr Moist about the Claimant's performance and training and she detailed a timeline of things done. Included in the e-mail was an analysis of work done on journals by the Claimant and by Amber, a level 1, unqualified apprentice school-leaver. The Claimant was taking on average 20 minutes per journal, whereas the level 1 was taking 8 minutes and they were both spotting a similar number of errors. We accepted that at this time the Claimant was still making the same mistakes.

<u>May 2018 to 15 November 2018</u>

41. In May 2018, Emma Simmonds, joined the department as head of the Bespoke Trading entity ("BTE") level 4, and became the Claimant's line manager.

*Training*

42. Ms Simmonds was aware that the Claimant was new to the MOD and although she had been told the Claimant had been trained, he had informed her that he had not received enough training. Ms Simmonds agreed that they should re-set the Claimant's training so that it could be reinvigorated. The training was based around the Claimant's CV. Ms Simmonds implemented the accelerated training plan [p176-177]. The plan identified that it was understood training had been patchy as part of the induction process due to pressure of workload. It was put in place to de-risk the impact

on the accounts and the team. They went through journals the Claimant had done and identified errors he had missed, so that he could understand what to do differently the next time.

43. The Claimant continued to be provided with training by Ms Porter, Ms Carnell and Ms Martin. We accepted that the training was extensive as demonstrated by Ms Porter's record between May and July 2018 [p198-204]. Ms Simmonds was also involved in the Claimant's training and we accepted her evidence that she had shown him some excel skills, however when she asked him to demonstrate for her on screen he refused, became agitated and left the floorplate. We also accepted that when Ms Simmonds ran through instructions and asked the Claimant to have a go, so she could check he had understood, the Claimant refused. The Claimant would then go away and make errors or ask others for help. The Claimant's refusal to demonstrate his learning made his training less effective.

44. Ms Porter was concerned that the Claimant did not appear able to grasp some of the basic fundamentals of finance, which a level 3 was expected to have, and that he was being comprehensively supported by a level 2. An example was on 11 June 2018, when the Claimant said that he had completed a ledger in line with his training, but on analysis a number of steps had been missed and there were obvious errors including formula errors. We accepted that during training by Ms Porter, if the Claimant did not understand the processes or the training was repeated he got upset and shouted at her and on one occasion she was upset enough to go home.

*Incidents which took place*

45. The Claimant's evidence was that at his mid-probation review it was agreed that he would prepare to get into a position to cover Ms Porters AP2 work whilst she was on leave in June 2018. The Claimant's evidence was that at the beginning of June, Ms Simmonds told him that he could not do this and could not lead the team and he was not working at the standard of a level 3. We accepted that the Claimant was still not spotting errors in journals and that Ms Simmonds needed to be confident that they were being spotted and remedied, so that errors did not appear in the accounts. Ms Simmonds told him that she felt confident he could do it after further training, but she could not allow the risk. The Claimant did not have the knowledge or expertise to undertake the task. We accepted that Ms Simmonds had observed that the Claimant was inconsistent in his work and needed more time to develop.

46. The Claimant said that in April or May 2018, Ms Simmonds, Ms Maddox Bolton and Ms Ganfield told him that he was not performing like a level 3 employee. We accepted Ms Simmonds evidence that she said something on the lines that he was not meeting her expectations in terms of behaviours and competencies and this was on the basis of her observations. We

accepted Ms Maddox-Bolton's evidence that she had explained to the Claimant that to be trained up to the level of his grade, he needed to understand some of the basic activities performed by the junior members of his team because it would allow him to explain and assist others as part of his role. Ms Maddox-Bolton also told the Claimant that he was not performing as expected. We accepted Ms Ganfield's evidence that she did not say something like this in about May, but did say something similar at the probation review meeting in July 2018. We accepted the evidence of Ms Simmonds, Ms Maddox-Bolton, Ms Ganfield and Mr Coxon that they did not tell the Claimant that he 'should know the operational issues being discussed because he was employed as a level 3.' The Claimant did not adduce evidence that words to the effect of 'not knowing', 'learning the job' and 'not done these tasks before' were used. Ms Simmonds, Ms Maddox-Bolton, Ms Ganfield and Mr Coxon accepted in their statements that they might have used such words because it was an accurate reflection of the situation. There was a lack of evidence as to when or in what context the words were used, we considered it likely that words to that effect were used when discussing new tasks with the Claimant. The Claimant was told that he was not performing at the level expected of him. We accepted the evidence of Ms Maddox-Bolton that they had been working on the basis of the 15 years' experience the Claimant had detailed on his CV and age did not come into it. The Claimant accepted that Ms Martin and Ms Carnell were of a similar age to him.

47. The Claimant's written evidence was that in about May or June 2018, Ms Martin gave him a task without any backing data. The Claimant's oral evidence was that in July he approached Mr Moist and was told that he was missing some data and Mr Moist then sent it to him. The Claimant's evidence was confused in this respect and we noted that Mr Moist ceased being the Claimant's line manager in May 2018. Ms Martin could not recollect setting the Claimant a task in May 2018, and we accepted that he was not in her team. Ms Martin accepted that it was possible the task had been set. She did not recall being approached for missing data, but if she had it would have been provided. We accepted that May is an extremely busy time of year. The Claimant suggested that he was being deliberately set up to fail, we rejected that assertion and accepted Ms Martin's evidence that everyone was working to tight deadlines, had a large amount of work to do and it was in no-one's interest to set him an impossible task. We accepted that the Claimant was asked to undertake the task, but concluded that any missing information was unintentional. The Claimant approached Mr Moist for assistance when he could not see how to do the piece of work. There was no evidence that the Claimant was criticised for this.

48. On 11 June 2018, Ms Simmonds e-mailed Ms Ganfield and said that she would monitor behaviours in the team and ensure the Claimant was copied in where appropriate. She also identified that the Claimant had been hostile

that morning, was struggling to complete tasks, a number of steps in his instructions had been missed and there were obvious errors. She queried whether a copy of the Claimant's qualification had been received by HR. It was noted that the Claimant was being quite hostile.

49. On 27 June 2018, the Claimant had a meeting with Mr Coxon at which he was advised that to successfully come off probation they needed to ensure that he was completing level 3 tasks.

50. In May/June 2018, Ms Simmonds received complaints from the Claimant that Ms Porter would not immediately stop what she was doing when he required assistance. We accepted Ms Porter's evidence that the Claimant did not like it if she did not immediately stop what she was doing. If Ms Porter asked for 5 to 10 minutes to finish what she was doing, he would tell her to come straight away. On 28 June 2018, Ms Simmonds had a meeting with the Claimant. Immediately following the meeting Ms Simmonds sent an e-mail saying: (1) that the Claimant had become frustrated with his staff member and he expected that she shows him how to complete the task and he can observe. Ms Simmonds had witnessed Ms Porter at his desk on many occasions. (2) the Claimant had called for a meeting when Ms Porter did not stop her task at his request and she said she would be over when she had finished what she was working on and he became frustrated with it. (3) During the meeting that the Claimant was rude and attempted to belittle her. He out of the blue sarcastically asked what the time was and when asked why, he asked the question again forcefully. This made Ms Simmonds feel uncomfortable, which she told him and put a stop to the meeting. The Claimant then said he normally left at four, but at the time of writing the e-mail (1706) he was still in the office. We accepted that this was an accurate account and that the Claimant had stared at her and asked what the time when the meeting was in mid-flow. When Ms Simmonds asked why, he continued to stare at her and asked the question again. We accepted Ms Simmonds' evidence that he was staring her down which she found intimidating. It was only after she had ended the meeting and said she was uncomfortable that the Claimant sought to back track on what he had said and done.

51. On 2 July 2018, the Claimant sent Mr Coxon a list of concerns that he had. In the concerns he referred to not being trained on the SV and Trans <£1k workbook whereas Ms Simmonds had been. Mr Coxon responded that Ms Simmonds would be producing the 17/18 accounts and leading on audits and at the time the Claimant was focussing on journal process. The Claimant also referred to Ms Porter not copying him in on all outgoing e-mails to S&SC and suggested he was being undermined. Mr Coxon asked why the Claimant thought he was at a disadvantage when all e-mails went through the multiuser account and he could see them there. The Claimant did not respond. We accepted that Mr Coxon explained to the Claimant

about the use of the multiuser account. He also spoke to the team to ensure that the Claimant was getting the information he needed and it was in the multiuser account.

52. On 2 July 2018 Mr Coxon e-mailed Ms Elgood, case worker. Mr Coxon was concerned about the Claimant's ability to perform as a level 3 and said, "If my concerns on his ability were in the margins I would always be prepared to give him the benefit of the doubt, however in this case there is a significant gulf. This is now impacting on the wider team and delivery of work. I am concerned that by extending his probation for 3 months it will exasperate the situation for all concerned especially as Trevor (in my view) will not successfully pass his probation." Mr Coxon referred to concerns about his performance, including that: (1) he was currently working at what was expected from a new Level 1 rather than Level 3 and increasing the complexity of work would cause increased stress for him, (2) having worked in finance for many years, there was not tangible evidence he would perform effectively in the role and (3) he had demonstrated limited initiative and needed high level support from colleagues to the extent where they were completing the bulk of the task for him, he struggled with basic reconciliations and did not respond well to priorities. He also referred to team morale being affected and individuals were being spoken to in a way that was not appropriate. The time taken providing support was detracting from team outputs and resulting in excessive hours worked. We accepted that this was Mr Coxon's genuine opinion.

53. Ms Elgood replied that it had been indicated that the probation period would be extended and suggested that the next 3 months were used to test and document the Claimant's capabilities so that any potential decision to dismiss was based on tangible evidence. She said he should be given level 3 work which was achievable within a three-month timeframe. We accepted Ms Simmonds' evidence that although an employee might be on track at 3 months there could be underperformance thereafter and it was at that point staff were expected to become more independent.

54. On 2 July the decision was taken to move the line management of the Claimant to Mr Coxon and Ms Maddox-Bolton. The Claimant had a meeting with Mr Coxon to explain this and was told that the Respondent wanted to bring the Claimant's 15 years accountancy experience to the fore. The decision was taken due to the incident involving Ms Simmonds and the disproportionate amount of time the team were spending supporting the Claimant, which was preventing them from focussing on their own work. The Claimant's line management responsibilities were removed to reduce the pressure on him so he could concentrate on the deliverables in his role.

55. On 4 July 2018, Ms Elgood e-mailed Dale Coxon, referring to an informal discussion with the Claimant ahead of his end of probation meeting. Ms

Elgood recorded that the meeting did not go well and said "Trevor dominated the conversation, despite being asked to listen and be respectful of others on a number of occasions. Trevor was aggressive in both tone and gesture, loud and accusatory, blaming his member of staff, Sophie, for frustrating his abilities to achieve and denying that Emma has previously spoken to him about his performance. … I told him that I was not impressed by his confrontational attitude and he would have to work on his listening skills if he was going to improve his performance. He ignored my comments and, at no time, modified his manner." It concluded by saying there were real concerns in allowing the Claimant to undertake the delivery manager role, "Given that he is blaming Sophie for his poor performance, we do need to protect her going forward, and also protect Trevor from a complaint of bullying and harassment, as he appears to have no idea of the impact that his manner and leadership style has on others."

56. The Claimant's line management officially changed on 8 July 2018 and he moved desks so that he was next to Ms Maddox-Bolton. From this time Ms Maddox-Bolton personally provided training and support to the Claimant, which initially consisted of 2 hours in the morning and 1 hour in the afternoon. We accepted Ms Maddox-Bolton's evidence that the Claimant was taking on board what she was saying. Mr Coxon also provided informal support and advice. During this time the Claimant's objectives remained the same, but his line management had changed.

57. In July, queries were raised about the Claimant's qualification. Ms Ganfield had identified that the Claimant passed his ACCA exams, but could not find any reference to him being an affiliate or a member. The Claimant informed the Tribunal that he had never been an affiliate or member of ACCA.

58. During July 2018, the Claimant indicated to Mr Coxon that he wanted to move roles and was advised it was likely he would need to stay in his role until he completed his probation.

59. On 24 July 2018, the Claimant attended an end of probation meeting with Ms Ganfield and was accompanied by a trade union representative. The Claimant did not consider that he had received adequate training. He referred to PSS and that he was not shown the full workings of the workbook on the charter contract. He was told that journals were level 1 and 2 work and PSS was level 3. In the meeting the Claimant's representative asked what was necessary for the Claimant to be signed off as a level 3 and was told that it was being able to do level 3 work at the expected standard. The Claimant said he was not being given that level of work. The Claimant was told that, as previously explained, the training plan took him through each level, which meant he had to understand how to post journals (level 1 work) so that he could advise others in his level 3 role. They needed to be confident in his level 2 work before he could be handed level 3 work and he

was still making mistakes. It was important to address it before moving forwards as it could risk the integrity of accounts or result in inaccurate advice being given. The Claimant was told that it was not expected he would be an SME (subject matter expert) from the outset and the training plan was to get him there, but they could not move forward with the training plan to the SME level until they knew he was ready.

60. In the meeting Ms Ganfield referred to just being informed of the Claimant's diabetes and asked if they needed an occupational health assessment. The Claimant responded by saying he did not want to discuss it and his health did not affect his work.

61. It was concluded that the Claimant had not progressed in the way that was expected, he was struggling in the role and not performing at the level expected of a level 3. We accepted that it was not sustainable for the Claimant to be engaged as a level 3, but only operating at level 1 or 2. The Claimant, in evidence accepted that he was not undertaking level 3 work, but said it was because he was not being given it. We accepted the Respondent's evidence that the Claimant was struggling with level 1 and 2 work and therefore he could not be given the supervisory and more technical level 3 work. The Claimant's probationary period was therefore extended.

62. On 30 July 2018, the Claimant's employment was formally extended by 3 months. The letter said that there were remaining issues regarding his development within his level 3 role and his ability to meet objectives.

63. On 9 October 2018, Ms Ganfield e-mailed Ms Harris saying the Claimant's performance had improved and it was likely his probation would be completed and asked her to attend. Ms Harris said that if probation had been successfully concluded there was no need for her to attend. Ms Ganfield checked with Ms Maddox-Bolton as to whether it was likely the Claimant would pass his probation, to make sure the case worker did not need to attend. The Claimant asserted that this was an inconsistency and Ms Maddox-Bolton was being told he would fail. This was not the case and the Claimant had misinterpreted the e-mails.

64. On 11 October 2018, Ms Maddox-Bolton wrote that she had assessed the Claimant's performance against the DE&S competencies based on the past 9 months, but more specifically on the 3 months she had line management of him. She concluded that he was not a clear fail, but considered his competence was more suited to a level 1 or 2 role, where judgment was not an essential factor. She attached her assessment against the criteria, which included both positive and negative factors. We accepted Ms Maddox-Bolton's evidence that his behaviours had improved, but there was still some way to go to meet the level 3 competencies.

65. In an e-mail dated 15 October 2018, Ms Ganfield wrote that it was not a clear pass of probation for the Claimant and said, “Although Trevor is progressing and improving he is still not fully operating in the level 3 (PII) space and exhibiting more level 2 (SAS) characteristics when assessed against the DE&S professional.” Guidance was sought as to whether he could be moved to a level 2 role and whether it was an option. We accepted that the options open to the Respondent after an extension of probation were to either confirm the employee in their position or say that the probation period had been failed.

66. On 19 October 2018, the Claimant attended an end of probation meeting and it was confirmed that he had passed. It was hoped that with clear objectives the Claimant would continue to improve. The Claimant was told that his current objectives were limited and they would reasonably increase and he could expect to deliver 50% more as standard and he should focus on getting quicker. Ms Ganfield accepted that it was implicit that by passing probation the Claimant was capable and able to deliver for the business.

67. The same day Ms Maddox-Bolton sent an e-mail identifying objectives for the next 6 months, with the following areas for improvement: (1) Leadership and that he needed to expand his knowledge, (2) Working together and developing communication skills, (3) Business Acumen Delivery Focus developing on getting quicker, and (4) Business Acumen Delivery Focus – building wider knowledge and developing his ability to use judgment/improve processes and problem solve efficiently.

68. On 23 October 2018 the Claimant attended a mid-year Performance Annual Review (“PAR”) meeting. Discussion took place about the developmental areas identified in the e-mail dated 19 October 2018.

69. On 15 November 2018 the Claimant, at his request, was redeployed to the Air BTE team. The Claimant’s line manager (delivery manager) was Mr Merrett. The Claimant was line manager to Ms Ashby, level 2. Also in the team was Mr Chappell (level 2) and Ms Long (level 1). Mr Merrett reported to Mr Vercoe, Deputy CFO Air (level 5).

70. The Claimant suggested that there had been a plan to remove him from his role and replace him with Ms Porter. In September 2018, Ms Porter temporarily took over Ms Martin’s role. We accepted that Ms Porter was not a qualified accountant and that at the date of the Tribunal hearing she had not finished her exams and therefore could not be permanently appointed to the Claimant’s role. Ms Porter was appointed to a permanent level 3 role in a different department in April 2021.

