EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr A Manzoor	AND	Ministry of Defence

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 8 to 12 and 15 to 16 August 2022

EMPLOYMENT JUDGE J Bax
MEMBERS Mrs D England
Mrs P Ray

Representation

For the Claimant: Mr A Manzoor (in person)
For the Respondent: M (Counsel)

JUDGMENT

The unanimous judgment of the tribunal is that:

The claims of direct race discrimination and harassment related to race are dismissed.

REASONS

1. In this case the Claimant, Mr Manzoor, brought claims of direct race discrimination and harassment related to race.

Preliminary matters and matters arising during the hearing

2. The Claimant notified ACAS of the dispute on 26 June 2020 and the certificate was issued the same day. The claim was presented on 12 September 2020.

3. At a case management preliminary hearing on 10 September 2021, the Claimant confirmed that he brought claims of direct discrimination and

harassment. The claim of victimisation was withdrawn and dismissed upon that withdrawal. Employment Judge Fowell identified the issues to be determined, namely 8 allegations of harassment or direct discrimination in the alternative and 13 allegations of direct discrimination. Some of the allegations occurred more than 3 months before ACAS was notified of the dispute and therefore there were issues of jurisdiction relating to time to be determined. The issues were further confirmed by the parties at a case management hearing on 12 July 2022.

4. All witnesses gave oral evidence at the Tribunal, apart from Lt Col McGregor who gave evidence by video link.

5. At the start of the hearing the Respondent raised an issue about the Claimant's Schedule of Loss. At the case management hearing on 10 September 2021, the Claimant said that he had suffered no direct, personal loss of earnings as a result of having to return to the UK, although it had disrupted his daughter's schooling and his wife had to leave her job in Germany. He was ordered to provide a Schedule of Loss, setting out what losses he had suffered. He did not file a Schedule of Loss. At the case management hearing on 12 July 2022 he confirmed he did not have any financial losses and it was explained that if he wanted to make a claim for injury to feelings he would need to specify what figure he should be awarded. On 18 July 2022, the Claimant filed a Schedule of loss with financial losses of about £148,000. The Respondent objected to reliance on the Schedule on the basis that it was unable to challenge it with witness evidence and it had not been the basis of the case it had been working on. The Claimant said that because he did not have a loss of earnings he did not think there was a financial claim and it appeared that there was a misunderstanding. It was considered that the appropriate course of action was to first determine the issue of liability and on receiving that Judgment the Claimant, if successful, could decide whether he wanted to pursue financial losses in addition to injury to feelings. The Respondent would be able to make further submissions at that stage. The Claimant was warned that if an adjournment was necessary that there could be an application for costs in relation to any further hearing.

Amendment Applications

6. The Claimant also sought to amend his claim, to add an allegation about the allocation of offices. In the claim form the Claimant provided brief particulars of claim. The Claimant provided further information and a factual reference was made. At the case management hearing on 10 September 2021 the issues to be determined were discussed and agreed. The issues to be determined were set out in the case management summary, none of which made reference to the Claimant's office. At paragraph 12 of the Order, the parties were ordered to check the list of issues and if it was wrong

or incomplete to write to the Tribunal within fourteen days, otherwise it would be treated as final unless a Judge ordered otherwise. Directions were also given for the preparation of witness statements and exchanged by 20 June 2022. In the further information provided by the Claimant following that hearing, the office issue was not mentioned [p75-79]. On 12 July 2022, Employment Judge Rayner discussed the issues and both parties confirmed that the list produced by Employment Judge Fowell was correct, and they were the issues to be determined. The parties were given directions to exchange witness statements by 18 July 2022. The office issue was referred to in the Claimant's witness statement. The Claimant did not really provide an explanation as to why he did not raise the office issue after the hearing in September 2021 or in July 2022. He said he had provided a long document and thought it would be discussed, but he did not address why he did not say that the list was incomplete. He acknowledged that the Respondent was prejudiced. The Respondent opposed the application on the basis that it had not prepared on that basis and it was noted there was no such reference in its witness statements.

7. We considered the guidance in Cocking v Sandhurst (Stationers) Ltd and Anor [1974] ICR 650 and the need to have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. We also took into account the guidance in Selkent Bus Company Ltd v Moore [1996] ICR 836 and in Vaughan v Modality Partnership UKEAT 0147/20. In Vaughan it was said that the factors identified in Selkent are not a tick box exercise, they are the kind of factors likely to be relevant in striking the balance. The EAT said that representatives would be well advised to start by considering what the real practical consequences would be of allowing or refusing the amendment, if the application is refused how severe would the consequences be and if permitted what are the practical problems in responding. This requires a focus on reality, rather than assumptions. It will often be appropriate to consent to an amendment that causes no real prejudice. A balancing exercise always requires express consideration of both sides of the ledger, both quantitatively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice.

8. Although the fact of the office issue had not strictly been raised for the first time, it was the first time that it was said to be an issue to be determined. The Claimant was seeking to add an issue, which since September 2021, did not appear to be an allegation that the Tribunal was required to determine. We took into account that the Respondent relied upon what was said at the hearings in September 2021 and July 2022 and the Claimant had not sought to correct the position until the first day of the final hearing. The Claimant accepted the Respondent was prejudiced and we accepted that prejudice was significant in that it had not addressed the issue in

witness evidence. The Respondent was entitled to know the case it had to meet. Balancing the prejudice to both parties the Claimant could rely on the issue as background but if he was permitted to rely on it as an allegation the Respondent could not meet it with any evidence. The prejudice to the Respondent was far greater in allowing the application than to the Claimant by refusing it and the application was refused.

9. Part way through the evidence of Lt Col McGregor, it became apparent that the Claimant was seeking to allege that Lt Col McGregor being his line manager was an act of direct discrimination. The Claimant made an application to amend the allegations of direct discrimination to include it. In the Claimant's further particulars, there was a line that they were of the same rank and the Claimant accepted that it was not clear he was alleging it was discrimination on the grounds of race. At the case management hearing on 10 September 2020 the issues to be determined were discussed and agreed. The Claimant did not suggest, despite the order referred to above, following that hearing that the issues were incorrect and the issues to be determined were confirmed as correct on 18 July 2022. The Claimant accepted that he could not offer an explanation as to why he had not sought to raise the issue on those occasions. The Claimant accepted there was some prejudice to the Respondent. The Respondent said it was prejudiced because it could not deal with the allegation. The only witness called at the hearing who could deal with the allegation had given evidence and left the Tribunal and no questions about the issue were put to Mr Nash. The Respondent considered that the Claimant was seeking to bring a claim which was a movable feast. We considered the principles in the authorities detailed above. We concluded the prejudice to the Respondent was significant given the late stage of the proceedings. The Respondent was entitled to know the case it had to meet. It should not be required to respond to questioning in the final hearing raising an issue for the first time. The only witness who could give evidence that had been arranged to attend the Tribunal had given evidence, left the building and was someone who had to be persuaded to attend whilst on holiday. The other potential witnesses from UK HQ had not been approached to give evidence or the issue investigated with them. Balancing the prejudice to both parties the prejudice to the Respondent was significant in granting it. The application was made too late for there to be a fair hearing if it was included. Accordingly the application was refused.

<u>Withdrawal of claims.</u>

10. After the Claimant cross-examined Mrs Hunt, he said he accepted that she had not discriminated against him and withdrew his claims against her. Claims under paragraphs 7(e) and (f) of the list of issues were dismissed upon that withdrawal.

The evidence

11. We heard from the Claimant. For the Respondent we heard from, Lt Cols White, Whitticase and McGregor, Mrs Hunt, Mr Nash, Mr Donnan and Mrs Somerville (nee Jones). We were also provided with a bundle of 839 pages, plus additional documents by the Claimant and any reference in square brackets within these reasons is a reference to a page in the bundle.

12. The Claimant said during his oral evidence that no one he worked with made a racist comment or said something with a racial undertone. Further he accepted that there was not a document in the bundle which showed he had been discriminated against and it was all circumstantial. He also clarified that he did not consider that Mr Marden, Mr Norris, Mrs Somerville and Mr Donnan had discriminated against him on the grounds of his race.

The facts

13. 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.

14. The Claimant identifies as Asian with Pakistani origin. He started working for the Respondent on 1 June 2016.

15. In 2018, the Claimant applied for the position of Business Manager for the Service Delivery: Training Division of the Defence Infrastructure Organisation in Sennelager, Germany.

16. The advertisement did not refer to a tour end date and it was stated to be overseas. The policy in relation to Overseas Recruitment [p298] provided that overseas tours of duty could either be permanent (12 months or more) or temporary (more than a month but less than 12 months). The normal length of an overseas tour on permanent transfer is three years, with the option of extending up to two years and the maximum length is 5 years. We concluded that it was a permanent position.

17. The Claimant was interviewed on 30 May 2018 by Lt. Col Parker and another panel member. In the interview Lt Col Parker clarified that if successful the posting would be until 31 March 2020. Discussion also took place about the possibility of extending the tour. The Claimant raised concerns about his daughter's schooling at a faith school and he did not want to risk displacing his family if he was not certain his job would continue after March 2020. It was notable that the discussion was not referred to in e-mails at this time. Lt Col Parker did not inform the Claimant that his role would be extended. The Claimant was reassured that there would be an

MOD presence post March 2020, Lt Col Parker was working on it and he did not see any problems, at that stage, with an extension.

18. The Claimant was sent a notice of posting which stated his tour end date was 31 March 2020. The Claimant accepted that at that date the base was scheduled to close. The Claimant accepted the appointment and started his post in Germany on 27 August 2018 with a transfer date of 31 August 2018. The Claimant's countersigning officer was Mr Nash, Deputy Head Overseas Defence Training Estate, who was based in Warminster, UK.

19. The Claimant's role involved: processing bills and land management, attending Berghan-Hohne range conference and processing training bills, processing business case material and spares for target systems and liaising with HQ in Warminster for the preparation of the monthly report. The Claimant's responsibilities related to the Sennelager training area only. Although the Claimant would process expenses claims he did not line manage any staff and he did not undertake performance appraisals of other people.

20. In 2018 the UK Defence Minister agreed with their German counterpart what would happen with the UK military presence in Germany. The effect was that the whole organisation in Germany, both Army and Defence Infrastructure Organisation ("DIO") was to be closed down on 31 March 2020 and a new organisation opened on 1 April 2020. The majority of sites in Germany were to be closed, however it was decided some training centres could remain, but that the new site would be run by a single MOD department together with the associated business infrastructure.

