EMPLOYMENT TRIBUNALS

Claimant: **Mr T Azam**

Respondent: **IBM United Kingdom Limited**

Heard at: **Birmingham**

On: **17-31 January; 28-31 March (in chambers) and 6 May 2022**

Before: **Employment Judge Flood**
Dr Hammersley
Mr Stanley

Representation
Claimant: In person
Respondent: Miss Azib (Counsel)

JUDGMENT having been sent to the parties on 9 May 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 ("ET Rules"), the following reasons are provided:

REASONS

The Complaints and preliminary matters

1. The claimant presented claim forms on 22 July, 12 October, 19 October (3 claim forms) and 25 October 2020 (pages 1-20; 40-118). Employment Judge Dimbylow ordered that the claims be heard together. The claimant brought complaints of direct disability, race and religious discrimination, race related harassment and victimisation against the respondent. Complaints of equal pay and sex discrimination were dismissed upon withdrawal, by a judgment sent to the parties on 26 February 2021 (page 157). The respondent's amended grounds of response dealing with all six claims is set out at pages 193-209. There were three preliminary hearings for case management before Regional Employment Judge Findlay on 26 January, 18 August and 12 November 2021 (see case management orders at pages 143-153; 168-171 and 220A-C).

During these case management hearings, the issues to be determined by the Tribunal were extensively discussed and recorded and an agreed list of issues had been produced (pages 210-218) which is set out below ("List of Issues"). The List of Issues was referred to extensively and repeatedly during the hearing and the Tribunal has directed its findings of fact and deliberations to the matters recorded in the List of Issues. An agreed bundle of documents ("Bundle") was produced for the hearing and where page numbers are referred to in this document, these are references to page numbers in the Bundle. We also had a Chronology and a Cast List prepared by the respondent. The Tribunal conducted pre reading on the first day of the hearing.

2. This was a hybrid hearing with the Employment Judge attending in person throughout and the non-legal members attending remotely by CVP video link (save for the day on which oral judgment was delivered). The claimant attended in person throughout. Miss Azib and the respondent's witnesses started by attending in person but having informed the Tribunal that there had been positive Covid 19 tests within the respondent's group over the weekend after the first week, Miss Azib, and all the respondent's witnesses then attended remotely for the remainder. The claimant gave evidence in person and was cross examined by Miss Azib on days 2, 3, 4 and 5. Cross examination was completed remotely by Miss Azib on Day 6. There were some issues with audibility on Day 6, but these were able to be resolved. The claimant started his cross examination of the respondent's witnesses at 3pm on Day 6 and this was completed on Day 10. Oral submissions were made on Day 11 (Miss Azib produced a detailed written submissions document). The Tribunal met in chambers over 4 days in March 2021 (the first available date) and made and prepared its decision. The parties attended for an oral judgment dismissing all the claims on 6 May 2022 (the claimant and Tribunal in person, the respondent by CVP). The claimant became distressed on occasion during the hearing and (in particular) upon hearing the decision. Regular breaks were taken, and the assistance of the Tribunal's mental health first aider was provided on the day of the decision. The claimant recovered sufficiently for the Tribunal to deliver a summary of its reasons. Both parties requested written reasons. The claimant made an application under Rule 50 of the ET Rules (which the respondent has objected to). This will be considered separately by the Tribunal as soon as is practicable.

3. The claimant has brought a number of additional claims in addition to the six claims that form part of this judgment, which have all been stayed pending the outcome of these proceedings.

4. The List of Issues to be determined by the Tribunal were as follows:

1. DIRECT RACE DISCRIMINATION

1.1 Did the following act(s) occur?

1.1.1 2018 to January 2019: Not Paying for the claimant to sit an exam/get a professional qualification/MD101 Course until January 2019.

1.1.2 1 May 2020: The claimant being told by D Abel that "nothing lasts

forever".

1.1.3 13 May 2020: The claimant being paired up with people with whom he had previously had issues.
1.1.4 13 May 2020: Being told to email a senior person on the account for PEN testing opportunities and being "blasted" for asking in email response by M Pearce.
1.1.5 19 May 2020: In a Black Box assessment, R Connor complaining the claimant should be coming in from a specific IP address.
1.1.6 20 May 2020: Not signing the claimant off for Mentor badge.
1.1.7 22 May 2020: Being paired with G Bucklow-Hebbard on Project Y and being "ghosted" by Mr Bucklow-Hebbard when the Claimant asked for his results.
1.1.8 25 May 2020: A telephone call with Mr V Nikolic, who kept referring to "black-listing". This was around the time of the George Floyd murder.
1.1.9 27 May 2020: Failing to revert back to the claimant on his Checkpoint Review for 2019 until the meeting on 24 September 2020.
1.1.10 15 June 2020: Rejecting the claimant's holiday at the last- minute.
1.1.11 16 June 2020: Trying to off-board the claimant from the and ( ) accounts, and the claimant's manager saying he should not question leadership.
1.1.12 1 July 2020: Sending a report for QA and being told it was the wrong template by C Lynch and B McGlone. This was the claimant's first internal project since his return from sick leave.
1.1.13 2 July 2020: being given 2 days for a re-test by B McGlone (Project) when the claimant believed the job would take longer.
1.1.14 21 July 2020: Being told off by B McGlone for sending out a report directly to the client instead of QA, sending out a report without authority and mentioning a project name.
1.1.15 24 August 2020: R Connor aborting a job of the claimant's; The claimant explained on 18.8.21 that the job was " " and that he considered that this amounts to race discrimination because he was the "only Asian in the group", the Group being "X Force Red".
1.1.16 2 September 2020: The claimant was told by N Walker to only share a report via Box,
1.1.17 N Walker was favoured over the claimant, and the case was closed by C Shepherd.
1.1.18 22 September 2020: Being told by B McGlone that his report was password protected, sending an email copying in the Claimant's manager, making comments on Trello, humiliating the claimant in front of the client.
1.1.19 24 September 2020: At the Checkpoint Review Meeting, by T Joy marking the Claimant down and telling the claimant he walked out on a job.
1.1.20 19 October 2020: At a Checkpoint meeting, T Joy ignored information sent by the claimant to him and failed to send the claimant a report with his findings after the meeting.
1.1.21 Not promoting the claimant/delaying the claimant's career progression. The claimant provided further details at the hearing on the 26th of January:

- Deliberately marking the claimant down in his Checkpoint review (2019) and delaying his Checkpoint review since May 2019.
- Not paying for the Claimant to sit an exam/get a professional qualification/MD101 course until January 2019.
- C Henderson informing the claimant in 2017 that he would never be considered for progression.
- June 2018: the Claimant enquired about a Band 10 role reporting into Mr Henderson and was told the role was filled on 4 June 2018.

1.1.22 In 2016 the claimant says that he put a package together, as required by the respondent in order to progress his career. claimant says that the usual process was for the package to be presented to a board. the claimant alleges that B McGlone said that he should park the issue and that he (Mr McGlone) would look into it the following year.

1.1.23 The following year, 2017, the claimant moved into the C-cell team as part of the X force rating team. The claimant got in touch with Mr Henderson and asked him to consider the claimant for career progression. The claimant says that Mr Henderson said that he would never consider the claimant for progression.

1.1.24 The claimant says that in 2018 he applied for several positions and wrote to the operations manager but did not get a reply one of them was for a managing consultant position within X force to which he received no reply.

1.1.25 The claimant says that in 2018 he asked his manager to prepare him for promotion, but the manager said that she could be reading feedback all day long and did not help him. The manager in question is called D Abel.

1.2 If so, did the same amount to less favourable treatment of the Claimant because of his race or was there an alternative, non-discriminatory explanation for such treatment:

a. The claimant is Asian and relies upon colour as his protected characteristic

b. the claimant relies upon hypothetical comparators or alternatively, in relation to his complaints about lack of promotion, the following: R Connor (2016), D Rees (2016), J Simeonova (2017), M Mitchell (2018), P S Clark (2018), M Frith (2018) and G Bucklow-Hebbard (2018).

2. DIRECT DISABILITY DISCRIMINATION

2.1 Did the claimant have a physical and/or mental impairment that meets the definition of disability within the meaning of section 6 Equality Act 2010 ("EQA") at the relevant times and in particular, did the condition have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities, that lasted or was likely to last, for 12 months or more? The claimant relies upon the conditions of stress, depression and anxiety, which he says was diagnosed sometime in 2016.

2.2 If so, did the respondent have actual or constructive knowledge of the condition and accordingly, that the claimant was a disabled person within the meaning of section 6 EQA, at the material times?

2.2.1 The respondent accepts that the claimant was disabled due to depression and anxiety from July 2020.
2.2.2 The respondent does not accept that the claimant was disabled due to stress at any material time.

2.3 If so, from when did the respondent have such knowledge?

2.3.1 The claimant considers that the respondent should have known from the time of his sick leave in 2016, when had 30 days absence.

2.3.2 The respondent accepts it had knowledge of the claimant's depression/anxiety from 9 December 2020

2.4 Did the following act(s) occur?

2.4.1 23 June 2020: claimant being told by S Paulin (with whom D Abel agreed) "you were taken off the project because you went on sick leave" - and S Paulin saying that the claimant could not return to the project because he had just come back from sick leave; The claimant says that in addition this is discrimination arising from disability and that the "something arising" was his sickness absence;
2.4.2 5 August 2020, C Blood at OH asking the claimant to talk to the person who has caused him the problem and asking the claimant to talk about his problems with OH; The claimant has been directed to provide further details if he is claiming discrimination arising from disability, see order.
• The claimant alleges that "discrimination arose as a consequence of the actions of C Blood".

2.4.3 5 August 2020, D Abel not sending consent to access medical report to Medigold; The claimant clarified on 18.8.21 that this is said to be direct discrimination only.

2.5 If so, was such treatment because of the claimant's disability?

2.6 Was the treatment a proportionate means of achieving a legitimate aim?

3. DIRECT RELIGION/BELIEF DISCRIMINATION

3.1 Did the following act(s) occur?

3.1.1 Being required by B McGlone to work in pairs with employees with whom the claimant did not get along when the claimant asked to work alone, following his return to work between May and October 2020 (the claimant says this continued into November 2020 after his claims were lodged)
3.1.2 22 May 2020: Being paired with G Bucklow-Hebbard on Project Y

(the GTS Project) and being "ghosted" by Mr Bucklow-Hebbard when the claimant asked for his results, causing the client to be aggressive on the call on 23 May 2020 (saying the claimant had not shared results)-on the same day as Eid.

3.1.3 16 October 2020: Having a meeting request sent two hours before a meeting, with the meeting taking place during Jummah prayers and ignoring and belittling the claimant at the meeting; The claimant alleged on 18.8.21 that it was C Lynch-Paxton who carried out the matters complained of.

3.1.4 22 October 2020: Rude and aggressive slack exchange with the person with whom the claimant was working on testing (Venkat), a Checkpoint Review and Report, including Venkat saying the claimant was only finding low risk issues. Venkat is Asian but of different religion to the claimant.

3.1.5 The claimant said there was a general issue of N Bean and others requiring him to attend meetings at 1pm on a Friday when it was known he would attend Prayers. He believes that the incident at 3.1.3 relates to C Lynch-Paxton but will confirm. The claimant confirms this relates to C Lynch-Paxton.

3.2 If so, did the same amount to less favourable treatment of the claimant because of his religion or was there an alternative, non-discriminatory explanation for such treatment?

3.2.1 The claimant is Muslim.

3.2.2 claimant to specify comparator relied upon – Claimant has not specified any particular comparators

4. HARASSMENT

4.1 Did the following act(s) occur?

4.1.1 In April 2019 that J Sykes and C Perry were having a telephone call with the claimant when J Sykes made two racially disparaging remarks to the claimant, calling him a "Fucking Indian" twice and hanging up on him.

4.1.2 Also, in April 2019 that C Perry said I thought you guys were expert in breaking into vaults.

4.1.3 in March 2019 A Thomas in a weekly call attended by the claimant said" some Indian name I can't remember who".

4.1.4 in April 19 P Briscoe ignored the claimant's work and favored white people such as N Bean, P Stephenson and A Bennett.

4.2 If such act(s) occurred, did any amount to unwanted conduct towards the claimant on the basis of the claimant's race/colour which had the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.3 Was it reasonable in all the circumstances for the conduct to have such effect?

5. VICTIMISATION

5.1 Did the following amount to protected act(s)?

5.2 The claimant says that he had made complaints of race discrimination in March and April 2019 in several documents. On 18.8.21 the claimant said that these were:

5.2.1 his grievances of 11.1.18 re P Briscoe/D Abel,
5.2.2 1.10.18 re N Bean
5.2.3 a grievance in March 2019.

He has been directed to provide further details if there are any other documents (see order).

5.2.4 27 February 2017: claimant's grievance.
5.2.5 11 January 2018: claimant's grievance about P Briscoe/D Abel (referred to at 5.2.1).
5.2.6 14 May 2018: claimant's email to C Tucker.
5.2.7 29 May 2018: claimant's email to the Respondent's grievance coordinator task ID forwarding on the email at 5.2.6.
5.2.8 4 June 2018: claimant's grievance appeal.
5.2.9 1 October 2018: claimant's grievance about N Bean (referred to at 5.2.2).
5.2.10 16 January 2019: claimant's email to G Taylor at 21:36.
5.2.11 18 February 2019: claimant's email to G Davis and R Sedman.
5.2.12 18 February 2019: claimant's email to A Sullivan, forwarding email at 5.2.8.
5.2.13 March 2019: claimant's grievance (referred to at 5.2.3).
5.2.14 3 June 2019: claimant's grievance appeal.
5.2.15 19 July 2019: claimant's grievance appeal.
5.2.16 25 July 2019: claimant's email to A Brumpton and C Tucker.
5.2.17 14 August 2019: claimant's grievance.
5.2.18 18 September 2019: claimant's email to M Trinder.
5.2.19 Claimant's ET1's in 2020: 22 July, 12 October, 19 October, 19 October, 19 October, 25 October.

5.3 In doing any of the acts referred in paragraph 5.2 above, did the claimant give false evidence or information, or make a false allegation, in bad faith?

5.4 If the claimant did a protected act, did the claimant suffer the following:

5.4.1 Being given a written warning in November 2019.
5.4.2 The grading in his Checkpoint Review for 2019.
5.4.3 November 2019: a group of 5 employees gathering around the claimant and laughing and joking around him. The claimant said on 18.8.21 that these were C Porritt, J Sykes, A Atterbury-Thomas and another 2 whose names he will supply by 1 September if he remembers them. The Claimant is now saying those individuals are: "A Atterbury Thomas - Chair M Wheeler C Keeler (Left IBM in 2019/2020) (And/Or C Kelly - But not sure if he was fully involved at that stage) J Haywood -> J Sykes (Introduced on call was not invited) Everyone was smirking/Joking when they invited him into the call and introduced him in."

5.5 If so, did any amount to detriments?

5.6 Did any such detriment occur as a result of the claimant having done a protected act?

6. JURISDICTION

6.1 Were the claims in respect of any alleged discrimination, harassment or victimisation brought within 3 months from the date upon which the alleged acts occurred?

6.2 If not, did they amount to continuing acts such that the time limit for bringing such claims starts to run from the date of that last act?

6.3 If not, would it be just and equitable to extend the time limits for bringing such claims?

7. REMEDY

7.1 Is the claimant entitled to any remedy?

7.2 Is the claimant entitled to a declaration?

<u>Findings of Fact</u>

5. The claimant attended in person to give evidence and did not call any additional witnesses. The following witnesses gave evidence via CVP video link on behalf of the respondent: D Abel ("DA"), Professional Development Manager and Claimant's First Line Manager from September 2018 to present; A Atterbury-Thomas ("AAT"), Senior Managing Consultant; C Blood ("CB"), Corporate Health & Safety Project Lead; R Conner ("RC"), Managing Security Consultant and claimant's Task Manager from November 2019 to present; G Davis ("GD"), Partner, IBM Security and claimant's former Second Line Manager and disciplinary hearing manager; C Henderson ("CH"), Global Managing Partner and Head Of X-Force; C Lynch ("CL"), Global Leader of Delivery Operations, X-Force Red; B McGlone ("BM"), Associate Partner & Regional Leader of X-Force Red - CST, Europe and Claimant's First Line Manager from October 2015 until September 2018 and Task Manager from October 2015 until November 2019; G Narasimhaiya ("GN"), Vice President & Managing Partner, EMEA Security Services and Claimant's current Third Line Manager; V Nikolić ("VN"), Senior Managing Consultant and EU team leader for the X Force Red team; and J Sykes ("JS"), Manager of the Messaging Middleware Team at the relevant time. We considered the evidence given both in written statements and oral evidence given in cross examination, re-examination and in answer to questioning from the Tribunal. We considered the ET1s and the ET3s together with relevant numbered documents referred to below that were pointed out to us in the Bundle.

6. The claimant gave a significant amount of evidence by way of his written

witness statement and in response to cross examination and Tribunal questions. Much of the evidence the claimant gave in his written witness statement dealt with matters that were not the subject of the proceedings before this Tribunal. The first 110 pages of his witness statement dealt with many events dating from the start of his employment. Although some of the events relied upon in the List of Issues were addressed in this evidence, the majority of this evidence dealt with matters that are not referred to in the List of Issues at all. We are conscious that there are 11 other claims being pursued by the claimant in the Employment Tribunal against the respondent and some of the evidence given by the claimant deals with factual matters that may form part of these claims. The List of Issues is agreed by the parties and was prepared and revised on the basis of the claim forms this tribunal is dealing with and also following two detailed and lengthy case management hearings before Regional Employment Judge Findlay. To that end, we have not (in general) made findings of fact that go beyond the scope of the List of Issues, save where such findings were necessary to consider whether the Tribunal could draw relevant inferences.

7. As a general comment, we had difficulties in accepting the credibility of the evidence that the claimant gave on many issues. The claimant was at times evasive in cross examination stating that he could not remember when asked questions in cross examination challenging his evidence. He had a tendency to focus on certain incidents and at times was exaggerating and embellishing the significance of these incidents in the overall narrative. We accepted that, on the whole, the claimant is entirely convinced that the matters he described took place, and he is not setting out deliberately to mislead or be dishonest at all times. However, we struggled with the plausibility and reliability of much of his evidence. As a Tribunal we reminded ourselves that our findings of fact must be based on evidence and not conjecture and speculation. Whilst those facts can be found based on inferences, there must be some underlying evidence for us to make inferences from.

8. The respondent's witnesses gave evidence that was more credible and consistent with the contemporaneous documents. In particular we found GN, RC, CB, CL, JS, GD, VN and CH entirely straightforward, robust and convincing witnesses. BM and DA were more guarded in their evidence and gave more defensive answers in cross examination by the claimant, perhaps understandably, as they came in for some harsh and personal criticism by the claimant in his evidence. It is clear to us that the relationship between the claimant and these witnesses was now not good. However, we found them honest in their answers and their evidence was internally consistent and broadly consistent with other witnesses where any detail was available.

9. We made the following findings of fact:

9.1. The respondent provides IT, technology, hardware, software, new business solutions and services. It is organised into discrete business units to which its employees are assigned. These business units operate independently of

one another, and each has its own management and team structure, budgets and HR support. The claimant is employed as a Security Consultant within the Cloud and Cognitive Software business unit.

9.2. The respondent's professional employees are banded in numbers ranging from 3 to 10 (with 10 being the highest non-executive Band), above which there are executive Bands, which start from Band D and go up to Band A.

Culture and progression within the respondent

9.3. Employees at the respondent work in accordance with its 'One Purpose, Three Values, Nine Practices' model. The purpose being that the respondent is to 'Be Essential' to its clients. The model goes on to list the values employees are expected to show, namely 'Dedication to every client's success, Innovation that matters – for our company and the world and Trust and Personal Responsibility' and further identifies the practices employees should engage in to demonstrate these values, such as 'Put the Client First'; 'Share expertise'; 'Dare to create original ideas'; 'Unite to get it done now' (page 2528H). For career progression, employees are expected to demonstrate that they exhibit these values and develop using these practices. This flows down into the respondent's Checkpoint appraisal system (implemented in 2016), where employees are assessed against five 'dimensions' – 'Business Results', 'Client Success', 'Innovation', 'Responsibility to Others' and 'Skills'. For each dimension they can receive a rating of 'Exceeds', 'Achieves' or 'Expects More' and these ratings are discussed and, if necessary, adjusted following an annual Checkpoint review meeting which takes place between the employee and their manager(s).

9.4. Promotion is not based on length of service but how an employee develops which includes their skills and performance. The claimant told us that promotion was based on length of service, and it was only in his case and not for others that performance was relevant. We did not accept this contention and accept that in order to be considered for promotion, the respondent's employees needs to demonstrate that they are capable and willing to meet the requirements of the band above and have been a proven performer at their current band for an extended period (usually at least two years) - see list of Promotion prerequisites shown at page 2528J. Promotion is not an automatic process but requires an employee to seek development opportunities with the assistance of their managers and then participate in that process together with their manager. Employees are expected to be proactive about this and take responsibility for their own professional development. Employees will discuss whether it is appropriate for them to seek promotion with their managers which will include discussing Checkpoint ratings over the previous three years, feedback received, business metrics (including utilisation rates) and professional development and education including internal respondent Badges (see below). If the employee and the manager agree that promotion criteria have been met, then the employee will be placed on a promotion long list. Since 2017 the respondent's managers have been informed that 'Security Leadership will

expect to see all aspects of diversity well represented in the population being promoted, wherever possible' – see guidance at page 2528I. This long list is then reviewed by the promotion board chairman for the particular business unit who will consider the list based on the criteria being met and also business priorities and affordability. In 2017 the person responsible for this decision in the claimant's business unit was C Lees and since December 2020 it has been GN. A promotion short list is then produced containing the names of individuals who will be taken forward. Those who are not shortlisted are informed that decisions on their promotion will be deferred to the next round.

9.5. The employees that are short listed are then invited to attend a promotion panel consisting of five or six senior managers including a representative of HR. The promotion candidate must prepare a presentation in advance of the panel meeting. They are sent a template to complete (shown at pages 2528Q-U) which sets out details of their current role, their achievements and track record over the last 2-3 years; details of skills and personal development including professional qualifications, courses attended, Badges completed etc; details of people management and leadership skills and a manager summary setting out why their line manager feels they should be promoted. This is reviewed in advance by the promotion panel and the candidate is required to give a short presentation to the panel after which they are asked questions. The panel then makes a decision on whether a candidate should be promoted. Not all candidates succeed (GN estimated that around 80% are successful at this stage). Those that are unsuccessful are provided with feedback and can be deferred to the next promotion cycle to try again.

9.6. We were satisfied that this process was the requirement for promotion in place within the respondent at every level and that there were no short cuts or exceptions made. In general employees are only ever promoted one band at a time as there is a significant difference in skills between each level. There are no set timescales for promotion, and it can take individuals many years to progress through the bands. It is also clear that not all individuals are promoted in this manner and can remain in the band they were engaged on for significant periods of time. It appears that there is no specific process to pick up any employees who are not promoted within a particular period of time or who are "left behind' by this process.

Diversity and Inclusion initiatives at the respondent

9.7. We accepted the evidence of GN about the various initiatives he was aware of at the respondent promoting diversity and inclusion and his understanding about the number and percentage of Asian employees in the workforce. He gave details of a number of very senior Asian employees (including himself and the Chairman of IBM, A Krishna and the Chief Executive of IBM UK, S Visvanathan). Of his UK direct reports, five out of six were Asian including the claimant's second line manager (who manages DA, S Arora). He estimated that of the 370 UK employees within the Security business unit, approximately 25-30% were Asian. We accepted

what GN told us about diversity and inclusion having always been part of the respondent's core ethos and culture, having hired its first Asian executive in 1971 and commissioning 8 executive task forces in 1995 to improve diversity for particular groups including Asians. The respondent's UK's business has a Multicultural Business Resource Group (BRG) which is an employee led group dedicated to 'improving and accelerating the growth and engagement of minority communities' (page 2526). This group became the BAME BRG group in 2018 (having split into two groups in 2020 to focus on the particular needs of Black and Asian communities). The claimant acknowledged in cross examination that the examples given of Asian people succeeding in the respondent contradicted his allegation that in the respondent non-Asian people did better than Asians, "*to a certain extent*".