Period 15 November 2018 to 4 March 2019

71. At the start of the Claimant's new role, Mr Merrett spoke to him about Ms Ashby and her performance. Ms Ashby had been recently diagnosed with a disability and was not always able to attend work. It was hoped that the Claimant could bring on Ms Ashby's performance. The Claimant spent time observing Mr Merrett and was receiving training from him. Mr Merrett was concerned that the Claimant was slower in demonstrating his level 3 competence than other level 3 employees. We accepted Mr Merrett's evidence that the Claimant's predecessor, Mr Richards had no MOD experience when he joined the team but his performance was markedly better than the Claimant's within 2 months, whereas the Claimant had 9 months MOD experience when he joined the team. We accepted that it was taking longer for Mr Merrett to pass tasks over to the Claimant and that by January 2019 things were going into reverse. The Claimant was given regular feedback 'in the moment' and was advised on ways in which he could work more efficiently. Ms Ashby and Mr Chappell also gave the Claimant training in relation to the processes used by the team.

72. One of the tasks Ms Ashby had responsibility for was the Consolidator tab in what was known as the Flash document, which was saved on the shared drive, to which all members of the team had access. The team received financial data from each of the domains in the department and when the information was received it was put into a respective tab in the Flash. When the data had been received from all of the domains, Ms Ashby would drag it from the respective tabs and insert it into the consolidator tab. We accepted the Respondent's evidence that a separate file was never created for the consolidator and that the Claimant was wrong in this respect. The Claimant asked Ms Ashby to inform him when she had prepared the December 2018 consolidator so that he could review it before it was uploaded. The Claimant's evidence was that Ms Ashby ignored this request, however we concluded that the Claimant had misunderstood the process and that the way the December consolidator was prepared was by the method described above and was in accordance with the designed process. We did not accept that Ms Ashby said that she had been on auto-pilot in the following conversation. We also did not accept that Ms Ashby told the Claimant that she was not there to do administration work, a significant part of Ms Ashby's role was to undertake administration work.

73. In November 2018, Mr Merrett asked the Claimant to make sure that the contact list for the domains was up to date, that it was not urgent and he could delegate it. On 28 November 2018, the Claimant asked Ms Ashby to do the task and told her it was not urgent. Ms Ashby spoke to Mr Merrett about the task, because she was undertaking priority work and was told not to worry about it. The Claimant chased Ms Ashby for the list on 14 December 2018. We accepted that the task was eventually undertaken. We rejected that Ms Ashby said that she was not there to do admin tasks.

74. The Claimant also asked Ms Ashby to use a control sheet, in relation to receiving forecasts from the delivery teams, that he had prepared and to put it on the team whiteboard. There was a formula within the Flash which turned the box green if a forecast had been received and red if it had not. Ms Ashby spoke to Mr Merrett about the use of the control sheet because it was duplicating work and if the information was recorded on the control sheet only the Flash would not be up to date. Mr Merrett told Ms Ashby not to use the control sheet. Ms Ashby showed the Claimant how the formula worked on the Flash.

75. The Claimant asserted that these incidents were upwards bullying and he believed that it was because he was a black man giving her instructions.

76. In the run up to Christmas 2018 Ms Ashby and Ms Long approached Mr Merrett in tears after interactions with the Claimant. We accepted that when the Claimant was frustrated he raised his voice and shouted at Ms Ashby and she felt his behaviour was aggressive. Some of these incidents occurred in public areas. These incidents became the subject matter of a later complaint.

77. Mr Merrett did not initially see the Claimant's concerns about Ms Ashby as significant, in that it was the Claimant's responsibility to manage her. When Ms Ashby and Ms Long approached him in tears, Mr Merrett spoke to the Claimant and suggested that he might need to change his management style and that if he could develop a better rapport he might get a different response from them.

78. On 8 January 2019, Ms Long and Ms Ashby stayed late to compete commentary packs, because Ms Ashby had been delayed by assisting the Claimant. The next day she discovered that her work had been deleted and replaced by the Claimant's work. On 9 January 2019 the Claimant wanted a 1:1 to meeting with Ms Ashby and she agreed to attend in a public area. The Claimant became angry and told her that she had been disregarding basic instructions, blamed her for mistakes said she was on a PIP and if there was no improvement her PAR would be affected, this caused her to well up with tears. The incident was on the boat deck, in front of other people who were eating their lunch. Ms Ashby then informed Mr Merrett that she did not want the Claimant to be her line manager.

79. In early January 2019, Mr Vercoe became aware that members of the team were complaining about the Claimant's behaviour and conduct towards them. On 11 January, Mr Vercoe arranged a meeting with the Claimant and Ms Ashby to try and conciliate the situation. Ms Ashby said she would continue the relationship if the Claimant apologised. The Claimant stared at

the floor for 10 seconds and then muttered he was willing to give the professional relationship another go.

80. On 17 January 2019, a team huddle meeting took place which included the Claimant and Ms Ashby. Discussion took place about where the Claimant had saved a document. Ms Ashby subsequently complained that the Claimant had become angry and was shouting at her and said this was a further example of finger pointing at her. She left the meeting in tears and then decided to work from home for the rest of the day. Mr Merrett was aware of the incident.

81. On 17 January 2019, Mr Merrett e-mailed Ms Ganfield of the Functional Management Team, referring to 3 incidents reported to him, the urgent need to mediate/investigate between the Claimant and 2 of his direct reports and it was likely Ms Ashby would raise a grievance. He also said that the Claimant's performance since starting the role had been poor and was slow to improve. Mr Merrett believed that the way in which the Claimant was engaging with Ms Ashby and Ms Long was making them feel intimidated. A mediator was not appointed because events were superseded by Ms Ashby's formal complaint. Ms Ganfield spoke to Mr Merrett about the situation and we accepted her evidence that she did not form a view and tried to remain impartial.

82. On 28 January 2019, Ms Ashby made a formal complaint against the Claimant. She made further complaints on 15 and 20 February. A full log of the complaints was sent on 20 February 2019 [p378-384], and included allegations of aggression towards Ms Ashby in both public and private places and included "pin-pointing" her. Mr Short, Domain Functional Manager (Executive Officer level 1) was appointed as decision manager for the complaint. He worked in a different domain to the Claimant and had not met him or the witnesses before.

83. On 30 January 2019, Mr Merrett and Ms Ganfield had a meeting with the Claimant, at which they discussed the objectives he had been given at the end of his probation period. It was noted that he needed to increase his speed and that there needed to be more delegation to his team. The Claimant raised issues with his team members and was advised that as a level 3 there was a reasonable expectation that he should manage those things. The meeting was concluded on 5 February. The Claimant did not want to discuss health and wellbeing issues and confirmed that he did not have membership status with ACCA. In February 2019, Ms Ganfield asked Ms Kehoe, finance business partner for Air ISTAR portfolio, to help the Claimant demonstrate that he was suitable for a level 3 role.

84. On 8 February 2019, Mr Vercoe had a meeting with the Claimant, during which he tried to draw out what line management experience the Claimant

had, however he would not elaborate. Mr Vercoe formed the view that the Claimant's current role was his first proper supervisory role.

85. On 15 February 2019 the Claimant attended a daily huddle meeting with Mr Vercoe and Ms Ashby. Ms Ashby had provided a draft list of errors she had discovered on the Flash, after having been asked to fix any she had found. The Claimant had amended it on 13 February 2019. Ms Ashby discovered that some formulas had been hardcoded and various other niggly errors. Mr Vercoe mentioned that he had been given the list of errors. The Claimant asked to see it and Mr Vercoe said it was Ms Ashby's and that he thought she could share it. The Claimant then leant forwards in his chair, raised his voice 3 fold and wagged his finger at Ms Ashby. Mr Vercoe considered that the Claimant had been speaking aggressively and said so to him, to which the Claimant replied he was being passionate.

86. Mr Vercoe asked the Claimant to arrange a meeting to discuss the Flash. Mr Vercoe had also told Ms Ashby not to have 1:1 meetings with the Claimant. We accepted Ms Ashby's evidence that after 15 February 2019, Mr Vercoe had told her not to work on the Flash with the Claimant. On 19 February 2019, Ms Ashby and Mr Chappell attended a meeting with the Claimant at which the Claimant wanted to discuss the errors on the Flash. Ms Ashby told the Claimant that she would not work on the Flash because Mr Vercoe was not there. Both Ms Ashby and Mr Chapelle left the meeting. The Claimant followed up the meeting with an e-mail to Mr Vercoe [p374] in which he said they voiced their disquiet and disregarded team working. In her complaint, Ms Ashby described that the Claimant had shouted at her. We accepted that the Claimant shouted on this occasion.

87. As a consequence Mr Vercoe arranged a meeting with the Claimant and Mr Chappell on 21 February 2019, to try and understand the issues with the Flash and to stop the dispute. It became apparent that version control was an issue. The Claimant had brought a version of the Flash with him to the meeting, which was different to the one on the shared drive, and was asked if he had amended it. The Claimant said he had not amended it and Mr Vercoe said he did not believe him. It appeared to Mr Vercoe that the version the Claimant had was different to the one on the shared drive. At the meeting, Mr Chappell commented that he had helped the Claimant on a number of occasions. The Claimant responded loudly by saying that Mr Chappelle had lied. Mr Chappell responded by saying he would not stand being spoken to like that and it was the last time he would help him. Mr Chappell then left the meeting. At this stage it appeared to Mr Vercoe that the Claimant's position in the team was becoming untenable.

88. After the meeting Mr Vercoe checked the version history on the shared drive. He saw that the Claimant edited the Flash on 13 February 2019, Ms Ashby reviewed, but did not amend, it on 15 February and it was not

amended again until after the meeting on 21 February. The Claimant had not edited the master copy but had saved his own copy locally.

89. On 22 February 2019, the Claimant attended a meeting with Ms Ganfield at which he was placed on an informal PIP. The Claimant considered it was unreasonable to put him on an informal PIP because he had only just started his new role. Ms Ganfield considered that it was appropriate because although he had been in the role since November 2018, he had been in a level 3 post since the start of his employment in January 2018. The concerns related to the Claimants performance and were focused on the objectives raised at the end of his probation period and his working relationships with the team. On 1 March 2019, the Claimant e-mailed Ms Ganfield and said that he was still learning the role and the decision was harsh and referred to push-backs from Ms Ashby which were impinging his role. Ms Ganfield replied on 19 March 2019 and advised the Claimant how he could deal with the issues by approaching her FDO and an approach to Ms Ashby could have been agreed.

90. After the meeting with Ms Ganfield, Mr Vercoe spoke to the Claimant about the Flash. Ms Ashby confirmed she had colour coded the parts in the Flash to be reviewed and the Claimant had kept his own copy and the content was not different. This was confirmed to the Claimant and he said he had his own copy offline. Mr Vercoe advised the Claimant that keeping offline copies was a potential error trap.

91. On 22 February 2019, Ms Ashby attended an investigation meeting with Mr Short.

92. On 24 February 2019, Mr Vercoe sent an e-mail to Mr Tregower, Air Domain Senior HR officer, referring to passionate exchanges, but after what the Claimant said to Mr Chappell he had lost the support of the wider team. He said, if the team did not support the Claimant he could not do his wider job. Mr Vercoe did not think it was fair to manage him on a PIP because team management could not be properly assessed. He said that they might have to remove the Claimant from his supervisor role.

93. Mr Vercoe considered that the working relationships between the Claimant and the team were ineffective and not conducive to the Claimant proving he could come off the informal PIP. Mr Tregower suggested that the Claimant could be moved to a level 3 cost controller role for the Sentinel Delivery Team in the Air ISTAR project. Ms Kehoe was influential in persuading Mr Dell, the Air ISTAR team leader, to allow the Claimant to join the team.

<u>4 March 2019 to the end of the Claimant's employment</u>

94. On 4 March 2019, the Claimant was moved to the Cost Control Lead on the Air ISTAR project role. The team was run by Mr Heath. Mr Seton-Mead, operations manager, was the Claimant's DM. Ms Ganfield remained the Claimant's FDO, despite the Claimant moving to a different function, on the basis that there was an overlap between finance and accounting and cost control.

*Training*

95. On starting with the team Mr Heath and the other senior managers sought to assist the Claimant. The Claimant's role involved looking at all finances to see how money moved in and out of the accounts and to publish journals. The Claimant was taking over from Mr Ingram. A handover period would normally be a week, however Mr Ingram remained in the department for nearly 3 months and the Claimant had an extended handover period and during that time he shadowed Mr Ingram. There were also two experienced level 2 employees in the team, who provided support and assistance to the Claimant. A training programme was set up in relation to specific DE&S work. The Claimant also received training from Mr Scott from one of the domain teams and Mr Hardy.

96. We accepted Mr Heath's evidence that some of the training given by Mr Ingram was not sufficient to allow the Claimant to do tasks later on. The PCR (Project Cost Review) package was brand new to all members of the team, and it had replaced an older package, QRPC. The PCR package relied on information being put into the core system, from which an extraction pack was created which populated tables with future expenditure, risks, costs and variance. When the tables had been populated it was given to Mr Heath to provide a narrative. The Claimant had observed Mr Ingram using the package, but had not done a live demonstration with him. When the Claimant needed to populate the tables he had been unable to pull the correct figures from the core system. Mr Heath set up a meeting to assist the Claimant and they obtained manual figures. We accepted Mr Heath's evidence that the Claimant was the only cost control lead having trouble generating the pack and that although the others had used the PCR predecessor, the PCR was easier to use.

97. We accepted that the Claimant was given a large amount of training and had a handover period far in excess of what was normal.

98. Even though the Claimant had moved to a different area of the business it was decided that the informal PIP should continue. Ms Ganfield considered that the only way the Claimant would be able to develop and come off the informal PIP was for him to work in a new team. Putting the Claimant in a new team would give him a fresh start with new people. Mr Dell decided it would be beneficial to keep the existence of the informal PIP confidential

from the new team so that he could start with a clean slate. To achieve this Mr Dell asked Ms Kehoe to support the Claimant in relation to the informal PIP because she had expertise as the Air ISTAR Finance Business Partner. Ms Kehoe was the interface between the delivery team leaders and their cost control leads and was well placed to observe the Claimant's work and help him to demonstrate he was performing at a level 3. We accepted that Mr Seton-Mead did not have the technical knowledge of Ms Kehoe. Ms Kehoe was not the Claimant's primary delivery manager, which was the person under the policy who would normally manage a PIP. We accepted Mr Heath's evidence that Mr Dell wanted to give the Claimant the best opportunity to join the team and to be an unknown quantity rather than having performance concerns, so that he could join in a normal manner.

99. On 7 March 2019, the Claimant attended a harassment investigation meeting with Mr Short and was accompanied by Mr Burgess, a trade union representative. The Claimant either did not recollect the alleged incidents or had a different recollections to Ms Ashby. The Claimant raised that he is not softly spoken and sometimes people think he is aggressive. Mr Burgess said he had a number of sessions with the Claimant to try and address character traits which could be seen as aggressive. [p1416-1417]

100. On 19 March 2019, the Claimant attended an informal PIP meeting with Ms Ganfield at which he did not want to discuss the PIP and said it was not appropriate for it to continue. Following the meeting Mr Burgess e-mailed her saying he had some concerns about the Claimant being under stress and not eating properly which had aggravated his diabetes.

101. On 25 March 2019, Ms Ganfield informed the Claimant that the informal PIP process would restart for a period of 4 weeks [p436].

102. During March 2019, the Claimant came across an acronym, CSSF, of which he did not know the meaning. The Claimant's colleagues also did not know the meaning and he approached Ms Kehoe. There was a dispute of fact as to what occurred. The Claimant's witness statement said that he had been spoken to in a demeaning way which made him feel belittled and humiliated, however he did not give evidence as to what was said. When cross-examining Ms Kehoe, the Claimant suggested that Ms Kehoe said things along the lines of, 'you don't know what it means, you must know did Dave Ingram not explain' and she then asked someone else'. Ms Kehoe did not recall the Claimant coming to her about a CSSF acronym, but disputed that she ever would have ridiculed him. We accepted Ms Kehoe's evidence that she did not know what CSSF stood for and still did not know at the final hearing. We accepted that the Claimant asked what CSSF meant and considered it likely that Ms Kehoe said she did not know what it meant and asked others. We considered it unlikely that Ms Kehoe made the comments suggested by the Claimant and did not accept that he was ridiculed.

103. On 29 March 2019 Mr Short informed the Claimant that he had decided to instigate an independent investigation into the allegations made by Ms Ashby and that he would hear from an Harassment Investigation Officer ("HIO"). This was because the Claimant had denied the allegations. Mr Short then started the process to appoint an independent HIO who was external to DE&S. This was a process which required approval, and once given HR suggested independent HIOs from which Mr Short could select one.

104. On 29 March 2019, Mr Burgess wrote to Ms Ganfield and said that the Respondent could not have both an extended probation period and PIP and raised concerns about the Claimant's diabetes being a disability. On 1 April 2019, Mr Burgess said in an e-mail that there should not be a PIP until Occupational health had reviewed the Claimant and suggested that there protected characteristics of race, disability, sex, religion and belief and age. He proposed a 6 month pause.

105. On 2 April 2019, the Claimant asked Mr Seton-Mead if he would come to an informal PIP meeting , to which he agreed but said he needed to speak to Ms Ganfield first. After speaking to Ms Ganfield, Mr Seton-Mead told the Claimant that he did not think it would add value and he did not think he needed to attend.