21. We accepted that an overseas posting normally lasts 3 years and extensions could be granted on the presentation of a business case. We accepted that extensions in Germany were not possible beyond 31 March 2020 due to the closure of the organisation. There was an exception due to exceptional circumstances in which satellite sites were being closed and the project was to be concluded within 8 months of 31 March 2020 and it made no sense to recruit an individual for such a short period. All civil servants were told that their post would expire on 31 March 2020 and they would need to apply for a new role.

22. When the Claimant moved to Germany his line manager changed from Lt Col Parker to Lt Col McGregor, who was also a C2 civil servant. Lt Col McGregor was appointed as line manager due to the physical dislocation from more senior members of the team and because he was the senior health and safety officer and had been allocated by HQ in Warminster to have responsibility for the training area, including aviation. Further he was considered to be a safe pair of hands. There was not anybody more senior in the chain of command based in Germany. Lt Col McGregor's line

manager was Lt Col. Parker. Lt Col McGregor did not consider it was unusual for a C2 to manage another C2.

23. When the Claimant arrived in Germany, Lt Col McGregor allocated him an office next to his in building 69. The Claimant shared the office with the office manager. There were two other grade D civil servants, Mr Hoskins and Mr Lane, also based at Sennelager. The Claimant's predecessor had his own office in building 78. Before the Claimant arrived Mr Lane was given that office. We accepted Lt Col McGregor's evidence that Mr Lane had been sharing with the office manager, Ms Thompson, and there had been a breakdown of relationship between Mr Lane and Mr Hoskins, to the extent that Mr Lane no longer wanted to work in close proximity to Mr Hoskins. Therefore Mr Lane was moved to building 78. The Claimant had not worked in operational delivery or close to military or army personnel before and had no experience of a firing area. Lt Col McGregor thought it was wise that the Claimant set up in Mr Lane's old workspace so that the Claimant could easily ask him questions. Lt Col McGregor considered that there would have been nothing worse than to send the Claimant to a partly inhabited block 800m away, where he would be divorced from day to day matters and lose the opportunity to understand what they did and how it was done. The Claimant did not complain about the arrangement. In January 2019 the Claimant requested to move to building 78 and it was granted.

24. On 11 and 12 September 2018, Lt Col White gave a presentation about a proposed DIO organisation chart of Germany. Lt Col White said that they would need to recruit for the four remaining C2 posts. Mr Nash enquired when the Claimant's end date was, which was confirmed as 31 March 2020. We accepted Mr White's evidence that he did not give the Claimant an assurance that he would be taken across into the new organisation. It was likely he said that ordinarily a post could be extended with an approved business case, but he did not suggest it was valid in the present circumstances.

25. On 26 November 2018, the Claimant completed the MOD DSE Eyesight Test and Provision of Spectacles form to claim a contribution of £45 towards spectacles, which he took to Lt Col McGregor. Lt Col McGregor's workload was extremely high and he was not familiar with the policy for claiming a contribution. We accepted that Lt Col McGregor wanted to consider the policy before approving the claim and that he always had in mind that it was tax payer's money which was being spent. We also accepted that his mother had worked for the NHS and been disgusted at the level of waste and this had influenced his approach. We accepted that with any claim by an employee Lt Col McGregor always asked questions and he would not sign blank cheques. Lt Col McGregor felt badgered by the Claimant and wanted to study the form and policy before signing the authorisation and asked to be left with it.

26. Lt Col McGregor understood from the JSP policy that the contribution could only be allowed for glasses for DSE use only and not generally. He explained this in an e-mail to the Claimant and asked for the Claimant's confirmation at which point he would sign the form. The Claimant took this to be a refusal and e-mailed Mr Richmond, copying in Lt Col McGregor, seeking clarification. Lt Col McGregor sought advice from Mr Richmond who referred to a BFG policy which did not specify the glasses had to be solely for DSE use. This confused Lt Col McGregor because the policies did not seem consistent, however he was happy that the expense could be justified under at least one of the policies and the allowance was authorised within a day of the request being made. The Claimant said in oral evidence that he strongly believed that this occurred because of his race and that the Claimant had signed similar forms for other people. Lt Col McGregor denied that suggestion.

27. On 9 or 10 January 2019 the Claimant was asked by Lt Col McGregor, to check and provide suggestions to a job description for Business Manager post in the new organisation. The first draft had been prepared by Lt Col White.

28. On 10 January 2019, the Claimant was informed by DBS, in response to his query about an extension of his tour, "you will need to speak to your line manager who will need to initiate the process although we do feel you need to be aware that your current end date is 31/03/2020 and as you are stationed in Germany any extensions beyond this date will be subject to the critical needs of the Germany draw-down of personnel." The Claimant accepted that he was told that the policy was that the tour would end on 31 March 2020. After speaking to DBS the Claimant gave Lt Col McGregor a completed form for an extension of his tour. Lt Col McGregor said that he would raise it with Lt Col White.

29. A couple of days later Lt Col McGregor informed the Claimant that HQ Warminster did not agree to an extension because it would be into a new post, for which the Claimant would have to apply. The Claimant objected to this and Lt Col McGregor said something on the lines of 'full stop that is what I have been instructed.'

30. In February 2019 the Respondent consulted the Trade Unions on the impact of the Future Defence presence in Germany.

31. On 12 February 2019, the Claimant had an argument with Mr Hoskins. We accepted that Mr Hoskins was fiercely protective of his work area and his direct reports. The Claimant discussed the incident with Lt Col McGregor who told him that Mr Hoskins was very sensitive about his reports and suggested that he should try not to approach them directly. The

conversation occurred in Lt Col McGregor's office. Lt Col McGregor asked if the Claimant wanted to raise a complaint.

32. On 14 March 2019 Mr Hoskins prepared a draft business case in relation to operational batteries and sent it to Lt Col McGregor, rather than sending it to the Claimant. Business cases were the Claimant's responsibility. The Claimant's electronic signature was included; however he had not been involved and it contained incorrect financial details. This was the only time the Claimant's signature was not added by himself.

33. Lt Col McGregor assumed that the business case had been discussed with the Claimant and sent it to Lt Col White, copying in the Claimant and Mr Nash. It was queried whether the Claimant had a budgetary delegation and he said that the Claimant did not have such a delegation; this was with reference to the section in which the Claimant's signature had been added.

34. The Claimant sent an e-mail to Lt Col McGregor copying in Mr Nash and Lt Col Parker, Lt Col White and Mr Hoskins saying that he politely reminded them, for audit trail purposes, he should be sent business cases first and he would then send them to the multiuser account. The Claimant's evidence was that after sending the e-mail, Lt Col McGregor said that if he had any issues with him he should speak directly and not send an e-mail to others. Further that after saying that it was because his signature had been added, Lt Col McGregor said 'if you want to play this game, then I will play too and I will also CC in others while communicating with you'. Lt Col McGregor did not recall saying anything of that type and considered it was unlikely because they were generally copying in others to important e-mails. We concluded that Lt Col McGregor was busy and irritated and said something on the lines that, if the Claimant was going to copy people in he would play that game too.

35. The Claimant said that he did not think such a thing would have been said to someone of a different race, however he did not have any evidence to support the assertion. When asked why it was because of his race or related to it, he referred to doing his duty and being told not play games and that Lt Col McGregor said that if he had an issue to go to him. He accepted employees did not always get on, but believed it was to do with race.

36. On 27 March 2019, Lt Col McGregor e-mailed the Claimant and Mr Hoskins and asked them to investigate the procurement route. He was also conscious that the Claimant had to have ownership of the final business case and asked him to take the lead on it [p106]. The Claimant later signed off the final business case.

37. In April 2019, Mr Nash met the Claimant and other civil servants in his team and explained the situation in relation to the close of the organisation.

38. The Claimant relied upon a performance review dated 20 February 2020, with a mid-point review of 30 October 2019, to show that his role was the same as the new role, however it did not cover all of the new organisation tasks. Taking into account that document, the job descriptions and the Claimant's oral evidence it was likely that, the business manager role in the new organisation incorporated the Claimant's role, in addition to which there were the following responsibilities which the Claimant had not performed: (1) overseeing the site facilities management contract and the maintenance of all buildings and services and the certification of the monthly contract, (2) oversight of soft facilities including cleaning, waste management and hotel services, (3) overseeing all HR aspects of the organisation including dealing with those who did not speak English and the Claimant did not speak German, (4) responsibility for a much greater budget. Other aspects with which the Claimant had been previously involved were increased. The Claimant's previous HR function had been connected with processing wages and was not managing people day in day out, whereas under the new structure the business manager had line management functions for four direct reports. We accepted that the role in the new organisation was significantly different to the role which the Claimant had been performing and it was a new role.

39. We accepted Mr Nash's evidence that he was not responsible for refusing to extend the Claimant's existing role. The old organisation was closing down and the Claimant's role no longer existed and he did not have ability to extend it. The Claimant accepted in cross-examination that if there was a new role that it was correct for the Respondent to have advertised it in an open competition. Further in such circumstances the decision to advertise externally was nothing to do with his race.

40. Lt Col White had authority to recruit the C2 posts at level 4. This meant that the position was open to internal and external candidates. If the posts were recruited at level 3 they would only consider internal candidates, however it was the policy that candidates already overseas would not be able to apply for a level 3 post on the basis that it would allow other employees to work overseas.

41. In June 2019, Lt Col White advertised three C2 posts. The Business Manager and HFM posts were advertised externally whereas the SFM post was advertised internally.

42. The Claimant e-mailed Lt Col white on 18 June 2019, querying why the SFM post was advertised internally. Lt Col White immediately recognised it was an error and corrected it straight away. The following day all posts were advertised externally. The candidate already in post for the SFM role was selected after the exercise. We accepted that if the SFM role had continued

to be an internal advertisement only, the previous SFM could not have been appointed.

43. The Claimant said in evidence that this was to do with his race because he had been in his post for less than 5 years and it was not justified and he did not accept it was a new role for which the Respondent had to advertise externally. The Claimant accepted that Ms Revill had not discriminated against him and she confirmed on 13 September 2019 that because a new unit would be required the posts were advertised under a fair and open recruitment process.