Claimant's contract of employment and job role

9.8. The claimant started work with the respondent as a Security Consultant, Band 6, on 12 October 2015, under a contract of employment dated 24 September 2015 (page 221-231) at a starting salary of £45,000. He was appointed to the Cyber Security and Response team ("CSAR") (which was subsequently amalgamated into the X Force Red team). It was confirmed during oral evidence that the claimant in fact commenced employment on a higher salary of £55,000 which was at or near the top of the salary range for this Band.

X Force Red team

9.9. The global X Force team, headed up by CH, is made up of two divisions (i) X Force Red (which used to be the cyber security part of CSAR), where the claimant works, and (ii) incident response (called X Force IR). The X Force Red team does penetration testing (pen-testing) and offensive security, searching for security risks or holes within a client's IT networks, applications, hardware and systems looking at how hackers could exploit any vulnerabilities. In the global X Force Red team there are about 200 people working in the UK, Europe, the United States of America, India, Australia and MEA (Middle East and Africa). There are approximately 40 employees in the X Force Red team in the UK. The European X Force Red team is headed up by BM (a Band 10 Associate Partner), who has three direct reports, RC (a Band 8) who is team leader in the UK, VN, team leader in Europe and V Akumar who heads up the team in India. The claimant works in RC's team based in the Warwick office. There are currently 7 pen testers including the claimant who are either Band 6 or Band 7. All carry out similar work but those graded at Band 7 tend to have more experience and have different expectations in terms of taking more control of projects and possessing the softer skills such as speaking to and managing clients.

9.10. The work carried out by the European X Force Red team can be for internal and external clients and comes from four different sources: Pen-testing work from new IBM external client sales (via I Tyrrell, Operations Manager in the European X Force Red team); internal jobs from the US from CL (who

worked closely with GTS (Global Technology Services) which was one of IBM's business units now hived off which provided strategic outsourcing, IT infrastructure and technology support services to external clients; internal UK IBM projects coming directly to BM (as someone well known within the business) and fourthly via long-term existing client contracts (blue dollar projects) which had a requirement for pen-testing as a part.

9.11. Projects tend to last between one and three weeks (which timescale is agreed with the client at the outset). If additional time is needed it has to be agreed in advance to ensure it can be charged for. After the testing is finished, a written report of findings is provided which is written by the tester or testers involved in the project. There are generally two or three people working on a project who combine their findings into one report, especially if there is a short turnaround time. GTS projects are often staffed by cross-region teams, particularly testers from the US, UKI and European teams. The UKI team also worked frequently with the Indian team. In most cases there is not a primary or leader tester, but equal collaboration between testers. For larger (and longer) projects testers may come in and out of the project. In that case, the tester or testers on the project full time tend to be the primary testers and the part-time testers the secondary testers. The claimant acknowledged that working with others was a primary part of his role. Allocation of pen testers to particular projects depends on various factors including availability, capacity/workload, particular skills and whether someone has security clearance for an account.

9.12. Once a tester or testers have finished their report, it goes through a quality assurance process (QA) to check for inconsistent findings, lack of evidence supporting the findings, inappropriate evidence not related to the finding, that the narrative included explained the testing carried out and the findings, that it had accurate and concise technical explanations, and to check for incorrect risk ratings assigned to findings, and for typos and formatting errors. The report is then sent back to the testers with comments and suggested amendments. Once any amendments have been made by the testers, the report is rechecked by QA and then sent back to the tester with any further amendments. This exercise is repeated until the report is signed off by QA. The report is then sent out to the client (whether internal or external). Reports for US or MEA clients may have a secondary QA process for issues specific to their region.

9.13. Generally speaking, IBM employees have two managers. A line manager, or 'Blue Pages' manager (Blue Pages being IBM's internal directory), who is responsible for the administrative aspects of an employee's employment, such as holiday booking and sickness absence etc and a task/functional manager responsible for managing day to day work. An employee's first line manager, or 1LM is the direct line manager with the second line manager (2LM) being the manager of that first line manager and so on. The claimant acknowledged that he did not carry out any line management duties for other employees.

<u>November 2015 Alleged comparator M Mitchell ("MM") promoted from Band</u>

6 to Band 7

9.14. Shortly after the claimant began employment, a colleague of his, MM (who had started at IBM in the apprentice scheme as a Band "TN" in May 2010 and had been promoted to Band 6 within that scheme on 1 July 2011) was promoted from Band 6 to Band 7 on 1 November 2015. This event was referred to as MM is someone who the claimant compares himself to for the purposes of his race discrimination claim relating to not promoting him/delaying his career progression (allegation 1.1.21 in the List of Issues). We did not hear from MM but accepted the (unchallenged) evidence of BM that MM is a senior member of the European team and will be in line for promotion to Band 8 in the first quarter of 2022; that he is one of the UKI QA'ers; that his report writing is excellent; that he helped BM at many industry conferences with his unique skills at 'lock picking' (a cybersecurity term), which has helped bring crowds to IBM hosted events (BlackHat EU - London, Think - London, Think - Dublin etc.) and helps to raise IBM's external pen-testing profile; that he carries out many testing activities (i.e. beyond just application and infrastructure testing); that he is a respected team player and gets on with everyone; that he often presents at universities in Dublin and promotes X Force Red at these events and is also studying for a Postgraduate Diploma in Cybersecurity in his spare time.

Events during 2016

9.15. The claimant's witness statement makes reference to various events which he says took place during 2016 involving BM. For the reasons already alluded to, we are not making findings of fact about these matters save to the extent required in order to determine the claims before this Tribunal. Suffice to say during the course of 2016 the claimant carried out his role as a pen tester within BM's team working on various projects during that time including Project TT. At times he worked away from home in London and other locations. The claimant performed his duties well during this time and we saw examples of feedback on the claimant's work provided by colleagues (including BM) between April and July 2016 at pages 261-264 which was positive.

9.16. The claimant appears to have submitted a complaint to the respondent's central complaints procedure on 24 February 2016 (page 247). There were no details of what the complaint entailed save that the subject areas it referenced (selected from a list of subject fields provided on the automated system) included 'Discrimination' 'Favouritism' and Retaliation'. The claimant asked when making the submission for an e mail address to send his complaint to (as it was more than the character limit). A response was provided on 23 March 2016 from T Poots, UK Grievance Coordinator (with an apology for the delay) which provided an e mail address to which the claimant replied on 2 April 2016 stating that he would be "*putting forward my concerns. I have a fair few issues to discuss*" (page 246). When asked about this in cross examination the claimant said he could not remember why he had raised this complaint but thought that it was something to do with someone being hired at a higher band who was doing the same job as

him. This complaint does not appear to have been pursued further as no further e mails were referred to by the parties.

9.17. On 11 April 2016 the claimant e mailed N Southam, UK Security People Programme Manager, to chase on when his six-month probation period would be confirmed as having been completed (six months since he started employment having expired on 12 April 2016) (page 249). He was directed to ask his task manager (page 248). The claimant was notified on 10 June 2016 that he had completed his probationary period (page 253).

CREST Accreditations

9.18. BM gave evidence, which we accepted, about the qualifications and accreditations for the pen tester role, provided by CREST (Council for Registered Ethical Security Testers). In particular there were two accreditations of relevance, the Crest CRT (Registered pen Tester exam), which is a basic exam and the Crest CCT (the Certified Tester exams), which is a higher level and can be taken for Web Applications and Infrastructure (each costing approximately £2,000). Both qualifications required the sitting of a written examination (which has to be passed) before moving on to a longer hands-on practical examination. Each accreditation lasts for 3 years and then has to be taken again. We accepted the evidence of BM that no employee in XFR in Europe had been put forward for the CCT exam since 2017. The claimant had the Crest CRT accreditation in place when he joined the respondent. In March 2016 BM sent an email to his team asking them about their training requirements for the year ahead (page 245). The claimant replied stating that he wanted to take the CCT Web Applications qualification in 2016 and the CCT Infrastructure qualification in 2017 (page 243). On 20 June 2016 the claimant emailed BM chasing him about when he would be able to take his CCT exam (page 255). We did not see a response to this e mail. BM's evidence was that there was no budget in 2016 for external qualifications and he told the claimant and the rest of the team that this was the case. In June 2016 the claimant complained to his then 2LM M Buckwell about BM's management of him in a lengthy e mail (starting at page 257) including not holding 1:1s and also the fact that he had not been approved for his exams. The claimant mentioned that he had some personal issues including deaths in his family and injuries to his calf and breaking his toe. Mr Buckwell responded on the points made and at page 257 explained to the claimant that BM was having some personal issues at the time which may have caused delays to some of the claimant's requests. He also stated that part of the "*delay*" was caused by him taking over the role and "*putting in place the administration support to order the courses*". We accept that during most of 2016 no external courses were being approved for anyone in BM's team. The claimant further complained to Mr Buckwell on 12 July 2016 (page 256). It is not clear if these matters were taken further, and it appears that they were not.

9.19. The claimant was booked to take his written CCT Web Application written exam on 9 December 2016 (when BM received a budget to be able to book

courses) on 26 January 2017 in Birmingham. Other members of BM's team also took exams at the same time, including D Reece, M Fitch and S Simeonova. The claimant alleged that he paid for this exam himself, but we preferred the evidence of BM on this that this was paid for by the respondent (with the claimant using his company credit card, hence the invoice at page 269-270 showing his name). The claimant did not pass the CCT written exam achieving a score of 7 out of a maximum of 45 (page 1277). This meant he was not eligible to take the practical part of the exam. The claimant told us that in his view he had not performed poorly in this exam which did not accord with the official result obtained.

Issues with stress 2016

9.20. The claimant's role was challenging, and the claimant became stressed during 2016. The claimant was involved in a car accident (we understand on 7 November 2016). The claimant contends that from as early as 2016 the respondent was aware that he was a disabled person as a result of stress, anxiety and depression. He relies on a text message received from his colleague, D Rees (page 268) on 17 November 2016. In this message Mr Rees apologised to the claimant if got upset, following some interaction between the two and goes on to state, "*I forgot you get stressed easily and I didn't mean to make anything difficult*". It further notes *"I like you a lot mate and its honestly horrible to hear you say that you want to hurt yourself and that you're having a rough time outside of work, I've had to give Brian a call and let him know im worried"*. Following this message Mr Rees raised the matter with BM. The claimant recalled BM telephoning him later that day to check that he was OK. The claimant did not seek medical assistance at this time and did not go to his GP to raise any concerns. BM spoke to E Staples in HR at some point before Christmas 2016 as we saw correspondence referencing a conversation in an e mail from BM on 20 January 2017 at page 279. In this e mail he asks whether Ms Staples has been able to speak to the claimant "*about stress*" as per their earlier conversation. His e mail went on to state that BM "*really need to try and sort something as it's concerning that he cannot perform more than 1 task without getting himself worked up and stressing himself out .The work we perform is demanding and schedules change frequently".* This e mail further notes *"I am guessing IBM can help people with stress, [claimant]'s seems to result in paranoia and he sometimes thinks people have it in for him. Whether this be IBM colleagues or people outside. I explain things and he understands I think. Then give it a few weeks and we are back to square one."*

9.21. When asked about this e mail in cross examination, BM stated that he was not alluding to any specific concerns here about the claimant's mental health, but the effects of stress on the claimant and his use of the word "*paranoia*" was not used in the medical sense as he was not medically qualified to make this assessment, which we accepted. Ms Staples informed BM to encourage the claimant to see his GP if he feels his stress levels are "*very high*". During deliberations we also saw an e mail from Ms Staples to the claimant on 31 January 2017 (page 296) where she asks the claimant whether he would be able to attend a call with her and that BM may

have mentioned her. She suggests that the claimant has a lot on and suggests that a "*general chat*" might be helpful. The claimant replied that he has accepted the call request (page 299) so it appears that a conversation between the claimant and Ms Staples may have taken place, but we did not hear any evidence about what was discussed. We find that from December 2016 onwards the respondent was aware that the claimant had some issues with stress at work.

Issue 1.1.22 - Allegation that the claimant put package together to progress his career and was told by BM said he should park the issue and BM would look at it the following year

9.22. On 5 December 2016 the claimant had an exchange of messages with BM on its internal messaging system (page 1239). At this time, the respondent operated a career development programme called 'Career Framework'. This was replaced at the end of 2016 with the Checkpoint system described above. The claimant had been working on the preparation of a presentation under the Career Framework system to take steps to apply for promotion to Band 7. He sent a message to BM as follows "*I was in the process of doing my career framework and doing a package, majority of it is done, was wondering if you can give me any pointers etc. if you can set aside some lime for me that would be great"*. BM responded to him as follows "*ok career framework will no longer exist soon"*. The claimant responded that he had read about it the change and asked what would replace it and asked BM whether he was wasting his time doing this one. BM replied in three short messages sent in quick succession as follows:
"*now one is reviewing these anymore, so I would park it*
you might be able to use things from what you have done
but it's a whole of IBM thing"

This exchange broadly took place as the claimant alleges in the list of issues. We find that these messages also show that BM told the claimant to "*park it*" because of upcoming system change as this is directly referenced in the messages and the context of the overall conversation between the claimant and BM at the time. The claimant did not at this, or any later stage send the presentation he said he had prepared to BM or any other member of his direct line management. The claimant sent a copy of a document to W Iqbal (who the claimant told us was a colleague he had asked to mentor him) on 25 January 2017 stating that it was 87% complete (page 278). We did not hear whether there were any further discussions between the claimant and his mentor or indeed anyone else about this document.

9.23. The claimant's performance review for 2016 was carried out under the Checkpoint process on 31 January 2017 and the document recording this was shown at pages 281-295. This recorded the claimant's goals for that year and progress against those goals as assessed by the claimant by him setting out evidence of how he says he has achieved his goals. It went on to record the claimant's scores awarded by BM against each of the five dimensions referred to above. The claimant scored a rating of 'Achieves'

on the dimensions of 'Business Results', 'Client Success', 'Innovation' and 'Skills'. He was scored as 'Expects More' on the dimension of 'Responsibility to Others'. Under the comments section, where BM (as manager) adds comments on the scoring, for this dimension, BM adds: "*Most of the time [claimant] is responsible to others. However he needs to be more of a team player than he currently is. Sometimes this is not always the case. Issues around stress levels affect his ability to communicate positively.*" The checkpoint review also asks the manager to indicate by ticking a box, whether the employee is ready and available for a new opportunity in the next year. This box was not ticked in the claimant's case.

9.24. The claimant emailed BM about his checkpoint scores on 21 January 2017 (page 297) and suggested that he should have received 'Achieves' on the 'Responsibility to Others' matrix and 'Exceeds' on the 'Client Success' matrix. The claimant asked for a call to discuss this with BM, but we did not hear any evidence about whether this conversation took place. The e mail the claimant sent is recorded as being 'replied to and forwarded' but we did not see any of these replies or forwarding e mails. The claimant was asked whether he took any steps to ensure he communicated more positively after receiving these comments in the checkpoint review and he said that he did by setting a checkpoint goal for the following year and seeking feedback. The claimant was asked whether when making complaints about incidents involving colleagues, he ever acknowledged that he had done anything wrong himself and the claimant said he was not at fault at all, his behaviours were completely appropriate and professional and that he was "*faultless*". This did provide a level of insight to the Tribunal as to how the claimant viewed his interactions with his colleagues during his employment.

Issue 1.1.21 and 1.1.23 - Allegation that the claimant was not promoted/delaying claimant's career progression. Claimant moved into the C-Sar team, and C Henderson told him he would never consider him for career progression

9.25. At the beginning of 2017, the CSAR team that the claimant was working in amalgamated with the Global X Force Red team headed by CH. An 'All Hands Call' involving all members of the X Force Red team globally took place around 19 January 2017 which the claimant attended. Following this call, the claimant emailed CH with some questions (page 277). The claimant emailed CH again on 3 February 2017 asking for a 1:1 call with CH and suggested a time. CH responded that this was fine and asked the claimant to book it in his calendar. CH told us it was quite unusual for an employee of the claimant's seniority to ask for a call with someone that many levels above him, but that it was his personal philosophy to be responsive to all members of his global team, so he agreed to the claimant's request. We accepted that this was the case. The claimant and CH spoke on 6 February 2017. The claimant said that this call was friendly but that he could not remember that CH was helpful, and he does not remember the call being constructive. However the claimant alleges that during this conversation, CH told him that he would never be considered for promotion. CH did not remember the deta. of the conversation but remembered an overall

impression that the claimant was concerned that team members were disadvantaging him during the QA process and that he was not getting credit or recognition for the findings he was making in his reports. CH said he reassured the claimant that QA was part of the process and that it was not usual for individual employees to be referred to in client reports. CH denied that he had during this call told the claimant that he would never be considered for career progression. CH said he followed up on this call with BM who told him the claimant had raised similar concerns with him. We preferred CH's recollection on this particular issue and accept that CH did not during this call tell the claimant he would never be considered for career progression. This would have been a somewhat jarring comment for a senior manager to have made to someone he did not know personally and had not spoken to before and did not fit with the context or background to this conversation taking place. This was not mentioned in later correspondence between the two (see para 9.33).

9.26. The claimant went on sick leave on 23 February 2017 as he emailed BM with his sick note on this date (page 311). It is not clear what the reason or length of this absence was. The claimant was off sick until 6 March 2017 (see below).

<u>27 February 2017 Issue 5.2.4 - Alleged Protected Act: C raises first formal grievance</u>

9.27. The claimant raised a grievance on 27 February (page 313 – 376). This raised a number of issues from the previous year. He complained about difficulties working with Mr Rees and complaints he had made to BM. He also makes reference to issues taking place outside work including being involved in a car accident and a number of deaths in the family taking place and the lack of sympathy from BM. He complains of being overworked, being given tasks that are laborious and not being given credit for his work (complaining about the deletion of his work by various people and failing to add his name to client reports). He also complained about differential treatment as regards overnight stays at hotels. At page 326 it says

"I often feel intimidated and feel I must suffer in silence and this has been happening constantly thought out the year, when I joined here, with the company being such a global organisation I did not expect to feel this way, I feel that it may be because I am Asian working in an all Caucasian environment often being neglected within the team whilst the team excluding me reap the benefits and rewards. I am often blamed for things that are not my fault and things are happening without my knowledge is my probation was extended for no reason and I am often told that my manager should be my punch bag, I often question what it is that I have down that someone else must stick up for me. I feel I am being discriminated against …"

9.28. The claimant's grievance was lengthy and contained detail about a large number of different incidents in the workplace where he felt he was treated badly. The claimant went on to complain about not getting a salary increase

or promotion when other employees had. At page 366 it is stated:

"I genuinely believe is to do with the colour of my skin I am being held back and discriminated against. I am the only Asian person in the group I have seen other talented individuals of Indian heritage leave or be forced out for similar reasons."

The claimant also alleged that he had been subject to religious discrimination (page 370) mentioning having to work on Eid the previous year and conversations about alcohol and being offered beef. This document also complained that his failure to progress was an act of age discrimination stating at page 371 about this *"I have been told that it will take me a long time to achieve where I feel I am already, not sure why this was, maybe Racial, but I think it was mostly my age"*

When asked about these differing allegations in cross examination, the claimant gave confused answers about what he felt was the reason for his lack of progression but stated that he was sure it was related to his race as well as his age at this time.

9.29. We find that although this grievance was confused and adopted a scattergun approach, that the claimant did have a genuine belief that the reason he was being treated differently in his perception, was because he was Asian.

9.30. On 9 March 2017, BM emailed Ms Staples in HR regarding the claimant returning to work (on 6 March 2017) suggesting that the claimant had been absent until this date. He mentioned in the e mail that the claimant then was planning to go off sick again. Ms Staples advised BM to monitor the situation and if it continued to seek an occupational health review. The claimant worked on 6 and 7 March 2017 and then went on sick leave for stress related problem from 8 March 2017 to 6 April 2017 (pages 379 and 381).

9.31. Shortly after returning to work on 12 April 2017, the claimant e mailed Mr Buckwell to complain about work issues and was directed to direct his complaint to GD, as BM now reported to GD and not Mr Buckwell. The claimant emailed his complaint (about BM and again related to issues around people removing his name from reports) to GD on 16 April 2017 (page 384-387). In this e mail the claimant complained that he was being discriminated against. GD responded on 7 May 2017 stating that he had only just found the e mail, apologised for the delay and asked the claimant could they discuss matters (page 395). The claimant responded on 19 May 2017 asking whether they could arrange a call to discuss that week (394). It is not clear whether this call ever took place and GD cannot recall a conversation and the claimant does not mention this in his evidence. We find that it did not. On 19 May 2017 the claimant was contacted about the grievance he had raised in February 2017 by S Grinham ("SG"), a senior manager in the respondent's Tax policy department, who advised him she had been assigned to investigate it and asking for a meeting to be arranged

(page 397).

<u>*July 2017 Alleged comparator RC promoted from Band 7 to Band 8*</u>

9.32. In July 2017 RC was promoted from Band 7 to Band 8. BM gave unchallenged evidence that prior to promotion RC led many engagements for X Force Red and was a senior member of the team managing many clients and had been informally operating as the claimant's manager (which was formalised in June 2020). He had been conducting 'lunch and learn' sessions and had starred in a video promoting IBM pen-testing. Prior to working at the respondent RC was a CREST Team Leader and was experienced in leading teams, solutioning and technical pre-sales. BM said that RC had an exemplary and methodical management style and helped team members resolve problems arising during testing. We find that RC was operating at a more senior level to the claimant (which involved management) before he was promoted in July 2017.

9.33. On 19 August 2017 the claimant emailed CH about issues around the reports he produced and not getting credit (page 404A). CH spoke with the claimant later that same day and the claimant emailed CH after the call (page 404B). The claimant raised six issues with CH, namely (1) a lack of salary increase; (2) a damaged laptop; (3) a lack of training; (4) his colleagues using his template reports; (5) his name not being on reports; and (6) there being a double standard where his colleagues could send out reports but he could not do so and this was because he was Asian. CH replied responding to each point (pages 404G-404H) and on the allegation of race discrimination stated

"*we have Asian individuals who deliver reports all the time within our team. I can also say that diversity is very important to this team and something we stress with all the managers. As you have marked this as confidential and asked that I do not share the information, my ability to investigate is quite limited. That said, if you feel that there are issues of racial bias, please report them to HR immediately. We will not tolerate racial bias*"

CH further e mailed the claimant on 21 August 2017 (404G) following up on the claimant's complaint about race discrimination (as he had not received a response from the claimant). He stated that he wanted to make sure this was resolved and suggested that the claimant raise this with HR. He also offered to have a further discussion with the claimant. The claimant responded on 22 August 2017 (page 404E-F) stating that he was happy with CH's response on his discrimination point which gave him confidence in CH and went on to describe him as a good leader. The claimant's e mail went on to raise further issues on CH's response to his six points. When asked about this email in cross examination, the claimant said he had later concluded that what CH said were "*empty words*" despite the positive comments about CH himself in this e mail. There was no mention in this conversation or correspondence to CH stating that he would never consider the claimant for career progression on any previous occasion.

July 2017 Alleged comparator G Bucklow-Hebbard ("GBH") promoted from Band 6 to Band 7

9.34. In October 2017 GBH was promoted from Band 6 to Band 7. GBH started in 2014 in the foundation apprentice scheme as a Band TN apprentice (moving up to Band 6 after one year in the scheme, which is typical). At the end of that two-year scheme, employees are considered for promotion from Band 6 to Band 7. BM told us that he put GBH forward for promotion but did not make the decision to actually promote him. He explained (unchallenged) that GBH is highly motivated and had improved his ability to perform application and infrastructure testing, as well as the more niche areas of mobile testing and code review, making him more deployable on projects. He stated that GBH was "*brilliant*" in front of clients and had worked for a high-profile banking client with limited supervision. He had also given presentations on team calls and had taken steps to invent new tooling (coding language) to help with our testing. We accepted this evidence.

October 2017 Alleged comparator M Fitch ("MF") promoted from Band 6 to Band 7

9.35. In October 2017 another member of the X Force Red team, MF was promoted from Band 6 to Band 7. MF started in 2012 and had worked as a Band 6 analyst in a different part of IBM before joining XForce Red. BM gave us unchallenged evidence that MF went through the usual promotion process as referred to above and was is a "*seasoned IBMer*" with technical and non-technical abilities, who is able to communicate and lead teams, regarded as a safe pair of hands when communicating with project teams and management. He was regarded as a rounded professional, who can converse at a technical and management level. Again we accepted this evidence.