106. On 2 April 2019, the Claimant suffered a panic attack and later that day a hypoglycaemic episode.

107. On 4 April 2019 Occupational Health prepared a report in relation to the Claimant. It was said that stress could have an adverse effect on diabetes control and could cause low blood sugars and that the Claimant had been suffering from a degree of work stress. It was also said that the Claimant was aware of how to manage his diabetes and he kept appropriate drinks and snacks. No other adjustments could be suggested, although it was recommended the Claimant carried out a stress risk assessment. Ms Ganfield received the report on 17 April 2019 and sent the Claimant a link to the stress assessment tool. The Claimant did not complete it and we accepted his evidence that he did not get around to doing it. This was despite his trade union encouraging him to do it [p857].

108. On 10 April 2019, Ms Ganfield sent the Claimant sent the Claimant details of what she wanted to discuss in an informal PIP meeting the following day, to which the Claimant provided written responses [p609-613].

109. On 29 April 2019, Ms Ganfield held an informal PIP meeting with the Claimant and Ms Kehoe. They discussed who could be approached for 360° feedback and agreed with the Claimant who could be approached. Ms

Ganfield asked what the Claimant was still learning because he had been in the team for 8 weeks. The Claimant said that his learning was ongoing. The Claimant was told that Mr Ingram would not always be there and that he needed to start using his judgment to review project options independently and training could not be provided for every scenario. It was also noted that by this stage the Claimant was still not understanding the terminology and when pressed he displayed poor behaviour by being aggressive and agitated [p738].

110. The Claimant said that the evidence of his performance provided on 10 April 2019 [p610-613 and 741] was ignored. In the Claimant's responses he had provided information about the work he had been doing. We accepted that Ms Ganfield did not see the document at page 741 at the time, but she read and considered the documentation provided to her. Ms Ganfield was assessing the Claimant against the four objectives set at the conclusion of the probationary period. There were concerns that the Claimant was not being proactive in meetings and was not planning work. Ms Ganfield did not consider that the Claimant was meeting the standard required of a level 3 and we accepted that she informed the Claimant of this. We did not accept that the Claimant's targets were changed.

111. On 1 May 2019, Mr Bryce was appointed as HIO and he interviewed Ms Ashby on 15 May 2019 [p1422-1427].

112. On 8 May 2019, Ms Ganfield started to receive 360° feedback and did not consider all of it was positive, but there was nothing they were not aware of regarding performance and behaviour.

113. On 16 May 2019, Ms Ganfield and Ms Kehoe had a meeting with the Claimant at which a summary of the 360° feedback was given. The Claimant was told that he was not performing to the level expected of a level 3 and that he would be moved to a formal PIP. Ms Ganfield did not consider that the Claimant's performance had sufficiently improved and she based that decision on reports she had received from the Claimant's delivery manager and his direct reports. We accepted that Ms Ganfield took into account all of the information she was provided with.

114. On 22 May 2019, Ms Ganfield wrote to the Claimant and informed him that a formal PIP was being started. She said that he had not meet the standard expected for the four objectives and invited him to a meeting on 4 June 2019. After a discussion with the Claimant and Mr Seton-Mead on 29 May 2019 the Claimant was advised that the PIP would be paused. This was confirmed in an e-mail dated 31 May 2019 and was said to allow him more bandwidth to concentrate on the grievance case and it would be picked up again when it was completed. It was noted that some of the Claimant's behaviour was not appropriate and he was asked to deploy more

calmness in meetings. The meeting scheduled for 4 June 2019 did not take place.

115. We accepted the Claimant's evidence that he felt under constant pressure and that the criticism was a cause of pressure and it was causing him stress and led to him going off sick and having psychological problems. He also had an increase in hypoglycaemic episodes.

116. By June 2019, Mr Heath had become increasingly concerned that the Claimant was not performing at the level required, in that his work did not seem to be improving or progressing. On 10 June 2019, Mr Heath e-mailed Ms Ganfield and said that he was concerned about the delay to the PIP because it was leaving Sentinel in a difficult position for a protracted period. It was noted that the Claimant was willing to work hard and worked long hours, however he failed to deliver against deadlines and had problems managing his time. His biggest concern was the amount of support required and referred to him and Mr Seton-Mead spending days with helping the Claimant to prepare the PCR pack and they had done the majority of the work themselves. He considered that the Claimant was 'overfaced' by the appointment and if left to lead his team without support many of the Sentinel accounts would be out of date and incorrect in a short period.

117. The Claimant was becoming distressed and on 10 June 2019 was in tears on the floorplate. Mr Heath was concerned and e-mailed Ms Ganfield and said he was beginning to fear for his well-being and he was struggling to support Sentinel to the best of his abilities and was being pressured from all sides.

118. On 16 June 2019, the Claimant was interviewed by the HIO [p1433-1440]. During the meeting the Claimant informed Mr Bryce he had an important medical appointment and the interview was suspended at 1710 and reconvened on 2 July 2019. The Claimant had a full opportunity to provide his version of events in relation to the allegations. He explained about the instructions he had given Ms Ashby and that he considered her behaviour was upward bullying. He denied being loud and aggressive and said that because he was from Jamaica he was not softly spoken and it was his personal disposition. He denied shouting and deleting Ms Ashby's work. On 19 February 2019 he said that it was Ms Ashby and Mr Chappell who were being insulting and bullying a level 3. He referred to a rift between Ms Ashby and Dr Long. Ms Ashby ignored his instructions. Ms Ashby was often off sick and did not call him, but would call Mr Chappell who would pass the message on.

119. On 19 June 2019, Mr Heath e-mailed Ms Ganfield in which he said, "You might like to be aware that financial work is slipping here with things not getting done and other work being done by other people because we

know that they will not be completed by the required deadlines. More importantly I am seeing and hearing the impact on the wider team and have just had one member of my commercial team burst into tears because she has been unable to expedite a payment to Raytheon which is stuck in the finance process. I know you are aware that things are not good here on the finance side but I fear the situation is now adversely affecting the people and the output."

120. On 26 June 2019, the Claimant attended an inventory meeting with Ms Kehoe and Mr Crane. The Claimant was the cost control lead and as such was responsible to ensure that the system was updated in line with the forecast. There was a dispute between the parties as to whether the Claimant had updated the figures and who had raised the issue. The Claimant's evidence was that it was Ms Kehoe who had raised the issue when he had already updated it. Ms Kehoe's evidence was that the chair raised the issue. Ms Kehoe's evidence was that the Claimant did not say it had been done. When it was put to the Claimant in cross-examination that when he was asked it about it he said nothing, his reply was that there was no need because he knew it had been done. We considered the Claimant's version of events was unlikely, if he had updated the figures it was likely he would have provided an explanation. We preferred Ms Kehoe's account. The chair raised that the figures were not updated and we accepted that the Claimant had not done so. Ms Kehoe asked the Claimant about it and he did not provide an explanation. The Claimant said he had done it, but on checking with the delivery team, Ms Kehoe was told that it had not been done.

121. After the meeting, Ms Kehoe arranged a further meeting on 23 July 2019, at which the Claimant was asked if he had been able to get the figures and he said nothing. On 31 July 2019, Mr Crane helped the Claimant put the correct figures in the accounts.

122. The Claimant sought assistance, with some of the work he undertook as a cost control lead, from Mr Eldridge, who was based in Lincolnshire. Mr Eldridge told the Claimant that he was willing to assist and would visit Abbey Wood, Bristol and that there were other things he could do in Abbey Wood. The Claimant agreed a date and time with Mr Eldridge. We accepted that, taking into account travelling time, it would take 2 days out of Mr Eldridge's duties to assist the Claimant and involved overnight stays. Ms Kehoe accepted that guidance could be sought from colleagues but it needed to be within reason. We accepted that Ms Kehoe did not stop Mr Eldridge providing assistance to the Claimant, but she considered that skype or telephone was more appropriate. Ms Kehoe spoke to Mr Eldridge's delivery manager as to whether there were other things he could do at Abbey Wood and was told that it was not in the interest of the public purse to send Mr Eldridge to Abbey Wood. Ms Kehoe told Mr Eldridge that there was no need

to make a specific trip to provide assistance and he did not travel to Abbey Wood. Ms Kehoe considered that there were many people in Abbey Wood who could assist the Claimant and had been given considerable training by Mr Hardy, who eventually refused to assist the Claimant after being accused of looking at the Claimant's iPad. There were also people in the ISTAR delivery teams who could have assisted.

123. On 1 July 2019, Mr Dell sent an e-mail to HR about the Claimant. He considered that the Claimant's performance was below the required standard and referred to work being produced late and being poorly compiled with numbers not adding up, resulting in it being re-written a number of time and being reviewed by multiple people, he had inadequate knowledge of how to account for an inventory and managed his time poorly. He referred to the Claimant saying he did not have enough support, but considered it untrue and referred to almost 3 months of handover and support by many others. There was reference to the Claimant being extremely rude. He had a tendency to ask for information late and then be rude when it was not produced. It was said that the team was at the end of its tether. He saw a person who was out of their depth and was using a mixture of aggression and rudeness to cover the position. In 43 years he had not seen another person who had such a detrimental effect on a team in a short space of time. He concluded by saying it was time to 'grasp the nettle' and address the issue immediately because of the adverse impact on the team. Further that there was a widely held view that the Claimant had not demonstrated professional or leadership skills required of a level 3 and whilst HR might have good reasons the impact on the team and business outputs was unacceptable. In cross-examination the Claimant said that the expectation was unreasonable because he was new and the PCR process was also new.

124. On 11 July 2019, Mr Seton-Mead sent an e-mail stating his concerns about the Claimant's health and referred to an emotional breakdown after losing some work through no fault of his own. On speaking to the Claimant, it became apparent the Claimant was having a hypoglycaemic episode and the emergency services were called. He understood symptoms could be brought on by stress and he did not think the pressure of the role was helping. [p969-970]

125. On 17 July 2019, Mr Bryce sent Mr Short his investigation report, having conducted interviews with Dr Long, Mr Merrett, Ms Porter, Mr Chappell and Mr Vercoe, in addition to those with Ms Ashby and the Claimant. Of the 11 allegations Mr Bryce considered that there was corroborating evidence for 8 allegations, one was partially corroborated and the remainder uncorroborated [p1403-1411].

126. On 29 July 2019 the Claimant was sent a copy of the report by Mr Bryce and was invited to confirm the contents were correct by 13 August 2019. The Claimant asked for some extensions which were granted and he was given until 15 October 2019 to provide them. No comments were received and the report was confirmed as final on 17 October 2019. Mr Short considered that 11 weeks was sufficient time for the Claimant to provide any comments.

127. On 16 July 2019, the formal PIP restarted and the responsibility for the process was handed over to Mr Seton-Mead.

128. On 26 July 2019, Occupational Health provided a report following a referral about the Claimant's stress symptoms. The Claimant had said that the PIP was increasing his levels of stress. He reported that the stress related symptoms were having an impact on the control of his diabetes. He made had some changes to his insulin regime and it was expected that would improve the management of the diabetes. He was working his full normal hours and was fit for them. It was recommended that a stress assessment was completed. A prompt resolution of the outstanding investigation was likely to be helpful.

129. On 1 August 2019 Ms Kehoe conducted a deep dive review meeting of the Private Sector Support (PSS) forecast against budget and funding. The Claimant's evidence was that at the meeting Ms Kehoe said he had not received PSS updates, when she knew that he was not the person who would receive them and it was said to suggest he had not been doing his work. Ms Kehoe's evidence was that the meeting related to the in-year process, with which the Claimant was not involved, and he had been invited so that he got a feel for what happened at the meetings. The parties agreed that the Claimant would not have received the figures. Ms Kehoe probably said that the Claimant did not have the updates because that was an accurate position. We did not accept Gp Cpt Bennett said that she was being unfair.

130. A PIP meeting, on 6 August 2019, took place with Ms Ganfield and Mr Heath (standing in for Mr Seton-Mead). The Claimant asked how he could raise concerns about being on the formal PIP. Ms Ganfield took him through the areas which needed improvement. The Claimant said that the role had not been sufficiently explained to him. During the meeting the Claimant refused to answer some questions and he ended up shouting, which Mr Heath considered was aggressive. We accepted Mr Heath's evidence that the way the Claimant was generally presenting during the Tribunal hearing was not how he presented when he was angry and that when he shouted it became oppressive and intimidating. We accepted Mr Heath's evidence that when the Claimant was angry and lost his temper he was a different character.

131. In mid-August 2019 the Claimant had been involved in an incident with his trade union representative at which it had been alleged he had made threatening remarks. Mr Heath was asked to get the Claimant to a meeting with HR in order to avoid the MOD police attending to take him to it. Mr Heath found the Claimant, who broke down. Mr Heath took the Claimant to a quiet place and had a lengthy chat with him. During the conversation Mr Heath suggested that the Claimant could consider taking a drop in grade which would make it professionally easier for him in terms of management of people and the demands of the role. We rejected the Claimant's evidence that Mr Heath said that he would deny saying it if the Claimant repeated it. We accepted that Mr Heath said this because he could see the Claimant was struggling in his role and he was concerned about his health and wellbeing.

132. On 20 August 2019, the Claimant attended a PIP review meeting with Ms Ganfield and Mr Seton-Mead. Mr Seton-Mead said that he did not think the Claimant was proactively engaging with conversations with the team or leading it. Reference was also made to the Claimant, in a meeting, blaming a level 1 for not delivering something outside of their remit.

133. Following the meeting, the Claimant was signed off sick with work related stress and he returned to work on 23 September 2019.

134. On 30 September 2019, the Claimant attended a formal PIP review meeting. A PIP meeting scheduled to be heard on 7 October 2019, did not go ahead because the Claimant had training scheduled at the same time. The meeting was reconvened for 9 October 2019, but on the morning the Claimant said he had decided to work from home.

135. On 14 October 2019, Mr Heath arranged a meeting with the Claimant, Mr Seton-Mead and Mr Mallett in order to assist the Claimant with creating the PCR pack for in year performance in relation to planned and actual expenditure and financial risk profiles. In meetings the Claimant had a tendency to focus on his laptop and not the conversation taking place. There was a dispute between the parties as to whether the Claimant was asked to bring a notebook on which he could take notes or to bring a paper copy of the report. We accepted that the Claimant had difficulty reading the fine print in the reports. We accepted Mr Heath's evidence that he asked the Claimant not to bring his laptop and to bring a notebook to take notes in. The idea for the meeting was for Mr Heath to provide figures to the Claimant and to discuss them, at which Mr Heath wanted the Claimant's full attention. We did not accept that the Claimant was asked to bring paper copy of the reports. We accepted that the request was intended to relate to that meeting only.

136. The Claimant took his laptop to the meeting and used it to take notes and view documents in any event, and he was not stopped from doing so. We rejected the Claimant's evidence that Mr Seton-Mead and Mr Mallett joined him and Mr Heath later. We accepted Mr Heath's and Mr Seton-Mead's evidence that all four of them were present the whole time. During the meeting it appeared that the Claimant was concentrating on his laptop rather than the discussion. Mr Seton-Mead was concerned that he was not getting any responses from the Claimant and asked him what he was doing. The Claimant said that he was looking at an e-mail in relation to TLRFP, which was a different project and nothing to do with the meeting. We accepted that the Claimant had a deadline in relation to TLRFP and concluded that he became distracted by the e-mail and was reading and considering what it said. The Claimant was informed that the purpose of the meeting had been to assist him with the PCR. Mr Heath asked him to read back the notes he had taken at which point the Claimant became agitated and said his laptop had crashed.

137. There was a dispute as to whether the Claimant asked for Mr Heath's notes and we preferred the evidence of Mr Heath and Mr Seton-Mead. The Claimant asked for the notes and he was provided with a copy shortly afterwards. The Claimant shouted at Mr Heath. He was staring and leaning forwards towards Mr Heath and Mr Seton-Mead. Mr Seton-Mead moved backwards due to feeling intimidated. Mr Heath and Mr Seton-Mead considered that the Claimant was being aggressive.

138. The Claimant alleged that Mr Seton-Mead had said he had been told to just bring pen and paper and he should not have brought his laptop. We rejected that evidence and accepted Mr Seton-Mead's evidence that there was discussion as to whether the Claimant had taken notes and whether he had lost them when his laptop crashed.

139. In response to the Claimant's behaviour Mr Heath ended the meeting and as he was leaving the Claimant said words to the effect that he could see what they were doing and they were ganging up on him. Mr Seton-Mead tried to calm him down, but the Claimant continued to be angry, which Mr Seton-Mead found to be aggressive and threatening.

140. On 15 October 2019, the Claimant sent a doctor's note which said that he had problems with his eyesight. We accepted the evidence of Mr Heath that the first he was aware of the issue was that day. The Claimant asserted that he had told Mr Seton-Mead about problems with his eyesight after a meeting with him and Ms Maddox-Bolton. The Claimant was unable to say when that meeting was but it was the first meeting he had with Ms Maddox-Bolton when she became Finance Business Partner. Mr Seton-Mead denied being told this prior to 14 October 2019. It was unlikely Mr Seton-Mead was told this before the meeting on 14 October 2019.