44. On 30 June 2019, the Claimant e-mailed Lt Col. White stating that he had not applied for his position because he had reservations about the recruitment campaign and that his position should not have been advertised and that it was not a new post. There was no mention in the e-mail that the Claimant had been given an assurance as to an extension. Lt Col White was not part of the Claimant's chain of command and he referred the e-mail back to the Claimant's chain of command, i.e. to Mr Nash to explain that it was a new post and the reasoning for the new business model had been well advertised and explained on a number of occasions.

45. Lt Col White did not see the e-mail as a complaint on the basis that the Claimant's concluding line was, "looking forward to your thoughts on this matter please." The Claimant did not chase for a response. In cross-examination of Lt Col White it was suggested by not responding it caused the Claimant to believe he was being ignored and that it could be an environment which could be racist. Lt Col White did not accept the suggestion. We accepted his evidence that he considered diversity within the MOD was a positive thing and in his experience ethnic diversity improves the performance of teams.

46. Mr Nash did not respond to the e-mail forwarded to him. We accepted his evidence that the situation had been fully discussed in April 2019 and that it must have been an oversight on his part. The Claimant suggested in cross-examination that this was racial harassment, which Mr Nash denied.

47. On 2 July 2019, Lt Col McGregor sent an email regarding the job advertisements to the Claimant, Mr Hoskins and Mr Lane saying he had been asked to mention that they have a lower priority when applying whilst already overseas. The Claimant raised concerns with Lt Col McGregor, who forwarded them to Lt Col Parker, supporting what he had said. Lt Col Parker responded by saying he fully supported that view. Lt Col McGregor showed the Claimant the e-mail he had sent and was treating it seriously by passing it on to their superiors.

48. On 7 July 2019, the Claimant had not heard anything about his e-mail of 30 June 2019 and applied for the Business Manager post. On 15 July 2019 the Claimant was invited to an interview.

49. Lt Col White devised the interview panels for all of the C2 roles being recruited for. Lt Col White chaired the panel for Business Manager interviews and was accompanied by Lt Col Parker and Mr Marden. Lt Col White thought that he had constituted the panel in accordance with policy and sought the advice from DBS when doing so. In cross-examination the Claimant referred Lt Col White to the Civil Service Recruitment Principles which stated at paragraph 10, that the panel must be chaired by a civil servant. Lt Col White, during cross-examination, was shocked at learning this and we accepted that if he had known he would have constituted the panel differently. This issue was looked into by Mr Donnan when investigating the grievance appeal and he discovered that the MOD recruitment policy, at the time, permitted a military officer to chair the recruitment of a member of the Civil Service. We accepted that the MOD policy had not been updated to take into account the Civil Service policy and that aligning the policies was an HR function rather than that of Lt Col White. There was no evidence to suggest that the Claimant's case was a relevant factor in the difference between the policies. The same panel was used for all of the C2 recruitment exercises which consisted of about 25 to 30 candidates in total, of which some were from ethnic minorities.

50. The Claimant did not raise any objection about the panel at his interview or before the outcome of the process was announced. We accepted that the Claimant knew Lt Col White was organising the recruitment process.

51. On 22 July 2019, the Claimant was interviewed at Warminster HQ by Lt Col Parker, Lt Col White and Mr Marden. We accepted Mr White's evidence that before the interviews were held, they expected the Claimant to be the strongest candidate for the business manager role. Before the interviews started Mr White disclosed to the panel that he knew the Claimant, this was not recorded in writing. He also informed the panel that the Claimant had raised an issue with the overall business model and that he felt he should have been post mapped into the new post, which also was not recorded in writing. We accepted that he did not directly discuss the Claimant's e-mail of 30 June 2019. Lt Col Parker was also aware that the e-mail had been sent. We accepted Mrs Somerville's evidence that traditionally within the MOD knowledge of candidates would be discussed among the panel before the interview and the independent member would militate against that knowledge and that the discussion did not go through DBS.

52. We accepted Lt Col White's evidence that the same question template was used for each candidate and the questions on it were asked. The Claimant referred Lt Col White to the job description in the bundle [p505] and said

that the core competencies did not include leadership, whereas the interview criteria included it. Lt Col White was not sure whether the job description in the bundle was the final version. We accepted his evidence that he had based the questions on the criteria set out in the advertisement, which set out that the candidates would be assessed against the civil service behaviours of leadership, managing a quality service, delivering at pace and making effective decisions. We accepted that leadership would be a relevant consideration given the management functions involved in the role. We accepted that it was policy that only evidence provided by candidates at the interview could be considered and other external knowledge could not be taken into account, and that policy was consistently applied to all candidates.

53. The Claimant suggested in his evidence that he had been asked inappropriate questions in relation to how to get other C2s to work for him, whether he had worked as a 2IC in a military environment, and why they should select him. The Claimant accepted that the questions were “100% not connected to race”.

54. The panel considered how each candidate had performed. We accepted that each member of the panel took notes and they then discussed the scores and the notes. The panel reached a unanimous decision on the scores. We accepted Lt Col White’s evidence that in terms of agreeing the order of merit there was a unanimous decision within about 30 seconds.

55. The Claimant had an overall score of 27, whereas the successful candidate scored 33. The comment on the HMRS record for the Claimant was that there was an acceptable demonstration of evidence, but the panel was of the opinion that greater evidence of leadership of teams and organisations to better demonstrate the ability to coordinate overall delivery outputs would have improved his competitiveness for the post. The Claimant was second in the order of merit and first reserve should the successful candidate not accept the post.

56. The Claimant accepted that Mr Marden had not racially discriminated against him and that the notes of Mr Marden’s interview for the subsequent grievance were accurate. Mr Marden said that although the Claimant was a strong candidate, his answers were too focused on financial detail, whereas the successful candidate’s answers were more consistent, generally of a higher level and they provided stronger evidence of working with others. He also said discussion took place as to whether the Claimant’s proven experience should justify appointing him over the higher scoring candidate, but concluded they could not.

57. We accepted Lt Col White’s evidence that the Claimant’s answers were a narrow view relating to technical evidence of financial accounting roles and

did not present evidence of understanding or being able to manage traditional Business Manager lines of responsibility, especially in relation to personnel management and management of contractors. The successful candidate had provided a wide range of evidence demonstrating the behaviours required. We accepted the Respondent's evidence that the successful candidate performed better at the interview and due to the examples given within it, was scored higher than the Claimant.

58. The Claimant relied upon an e-mail from Mr Marden dated 9 October 2019 [p196], in which he said he was sure that the successful candidate scored higher than the Claimant, but he had not seen the moderated outcome sent in by Lt Col White. We accepted Lt Col White's evidence that the panel had discussed each individual and the scores awarded and that Mr Marden had not understood one of the technical aspects concerning one score and after discussion was happy to reach a consensus. We did not accept that Lt Col White and Lt Col Parker influenced Mr Marden or pressurised him in the way he conducted his scoring. We accepted that the panel agreed the scores and the comments which were put onto HMRS. We concluded that Mr Marden's comment that he had not seen the moderated outcome referred to Mr White's spreadsheet that he inputted into HMRS, but that the contents of that spreadsheet had been agreed by the panel.

59. The Claimant asserted that the outcome was racially motivated and said it was demonstrated by the errors in the procedure.

60. We accepted that neither Lt Col McGregor nor Mr Nash had any involvement or influence in the recruitment process. Col McGregor had to apply for a new position too.

61. After the interviews concluded, Lt Col White immediately inputted the results onto HRMS as per the spreadsheet [p647]. He understood from an interviewing course that once the data had been inputted onto HRMS there was no need to keep the handwritten notes. As soon as the data had been inputted Mr White destroyed all of the notes taken by the panel for all of the interviews for the business manager role and the other C2 roles being recruited for. We accepted Lt Col White's evidence and that it was a genuine misunderstanding by him.

62. The Claimant was informed that he had not been appointed and had been selected as first reserve for the position. On the Claimant's return to Germany he spoke to Lt Col McGregor who commiserated with him about the interview. The Claimant said that he was going to submit a formal complaint about the process. We did not accept that the Claimant told Lt Col McGregor that he was going to complain about him. Lt Col McGregor suggested to the Claimant that he make a complaint.

63. On 2 August 2019, the Claimant e-mailed Lt Col Parker [p131-132], informing him that he wanted to make a formal complaint about Lt Col McGregor for not following the correct procedures regarding an extension of his post, and in relation to assurances he had been given by Lt Col White and Lt Col Parker. He concluded by saying, "I am sorry if my concerns have caused you any offence but I don't want to live for the rest of my life with the feeling that I was a victim of discrimination and/or extremely unfair and unlawful treatment as on several occasions, I had professionally challenged wrongly made decisions by others and changed and streamlined the processes and procedures which may have played a role resulting in the situation I am in. I have sent a written complaint to John White and Ruaraidh McGregor and they didn't even bother to reply, and I feel strongly offended and insulted by their approach which convinced me to take this matter towards formal complaint." There was no reference to the Claimant's race being a factor.

64. Lt Col Parker met the Claimant on 29 August 2019 and sent him an e-mail on 30 August 2019, which included, "You were specifically recruited into a post into the current DIO SD Training Germany Business Manager and the end of that post, and your tour in Germany, is 31 Mar 20. You are unable to apply for an extension of that post because it is disestablished from 31 Mar 20." He was also informed that the post in the new organisation was not his current post. Mr Nash had input into the form of words used. We accepted that Mr Nash was trying to help Lt Col Parker, as his line manager.

65. On 2 September 2019, the Claimant e-mailed Mr Nash [p138] in which he forwarded a lengthy chain of e-mails with the Claimant's comments within them. At the end of the e-mail he requested a change of line manager on the basis that he was one of the people he was complaining about and that Lt Col Parker had asked him to raise a complaint with DBS and Mr Nash.

66. Lt Col McGregor remained the Claimant's line manager until his last day in post. Mr Nash's unchallenged evidence was that he was focusing on the Claimant's grievance and had not noticed that the Claimant had asked for a change of line manager. The Claimant did not chase up Mr Nash about a change of line manager.