9.36. During this period the claimant's grievance was ongoing and the claimant e mailed SG twice on 24 August 2017 making further complaints (page 407 and 411). In the second of those e mails the claimant states about BM: "*He is also constantly finding ways to wind me up, I dont think that is right, considering I took time off work for stress for exactly this kind of thing. Dont really want to be diagnosed with something more severe, like a mental health problem or breakdown."*

9.37. On 22 November 2017 the claimant and CL had a discussion via Sametime chat regarding sending out a report, where CL instructed the claimant to send a report to her, so she could send it out. The claimant sent CL a message complaining about this and stated that he was being discriminated against, referring back to similar issues he had with BM. He also commented: "*obviously someone has told you to wind me up constantly, just keep burning him they probably said*."

CL discussed this with her manager CH and on his advice, she emailed her concerns about the claimant's communications to HR (pages 423-424) stating that she had concerns for herself and also about the welfare of the

claimant. CL received a reply advising CL to raise it with line management which CL said she had already done, so did not take further action. It does not seem that this matter was further discussed with the claimant at the time.

Issue 1.1.24 - Allegation that the claimant applied for several positions and wrote to operations manager, didn't get a reply, one was a position was managing consultant within X Force team

9.38. The claimant said that around this time, he applied for various positions within the respondent and did not get any response. This allegation appears to relate to the position of 'Global Security - Penetration Testing Associate Partner1. At page 422A we saw an automated e mail which indicated that the claimant had referred himself for this position and so a link to make the application for this role was e mailed automatically to the claimant on 13 October 2017. This was a Band 10 position and the advertisement for the role was shown at page 519A-B. There is no evidence that the claimant applied for this role at the time by following the link and making an application and we find that he did not make an application at this time. The claimant told us that he felt he should have been in a Band 10 position by this date. The claimant later emailed CH about this role (see para 9.49).

9.39. On 23 January 2018, the claimant's 2017 Checkpoint review meeting took place with BM. The assessment completed in advance, during and after that review was shown at pages 426-439. The claimant scored a rating of 'Achieves' on the dimensions of 'Business Results, 'Client Success', 'Innovation' and 'Skills'. He was scored as 'Expects More' on the dimension of 'Responsibility to Others'. Under the comments section, where BM as his manager adds comments on the scoring, BM noted: "*Had a relatively good year with patches of issues regarding one dimension responsibility to others. On more than one occasion had issues with a variety of people within XFR UK & Globally. Lots of hard work and goal creating has been done. The skills are there, but the responsibility to others whether stressed or reflects badly. This creates a reputation and they are harder to fix than skills. For 2018 this needs to be addressed in order to progress in IBM."*

It does not appear as if any appeal or challenge was submitted to this Checkpoint review by the claimant. The claimant said that he took steps to address the comments made by setting up a Checkpoint goal and by trying to concentrate on that particular aspect, although was unable to say what specific steps he took to address the concerns. During the early part of 2018 the investigation into the claimant's grievance was ongoing and we saw a number of e mails between the claimant and SG during February 2018 relating to issues raised in this grievance. The claimant was informed by C Tucker ("CT"), the respondent's HR case management and Appeals Partner, in February 2018 that the outcome report was being finalised (page 452). The claimant chased further for the outcome on 23 March 2018.

9.40. The claimant was off work from 7 March 2018, and we saw a fit note at page 456 signing the claimant off work until 21 March 2018 for a 'stress related problem'. The claimant e mailed this sick note to BM and Ms Staples in HR

on 7 March 2018 and stated that it was due to "work related stress" (page 455). A further sick note was provided on 19 March 2018 again signing the claimant off work due to a 'stress related problem' until 12 April 2018 (page 461).

9.41. The claimant put together a second formal grievance (dated 3 April 2018) which is shown at pages to 464-498. This grievance does not form part of the claim in front of this Tribunal (and is not relied upon as a protected act) so we have not considered this further. It is not clear if or when this was submitted to the respondent.

<u>May 2018 Alleged comparator D Rees promoted from Band 6 to Band 7</u>

9.42. In May 2018 one of the alleged comparator the claimant relies on, D Reece, who started employment in 2016, was promoted from Band 6 to Band 7. BM gave unchallenged evidence about this promotion at para 50.2 of his witness statement which we have accepted. He confirmed that Mr Reece met the criteria for Band 7 from a technical and non-technical standpoint, as an accomplished tester who is very good in front of clients. He made reference to his proficiency at mobile testing; a specialist skill and that he had managed a team of four testers. He also referred to lecturing and presenting activities and the achievement of constantly high Checkpoint results.

<u>Issue 5.2.6 Alleged Protected Act: C's email to CT 14 May 2018</u>

9.43. The claimant sent an e mail to CT on 14 May 2018 to further chase for the outcome of the grievance report and in this e mail made further complaints about various incidents he said had occurred between January and April 2018 (pages 506 – 510). He again complained about being excluded from projects and about others taking credit for his work in particular complaining about the action of CL accusing her of lying and of treating the claimant differently to IC1 males in relation to claim codes. He contended that the respondent is trying to *"constructively dismiss"* him. This e mail further stated at page 509 "*I did not realise that there was still such a divide between Asian people working from nearly 60 years ago I did not realise we were still living in the times as my ancestors. having being born and bred in Birmingham, this is the second time in my life that I have felt this way. Also I think that my making this complaint, certain individuals have retaliated hence the reason, the way I have been treated.*" We find that the claimant did genuinely believe that he was being discriminated against and victimised in relation to this matter at this time.

9.44. On 17 May 2018, SG wrote to the claimant to inform him that the grievance outcome report had been finalised and asked him whether he would like a meeting to discuss this or would like it emailed to him. The claimant asked for it to be sent to him and SG replied to him on 18 May 2018 to confirm that she intended to send it to him by e mail marked confidential and asked the claimant whether this was acceptable. The claimant took exception to this short e mail and complained to CT accusing SG of "*playing games*" and

stating that her e mail had caused him more stress. He asked that the report be sent to CT and securely forwarded to him. We found that this was a curious e mail to send to what seemed to be a purely administrative question.

29 May 2018 Issue 5.2.7 Alleged Protected Act: claimant's email to grievance coordinator forwarding on email in Issue 5.2.6 (page 506)

9.45. On 29 May 2018 the claimant forwarded the email he sent to CT as referred to above to the respondent's shared grievance co-ordinator e mail address (page 506). We make the same findings of fact as above on this issue that the claimant genuinely believed that he was being subject to discrimination and victimisation in the way set out in the e mail.

9.46. On 4 June 2018 SG provided the claimant with the outcome of his first formal grievance (page 524 – 532). The outcome was that a number of the complaints were not upheld (including the complaints of religious and age discrimination). In relation to complaints about career progression, the outcome noted that that claimant had an expectation "*that promotion and salary increases are automatic, and not based on the needs of the business"* and noted that there had been *"ineffective management of setting [claimant]'s expectations correctly at the commencement of his employment, along with a lack of clear explanation of why promotion and salary increases had not occurred. However, I do not find this to be culture, religious or age based but more to do with communication and management style/lack of training."*

The grievance outcome found that the claimant's complaint that he had not been supported sufficiently as regards his medical needs with regard to his foot injury was partially valid and that he should have received more support. His complaints regarding lack of support during the appraisal process and regarding promotion and salary were held to be partially valid noting that the claimant did not understand and did not appear to have had anyone explain to him the details of the respondent's promotion and salary increase process. It went on to state that there had been confusing and limited communications. It noted that it was *"not possible for everyone to be promoted at the same time and employees have to be assessed by all round skills including teaming, working with clients in addition to team skills."*

9.47. The grievance outcome also noted that the claimant had been recruited at a Percent of Market Reference ("PMR") (a ratio used by the respondent to measure how an employee's salary compares to the average market rate for their role) of above 100% and so had been difficult for management to provide salary increases as other team members who were performing well had not yet reached 100% PMR. It concluded that bonus payments had been made fairly and equitably between all team members. It referred to the claimant having unrealistic expectations of promotion and that the claimant's technical skills were good but that there were other areas of focus required in order to gain promotion. It stated that overall, the grievance was not upheld but recommended various learning points around

communication. It noted that at times the relationship between the claimant and BM had broken down and suggested regular 1:1s which was noted as an action for GD as BM's line manager. It recommended that the claimant: "*should be considered for promotion in the next promotion cycle and if unsuccessful a plan be jointly documented between [BM] and [claimant] of what is required to achieve the next band with meaningful time measurements."* We find that this was in general a measured and balanced response to the claimant's many complaints and offered practical solutions to try and resolve issues.

4 June 2018 Issue 5.2.8 Alleged Protected Act: claimant's first grievance appeal against SG's findings (page 520 – 523)

9.48. The claimant immediately appealed against the grievance outcome complaining that the response had been fabricated and that there had been no mention of religious discrimination and had not addressed issues of bullying and harassment. He challenged all of the findings made by SG and stated that: *"It seems that [SG] thinks it is OK for IC1 males within our team to treat me like a slave"* and further when referring to the findings around promotion *"I am concerned that I have had to raise a grievance to be considered for promotion whilst others have had a easy ride, and this is where I think I am less favour because I am Asian."*

We find that the claimant at this stage still held and communicated a genuine belief that he was being discriminated against. The investigation on this appeal was taken over by G Taylor ("GT"), a Risk Consultant from the Delivery Excellence area of the business, and we saw numerous e mails between the claimant and GT over the months following with GT asking for and the claimant providing information about the matters being investigated.

4 June 2018 Issue 1.1.21 - Allegation that CH told claimant that Band 10 Global Security – Penetration Testing Associate Partner vacancy was filled (page 517 – 519)

9.49. On 4 June 2018 the claimant emailed CH about the role of Penetration Testing Associate Partner which he said he "*just found out from jobs-atxfr-Slack channel"* and asked to be considered for it (page 519C). CH replied to this e mail that he was unsure what position the claimant was referring to as he did not believe there were any open positions at this level (page 518-9). The claimant sent him the link to the position on the respondent's website and CH replied the same day (page 517-8) stating that the position had been filled, commenting: "*That is the position Thomas MacKenzie was hired into. He runs the business for all of UKI and Europe and reports to me. He started in October of last year. If the system still shows it as open, that is an error.*" The claimant replied stating that he had applied for the position in October 2017 and was unsure why CH did not get back to him (page 517). He also stated that the "*issues I raised with you in 2016 makes it difficult for people like me to move around this business and in particular x-force-red".* CH confirmed in reply to the claimant that he had received the claimant's e mail only that date and went on to state that the role was as a

senior position, second only to CH and had already been filled (page 517). We find that the claimant did not make any applications for this role in October 2017, either to CH by e mail or by applying online. If this had been the case, there would have been some record of this in the Tribunal bundle. The claimant also stated in his first e mail on 4 June 2018 that he had just found out about the role. We also accept the evidence of CH that this was a role two grades above the claimant's and would have been unrealistic for the claimant to apply for such a role in any event. He told us had never heard of anyone in the organisation who had been promoted by 4 grades at once in this manner. The claimant went on to forward this e mail exchange he had with CH to CH's line manager at the time, C Carney, the Vice President and Global Managing Partner of IBM Security Services, on 4 June 2018 complaining about the actions of CH. He complained of CH denying him opportunities and raising concerns about race discrimination (page 533-4). CC arranged to have a call with the claimant to discuss his concerns (see email at page 542) on 21 June 2018. During his evidence the claimant referred to the conversation he had with CC as a positive one.

9.50. On 11 July 2018 the claimant further emailed CC (pages 549 a-c). This e mail stated that he had raised the issue of promotion again with BM, but no action had been taken. He complained to CC of racial discrimination. CC replied to the claimant the same day and stated that he wanted to address this but needed the claimant to agree to CC speaking to BM which the claimant had not agreed to. The claimant replied the next day and did not answer the question but simply asked for an update on the issues he had raised. CC replied that he did not have an update "*one day after I sent the e mail*" and that he had engaged HR and would keep the claimant posted (page 678). There was further communication in August 2018 between the claimant and CC when the claimant said he was annoyed that CC had sent him an abrupt e mail and complained again about discrimination. (676-77). CC informed the claimant that he had passed his complaint to GD to deal with and the claimant told him in response that he was "*furious*" about this (pages 635A-B). The claimant suggested in his cross examination of BM and CH that CC had been forced out of his employment with the respondent because he had taken up the claimant's concerns. This was denied by both witnesses who stated that they believed CC had retired. We could find no evidence other than this bare assertion that the claimant's suggestion was true, and we did not believe this to be a credible or realistic allegation.

9.51. The claimant raised a further concern on 4 June 2018 about some communications he had with a colleague J Hunter (page 540) and made another complaint on 19 June 2018 about some issues he was having with two other colleagues, A Davies and a contractor C Williams (page 542-3). He asked these to be considered as part of his second ongoing grievance.

9.52. On 12 July 2018 the claimant emailed GD raising concerns about BM (pages 556- 557), in this stating *"I have a major concern about [BM], can you explain this message below, for nearly 3 years he has treated me this way, bullied, harassed, racially discriminated against me on multiple occasions."* This comment was in reference to an e mail sent by BM on 12

July 2018 (page 558) replying to a work-related e mail sent by the claimant instructing the claimant that he had been "*Wrong*" and explaining different arrangements for the following working week. This was an abrupt e mail, but there did not seem to be anything contained in this e mail other than instructions as to how upcoming work would be arranged. He described BM as a *"racist manager, just like his global manager [CH], his manager [CC], praised him for being a racist".* The claimant insisted during cross examination that at the time he felt that all three individuals named were racist acknowledging that this was a serious allegation. He denied the suggestion that he had made this allegation against CH because he had not given him the promotion to the Associate partner role he had asked for. GD replied the next day and confirmed that he took the claimant's allegations seriously and that when he was back from holiday he would confirm the process to be followed (page 555). GD and his line manager sought advice about how to handle this complaint. GD emailed the claimant on 16 July inviting him to attend a meeting (page 574).

9.53. On 20 July 2018 the claimant BM asking to re-do the CREST CCT exam and to take the CISSP qualification (page 1305). BM confirmed on 14 & 15 January 2019 that he had budget for the claimant to sit his CISSP exam (page 789) and for the claimant to take his CREST CRT exam (page 791) The claimant had already achieved this qualification before he joined the respondent, but the qualification had since expired (as it was time limited).

9.54. On 23 July 2018 the claimant and GD met at the Portsmouth office. GD said that during the meeting the claimant's complaints were not discussed in detail, but the claimant's career and his aspirations were discussed, and he made some suggestions to assist. GD said he had a positive impression of the claimant at this meeting and the claimant explained that his family had very high expectations of him. The claimant said in cross examination that GD did not provide any genuine offer of help at this meeting. We prefer the evidence of GD in this regard. This is not least because following that meeting GD emailed the claimant to summarise their discussions (page 590). He explained to the claimant that he firstly needed to decide whether he wanted to pursue the complaint against BM and to confirm his decision on this. He then went on to suggest that the claimant should focus on the current client project he was working on to demonstrate his performance and how he was supporting IBM core values. GD said he would discuss matters with the claimant's management team and "*look at your path to promotion*" stating that he had told the claimant that being taken forward to a promotion board was not a guarantee of promotion, but opportunity for him to present his case to a promotion panel. He went on to state "*I will get you help to prepare when the time comes.*" GD denied the suggestion of the claimant in cross examination that promotion was about who you know and not what you know. He told us that to achieve promotion it is not enough to do your job well, you are expected to have high quality work, high quality relationships and eminence in the work you do. He explained that good feedback was only part of this, whilst important, it did not have a massive bearing. We accepted this explanation which was logical and convincing.

9.55. On 25 July 2018 the claimant GD he wishes to raise his grievance formally (page 588). The complaint was then incorporated into the investigation into the claimant's second grievance that was already being conducted by GT. We saw various communications between the claimant and GT around this time progressing the investigation. There were several meetings during July 2018 where GT was investigating the claimant's appeal against his first grievance and investigating the second grievance and additional complaints raised. A summary of the matters being considered as part of this investigation was sent to the claimant on 3 August 2018 (pages 612-618). Further matters were subsequently added to this complaint during August 2018. The claimant attended some meetings with BM around this time to discuss his career, although nothing substantive seems to have been actioned, save that the claimant's goals on checkpoints were updated. BM acknowledged that he did not at this, or any other time nominate the claimant for a promotional panel because in BM's view he did not meet the criteria at any time which required him to be a rounded individual. He explained that one of the issues he had with the claimant meeting this test related to the problems arising with the 'Responsibility to Others' dimension in his checkpoint review which the claimant never improved his scoring on over his time with the respondent.

2018 (to January 2019) Issue 1.1.1 and Issue 1.1.21 - Allegation that the respondent did not pay for the claimant to sit MD101 Management Course

9.56. On 9 September 2018 the claimant requested an invitation to attend MD101 and MD102 Management Development Courses (page 637 and 639). The details around these courses showed us that they were aimed at existing managers. The MD101 course was described as being to help an employee "*succeed as a manager*". The MD102 course description stared "*Now that you've been a manager for some time*" and was the follow-on course for managers who had completed MD101 and had been managing for some time to take them to the next stage of management. The claimant was not permitted to take these courses and we find that these courses were unsuitable for the claimant as at the time he was not an existing manager.

9.57. On 25 September 2018 S Paulin ("SP") invited the claimant to join the respondent's BAME network (page 650).

9.58. GD decided around this time that as the claimant and BM were finding it difficult to work together he would change the claimant's blue pages manager to DA. DA's role was a Professional Development Manager in the Security business unit and she was solely working on line management of a number of individuals across the business unit (between 30 and 55 employees at any one time). She had no functional responsibilities for these individuals but was there to management administrative tasks and in particular to conduct career conversations and to help them to achieve their goals and to provide pastoral care. The respondent regarded DA as a safe pair of hands and an experienced people manager who they felt could assist the claimant to progress his career. Before DA agreed to be the claimant's manager, she checked with BM that the claimant was content for this to take

place, expressing her concern that the claimant should not feel that he was being discriminated against and that this was a positive step (page 644). On 26 September 2018 the claimant met with BM and DA where this was communicated to him.

1 October 2018 - Issue 5.2.2 and Issue 5.2.9 Alleged Protected Act: grievance against N Bean ("NB") (see complaint raised on 11 October 2018 at page 730 – 732)

9.59. The claimant emailed D Pearce ("DP"), an Associate Partner who was responsible for the Client L project, making various complaints about his interactions with NB, a Security Project Manager who was working on this project, on 1 October 2018. There were complaints about rudeness and about the claimant doing all the work. There is no express complaint about discrimination in this e mail, other than a comment the claimant makes at page 655 about a discussion around CyberArk credentials where the claimant says, "*It almost felt like he was reluctant to help, not sure why this way, colour?race?*". We find that this does not show that the claimant had a genuine belief that he had been discriminated against and we find this was more a complaint about the nature of interactions and was not a firm allegation of discrimination. The claimant merely speculates about the reason for the treatment. DP acknowledged the claimant's concerns and gave him some positive feedback about his work asking him to raise concerns directly with NB (page 655). The claimant complained again to DP on 24 October about NB giving credit to other employees on calls although the claimant had done all the work. He states: "*Not sure if again I am reading too much into this, I guess this time I am not and it is clear that there really is a big divide between Asian and White people within the organisation and that racism is a very big problem"(page 686).* DP reassures the claimant that there is no divide and that his contribution is significant and positive. He further asks the claimant whether he requires any further support or if anything further is causing him worry (page 685).

Issue 1.1.25 - Allegation that the claimant asked his manager, Delia Abel ("DA"), to prepare him for promotion, DA said she could be reading feedback all day long, DA didn't help the claimant

9.60. DA started to hold monthly one to one meetings with the claimant and we saw a calendar entry for the first of these on 15 October 2018 (page 662). At this meeting DA discussed promotion and what was required with the claimant. Following that meeting DA sent the claimant some information by e mail about the position requirements for grade 6 and 7 (663-667). The claimant said he would review and get back to DA if he had any questions. On 23 October 2018 the claimant emailed DA with a copy of the ACE feedback he had received since December 2016 and informed her that he would be working on updating his checkpoint goals and that he was also compiling a spreadsheet of jobs he had worked on so that he could obtain feedback directly (672-3). DA responded to this e mail on 23 October 2018 thanking the claimant for sharing it and going on to say, "*as discussed in our last 121 session promotion is not all about ACE feedback any business*

senior management team will always consider a range of factors when considering if someone is promotion ready". The e mail went on to give the claimant some suggestions including that he "*be proactive & to put some slides together& then share/discuss with your manager as to why they think they are promotion ready*". She went on to give the claimant guidance about what to put in those slides, directing him to the respondent's 1-3-9 purpose, values and practices and to set out examples as to how he had contributed and shown leadership on each. She also suggested he build some slides on the checkpoint dimensions including setting out how his promotion would help the team grow, how he had shared expertise and demonstrated curiosity etc. The claimant denied when asked about this in cross examination that this was DA trying to help him. We found that this was useful and practical advice as to how the claimant could take the next steps to apply for promotion. The claimant said he could not remember whether he prepared a document as suggested by DA, but we find he did not at any time after this e mail prepare any slides of this nature as suggested by DA. We do not find that the claimant was told by DA that she could be reading feedback all day and did not help him, on the contrary she helped him significantly at this time by providing information and advice.

9.61. On 24 October 2018 complained to GD about CC and also GD himself (page 674 – 675). This is a very strongly worded e mail where the claimant alleges that CC "*shouted at him*" in e mail, accusing the respondent of "*racial hatred towards Asians*" and it had a major problem with racism. After this exchange of emails, GD told us he decided that he would take the lead on responding to the claimant as he felt that the claimant was raising multiple issues with various people and this was causing significant disruption and upset to people who were being accused of racist behaviour, including very senior managers based in the USA who did not have any direct involvement with the claimant. At page 674 we saw an e mail from GD to CC and a senior HR manager, A Sullivan ("AS") stating that a clear response needed to be put together. He sent a further e mail to HR, his line manager, BM and DA on 6 November 2018 where a structure for dealing with the complaints the claimant was now raising was set out (page 694-5). GD wrote to the claimant on 24 October 2018 to inform him that he would be taking the lead on responding to the claimant's complaints (page 705) to which the claimant replied, "*Are you saying these issues have not yet been looked at?" (page 704)* and when GD responded to state he was *"just being courteous in letting you know we had received your e mail",* the claimant then wrote back on 15 November 2018 stating*: "I have been courteous for the past THREE years and continue to be. In that time I was/am BULLIED, HARASSED, HUMILIATED, RACIALLY DISCRIMINATED against" (page 703).* GD responded to the claimant on 16 November 2018 (page 718) and informed him that he should raise all future concerns with DA. He also set out the steps GD had taken to try and address the claimant's concerns, mentioning moving the claimant to a higher visibility account to enable him to show his skills and "rounded professionalism" and changing his line manager.

November 2018 Alleged comparator S Simeonova ("SS") promoted from

<u>*Band 7 to Band 8*</u>

9.62. BM nominated SS for promotion but had no input in process after that. He gave unchallenged evidence which we accepted, that SS started at the respondent at Band 7 and had exceptional skills leading her to be already working at Band 8 level alongside RC at the time of her promotion. She assisted BM to manage many complex clients and led a large telecom project, managing a team of five people. She also took over BM's role of lecturing at Warwick University, writing the course material herself. It appeared to us that SS was operating a different level to the claimant throughout this period and was not an appropriate comparison in terms of roles and promotion.