141. On 16 October 2019, Mr Seton-Mead sent an e-mail to HR in which he said that the Claimant had been aggressive in the meeting. He said that he had become increasingly aggressive and he was feeling personally threatened by the behaviour and wanted guidance.

142. After Mr Bryce confirmed that the Claimant had not responded to the investigation report, Mr Short considered it. On 17 October 2019, Mr Short concluded that there was a case to answer and the Claimant should attend a disciplinary hearing.

143. On 17 October 2019, Mr Young, head of financing and accounting function, e-mailed Mr Short asking what the next steps were. He said, "As you know my view is that within DE&S policy which states "zero tolerance" so if case found, we should now suspend him immediately on gardening leave, but assuming he will exercise right of appeal of decision, but without prejudging outcome our approach should be dismissal in accordance with the Conduct and Discipline Policy." We accepted that Mr Short interpreted this to mean that he was being referred to the guidance in the policy that if bullying and harassment is found it is taken as gross misconduct and if so it should normally amount to dismissal. Mr Short interpreted it as the policy being zero tolerance and not that he was being instructed to dismiss the Claimant.

144. On 22 October 2019, Mr Short e-mailed Mr Tregower asking him to cast his eye over his letter inviting the Claimant to attend a disciplinary hearing. In the e-mail he said he had quoted the breach as being a breach of the bullying and harassment policy and asked if it was correct. The Claimant suggested that this meant Mr Short was not sure of his wrongdoing. We accepted Mr Short's evidence that he was an accountant and not an HR specialist and was checking at each stage to ensure that he was following the correct process.

145. On 24 October 2019, the Claimant was suspended and was informed that this was because the allegations involved potential gross misconduct. He was informed it was not an assumption of guilt and he would remain on full pay.

146. The same day he was invited to attend a formal disciplinary meeting on 7 November 2019. He was informed of his right to be accompanied and that on the day he should ensure he was in good health to be able to fully engage [p1569].

147. On 29 October 2019, the Claimant informed Mr Short that he had been signed off work as unfit by his GP until 17 November 2019. Mr Short rescheduled the disciplinary hearing to 22 November 2019. The Claimant

was informed that he could send written representations or attend by telephone. The Claimant was informed that an occupational health referral would be made.

148. On 12 November 2019, the Claimant's GP signed a fitness to work statement saying he would not be fit to attend work for a month [p1615].

149. Mr Short asked Ms Ganfield to arrange an occupational health report and a telephone appointment took place on 18 November 2019. The report identified that the Claimant was diagnosed with anxiety, depression and stress and he was waiting for counselling sessions. The Claimant attributed his symptoms to work related issues. It was considered he was not currently fit to return to work or participate in disciplinary procedures, but it was not possible to say when that would change. It was considered that the impairment was unlikely to be a disability. If further occupational health advice was required consideration should be given for a referral in a further 6 weeks' time.

150. On 22 November 2019, Mr Short sought advice from HR. Mr Gwinnell advised Mr Short that if further advice was sought that would be in January with the disciplinary issues unresolved and he could say the situation was compounded. The Claimant's request for a different date was a key e-mail. Mr Short responded by saying : "from my perspective I think we need to hold the disciplinary hearing next week as planned. Trevor's condition is due fully or in part to the disciplinary process that he is going through. Unless we hold the hearing , that will continue to be the case and his condition will not improve and we won't be able to progress. As you mention I have detailed on a number of occasions that there are alternatives open to him rather than attending the hearing in person … and I plan to go back to him on that basis unless you have any objections."

151. On 25 November 2019, Mr Short e-mailed the Claimant and said that although the occupational health report said he was unfit to attend there was no timescale as to when he would be. It had been explained that the condition was due to work related issues including the disciplinary hearing. He therefore planned to hold the hearing on 28 November 2019 as it would complete that part of the process and give him clarity as to where he stood. The Claimant responded by saying he was unfit and the decision was contrary to the occupational health advice. Mr Short responded that that there was no confirmation as to when he would be able to attend. Further that the prospect of the disciplinary hearing hanging over him was adding to his anxiety and holding it at the earliest opportunity would remove the issue and that postponing indefinitely would run counter to his duty of care. We accepted Mr Short's evidence that this was his belief and that he had taken into account what had been said in the reports.

152. We accepted the Claimant's evidence that he felt mentally unable to deal with the hearing, was feeling suicidal and that he found the issue devasting. He said he was still having some hypoglycaemic episodes, however he did not give any specific evidence. The Claimant did not give any evidence that he had any hypoglycaemic episodes in mid to late November 2019 and there was no supporting evidence in the Occupational Health report, which was silent on the issue of diabetes. It was unlikely that the Claimant had a hyperglycaemic episode between 18 November and 3 December 2019.

153. On 27 November 2019, the Claimant said he would attend by telephone and sent written representations [p1669-1678]. In the written submissions he set out his position in relation to managing Ms Ashby and that he believed she had raised a false and vexatious claim to draw attention away from her performance issues. He said that the allegations were attributed to his cultural background. He provided comments about the allegations. He said that there was collusion against him. The Claimant provided a log of events he had with Ms Ashby. We accepted that Mr Short read and considered the documents before the start of the hearing.

154. The Claimant attended the disciplinary hearing on 28 November 2019 by telephone. At the hearing the Claimant was asked if he wanted to add anything else and was given an opportunity to state his case. The Claimant maintained that he had not bullied or harassed anyone and referred to Ms Ashby's performance and behaviour was harassment. The Claimant was told that all of the evidence would be reviewed and decision would be sent within about 5 days.

155. On 29 November 2019, the Claimant sent an e-mail saying he was fit and available for work and wanted it to replace his sicknote. The Claimant gave evidence that this was because he was going on to half pay, which we accepted.

156. The Claimant was invited to attend an outcome meeting, but said he was unwell. Mr Short therefore sent a letter dated 3 December 2019, in which he was informed the allegations were substantiated and that the Claimant was dismissed for gross misconduct.

157. Mr Short accepted in cross-examination that Ms Ashby might have raised the complaint to deflect attention away from her performance issues. We accepted Mr Short's evidence that he considered that the events had occurred and that they constituted bullying and harassment. Eight of the events had been corroborated by other witnesses. He considered that the aggressive behaviour was at odds with the culture and expectations within the MOD. The Claimant had not recognised his wrongdoing and he considered it extremely unlikely, if the Claimant's employment continued,

there would be any change. Mr Short considered the cultural characteristics, but concluded others were perceiving him as aggressive due to shouting, tone of voice, facial expressions and body language.

158. On 23 December 2019, the Claimant appealed against the decision to dismiss him. The Claimant in addition to raising matters about the individual allegations said that the complaints related to the way he spoke which was perceived to be loud and aggressive and was attributed to his cultural background and ethnicity. His complaints about Ms Ashby had not been investigated and it would have been more proportionate to give him a warning.

159. The appeal was heard on 30 January 2020 by Ms Ball and at which the Claimant attended. On 6 February 2020, the Claimant was sent a letter informing him that his appeal had been refused and the decision to dismiss stood.

Time

160. The Claimant's evidence, which we accepted, was that he did not approach ACAS earlier because he wanted to go to work and he hoped he could address the work related matters. We rejected the Claimant's evidence that he did not know about the Tribunal process in April 2019, he was being advised by his union and had advised the Respondent on 4 April 2019 that they were considering notifying ACAS to protect his position. It was unlikely that he was not informed about the Tribunal process by his union at that stage. We accepted that the Claimant had been brought up to see the good in people.

**The Law**

Discrimination claims

161. The claim alleged discrimination because of the Claimant's race, age and disability under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complained that the Respondent had contravened a provision of part 5 (work) of the EqA. The Claimant alleged there had been direct race and age discrimination, harassment related to race and a failure by the respondent to comply with its duty to make reasonable adjustments.

162. As for the claim for direct disability 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.

163. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

164. The provisions relating to the duty to make reasonable adjustments are found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

Direct Discrimination

165. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably, on the ground of his disability, than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

166. We approached the case by applying the test in Igen v Wong [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

"*(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.*"

167. In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More

than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. As to the treatment itself, we had to remember that the legislation did not protect against unfavourable treatment per se but less favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (Law Society-v-Bahl [2004] EWCA Civ 1070).

168. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The Supreme Court in Royal Mail Group Ltd v Efobi [2021] UKSC 33 confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remained binding authority.

169. In Denman v Commission for Equality and Human Rights and Ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the "more" which is needed to create a claim requiring an answer need not be a great deal.

170. The function of the Tribunal is to find the primary facts and then look at the totality of those facts to see if it is legitimate to infer that the acts or decisions were done/made on prohibited grounds (Qureshi v Victoria University of Manchester [2001] ICR 863). In terms of drawing inferences, in Efobi v Royal Mail Group Ltd [2021] ICR 1263 in which after referring to Wisniewski v Central Manchester Health Authority [1998] PIQR 324 it was commented that, "Tribunals should, as far as possible be free to draw, or decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books before doing so."

171. In every case the tribunal has to determine the reason why the Claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question." It is for the claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and

Ors v Wong), i.e., that the alleged discriminatory has treated the claimant less favourably and did so on the grounds of the protected characteristic. Did the discriminator, on the grounds of the protected characteristic, subject the claimant to less favourable treatment than others? The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07). The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

172. "Could conclude" means that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

173. The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see Madarassy-v-Nomura International plc and Osoba-v-Chief Constable of Hertfordshire [2013] EqLR 1072). At that second stage, the Respondent's task would always have been somewhat dependent upon the strength of the inference that fell to be rebutted (Network Rail-v-Griffiths-Henry [2006] IRLR 856, EAT).

174. We needed to consider all the evidence relevant to the discrimination complaint, that is (i) whether the act complained of occurred at all; (ii) evidence as to the actual comparator(s) relied on by the claimant to prove less favourable treatment; (iii) evidence as to whether the comparisons being made by the claimant were of like with like; and (iv) available evidence of the reasons for the differential treatment.

175. Where the Claimant has proven facts from which conclusions may be drawn that the respondent has treated the Claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden, it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the

balance of probabilities that the protected characteristic was not a ground for the treatment in question.

176. The circumstances of the comparator must be the same, or not materially different to the Claimant's circumstances. If there is any material difference between the circumstances of the Claimant and the circumstances of the comparator, the statutory definition of comparator is not being applied (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337). It is for the Claimant to show that the hypothetical comparator in the same situation as the Claimant would have been treated more favourably. It is still a matter for the Claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

177. When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why' something happened (see Fraser-v-Leicester University UKEAT/0155/13/DM).

178. We were referred to Lee v Ashers Baking Co Ltd [2018] UKSC 49, in which the Supreme Court held that the refusal to make a cake with the words 'Support Gay Marriage' on it was not direct discrimination on the grounds of sexual orientation. In particular were referred to paragraph 25:

*"25. The District Judge also considered at length the question of whether the criterion used by the bakery was "indissociable" from the protected characteristic and held that support for same sex marriage was indissociable from sexual orientation (para 42). This is, however, to misunderstand the role that "indissociability" plays in direct discrimination. It comes into play when the express or overt criterion used as the reason for less favourable treatment is not the protected characteristic itself but some proxy for it. Thus, in the classic case of James v Eastleigh Borough Council [1990] 2 AC 751, the criterion used for allowing free entry to the council's swimming pool was not sex but statutory retirement age. There was, however, an exact correspondence between the criterion of statutory retirement age and sex, because the retirement age for women was 60 and the retirement age for men was 65. Hence any woman aged 60 to 64 could enter free but no man aged 60 to 64 could do so. Again, in Preddy v Bull [2013] UKSC 73; [2013] 1 WLR 3741, letting double-bedded rooms to married couples but not to civil partners was directly discriminatory because marriage was (at that time) indissociable from hetero-sexual orientation. There is no need to consider that question in this case, as the criterion was quite clear. But even if there was, there is no such identity between the criterion and sexual orientation of the customer. People of all sexual*

*orientations, gay, straight or bi-sexual, can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation."*

179. We were also referred to Onu v Akwiwu [2016 UKSC 31], in which it was held that it was held that the reason for the less favourable treatment had been the Claimant's precarious immigration status rather than their race. In particular we were referred to paragraph 26:

*26. Clearly, however, there are many non-British nationals living and working here who do not share this vulnerability. No doubt, if these employers had employed British nationals to work for them in their homes, they would not have treated them so badly. They would probably not have been given the opportunity to do so. But equally, if they had employed non-British nationals who had the right to live and work here, they would not have treated them so badly. The reason why these employees were treated so badly was their particular vulnerability arising, at least in part, from their particular immigration status. As Mr Rahman pointed out, on behalf of Mr and Mrs Akwiwu, it had nothing to do with the fact that they were Nigerians. The employers too were non-nationals, but they were not vulnerable in the same way.*

And as noted at paragraph 27, that was enough to dispose of the direct discrimination claim.

180. To be a proxy for race, the manner of the Claimant's speech must be indissociable from his race.

Harassment

181. Not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (Bakkali-v-Greater Manchester Buses [2018] UKEAT/0176/17).

182. As to causation, we reminded ourselves of the test set out in the case of Pemberton-v-Inwood [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the

conduct to have been regarded as having had that effect, then it should not be found to have done so.

183. It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in Grant-v-HM Land Registry [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in Betsi Cadwaladr Health Board-v-Hughes UKEAT/0179/13/JOJ.

Reasonable adjustments

184. In relation to the claim under ss. 20 and 21 of the Act, we took into account the guidance in the case of Environment Agency v. Rowan [2008] IRLR 20 in relation to the correct manner that we should approach those sections. The Tribunal must identify

(i) the provision, criterion or practice applied by or on behalf of the employer; or
(ii) the physical feature of the premises occupied by the employer,
(iii) the identity of the non-disabled comparators (where appropriate); and
(iv) the nature and extent of the substantial disadvantage suffered by the claimant;

before considering whether any proposed adjustment is reasonable.

185. It is necessary to consider whether the Respondent has failed to make a reasonable adjustment in applying the PCP and whether reasonable steps were taken to avoid the substantial disadvantage to which a disabled person is put by the application of the PCP (Secretary of State for Justice v Prospere UKEAT/0412/14/DA).

186. We have also been reminded that, in the context of defining a PCP, a 'practice' has been said to imply that an element of repetition was involved (Nottingham City Transport-v-Harvey [2013] Eq LR 4 and Fox-v-British Airways [2014] UKEAT/0315/14/RN).

187. In Ishola v Transport for London [2020] EWCA Civ 112 the Court of Appeal held.

*35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims*

*based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits. Mr Jones' response that practice just means "done in practice" begs the question and provides no satisfactory answer. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice". It is just done; and the words "in practice" add nothing.*

*36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.*

*37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.*

*38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises.*

*Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.*

*39. In that sense, the one-off decision treated as a PCP in Starmer is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of the element of repetition about it. In the Nottingham case in contrast to Starmer, the PCP relied on was the application of the employer's disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way.*

188. In relation to the second limb of the test, it has to be remembered that a Claimant needed to demonstrate that he or she is caused a substantial disadvantage when compared with those not disabled. It is not sufficient that the disadvantage is merely some disadvantage when viewed generally. It needs to be one which is substantial when viewed in comparison with persons who are not disabled, and that test is an objective one (Copal Castings-v-Hinton [2005] UKEAT 0903/04).

189. Further, in terms of the adjustments themselves, it is necessary for them to have been both reasonable and to operate so as to avoid the disadvantage. There does not have to have been a certainty that the disadvantage would be removed or alleviated by the adjustment. A real prospect that it would have that effect would be sufficient (Romec-v-Rudham UKEAT/0067/07, Leeds Teaching Hospital NHS Trust-v-Foster [2011] EqLR 1075 and First Group v Paulley [2017] UKSC 4).

190. It was not generally considered reasonable to have required an employer to make an adjustment which might cause there to be a drop in standards of competence (Hart-v-Chief Constable of Derbyshire UKEAT/0403/07/ZT).

191. Schedule 8, paragraph 20 of the EQA provides

*Lack of knowledge of disability, etc.*
*20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—*

*(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;*
*(b) in any other case referred to in this Part of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*"

192. Para 20(1) says that the employer will only come under the duty to make reasonable adjustments if it knows not just that the relevant person is disabled but also that his or her disability is likely to put him or her at a substantial disadvantage in comparison with non-disabled persons. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known). In view of this, the EAT has held that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:
(i) first, did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?
(ii) if not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially? (Secretary of State for Work and Pensions v Alam [2010] ICR 665, EAT)
It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments.

193. Ignorance itself is not a defence under this section. We have had to ask whether the Respondent knew or ought reasonably to have known that the Claimant was disabled. In relation to the second part of that test, we have had to consider whether, in light of Gallop-v-Newport City Council [2014] IRLR 211 and Donelien-v-Liberata UK Ltd [2018] IRLR 535, the employer could reasonably have been expected to have known of the disability. In that regard, we had to consider whether the Respondent ought reasonably to have asked more questions on the basis of what it already knew and we have had in mind Lady Smith's Judgment in the case of Alam-v-Department for Work and Pensions [2009] UKEAT/0242/09, paragraphs 15 – 20.

194. We also had regard to the EHRC Code of practice on employment paragraph 6, relating to the duty to make reasonable adjustments (2011).