67. On 2 September 2019, the Claimant raised a formal complaint with Mr Nash [p144] that (1) his e-mails of 30 June and 4 July were not responded to, (2) the recruitment should have been put on hold and (3) that "I strongly feel that I was unsuccessful in the interview because either senior management including two out of three members were upset/influenced by my complaint which they had received but entirely ignored, or they had made up their minds to get rid of myself since I had professionally challenged some wrongly made decisions of others including my LM." There was no

suggestion that the Claimant had been racially discriminated against. He asked Mr Nash for a meeting to discuss it

68. On 4 September 2019, Mr Nash forwarded the complaint to Lt Col Parker for his information, anticipating he would be involved in the process. Lt Col Parker responded by saying that he was implicated and should not be involved in the investigation.

69. On 6 September 2019, the Claimant e-mailed DBS about his complaint [p174], in which he said, "I strongly feel that I was unsuccessful in the interview because either senior management including two out of three members of the interview panel were upset/influenced by my complaint dated 30 June 2019 which they had received but entirely ignored, or they had made up their minds to get rid of myself since I had professionally challenged some wrongly made decisions of others including my LM."

70. On 13 September 2019, the Claimant e-mailed Mr Nash that he was aware of another person in Germany who had an ongoing grievance and the recruitment had been put on hold. He suggested that was an appropriate course of action in the present case [p165]. Mr Nash made enquiries with DBS and discovered that the individual was not part of their chain of command and was in the Army part of the MOD. He was not advised to stop the recruitment and the decision was taken to continue. The recruitment into the new organisation was business critical and the process was not stopped.

71. On 24 September 2019, Mr Nash was appointed as deciding officer for the grievance because he was the Claimant's counter-signing officer. Although he could not personally overturn the recruitment panel's decision if he thought that was the correct decision he 'could push it up the chain of command'. The Claimant was informed that Mr O'Brien would be appointed as the investigating officer. The Claimant did not object to the decision. We accepted Mr Nash's evidence that he was trying to deal with the grievance as best he could and thought he was helping the Claimant with his grievance.

72. The Claimant cross-examined Mr Nash on the basis of paragraph 54 of the grievance policy which said that the complaint ordinarily should be submitted to their line manager , but a manager should not deal with it if they are or could reasonably be perceived as being involved or implicated, biased or had a personal interest in the outcome. At this stage it was not apparent that Mr Nash was implicated in the allegations.

73. On 24 September 2019 Mr Nash appointed Mr O'Brien as investigating officer because he had a background in MOD HR processes and understood the ongoing restructure. He was also waiting to be assigned to

a substantive post, after returning from a year's training, and as such had time to conduct the investigation. Mr O'Brien did not work for Mr Nash and worked in the wider HQ for the Brigadier and was independent. We were satisfied that Mr O'Brien did not have close personal links with the main parties. Ms Rees was appointed as notetaker, who was also PA to Brig. Stockley, although she was not present for the interviews of Lt Col McGregor and Mr Marden.

74. On 25 September 2019, Mr O'Brien invited the Claimant to attend a meeting to investigate: (1) the decision not to extend his current role, (2) the treatment of complaints submitted to Lt Col McGregor and Lt Col White, and (3) the fairness of the interview.

75. On 2 October 2019, the Claimant attended an investigation meeting with Mr O'Brien and was accompanied by Mr Lange, Trade Union representative. At the start of the meeting it was clarified that the grievance related to the points identified in the invitation letter. The Claimant did not suggest his race was a factor. Prior to the meeting the Claimant had a discussion with his union representative and had not told him anything about racial discrimination. During the meeting the Claimant did not refer to being racially discriminated against. He also accepted that he was not entitled to have his post extended and that it was a discretion of the employer. He also confirmed that his e-mail dated 30 June 2019 was an informal complaint. He also confirmed that Lt Col McGregor, after informing him about the outcome of the interview, had said he was sorry and asked when he was leaving. Mr Nash was also referred to in that after the interview he had been consulted by Lt Col Parker.

76. On 2 October 2019, Mr O'Brien e-mailed Mr Nash and identified that he might be too close to the principal decision complained about by providing direction to Lt Cols White, Parker and McGregor and suggested advice was sought from DBS as to whether an alternative decision maker should be identified [p187]. Mr Nash sought advice and instructed Mr O'Brien to continue his investigation [p189].

77. Mr O'Brien also interviewed Mr Marden, Lt Col Parker, Lt Col McGregor and Mr Nash. On 10 October 2019, Lt Col White provided Mr O'Brien with written responses to the grievance.

78. On 9 October 2019, the Claimant was sent the notes from the investigation meeting. The next day the Claimant returned the document with what he described as two types of changes, rephrasing some answers and adding some new parts. A significant amount of additional material was added. Mr O'Brien provided comments on the amendments, including that he did not agree that all of the rephrasing was accurate, but that he would include the changes as post meeting notes. On 28 October 2019, the Claimant said he

did not want to comment further even if the original notes had been kept. We considered that the Claimant's comments were included in the final note of the meeting.

79. Mr O'Brien sent his investigation report to Mr Nash, who was still decision manager, on 7 November 2019. The complaints discussed were summarised. It was specifically mentioned in the summary of evidence that the notes from the interviews for the C2 posts had been destroyed following the submission of results to DBS. It was noted that the majority of the notes of the Claimant's meeting were agreed in full, however some additions proposed by the Claimant did not reflect his recollection or that of the notetaker, but the text the Claimant requested had been included in full and identified as such. Whether the Claimant's role and the role in the new organisation were the same was considered and it was concluded there were some similarities but there was evidence supporting the conclusion that they were different. He considered that the Claimant's and Lt Col Parker's recollections, about whether the Claimant was given assurances, were different. Mr O'Brien found no MOD policy stating that a recruitment process should be halted if a grievance was raised.

80. At this time Mr Nash had become overworked and became ill before going off sick in December 2019. He had discussions with DBS to move the decision making responsibility to someone else.

81. On receiving the investigation report, the Claimant discovered that the interview notes for the C2 posts had been destroyed by the panel.

82. On 15 November 2019, the Claimant e-mailed Mr Nash reminding him that a case conference should be held if the grievance had not been concluded within 30 working days.

83. On 23 January 2020, Richard Norris was appointed as decision manager and dismissed the grievance without having a meeting. The Claimant was informed of his right to appeal to Brig. Stockley. The Claimant accepted that Mr Norris had not racially discriminated against him.

84. On 26 January 2020, the Claimant appealed against the dismissal of his grievance. His grounds included that an independent appeal manager had not been nominated and that the notetaker was Brig. Stockley's PA. He had not been invited to a meeting to discuss his complaint before the decision letter was written and polices had not been followed. He re-set out his complaints against Lt Cols Parker, White and McGregor. It was not suggested that he was racially discriminated against.

85. Between 28 January and 2 March 2020, the Claimant was signed off work for stress related issues.

86. On 5 February 2020, the Claimant e-mailed Ms Peel, head of the people team, raising three points about the process which had been followed [p352]. The following day the Claimant was informed that the appeal meeting was cancelled and the grievance outcome was rescinded and a new decision manager would be appointed.

87. In February 2020, Ms Raynor, the successful candidate for the business manager role was promoted on a temporary basis to a C1 grade. We accepted the Respondent's evidence that Ms Raynor was in a permanent post with longevity and they were struggling to recruit a leader of the team in Germany and they were faced with a robust Army organisation forcing them to do things early. Someone was required to deal with senior personnel and it was necessary to give her a rank higher on a temporary basis so she could lead the organisation to hand it over when the new commander had been appointed. Mr Whitticase was her line manager.

88. On 7 February 2020, the Claimant asked for his stay in Germany to be extended to at the least the end of July. Brig Stockley authorised the Claimant's stay to be extended in order to take into account difficulties with travel restrictions due to Covid-19 and due to the ongoing grievance process.

89. Mrs Somerville, nee Jones, was appointed as decision maker for the Claimant's grievance. After her acceptance of the role, she was sent the investigation report and the accompanying documents on 13 February 2020, which she considered. The only thing she was aware of about the earlier part of the process was that there had been procedural issues.

90. The 21 February 2020 was Lt Col McGregor's last date as Senior Training Safety Officer at which point his line management of the Claimant ceased. Lt Col McGregor sent the Claimant an e-mail, which the Claimant accepted was friendly and professional. At no stage did Lt Col McGregor consider that there were any issues with the Claimant's performance in his role and no such concerns were ever raised with the Claimant. Ms Hunt agreed to line manage the Claimant from this point in order to help him relocate to the UK and to help him find a new post. Ms Hunt's role was not to line manage the Claimant in relation to his daily tasks.

91. On 18 March 2020, the Claimant attended a meeting with Mrs Somerville and he was accompanied by a Trade Union representative. At the Claimant's request this was face to face. In the meeting the Claimant confirmed the complaints he was raising were that: his current role was not extended, he was not allowed to apply for the role as an internal applicant and the interview was not conducted with the correct procedures. He referred to his e-mails of 30 June and 4 July not being responded to. He

complained about the notes of his investigation meeting and that the interview notes for the business manager role had been destroyed. The interview panel had not been independent and had a conflict of interest due to his e-mails, although there was no reference to this being racial discrimination. The Claimant wanted to know who had signed off the Form 214 on behalf of the Trade Union for the business manager role in the new organisation. Towards the end the Claimant mentioned discrimination and was asked whether it was a grievance against policy or whether he had also been discriminated against. The Claimant said he had put the complaint in writing on 2 August 2019 in an e-mail sent to Lt Col Parker, but it was detail he did not want to go into. Mrs Somerville said that discrimination should be brought under the bullying and harassment policy. She further said she was duty bound to challenge discrimination. The Claimant confirmed he had no new evidence.

92. Mrs Somerville reviewed the documents again. She made further enquiries. In relation to the form 214, the signed copy could not be found, however there was a copy of the original Trade Union consultation which she considered was sufficient. Mrs Somerville considered the appropriateness of Mr O'Brien's appointment and her experience showed that investigation officers were traditionally brought in from outside of the office and that was the normal practice. She thought there was a missing statement from Terry Williams, however that was a misunderstanding as to who was on the interview panel. In terms of conflicts of interest, if the panel know someone it was traditionally raised with the other panel members and the independent member militated against the knowledge and this was not passed through DBS.

93. On 25 March 2020 the Claimant was sent Mrs Somerville's decision, which partially upheld his grievance [p467-469]. The grievance was not upheld in respect of: (1) not extending the Claimant in his current role on the basis that she was satisfied it was a new role not the Claimant's existing role and due to the restructure his post could not be extended. The trade union consultation was sufficient to show conclusively it was a new role; (2) that he was assured he would be extended in his current role; and (3) his complaints about the interview on 24 July 2019. It was not considered that knowing someone was necessarily a conflict of interest.