9.63. On 15 November 2018 C emailed DP complaining of "*psychological bullying*" by NB, that he was furious and "*For the past three years I have been at IBM I have been bullied, harassed, humiliated and racially discriminated against and it is continuing to happen.*" (page 715). DP responded that he would not have categorised what the claimant had described as bullying but stated that the project had excessive demands. He suggested he raise it with NB and that he would meet the claimant to discuss it which he did on 19 November 2019 (see page 740-1). There were further discussions involving the claimant, DP and NB and it appears from an e mail sent on 19 December 2018 from DP (page 749-750) and the claimant's reply on 11 January 2019 (page 768) that agreement was reached that the claimant's concerns had been resolved. DP noted in this exchange "*We discussed again and agreed that there were no incidents regarding harassment, bullying or racism, and also I was pleased to learn you had been thinking about both how conversations are perceived which can lead to misinterpretation".*

<u>*Issue 4.1.4 - Allegation that PB ignored the claimant's work and favoured White people such as NB, P Stephenson and A Bennett (the respondent understands this to be a reference to A Bellis)*</u>

9.64. There was an exchange of messages between 29 to 31 December 2018 where the claimant asked P Briscoe ("PB"), the respondent's Chief Technology Officer and delivery executive on the Client L account, to provide feedback on his work (page 776). PB replied stating that he did not have enough visibility of the claimant's work to provide him with feedback. The claimant responded that he was surprised, as he had produced 50 scoping documents for PB and so his statement was very unfair. He went on to say "*I guess that is wrong with IBM in general when Asain people do work. people say they have not had visibility of work, when other people do work then they are praised to senior levels*". PB responded and challenged the claimant about this allegation and stated that it was nothing to do with the claimant being Asian and offered to give feedback if the claimant could point out which documents he had been responsible for The claimant acknowledged in cross examination that he had not met PB and that he was a senior manager, who was 6 bands above him in the respondent's structure. He also acknowledged that he was not having day to day contact

with PB at the time but said that PB approved 50 scoping documents that the claimant produced. We accepted the explanation about the failure to provide feedback. PB raised this matter with DA on 13 January 2019 stating that he was "*livid*" that the claimant had made such an allegation against him. GD told us that he was very disappointed that the claimant had again made what he felt was an unsubstantiated allegation of discrimination against a fellow employee and showed us an e mail he had written at the time expressing his concern that this had happened again (page 777). PB subsequently invited the claimant to a call to discuss providing him with feedback, but the claimant declined the call stating that he no longer wanted feedback from PB (page 799)

9.65. On 14 January 2019, DA wrote to the claimant to let him know that PB had raised the issue of his comments about ACE feedback with her and that the respondent took his comments seriously and wanted to investigate his concerns (page 813-814). She asked that the claimant provide her with examples of what he was referring to and also sent the claimant a link to the grievance procedure. The claimant and DA had call to discuss this on 15 January 2019. DA said that the claimant became very emotional on the call raising his voice and saying that DA was not listening to him. The claimant denied that this was the case during cross examination and said that this was a difficult call for him to talk about. In his witness statement he said that DA was "*shouting and screaming*" at him. There are no minutes of this meeting, but we find that this was a fraught call on both sides and the claimant and DA were clearly at cross purposes. We do not accept that DA was shouting and screaming at the claimant, as this would be a highly unusual way for an experienced manager like DA to have conducted this meeting. We observe that DA had become frustrated with the claimant as she referred to him not taking on board guidance she had given him.

16 January 2019 Issue 5.2.1, Issue 5.2.5 and Issue 5.2.10 - Alleged Protected Act: grievance against PB and DA

9.66. The day after the call with DA, the claimant raised a complaint with GT about this (818-822). The complaint started his e mail by focussing on what the claimant said DA said to him during that conversation, suggesting that she was dismissing his concerns, not listening, refusing to let him speak, defending PB and bullying, humiliating and degrading him. The claimant stated at page 819

"I am being victimised for raising issues about racial discrimination, I felt that my previous manager was discriminating and now I am with her as my new manager to be discriminating against me, for raising concerns about discrimination."

He went on to complain various issues involving PB not just the request for feedback stating that he felt that PB was discriminating against him whilst working on projects, by asking him to have documents peer reviewed and mentioning comments said to have been made during work calls. On this particular complaint raised, we were not in fact satisfied that the claimant

was raising a genuine complaint of race discrimination against PB or DA. The claimant made complaints about PB because he was unhappy that PB had not provided him with feedback when he requested it and that when this was discussed with DA, she, in his view, took PB's side by suggesting he had behaved reasonably and perhaps the claimant was at fault. Nonetheless taking this complaint as a whole, we were satisfied that the claimant had a genuine belief he was being discriminated against as he raised the same complaint about his former manager BM discriminating against him, and that in his view this was now continuing with his new manager DA who he believed was likewise involved in the discrimination. There may have been little basis for this particular allegation, but we were satisfied that the claimant was genuine in his belief about it.

9.67. The claimant's checkpoint review for 2018 took place on 24 January 2019. The document relating to this review was shown at pages 839 to 859. The claimant received a score of 'Achieves' for the dimensions of 'Business Results', 'Client Success', and 'Innovation' and 'Skills' but was again graded as 'Expects More' for the dimension of 'Responsibility to Others' (pages 857-858). BM's comments were that the claimant had a "*relatively good year with patches of issues regarding one dimension responsibility to others*". It noted that the claimant "*Really needs to think & check with management chain before firing off explosive emails*". The claimant acknowledged that there were more serious clashes with colleagues in 2018 than in previous years but that his position remained that he had done nothing wrong in any of these interactions.

9.68. The claimant was due to have a 1:1 meeting with DA on 28 January 2019 but did not attend. Following the claimant raising a grievance against DA, in February 2019, GD appointed S Shirley ("SSh"), the respondent's UK SSRC Manager, to becomes the claimant's temporary Blue Pages Manager. He discussed this with SSh around 28 January 2019 (see page 863) and informed DA on 29 January 2019 that the claimant would be allocated a temporary manager because a grievance had been raised against DA (page 957). The claimant had been informed that his line manager would change temporarily by 12 February 2019 as we see an email from the claimant to SSh on 12 February 2019 querying about arrangements for monthly 1:1 calls (page 164).

9.69. On 14 February 2019 the claimant sent an e mail to the respondent's Occupational Health shared e mail address (870-872) headed "*Confidential: Serious issues with health caused by IBM*". In this email he complains about interactions with DA and said that these were causing him to have a "*mental health problem*". The e mail makes reference to him having issues on a daily basis and that the respondent was carrying out a "*sort of voodoo*" on him. The claimant repeated his complaints about PB and DA. He also suggested that the respondent was arranging events such as its Time to Talk days and other functions to take place when he could not attend as a way to deliberately isolate him. He went on to state that: "*The reason for the e mail is to notify you that my mental state, its not good*" but stated that he did not want to go to his GP and be signed off work as it would affect his

career. CB responded on 18 February 2019 and suggested that the claimant consider accessing counselling or stress management/coping strategies by accessing the respondent's EAP service and provided him a link (page 870). The claimant replied stating that it would not do any good and was a way for the respondent to cover its back.

Issue 5.2.11 - Alleged Protected Act: the claimant's email to GD and R Sedman ("RS") and Issue 5.2.12 Alleged Protected Act: the claimant's email to AS, forwarding that e mail both on 18 February 2019

9.70. The claimant emailed GD and his line manager, RS on 18 February and made various complaints about DA (pages 877-910). He stated that she was "*discriminating, harassing, biased*" and forward the various e mails he had sent and replies largely around DA. He also asked that DA be removed as his manager on Blue Pages and suggested that DA was performing some "*Black Magic*" on him. The claimant also forwarded this email to AS just after sending it. Although the substance of these e mails is more with reference to problems with the investigation of his grievance and his personal issues with DA, raising again matters of not receiving credit for his work, the claimant does include earlier e mails in this correspondence where complaints of discrimination are made which we have already found to have been made genuinely. On balance we have found that there was within this lengthy exchange, a genuine complaint of discrimination. The claimant also stated that he now had a "*mental health problem*" that was caused by the respondent.

Issue 4.1.2 - Allegation that the claimant Perry said, "I thought you guys were expert in breaking into vaults" (the respondent understands this to be a reference to C Porritt ("CP")) April 2019

9.71. The List of Issues above refers to this incident having occurred in April 2019, but it is an incident that took place on 12 March 2019 that is being complained about. This was the first interaction the claimant had with both CP and JS. The claimant and CP were involved in an exchange of messages on an instant messaging service (OCS) which was used by client L (shown at pages 949-954). The context was that the claimant was carrying out work for Client L and required access to CyberArk SAFE (an IT system containing passwords to systems) in order to conduct some testing. The access sought was known as 'privileged access' putting the user behind the Client L security system enabling them to review confidential logs, administer software and make system changes. Such access is sensitive and only provided through a specific security procedure involving making a SNOW (service now) request via the system explaining who they are and why access is needed. This triggers a request to the user's line manager for approval and an e mail to the Data Power team who is responsible for the software. The claimant had made a SNOW request but had not received the approval he needed, because the back end of the system had not generated the required automatic e mail for approval. The claimant contacted CP by OCS (having been given his name by a colleague) and asked him for a service account to carry out a retest. CP asked the claimant

for more information about who he was and why he needed the access. There was an exchange about how access should be granted, and CP informed the claimant he needed to make a SNOW request and then stating, "*Has no-one told you this*" and "*I thought you guys were experts in cracking open systems"* (page 950). The exchange continued with CP continuing to ask the claimant to confirm who he was. The claimant became irritated by these questions and the exchange became tetchy on both sides with CP insisting he was following procedures and the claimant stating he was being prevented from doing his job and describing CP as a "*joke*". We were entirely satisfied that from the context of this exchange, the reference to 'cracking open systems' was a reference to the claimant's work as a pen tester, coming as it did in a conversation about getting access to a secure system. This is a different form of words than the one the claimant alleges was used in the list of issues which was "breaking open vaults". This is not a phrase which was used at all. The claimant's response calling CP, a joke, was an overreaction to the situation which was in essence a slightly ill-natured exchange of messages with CP ultimately asking the claimant questions that were entirely justified in the circumstances.

Issue 4.1.1 - Allegation that JS called the claimant a "fucking Indian" twice on a call with CP and the claimant and hung up on the claimant

9.72. That same day, 12 March 2019 the claimant called JS (CP's line manager) raising a complaint about CP (page 946). The claimant said that during this call JS spoke over the claimant and said under his breath "*Fucking Indian*" and when the claimant was speaking, interrupted him saying "*This isn't happening*" and again said "*Fucking Indian*" and then hung up. JS denied that he made these comments. His account is that he did not know who the claimant was before the call and that the claimant was animated and spoke loudly during the call when he said he wanted to complain. He recalls the claimant speaking loud enough that colleagues seated near him could hear through the headset he was using. JS said he was trying to explain the process for getting access but the claimant was speaking over him so he asked him to stop talking so he could explain what to do which he did and when the call went silent, he asked the claimant whether he was still there and the claimant responded that JS had told him not to speak. JS said he told the claimant he was going to end the call politely after about 15 minutes as the call was not going anywhere as he felt the claimant was not listening. He said the claimant was rude and unprofessional and it was one of the most difficult calls he has ever dealt with.

9.73. We preferred JS account of this conversation for various reasons. Firstly JS was in an open plan office at the time of the call and had the language being alleged been used by JS, our view is that someone would have heard and objected to it. During the later investigation of this allegation, the respondent's investigators T Poots ("TP"), an HR Partner, and A Brumpton, ("AB"), a Vice President - Global GTS IMV Vended Services Executive, looked into this suggestion that a witness had heard some of the conversation. AB spoke to the individual sitting next to JS on the day, J Whitehouse, who recalled the conversation, said that the claimant was

speaking loudly, it was a difficult call and denied that racist language was used as he was sitting next to JS and would have heard it. The claimant suggested that the evidence of this witness was fabricated but we did not agree that this was the case. JS was an extremely credible witness, and we found his account reliable, plausible and logical. The failure to mention the specific terms said to have been used the first time a complaint is made is also highly significant (para 9.74). We conclude that this particular allegation of the use of racist language was a fabrication from the claimant to perhaps deflect from his own behaviour during this call. Shortly after this exchange on 21 March 2019, in an e mail exchange when the claimant's name came up in a business context, JS said he was unhappy to work with the claimant on this matter as he had been "*extremely rude and impolite*" on a phone call which was the "*most unprofessional phone call I've had in my career*"(page 923).

9.74. We noted that the claimant first complained about these incidents in an e mail he submitted to the Grievance Co-ordinator shared in box on 13 March 2019 (page 920-21). He complained about unprofessional behaviour which he described as being racially motivated. During this initial complaint made the day after the incident the claimant does not make any reference to JS making the specific comments he later complained, about which we also feel was a significant factor to suggest these specific comments were not in fact made.

19 March 2019 - Issue 5.2.3 and Issue 5.2.13 Alleged Protected Act: C's third formal grievance against CP and JS (page 917 – 919)

9.75. The grievance co-ordinator asked for more information and the claimant responded on 19 March 2019. In this e mail he stated "*The racist Jonathon made me listen to him and then hung up when i heard a very shocking remark, a racist term he is most likely to deny this. Unless my mind is playing tricks on me, which I doubt*" and further stated that "*if your company did not want to hire Asain people then you should have just outlined this in your contract, and I would never have applied.*"

We were not satisfied that this was a genuine complaint about discrimination because we have already found that the claimant fabricated the substance of this allegation that this racist comment was made. The claimant did not act honestly when making this complaint when he alleged racism.

March 2019 - Alleged comparator S Clark ("SC") promoted from Band 6 to Band 7

9.76. SC appeared to be a more directly relevant comparison to the claimant's situation as he started at a similar time to the claimant at the same grade. BM gave unchallenged evidence which we accepted that he was promoted after following the respondent's process outlined above. He told us that SC was a competent tester who had successfully started to take on more of the management of projects, including scoping, showing willingness and skillset needed to be given more responsibility. BM concluded that SC

communicated and acted as a team player and was considered to be a trusted member of the team. He also conducted a 'lunch and learn' session and collaborated with colleagues globally to promote learning, receiving excellent feedback from a variety of project teams. We accepted that SC was promoted for these reasons.

9.77. In April 2019 RC began operating as Functional Line Manager for UKI Pen-testers and became more involved in day-to-day functional management of the claimant.

Issue 4.1.3 Allegation that AT said "some Indian name I can't remember who" on a call with the claimant taking place on 17 April 2019

9.78. The claimant said he attended a call with a B Smith (this may have been B Hastie) and C Keeler ("CK"), a Cloud Security Architect who worked on Client L, on 17 April 2019 when AT joined the call late, was angry and flustered and said "*Ah you know, dealing with something, with some Indian name I can't remember who*". On 24 April 2019 the claimant made a complaint that AT said "*Ha-HA some Indian!*" and then "*Hahaa some Indian name*" on that call (page 943D). AT categorically denied making this comment. He said he did not remember this call at all now, but we note he gave his account of it nearer that time during the investigation carried out by TP in 2019 which is recorded at page 940A-940D and 943O. He told TP on 25 April 2019 that he did not recognise the words attributed to him and would not have used that phrase. He said he could not recall a specific call with the claimant, but it could have been a call that took place on Client L that date between 1.15 and 1.45. He said he had limited interaction with Indian colleagues on this matter so could not understand the context of the conversation. CK was also interviewed as part of the investigation (page 943N) and told TP that could not remember any unusual, hostile or rude comment. He said he could recall a comment being made about someone on the Indian GTS team not meeting a deadline on a task and someone making a comment "*Good luck with getting that done*". He said this was more a comment about inter team frustration about the offshore team but was not race related. We found this account of the conversation the most persuasive, logical and plausible in the context of the conversation. We do not find that any such specific comment was made by AT but acknowledge that there may have been some loose talk criticising the offshore (Indian) team for failure to meet a deadline and making reference to not recalling the name of the person responsible for the task. We accept that the claimant perceived these comments to be derogatory and interpreted the criticism of offshore colleagues as one more generally made towards Asian people.

9.79. On 23 May 2019 TP provided the claimant with the outcome of his third formal grievance dealing with the complaints he made about CP, JS and AT as discussed above (page 944 – 955). The allegations against CP and JS were not upheld. The allegation in relation to AT was partially upheld with TP finding that a comment about an Indian name was made on the call in connection with some difficulty getting a task done. He concluded that the comment was "*innocuous*" but was "*unfortunate and ill advised at best*". He

accepted that the comment was not "*intended to be derogatory based on race*" but stated that employees had to be more careful about their choice of comments and unintended links created in other's perceptions. However TP found that he could not determine who made the comment.

3 June 2019 Alleged Protected Act: claimant's second grievance appeal against TP's findings Issue 5.2.14

9.80. The claimant indicated that he was going to appeal on 23 May 2019 and submitted his appeal against this decision (page 1006 – 1010). He said that the outcome was half baked and to *"protect the Ic1 male" and* accusing TP of stereotyping him because he was Asian and giving the IC1 male the benefit of the doubt dismissing the claim. Although we found that the complaint as regards CP and JS was not genuine and so make the same findings as regards this element of the appeal, we do find that the claimant's complaint against AT was genuine (albeit misconceived) so in relation to this element of the appeal we do find that the claimant was making a genuine complaint of race discrimination.

9.81. On 17 June 2019 AT raised concerns to DA about the claimant's behaviour on the Client L project (pages 961 – 963). The claimant was raising concerns with AT on messages about the amount of time SC was spending on the project and that the claimant was not getting credit for work. AT responded that the claimant's work was valued to which the claimant relied that he felt nothing he did was being highlighted which had been going on for 4 years, stating that it was because the colour of his skin was different to everyone else's. During this exchange with AT the claimant stated that the respondent had caused him a mental health problem. AT subsequently contacted DA stating that he needed some advice as he felt he was "*not able to work safely*" with the claimant as his behaviour was erratic (page 961). BM had also at a similar time received a complaint from SC about the claimant making similar complaints and he informed GD of these concerns on 17 June 2019 [965 - 966] stating that he felt that the claimant was "*volatile"* and he had concerns about the delivery of the project and the working environment for others. GD told us that he now felt that the situation involving the claimant was getting worse and becoming unmanageable damaging the team and the business. He arranged a call with DA and HR acknowledging in an e mail sent to BM, "*this can't continue*". During that call GD decided that as a result of the complaints made against the claimant that a formal investigation needed to be carried out.

9.82. On 18 June 2019 AT raised further concerns to DA about the claimant's work on the project in that he was defensive and aggressive when asked about information on a project (page 967 – 968).

9.83. The claimant drew our attention to an e mail sent on 20 June 2019 by BM following an e mail about the claimant working overtime. In this e mail BM stated:
"this is BS. I know what is happening here, he probably has said he has been busy doing the other project leaving no time to do his normal role. Now

we are paying him OT. You could not make this up. Normally he is speedy gonzalez, lets see how fast he is when he is being paid extra."

BM was asked about this in cross examination and said the reference to speedy Gonzalez was to a cartoon character who was very quick and was used to describe how the claimant was also in general a quick worker. He denied that there was a racial connotation to this comment which we accepted in the context of this message, although it was perhaps ill advised and disrespectful to use this sort of language in a business e mail.

9.84. On 25 June 2019 S Membury ("SM") who worked the respondent's UK Government Clearances and Vetting team which was responsible for providing security clearances to IBM employees who worked on UK government projects raised a complaint to DA about a message the claimant had sent to a member of his team (page 985 – 988). The claimant had been trying to obtain security clearance and had been communicating with the team responsible for annual vetting for this. This required a form to be filled in and then signed by the line manager. It appears that the claimant completed a form and sent it for signature by BM. He was chasing up about this and was informed by a member of the vetting team that the form had not been received. The claimant challenged this and was asked to send the form again by P Williams (an employee in SM's team) on 25 June 2019 (page 978). The claimant was then involved in an exchange of same time messages with another member of the vetting team, S Willcox (page 988), where he stated:

"Hi Sara. Seems like your colleague got out the wrong side of bed this morning ... I feel like I am his slave . does he know about the slavery act?
Modern Slavery Act 2015?
Im NOT his slave…
Maybe mixed in with some racism not sure?
Also why are you only targeting the asain people?"

9.85. SM stated in his complaint that he expected *"some escalation and action on this, as the acquisition is serious and totally unfounded and has offended all staff within the Vetting Office."* A further complaint was made by SM's line manager, G Clark, the respondent's Contracts and Commercial Director and Security Partner, who stated that the messages would have offended S Wilcox and is not behaviour he would expect from an employee of IBM (page 1098). When asked about this interaction in cross examination the claimant denied that he had behaved inappropriately and excessively and that his behaviour had upset people. We find that this accusation made by the claimant was inappropriate and appeared to be without foundation in the context of the very limited interaction the claimant had with the individuals in question. It illustrated to us that the claimant was now having difficulty in viewing any interactions he had with any of the respondent's employees objectively and reasonably.

9.86. On 2 July 2019 the claimant was off-boarded from Client C account (page 1013 – 1021). This was a standard process when an individual was no

longer working on a client account which came through to the individual's blue pages line manager. DA was still officially the claimant's blue pages manager at this time and so received this request. She checked with BM that it was correct that the claimant be offboarded and BM confirmed that this was correct as something that was done for all other team members not active on the account.

9.87. On 11 July 2019 Gill Sullivan ("GS") provided the claimant with outcome of his second formal grievance (page 1032 – 1037. This related to the complaints he made against PB for not providing him with feedback via ACE which was not upheld and in relation to how DA behaved during a meeting about this which was held to be inconclusive. GS suggested that the claimant seek out a mentor perhaps from the BAME community within IBM to talk to if he is feeling isolated.

Issue 5.2.15 Alleged Protected Act: claimant's third grievance appeal against GS's findings

9.88. On 19 July 2019 the claimant appealed and in his e mail (page 1044–1049) made a number of complaints including:
"*At the moment I feel like the same way my ancestors felt when they came over. I was born in England so not sure why I am having to feel the same way they felt when they came over*". He stated that he felt the respondent was "*xenophobic*" and further:
"*when Asian people do work, its recycled so much that it ends up being made into something feeling as if someone else has done it.*"

He complains about being discriminated and the respondent covering its back. Towards the end of the appeal, the claimant makes some concerning allegations about DA, stating that she is psychotic and was being egged on by someone else in the room. He went on to mention getting in touch with lawyers and also stated that the respondent had "*caused him a mental health problem*". It is clear that the claimant at this stage is genuinely of the belief that he is being discriminated against in almost every interaction he has. The nature of his complaints was becoming more serious, less specific in nature and he make personal criticism of individuals and questions their motives.

9.89. On 25 July 2019 provided the claimant with outcome of his second grievance appeal against TP's findings (page 1058– 1065). This related to the complaints the claimant made about CP, JS and AT. She found that the appeal was partially valid in that in relation to the sametime message exchange between CP and the claimant she concluded that both CP and the claimant were behaving inappropriately although not racially motivated. She recommended training and coaching on communications. The week before she had provided this outcome to the claimant, AB had e mailed CT (page 1109-1110) stating that she (AB) had concerns about the claimant's behaviour that had arisen during her investigations. She referred to the incidents investigated and said that she was concerned that the claimant appeared "*to have no concept of what is acceptable behaviour with regard*

to interactions with other IBMers, particularly when he is feeling frustrated" and went on to state that "*I consider [claimant]s behavior unprofessional and not in accordance with IBM's values and conduct guidelines.*" She also stated her concern that his insistence on being allowed instant access to systems demonstrated that he did not understand or adhere to important security processes. Her final concern was that that the claimant appeared to "*fabricate a racial accusation, including the accusation of [JS]'s use of foul language as an attempt to divert any attention or consequence arising from his own unacceptable behaviour. From witness accounts, there is no evidence to support [claimant]'s allegations of racist treatment. I therefore again [claimant]'s behavior to be unprofessional, and not in accordance with IBM values or conduct guidelines.*"

Issue 5.2.16 Alleged Protected Act: claimant's email to AB and CT (page 1057 – 1058)

9.90. On 25 July 2019 the claimant complained about AB's findings and went on to state:
"*I am more concerned about the company I am working for…..seems like IC1 voices are heard much louder than mine*" and stated, "*do I need to get a lawyer involved*".
This e mail does contain a genuine complaint about discrimination which the claimant by this stage was entirely convinced was the case. It appeared to have gone beyond the original incidents now to a wider complaint of discrimination which we were satisfied the claimant was entirely convinced of at this time.

9.91. In August 2019, the respondent started to take steps to investigate issues around the claimant's conduct as had been agreed in the call in June 2019. On 13 August 2019, J Ferdinand ("JF"), the respondent's Security Services Strategic Sales Leader, was instructed by S Skerry ("SSk"), HR Partner, to commence an investigation (see e mail 1088-1089). This forwarded the e mails from SM about the complaint he made about the claimant in July 2019. It also forwarded the e mails complaining about the claimant from AT in June 2019 and from AB as set out above.

Issue 5.2.17 Alleged Protected Act: claimant seeks to raise a fourth formal grievance

9.92. On 14 August 2019 the claimant sent an e mail to the Grievance Co-ordinator e mail account raising a complaint (pages 1080 – 1081). He sets out various general allegations about racism and being treated differently because he was Asian. He also complains that all decisions have gone against him because he is Asian. He makes a further complaint about his lack of promotion and salary increase and states that he has not been advanced because of the fact that he has "*complained and am British Asian*". We were satisfied that at this stage the claimant held a genuine belief that he was being discriminated against in almost all interactions he was having and so the complaint was a genuine complaint of discrimination.