Time

195. Under section 123 of the Equality Act 2010 a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates (s. 123 (1)(a)). For the purposes of interpreting this section, conduct extending over a period is to be treated as done at the end of the period (s. 123 (3)(a))

and this provision covers the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

196. In a claim under s.20, time starts to run for the purposes of s.123 of the Act from the date upon which an employee should reasonably have expected an employer to have made the adjustments contended for (*Matuszowicz-v-Kingston upon Hull City Council* [2005] IRLR 288 and *Abertawe Bro Morgannwg University Local Health Board-v-Morgan* [2018] EWCA 640), which may not have been the same date as the date upon which the duty to make the adjustments first arose. Time does not start to run, however, in a case in which a respondent agreed to keep the question of adjustments open and/or under review (*Job Centre Plus-v-Jamil* UKEAT/0097/13)

197. The relevant law relating to early conciliation ("EC") and EC certificates, and the jurisdiction of the Employment Tribunals to hear relevant proceedings, is as follows. Section 18 of the Employment Tribunals Act 1996 (“the ETA”) defines “relevant proceedings” for these purposes. This includes in Subsection 18(1) the discrimination at work provisions under section 120 of the Equality Act 2010.

198. Section 140B of the EqA provides: (1) This section applies where a time limit is set by section 123(1)(a) … (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.. (4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

199. Where the EC process applies, the limitation date should always be extended first by s.140B(3) or its equivalent, and then extended further under s. 140B(4) or its equivalent where the date as extended by s. 140B(3) or its equivalent is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate to present the claim (Luton Borough Council v Haque 2018 ICR 1388, EAT). In other words, it is

necessary to first work out the primary limitation period and then add the EC period. Then ask, is that date before or after 1 month after day B (issue of certificate)? If it is before the limitation date is one month after day B, if it is afterwards it is that date.

200. It is generally regarded that there are 3 types of claim that fall to be analysed through the prism of s. 123;

a. Claims involving one off acts of discrimination, in which, even if there have been continuing effects, time starts to run at the date of the act itself;
b. Claims involving a discriminatory rule or policy which cause certain decisions to be made from time to time. In such a case, there is generally a sufficient link between the decisions to enable them to be joined as a course of conduct (e.g. *Barclays Bank-v-Kapur* [1991] IRLR 136);
c. A series of discriminatory acts. It is not always easy to discern the line between a continuing policy and a discriminatory act which caused continuing effects. In *Hendricks-v-Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal established that the correct test was whether the acts complained of were linked such that there was evidence of a continuing discriminatory state of affairs. One relevant feature was whether or not the acts were said to have been perpetrated by the same person (*Aziz-v-FDA* [2010] EWCA Civ 304 and *CLFIS (UK) Ltd-v-Reynolds* [2015] IRLR 562 (CA)).

201. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service IRLR 434 CA that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable - Pathan v South London Islamic Centre EAT 0312/13.

202. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13 before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.

203. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: "In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."

204. In exercising its discretion, tribunals may have regard to the checklist contained in s. 33 of the Limitation Act 1980 (as modified by the EAT in British Coal Corporation v Keeble and ors [1997] IRLR 336, EAT). S. 33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case and lists some of the factors.

205. In Department of Constitutional Affairs v Jones [2008] IRLR 128, CA, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal did not regard it as healthy to use the checklist as a starting point and that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to a very broad general discretion. The best approach is to assess all factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular the length of and reasons for the delay. If the Tribunal checks those factors against the list in Keeble, it is well and good, but it was not recommended as taking it as the framework for its thinking.

206. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have

submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other: Pathan v South London Islamic Centre EAT 0312/13 and also Szmidt v AC Produce Imports Ltd UKEAT 0291/14.

207. No one factor is determinative of the question as to how the Tribunal ought to exercise its wide discretion in deciding whether or not to extend time. However, a claimant's failure to put forward any explanation for delay does not obviate the need to go on to consider the balance of prejudice

**Conclusions**

Direct Discrimination and Harassment

208. Before dealing with the individual claims we make some general remarks and findings.

209. The Claimant submitted that being loud and using his hands was a cultural trait of being Jamaican and that the Respondent's witnesses misconstrued this as aggression. What the Respondent's witnesses described was when the Claimant was frustrated or angry that he would raise his voice and shout and his body language would become aggressive. We had the advantage of being able to observe the Claimant during the hearing. For the majority of the time the Claimant spoke with an average tone and level of voice and would make mild gestures with his hands as he spoke. We observed one particular occasion when the Claimant raised his voice and shouted and pointed his finger at counsel for the Respondent. This was consistent with the evidence given by the Respondent's witnesses as to what they described as aggression. There is a difference between being loud and using hand gestures, which are engaging and non-threatening and those which are shouting, aggressive and intimidating. We did not accept, and there was no evidence to support, that it is a cultural trait of Jamaican people to shout angrily and point at people. We concluded such behaviour is common to people of all races when they are acting aggressively. We did not accept that such behaviour was indissociable from the Claimant's racial background.

210. The Claimant made a general assertion that when he started his employment that his colleagues did not like that he, a black man, had replaced Ms Salmond, a white woman. The Claimant was unable to give any specific examples of behaviour which involved a racially motivated comment or undertone. The Claimant referred to the events which formed the allegations of discrimination as supporting his contention that the motivation was because he was black. There was no evidence that there

was any dissatisfaction that Ms Salmond had left and been replaced. At the heart of this case was an issue, as to whether the Claimant received appropriate training and whether he was sufficiently able to perform at a level 3 function. We concluded that the Claimant was given extensive training and that the Respondent had concerns about the speed at which the Claimant was progressing and in relation to his ability to undertake the work. It was relevant that he had been employed at level 3, however in order to undertake the supervisory aspects of the roles he needed to be able to understand and perform the level 1 and 2 work too. There was no evidence to support that there was any animosity towards him because Ms Salmond had left.

211. It was significant that the similar issues in relation to behaviour and ability to pick up how to undertake work were present in all 3 roles that the Claimant undertook, when he worked for the Respondent. It was further significant that the Respondent, rather than choosing to end the Claimant's employment at the end of his probationary period, extended it. Further when it was borderline as to whether he had passed the extended probationary period, rather than ending his employment due to the policy not allowing a further extension, the Claimant was informed he had passed it. We also accepted that it was difficult to obtain funding for new employees and that the Respondent's resources, in terms of manpower, were stretched and it was in the Respondent's best interests for the Claimant's employment to be successful.

212. The conclusions below were made after considering the totality of the allegations.

213. An appropriate comparator for the direct race discrimination claim was a person who had 15 years' experience as a qualified accountant, who was new to the MOD and was appointed to a level 3 role and was white or from a background other than Jamaican.

214. In terms of the comparator for the direct age discrimination claim, an appropriate comparator would be someone who was a person who had 15 years' experience as a qualified accountant, who was new to the MOD and was appointed to a level 3 role and was in their mid-20s to early 30s.

<u>Allegations of specific direct discrimination and or harassment</u>

<u>Was the Claimant subject to the following less favourable treatment or harassment?</u>

*Failure by Ginny Salmond to train the Claimant on established structure and protocols from January through May 2018 and the failure by Sophie Porter to train the Claimant on established structure and protocols from January 2018 to July*

*2018. The comparator(s) relied upon is (are) Dianne Martin, Kirsty Carnell, Hypothetical (Direct Race Discrimination);*

215. Ms Salmond and Ms Porter were level 2 employees. They gave the Claimant training on the work to be undertaken in the journals and workbooks that was undertaken by levels 1 and 2 staff. This involved training the Claimant on how to create and review a journal so that he would have the foundations to be able to supervise level 1 and 2 employees and be able to provide advice. Neither Ms Salmond or Ms Porter were able to provide training on the level 3 activities, which was carried out by Ms Martin and Ms Carnell. We accepted that the Claimant struggled to pick up the basics of journal posting and by May 2018 he was still unable to properly enact a journal. Mr Coxon expected, given the Claimant's experience, that he would quickly understand the level 1 and 2 work however that was not the case. The Claimant relied upon not being trained on the SV and Trans £1k workbook for the year 2017/2018. It was agreed that the Claimant was not trained on this workbook and we accepted the Respondent's evidence that it was becoming obsolete and the Claimant was struggling with other work. The Claimant was not shown how to attach backing data to the PSS workbook, however we rejected that Ms Porter did not explain it in order to make it appear that the Claimant could not do the job. Elements of the training were patchy.

216. The Claimant received more 1:1 training than any other employee. We also accepted that Ms Porter was spending significant amounts of her time with the Claimant, to the extent that she had to organise a time for the Claimant to approach her, so that she could undertake her own tasks.

217. When Ms Simmonds became the Claimant's line manager, she re-set the training. The training from May to July 2018 was extensive. It was significant that the Claimant refused to demonstrate his learning and continued to make mistakes.

218. There was no evidence that Ms Martin or Ms Carnell were trained differently to the Claimant. The Claimant was given more training than any other employee had been. There was no evidence that there was any animosity towards him because Ms Salmond had left or any evidence of racial related language or undertones. We were not satisfied on the evidence that the Respondent failed to train the Claimant in relation to structure and protocols although there were some deficiencies, which were addressed under the accelerated training plan. The Claimant did not adduce any facts which tended to suggest that those deficiencies were because of his racial background or that a white person or someone of a different racial background would have been trained differently. The Claimant therefore failed to discharge the initial burden of proof.

219. In any event we were satisfied that Ms Salmond and Ms Porter were trying to provide the Claimant with the best training that they could. The Claimant struggled to pick up the concepts and was unable to properly undertake the work of a level 2 by July 2018. Therefore this made it difficult for the Claimant to progress and therefore it was likely that the greater time required for the Claimant to learn meant that some aspects were missed. We were satisfied that the Respondent had proved that the reason for deficiencies in the Claimant's training were in no sense whatsoever because of his racial background.

220. This allegation was therefore dismissed.

*Sophie Porter not following the Claimant's reasonable instruction to copy him into her email correspondences to other sections of the business from January to July 2018. The comparator(s) relied upon is(are) Dale Coxon, Steph Maddox Bolton, Dianne Martin, Kirsty Carnell, Hypothetical (Direct Race Discrimination);*

221. Mr Coxon and Ms Maddox-Bolton were higher grades than the Claimant and therefore would not be appropriate comparators.

222. The Claimant asked Ms Porter on two occasions to copy him into all outgoing e-mails in relation to the S&CC domain. The department process was to send e-mails in relation to journals from a multiuser account due to the limited capacity of personal e-mail accounts. Ms Porter explained to the Claimant that the information was in the multiuser account and how to access it, due to the size of the journal files. Ms Porter otherwise generally copied in the Claimant, when a journal was not being attached. It was significant that there was not a blanket refusal to copy the Claimant into e-mails and that it was generally done. We accepted that it was not a reasonable instruction to copy in the Claimant when a journal was being attached and that any such instruction was contrary to the department process. There was a misunderstanding by the Claimant as to how the process operated. It was relevant that Ms Porter was providing the Claimant with a significant level of support and training. There was no evidence that a similar situation would not have occurred with such an instruction from Ms Martin or Ms Carnell or level 3 manager of a different racial background to the Claimant. We were not satisfied that the Claimant adduced facts from which we could infer that when there was a failure to copy in the Claimant by Ms Porter that it was because of the Claimant's racial background.

223. The claim was therefore dismissed.

*Failure by management to address the Claimant's concerns regarding Sophie Porter following the Claimant raising this behaviour in meetings in February and March 2018. The comparator(s) relied upon is(are) Dale Coxon, Steph Maddox*

*Bolton, Dianne Martin, Kirsty Carnell, Hypothetical (Direct Race Discrimination and harassment):*

224. There was not any evidence adduced that the Claimant raised with management concerns about Ms Porter in meetings in February and March 2018. The Claimant raised a concern with Ms Simmonds in May/June 2018 about Ms Porter not immediately stopping what she was doing in order to assist him. Ms Simmonds sought to discuss the matter with the Claimant, however he became rude and attempted to belittle Ms Simmonds, to the extent that she stopped the meeting. The other example we were referred to was when the Claimant sent a list of concerns to Mr Coxon and referred to Ms Porter not copying him in on e-mails. Mr Coxon also explained the use of the multiuser account to the Claimant and then spoke to the team to ensure the Claimant was given the information he needed.

225. The Claimant was not satisfied with the responses, however that is different to the concerns not being addressed. Given the circumstances of how the multiuser account was used, we were not satisfied that the Claimant adduced primary facts that tended to show that if another employee, of a different racial background, had made a similar complaint, Mr Coxon would have acted differently. Further we were not satisfied that the Claimant adduced primary facts that tended to show that if another employee of a different racial background had made a similar complaint, that Ms Porter was not immediately dropping what she was doing to assist them, Ms Simmonds would have acted differently. It was highly relevant that that the Claimant had extensive training and Ms Porter had her own work to do, which she should be allowed to undertake at reasonable times of the day. Mr Coxon and Ms Simmonds had to consider not only what the Claimant was requiring Ms Porter to do, but also whether those requirements were having an adverse effect on her.

226. The Claimant failed to discharge the initial burden of proof and the claim was dismissed.

227. In any event we were satisfied that the Respondent proved that the reason for the responses was to take into account its duty of care towards Ms Porter and the Claimant. We accepted it was considered unreasonable to expect Ms Porter to drop everything as soon as the Claimant wanted assistance or that he should be copied in on every e-mail when there was a department process in place. We were satisfied that the Claimant's racial background had no influence in what occurred.

228. For the same reasons the Claimant failed to prove facts which tended to show that the reason for the way in which his concerns were handled related to his race. The Claimant failed to discharge the initial burden of proof and the claim of harassment was dismissed.

*Emma Simmonds preventing the Claimant from carrying out Sophie Porter's duties while Sophie Porter was on annual leave in June 2018. The comparator(s) relied upon is (are) Sophie Porter, Dianne Martin, Kirsty Carnell, Hypothetical(Direct Race Discrimination);*

229. In the time leading up to when Ms Porter went on annual leave in 2018, the Claimant was still not spotting errors in journals. Spotting errors was important to ensure that they were remedied in order to prevent errors appearing in the accounts. Ms Simmonds was concerned that there was a significant risk to the Respondent if the Claimant carried out Ms Porters' duties at that time. The Claimant was inconsistent in his work and Ms Simmonds considered he needed more time to develop. The Claimant was told that Ms Simmonds was confident he could do it after further training. The Claimant relied on a general assertion that reason was because he had replaced Ms Salmond. At this stage the Claimant was struggling to perform the level 2 work sufficiently adequately. Taking into account our conclusions in relation to the general matters raised above we were not satisfied that the Claimant had proved any primary facts that tended to show that a level 3, with the same rate of progression and in the same circumstances as the Claimant, but of a different racial background, would have been treated differently. The Claimant failed to adduce primary facts that tended to show that the reason for the treatment was because of his race and he failed to discharge the initial burden of proof.

230. In any event we were satisfied that the reason was because Ms Simmonds considered that the Claimant's work was inconsistent and if he undertook Ms Porter's duties there was a significant risk to the business. We were satisfied that the Claimant's race had no influence in the decision.

*Extending the Claimant's probation period in July 2018 and telling him he could not line manage or do his job as a level 3. The comparator(s) relied upon is(are) Dianne Martin, Kirsty Carnell, Sophie Porter, Hypothetical (Direct Race Discrimination and harassment);*

231. The Claimant's probationary period was due to end in July 2018. A main thrust of the Claimant's case was that he was not being given level 3 work and therefore he was unable to demonstrate that he should pass. He also criticised the training he had received. However, that training, for the reasons set out above, was far in excess of what normally was expected. We accepted that the Claimant was told that he was undertaking level 1 and 2 work and not that of a level three and that he could not carry out the subject matter expert level training until he was ready. This was the line management element. The Claimant linked the decision to his race on the basis of his replacing Ms Salmond and a perception of him being aggressive. The Claimant did not accept that he was struggling to pick up

the concepts. We found that the Claimant was struggling with picking up on how to perform the level 1 and 2 work and that it was taking longer than was normally expected, which required significant 1:1 input from his colleagues. We preferred the Respondent's evidence as to the Claimant's rate of progress. We took into account that the Claimant was told he was on track at his mid-probation review, but accepted that things could change. There was no suggestion of any racially related language or undertones in things that were said. In his submissions in reply, the Claimant sought to use Amber as a comparator, however her situation was not substantially the same as the Claimant's, in that she was an apprentice level 1 school leaver with no accountancy experience and was therefore not a valid comparator. The Claimant suggested during his evidence that there was a desire to remove him from the organisation, however his probation period was extended rather than being ended which contradicted the suggestion. Taking into account the general points above, the Claimant failed to adduce primary facts which tended to show that a person from a different racial background employed at level 3 in the same role, with the same level of qualifications, experience and rate of progress would have been treated differently. The Claimant failed to adduce primary facts which tended to suggest that the decision to extend his probation or inform him that he was not undertaking the work of level 3 and could not move to the SME level was because of his racial background and the claim of direct discrimination was dismissed.