94. The complaint about the treatment of his e-mails was partially upheld in that they were clear indications of discontent and they should have been addressed directly with the Claimant. It was noted the destruction of the interview notes was unacceptable and they should have been retained for 2 years. She disagreed that Mr O'Brien was biased on the basis of the conflicting accounts. Mr O'Brien had accepted all amendments to the notes, including where he had disagreed with the Claimant's recollection. It was acknowledged that it would have been best practice to appoint a completely

independent investigator, however while there were some omissions from the report she did not think they would have been material to the decision and the investigation did not warrant a restart. The Claimant was urged to consider a complaint under JSP 763 if he felt he had been discriminated against. The Claimant was informed of his right of appeal to Mr Crosfield.

95. We accepted that it was not within Mrs Somerville's remit to consider whether the Claimant had been discriminated against as part of the grievance. The Claimant said he did not consider that Mrs Somerville, had discriminated against him and he accepted that she had dealt with the issues involving Lt Col White in a fair and even handed way.

96. On 3 April 2020, Mrs Somerville sent recommendations to Mr Norris that expectations should be managed effectively regarding extensions in posts, records of interviews should not be destroyed, and that a completely impartial investigator will remove allegations of partiality to ensure a high quality report. She also said she would write to Lt Cols White and McGregor with an informal warning and reminding them of the policy and procedures.

97. On 3 April 2020,the Claimant spoke to Ms Hunt and informed her that he felt he was being ignored and was excluded from the team. The Claimant was aware he was not the business manager anymore and felt he should step back, but also that he was not included. She considered that although his post had ended he was still part of the Overseas Training Department. Ms Hunt e-mailed Ms Raynor, the new business manager, and asked that the Claimant was included in communications and updates and for Ms Raynor to task him with any work to help out. Mr Nash had been copied in and endorsed the suggestion and asked Ms Raynor to think what she needed him to do [p413-414].

98. Between 31 March 2020 and 12 August 2020, the Claimant was not called into any meetings.

99. On 8 April 2020, the Claimant appealed against the grievance outcome to Mr Crosfield, in which he set out why he did not consider he was independent [p423-430]. A new appeal manager was appointed.

100. On 15 April 2020, Mr Donnan, Head of the Delivery Support Team, was appointed to be the appeal decision manager. Prior to the appeal Mr Donnan considered the documentation available to Mrs Somerville and various policies and procedures. Mr Donnan's role was to examine Mrs Somerville's decision and determine whether it was reasonable.

101. On 9 April 2020, the Claimant informed Ms Hunt at 0224 hours [p416-417] that he had become a qualified accountant and had become eligible for functional allowances. We accepted that Mrs Hunt was alarmed at the

time the e-mail was sent. She spoke to him, offered congratulations, said it would help him get a job and mentioned it was 3am. Mrs Hunt later told him that he was not entitled to allowance because he was a priority mover and he was not in a post that permitted an allowance; this was confirmed in an e-mail. The Claimant did not want to hear that he was not entitled to an allowance and Mrs Hunt perceived that he was being passive aggressive and ended the call.

102. On 13 May 2020, the Claimant was invited to attend an appeal meeting and he was informed of his right to be accompanied. There was a delay in sending the letter due to Mr Donnan's work commitments caused by the Covid-19 pandemic.

103. The Claimant attended the appeal meeting, on 27 May 2020, by Skype and was accompanied by a trade union representative. The Claimant explained his version of events and his case. The Claimant felt that the interview panel was biased and there was a conflict of interest. There was no mention of discrimination on the grounds of race.

104. Following the meeting, Mr Donnan undertook further investigation into the restructure. He was sent information which included the information sent to the trade unions, including the consultation, which showed there were regular briefings. Investigation took place in relation to extensions of posts for other individuals, although the Claimant had not provided him with a name. Two individuals undertook work for Supreme Headquarters and were required to stay and the claimant did not do such work. The other individual was unable to travel due to Covid-19 restrictions and had a temporary extension.

105. Mr Donnan also investigated the policies regarding the composition of the panel. The Civil Service policy required that the chair of the panel was a civil servant. However the MOD had a different policy in force at the time of the interview, which did not exclude military personnel chairing a panel. An independent member had been appointed and Mr Donnan concluded that the panel had been appropriately constituted. Further investigation took place in relation to the constitution of the selection panel and he concluded it had been constituted in accordance with the MOD guidance at the time.

106. On 2 June 2020, the Claimant was informed there would be a slight delay due to the further investigations. On 10 June 2020, the Claimant was sent a letter informing him that the appeal was not upheld. The letter attached an 18 page report which the Claimant accepted was fair and considered. The Clamant said in evidence that he did not consider that Mr Donnan discriminated against him. The report considered whether any other individuals had been treated differently in relation to extensions. It was concluded that the role the Claimant was interviewed for was a new role

and was fundamentally different to his role. It was concluded that the Claimant had been asked appropriate questions at interview. It was noted that the destruction of notes was contrary to the guidance.

107. On 19 July 2020, the Claimant raised a complaint with the Civil Service Commission in relation to the outcome of his grievance concerning the recruitment principles.

108. On 4 August 2020 Ms Hunt confirmed that the Claimant's new line manager would be Mr Whitticase, with effect from 10 August 2020. The same day, the Claimant sought special paid leave for his return to the UK. The Claimant was seeking 8 days (3 in Germany and 5 in the UK). Ms Hunt, from her own experience thought he was entitled to 3 days. The Claimant sent her the policy pointing out it was 5 days, for which she thanked him and asked him to add 5 days to HMRS. The Claimant added the 8 days and she replied that she read the policy as 5 days. The Claimant was then granted the leave requested. The Claimant initially suggested that this was harassment or direct discrimination on the grounds of race, but withdrew the allegation.

109. On 24 August 2020, the Claimant received an offer of a post for a C1 finance role, which would start on 21 September 2020. The Claimant was congratulated by Mrs Hunt, Mr Nash and Lt Col Whitticase.

110. The Claimant started in his UK C2 post in Andover on 2 September 2020, under the line management of Mr Whitticase.

111. On 2 September 2020 at 1402, the Claimant requested 7 days additional leave starting on 3 September 2020. Lt Col Whitticase asked him to confirm what leave he had booked so far for that leave year. The Claimant provided the details. Lt Col Whitticase responded and said that the Claimant must have taken time off between 1 April 2020 and 26 August 2020 and asked him to review it and make sure it was logged onto HRMS [p649]. We accepted Lt Col Whitticase's evidence that it seemed a long time in which only 5 days leave had been taken and he was asking him to make sure it was recorded correctly.

112. The Claimant explained on 3 September 2020, that he had booked leave to go to his brother's wedding, but his flights got cancelled and he cancelled the leave request too. Lt Whitticase responded at 0909 hours that the leave request was granted. He said that since the Claimant had not been working every day between April and August he should consider retrospectively booking some leave and not travelling is not a reason to cancel leave and if he was not working he should book the time off as leave. We accepted Lt Col Whitticase's evidence that there was a

misunderstanding in that he thought that the Claimant was not working for all of that period.

113. On 5 January 2021, the Civil Service Commission concluded that there had not been a breach in relation to the method of assessment at the interview. It was concluded that the issues in relation to record keeping (how conflicts are dealt with and keeping the interview notes) in totality amounted to a breach of recruitment principles.

Time

114. The Claimant's evidence was that his complaint was being investigated by the department and it was concluded in July 2020. He said regarding the matters in 2018 that he raised a grievance in June 2019 and he needed to follow departmental guidelines. The Claimant has been a member of the PCS trade union since the start of his employment. The Claimant accepted that he had access to advice and had discussed matters with them regarding his grievance. On 13 September 2019, the Claimant wrote to the Respondent about his complaints and referred to that the Employment Tribunal could uphold his grievances. The Claimant's evidence was that at this stage he had not researched bringing a claim properly and he had spoken to ACAS and was told he needed to go through the departmental process first. It was likely that the latest the Claimant knew that he could bring a claim in the Employment Tribunal was when he raised his grievance on 2 September 2019. There is a significant amount of information online about bringing a claim in the Employment Tribunal, of which the Claimant was aware.

The Law

115. The claim alleged discrimination because of the Claimant's race 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 discrimination and harassment related to race.

116. 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.

117. 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.

Direct Discrimination

118. 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 race, 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.

119. 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."

120. 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).

121. 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.

122. 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.

123. 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 Lord Leggatt, after referring to Wisniewski v Central Manchester Health Authority [1998] PIQR 324, said 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."

124. 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).

125. "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.

126. 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).

127. 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.

128. 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.

129. 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).

130. 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).

Harassment

131. 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).

132. 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.

133. 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.

Time

134. 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.

135. 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. Section 140B of the EqA sets out how the EC process is taken into account. 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.

136. 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)).

137. 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).

138. 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.

139. 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.

140. In Department of Constitutional Affairs v Jones [2008] IRLR 128 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.

141. 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.

142. 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

143. The Claimant accepted that he did not have any direct evidence, either oral or documentary, that the matters complained of were because of or related to his race. The Claimant relied upon his strong belief that they had. A belief in something is not the same as proving facts that something has occurred. The Claimant relied upon the totality of the allegations and invited an inference to be drawn that the totality tended to show that his race was the cause. We addressed the individual allegations first and then considered the totality.

144. The Claimant relied upon the issues relating to his line management and his office allocation as matters which started to make him think that race could be a motivating factor. Although they were not allegations of discrimination to be determined they were used as background, and we reached the following conclusions in relation to them.

145. In relation to the Claimant's office, the Claimant's predecessor had their own office and therefore there appeared to be a difference in treatment between them. Other than a difference in treatment, the Claimant could not point towards any evidence which tended to suggest that the decision had been taken because of his race and he would not have discharged the initial burden of proof. We accepted Lt Col McGregor's evidence as to the situation between Mr Lane and Mr Hoskins and for his reasoning as to why he put the Claimant in the office next to his. The Claimant had not worked in operational delivery before, nor close to the military or army personnel. He also had no experience of a firing area. If the Claimant had been given his own office it would have been 800m away from Lt Col McGregor. We accepted that the Respondent proved that the reason was so that the Claimant could easily ask questions and not be located away from where day to day matters occurred. The Respondent proved that the reason was to ensure that the Claimant was not in an isolating situation and was able to have the best opportunity to understand what occurred and how things happened and that it was wholly unrelated and unconnected with the Claimant's race.