9.93. The investigation into the claimant's conduct was being progressed and on 28 August 2019, JF interviewed the claimant to conduct an investigatory meeting (minutes at page 1170-1174). On 30 August 2019 JF interviewed AT. On 3 September 2019, DA received a follow up request from SM about the complaint he made against the claimant (page 1083).

9.94. On 11 September 2019 M Trinder ("MT"), the respondent's HR Director, WW Case Management and Employee Concerns, provided the claimant with the outcome of his third grievance appeal against GS's findings on his complaints about PB and DA. She did not uphold the allegation of unfair treatment on the grounds of race (page 1147 – 1151).

Issue 5.2.18 Alleged Protected Act: claimant's email to MT

9.95. On 18 September 2019 e mail MT and stated that the respondent was "*dominated by IC1 people*" and that he felt "*discriminated against, and the reason this happening is because the colour of my skin is different*" (page 1146 – 1147). Again we were satisfied that the claimant was making a genuine complaint of discrimination and by this stage was entirely convinced that he was being discriminated against on the grounds of race. In this e mail the claimant also stated that he was suffering from mental health issues and made reference to issues with management that may cause him to end his life. These were disturbing comments, and we note that MT replied on 25 September stating that she was concerned to read the reference to mental health in the claimant's e mail. She urged the claimant to contact his GP, to use the EAP programme or to ask his manager to refer him to occupational health for specialist help.

9.96. JF concluded his investigation and prepared and submitted a report to SSk on 7 October 2019 (page 1166–1169). The report concluded that the claimant appeared to be making unfounded allegations of racial discrimination causing an adverse impact on the working environment and that his behaviour may be going against the business conduct guidelines. SSk sent this report to GD on 9 October 2019 (1164) stating that GD should read the report and discuss the findings with JF before calling the claimant to a disciplinary meeting. GD was sent the templates and protocols for this process. GD said that in reviewing the report he put aside the previous interactions had had with the claimant and focused on the points raised in the report. On 9 October 2019 GD was also informed by SSk that the claimant's grievance and appeal against DA has been closed as the complaints has not been substantiated and so his transfer to be managed once again by DA should be arranged (page 1163).

9.97. On 10 October 2019 GD emailed the claimant inviting him to disciplinary hearing on 15 October 2019 (page 1491-1492). The claimant requested a postponement due to ear infection issues and an upcoming hospital appointment (page 1206). The claimant was off sick on 11 October 2019 (page 1179) and then remained off sick being signed off from 14 to 28 October 2019 for "*stress related problem*" (page 1203). On 11 October 2019, CB provided details to the claimant and GD of the respondent's

outsourced occupational health provider Medigold Health (page 1204).

9.98. On 16 October 2019 DA resumed line management of the claimant and he was informed of this by GD by e mail (page 1200). On 25 October 2019 GT provided C with outcome of his first grievance appeal against SG's findings and other grievances (page 1217 – 1462). This related to the detailed and lengthy grievance that the claimant raised in February 2017 (and added to subsequently) of which an outcome was provided in June 2018. All appeals on the very many separate issues raised were found to be invalid and found not to be anything to do with discrimination on the grounds of a protected characteristic. The report specifically addressed the recurrent complaints made by the claimant about his not receiving a salary increase, concluding that the claimant was recruited at above 100% of the respondent's PMR. It also noted that promotion to a different band was based on business need and based on eligibility requirements, promotion packages and priority/merit. It also addressed another repeated complaint raised by the claimant surrounding other employees taking credit for work he has done by analysing the detail of a particular example the claimant provided involving DR. It concluded that this was simply an employee using a report the claimant had prepared previously as a starting point for a new and different report at a later point in time for the same client and same equipment. It concluded that there was nothing untoward about this and represented re-use in an effective form which was efficient and good practice. It addressed the specific allegation that BM had blocked his promotion, finding no evidence that this was the case and also went on to look at the package the claimant had prepared back in 2016 concluding that it was "*far from what would be needed to be promoted from a Band 6 to Band 7*". It also noted that the claimant had not produced any evidence of preparing a promotion case other than this partially complete one.

9.99. The report also addressed the allegation that the claimant had applied for roles in 2018 and had received no response which included the role of associate partner which he contacted CH about in June 2018 (see para 9.49 above). It concluded that the claimant had not applied for the advertised roles and none of the roles the claimant referred to would have been appropriate for the claimant as there were of much higher seniority. It noted that one of such being in Canada and would have required him to leave IBM UK and apply externally. The outcome concluded that the claimant "*appears to believe that anything that happens that does not go completely as he would like it is an example of discrimination against him and appears to regularly misinterpret very innocent things and things that are part of standard processes that he either has not checked, or does not understand all being against him and discriminatory*." We found that the report was balanced and considered thoroughly the issues raised providing an insightful conclusion which the Tribunal concurred with.

9.100. On 29 October 2019 the claimant returned from sick leave and on 31 October 2019 C's disciplinary hearing took place via Webex (as the claimant stated he was unable to travel to London). The claimant had asked if he could bring a legal representative but was informed by GD that he could not

but could bring a trade union rep or colleague. The meeting was chaired by GD and the claimant did not turn his web camera on during the meeting. The minutes of the meeting were at 1569 - 1574. GD's impression from the responses given by the claimant during the meeting that the claimant did not understand or have insight that his behaviour was problematic or caused issues with his peers, the team and could impact the business. GD said that the claimant was unable to explain why he had made an accusation of racial discrimination relating to the incident involving the Security Clearance team asking him to resend information. The claimant was concerned about the loss of personal information and referred to the fact that he had suffered discrimination 17 times. When the issue involving AT was discussed the claimant said he was forced to do all the work. On the final allegation the making of unfounded racial allegations, the claimant was asked whether he could be misinterpreting things that were said but did not accept this. The claimant alleged that the disciplinary process had been motivated by retaliation because of his earlier grievances. Following the meeting the claimant sent further information to GD to consider which was some ACE feedback with positive comments on his work.

Issue 5.4.1 claimant's First Written Warning

9.101. GD told us that he considered all the evidence following the hearing and decided that the claimant had not persuaded him that his behaviours were justified or acceptable. He concluded that the claimant had failed to answer questions, provided vague and irrational answers, believed he had done nothing wrong and that others were to blame and engaged in a vendetta against him. He told us he found this lack of self-awareness and disregard for others, including the impact of his actions, concerning. He decided that the claimant had behaved contrary to IBM BCG standards 2.1 'maintaining a safe and productive work environment' (pages 2412-2413) and so had committed the alleged misconduct he was accused of. He decided to impose a first written warning on the claimant and said he hoped it would help the claimant to understand the seriousness of his actions and prompt him to readdress the way he communicated. He checked the decision with SSk before issuing it to the claimant and sought advice (page 1562 and 1565). There was also a discussion about available support for the claimant between SSk and CB in advance (page 1582). GD refuted the allegation that the fact that the claimant had made complaints was the reason for the issuing of a warning. We accepted the evidence of GD entirely and found him an honest and credible witness on his decision making and the reasons for it.

9.102. On 4 November 2019 GD held a disciplinary outcome meeting with the claimant (minutes at pages 1598 – 1605) at which the claimant was issued with the first written warning (page 1596 – 1597). During that meeting GD explained to the claimant that he had considered the ACE feedback provided but that the issue was not about performance or quality of work but about his behaviour. The claimant was told he could appeal. GD told us that the claimant became upset and emotional during this meeting and confirmed his view that the warning was "*retaliation*". GD told the claimant

that he had the right to raise grievances but needed to consider his actions carefully where there was conflict as it appeared to be his default reaction to accuse people of racial discrimination when that may not be the case at all. During the meeting with GD the claimant told him that he had lots of medical conditions and that he was on suicide watch by his doctor. When asked about this in cross examination the claimant said that he had not in fact been placed on suicide watch although said he did have a health condition. GD told the claimant he was concerned about his state of mind and suggested he contact the EAP and offered occupational health support. The claimant indicated that he was going to appeal against the decision but ultimately did not.

Issue 5.4.3 - Allegation that 5 employees were laughing and joking and smirking around the claimant on a call. These employees were AT, M Wheeler, C Keeler and/or C Kelly, J Haywood and JS

9.103. The claimant made an allegation regarding a call that took place in November 2019 and suggested that the above employees were on that call and were laughing and joking and smirking about him. On 4 November 2019 the claimant had just started a two-week project for Client C with RC, MF, SC and MM, with GBH joining for the second week (see page 1575). RC replaced BM as the claimant's task manager around this time. During cross examination the claimant said that this call in fact took place much earlier when he was working on client L. AT and JS gave evidence that he had no recollection of such a call and had no idea what the claimant was referring to. He was unable to give clear evidence about this call and what it was that was said or done by anyone, save for an allegation of laughing and smirking. We were unable to make any firm findings of fact to support this allegation so find that it did not take place as alleged.

9.104. On 7 November 2019 the claimant commenced a period of sick leave due to "stress-related problem" which lasted until 30 April 2020. Sick notes relating to this absence were shown at pages 1203, 1613, 1638, 1683, 1691, 1706 and 1712. Both GD and DA e mailed the claimant as he went off sick encouraging him to stay in contact and to focus on his health as the priority (page 1610 and 1617). The claimant wrote on 9 December 2019 with a fit note and in that letter stated that it was:

"a IBM UK problem as to why I am taking time off for stress..I have been discriminated multiple times, hence the stress for my sick leave, this stems back to 2016"

He stated that he was perfectly fine before he joined the respondent and was now "*constantly stressed and paranoid*" and said he "*expected to be compensate*d". He said that was not fit for work but would not be providing further details to the respondent as he was talking to his GP and no-one else. He described himself as being "*burnt out*". On 19 November 2019 DA sent the claimant a standard letter setting out all the terms related to sickness absence, again providing details of the EAP (page1629-1631). On 9 December 2019 the claimant submitted a further sick note and in the

covering e mail stated he was "*not doing well at the moment*" and was "*paranoid*". Attempts were made by DA to contact the claimant in early December 2019 and the claimant emailed on 9 December asking for an alternative person to contact as he wanted to keep his distance from DA. GD responded on 11 December stating that he felt DA was the appropriate person to support him. DA asked for a HR business partner to be assigned to the claimant at this time.

9.105. On 11 December 2019 BM emailed DA with some comments he asked her to raise with the claimant on his return from sick leave. One of these related to leaving the client C account without providing test results he had worked on when he went off sick which led the team to having to repeat the work (page 1662). The claimant was not included on copy to this correspondence.

9.106. The claimant emailed GD with a sick note on 18 December 2019 and asked him to inform OH of everything that was happening. He stated that he wanted to stay away from DA as she was causing him to have a *"mental health issue"*. He also alleged that he had been issued with a written warning because he had raised multiple grievances. He said he had an "*illness that is not easily fixed*". On 20 December 2019 CB emailed C to provide details of support available and the OH referral process (page 1680 – 1681). When sending his sick note on 5 January 2020 the claimant informed GD that he was having counselling and if that did not help, he would be put on anti-depressants. He said that the EAP did not help and felt it was a service to keep the respondent up to date, was not confidential and caused him paranoia and sleepless nights. He informed DA by e mail on 3 February 2020 that he had been seen by Birmingham Healthy Minds and was currently on a waiting list for therapy (page 1702). DA replied on 4 February 2020 reminding the claimant that he could access support via his company private medical insurance (page 1702). He was reminded again of this benefit on 18 March 2020 when he informed DA he was still on a waiting list (page 1710).

9.107. On 8 April 2020 DA informed the claimant that his entitlement to full company sick pay ended on 5 May 2020 and asked for consent to make an OH referral (page 1717). On 9 April 2020 she spoke to the claimant by phone to discuss his return to work and her note of that call was at page 1724. She asked the claimant to consider thoughts for workplace adaptations/return to work plan. She reminded the claimant of the private medical health plan he could access. There was a further conversation on 16 April 2020 between the claimant, DA and SP. During this call, a plan was arranged for a phased return to work which was suggested by DA using his accrued annual leave to ensure pay was not affected. Another call took place on 22 April 2020 during which the phased return plan was discussed and agreed with the claimant e mailing DA after this setting out the dates he would take as leave (page 1730-1). The claimant raised the issue of promotion during this call and after SP sent him a link to various sections of the respondent's intranet about career conversations (page 1738).

Issue 1.1.11- Allegation that claimant was offboarded from the client C account

9.108. On 29 April 2020 the claimant was sent some correspondence from the Client C security team about vetting for his security access for that client and asking him to provide the information to keep his security access in place (1741). The claimant replied explaining he had been on sick leave and was unsure what was required, that he thought he would need to stay on boarded but would check. He contacted DA about this at the time stating, "*Not sure if I will be on Client C anytime soon considering the pandemic and lockdown*" (1790). There was some further correspondence about this and on 5 May 2020 DA informed the security vetting team that the claimant should be "offboarded" from Client C as there were no plans for him to be working on this project at the current time (1783). DA gave unchallenged evidence (which we accepted) that she and BM had decided it would not be appropriate for the claimant to return to work on the Client C account which he had worked on before he went on sick leave because it involved a large amount of team work, was a stressful client requiring long hours and intense pressures and because of the issues around handover and not providing results which had come up before the claimant went on sick leave.

Issue 1.1.3 - The Claimant being paired up with people with whom he had previously had issues.
Issue 3.1.1 - Allegation that BM required the claimant to work in pairs with employees with whom he didn't get along, when the claimant asked to work alone between 1 May and October 2020

9.109. On his return to work in May 2020 the claimant was allocated to work on Client S1 and worked with MM. This was a project involving many different employees and the respondent accepted he was required to work with various different employees on it. There was no evidence that the claimant had any issues with MM previously. The claimant was also required to work with various different employees on projects from this point onwards. The claimant agreed that he had never provided the respondent with a list of employees that he did not want to work with at this or any other time. We were not referred by either party to a specific request made by the claimant to work alone at this time, although both DA and BM in their evidence referred to the claimant having a preference to work alone, so we find this was raised by the claimant at the time.

Issue 1.1.2 Allegation DA said nothing lasts forever on a call on 1 May 2020

9.110. On the claimant's first day back to work he had a call with DA and SP. All employees were working remotely at this time due to the Covid 19 pandemic. DA said she recalled that the claimant had mentioned during this conversation that he had worked for IBM as part of a placement many years ago and how it was much better then and not like it was now. DA said that SP replied to this comment acknowledging that the respondent had changed significantly over the years and said something like "*Nothing lasts forever*". DA said this comment was made in the context of discussion

around how the respondent had evolved as an organisation. We accepted DA's evidence entirely on this and this was a plausible and logical account of this comment and its context. DA acknowledged that during this call or the earlier discussion with the claimant she encouraged the claimant to reach out to individuals in the business for opportunities and to build relationships. The claimant contends that DA told him that he needed to e mail a senior person to ask for pen testing opportunities and DA acknowledges that whilst she did not give a specific instruction, she did encourage the claimant to proactively reach out for opportunities

Issue 1.1.4 - Allegation that M Pearce ("MP") "blasted" the claimant for asking for PEN testing opportunities on 13 May 2020

9.111. The claimant emailed MP on 7 May 2020 (page 1824) and asked about pen testing work that may become available on a contract MP was working on. MP replied on 13 May 2020 (page 1823), thanked the claimant for reaching out to him but telling him that there was no work on this particular account as they had a third party working on it. He said he was trying to get further tests done by xforce red and would "*do that through Brian to ensure we engaged directly"*. He finished the email by thanking the claimant again and that he would keep him in mind should any opportunities arise. MP copied his response to DA and BM. The claimant replied thanking him and stating, "*Wonderful that sounds great*". This appeared to us to be a standard business interaction with the claimant asking about opportunities for work and MP replying that there was none available currently but would keep him in mind. There did not seem to be any sort of criticism or admonishment in MP's response at all to us and we did not recognise this e mail as one in which MP "blasted" the claimant in any sense whatsoever. We did not agree with the claimant that this was a passive aggressive e mail.

Issue 1.1.5 Allegation that RC complained the claimant should come in from specific IP address in a Black Box Assessment

9.112. In May 2020 the claimant and others on X force red were working on a project for a client in the middle east, S1 which had been scoped as a black box assessment. This meant that the pen testers only had limited information about the system in question and did not have information or information of potential issues, so can only see what a potential hacker could see which can help the client understand threats to their systems. This is in contrast to a whitebox assessment where full details of the system and its vulnerabilities are provided in advance. RC said that the S1 project had not been scoped correctly and the team were having issues accessing the web addresses they needed to test. There was some confusion about access and BM asked RC to try and resolve the issues. We saw an exchange of direct messages between the claimant and RC (pages 1840-1841) where the issues of access came up. RC asked the claimant whether he had been able to access the system and start testing. When the claimant confirmed that he could, RC said that was strange as no-one else on the team had been able to and asked the claimant about his access, the claimant said he was accessing using his mobile data (an unauthorised

connection which should not generally be used for access to client sites). RC instructed the claimant to "*hold fire for now*" as he did not want an issue arising about accessing from an unapproved route. The claimant seemed content with this instruction. RC then sent a general message on the team message channel and instructed all testers to hold fire on attempting to access until the route in was approved (page 2044C). There was no reference to the claimant individually in the group message. We found that this was nothing more than a general business instruction regarding access on day to day to work matters.

Issue 1.1.6 Allegation that the claimant was not signed off for a Mentor Badge on 20 May 2020

9.113. The respondent operates a scheme of badges which are awarded to employees once they have demonstrated they have gained a particular skill or accreditation, and one of these is a Mentoring Badge. We saw a copy of the mentoring badge application form at page 1832 and noted that mentoring to gain this badge must take place over a period of at least three months and "*must have occurred within the last 3 years*". We saw an exchange of messages between the claimant and DA about this mentoring badge at pages 2224 – 2226. On 14 May 2020 the claimant messaged DA to approve his mentoring badge application, which he had said he had mentioned before to SSh whilst she was his manager, who had told him that only DA could approve it. DA asked the claimant when it was submitted and gave some information about the process for approval. He responded that it was submitted in 2018 and DA responded that she would be happy to look at it if she could find it and would discuss with BM and SS. DA advised the claimant to engage in mentoring again and submit a new mentoring badge case when ready. The claimant said he had been in touch with someone about this already and then sent the two applications he had submitted to DA. Those applications were at pages 1832 and 1834 and 1834A. The first application related to a period from 1 December 2015 to 31 March 2016 (not within the last 3 years at the time). The second application form was for the period 23 June 2017 to 31 December 2018 (so was within the 3-year period) but DA told us that the details of this second application suggested more of a day to day working relationship rather than a mentoring one. She also said that the employees in question were more senior than the claimant and had both left the respondent and so were unable to verify what had taken place and as she was not managing the claimant at this time had no information about what was carried out. We accepted the explanation of DA of her actions regarding the claimant's mentor applications and that she was not in a position to sign off the applications and would have not been following the process (including the conditions for such badges) if she had. The advice of DA to engage in up-to-date mentoring and submit new applications seemed sensible and practical.

Issue 1.1.7 and Issue 3.1.2 Allegation that GBH was paired with the claimant on a project and "ghosted" the claimant when asked for his results on 22 May 2020 which caused the client to be aggressive to the claimant

on a call on 23 May 2020 which was the same day as Eid

9.114. The claimant was asked about the timing of this alleged incident during cross examination as RC's evidence was that the issues with GBH took place in July and not May 2020. The claimant agreed that this issue had arisen in July 2020 and also went on to say that there was in fact no client call at all. However, the claimant did not want to withdraw the specific allegation. We find that there was no incident on 22 May 2020 or 23 May 2020. The claimant was in fact on leave on 22 May 2020 as he was still in a period of a phased return (1846). Eid al-Fitr took place on Saturday 23 and Sunday 24 May 2020 and no phone call took place on this day either. On the substance of the particular complaint, we find that an issue did arise on 30 July 2020 involving GBH. The claimant had been working with GBH on a project and they had been asked to collaborate to put a report together. There were very many messages between GBH and the claimant on this project and at page 2271 we saw some messages where the claimant asked GBH to send his findings over so that the claimant could write the report himself. GBH suggested that the claimant send his report over so that GBH could add his findings, and the claimant continued to ask GBH to send his findings. GBH then contacted BM to ask him how to respond to the claimant and we saw the direct messages exchange between GBH and BM at pages 1996. GBH messaged BM and said he had a "*slight problem*" at 9.42 and when BM did not respond, he messaged again at 13.46 stating that the claimant was "*pestering"* him and he was not sure what to say. BM responded to GBH and instructed him to ignore and that he needed to put a call in. GBH sent a further message saying that the claimant was trying to call him, and he need an "*excuse for being a ghost*". It was clear that the context of these comments (which were not made to the claimant) was that GBH was being asked questions by the claimant, did not know how to respond and was then instructed by BM not to reply and was still receiving contact from the claimant and was unsure how to deal with this. This was an operational issue and GBH was awaiting instruction from BM as to how to respond and in the meantime had been told not to.

9.115. BM then spoke to RC and a call took place the next day with BM, RC, GBH and the claimant where how the report should be compiled was discussed. RC instructed the claimant to send his draft report that was half completed to GBH and for GBH to then add his findings to this report and send the report for QA, and the QAd version would be sent back to both with any actions before being sent on to the US team for their QA process. This was confirmed by an e mail sent by RC (page 1984). The claimant complained to DA about this incident on 3 August 2020. The claimant did not share his report with GBH as instructed until 4 August 2020 and there were various further requests for him to do so from RC and from BM before he did this on 5 August 2020 (page 2007, 1984, 2009, 2238 – 2239 and 1999).

Issue 1.1.8 - Allegation of claimant call with VN on 25 May 2020 referring to "black-listing" around the time of the George Floyd murder

9.116. The claimant complained about VN making a comment about blacklisting

on a team call which he took as a reference to the George Floyd murder (which occurred on the evening of 25 May 2020 in Minneapolis, USA). In fact, it was unclear when this comment was said to have been made. That day was a bank holiday in the UK. VN could not recall having a call involving the claimant but accepted that there could have been a call around this time, and he does use the word blacklisting and whitelisting. We heard evidence from a number of the respondent's witnesses about what those terms mean, namely that blacklisting is where a specific list of IP addresses that are not allowed to connect to a system is in place and thus any address not on that list will be rejected. A whitelist is where there is a full list of those IP addresses that are allowed and so access will be accepted from those on the approved list and no others. This was described as legacy terminology and there had been a move towards using terms such as allowed and denied list but that these terms were commonly used in the industry. The claimant himself also used such terms in communications we have seen as part of these proceedings at around this time on 14 and 26 May 2020 (page 2044A and 2044F). We found this a puzzling allegation as the only reference to blacklisting at this time we saw in messages was made by the claimant and there is no evidence that VN was involved in any of these. Nonetheless we find that VN is also likely to have used the term blacklisting around this time as he acknowledged its use more generally. This allegation changed in the claimant's oral evidence as being that VN used the word 'black' in referencing to discussions around the formatting of documents with a particular emphasis on the word 'black' when doing so that the claimant found offensive. There was no evidence that this took place. We do not find that there was anything sinister in the way he or anyone used the word 'blacklisting' or 'black' as suggested by the claimant. We were not satisfied that there was any link at all to the George Floyd murder on any mention of this phrase on this day and it was used by all (including the claimant) in a purely business context. VN was an extremely convincing witnesses whose evidence we accepted entirely on this matter. Our view is that this allegation has been constructed after the event by the claimant as a way to bolster his claim and to support his views that every individual he interacted with was racist.

Issue 1.1.9 and Issue 1.1.21 Allegation of failure to revert back to the claimant on his Checkpoint Review until meeting on 24 September 2020 thus delaying his career progression

9.117. The claimant completed and submitted the employee section of his Checkpoint Review assessment for 2019 sending it to DA on 27 May 2020 shortly after his return from sick leave (pages 1856-7). DA acknowledged that after submitting this, the claimant chased her on several occasions as to when this would take place and she explained that this would take place after he had completed his phased return from work. DA explained that this was in accordance with the respondent's guidelines on rehabilitation from sick leave (page 1688). The claimant completed his phased return from work at the end of July 2020. DA said that during August it was difficult to seek input from all the people required to complete this and so she started to gather the information she needed during September 2020. We saw e

mails sent on 21 September requesting information on the claimant's utilisation figures for the year (2110) and also e mails between DA and SSh (who had been the temporary line manager during that year) and BM (2133 and 2116-7). DA also requested feedback from people that the claimant had worked with including AT, who provided positive feedback (2139). The checkpoint review took place on 24 September 2020. There was a delay in completing this checkpoint review from May to September 2020 but accepted the evidence of DA that any such delay did not have any impact on decisions around promotion or career progress. The completion of a checkpoint review was not of itself part of any promotion decisions and only part of the process of career progression.