232. In any event, the Claimant had been provided with significant training and assistance. The Respondent needed to be confident that the Claimant could properly undertake the level 1 and 2 work so that it he could supervise it as a level 3. There was a consistency of concern that the Claimant was struggling with his work and was not progressing as expected. We were satisfied that he Respondent genuinely considered that the Claimant was struggling with his work and picking up the concepts that he was not performing at the required level to pass his probationary period. We preferred the Respondent's evidence as to the Claimant's rate of progress and his level of understanding. It was notable that the Claimant refused to demonstrate his learning. It was significant that rather than ending his employment the decision was taken to extend the probationary period in order to see if the Claimant could reach the required level. We also accepted that the reason for removing line management responsibilities was to reduce the pressure on the Claimant and enable him to focus on his own deliverables. We were satisfied that the Respondent had proved that the reason related to the Claimant's ability at the time and to reduce pressure on him and his race played no part in the thought process.

233. We accepted that being told that the probationary period was being extended and that the Claimant was not undertaking level 3 work and he could not be given the supervisory and more technical work was something

which he found humiliating. In the circumstances of someone who believed that they were performing we accepted that it was reasonable for it to have that effect. However, for the same reasons as for direct discrimination, the Claimant failed to prove facts that tended to show that it related to his race. The reason for the treatment was because the Claimant had not picked up the concepts and was not able to perform at the required level. The claim of harassment was therefore dismissed.

Comments made by Emma Simmonds, Steph Maddox Bolton and Vicky Ganfield in or around April/ May 2018 about the Claimant "not working like a level 3" employee. The comparator(s) relied upon is(are) Dianne Martin, Kirsty Carnell, Sophie Porter, Hypothetical *(Direct Race Discrimination and harassment and Direct Age Discrimination)*;

234. In April/May 2018, Ms Simmonds told the Claimant that he was not meeting her expectations in terms of behaviours or competencies. Ms Maddox-Bolton told the Claimant that to be trained up to his grade he needed to understand some of the basic activities performed by the junior members of the team to allow him to explain and assist others. She also said that he was not performing as expected. Ms Ganfield did not make such a comment at this time.

235. The Claimant's evidence did not suggest a specific context of when or how the comments were made. He relied upon his general assertion that it was part of a pattern of behaviour because of his racial background. It was significant, that the Respondent's witnesses considered that the Claimant was not making the progress that they thought he should have been making at that stage. It was relevant that at the subsequent 'end of probation meeting', rather than dismissing the Claimant, the probationary period was extended. Again at the heart of the allegation was a fundamental dispute between the Claimant and the Respondent as to whether he was able to adequately undertake the level 1 and 2 work. The Claimant had been given significant training and on the arrival of Ms Simmonds she reset that training to try and fill gaps. Taking into account the general position set out above, the Claimant did not prove facts which tended to show a level 3 person of a different racial background, with similar experience and qualifications as himself would have been treated differently. The Claimant failed to adduce primary facts that he was told these matters because of his race.

236. In any event the Respondent proved that the reason was because the Claimant had not picked up the level 1 and 2 work as quickly as expected, despite the training and assistance he was given. The Claimant was still having problems with the level 1 and 2 work and therefore could not progress to the level 3 work. The reason why the Claimant was told this was because he was not performing at the level expected and we were

satisfied that his race played no part whatsoever in the thought process of Ms Simmonds and Ms Maddox-Bolton.

237. We accepted that the Claimant was upset at being told that he was not performing at the required level. However, for the same reasons the Claimant failed to adduce primary facts that the comments related to his race. We accepted that the Respondent had proved that it related to the Claimant's performance and rate of progress and that it was wholly unrelated to his race.

238. The Claimant also claimed that it was direct age discrimination and said in his evidence that he believed he was being compared to a graduate employee who would typically be in their 20s. The appropriate comparator would be someone performing the same level 3 role, with the same qualifications and experience as the Claimant but is in a younger age group. We rejected the Claimant's suggestion that a graduate employee in their 20s is an appropriate comparator, because it fails to take into account that the Claimant had passed his ACCA exams and had 15 years' experience and therefore they would not be in sufficiently similar circumstances. Further it is not appropriate to compare the Claimant with level 1 or 2 employees, because they were not engaged in work that the Claimant was employed to do. The Claimant made reference to the probation review meeting and that it was hoped his 15 years of experience could be drawn out, however this underlines the need to properly examine the comparator. There was no suggestion that age was referred to in a derogatory manner by any of the Respondent's witnesses. We were not satisfied that the Claimant proved primary facts which tended to suggest that an appropriate comparator would have been treated differently or that the comments were made because of his age. The direct age discrimination claim was therefore dismissed.

239. In any event we were satisfied that the Respondent had proved that the Claimant was not performing at the level normally expected, despite the training and 1:1 assistance he had been given. We were satisfied that the reason was because the Claimant had been slower to pick up the level 1 and 2 work and was still making mistakes and that any new level 3 employee with the same level of experience and qualification as the Claimant would have been treated the same and the Claimant's age played no part whatsoever.

*In April/May 2018 Management (Emma Simmonds, Steph Maddox-Bolton Vicky Ganfield and Dale Coxon) commenting that the Claimant should know operational issues being discussed as he was employed at Level 3 when graduates and Level 1 and 2 employees were not subject to the same comments. These comments included "not knowing", "learning the job" and "not done these tasks before". (Direct Age Discrimination)*

240. We did not accept that the Claimant was told that he should know operational issues being discussed. The Claimant did not adduce evidence as to the use of the words 'not knowing', 'learning the job' and 'not done these before' or the context in which they were said. Ms Simmonds, Ms Maddox-Bolton, Ms Ganfield and Mr Coxon accepted that they might have used such words. The words were used in the context of discussing new tasks with the Claimant. The appropriate comparator would be a level 3 employee with the same experience and qualifications. The comments are with reference to new tasks and the Claimant failed to provide an explanation as to why such comments would be less favourable treatment. The comments are of the type which could be used in the context of discussing a new task. There was no evidence that tended to that the comments would not have been used with a younger comparator. We were not satisfied that the Claimant had proved primary facts that tended to show a younger comparator would have been treated differently or more favourably. The claim was therefore dismissed.

*Dianne Martin directing the Claimant to conduct tasks without providing important data to enable the Claimant to conduct this work in or around May/ June 2018. The comparator(s) relied upon is(are) Sophie Porter, Kirsty Carnell, Hypothetical (Direct Race Discrimination and harassment);*

241. We accepted that Ms Martin had no recollection of the incident. The Claimant was asked to carry out the task and some data was missing. The Claimant approached Mr Moist when he could not see how to do the work and was given the data needed. The Claimant was not criticised for what happened. It was significant that the task was given during an extremely busy time of the year and everyone was working to tight deadlines. Ms Martin had a large amount of work to do and we accepted her evidence that it was in no-one's interests to set an impossible task. This was because if it was not undertaken then it would increase the pressure on everyone else in the team. There was no evidence of a poor relationship between the Claimant and Ms Martin , nor any suggestion of any other improper conduct by her towards the Claimant. Taking into account the general points raised above, the Claimant failed to adduce primary facts that a level 3 from a different racial background would have been treated differently. Ms Porter was a level 2 and therefore not an appropriate comparator. No evidence was adduced that Ms Carnell would have been treated differently. The Claimant failed to discharge the initial burden of proof that it was because of his race and the claim was dismissed.

242. The Claimant also regularly asked others for assistance with his work. The Claimant did not give evidence that he found the situation humiliating, hostile, degrading or offensive. In the light of the Claimant's regular seeking of assistance we would have found that it would not have been reasonable for the alleged conduct to have had that effect. In any

event for the same reasons as for direct discrimination the Claimant failed to prove primary facts which tended to show that it related to his race. Therefore the claim of harassment was dismissed.

*Being wrongfully mischaracterised by Danielle Ashby, John Vercoe, Adam Seton Mead, and Nick Heath, and referred to as aggressive on several occasions during my three roles held due to the Claimant's Caribbean background and the way he speaks. (Direct Race Discrimination and harassment) The Claimant says he was wrongfully mischaracterised in the following ways:*

243. Before addressing the specific allegations we address the general position. We repeat our findings as set out above in relation to the perception that the Claimant was being aggressive. People from all cultures and backgrounds can be aggressive. It was notable that it appeared that the Claimant had a lack of awareness as to how his behaviour could affect others as demonstrated by the way he sought to question a witness about a particularly upsetting incident. We were not present during the alleged incidents and had to form conclusions based on the evidence presented. It was significant that some of the behaviour of the Claimant during the hearing was consistent with the behaviour alleged against him. We found as a fact that on occasions when the Claimant was frustrated or angry, he shouted and that was very different to being a naturally loud person. We also accepted that when angry or frustrated the Claimant used hand gestures, which included pointing his fingers and he would lean in and close the space between him and the person he was engaging with. A combination of shouting and such gestures is something likely to be construed as aggression and we were not satisfied that such behaviour was a cultural trait of the Claimant. The allegations followed specific incidents when colleagues experienced such behaviour from the Claimant leading them to feel intimidated and in some situations reduced to tears.

*(1) John Vercoe informed the Claimant on 15 February 2019 that he had a piece of paper with a listing of errors in an excel file called the Flash. And When the Claimant raised his concerns about Danielle Ashby in meetings with management on 15th February 2019, being accused of being aggressive and loud as the Claimant is not soft spoken being born in Jamaica. The comparator(s) relied upon is (are) Sarah Long, Danielle Ashby, Hypothetical;*

244. At the meeting Mr Vercoe told the Claimant that Ms Ashby had discovered some formulas had been hardcoded and some other niggly errors and he had been given a list. After telling the Claimant that the list was Ms Ashby's and he thought she could share it, the Claimant leant forwards, shouted and wagged his finger at Ms Ashby. This was denied by the Claimant and we rejected his evidence. The Claimant was told that he was being aggressive. For the reasons set out above we rejected the

Claimant's assertion that this was a cultural trait. The Claimant shouted which is a sign of anger and aggression, closed the distance between himself and others and wagged his finger which is something likely to be received as intimidating and threatening.

245. We were not satisfied that the Claimant had proved primary facts that the suggestion he had been aggressive was related to his cultural background and the claim of harassment was dismissed. We did accept that the Claimant found the reference offensive. We were also not satisfied that the Claimant proved primary facts that a person from a different racial background who shouted, closed the distance with the other person and wagged their finger would not have been told they were being aggressive. The claims of direct discrimination and harassment were therefore dismissed.

246. In any event we were satisfied that the Respondent had proved that the incident was perceived as aggressive and that the Claimant's racial background had no influence in that perception. The perception was caused by the Claimant's anger and shouting in combination with body language which was threatening.

*(2) Danielle Ashby refused to attend a meeting on 19 February 2019, stated "no we're are not doing this, we are not working on the flash because John Vercoe is not here" and referred to the Claimant as aggressive.*

247. In the meeting on 19 February 2019, Ms Ashby refused to discuss the Flash with the Claimant in the absence of Mr Vercoe. The Claimant later described that the Claimant had shouted at her. This was a situation in which Ms Ashby did not want to discuss the Flash with the Claimant because she had been told not to work on it with the Claimant. This was a situation which the Claimant would have found to be frustrating and he shouted at Ms Ashby. We accepted that the Claimant had a tendency to shout if he was frustrated or angry. We repeat our reasons as set out above.

248. We were not satisfied that the Claimant proved primary facts that the suggestion that he had been aggressive was related to his cultural background and the claim of harassment was dismissed. We did accept that the Claimant found the reference offensive. We were also not satisfied that the Claimant proved primary facts that a person from a different racial background who shouted, at another person with the previous history would not have been described as aggressive. The claims of direct discrimination and harassment were therefore dismissed.

249. In any event we were satisfied that the Respondent had proved that the incident was perceived as aggressive and that the Claimant's racial

background had no influence in that perception. The perception was caused by the Claimant's anger and shouting in combination with the earlier events.

*(3) and (4) Adam Seton Mead in a meeting on 14 October 2019 told the Claimant that he should not be using the laptop but should be using the paper printed report. Nick Heath before a meeting on 14 October 2019 told the Claimant, "Do not take your laptop, only take the printed paper" version. In the meeting, Nick Heath told the Claimant that he had told him earlier not to take his laptop with him.*

250. These allegations on their face did not relate to allegations of aggression, however during the meeting on 14 October 2019 Mr Seton-Mead and Mr Heath considered that the Claimant had been aggressive and we considered the allegation in that manner.

251. During the meeting it became apparent that the Claimant was looking at an e-mail in relation to an unrelated subject. The meeting had been arranged to assist the Claimant in relation to a particular part of his work. The Claimant did not appear to be paying attention and was challenged as to what he was doing. When the Claimant was asked to read back his notes he said his computer had crashed and became angry and agitated. The Claimant leant forwards towards Mr Seton-Mead and Mr Heath and stared at them, this caused Mr Seton-Mead to move backwards and Mr Heath to terminate the meeting. Both men found the behaviour to be aggressive and threatening. This was not an incident in which it was alleged that the Claimant used expressive hand gestures. This was an incident in which the Claimant had closed the distance between himself and the others and was staring at them. This did not form part of what the Claimant said was a cultural trait.

252. We were not satisfied that the Claimant had proved primary facts that the suggestion that he had been aggressive was related to his cultural background and the claim of harassment was dismissed. We did accept that the Claimant found the reference offensive. We were also not satisfied that the Claimant proved primary facts that a person from a different racial background displaying the same body language with the previous history would not have been described as aggressive. The claims of direct discrimination and harassment were therefore dismissed.

253. In any event we were satisfied that the Respondent had proved that the incident was perceived as aggressive and that the Claimant's racial background had no influence in that perception. The perception was caused by the Claimant's anger, agitation and body language.

*Being ignored by his subordinate Danielle Ashby during November 2018 to March 2019, her failing to follow his reasonable management instructions in the role and*

*verbal attacks including "she is not here to do admin work" and "I was on autopilot" in a follow up conversation because she failed to action specific instruction the Claimant gave her to allow him to review her output of the 'consolidator' before inserting into the 'flash' but was deliberately ignored (Direct Race Discrimination);*

254. Ms Ashby had responsibility for the consolidator tab in the Flash. The Claimant fundamentally misunderstood how the consolidator tab was used within the Flash. The Claimant wanted Ms Ashby to send him the December consolidator to review it before it was uploaded. However the consolidator was not prepared as a separate document and then uploaded, it was created by dragging the data from the other tabs into it within the Flash itself. Ms Ashby undertook the work in accordance with the process used. We did not accept that she used the words alleged. Ms Ashby did not ignore the instruction but undertook the work in the only way possible. There was no evidence that Ms Ashby had made racially related remarks or said things with such undertones. This was against a background of an initially good start to the relationship with Ms Ashby. Other than a general assertion there was not any evidence which tended to suggest that if the Claimant had been from a different racial background Ms Ashby would have acted differently. We were not satisfied that the Claimant had discharged the initial burden of proof and the claim was dismissed.

255. In any event we were satisfied that the reason why Ms Ashby undertook the work as she did, was because that was the process which had been developed and the only way to undertake it was to drag the information into the consolidator tab. We were satisfied that the Claimant's race played no part in the thought process of Ms Ashby.

*Not preparing a directory of contact details and telling the Claimant she wasn't there to do admin tasks. The comparator(s) relied upon is (are) Andy Merrett, John Vercoe, Hypothetical (Direct Race Discrimination);*

256. We preferred the evidence of Ms Ashby and concluded that it was eventually undertaken and that she did not say she was not there to do administration tasks. The Claimant had said that the work was not urgent and Mr Merrett also told her not to worry about it while she was undertaking priority work. The Claimant did not establish the factual background to the allegation. The Claimant did not adduce primary facts which tended to suggest that if he had been from a different racial background there would not have been a similar delay. We took into account the general observations set out above. The Claimant failed to discharge the initial burden of proof and the claim was dismissed.

257. In any event we were satisfied that the Respondent had proved that the delay was because the work was not urgent and that the Claimant's race played no part in the thought process of Ms Ashby.

*Not completing and using a control sheet on a team whiteboard. The comparator(s) relied upon is (are) Andy Merrett, John Vercoe, Hypothetical (Direct Race Discrimination).*

258. The Claimant produced and asked Ms Ashby to complete a control sheet in relation to forecasts received from delivery teams. The Flash had colour coding within it which provided this information. Ms Ashby thought this was a duplication of work and spoke to Mr Merrett, who told her not to use the control sheet. After this Ms Ashby explained to the Claimant how the formula worked in the Flash. We considered our general conclusions as set out above. Other than a general assertion, the Claimant did not adduce any facts which tended to show that the non-completion of the control sheet was because of his racial background or that Ms Ashby would have behaved differently if he had been from a different background. The claim was therefore dismissed.

259. In any event we were satisfied that the reason was because it was causing a duplication of work and that there was a risk if two systems were used that information on the Flash could become out of date. The Claimant was shown how the formula worked after making the request. We were satisfied that the Claimant's racial background played no part in the thought process of Ms Ashby.