146. In relation to line management, it was not unheard of for a C2 to line manage another C2. There was not a C1 at Sennelager and otherwise the Claimant would have been line managed from the UK. Lt Col McGregor had responsibility for the training and firing area. The Claimant other than his general assertion adduced no facts which tended to show that the decision was because of his race and we would have not been satisfied that the Claimant discharged the initial burden of proof. In any event we were satisfied that the reason was because there was not a C1 in Sennelager, Lt Col McGregor was very experienced, was in overall charge for the safety of the site, and he was able to guide the Claimant as to how the site operated.

We accepted that the Respondent proved that it was a practical solution to the geographical distance between Sennelager and Warminster and that the Claimant's race played no part whatsoever in the decision making process.

Allegations of specific direct discrimination and or harassment

Lt Col. McGregor, his line manager, challenging his request for an eye test voucher of £45;

147. The Claimant submitted that the issues with his office and line manager allocation made him think that it might be his race that caused Lt Col McGregor to challenge his request for an eye test and spectacles. We accepted that the questioning was unwanted and that the Claimant felt like it was suggested he was abusing the system. Mr McGregor wanted to consider the policy and the request before making the decision and found the policy confusing and that the policies under the JSP and BFG were different. The Claimant relied upon that he himself had approved other people's glasses requests; however it was important to remember that it was not how the Claimant approached such authorisations, but how Lt Col McGregor did. There was no evidence that Lt Col McGregor had acted differently with people from other races in relation to similar requests. Other than the Claimant's belief, he could not show that there was any evidence that tended to suggest that the questions were because of or related to his race or that someone from a different racial background would have been treated differently and he failed to discharge the initial burden of proof in relation to harassment and direct discrimination.

148. In any event, we were satisfied that the Respondent had proved that the reason for questioning was because Lt Col McGregor was very conscious of not wasting taxpayers money and that he wanted to be certain that he correctly authorised the voucher. Lt Col McGregor was unfamiliar with the policy and wanted to check it before granting the request and this was something that a reasonable manager would do. We accepted that Lt Col McGregor understood the JSP as saying that the voucher could only be permitted if the glasses were for DSE use only. He further proved that there was an inconsistency between the JSP and BFG. We were satisfied that the reason for asking the questions was for Lt Col McGregor to satisfy himself that the Claimant was entitled to the voucher and that he understood the policies correctly. We were satisfied that Lt Col McGregor would have treated all employees in the same way. The Claimant's request was granted within a day of it being made. We were satisfied that the Claimant's race played no part in the reason why Lt Col McGregor asked questions about the application.

Excluding him from relevant meetings and from the preparation of a business case; and falsifying his signature on the business case to suggest that he supported it:

149. The Claimant was not involved in the preparation of the draft business case and it was prepared by Mr Hoskins. We accepted that it was unwanted for the Claimant not to be involved and his signature to be added. The Claimant did not suggest that Mr Hoskins had exhibited any racially motivated behaviour towards him. Lt Col McGregor, on receipt of the draft business case, assumed that the Claimant had been involved. It was significant that when Lt Col McGregor forwarded the business case he copied in the Claimant. The Claimant alleged that Lt Col McGregor had excluded him from relevant meetings and permitted the inclusion of his signature for reasons relating to his race or because of his racial background and relied on the previous incidents to support the assertion. There was no evidence that Lt Col McGregor had any involvement in the preparation of the draft business case and it was not Lt Col McGregor who added the Claimant's electronic signature. The Claimant became aware of it because Lt Col McGregor copied him in. The Claimant did not adduce any facts which tended to suggest that this related to his race or that it occurred because of his racial background or that it would not have occurred to someone of a different racial background.

150. In any event we were satisfied that the Respondent had proved that Mr Hoskins had undertaken the work on the batteries and prepared a draft business case and sent it to Lt Col McGregor. Lt Col McGregor was unaware that the Claimant had not been involved and forwarded it thinking that he had been. We were satisfied that the Claimant's race played no part whatsoever in the preparation of the business case and the inclusion of his signature. It was significant that it was an isolated incident.

151. The Claimant also said that he was excluded from meetings and relied on the preparation of the business case and we repeat our findings above. He also relied on not being invited to meetings after 31 March 2020. The Claimant's role had ended on 31 March 2020 and meetings after that date were unrelated to the Claimant's role. Mrs Hunt sought for the Claimant to be provided with work during the time when his stay in Germany had been extended by Brig Stockley and there was no evidence that the Claimant was not given work to do. The Claimant failed to adduce any evidence that not being invited to these meetings was related to or because of his race and he failed to discharge the initial burden of proof.

Lt Col. McGregor accusing him of playing games with regard to this signature;

152. After the Claimant sent his e-mail, reminding everyone that he should be sent business cases first, Lt Col McGregor said to him that if he had any

issues with him, the Claimant should see him first. Lt Col McGregor also said that if the Claimant was going to copy in other people he would play that game too. There was nothing within what was said which could be construed as racially related or motivated. The Claimant accepted there was no direct evidence that connected what was said with his race and relied upon his strong belief. The Claimant relied upon the previous incidents involving Lt Col McGregor as inferring that it was said because of his race. What was said was against a background of Lt Col McGregor being extremely busy. There was never a suggestion of an improper remark or comment by Lt Col McGregor which could be remotely construed as having a racial undertone. We were not satisfied that the Claimant had discharged the initial burden of proof that what was said was related to his race, or that it would not have been said to a person of a different racial background or that it was said because of his race. Even taking all of the previous incidents involving Lt Col McGregor together, they all related to reasonable line management instructions or checking of position and the Claimant was still unable to discharge the initial burden of proof. In any event, we were satisfied that what was said was due to irritation, in the context of a very busy job and that the Respondent proved that it was in no way whatsoever related to or because of the Claimant's race.

Mr Stuart Nash ignoring his request to be allocated a different line manager

153. On 2 September 2019, the Claimant sent Mr Nash 2 e-mails. One requested that his line manager was changed and the other was his grievance. We accepted that not responding to the request for a change of line manager was unwanted and that Mr Nash had not responded. The Claimant at no stage chased a response to his request. There was no evidence that Mr Nash had ever made an improper comment or remark that could be remotely construed as racially related. The Claimant relied upon his strong belief that it must have been because of or related to his race. However it was noteworthy that in the grievance and e-mail of 8 August 2019 the Claimant suggested he had been discriminated against because he had complained about the advertising of his post and that there was not a new role, which was inconsistent with the assertion. It was unreasonable to not respond, however unreasonable treatment of itself does not found an inference of discrimination or harassment, there needs to be something more. We accepted that the something more need not be a great deal, but there still must be that something. The Claimant was aggrieved at the decision not to appoint him to the role in the new organisation and did not accept that there was a new role at all. We were not satisfied that the Claimant proved any facts which tended to show that the failure to change his line manager was related to or because of his race or that someone from a different racial background in the same situation would have been treated

differently. The Claimant therefore failed to discharge the initial burden of proof.

154. In any event, we were satisfied that Mr Nash proved that the reason was because he had failed to realise he was required to do something. The Claimant sent him 2 e-mails. The e-mail with the request forwarded a large chain of e-mails with comments about what had happened, which was likely to have caused the oversight. The grievance related to the recruitment process for the new organisation at a time when the military presence in Germany was being drawn down. All civil servants had to apply for roles in the new organisation. A complaint involving the process had potentially significant ramifications. We accepted the Respondent's submission that a complaint about a line manager, does not mean that the line manager should be changed and that if a line manager was changed each time a complaint was raised that management structures would become impossible. It was significant that the Claimant did not chase Mr Nash to respond to his request. The Respondent proved that the reason was due to the oversight of Mr Nash and that it was wholly unrelated to the Claimant's racial background.

Lt Col. Stuart Whitticase, his line manager on return to the UK, suggesting that the claimant had not recorded the holiday he had taken, and requiring him to take retrospective holiday when he had been working throughout the period in question;

155. The Claimant accepted that a line manager was entitled to question whether holiday had been correctly recorded. Lt Col Whitticase had queried the length of time between 1 April and 26 August 2020 in which leave had not been taken, following which the Claimant provided an explanation. The response was that cancelling travel is not a reason to cancel leave and if he was not working he should retrospectively book the time as leave. We accepted that this was unwanted. It was notable that the leave was granted within less than 24 hours. The Claimant relied upon his strong belief that it was racially motivated. The Claimant also referred to Lt Col Whitticase being involved in the promotion of Ms Raynor. Until Lt Col Whitticase became the Claimant's line manager he had no involvement with the Claimant. It was also notable that on 24 August 2020, the Claimant informed Lt Col Whitticase of his promotion and had been congratulated which pointed away from any animus towards him. The Claimant had said in his e-mail that his leave had been cancelled and therefore it appeared unreasonable for Lt Col Whitticase to refer to retrospectively booking time off, however unreasonable conduct on its own is insufficient to infer that there was a racial motivation for it. We were not satisfied that the Claimant had proven facts which tended to show that Lt Col Whitticase's questioning and remarks about leave were related to or made because of the Claimant's

race or that someone from a different racial background would have been treated differently. The initial burden of proof was not satisfied.

156. In any event we were satisfied that Lt Col Whitticase was entitled to query whether all leave had been recorded on HMRS. We were further satisfied that Lt Col Whitticase had misunderstood the Claimant's e-mail on 3 September and had not appreciated that the Claimant had said the leave had been cancelled. The Respondent proved that the e-mails were wholly unconnected or related to the Claimant's race or racial background.