Issue 1.1.11- Allegation that claimant was offboarded from the client L account

9.118. On 3 June 2020 C was one of 15 people off-boarded from the Client L account (page 1868). The offboarding of the claimant from this account was queried by C Kelly with AT on 3 June 2020 when he asked whether it was wise to remove pen testers in view of upcoming requirements. AT raised this with DA who confirmed that the project had sufficient pen testers already and should have been offboarded when he stopped working on the project in quarter 3/4 2019. BM confirmed on 3 June 2019 that the claimant should be offboarded as planned (1864). C Kelly got in touch with the claimant following this to make arrangements for him to be offboarded from the account including the return of a laptop specific to this (1873). The claimant raised concerns about providing his home address to the respondent (as it wanted to arrange collection of the laptop as there was no attendance at the office at the time). However this process appears to have been completed without any objection from the claimant and he was not at that time working on the Client L account. It was not clear what the allegation that DA had told the claimant that he should not question leadership on this matter related to and we had no specific evidence from either the claimant or DA about when this was alleged to have taken place. DA acknowledged that she may have said something to the claimant that which projects he worked on was a matter for his task manager to decide at all times and we accepted her explanation that this was a comment about how allocation to accounts works more generally.

9.119. On 5 June 2020 the claimant uploaded a report on the Client S1 project into a folder on Box (the respondent's file sharing system). RC moved the report to a different folder as it was not in the correct place. RC said he did this many times with numerous individuals and did not think anything of it. The claimant complained to RC about this on 9 June 2020 mentioning he was no longer shown as the author, and this had been "*a major problem at my time here*" (page 1887).

Issue 1.1.10 Allegation that the claimant's holiday was rejected at the last minute

9.120. On 9 June 2020 the claimant got in touch with DA about changes to his

phased return to increase his working days from three to four a week. This also involved changes in annual leave dates as the claimant had been using up accrued annual leave to enable his phased return to remain fully paid. DA asked the claimant whether this change had been approved by his doctor and as the claimant said it had been approved, she agreed to the request on 11 June 2020 (1891-2). DA then discussed with the HR team who advised her that they would prefer the claimant to remain on the current plan and she informed the claimant of this on 15 June 2020. The claimant then agreed that he would take a different day that week as leave to ensure that he would only complete 3 days that week. He confirmed that his health was important and so he would stick to the return-to-work plan as had been agreed. DA confirmed the change by e mail to the claimant on 18 June 2020 (1897-1898). We do not find that the claimant's holiday request was rejected at all. A change to arrangements was made and confirmed by the claimant.

Issue 2.4.1 Allegation that SP told the claimant on 23 June 2020 that he was taken off a project because he was on sick leave and he could not return to the project as he had returned from sick leave

9.121. The claimant attended a meeting with DA and SP as part of his return-to-work process on 23 June 2020. During that meeting the claimant asked why he had not been assigned back to client C which was the project he had worked on before he went on sick leave. The claimant alleges that he was told he was taken off the project and could not return because he had been on sick leave. DA acknowledged that SP told the claimant that when employees are on extended leave, their tasks are assigned to someone else to ensure deadlines are met and so another penetration tester had been assigned to the Client C project when the claimant was on sick leave. DA denies that SP said that the claimant could not return to the client C project because she said this was incorrect. The claimant had not been assigned back as there were enough pen testers on the project at the current time. We accepted DA's account on this matter. The exchange of correspondence at page 1865 confirmed that at this time this project had its "*complement of pen testers*" for the project moving forward.

Issue 1.1.12 Allegation that the claimant sent a report for Quality Assurance ("QA") and was told by BM and CL it was the wrong template on 1 July 2020

9.122. Although this allegation is made about CL and BM, this incident relates to an exchange of e mails between the claimant and VN at pages 1932F - G. VN had been asked to QA a report prepared by the claimant around the end of June 2020. The claimant submitted his report on 30 June 2020 and VN emailed the claimant on 1 July 2020 attaching the claimant's report adding some comments following the QA process and informed the claimant that that he had used the wrong template. He also sent him a link to the correct template. There followed a number of e mails and messages between the claimant and VN back and forth about various issues arising during the QA process. We find that all of this exchange was purely operational and did not appear to be out of the ordinary in any way but was a series of business

communications exchanged politely and reasonably on all sides about how to complete a piece of work.

9.123. On 1 July 2020 the claimant attended an appointment with Dr Vishal Agrawal, a Consultant Psychiatrist. He had been referred for treatment as part of the respondent's private health benefit he received. A report was produced by Dr Agrawal which was at pages 2529 – 2532. This is a detailed document and sets out what the claimant told Dr Agrawal about his background, issues at work and symptoms. It described the claimant stating he was angry and frustrated, constantly anxious and sometimes feels helpless and worthless and that has paranoia that people are doing things deliberately to hurt him. It noted that the claimant had not presented with any self-harming behaviour. He diagnosed the claimant with mixed anxiety and depressive order with elements of overvalued ideas about work situation. It found that other than elements of suspicion and paranoia described, there were no other features of a psychotic illness but that such thoughts could be emerging from stress. This report was not disclosed or shared with anyone at the respondent at this time. The respondent accepted that the claimants is disabled from this date of this report due to depression and anxiety

Issue 1.1.13 Allegation that BM gave the claimant only 2 days to complete a retest on Client N1 when the claimant thought it would take longer

9.124. On 30 June 2020 BM asked the claimant to help with a project. This involved testing a web application firewall that had been created by the respondent for a client in preparation for a competitive process that would be carried out by the client on this. The X force red team had been asked to test this before it was sent to the client to see how it was likely to perform when the client tested it competitively. This was not a full testing project but simply a pass/fail test. BM asked the claimant how long the Client N1 project tests would take, and the claimant said 12-15 days. It appears this estimate was given on the basis that full testing would be required. BM replied to the claimant explaining they have 2 days and that this was a validation and should be a simple test. The claimant replied to BM and confirmed that if the task was just to retest as explained then the timing of two days sounded "*about right*" (see pages 1913-1917). The matter appeared to have then been clarified. We were satisfied that this exchange was nothing more than a communication about timescales with the claimant's initial estimate being made on a misunderstanding of the scope of the project and once this was fully explained, he was content with the timescale and agreed to it.

Issue 1.1.14 Allegation that the claimant was told off by BM for sending report directly to client instead of QA, without authority and mentioning a project name

9.125. On 2 July 2020 the claimant had an exchange of messages with BM and RC about the N1 project he was working on (page 1932). There were some questions about the issues identified which were resolved and the claimant

confirmed in a message sent at 15.11 that he had carried out the testing and completed it. He went on to note that he was off in the afternoon and would send the report out before he left on Friday and would cc BM and RC in when it was sent to the client. BM replied to this message at 15.43 and asked the claimant to share the Client N1 report with RC to be QAd before sending to the client. There was no response to BM's message from the claimant that day. We find that it is likely that the claimant did not in fact see this message on 2 July 2020 as if he had, this would have been responded to. On 3 July 2020 at 9.04 RC messaged the claimant asking him to send Client N1 report to be QAd. The claimant sent out the report to the client (with RC and BM on cc) at 9.11 on 3 July 2020 and did not send it to RC to be QAd in advance (page 1929). We found that it is likely that the claimant did not in fact see the messages asking him to QA the report before sending it out. He had proceeded on the basis that no QA was required.

9.126. BM said he was very frustrated when he saw that the report had been sent out without being QAd and had a particular reason why he wanted RC to check this report related to poor scoring of the application in question on an earlier client issue. BM further messaged at 10.41 on 3 July 2020 stating: "*I thought I was very clear with this and it needed QA. Richard also asked this morning. But you don't see to listen to instruction. Or follow XFR process. I will follow this up with an email with Dee and Shelia*". BM said that this and the other issues arising since the claimant's return had led him to be concerned about the claimant's performance. On 21 July 2020 RC, DA and BM held a refresher session with the claimant on the X Force Red QA process via telephone (page 1947). BM said he thought the session went well and was calm and professional. RC emailed the claimant after the session to confirm what was discussed and to provide links and information. This was a comprehensive and informative e mail with practical information about work and processes.

Issue 5.2.19 Protected Act

9.127. On 22 July 2020 the claimant presented his first claim to the Tribunal (pages 1 – 20).

Issue 2.4.2 - Allegation that on 5 August 2020 CB asked the claimant to talk to the person who had caused him the problem and talk about his problems with OH

9.128. This appears to relate to an incident that actually happened on 27 July 2020. The claimant emailed CB saying that he had recently returned from sick leave and had obtained a medical report as he had been to some counselling through the medical insurance scheme. We take this to refer to the report from Dr Agrawal as referred to above. He asked CB how to provide this sensitive medical information to the respondent (pages1970 – 1971). CB replied and stated that if he thought this should be reviewed by an OH adviser, that he should "*speak to his manager to request an OH referral*" so that he could discuss the medical situation with OH. She provided further information about the OH service. The claimant replied and

said he had already been referred to OH but could not find the form and he also said he could not discuss with his manager as she was part of the problem (page 1969). CB then explained that he would need to speak to "*a manager or a delegate within your business line*" so that they could submit a OH referral. She explained that the reason for this was because the business was responsible for work arrangements and tasks and would receive an OH report which may make recommendations to implement. She again provided the link. We do not find that the claimant was told he had to talk to the person who caused the problem, but that an OH referral had to be completed by the business line manager. He was also not instructed to talk about his problems with OH but simply given the information required for an OH referral request in accordance with standard process. The claimant subsequently completed the OH consent form and on 29 July 2020 sent this to DA (pages 1972 – 1974).

9.129. At the end of July 2020, the claimant's phased Return to Work ended and he returned working full time.

Issue 2.4.3 - Allegation that DA did not send consent to access medical report to Medigold on 5 August 2020

9.130. DA told us that she was surprised when the claimant provided his consent to an OH referral by submitting the form on 29 July 2020, as she had raised this first back in April and again on his return to work and he had been reluctant to do so. DA acknowledged that she did not act promptly having received this form as she was dealing with many other issues at the time, including the claimant's checkpoint review process. She told us at that time she had over 50 direct reports to manage. She also wanted to seek advice on the process which caused delay. It is unfortunate that there was a 3-month delay to actioning this, which was done on 31 November 2020, but we accept the evidence of DA as to what the explanation for this delay was.

Issue 1.1.15 Allegation that RC aborted a job of the claimant for Client S1 24 August 2020

9.131. The Client S1 project had started in May 2020 but had been postponed. The claimant had carried out some testing in May and prepared a report which had been stored and a Trello card had been created and left on the system. When the project resumed in August 2020, the claimant prepared a new report and a second Trello card with a similar name was created on the system. RC was responsible for QA on the second report prepared by the claimant and went on to the system and saw that there were two similarly named files so archived one of them (page 2044). The claimant noticed that this had been done and so contacted RC to inform him that he had aborted the wrong card, (page 2045) and moved the correct one back to the QA Queue (page 2044). RC thanked the claimant for picking this up and acknowledged he had moved the wrong card. This was nothing other than an operational communication between two colleagues and the archiving or aborting of the report completed by the claimant was done in error by RC and as soon as it was picked up was rectified.

Issue 1.1.16 and Issue 1.1.17 Allegation that N Walker ("NW") told the claimant to only share a report via Box on 2 September 2020 and that NW was favoured over C and C Shepherd ("CS") closed the case

9.132. The claimant was working on the S1 project with NW (who was the leader of the Xforce team in the middle east region) towards the end of August 2020 and prepared a report which was submitted for QA. NW got in touch with the claimant on 2 September to tell him that his report was good and to thank him for his work and the claimant replied to ask NW him to copy him when sending it out to the client. NW had in fact already sent the report to the client as he had been under time pressure at the time and so had QAd the report himself. He told the claimant this and the claimant challenged this stating that it still needed to be QAd. He asked NW to inform BM that this had happened as he was concerned that process had not been followed. When NW told the claimant he had done this, the claimant seemed to be satisfied with the outcome (page 2083). There was subsequently a message exchange between the claimant and NW about this issue (page 2084). The claimant asked NW to send him a copy of the e mail sending the report to the client and NW replied stating that it had not been e mailed but had been made available on a shared Box folder and had simply notified the client he had done this. The claimant asked NW for a copy of that e mail which was sent to him (2084). The claimant then messaged NW and questioned why he was not copied in on that e mail as he had completed the testing. He said he got the feeling of "*déjà vu*" and the same thing had been happening for 4 years, to which NW replied asking what this related to as this was the first time he had dealt with claimant. The claimant told NW that he had recently returned from sick leave and NW should have been aware of this. NW then reassured him that he had not been intentionally left off the e mail chain, but NW had just responded to an existing e mail chain which the claimant was not involved in. NW raised this matter with BM at the time and stated that he did not want to get the claimant into trouble but thought this was a strange interaction (page 2087a-b) and BM forwarded this on to DA.

9.133. On 8 September 2020 the claimant complained about this interaction to CS (NW's line manager) (page 2091). On 16 September 2020 CS responded to C to state that he had spoken to NW, and he believed it was a misunderstanding and the matter is resolved. The claimant responded stating that he disagreed and that he thought it was deliberate and could not understand why NW was sending reports he had written directly to the client rather than the claimant himself. CS informed the claimant that NW owned the relationship with this client (see all messages at pages 2094 – 2095). CS, NW, DA and BM had a call to discuss C's complaint about NW and on 18 September 2020 CS emailed the claimant and sent him a copy of the final report sent to Client S1 showing that the contributors included the claimant (page 2108) and stating that he considered the matter closed. We find that this arose out of a very minor matter and appeared to have been escalated by the claimant to a problem that did not appear to be there at all as NW had no interaction with the claimant previously. It indicated to us

that the claimant was now behaving in an unpredictable and concerning way in all interactions he had and creating ulterior motives from entirely innocuous day to day interactions.

Issue 1.1.18 Allegation that BM told the claimant that his report was password protected on 22 September 2020 sending an email copying in the claimant's manager, making comments on Trello, humiliating him in front of client

9.134. Although this allegation refers to BM, this is an incident involving RC. The claimant had uploaded a testing report he had written to a box file and RC had tried to access the file in order to QA it. RC explained that he was able to access the file but could not make any edits to it because a password had been applied to it (it was not usual for this to happen as various people needed to input on such reports so passwords being added would make this more difficult). RC emailed the claimant to ask him to resave the document or send the password to him (2131). The claimant replied to say that there was no password on it, but he had added another version on Box (2130). Both the claimant and RC logged the various activities carried out on Trello (page 2134). There was a back-and-forth exchange about whether a password had been added or not. RC told us he did not feel that the Trello activity log was the correct forum for messages of this nature and emailed the claimant to say that the matter was closed stating "*From a QA position we have a workable copy of the report in the second one that you uploaded to box. Moving forward please be mindful that for any reports it is sent in the correct manner so that whoever the QAer is, is able to QA it. This matter is now closed*". RC said he was frustrated with the claimant's refusal to accept that he had put a password preventing edits on the document, even though proof had been sent and felt like the claimant was accusing him of lying (the claimant confirmed in response to cross examination that he thought RC had fabricated the evidence he had sent to him showing that a password had been applied). We accepted the evidence of RC that he did not make any comments in front of client as Trello was an internal system only visible to the respondent's employees on the project and the e mails were just between the claimant, RC, BM and DA (although it is correct that the claimant later included the e mail quoted above in a response he sent which included the internal client). Ultimately, we found that this was a purely operational matter about access to a document. The claimant appeared unable to accept RC's suggestion that a password preventing editing had been applied, even though this was not raised as a major criticism of him.

Issue 1.1.21 and Issue 5.4.2 Allegation that the claimant's grading in his Checkpoint review for 2019 (carried out on 24 September 2020) was deliberately marked down and was delayed since May 2019 (the respondent understands this to be a reference to May 2020)

Issue 1.1.19 Allegation that at the Checkpoint Review meeting, Tom Joy ("TJ") marked the claimant down and told the claimant he walked out on a job

9.135. It was clarified during the hearing that issue 1.1.19 was an allegation made against BM (not TJ) and related to comments made by BM during this checkpoint review meeting on 24 September 2019. We have already addressed the issue of the delay in holding this meeting above and the same findings of fact are made in relation to this allegation. The claimant was provided with his ratings in the five Checkpoint parameters for the period January to December 2019 and these are shown at pages 2192 – 2194. The claimant was scored as 'Achieved' on the dimensions of 'Business Results' and 'Client Success' and was scored as 'Expects More' on the dimensions of 'Innovation'; 'Responsibility to Others' and 'Skills'. There is a change on two of the dimensions from previous years, as on 'Innovation' and 'Skills' he drops down a grade from 'Achieves' to 'Expects More'. On the 'Responsibility to Others' dimension he receives the same grade as on previous years. The claimant believes that these grades were given to him because he is Asian and because he had raised complaints of discrimination.

9.136. BM gave detailed evidence about why the claimant was awarded these grades which was not challenged by the claimant. He explained that in terms of innovation, just keeping up with the latest trends in pen testing was no longer considered by the respondent to be sufficient and employees were now expected to do something for the business which saved time and money, which for pen testers might including developing a new tool and working with others on a new coding script. He explained that this was one of the harder metrics to meet and the majority of his team received the same grading on this dimension as the claimant. BM noted in the comments section for this section in the checkpoint review document (page 2193) "*From an innovation perspective, I have not seen anything that demonstrates innovation during 2019 to meet the innovation criteria. So expect more in 2020, some examples will be provided for 2020 checkpoint goals."* When asked about this in cross examination the claimant said that was doing exactly the same as he had done in other years and so he was surprised that the rating had changed. We preferred the evidence and explanation of BM on this matter and noted that the respondent's thinking on innovation had changed generally at this time which meant that all employees had a more difficult time meeting this dimension.

9.137. BM also gave evidence about why the claimant had been graded this way on the other dimensions. He referred to multiple incidents having taken place in the previous year which demonstrated that the claimant had struggled to work with others. In the comments section for this grading BM noted "*We have had patches of isolated issues throughout 2019.Whether stressed or not reflects badly if behaviors are not professional. This creates a reputation and is harder to fix than having technical skills. This is not a new thing and it's a recurring checkpoint issue. So it's expected that 2020 is better."* This is almost a direct lift from previous gradings, and it is clear to us that the respondent determined that the claimant had not improved in this area so awarded the same grading as it had in previous years. It was noted later in the document: *"As mentioned before you need to think about responses to slack messages & emails before sending. Things can be*

misinterpreted on text, slack, email, and other written communications. Consider arranging meetings to discuss where things can be put into the context they were meant. Rather than jump to conclusions that may be incorrect." We accepted this evidence and explanation. The claimant was asked about his behaviour towards others in 2019 in cross examination and whether it was "*faultless*", and the claimant said it was and that he had simply raised grievances for the right reasons through correct channels. The claimant also contended that he acted entirely appropriately to everyone and was also "*faultless*" in his interactions from this point on and throughout 2020 also.

9.138. BM also told us that the claimant had been graded as Expects More on the 'Skills' dimension and that this was because he did not see the claimant stretching himself in 2019 and acquiring new skills. He said he had worked on Client L for much of the year and that the claimant was doing more in the way of defect management which is something he was really overqualified for and had not stretched himself. It was noted in the comments section: *The skills used mainly on the Client L project were standard pen testing skills. As far as the other role on the accounting defect management, you did receive very positive feedback which was great to receive. Do be mindful in terms of your own career path & progression when taking on this type of project work that it is not building your skill set in terms of your IBM career development path."* Again, we were satisfied that these explanations were truthful and valid. The claimant again said he was doing his work exactly in the same way as last year and the year before and the year before that. This acknowledgement supported what BM was saying about skills and the appropriate grading and we accepted his evidence on this point. We also note that given the way in which the document is designed, much of the grading must be supported by data and examples, which it was.

9.139. The claimant also complains about comments now said to have been made by BM that he had walked out of a job. BM told us that this related to a discussion that he had with the claimant during the Checkpoint review meeting about the Client C project he had worked on for 2 weeks before he went off on sick leave in November 2019. He explained that before and during his sick leave the claimant did not share with RC and the rest of the team what work he had already carried out which meant that the team had to repeat work. BM explained that he raised this matter as one of lack of communication with the team and not sharing/providing access with others which could cause a problem if a team member was unexpectedly absent. He said this was a problem that had arisen before with the claimant being reluctant to share his findings and the Client L project was an example of how this caused a problem for the team who could not easily pick up the project from him. He denied saying that the claimant had walked out on the job. We accepted the evidence of BM on this matter as this makes more sense and is logical and plausible in the context of discussions around collaboration and communication with others and its importance.

<u>Issue 5.2.19 Protected Act: claimant files Second Claim on 16 October 2020 (pages 40 – 57)</u>

Issue 3.1.3 - Allegation that a meeting request was sent 2 hours before a meeting, the meeting took place during Jummah prayers and CL ignored and belittled the claimant at the meeting

9.140. In October 2020 the claimant was allocated along with others to the Security Operational Services application testing project coordinated by CL. She decided to arrange a 'kickoff' call with those involved. This included the claimant and MF in the UK and other employees based in different parts of the USA. She originally scheduled a meeting with the claimant and three others for 6pm UK time on Friday 16 October (page 2197) and sent a calendar invitation the day before. The claimant accepted this but as MF told CL that he was unavailable at this time, she tried to reschedule this subsequently updating the invitation to 1pm UK time (which would be 6Am US time). CL said that this time was showing as available on the claimant's calendar. This calendar invitation was accepted by the claimant and no comment was made about him not being able to attend at the time (page 2200). The claimant messaged CL about the meeting just before the call asking to confirm the time and again did not mention that he could not attend but stated he did not have a problem with the original time when CL said that RF could not make that time (pages 2288 – 2289). The call went ahead, and the claimant attended. CL denied ignoring and belittling the claimant during the call. She said that the project had to cover four separate applications and that MF was due to start his part on that project the following Monday, so the priority for discussion was his part in the project as this was imminent (with the start of other applications was being staggered). CL also told us that she had no idea of the claimant's religion nor that he wanted to attend prayers on Friday lunchtime. The claimant agreed that he had never told CL at this or any point that he was unable to attend meetings at this time because of Friday prayers. He said that "*everyone knew*" at this stage and given historic events, CL would have known. We did not agree that this was the case. We accepted her evidence on this matter which was convincing and in line with the documentary evidence. The exchange of messages was friendly and polite and there was no evidence that CL knew that the claimant had any problem with the time of the meeting at all, let alone what the reason for that was or that it had anything to do with the claimant's religious observance. We also accepted her evidence that she would have been happy to schedule a different time or an additional call if the claimant had told her he was unable to attend at the time. We also accepted her explanation about what was discussed during the call and that she did not belittle or ignore the claimant during the call.

Issue 3.1.5 Allegation of NB and others requiring the claimant to attend meetings at 1pm on Friday when it was known he would attend prayers

9.141. Other than the incident referred to above, no evidence was called to suggest that meetings were called by NB or any other employees at times when it was known the claimant would be attending prayers. This was a general allegation, and we are unable to make any findings of fact to support it on

the evidence heard.

Issue 1.1.20 Allegation that at a Checkpoint meeting, TJ ignored information sent by the claimant and failed to send the claimant a report with his findings after the meeting

9.142. This allegation was a little unclear as we did not hear any direct evidence about what is said to have been done or said by TJ at any meeting. The allegation appears to relate to some interactions between the claimant and TJ (a pen tester based in the USA) who were paired on a project together by CL on 29 September 2020. CL told us that another US tester had been originally selected for the project but was unavailable, so the claimant was allocated as he had some availability at the time (as per the e mail at page 2174). The claimant messaged CL on 6 October to confirm he would get on with the project when he finished his current one (page 2176). On 16 October 2020 the claimant messaged CL to say that he had only heard from TJ twice during the project and there was then some further messages about this with the claimant clarifying that TJ should have a report for him to add findings to (messages at page 2289). On 28 October 2020 the claimant sent a report to CL without TJ's results and told CL that he only saw a blank template from TJ on Box so wrote the report himself. CL replied asking whether he had included any findings from TJ and the claimant said that there were no results from TJ so CL said she would take up with his manager (messages page 2204 – 2205). On 29 October 2020 CL sent a slack message to the claimant to say that TJ was on holiday, and she had tried to find out what had happened, had looked at the report he had uploaded which had 1 finding and asked the claimant to include TJ's finding in the report (page 2210). The claimant replied stating that it was not really a finding and criticised what was included. He said he did not hear from TJ during the project and TJ had contributed little or nothing to the project. There were some exchanges about this between the claimant and TJ's manager (R Sims) during which the claimant acknowledged he had communicated with TJ. This resulted in R Sims asking the claimant to include whatever findings there were in the report (page 2214).