*Failure by management to take appropriate specific action following the Claimant raising his concerns about Danielle Ashby. The comparator(s) relied upon is (are) Danielle Ashby, Sarah Long, Adam Chappell, Andy Merrett, Hypothetical (Direct Race Discrimination);*

260. The Claimant raised some of his concerns with Mr Merrett, who did not initially see them as significant on the basis that the Claimant's role was to manage Ms Ashby. In the run up to Christmas, Ms Ashby approached Mr Merrett in tears after being shouted at by the Claimant. At this stage Mr Merrett suggested to the Claimant that he might need to alter his management style. On 11 January 2019, Mr Vercoe arranged a meeting to try and effect a reconciliation of the relationship between the Claimant and Ms Ashby after the incidents on 8 and 9 January. On 17 January 2019, Mr Merrett requested a mediator assisted with the relationship between Ms Ashby and the Claimant. At this stage Ms Ashby was also complaining about the behaviour of the Claimant towards her. The mediation was overtaken by Ms Ashby raising a formal grievance against the Claimant. Ms Ganfield also provided the Claimant with advice as to how he could try and manage the situation. The Claimant did not raise a formal complaint against Ms Ashby. This was against a background of incidents in which the Claimant had shouted at Ms Ashby and displayed aggression towards her. Other than a general assertion the Claimant did not adduce facts which

tended to show that the actions of his managers were because of his race or that if he had been from a different racial background he would have been treated differently. The claim was therefore dismissed.

261. In any event, the Claimant was the manager of Ms Ashby, he was given advice as to how to try and manage the situation, however events were overtaken by Ms Ashby's formal complaint. The Claimant did not raise a grievance against Ms Ashby. The suggestions by Mr Merrett were valid and could have made a difference to the relationship. When it was recognised that the situation was becoming serious Mr Merrett tried to arrange a mediation. It was notable that matters escalated within a short period of time. We were satisfied that Mr Merrett and Ms Ganfield made suggestions that they thought would help with the situation and would help to improve the relationship. We were satisfied that the Claimant's racial background played no part in their thought processes.

*On or around January 2019 being placed on an informal Performance Improvement Plan ("PIP) having been in the new role for only 2.5 months and not being given sufficient time to learn the role. The comparator(s) relied upon is (are) Danielle Ashby, Hypothetical (Direct Race Discrimination and harassment);*

262. The Claimant was placed on the informal PIP in February 2019. The Claimant had passed his probation period in October 2018, however it was not a clear pass and Ms Ganfield had been advised that under the policy her options were to pass or fail the Claimant and that a further extension was not an option. At the meeting the Claimant had been told that he still needed to improve and he was given objectives for improvement over the next 6 months. On 30 January 2019, the objectives were discussed with Ms Ganfield and it was noted that he needed to increase his speed. Ms Ganfield also arranged for Ms Kehoe to help the Claimant demonstrate that he was suitable for the role. It was relevant that the Respondent could have decided to end the Claimant's employment in October 2018, but decided to allow him to remain and gave him a further opportunity to improve. We took into account the improving performance procedure and that dips in performance should be addressed at an early opportunity. By February 2019 the Claimant was not showing sufficient improvement in the objectives identified at the end of his probation period. The Claimant relied upon his general assertion and that he had only been undertaking his new role for 2.5 months, however he had been in a level 3 role for more than a year. There was a background of the Claimant struggling to pick up how to undertake work. Ms Ashby is not an appropriate comparator because she was a different level to the Claimant. The appropriate comparator was someone who is in circumstances not materially different to that of the Claimant and from a different racial background. There was a history of performance concerns and a need for the Claimant to carry out level 3 work independently. The Claimant was not placed on a formal PIP, but an

informal measure to avoid the need for a formal procedure to be undertaken. We were not satisfied that the Claimant adduced primary facts that tended to show a person from a different racial background with a similar history would have been treated differently and would not have been placed on an informal PIP. The claim was therefore dismissed.

263. In any event we were satisfied that the Respondent had proved that although the Claimant had passed his probationary period, it still had concerns about his performance as demonstrated by the improvement objectives. We were satisfied that engaging in an informal process 4 months after the probationary period had ended to address the performance objectives was reasonable given that the improvement was expected at 6 months. We were satisfied that the Respondent remained concerned about the Claimant's performance and that it had taken into account the guidance in the procedure. The Claimant had been given 2.5 months in his new role before addressing the matters which were fundamental to a level 3 role. We were satisfied that the reason for placing the Claimant on the informal PIP was due to the concerns about his performance and that the Respondent had proved it would have acted in the same way with any employee. We were satisfied that the Claimant's race played no part in the decision making process.

264. For the same reasons the Claimant failed to adduce primary facts which tended to show that the decision related to his race. In any event we were satisfied that the Respondent had proved that the reason was unrelated to his racial background and was due to his performance. The claim of harassment was dismissed

*Being wrongly accused of amending an excel spreadsheet despite evidence to the contrary in February 2019 and the deputy CFO, John Vercoe, telling the Claimant in a meeting that "he did not believe me" when the Claimant told him that he did not amend the excel spreadsheet he was accused of amending. The comparator(s) relied upon is (are) Danielle Ashby, Adam Chappell, Sarah Long, Andy Merrett, Hypothetical(Direct Race Discrimination and harassment);*

265. After the events on 15 and 19 February 2019 in relation to the Flash, Mr Vercoe arranged a meeting on 21 February 2019 to try and understand the issues and stop the dispute. The Claimant brought a version of the Flash, which appeared to be different to the version on the shared drive. Mr Vercoe said that he did not believe the Claimant when he said that he had not amended it. After the meeting Mr Vercoe checked the version history and discovered that the Claimant had not amended it, but had saved his own copy locally. The last person to have amended the Flash before the meeting was the Claimant. Mr Vercoe then spoke to the Claimant at which point he said he had saved an offline version. Mr Vercoe explained that keeping an offline version was a potential error trap. Other than a general

assertion there was not any evidence to suggest that Mr Vercoe said he did not believe the Claimant because of his racial background or that it related to his racial background. The Claimant failed to prove the necessary primary facts and the allegation was dismissed.

266. In any event we were satisfied that the Respondent had proved that Mr Vercoe was presented with a team which was becoming increasingly dysfunctional. The Claimant had a version which was different to the shared version and he was the last person to amend it. We were satisfied that Mr Vercoe would have thought the same thing if the Claimant had been from a different racial background and would have acted in the same way. We were satisfied the Claimant's racial background played no part in Mr Vercoe's thought process and it had no influence in what he did.

*Following (2.13) above, being removed from that role in March 2019. The comparator(s) relied upon is (are) Danielle Ashby, Sarah Long, Andy Merrett, Hypothetical (Direct Race Discrimination);*

267. This allegation related to the Claimant's removal from the Air BTE role. By the end of February 2019, Ms Ashby had raised a formal complaint against the Claimant. On 21 February 2019, Mr Chappell had been accused of lying by the Claimant in relation to help he had been given, to which Mr Chappell said it was the last time he would help him. Mr Vercoe considered that without the support of the team, the Claimant would not be able to do his wider job. The Claimant would not be able to demonstrate the management aspects of his level 3 role if the team would not work with him. The Claimant suggested that this was part of a general plan against him and asserted that it was due to his racial background. We took into account the general points referred to above. We were not satisfied that the Claimant had proved facts which tended to show that the decision to remove him from his role was because of his race or that a person from a different racial background would have been treated differently. The actual comparators the Claimant relied upon were not in the same situation as the Claimant or were employed at different levels.

268. In any event we were satisfied that the Respondent proved that the reason was because the working relationships within the team were ineffective and as such the Claimant would not be able to demonstrate that the management aspects of his performance had improved so that the informal PIP could be brought to an end. A search was undertaken for a role in which the Claimant could work in a wholly new team. We were satisfied that the Claimant's race played no part in the decision.

*Despite the Claimant being redeployed to a new role in March 2019, continuing with the informal PIP and not permitting the Claimant's line manager to attend the*

*PIP meetings. The comparator(s) relied upon is Hypothetical (Direct Race Discrimination and Harassment);*

269. Ms Ganfield had concluded that the only way for the Claimant to demonstrate he met level 3 and come off the informal PIP was for him to move to a new team. The fact that the Claimant had moved teams did not remove that there were concerns as to whether his performance was that of a level 3, or that an informal process had started. The Claimant relied upon a general assertion that it was continued because of his race. It was relevant that in the previous role, a fair assessment of his management skills would not be possible and that there were general concerns about his level of performance. We were not satisfied that the Claimant had adduced primary facts which tended to show that a person of a different racial background, in a similar situation, would have been treated differently and the informal PIP not continued. Further the Claimant did not adduce facts which tended to suggest that the decision related to his race. The claims were therefore dismissed.

270. In any event we were satisfied that the Respondent had proved that the reason for it to continue was because the only way the Claimant could reasonably demonstrate that he was meeting the improvement objectives was to work in a different team. The concerns about the Claimant's performance existed and therefore it would be artificial to suggest that they had gone away. The process had been started and therefore was something which needed to be completed. We accepted that it was a pragmatic solution to the difficulties. We accepted that the Claimant's racial background played no part whatsoever in the decision and it did not influence it.

271. In relation to Mr Seton-Mead not attending the meetings, the Respondent accepted that it had departed from the policy in terms of that the employee's delivery manager should attend such meetings. The reason was to maintain the presence of the original people involved in the informal PIP. The process was formally restarted on 25 March 2019. On 2 April 2019 Mr Seton-Mead was spoken to by the Claimant and asked if he would come to an informal PIP meeting. Mr Seton-Mead had no objection, but after speaking to Ms Ganfield did not think he needed to attend because it would not add value. Unreasonable conduct on its own is not sufficient to shift the burden of proof. Other than a general assertion and relying on the events generally the Claimant did not adduce facts which tended to suggest that the decision was because of his race or that someone from a different racial background would have been treated differently or that it related to his racial background. The Claimant failed to discharge the initial burden of proof.

272. In any event we accepted the Respondent's evidence that the head of ISTAR wanted the Claimant to have a fresh start and for his new team to

be unaware of the previous performance concerns. This might have involved a departure from the policy but we accepted that the intention was to integrate the Claimant into his new team without the baggage of what had happened previously. We accepted that the Respondent thought that it was the best way for the Claimant to exit the informal PIP without being tarnished by its existence within the new team. We accepted that the Respondent had proved that the Claimant's race or his racial background played no part whatsoever in the decision.

273. The claims were therefore dismissed.

*In or around April 2019, Vicky Ganfield ignoring the Claimant's evidence of his performance to combat the Respondent's allegations against him and Vicky Ganfield then changing the Claimant's targets by saying what I worked on was not to Level 3 standard then place him on a formal PIP. The comparator(s) relied upon is Hypothetical (Direct Race Discrimination and Harassment); and In April 2019 Vicky Ganfield said that he was not working like a level 3 employee (Direct Age Discrimination); and in his 360 feedback in June/July 2019 the Claimant was told that he was not working like a level 3 employee (Direct Age Discrimination).*

274. On 29 April 2019, the Claimant attended an informal PIP meeting with Ms Ganfield. The Claimant was informed that Mr Ingram would not be in the department forever and he needed to start using his own judgment. There was still a lack of understanding of terminology and concerns that the Claimant was not being proactive in meetings or planning work. Discussion took place about the objectives given at the end of the probationary period. Ms Ganfield was given documentation by the Claimant, which she read and considered. The informal PIP targets were not changed. Ms Ganfield considered that the Claimant was not meeting the required objectives. At the meeting the Claimant was informed that he was not meeting the standard required of a level 3. We took into account that the Claimant had been in the department for just under 2 months, however he had been engaged in a level 3 role for more than 14 months. There had been concerns about the Claimant's performance from early in his employment and he had been given significant training each time his role moved. Ms Ganfield considered that the Claimant was not meeting the required objectives.

275. The Claimant did not adduce any facts which tended to suggest that a person with similar experience and qualifications to him, but who was younger and who had the same level of performance concerns would have been treated differently. The Claimant failed to discharge the initial burden of proof that the comment that he was not working like a level 3 employee was said because of his age. In any event the Respondent proved that the reason why it was said was because it was considered that the Claimant

was not performing at the required level, 14 months after starting his employment and we accepted that his age played no part in what was said.

276. At the meeting on 29 April 2019, people were identified for 360° feedback and the Claimant agreed they could be approached. The feedback was provided to the Claimant on 16 May 2019. He was told that he was not performing at the level expected as a level 3 and a formal PIP would be started. It was confirmed he had not met the four objectives set at the end of his probation period. For the same reasons with respect to the comment on 29 April 2019, the Claimant failed to discharge the initial burden of proof. For the same reasons we accepted in any event that the Claimant's age played no part in what was said.

277. The allegations of age discrimination were therefore dismissed.

278. In terms of the direct race discrimination claim, the Claimant was not performing at the level expected of a level 3. It was relevant that he had worked for the Respondent for 14 months and had been given extensive training and 1:1 support. The Claimant relied upon the performance issues being caused by Ms Ashby's refusal to follow instructions, however it was evident that there was not a blanket refusal to follow instructions and when she queried them there was either a misunderstanding by the Claimant or they involved a duplication of work. It was relevant that the Claimant's management style appeared to bring him into conflict with his colleagues and that there were occasions when they perceived he had been aggressive towards them. The Claimant relied upon a general assertion that he was moved onto a formal PIP because of his race or that it related to his racial background. We were not satisfied that the Claimant adduced facts which tended to suggest that was informed he was not working at a level 3 standard and was placed on PIP because of his race or that a person of different racial background would have been treated differently. We were similarly not satisfied that the Claimant established primary facts that it related to his race.

279. In any event we were satisfied that Ms Ganfield considered all of the information she had, including that given to her by the Claimant, and the information she had been given in the 360° feedback. The Claimant had been given 6 months to meet the improvement objectives set at the end of his probationary period. We accepted that Ms Ganfield considered that he had not met those objectives and he was not meeting the required standard. We accepted that the next stage was to move onto a formal PIP. We accepted that the sole factor was the Claimant's performance and that his race or racial background or cultural traits formed no part in the decision making process.

280. Accordingly the claims of direct race discrimination and harassment were dismissed.

*Not permitting the Claimant a reasonable timeframe to learn the role prior to implementing a PIP. The comparator(s) relied upon is (are) Sophie, Porter, Sarah Long, Danielle Ashby, Lucy Standen, SS, MHl, MB, Hypothetical (Direct Race Discrimination and Harassment);*

281. On 25 March 2019, the Claimant was informed that the informal PIP would restart and run for a period of 4 weeks, however it was extended to 29 April 2019. The Claimant relied upon only having been in the ISTAR role for just under 2 months when the decision was taken that he had not progressed sufficiently and an informal PIP should be implemented. During that time the Claimant had an extended handover with Mr Ingram, rather than a usual period of about a week. He was also given significant amounts of 1:1 training. The targets he was asked to meet were general targets. Although the Claimant had been in the ISTAR role for a relatively short period of time he had been working in a level 3 role for more than 14 months. We took into account that the Respondent needed its level 3 employees to operate at that level and that its resources were stretched. The improving performance policy required that the formal process was used when performance had not improved to the required standard despite informal action and when concerns had been raised about behaviour either in terms of delivery output or those contrary to accepted DE&S behaviours. We accepted the purpose of a PIP is to help improve performance. Although the time between starting the ISTAR role and the being placed on a formal PIP was relatively short we were not satisfied, that on its own, was sufficient to tend to show that the decision was taken when it was, because of the Claimant's race or his racial background or that it was related to his race or racial background. We were not satisfied that the Claimant had adduced primary facts which tended to show that a person of a different race would have been treated differently. The claims were therefore dismissed.

282. In any event we were satisfied that Ms Ganfield had taken regard of the whole period of the Claimant's employment and that he had been given 6 months to improve after the end of his probationary period. We were satisfied that she had genuinely formed the view that he was not meeting the required standard and had not sufficiently improved. We were satisfied that the Claimant's race or racial background formed no part of the decision making process and that it was not influenced by it.

*Angie Kehoe ridiculing the Claimant in front of colleagues including Lucy Standen in respect of the Claimant not understanding the terminology CSSF (Direct Race Discrimination and Harassment);*

283. In March 2019, the Claimant asked Ms Kehoe what CSSF meant, she told the Claimant that she did not know what it meant and asked others. We rejected the Claimant's evidence that untoward comments were made to him or that he was ridiculed. We were not satisfied that the factual basis of the allegation existed. In any event the Claimant failed to adduce any evidence has how it related to his race or was said because of his race and the Claimant would have failed to discharge the initial burden of proof.

*In an inventory meeting on 26th June 2019, Angie Kehoe telling the meeting that the Claimant had not updated the accounting system when the Claimant had completed this task (Direct Race Discrimination and Harassment);*

284. We found as a fact that the Claimant had not updated the system, when it was his responsibility. The chair of the meeting on 26 June 2019 raised the issue, rather than Ms Kehoe. Ms Kehoe asked the Claimant for an explanation and he did not provide one. A later check with the delivery team resulted in Ms Kehoe being told it had not been done. The Claimant failed to prove the factual basis for the allegation, essentially that false information had been provided. The Claimant relied upon a general assertion and our general observations are repeated. The Claimant failed to adduce facts which tended to show that someone from a different racial background would have been treated differently and that it was because of his race. Similarly the Claimant failed to adduce facts which tended to show it was related to his race. The claim was therefore dismissed.