Allegations of specific direct discrimination

Mr Nash refusing his application to remain in a business manager role in Germany beyond March 2020. And UK HQ requiring him to apply for a level C2 business manager role, which Mr Manzoor regarded as his own job;

157. We addressed both of these allegations together. The Claimant disputed that the business manager role in the new organisation was a new role. However, he accepted that if it was significantly different, that it would have been a new role, although this was also disputed. We found that the roles were significantly different and that the role in the new organisation was a new role. It was also important that the organisation within which the Claimant worked was being closed. The roles within that organisation were coming to an end on 31 March 2020. The Claimant had discussions with Lt Col Parker about what would happen when the organisation closed at the interview for the post. It was notable that the Claimant was not told that his role would be extended, although it was suggested it was possible. This was a source of great upset and stress for the Claimant, who had uprooted his family. All civil servants were required to apply for roles in the new organisation. The only exceptions were in relation to people closing down sites for a few months and those working for Supreme HQ, neither of which was the same situation the Claimant was in. The Claimant's role was ending and the organisation for which he worked was ceasing to exist and we accepted that it was therefore not possible to extend the Claimant's role. We did not accept that it was Mr Nash who refused the application, however it was not granted and we assessed the claim on that basis. The Claimant did not adduce any evidence that someone from a different racial background in the same circumstances as himself would have been treated differently. Apart from the exceptions above, all civil service staff were required to apply for the new roles, this included all civil servants at Sennelager. The Claimant based his assertion as to the motivation on his strong belief. Whilst we had sympathy for the Claimant's predicament, we were not satisfied that the Claimant proved facts from which we could conclude that his application was refused because of his race or that someone from a different racial background in the same situation as

himself, undertaking his role at Sennelager, would have been granted an extension.

158. In any event we were satisfied that the Respondent proved that the reason for refusing the application and requiring him to apply for the new post, was that the role was coming to an end at the same time as the organisation closed. The role in the new organisation was significantly different to the Claimant's current role and it was a new role. We were satisfied that the Claimant's role was not continuing and therefore it was not possible to extend it. The policy was applied to all civil servants apart from in relation to the specific exceptions, which did not apply to the Claimant. The reason was a policy decision by the Respondent and we were satisfied that the Claimant's race played no part whatsoever in that policy or its application.

UK HQ refusing to put on hold recruitment for his position when he saw it advertised;

159. The Claimant raised issues with the recruitment process on 18 June 2019 in relation to the SFM position being advertised internally and referred to the SFM under the outgoing organisation being appointed in the new role. We considered that this was a red herring. If the SFM post was advertised internally, the SFM in the old organisation was not eligible for the position. This therefore could not have been less favourable treatment of the Claimant to externally advertise the Business Manager role.

160. The Claimant's e-mail of 30 June 2019 raised his complaint that there was not a new role in the new organisation and that he had not been given an opportunity to extend his tour overseas. This was against a background of the Respondent having carried out consultation with the Trade Unions and a detailed explanation in April 2019 as to what was happening in relation to the close of the organisation. The Claimant relied upon his strong belief that there was a racial motivation for the decision. We took into account the size of the DIO operation in Germany and that setting up the new organisation was business critical. The old organisation would cease to exist on 31 March 2020 and it was necessary that the new organisation was up and running for 1 April 2020. We were not satisfied that the Claimant adduced any facts which tended to show that the reason for continuing with the recruitment exercise was because of his race.

161. In any event we were satisfied that the Respondent had proved the role in the new organisation was not the Claimant's role in the old organisation and that it was different. It therefore was not a case of being able to put recruitment for the Claimant's role on hold. Further we accepted that, as far as Mr Nash was concerned, the issue had been fully discussed

in April 2019 and the position was clear. We were satisfied that the Respondent proved that the reason for not putting the recruitment on hold was that it genuinely believed that the Claimant's role was going to cease to exist and that the role in the new organisation was a new role. Further it was necessary to quickly appoint staff in the positions in the new organisation. We were satisfied that the Respondent had proved that the Claimant's race played no part whatsoever in that reason.

The panel of Lt Col Nigel Parker, Lt Col John White and one other civilian (the interview panel) refusing his application for a level C2 business manager role;

162. The Claimant relied upon Lt Cols White and Parker having knowledge of him and that they had been the subject matter of an informal complaint about recruiting for the role as matters which tended to show that the decision as to the order of merit was because of his race. There was no evidence adduced of any animosity towards the Claimant by Lt Cols White and Parker or that they had any knowledge other than the role he had been performing. There was no suggestion of any concern about the Claimant's work when he had been business manager. Both men had explained to Mr Marden, before the interview commenced, that they knew the Claimant. This was also likely to be the same for the other C2 position interviews, in that incumbents in the old organisation were applying for roles in the new organisation. The Claimant also referred to the informal complaint, however it had to be borne in mind that the Claimant was complaining about being required to take part in a recruitment exercise and he adduced no evidence which tended to suggest that an employee in the same position, but of a different racial background would have been treated differently. We were not satisfied that the Claimant proved facts which tended to suggest that this aspect of the interview process was influenced by his race. In any event we were satisfied that the Respondent proved that Lt Cols Parker and White both said that they knew the Claimant and that they were aware the Claimant had raised his concerns on 30 June 2019. We were satisfied that the Respondent proved that the panel did not consider that there was a conflict of interest requiring disqualification from the interview process and that the Claimant's race played no part whatsoever.

163. The Claimant also relied upon paragraph 10 of the Civil Service Recruitment principles and the need for the chair to be a civil servant. The MOD policy at the time did not have such a requirement. It was notable that Lt Col White chaired all of the interviews. The Claimant failed to prove any facts which tended to suggest that Lt Col White chairing the interviews was because of his race. In any event we accepted that Lt Col White genuinely believed that he could chair the interviews and had sought advice from DBS when organising the panel. We were also satisfied that at the time of the interview, the MOD policy differed to the Civil Service policy. This was a

policy of general application and was wholly unrelated to the Claimant and his race. The Claimant's race played no part in the decision of Lt Col White to be the chair of the interview panel.

164. The same question template was used for each candidate and we accepted that the same form of questioning was used for each of them. The Claimant suggested that some inappropriate questions had been asked, although he accepted they were wholly unrelated to race. The Claimant sought to complain that criteria used in the job description did not include leadership, however this was an interview for a role in which the incumbent would be a line manager and for which there were other management functions. It was notable that the Civil Service Commission did not think that there had been a breach in relation to the method of assessment. The Claimant failed to adduce any evidence which tended to suggest that his race had any influence on the questions asked or the competencies/behaviours against which the candidates were assessed. In any event we were satisfied that the Respondent proved that the criteria was based on the matters stated in the advertisement for the role and that all candidates were asked the same questions and that the Claimant's race played no part whatsoever in the questioning process.

165. The Claimant asserted that the reason he was ranked second was because of his race. This was based on his strong belief and the other incidents which had occurred. The Claimant was required to prove a factual basis and a belief alone was insufficient, without some supporting evidence. It was notable that when the Claimant raised his subsequent grievance that the reference to discrimination related to having challenged the decisions of others, rather than his race, which could be said to be inconsistent with that belief. It was also relevant that Mr Marden, who was truly independent and whom the Claimant said had not discriminated against him, scored the Claimant in the same way as the other panel members. Mr Marden agreed that the successful candidate had performed better on the day and that the order of merit was clear. It was further relevant that the interview panel could only take into account what it was told in the interview and could not rely on other knowledge. We were satisfied that the scores recorded on HMRS were accurate and that the Claimant failed to prove facts from which we could conclude, in the absence of an explanation from the Respondent, that it was because of his race, or that someone in the same situation as him, but from a different racial background would have been treated differently. In any event, we were satisfied that the Respondent proved that the reason was because the successful candidate had performed better on the day, notwithstanding that the panel thought the Claimant would be the strongest candidate. We were satisfied that the scores were an honest assessment by the panel and it considered that another candidate should be appointed and that the Claimant's race played no part in the decision.

Subsequent breaches of the Civil Service recruitment policy

Mr Nash convening an interviewing panel, two of whom were the subject of complaints by the claimant

166. The panel was convened by Lt Col White and we considered the allegation on that basis. For the reasons set out in the preceding section, the Claimant failed to discharge the initial burden of proof.

The destruction of interview notes despite the knowledge that an investigation was in progress

167. The destruction of the interview notes was very concerning and we gave careful consideration to the issue. The MOD policy was for the notes to be kept for 2 years. The notes enable people to see that interviews had been conducted fairly. It was also Civil Service policy for the notes to be kept. It was significant that it was not just the interviews for the business manager role which were destroyed, but also the interviews for the other C2 roles. Those notes were also the place in which any potential conflicts of interest could be recorded. The Civil Service Commission considered that a breach of procedure had taken place and we agreed that it was likely a breach had occurred and that it was unreasonable. However, unreasonable behaviour alone is insufficient to create an inference that discrimination had occurred. The Claimant needed to adduce some evidence that tended to suggest that it was because of his race. The significance of the notes from all of the C2 post interviews being destroyed was inconsistent with the Claimant's belief that it was because of his race. All candidates for all C2 posts were equally disadvantaged. We were not satisfied that the Claimant proved primary facts from which we could conclude that they were destroyed because of the Claimant's race.

168. In any event, we were satisfied that Lt Col White misunderstood the policy. He thought he could destroy the notes once they were recorded on HMRS and that was the reason for their destruction. We were satisfied that the Claimant's race played no part in the decision.

Mr Nash appointing the investigating officers, decision making managers and the appeal hearing managers

169. We accepted that it was best practice to appoint an investigating officer from outside of the organisation. The Claimant asserted that Mr O'Brien was not impartial on the basis that there was a dispute about the notes of the Claimant's interview. We rejected that assertion. There was a dispute of recollection as to what had been said. Further the Claimant was

seeking to add additional matters he had not referred to. Mr O'Brien, rather than rejecting the additions included them in the final notes and identified that they were not agreed. We concluded that this was a fair and even-handed way of presenting the evidence. The Claimant suggested that Mr O'Brien was appointed into a permanent position as Investigating Officer, however this was a misunderstanding of the position. Mr O'Brien was a priority mover and was seeking a permanent position and as such was unassigned and therefore had the time to conduct the investigation. Other than the Claimant's belief that his race had influenced the decision he could not point to any evidence to suggest that the decision was because of it. The Claimant failed to prove primary facts to suggest that Mr O'Brien's appointment was because of his race.

170. In any event we were satisfied that the Respondent proved that Mr O'Brien was appointed because he had a background in MOD HR processes and he had an understanding of the ongoing restructure. We were satisfied that he did not work for Mr Nash and that Mr Nash thought that he would be a good person to undertake an independent investigation, and that due to waiting to be reassigned he had to time to undertake it. We accepted that the Respondent proved that the Claimant's race played no part in the decision.