9.143. On 2 and 3 November CL followed up with the claimant asking him again to include TJ's findings in the report (page 2215) to which she received no response. On 3 November 2020 BM asked the claimant to include TJ's finding in the report stating that he saw that the claimant disagreed with what had been done but that it was not "*our call*" as to what to include and it would be removed at QA if it was not correct. The claimant continued to challenge this and told BM that it was causing him a lot of stress (page 2209). The issue was resolved by CL working with TJ to include the finding himself. This course of events does not suggest that TJ ignored information produced by the claimant or failed to send the claimant a report.

Issue 5.2.19 Protected Act: The claimant a files Third Claim (pages 58 – 71); Fourth Claim (page 72 – 86) and Fifth Claim (pages 87 – 102) on 19 October 2020

Issue 3.1.4 Allegation that V Rajgor ("VR") had a rude and aggressive Slack exchange with the claimant 22 October 2020 and VR said the claimant was only finding low risk issues

9.144. This allegation related to a Slack exchange between VR, and C in relation to the N2 project (pages 2203I – 2203K). The claimant had been paired with VR (a Senior Information Security Analyst who worked for the GDC team based in India) on a project for the GTS team in India. There were some initial messages when VR informed the claimant he would send him a report and the claimant said just to send notes as he would be writing the main report. The report appears to have been written by the claimant and was then QAd by a manager in the US, D Pagan, who sent the report out to the client on 21 October 2020, copying a number of people including the claimant. His email contained a standard statement that recipients should let him know if there were any issues with the report. The claimant replied all to that e mail (including the client) to state that if there were any issues, they should direct questions to him "*the author of the document*" (page 2203G). We found that this was a surprising and somewhat unprofessional e mail to have sent to a client effectively contradicting information provided by a colleague.

9.145. VR sent a message to the claimant asking for a copy of the report that had been written and submitted to QA as he had just returned from leave as he wanted to make sure that everything was covered. He said, "*Ideally I should be in cc while sending the report for QA*". The claimant responded stating that he was the lead tester and responsible for the report which had been completed and sent to the client. He went on to question why VR should be on cc, why VR was asking and stating that CL had asked him to claim his time and nothing else. He also stated that he had added his name as tester stating, "*Is that what you are worried about*". VR responded that he was not worried about his name but the report. Those messages were shown at pages 2203J-K. VR contacted his manager VN to complain and VN passed the information on to BM (see page 2203L). We did not find that the actions of VR were in any way rude or aggressive in this exchange, if anything the claimant's replies to these requests were rude and aggressive. We did not see any reference to a comment made about the claimant only finding low risk findings so find that this was not made. The messages sent by VR appeared to us to be standard business requests asking for a copy and entirely innocuous.

Issue 5.2.19 Alleged Protected Act: claimant files Sixth Claim on 25 October 2020 (pages 103 – 118)

9.146. On 21 November 2020 DA submitted the claimant's OH referral to Medigold Health. The claimant attended an OH appointment on 30 November 2020 with Dr Weadick. Following this appointment on 9 December 2020 Dr Weadick's OH Report was sent to DA. This report shown at pages 2252 – 2255 sets out what the claimant had told Dr Weadick about his issues at work over several years with it being noted that the claimant's "*perceived issues relate to apparent verbal and racial abuse, victimisation, alleged*

bullying and general disrespect". He described the claimant as suffering symptoms "*seemingly suggestive of a moderate to severe depression, including (but not limited to) sleep disturbance, cognitive impairment (poor memory and concentration), marked low mood and anxiety*". Dr Weadick noted that the claimant was likely to be considered as a disabled person if his assertions about severity and duration of symptoms were correct and the respondent accepts that it knew that the claimant was disabled as a result of depression and anxiety from 9 December 2020.

9.147. As the events set out in the six claim forms that this Tribunal are dealing with end at this point in time, the Tribunal has not made any further findings of fact beyond this date.

The Relevant Law

10. The relevant sections of the EQA applicable to this claim are as follows:

4 The protected characteristics
The following characteristics are protected characteristics: …

disability,…race, religion or belief…;"

6 Disability
(1) A person (P) has a disability if -
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

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

15 Discrimination arising from disability
"(1) a person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability".

23 Comparison by reference to circumstances
(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."

26 Harassment
(1)A person (A) harasses another (B) if—
(a)A engages in unwanted conduct related to a relevant protected characteristic, and
(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or
(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect."

27 Victimisation
(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

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

123 Time limits
(1) [Subject to [sections 140A and 140B],] proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

136 Burden of proof
(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.

11. The EQA Employment Statutory code of practice was referred to. It deals with the issue of knowledge of disability as follows:

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

It deals with the issue of bad faith in claims of victimisation as follows:

9.13 *A worker cannot claim victimisation where they have acted in bad faith, such as maliciously giving false evidence or information or making a false allegation of discrimination. Any such action would not be a protected act.*

9.14 However, if a worker gives evidence, provides information or makes an allegation in good faith but it turns out that it is factually wrong, or provides information in relation to proceedings which are unsuccessful, they will still be protected from victimisation.

12. Jama v Alcohol Recovery Project UKEAT/0602/06 - on knowledge of the disability there is no need for the employer to know the precise nature of the medical condition. Wilcox v Birmingham CAB Services UKEAT/0293/10 and Gallop v Newport City Council [2013] EWCA Civ 1583 – it does have to know (actually or constructively) that the employee is suffering from an impairment with the characteristics identified in section 6 EQA, i.e., an impairment which has a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities

13. We were referred to the authorities of Ridout v TC Group [1998] IRLR 628 and Secretary of State for the Department for Work and Pensions v Alam UKEAT/0242/09; [2010] IRLR 283 to support the contention that a reasonable employer is not incumbent to make every enquiry whether there is little or no basis for doing so.

14. The relevant authorities which we have considered on the direct discrimination and victimisation claims are as follows:

Anya v University of Oxford & Another [2001] IRLR 377 **-** it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Igen v Wong and Others [2005] IRLR 258 and Madarassy v Nomura International PLC [2007] IRLR 246.

The employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

Madarassy v Nomura International Ltd 2007 ICR 867 - the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

Nagarajan v London Regional Transport [1999] IRLR 572, HL, -The crucial question in every case was, *'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'*

Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for …'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: *'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'*

Bahl v Law Society [2003] IRLR 640 – "*where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups.*"

15. In relation to section 15 EQA, the following authorities were relevant:

Pnaiser v NHS England and Coventry City Council EAT /0137/15 confirmed as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant ......

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links ...[and] may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) ..... However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) .....

(h) Moreover, the statutory language of section 15(2) makes clear .... that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so."

<u>*City of York Council v Grosset [2018] WLR(D) 296*</u> also confirmed that section 15 (1) (a):

"requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability". This case also established that there is no requirement in section 15(1)(a) that the alleged discriminator be aware that the "something" arises in consequence of the disability. That is an objective test.

<u>Elaine Robinson v Department for Work and Pensions –</u> which approved the EAT in Dunn v Secretary of State for Justice [2019] IRLR 298, that a 'but for' test was

not appropriate and an "examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary".

Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15- to be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so.

16. In relation to harassment the following authorities were relevant:

Richmond Pharmacology V Miss A Dhalliwell [2009] ICR 724. There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that the respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so. A respondent should not be held liable merely because his conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as the claimant felt, about the treatment in question, and the claimant must, additionally, subjectively feel that their dignity has been violated, etc.

Pemberton v Inwood [2018] EWCA Civ 564. Underhill J *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (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). It must also take into account all the other circumstances (subsection 4(b)).*

17. In relation to victimisation specifically we were referred to the following authorities:

Martin v Devonshires Solicitors UKEAT/0086/10 – The EAT upheld the Employment Tribunal's decision that the reason for dismissal was not wholly or in substantial part her complaint that she had been victimised; the EAT found instead that the Tribunal had been entitled to find that the reason for her dismissal was her conduct at work and the manner in which she had complained to the firm, and that the reason for her dismissal could be "properly treated as separable".

Woodhouse v West North West Homes Leeds Ltd [2013] IRLR 773 confirmed that the question was whether the protected had played any significant part in the employer's decision or whether there were "genuinely separable features" which allowed a distinction to be drawn between the conduct on the one hand, and the decision on the other.

Mr A Bham v 2gether NHS Foundation Trust:UKEAT/0417/14/DXA - the EAT upheld the Tribunal's decision an employee did not obtain "an impenetrable cloak of protection as a result of the protected acts" that he had done, as long as his employers did not act because he had done them.

Mr R A Saad v Southampton University Hospitals NHS Trust UKEAT/0276/17/JOJ- The question to determine for victimisation is whether the employee has acted honestly in giving the evidence or information which made up a protected act. Whilst motivation could be part of the relevant context, the primary focus in determining 'bad faith' was the question of the employee's honesty.

18. On whether the discrimination complaints are in time:

Section 33(3) of the Limitation Act 1980 (power to extend time in personal injury actions) specified a number of factors that a court is required to consider when balancing the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

British Coal Corporation v Keeble [1997] IRLR 336, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (Southwark London Borough v Afolabi [2003] IRLR 220).

Robertson and Bexley Community Centre (trading as Leisure Link) 2003 IRLR 434CA - there is no presumption that time should be extended to validate an out of time claim unless the Claimant can justify the failure to issue the claim in time. The Tribunal cannot hear a claim unless the Claimant convinces the Tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.

Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640 - the "such other period as the employment tribunal thinks just and equitable" extension indicates that Parliament chose to give the tribunal the widest possible discretion. Although there is no prescribed list of factors for the tribunal to consider, "factors which are almost always relevant to consider are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent".

Conclusions

19. The issues between the parties which fell to be determined by the Tribunal were

set out above. We have approached some of the issues in a different order but set out our conclusions on each issue below:

<u>EQA, section 13: direct discrimination because of race, religion or disability</u>

20. It is clear to us from the claimant's evidence at the Tribunal hearing that he holds a genuine and strong belief that he has been discriminated against in particular because of his race (although in some specific cases where this was alleged, we were not satisfied that the claimant genuinely believed this). We also accept that the claimant held a genuine belief that he was disabled, and this disability played a part in the respondent's decision making on the element of his claim that relates to this protected characteristic. The claimant was less resolute on his contentions that religion played a part where it is said to, and we do not accept that the claimant genuinely believed that the reason for the treatment complained of was his religion. In any event, in all instances for us to reach the conclusion that the claimant has been subjected to such discrimination, there must be evidence, although it is possible that evidence could be inferences drawn from relevant circumstances. A belief, that there has been unlawful discrimination, however strongly held is not enough.

21. In order to decide the complaints of direct discrimination, we had to determine whether the respondent subjected the claimant to the treatment complained of (which is set out at paragraphs 1.1.1 to 1.1.25; 2.4.1 to 2.4.3 and 3.1.1 to 3.1.5. of the List of Issues above and then go on to decide whether any of this was "less favourable treatment", (i.e., did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances). We had to decide whether any such less favourable treatment was because of the claimant's race, disability or religion (as pleaded for each particular allegation) or because of race, disability or religion more generally.

22. We applied the two-stage burden of proof referred to above. We first considered whether the claimant had proved facts from which, if unexplained, we could conclude that the treatment was because of race, disability or religion. The next stage was to consider whether the respondent had proved that the treatment was in no sense whatsoever because of race, disability or religion. We also had to determine whether the allegations were presented within the time limits set out in 123(1)(a) & (b) of the EQA and if not whether time should be extended on a "just and equitable" basis. We have considered first the substance of the complaints, before returning to the issue of time limits and whether we have jurisdiction to consider the complaints. We set out below our conclusions on these matters for each allegation listed in the List of Issues above with reference to each paragraph number whether the allegation is listed:

<u>Allegations of direct race discrimination (section 13 EQA)</u>

<u>Allegation 1.1.1 - 2018 to January 2019: Not paying for the claimant to sit an exam/get a professional qualification/MD101 Course until January 2019</u>

23. As per our findings at para 9.56, the claimant was not permitted to take the MD101 course. However the claimant has not met the first stage of showing a prima facie case that this was discrimination, nor indeed provided any credible evidence that there was any less favourable treatment because:

23.1. We accepted the explanation of the respondent that this was not a course suitable for or aimed at the claimant.

23.2. There is no evidence to suggest that any other employee in the same situation as the claimant i.e., not a line manager who was not the claimant's race would have been treated differently

24. The claimant has not proved primary facts from which the Tribunal could conclude that the complaint was because of race, we do not find that this shifts the burden of proof to explain the reason for the treatment. Even if the burden had shifted it, the respondent would have discharged that burden as the reason the claimant could not take the MD101 course was because he was not a manager and so not eligible. This treatment was not because of the claimant's race or race more generally. This allegation of direct race discrimination is dismissed.

25. We have also considered the wider allegation that the respondent did not pay for the claimant to sit an exam/get a professional qualification until January 2019. We refer to para 9.18 and 9.19. The claimant took the CCT Web Application exam (which was paid for by the respondent) on 26 January 2017 but could not take the next stage of this exam, given his scores in the written exam. The respondent also arranged funding for the claimant to take the CISSP qualification and to retake his expired CRT qualification in July 2018 (see para 9.53), but the claimant chose not to take these up. This allegation is not established on the facts on the balance of probabilities and is also dismissed.

Allegation 1.1.2 - 1 May 2020: The claimant being told by DA that "nothing lasts forever"

26. At para 9.110 we found that it was SP that said words to this effect. However we found that the comment was made in the context of discussion of the respondent having changed as an organisation. We could not see any less favourable or even any detrimental treatment here at all, nor could we see how any such comment was connected to the claimant's race or race more generally. This complaint is dismissed.

Allegation 1.1.3 - 13 May 2020: The claimant being paired up with people with whom he had previously had issues.

27. The claimant was on 13 May 2020 and thereafter paired with various different employees on projects including MM (para 9.109); GBH (para 9.114); MF (para 9.140); TJ (9.142) and VR (9.144). There is no evidence that the claimant had any previous issues with these named individuals. The claimant did not provide the respondent with details of those employees with which he did not wish to be paired because of previous issues. This allegation is not made out on the

facts. In any event, no evidence was presented, nor could we infer from our findings of fact that any decision as to who to pair the claimant with was influenced by his race. We accepted the respondent's contention that allocation of pen testers to particular projects depends on availability, capacity/workload, particular skills, whether someone has security clearance for an account (see para 9.11). It is not related to race. This allegation of direct race discrimination fails.

Allegation 1.1.4 - 13 May 2020: Being told to email a senior person on the account for PEN testing opportunities and being "blasted" for asking in email response by MP.

28. See para 9.111. The claimant was not blasted by MP in this e mail so the allegations fails on the facts. This was a standard business interaction with no criticism and was not passive aggressive in tone. There is no less favourable treatment and no connection at all with the claimant's race. This allegation is dismissed.

Allegation 1.1.5 - 19 May 2020: In a Black Box assessment, RC complaining the claimant should be coming in from a specific IP address.

29. See para 9.112. This was nothing more than a general business instruction made to the claimant and others regarding access on day-to-day work matters. There is no less favourable treatment and no connection at all with the claimant's race. This allegation fails.

Allegation 1.1.6 - 20 May 2020: Not signing the Claimant off for Mentor badge.

30. See para 9.113. DA did not sign off the claimant's application. However, we conclude that the claimant has not met the first stage of showing a prima facie case that this was discrimination, nor indeed provided any credible evidence that DA treated him less favourably than an actual or hypothetical comparator on the grounds of race. We conclude this for the following reasons:

30.1. We accepted the explanation of DA as to why the claimant's application for his mentor badge could not be signed off by her.

30.2. This explanation was eminently plausible and in accordance with the requirements to achieve the mentor badge in the respondent's policy.

30.3. There was no evidence that any other employee who had submitted an application with the same issues as the claimant's (i.e., not meeting the badge criteria) would have been treated any differently.

31. Therefore, as the claimant has not proved primary facts from which the Tribunal could conclude that the complaint was because of race, we do not find that this shifts the burden of proof to explain the reason for the treatment. Even if the burden had shifted it, the respondent would have discharged that burden. This treatment was not because of race. This allegation is dismissed.

Allegation 1.1.7 - 22 May 2020: Being paired with GBH on Project Y and being "ghosted" by GBH when the claimant asked for his results.

32. See para 9.114 and 9.115. There was a period of time between 30 and 31 July 2020 when GBH did not respond to the claimant's messages about the sharing of findings to be put into a report. However, the context of the messages explains why this took place and we found that they clearly show that GBH was not responding as he was unsure how to do so and was awaiting instruction from BM as to how to handle the situation and had been told not to respond. No evidence was raised, nor can we make inferences that this was done because of the claimant's race. We cannot see anything in our fact finding either directly or by inference which suggests that there was any other reason why this took place, other than what we have found in the facts above. This allegation is dismissed.

Allegation 1.1.8 - 25 May 2020: A telephone call with VN, who kept referring to "black-listing". This was around the time of the George Floyd murder.

33. See para 9.116. We have concluded that this allegation is not made out on the facts as alleged by the claimant and any use of the word 'blacklisting' or 'black' in any interactions with VN was entirely innocuous and descriptive. We found that this was a contrived allegation by the claimant as a way to bolster his own case, made after the event. This claim is dismissed.

Allegation 1.1.9 - 27 May 2020: Failing to revert back to the claimant on his Checkpoint Review for 2019 until the meeting on 24 September 2020.

34. See para 9.117. There was a delay in dealing with the claimant's checkpoint review. Moving on to whether this was less favourable treatment on the grounds of race, we conclude that the claimant has not proved any facts which firstly show that there was any less favourable treatment or from which, if unexplained, we could conclude that the treatment was because of race. We accepted the explanation as to why the delay took place. We cannot see anything in our fact finding either directly or by inference which suggests that there was any other reason for this. This complaint therefore does not succeed.

Allegation 1.1.10 - 15 June 2020: Rejecting the claimant's holiday at the last-minute.

35. See para 9.120. This allegation is not made out on the facts as the claimant's holiday request was not rejected. This complaint is dismissed.

Allegation 1.1.11 - 16 June 2020: Trying to off-board the claimant from the Client C and Client L accounts, and the claimant's manager saying he should not question leadership.

36. See paras 9.108 and 9.118. The claimant was offboarded from these two accounts and we found that DA said to the claimant that allocation to clients was a matter for management (we did not find a specific comment saying that the claimant should not question leadership was made). The next question is

whether the claimant was treated less favorably because of his race in this regard. The claimant has not been able to establish any element of less favourable treatment for this allegation. We cannot see how this standard business process for taking employees off security clearance for accounts they were no longer working on was in any way less favourable treatment and we conclude that any other employee in a similar situation as the claimant (who was no longer working on a particular account and not required to do so) would have been treated exactly the same way. We accepted the explanation of the respondent as to why this took place. There is nothing to suggest that race played a part in the decision to off board at all in this matter. This complaint is dismissed.

Allegation 1.1.12 - 1 July 2020: Sending a report for QA and being told it was the wrong template by CL and BM. This was the claimant's first internal project since his return from sick leave.

37. See paragraph 9.122. We conclude that the exchange that took place between the claimant and RC was operational, polite and reasonable. There was no less favourable treatment and there is nothing to suggest that there was any connection at all to the claimant's race in what was done by the respondent. This complaint is dismissed.

Allegation 1.1.13 - 2 July 2020: being given 2 days for a re-test by BM (Project) when the claimant believed the job would take longer.

38. See paragraph 9.124. We conclude that there was no less favourable treatment at all in this exchange about timescales between the claimant and BM. There is no evidence that race played any part in anything BM said or did in relation to this matter or that any other pen tester who had responded the way the claimant did to a request for timescales would have had any different sort of response. This claim is dismissed.

Allegation 1.1.14 - 21 July 2020: Being told off by BM for sending out a report directly to the client instead of QA, sending out a report without authority and mentioning a project name.

39. See para 9.125. We found that the claimant had been admonished by BM for sending out a report without it being QAd and we also accepted the evidence of the claimant that he was not aware at the time that he sent the report out that he should QA it. We have therefore gone on to consider whether this was less favourable treatment on the grounds of race, we conclude that the claimant has not proved any facts which firstly show that there was any less favourable treatment or from which, if unexplained, we could conclude that the treatment was because of race because:

39.1. BM reached the view that the claimant had sent a report to the client despite having been instructed to the contrary and we conclude that this is why he was admonished.

39.2. There was a further message from another manager instructing the claimant

to send the report from QA which again backed up why BM decided to tell the claimant off for not doing so.

39.3. There had been issues around ownership of reports/QA/credit for work which had arisen with the claimant before which were also likely to have informed BM's decision to raise this as a problem with the claimant.

40. We cannot see anything in our fact finding either directly or by inference which suggests that there was any other reason for this other than the genuine belief of BM that the claimant had not acted in accordance with his instructions. This complaint therefore does not succeed.

Allegation 1.1.15 - 24 August 2020: RC aborting a job of the claimant's; The claimant explained on 18.8.21 that he considered that this amounts to race discrimination because he was the "only Asian in the group", the Group being "X Force Red".

41. See para 9.131. This allegation is not made out on the facts pleaded in that the job was not aborted, just moved and then corrected when RC had realised his mistake. We were not satisfied that the claimant had adduced any evidence to suggest that this was either less favourable treatment or on the grounds of his race. The claimant says he is the only Asian in the Xforce red, but this is only the claimant pointing to his race and then to something that happened to him but cannot point to anything which suggests that this is less favourable treatment nor to the "something more" which might suggest that the actions of RC were racially motivated. This claim is dismissed.

Allegation 1.1.16 - 2 September 2020: The claimant was told by NW to only share a report via Box,

42. See para 9.132. However, the claimant has not proved any facts which firstly show that there was any less favourable treatment at all in what took place or from which, if unexplained, we could conclude that the treatment was because of race. We accepted the explanation as to why the claimant was told to share his report in the manner he was and was not copied in on a subsequent e mail from NW. It is also self-evident from the correspondence itself (which shows a reply all to an e mail chain which did not initially include the claimant). We cannot see anything in our fact finding either directly or by inference which suggests that there was any other reason for NW's actions. This complaint therefore does not succeed.

Allegation 1.1.17 - NW was favoured over the claimant, and the case was closed by CS.

43. See 9.133. For similar reasons to the allegations of 1.1.16, this complaint does not succeed. There is no evidence that race played any part whatsoever in the way that CS or NW handled this relatively mundane work interaction or the subsequent complaint about it. We concluded that the claimant had created an ulterior motive for an entirely innocent day to day interaction with individuals who had very little dealings with him. There is simply no evidence that race

played any part in the motivations for what NW or CS did. This claim is dismissed.

Allegation 1.1.18 - 22 September 2020: Being told by BM that his report was password protected, sending an email copying in the claimant's manager, making comments on Trello, humiliating the claimant in front of the client.

44. See 9.1.34. We found that these communications which involved RC (not BM) were purely operational maters about access to a document and did not involve RC humiliating the claimant at all. There was no unfavourable treatment let alone any evidence that any other individual would have been treated in a different manner had this situation arisen with them. There is no evidence that the claimant's race played a part at all in the way RC addressed this minor matter with the claimant. This claim is dismissed.

Allegation 1.1.19 - 24 September 2020: At the Checkpoint Review Meeting, by TJ marking the claimant down and telling the claimant he walked out on a job.

45. See paras 9.135 to 9.139. In relation to the substantive complaint that the claimant was marked down in his 2019 checkpoint review by BM, we have considered whether the claimant has shown any less favourable treatment in the awarding of grades by BM and whether the claimant has shown that the decisions to award him the grades given was in any way related to race. We conclude that he has failed to do this. BM's explanations were clear, cogent and were supported by the data set out in the documentary evidence and our own findings of fact about issues that had arisen in the previous calendar year. We were satisfied that BM's actions were not related to the claimant's race. For these reasons, this complaint also fails.

Allegation 1.1.20 - 19 October 2020: At a Checkpoint meeting, TJ ignored information sent by the claimant to him, and failed to send the claimant a report with his findings after the meeting.

46. See 9.142 to 9.143. This allegation is not made out on the facts and is dismissed.

Allegation 1.1.21 - Not promoting the claimant/delaying the claimant's career progression.