*Angie Kehoe in a deep dive review meeting on July 2019 verbally explained all CCLs on the platform had their PSS updates from their PSS colleagues and said the Claimant did not get his update from his PSS colleague, when in fact he had (Direct Race Discrimination and Harassment)*

285. The meeting occurred on 1 August 2019. The Claimant was invited so that he could see what happened at such meetings. The meeting related to the 'in year' process with which the Claimant was not involved. As such the Claimant would not have received any figures, which was agreed by all parties. The factual allegation was therefore not fully established. Ms Kehoe said that the Claimant did not have the updates. The Claimant relied on a general assertion that this was said because of his race or was related to his race. We repeat our general observations. The Claimant failed to adduce facts which tended to suggest that a person from a different racial background would have been treated differently or that it was said because of his race or related to his race. The Claimant failed to discharge the initial burden of proof and the claims were dismissed.

*Angie Kehoe cancelling training for the Claimant from Jon Eldridge to help fulfil his role as CCL on 28th June 2019 (Direct Race Discrimination and Harassment).*

286. The Claimant had arranged for Mr Eldridge to travel from Lincolnshire to provide him with some assistance in relation an aspect of the Claimant's work. This involved a 2 day trip and an overnight stay. Ms Kehoe spoke to Mr Eldridge's delivery manager to ascertain whether there was other work Mr Eldridge could undertake whilst at Abbey Wood and she was told that it was not in the interest of the public purse for him to travel. We accepted Ms Kehoe considered that assistance was reasonable, but it was more appropriate for it to be provided by telephone or videocall. Mr Eldridge was told that there was no need to make a specific trip. We accepted that there were many people at Abbey Wood who could have provided the Claimant with assistance. The Claimant failed to adduce primary facts which tended to suggest that a person from a different racial background would have been treated differently or that it was done because of his race. Similarly the Claimant failed to adduce primary facts that it related to his race. The claims were therefore dismissed.

287. In any event were satisfied that the Respondent proved that the reason was because Mr Eldridge did not have other work to do in Abbey Wood and the expense and loss of his time could not be justified. Further there were others at Abbey Wood who could have provided assistance. We were satisfied the Claimant's race and/or racial background played no part in the decision.

*Performance managing the Claimant in his third role from March 2019 to November 2019. The comparator(s) relied upon is (are) Lucy Standen, Sean Stone, Matt Hill, Matt Bartlett, Hypothetical (Direct Race Discrimination and Harassment);*

288. On starting his role in ISTAR there were concerns about the Claimant's performance and we have already addressed the decision to put the Claimant on a formal PIP. The Claimant was informed on 22 May 2019 that the formal PIP was being started, but it was paused on 29 May 2019. At the beginning of June, Mr Heath was concerned about the Claimant's performance as demonstrated by his e-mail dated 10 June 2019. On 19 June 2019, Mr Heath was concerned that the financial work was slipping in the department and the Claimant's productivity was having a negative effect on his colleagues. On 1 July 2019, Mr Dell was concerned about the Claimant's performance and the effect it was having on the team, as set out in his e-mail of the same date. After the PIP restarted in August Mr Seton-Mead was concerned that the Claimant was not proactively engaging in conversations with the team or leading it. We accepted that the Respondent needed its level 3 employees to perform at that level. The Claimant relied on his general assertion. We repeat our general remarks. The Claimant failed to adduce any evidence that tended to suggest that the reason for his performance management was his race or racial background or that it was related to it. the claims were therefore dismissed.

289. In any event we were satisfied that the Respondent proved that the reason for the treatment was that the Claimant was consistently not working at the required standard and that it was having a detrimental effect on the output of the team and its team members. We accepted that the Respondent needed to act and that the Claimant's race or racial background formed no part of the decision making process.

*Dismissing the Claimant on 3rd December 2019. The comparator(s) relied upon is (are) Danielle Ashby, Hypothetical (Direct Race Discrimination).*

290. When Ms Ashby made the allegations Mr Short was appointed as the decision manager. He had never met the Claimant or the witnesses. Ms Ashby attended an initial meeting with Mr Short on 22 February 2019 and the Claimant attended an initial meeting on 7 March 2019. The Claimant denied the allegations and Mr Short appointed an independent harassment investigation officer to investigate the allegations. Mr Bryce undertook investigation meetings with the Claimant, Ms Ashby and many other witnesses. The Claimant's meeting on 16 June 2019 was suspended due to an appointment the Claimant had, and was reconvened on 2 July 2019. All witnesses had a full opportunity to provide their versions of events. The investigation report identified that there was corroborating evidence for eight of the allegations and one allegation was partially corroborated. At the disciplinary hearing, the Claimant attended by telephone and had a full opportunity to provide his version of events and dispute the allegations made against him. The Claimant also provided a written statement which was taken into account.

291. The Claimant had attended an occupational health appointment on 18 November 2019 which identified that he had been diagnosed with anxiety, depression and stress and he was not fit to participate in the hearing or return to work. The impairment was unlikely to be considered a disability and it was not possible to say when he would be fit to return to work. Mr Short decided to hold the hearing in any event. Although at face value this could be considered unreasonable treatment, there was no evidence to suggest that it was in any way related to or because of the Claimant's race or racial background.

292. Mr Short took into account all of the evidence and concluded on the balance of probabilities that the corroborated allegations had occurred. Mr Short candidly accepted in cross-examination that Ms Ashby might have raised the complaint to deflect attention away from her performance issues. However, her allegations were not made in isolation and other people had given evidence supporting what she said.

293. The Claimant submitted that Ms Ashby and Ms Long had not got along, but they joined forces against him. We considered that it was unlikely that in the instance of two colleagues disliking each other, that one would support the other by inventing evidence.

294. Mr Short also considered whether there were relevant cultural aspects/characteristics involved and concluded that there had been aggression involving shouting, facial expressions and body language.

295. The Claimant suggested, when cross-examining Mr Short, that his thought processes had become contaminated by the discriminatory motives of others, which he denied. It was relevant that Mr Short had not met any of the witnesses nor the Claimant and Ms Ashby. He had engaged a wholly independent investigator who provided a detailed report. There was no suggestion that he had made any racially related derogatory remark or comment. There was no evidence that Mr Short had been influenced by anyone in relation to the making his decision. The Claimant failed to prove primary facts which would tend to suggest that Mr Short's decision was made because of his race, or that in the case of a person from a different racial background they would have been treated any differently.

296. In any event we were satisfied that the Respondent had proved that Mr Short considered all of the evidence. Further that he concluded that the corroborated allegations of bullying had occurred. Further that the Claimant had not recognised his behaviour and that if he his employment continued there would not be an improvement. We were satisfied that the Claimant's race played no part whatsoever in the decision making process of Mr Short.

297. The claim was therefore dismissed.

Failure to make reasonable adjustments

298. At all material times the Claimant was disabled by reason of Type 1 Diabetes. It was accepted by the Respondent that, at all material times, it knew that the Claimant was disabled by reason of diabetes.

Provision criterion or practice ("PCP")

299. The Respondent accepted that the informal and formal PIP procedures and the requirements to attend disciplinary hearings under the disciplinary procedures were provisions, criteria or practices.

300. The Claimant alleged a third PCP, namely a requirement not to use a laptop in meetings and/or use paper copies of reports. In relation to the meeting on 14 October 2019, the Claimant was asked not to bring his laptop and to use a notebook to take notes. He was not asked to bring paper copies

of the reports. There was no evidence that this occurred on more than one occasion. The alleged PCP suggested that it was a general policy. The Claimant normally took a laptop to meetings. The request related to the meeting on 14 October 2019 only. We accepted that a PCP should be construed widely and can arise from a one off act or decision. However, 'practice' requires some form of continuum in the sense that it would be the way things are generally or will be done. We needed to consider there was something which indicated that it would be done again in the future.

301. The request was made so that the figures could be discussed and the Claimant's full attention was provided. There was nothing to suggest that this was a general way of conducting meetings. We accepted that the purpose of the meeting was to provide the Claimant with assistance and to have a discussion with him. The Claimant however took his laptop with him to the meeting, used it and was not stopped from doing so. This was a request to bring a notebook only. There was no evidence of a practice of forbidding such use, there was a theoretical possibility at best. We were not satisfied that there was a practice of not permitting the use of laptops in meetings.

302. Even if we were wrong and there was a practice, the practice was not applied to the Claimant. The Claimant took his laptop to the meeting on 14 October 2019 and used it. The alleged PCP was therefore not applied to the Claimant.

Failure to make reasonable adjustments in relation to the informal and formal PIP procedures

303. The Claimant said that he was placed at a substantial disadvantage in comparison to non-disabled persons because he was not afforded sufficient time and training in the roles or sufficient time to improve before moving onto the next stage of the PIP process and he suffered stressful pressures worsening his diabetes.

304. The Claimant was provided with a significant amount of training when he started each role for the Respondent. There was no evidence to support that the amount of training put the Claimant at a substantial disadvantage in relation to his disability.

305. We accepted that being subjected to performance management processes will be stressful for an employee. The Claimant had been employed by the Respondent for just over a year when he was put on the informal PIP. At about the same time, the harassment allegations made by Ms Ashby started to be investigated. We accepted that after the informal process started the Claimant had some hypoglycaemic incidents at work. We accepted that stress could have an adverse effect on the Claimant's

ability to control his diabetes. A hypoglycaemic incident is something which is more than minor or trivial and we accepted that the Claimant was at a substantial disadvantage when the processes were active.

306. The processes were not active when the Claimant was on sick leave in August and September 2019 or after he had been suspended on 24 October 2019.

307. The Occupational Health report dated 4 April 2019 identified that stress could affect blood sugar level and that the Claimant was aware of how to manage his diabetes and he kept appropriate drinks and snacks. The Claimant was encouraged to complete a stress risk assessment and despite encouragement did not undertake it. The Respondent had asked appropriate questions, however the Claimant had not provided it with information from which it could realistically determine whether there was a substantial disadvantage arising from the informal PIP. The purpose of the informal PIP was to help the Claimant improve his performance and therefore avoid the need for a formal process. We were not satisfied that the Respondent knew that the informal PIP process was causing hypoglycaemic episodes or that as of 4 April 2019 it ought to have reasonably known it was.

308. On 16 May 2019, the Claimant was informed that his performance had not sufficiently improved and that he would be moved onto a formal PIP. We accepted that a formal process would cause more stress than an informal process. On 26 July 2019, the Occupational Health Report included reference to stress related symptoms having an impact on his control of his diabetes, however changes had been made to his insulin regime which was expected to improve the management of his diabetes. The stress risk assessment was recommended again; however the Claimant did not complete it. By this time the Claimant had experienced hypoglycaemic incidents at work and the Respondent was aware that stress made control more difficult. We concluded that the Respondent knew that the stress made the control of the Claimant's diabetes more difficult.

309. The Claimant suggested that affording him adequate training would have been a reasonable adjustment. We concluded that the Claimant was given adequate training and was in fact given significantly more training than other employees. In particular when he moved to ISTAR he had a 10 week handover period, when normally it would be about a week. Providing training to the Claimant involved his colleagues spending a significant amount of their time assisting him, rather than undertaking their own work. We accepted that there comes a point when providing additional training becomes overly burdensome and has a detrimental effect on colleagues and the performance of the department as a whole. We did not accept that providing even further training, rather than starting a performance

management process, when the Claimant was unable to properly pick up the concepts after approximately 18 months, was reasonable. The Respondent had to ensure that that the outputs of the department were maintained and also protect the wellbeing of its other employees. We found that it would not have a been a reasonable adjustment to provide further training before commencing the PIP.

310. It was also suggested that the Claimant should have been given a reasonable period to learn and carry out the role. For the same reasons as with the training, the Claimant was given a significant amount of support and assistance with his work. The Claimant was taking longer than other employees to get up to speed. There was no evidence that this was due to anything related to his disability. We accepted that the Claimant was given a reasonable period to learn and carry out the role and there was not a failure to make a reasonable adjustment in this regard.

311. In terms of when the PIP was imposed and the holding of meetings. The Claimant did not attend the first formal PIP meeting, because the commencement of the PIP was suspended. This was because it was recognised that commencing the PIP alongside the Claimant attending the harassment investigation meetings was stressful for him. It was a reasonable adjustment to stop the PIP process until the Claimant had attended those meetings and it was put in place by the Respondent.

312. It would not be a reasonable adjustment to postpone the PIP indefinitely. The Respondent had serious concerns about the Claimant's capability in his role. The Claimant had been engaged as a level 3 and it was necessary that he was able to undertake level 3 work. The Respondent paused the process whilst the Claimant was attending the harassment investigation meetings and the PIP did not take place whilst he was on sick leave. Further the PIP process was not continuing whilst the Claimant was suspended. The Respondent reduced potential stressors for the Claimant by not having PIP meetings when he was attending meetings in relation to the harassment investigation process. We accepted that this was a reasonable adjustment they put in place.

313. It would not be a reasonable adjustment for the Respondent to accept the poor level of performance as satisfactory, because it would place an unnecessary burden on the team and expose the Respondent to risks from inaccurate accounting.

314. We found that the Respondent made reasonable adjustments where it could, however there was nothing further that the Respondent could have reasonably done which would have alleviated the disadvantage.

315. The claim was therefore dismissed.

Attending meetings without a laptop.

316. Even if we were wrong about there being such a PCP, the Respondent was unaware that the Claimant had difficulties in reading paper reports due to issues with his eyesight. Until the Claimant informed the Respondent of this after the meeting on 14 October 2019 it would not have had any information on which it could be said that it should have asked questions. We accepted that there was a substantial disadvantage, but that the Respondent did not know of it and further it ought not to have reasonably known about it.

317. Further the Claimant was permitted to use his laptop at the meeting, which was the adjustment contended for. Therefore there was not a failure to make reasonable adjustments and the claim was dismissed.

Requirement to attend disciplinary hearings

318. The Claimant said that he was placed at a substantial disadvantage by suffering an increase in stress and worry while waiting for different stages of the disciplinary process, thereby exacerbating his condition.

319. When the disciplinary process was started, the Claimant attended an investigatory meeting on 16 June 2019, but could not complete the meeting due to an appointment. It was not possible to complete the meeting until 2 July 2019. The interviews with Dr Long, Mr Merrett, Ms Porter, Mr Chappell and Mr Vercoe took place after the Claimant's interview was completed. On 29 July 2019 the Claimant was sent the draft report and asked to comment on it before it was finalised. The Claimant asked for many extensions and ultimately was given until 15 October 2019 to provide them. We were not satisfied that the Claimant was wondering what was happening, he had been asked to provide his comments and had not. On 24 October 2019, the Claimant was invited to attend a disciplinary meeting. The Claimant was aware of the ongoing process and was informed of developments in short periods of time. We did not accept that he was wondering what was happening. The significant delay in the process was caused by the Claimant not responding to the draft investigation report. We did not accept that the Claimant was put at a substantial disadvantage in this respect.

320. In terms of being required to attend the disciplinary meeting on 28 November 2019, the Claimant said that the substantial disadvantage was being required to attend against occupational health advice and that he could not fully concentrate or engage in the process. We also interpreted as the Claimant as saying that the hearing was having an adverse effect on his diabetic control.

321. There was no evidence that the Claimant experienced hypoglycaemic incidents between 22 November 2019 and the disciplinary hearing. There was no evidence that the Claimant was experiencing hypoglycaemic incidents on the day of the hearing. The occupational health report made no reference to hypoglycaemic incidents and only made reference to psychiatric symptoms which were found not to amount to a disability. We were not satisfied that in the lead up to, and at the time of the disciplinary hearing, the Claimant's diabetes was being exacerbated. It was significant that the Claimant attended the hearing by telephone and was able to fully participate and had provided written submissions. We were not satisfied on the balance of probabilities that the Claimant was put to a substantial disadvantage by reason of his disability. He was at a disadvantage due to his mental health, however that was not a disability at the material time.

322. The claim was therefore dismissed

323. In the event that the Claimant had been at a substantial disadvantage, we would not have accepted that the Respondent ought to have reasonably known of that disadvantage at that time. The Claimant had been signed off sick by reason of psychiatric matters. There had not been any recent medical evidence which tended to suggest that control of the Claimant's diabetes was difficult and the Claimant had not suggested this to the Respondent. If the Respondent had such knowledge then it would have been a reasonable adjustment to postpone the hearing. However, it would not be reasonable to postpone the hearing indefinitely. We considered that if there had been such a postponement that a further occupational health report would have been obtained 6 weeks after 22 November. In such circumstances it was likely that a further disciplinary hearing would have been held about 8 weeks after 28 November 2019 and it was likely that the same decision would have been made.

324. The claims, that there had been a failure to make reasonable adjustments, were dismissed.

Time limits

325. In the light of our conclusions in relation to the individual allegations it was unnecessary to consider whether the allegations of discrimination/harassment were presented in time.

Unlawful deduction from wages/accrued but untaken holiday

326. It was agreed between the parties that the Claimant was due £666.11 net for accrued but untaken holiday. We accepted that the gross figure was £971.20. By consent Judgment was entered for the sum of £971.20 for this claim.

_____
Employment Judge J Bax
Dated 4 July 2022

Judgment sent to Parties on
11 July 2022 By Mr J McCormick

For the Tribunal Office