171. Mr Nash was originally appointed as deciding officer. A concern about whether he was too involved was raised by Mr O'Brien and Mr Nash took advice from DBS. It was significant that the decision was not taken by Mr Nash. Mr Nash was in the Claimant's chain of command and it was not initially apparent that there was an implication against him. It was notable that at the time the investigation report was produced Mr Nash started to become unwell and was seeking advice as to who could take over responsibility. We were not satisfied that the Claimant proved any facts that Mr Nash's appointment as deciding officer had any connection to the Claimant's race or that if the Claimant had been from a different racial background the same thing would not have occurred. In any event we were satisfied that the Respondent proved that Mr Nash thought he was helping the process and was appropriate to be deciding officer when he was appointed. Further that he sought advice when the issue was raised and was seeking for another deciding officer to take over. We were satisfied the Claimant's race played no part in the decision.

172. The Claimant also complained about the appointment of the appeal officers. It was notable that when the Claimant raised concerns about the impartiality of the appeal officers that alternatives were appointed. Further the appeal officer was nominated by the deciding officer and therefore not by Mr Nash. The Claimant failed to adduce primary facts tending to show that Mr Nash appointed appeal officers because of the Claimant's race.

Investigators declining to investigate aspects of the complaint on the ground that they should have been raised under policy JSP763

173. These allegations could only apply to Mrs Somerville and Mr Donnan. Mrs Somerville enquired whether the Claimant was raising a complaint of discrimination and he positively asserted that she and Mr Donnan did not discriminate against him. The factual basis for the allegation therefore was not established. It was also relevant that when the issue was discussed with Mrs Somerville, the Claimant did not say whether he was raising such a complaint and she suggested he used the JSP 763 bullying and harassment policy. There was no evidence to suggest that this occurred because of the Claimant's race and he failed to discharge the initial burden of proof. In any event we were satisfied that Mrs Somerville and Mr Donnan considered that this was the correct method of pursing the complaint and the Claimant's race played no part in that consideration.

Mr Nash ignoring his challenge in his grievance of 2 September 2019 to senior officers' conduct of the recruitment process, the response taking nearly a year;

174. The Claimant's grievance was addressed and an investigation was carried out therefore the factual basis was not proved. The Claimant had also referred to another person within the MOD raising a complaint about a recruitment process and the process had been paused whilst it was heard. We interpreted this allegation to refer to that incident. Mr Nash made enquiries of DBS and discovered that the person was not in DIO, but the army and he was not advised to stop the recruitment. It was relevant that it was business critical to complete the recruitment so that the replacement organisation was in place for 1 April 2020. There was no evidence as to the role played by the other person was business critical or whether there was the same demand to ensure that the recruitment happened quickly. The role of business manager was important to the proper running of the new organisation. We were not satisfied that the Claimant proved that a person from a different racial background, seeking to be recruited in the same role he was, would have been treated any differently. The initial burden of proof was not discharged.

175. In any event we were satisfied that Mr Nash proved that the reason for not putting the recruitment on hold was that the other example was not in the DIO but a different section of the MOD and it was business critical for the recruitment process to proceed and that the Claimant's race played no part in the decision.

Delay generally in handing the grievance and the appeal;

176. Between raising the grievance and the final appeal outcome the process took more than 9 months. The grievance itself was not straightforward. The investigating officer was appointed the same day as the initial deciding officer, Mr Nash. The investigation meeting took place 8 days after Mr O'Brien's appointment. It then took 26 days for Mr O'Brien to finalise the notes of the interview with the Claimant, due to a disagreement of recollections. The investigation report was provided on 7 November 2019 1 month 1 week after the Claimant's interview. During the latter time Mr Nash was seeking advice on who should act as deciding officer and he became unwell. The Claimant failed to adduce any facts that tended to show the timing was because of his race.

177. There was a significant delay between the production of the investigation report and Mr Norris giving his decision on 23 January 2020, during that time Mr Nash was off sick. Other than the Claimant's general assertion of race discrimination he did not adduce facts which suggested the delay would not have occurred if he had been of a different racial background. In any event we were satisfied that the delay was caused by Mr Nash taking advice as to his involvement and his illness which resulted him being unable to work and that the Claimant's race played no part in the delay.

178. The Claimant appealed Mr Norris' decision on 26 January 2020 and the original grievance decision was revoked on 5 February 2020. Mrs Somerville was appointed and was sent the investigation report on 13 February 2020. At the Claimant's request, a face to face meeting was arranged on 18 March 2020. The Claimant did not allege that Mrs Somerville discriminated against him. After making further enquiries Mrs Somerville provided the grievance outcome on 25 March 2020. We were not satisfied that the Claimant proved there was a significant delay in this part of the process.

179. Mrs Somerville nominated Mr Crosfield as appeal officer. On 8 April the Claimant objected to Mr Crosfield hearing the appeal and on 15 April 2020 Mr Donnan was appointed to be appeal officer. We did not consider that delay to be significant.

180. The Claimant positively asserted that Mr Donnan did not discriminate against him. There was a delay to organising the appeal hearing due to Mr Donnan's work commitments. The Claimant adduced no evidence that contradicted the reason. After the appeal hearing on 27 May 2020 Mr Donnan conducted further enquiries and provided the outcome on 10 June 2020.

181. We accepted that from the time the Claimant raised his grievance 9 months had elapsed and that this was contrary to the normally expected

resolution time. The Claimant other than asserting he had strong belief that discrimination occurred did not adduce facts which tended to suggest a person from a different racial background would not have experienced the same delays or that they occurred because of his race.

182. In any event we were satisfied that the Respondent proved the reasons for the extended time were due to taking advice in relation to the suitability of Mr Nash and his absence from work due to illness. Further the Respondent addressed the Claimant's concerns about appeal officers by appointing others. Further that the delay in Mr Donnan arranging the appeal hearing was due to the pressure of work commitments. We were satisfied that the Respondent proved that the Claimant's race played no part in the time taken to complete the process.

The appeal being allocated first to Brigadier Simon Stockley, whose PA had issued the decision on the grievance;

183. The Claimant objected to Brig. Stockley hearing the appeal because his PA had been a notetaker. This was acted upon immediately by the Respondent. In any event the decision of Mr Norris, who had nominated Brig. Stockley, was rescinded due to the lack of a grievance meeting. The Claimant positively asserted that Mr Norris had not discriminated against him on the grounds of his race. The Claimant adduced no evidence that tended to suggest that Brig Stockley was appointed because of the Claimant's race.

The second appeal manager being Mr James Crosfield, a person closely linked to the same area of work as Brigadier Stockley

184. Mr Crosfield was nominated by Mrs Somerville, nee Jones, to be the appeal manager. As soon as the Claimant objected, because he thought he was not independent, a different appeal manager was arranged. The Claimant accepted that Mrs Somerville had not discriminated against him. We were not satisfied that the Claimant had adduced any facts which tended to suggest that Mr Crosfield's nomination had any connection to his race.

<u>Allegations as a totality</u>

185. Taking the allegations individually we did not consider that the Claimant had adduced sufficient evidence to discharge the initial burden of proof, however we also considered whether all of the incidents taken together discharged that burden. We considered this carefully and took into account that with allegations of discrimination there is very rarely a smoking gun and that people generally do not accept that they have discriminated

against someone. The Claimant was unable to point to any direct written evidence of discrimination and accepted that there was not any evidence that oral remarks or comments were made that had racial elements or racial undertones. The Claimant's submission was that it was the number of incidents which tended to show that they occurred because of his race. We took into account that some of the actions of the Respondent were unreasonable, in particular the destruction of the notes of the recruitment interviews, not responding to the request for a different line manager and Lt Col Whitticase's response to the Claimant saying he had cancelled leave. There were also issues with the procedures adopted. The Claimant submitted that if there had only been one incident he would not have thought it was discrimination, but there were many. We considered the cumulative nature of the unreasonable behaviour and the background to the recruitment process. It was relevant that it was a business critical recruitment to ensure that the new organisation was properly running on 1 April 2020. It was also relevant that the Claimant's correspondence during the material times described the discrimination having been caused by his challenging the decisions of senior managers. This was something which tended to be inconsistent with the Claimant's assertion before the Employment Tribunal. The Claimant was clearly aggrieved at not being appointed to the business manager role in the new organisation and it had caused him and his family stress. Standing back and viewing the incidents as a whole we concluded that, despite the Claimant's strong belief that he had discriminated against, he had not discharged his burden of proof. We were not satisfied that he had proved facts which tended to show that that incidents occurred because of his race or were related to his race. Further for the reasons set out above we were satisfied that the Respondent had proved non-discriminatory reasons for those incidents.

186. Accordingly the claims of harassment and direct discrimination were dismissed.

Time

187. For completeness we addressed whether the claims were presented out of time and if not whether it was just and equitable to present them in time. We considered that the claims fell into three groups: (1) those involving Lt Col McGregor, (2) the recruitment exercise and the grievance process, and (3) the holiday request to Lt Col Whitticase.

188. We considered that the events involving Lt McGregor were unrelated to the recruitment exercise and holiday request. Lt Col McGregor was not involved in the recruitment exercise for the business manager role and was himself required to apply for a new post. There was no evidence that he had any influence in the recruitment decisions or involvement in the holiday request. We were not satisfied that there was conduct extending over period

covering the incidents involving Lt McGregor and the recruitment exercise. The last allegation against Lt Col McGregor was in March 2019. The Claimant was aware he could bring a claim in the Employment Tribunal, at the latest, when he raised his grievance in September 2019. ACAS was not notified of the dispute until June 2020 about a year after the last allegation. The Claimant could have presented this part of his claim earlier, he had access to Trade Union advice and in the circumstances it would not have been just and equitable to extend time for the allegations involving Lt Col McGregor.

189. The claim against Lt Col Whitticase was brought in time.

190. In relation to the recruitment and grievance issues, we considered that the two were heavily intertwined. There were issues which became apparent during the grievance process and the Respondent was in the process of investigating the allegations. It was reasonable for the Claimant to use the internal process. The Respondent was able to call witnesses to deal with the issues and we considered that it would have been just and equitable to extend time, to the extent that it would have been necessary, if those allegations had been proved.

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Employment Judge J Bax
Date: 27 September 2022

Reasons sent to Parties on
29 September 2022 by Miss J Hopes

FOR THE EMPLOYMENT TRIBUNAL