47. This appeared to be a fundamental and substantial part of the claimant's problems and complaints with the respondent and is an allegation which runs right through the facts of this claim almost from the start of employment. We take full account of the claimant's vehemently held beliefs that the managers were acting in a racist manager by not promoting him. We have no doubt that the claimant's feelings on this were genuinely held on the basis of lived experience of racism which we do not doubt in any way. However, as a Tribunal we must look at evidence, and on the basis of the evidence we heard, we are not able to make any findings of fact either directly or by inferences which suggest that race played any part in promotion decisions which would shift the burden of proof. We conclude this for the following reasons:

47.1. We refer to our findings of fact at paras 9.4 to 9.6 about the process for achieving promotion at the respondent which we were entirely satisfied were in place and applied throughout the claimant's employment.

47.2. The claimant first raises the issue of being promoted with BM in December 2016 after approximately a year of employment (see para 9.22). He raises this again and again with managers (paras 9.28; 9.33; 9.50; 9.54; 9.60; 9.92. However, we have also found that the respondent's managers provided him with information about how to progress his career (paras 9.22; 9.33; 9.39; 9.47; 9.54; 9.60; 9.98).

47.3. The claimant identified a number of comparators of a different race to him who were promoted, and we have addressed in our findings of fact what we determined the reasons for these promotions was at paras 9.14; 9.32; 9.34; 9.35; 9.42; 9.62; 9.76, which was based on unchallenged evidence of BM in the main. The claimant has not been able to show that race played a part in any decision to promote any comparator over him to challenge this evidence.

47.4. The claimant was never put forward for a promotion panel, but we also note that the claimant never prepared a further promotion presentation after he was told to park this and wait for the new system at the end of 2016 (see para 9.22). This seems to us be a highly relevant factor in a promotion process which requires employees to be self-motivated and to take responsibility for their own career progression. To have not prepared and submitted to any manager a PowerPoint presentation outlining his case for promotion was a highly significant factor in why he was not ultimately promoted.

47.5. We accept the submission of the respondent that the claimant had unrealistic expectations of his own progression from the start of his employment and throughout and his contention that by the end of 2017/early 2018 he should have been promoted by at least 4 bands and be carrying out the role of a grade 10 associate partner did not seem to be based in any realistic assessment of the respondent's processes or the claimant's abilities.

47.6. We heard of examples of Asian employees at the respondent progressing to the very highest levels of the organisation (see para 9.7) which is directly contrary to the suggestion that the organisation is racist towards Asians. The respondent is a global company with very many different races of employees working at every level and it was not plausible or logical that those who were Asian were being excluded from advancement on the grounds of their race.

48. In general terms, the claimant's case is akin to the issue raised in the Madarassy case that the claimant has only been able to point to his race and subjective complaints about his treatment but has not been able to show any causation.

49. Dealing with the specific allegations under this complaint in turn:

- *Deliberately marking the claimant down in his Checkpoint review (2019) and delaying his Checkpoint review since May 2019.*

50. See para 45 and our conclusions on this allegation as pleaded with respect to allegation 1.1.9 which apply here in the same way. See also findings of facts on this issue at para 9.135 and conclusions at para 23 above.

- *Not paying for the claimant to sit an exam/get a professional qualification/MD101 course until January 2019.*

51. The same conclusions on this issue as set out at para 36 above about allegation at 1.11 also apply here.

- *CH informing the claimant in 2017 that he would never be considered for progression.*

52. This allegation is not made out on the facts alleged (see para 9.25)

- *June 2018: the claimant enquired about a Band 10 role reporting into CH and was told the role was filled on 4 June 2018.*

53. Para 9.49 above contains our findings on this allegation. We were satisfied with the explanation of the respondent as to why this would not have been a suitable role for anyone at the claimant's grade as this was a grade 10 position, four grades higher than his current grade. We conclude that the claimant has not met the first stage of showing a prima facie case that this was discrimination, nor indeed provided any credible evidence that CH treated him less favourably than a hypothetical comparator on the grounds of race when informing him (correctly) that the role had been filled. This complaint fails.

    Allegation 1.1.22 - In 2016 the claimant says that he put a package together, as required by the respondent in order to progress his career. claimant says that the usual process was for the package to be presented to a board. the claimant alleges that BM said that he should park the issue and that he (BM) would look into it the following year.

54. See findings of fact at para 9.22. It is not disputed that BM told the claimant to park his presentation. We also found that the reason for this was because the respondent's system was changing and therefore any packages completed under the previous system would not be accepted. The claimant has not been able to show that any other employee in the same situation would have been treated differently in the situation of having prepared a presentation in a system that was about to expire. Therefore, as the claimant has not proved primary facts from which the Tribunal could conclude that the complaint was because of race, we do not find that this shifts the burden of proof to explain the reason for the treatment. Even if the burden had shifted it, the respondent would have discharged that burden.

Allegation 1.1.23 - the following year, 2017, the claimant moved into the C-cell team as part of the X force rating team. The claimant got in touch with CH and asked him to consider the claimant for career progression. The claimant says that CH said that he would never consider the claimant for progression.

55. See findings of fact at para 9.25 and our conclusions at para 52 above. This complaint is dismissed for the same reasons.

Allegation 1.1.24 - The claimant says that in 2018 he applied for several positions and wrote to the operations manager but did not get a reply one of them was for a managing consultant position within X force to which he received no reply.

56. See para 9.38. The allegation that several positions were applied for which he did not get a reply to is not made out on the facts. We also find at 9.49 that the claimant did not apply for the managing consultant position in October 2017 but contacted CH about this by e mail in June 2018 (when the role was filled). This allegation is not made out on the facts and is dismissed.

Allegation 1.1.25 - The claimant says that in 2018 he asked his manager (DA) to prepare him for promotion but the manager said that she could be reading feedback all day long, And did not help him.

57. See para 9.60. This part of the complaint is not established on the facts on the balance of probabilities. This complaint is dismissed.

EQA, section 13: direct discrimination because of disability and EQA, section 15: discrimination arising from disability

58. The first question to determine when considering a complaint of disability discrimination is whether the claimant had a physical and/or mental impairment that meets the definition of disability within the meaning of section 6 EQA at the relevant times and in particular, did the condition have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities, that lasted or was likely to last, for 12 months or more. The claimant relied upon the conditions of stress, depression and anxiety. The claimant said he was diagnosed with the impairments sometime in 2016 and suggested he was a disabled person from this date. The respondent accepted that the claimant was disabled due to depression and anxiety from 1 July 2020 but does not accept that the claimant was disabled due to stress at any material time. It is not in dispute that as of 1 July 2020 the claimant was suffering from an impairment i.e., depression and anxiety that was having a substantial adverse effect on the claimant's ability to carry out day to day activities which was long term.

59. As the first allegation of disability discrimination that the claimant makes is said to have taken place on 23 June 2020 and the last on 5 August 2020, the Tribunal has confined its fact finding on this matter to that relevant time and we have firstly considered whether the claimant was a disabled person between 23 June and 5 August 2020. We have concluded that he was a disabled person as of 23 June 2020 and remained so on 5 August 2020 as a result of mixed

anxiety and depressive disorder. As per our findings of fact at 9.123 above, the claimant attended an appointment with Dr Vishal Agrawal, a Consultant Psychiatrist on 1 July 2020 and at this appointment was diagnosed with mixed anxiety and depressive disorder. This is clearly an impairment and the claimant received confirmation of his diagnosis on 1 July 2020 (with it not being in dispute that the claimant met the criteria for being a disabled person from this time). However we also conclude on the balance of probabilities that the claimant was likely to have had this impairment and effects of this impairment, just over 1 week earlier on 23 June 2020. The claimant had by this time been referred for an assessment under his private health insurance and it is highly unlikely that the position would have been any different had the appointment taken place on or around 23 June 2020. We are therefore satisfied that the claimant was also a disabled person as a result of anxiety and depression on 23 June 2020 and 5 August 2020 when the purported acts of disability discrimination are said to have taken place.

60. The next issue for us to determine is whether the respondent had actual or constructive knowledge that the claimant was a disabled person within the meaning of section 6 EQA, at the material times. This is a different question and requires the respondent to have had actual or constructive knowledge of all the elements of the definition of disability. The claimant considered that the respondent should have known he was disabled from 2016 (see para 9.20). The respondent accepted it had knowledge of the claimant's depression/anxiety (and also his disability) from 9 December 2020 only when it was provided with a copy of the occupational health report. Once again as the first allegation of disability discrimination that the claimant makes is said to have taken place on 23 June 2020 and the last on 6 August 2020, the Tribunal has confined its fact finding on this matter to those dates applying the guidance in the case law referred to above.

61. As of 23 July 2020, we accept that the respondent had not been provided with any medical evidence which confirmed that the claimant had been diagnosed with anxiety and depression. However the respondent did have knowledge of other matters relating to the claimant's health at around this time:

61.1. The claimant had been absent from work on a number of occasions. ring his employment with the claimant for a "stress related reason". At page 1938 we saw the claimant's sickness record which showed that since March 2017, there had been 10 different sick notes which recorded this as the reason for absence. The claimant had recently returned from a length period of absence between 7 November 2019 and 30 April 2020 (see para 9.108).

61.2. On 14 February 2019 the claimant informed OH that he had a mental health problem, and his mental state was not good (para 9.69).

61.3. On 18 February 2019 the claimant emailed GD, RS and AS and stated that he had a mental health problem (para 9.70).

61.4. On 17 June 2019 he told AT he had a mental health problem, and AT

informed DA, mentioning erratic behaviour (para 9.81).

61.5. On 19 July 2019 in an appeal letter the claimant again made a comment about having a mental health problem (para 9.88).

61.6. On 18 September 2019 the claimant informed MT that he was suffering with mental health issues and made reference to ending his life. This caused MT to be concerned and urged the claimant to contact his GP, use the EAP or be referred for OH screening (para 9.95).

61.7. On 7 November 2019, the claimant wrote about being constantly stressed, paranoid and burnt out (see para 9.104).

61.8. On 18 December 2019 when the claimant was off sick, he emailed GD to tell him about a mental health issue and an illness and CB then provided him with details of support and the OH referral process (para 9.106).

61.9. On 5 January 2020 the claimant informed GD that he was having counselling (para 9.106).

61.10. On 3 February 2020 he informed DA that he was being seen by Birmingham Healthy Minds (para 9.106).

61.11. On 27 July 2020 he informed CB that he had been for counselling and had obtained a medical report and was referred again to an OH adviser (para 9.128).

62. The claimant's erratic and irrational behaviour had also been a cause for concern for some time. Concerns were noted by AT on 17 June 2019 (para 9.81); the claimant was observed by GD on 4 November 2019 as being emotional and that he was concerned about the claimant's state of mind and suggested he contact the EAP (para 9.102).

63. We have firstly considered whether the claimant had actual or constructive knowledge of disability as of 23 June 2020. We conclude that the respondent by this time was aware that the claimant was suffering from some sort of mental health impairment and was receiving treatment for it. It was aware that the claimant had taken significant periods of absence from work and that he was behaving in an emotional and irrational manner whilst at work during 2019 before his period of absence. This had been a state of affairs that had been going on for some time as of 23 July 2020. Whilst we cannot reach a conclusion that there was actual knowledge of the claimant being disabled on 23 June 2020, we are satisfied because of all the information set out above, that the respondent had constructive knowledge at this date. it is important to remember that an employer must do all they can reasonably be expected to do to find out if a worker has a disability, and just because there is no actual medical diagnosis confirming the situation, they are not expected to close their eyes to their own observations and experiences and what the employee themselves is telling them,

64. Having reached those conclusions, we have gone on to consider each of the acts relied upon as direct discrimination/discrimination arising from a disability and set out our conclusions on each below:

Allegation 2.4.1 - 23 June 2020: Claimant being told by SP (with whom DA agreed) "you were taken off the project because you went on sick leave" - and SP saying that the claimant could not return to the project because he had just come back from sick leave; The claimant says that in addition this is discrimination arising from disability and that the "something arising" was his sickness absence;

65. In the first instance, we are very clear that this allegation relates to the claimant being told by SP on 23 June 2020 about being taken off the project and not being allocated to it. The allegation does not concern (and we have not considered as it was not in the List of Issues) the actual decision to take the client off the project and not allocate it to him on return. This was not a decision made by SP or indeed DA in any event. We did not hear evidence on this matter and have not made findings of fact. We have confined our fact finding and so conclusions to the specific allegation specified in the list of issues. We refer to our findings at para 9.121 above that the claimant was told he was taken off the client C project because he was absent on sick leave, but we did not find as a fact that the claimant was informed that he could not return because he had just come back from sick leave. The claimant was told that he had been taken from the project when he was on sick leave and the project now had its full complement of pen testers allocated to it so was not being allocated to it again.

66. We have gone on to consider whether this was less favourable treatment and whether SP made this statement because of the claimant's disability. It appears to us that this factual statement was made in relation to needs of the project itself and availability of a pen tester. The claimant has not produced any evidence to suggest that any other employee who had been absent for a period of time (but not because of disability) would not be provided with the same information about allocation to a project. This appeared to us to be an entirely logical statement which was primarily about whether the claimant had been available for a project when he was absent (he wasn't) and whether he was now being allocated to that project (he wasn't because there was no need for further pen testers). There is no evidence to suggest that any other employee in the same situation who was not disabled would have been treated differently. The claimant has not proved primary facts from which the Tribunal could conclude that this statement was made because of disability, we do not find that this shifts the burden of proof to explain the reason for the treatment. Even if the burden had shifted it, the respondent would have discharged it. This treatment was not because of the claimant's disability or because of disability more generally. This allegation of direct disability discrimination is dismissed.

67. We have also gone on to consider the complaint made about this incident under section 15 EQA and have asked ourselves whether the treatment was because of something arising from the claimant's disability, namely the claimant's sickness absence. The first aspect of the statement i.e., that the claimant had been taken off the project because he had been absent on sick leave is

something that could be said to have been because the claimant had been and just returned from sick leave. The second element which relates to the needs of the project now is not in our view something that relates to the claimant's sickness absence, but the requirements of the client at that particular time. However fundamentally the making of these statements was not unfavourable treatment at all. SP was explaining to the claimant why he was not assigned to a particular project. He could not have been working on a project when he was absent from work on sick leave. The claimant is well aware of this. Therefore, we cannot see how a comment of this nature could possibly be regarded as unfavourable treatment.

68. Even if we are incorrect on our conclusions on this, it appears to us that informing the claimant of the reasons why had been in the past and was being allocated and not allocated to projects was entirely legitimate in terms of normal day to day communication with an employee who had returned from sick leave and was therefore a legitimate aim. We went on to consider whether SP's actions were a proportionate means of achieving that aim by considering whether it was an appropriate and reasonably necessary way to achieve those aims and whether something else could have been done instead balancing the needs of the claimant and the respondent. We conclude that the discussions were taking place as part of the return-to-work process following the claimant's return from long term sick leave and were entirely appropriate and designed to assist the client in understanding what projects he would be undertaking moving forward which was necessary. It does not appear to us that there was a different way this information should have been communicated and this was balanced and appropriate. The complaint of discrimination arising from disability is for all these reasons dismissed.

Allegation 2.4.2 - 5 August 2020, CB at OH asking the claimant to talk to the person who has caused him the problem and asking the claimant to talk about his problems with OH; The claimant has been directed to provide further details if he is claiming discrimination arising from disability, see order. • The Claimant alleges that "discrimination arose as a consequence of the actions of Cindy Blood".

69. Our findings of fact on this allegation are at 9.128 above. CB informed the claimant during an exchange of correspondence that OH referrals had to be authorised by the line manager or someone within the business. We found that she did not say the claimant had to talk about his problems with OH but merely providing the information about this service. This allegation is partly made out on the facts, so we have gone on to consider whether the treatment because of the Claimant's disability. The claimant has not been able to establish any element of less favourable treatment for this allegation. We cannot see how informing the claimant about the OH arrangements and that these had to be authorised by line management was in any way less favourable treatment and we conclude that any other employee in a similar situation as the claimant, namely who had just returned from long term absence and who was requesting OH support (who was not disabled) would have been treated exactly the same way. We accepted the explanation of CB as to why this took place. There is nothing to suggest that the fact that the claimant was disabled played a part in

the decision of CB at all in this matter. This complaint is dismissed.

70. We have gone on to consider whether CB made the comments because of something arising from the claimant's disability and we accept the contentions of the respondent that the claimant's case as pleaded on this point is misconceived and cannot succeed. The actions of CB cannot be matters arising from the claimant's disability. This complaint is also dismissed.

Allegation 2.4.3 - 5 August 2020, DA not sending consent to access medical report to Medigold ; The claimant clarified on 18.8.21 that this is said to be direct discrimination only.

71. Our findings of fact on this allegation are at para 9.130. There was a delay in processing the claimant's OH referral, which is unfortunate. However we cannot see how this is said to be less favourable treatment because of the claimant's disability. The claimant has not met the first stage of showing a prima facie case that this was discrimination, nor indeed provided any credible evidence that DA treated him less favourably than a non-disabled person who had submitted an OH form, when she delayed sending it to OH. The explanation of DA was clear, convincing and eminently plausible. Therefore, as the claimant has not proved primary facts from which the Tribunal could conclude that this was because of disability, we do not find that this shifts the burden of proof to explain the reason for the treatment. Even if the burden had shifted it, the respondent would have discharged that burden. This allegation of direct disability discrimination is dismissed.

EQA, section 13: direct discrimination because of religion/belief

72. As with the other allegations of direct discrimination, we have considered whether the conduct took place and then gone on to consider whether it was because of religion/belief in the same manner as above. Dealing with each allegation in turn:

Allegation 3.1.1 - Being required by BM to work in pairs with employees with whom the claimant did not get along when the claimant asked to work alone, following his return to work between May and October 2020 (the claimant says this continued into November 2020 after his claims were lodged)

73. We refer to our findings of fact at para 9.109 above and our conclusions at para 27. The claimant did not put to BM that any form of treatment as regards pairing him with people was because of the claimant's Muslim faith. On the basis of the evidence we heard, we were not able to make any findings of fact either directly or by inferences which suggests that religion played any part in what BM did in relation to this allegation which would shift the burden of proof. The burden of proof test at stage one is not met, and this allegation of direct race discrimination does not succeed.

Allegation 3.1.2 - 22 May 2020: Being paired with GBH on Project Y (the GTS Project) and being "ghosted" by GBH when the claimant asked for his results, causing the client to be aggressive on the call on 23 May 2020 (saying the

claimant had not shared results)-on the same day as Eid.

74. We refer to our findings of fact at para 9.114 and 9.115 above and our conclusions at para 32 above on the allegation of race discrimination arising out of the same facts. For the same reasons we do not conclude that any actions of GBH were because of the claimant's religion or belief. In addition, we note on this allegation, that the main substance of this complaint is that this took place on the same day as Eid, hence the claimant connecting this with his religion/belief. However, as we fact found that these interactions took place on 30 July 2020 (not the date of Eid) the apparent basis for the claimant believing the treatment was because of his religion is even more remote. This claim fails and is dismissed.

Allegation 3.1.3 - 16 October 2020: Having a meeting request sent two hours before a meeting, with the meeting taking place during Jummah prayers and ignoring and belittling the claimant at the meeting; The claimant alleged on 18.8.21 that it was CL who carried out the matters complained of.

75. See para 9.140. We did not find that CL ignored or belittled the claimant on a call, so this part of the allegation falls away. We did find that CL scheduled a meeting to take place during the time when the claimant wanted to attend Jummah prayers. However we entirely accepted CL's explanation for the reason the call was scheduled at this time. We were not able to make any findings of fact either directly or by inferences which suggests that religion played any part in what CL did which would shift the burden of proof. We conclude this for the following reasons:

75.1. We found that CL did not know that the claimant was a Muslim and did not know that he attended Jummah prayers on Fridays between 1-2 pm.

75.2. Her explanation for why the call was rescheduled was logical, clear and entirely consistent with the contemporaneous documents.

75.3. The claimant did not ask for the call to be rescheduled or mention that he had any issues with unavailability

76. The claimant points to his religion and the fact that a call took place at a time when he wanted to carry out religious observance but cannot point to the "something more" which might suggest that the actions of CL were in any way motivated by his religion and the evidence points to the contrary. The burden of proof test at stage one is not met, and this allegation of direct religious discrimination does not succeed.

Allegation 3.1.4 - 22 October 2020: Rude and aggressive slack exchange with the person with whom the claimant was working on testing (VR), a Checkpoint Review and Report, including VR saying the claimant was only finding low risk issues. VR is Asian but of different religion to the claimant.

77. Our findings of fact on this are at para 9.144. We found that VR was not aggressive or rude in any way during the slack exchange relied upon. This was

a standard business exchange and entirely innocuous. This allegation is not made out on the facts. The claimant does not seem able to be able to point to anything to suggest that VR was in any way religiously motivated other than pointing out that VR is also Asian but a different religion to him. This does not pass the threshold of shifting the burden of proof to the respondent as there is no evidence at all of a religious motivation to these actions. This allegation is dismissed

Allegation 3.1.5 - The claimant said there was a general issue of NB and others requiring him to attend meetings at 1pm on a Friday when it was known he would attend Prayers.

78. This allegation fails on the facts as other than the allegation in relation to CL (and the same conclusions as we set out above about allegation 3.1.3 applies to this allegation) there was no evidence of an occasion when this took place. This complaint is dismissed.

79. Accordingly, all the claimant's complaints of unlawful discrimination because of race, disability and religion/belief made against the respondent under section 13 EQA and the allegations made under section 15 EQA all fail and are dismissed.

EQA, section 13: Harassment claims

80. The claimant also makes complaints of harassment relating race. In order to determine these complaints, we needed to decide whether the claimant was subject to unwanted conduct of the type described; then determine whether the conduct was related to race. We are then required to consider whether the conduct had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. Dealing with each of the allegations in turn:

Issue 4.1.1 - Allegation that JS called C a "fucking Indian" twice on a call with CP and C and hung up on C

81. Our findings of fact on this matter are set out at para 9.72-9.74. For the reasons set out there we do not find that the alleged comments were made. Therefore, as the conduct relied on did not take place, these claims can go no further, and this complaint of harassment is dismissed.

Issue 4.1.2 - Allegation that CP said "I thought you guys were expert in breaking into vaults"

82. The facts behind this allegation were made out (at least in part) as we found at para 9.71 that CP did say "*I thought you guys were experts in cracking open systems"* which we accepted was unwanted by the claimant. The next question is whether the conduct is related to race. We were entirely satisfied that from the context of this exchange, the reference to cracking open systems was a

reference to the claimant's work of a pen tester, coming as it did in a conversation about getting access to a secure system. There is no reference to the claimant's race either express or implied. We conclude that the use of "*you guys*" relates to pen testers of which the claimant was one. It is a key component of harassment under section 26 EQA that it has to relate to the protected characteristic. This comment was not related to or on the grounds of race. Therefore the harassment claim of the claimant must fail on this ground alone. It is not necessary to go on to answer the remaining questions as to whether the conduct was unwanted, what its purpose or effect is. In any event our view is that this conduct could not be said to have the purpose that is required, and we also doubt that given the findings of fact and the evidence of the claimant even at its highest, that it had this effect.

83. The complaint of harassment against the respondent accordingly fails and is dismissed.

Issue 4.1.3 Allegation that AT said "some Indian name I can't remember who" on a call with the claimant taking place on 17 April 2019

84. Our findings of fact on this matter are set out at para 9.78. For the reasons set out we do not find that the alleged comment was made by AT. We found that there was a loose comment made criticising the offshore (Indian) team, albeit we could not find on the balance of probabilities that it was AT that said this. We conclude that what was said was not related to race but was about inter team frustration about the offshore team. We accepted that the claimant perceived these comments to be derogatory and interpreted the criticism of offshore colleagues as one more generally made towards Asian people, but we do not conclude that this was objectively the case. In any event our view is that this conduct could not be said to have the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment and we also doubt that given the findings of fact, that it could even have said to have had this effect on the claimant.

Issue 4.1.4 - Allegation that PB ignored the claimant's work and favoured White people such as NB, P Stephenson and A Bellis)

85. The facts behind this allegation were made out (in part only) as we found at para 9.64 that PB did reply to the claimant to say he would not provide ACE feedback to him. We were unable to make any more general findings that PB ignored the claimant's work or indeed favoured any other employees including those mentioned. There is no reference to the claimant's race either express or implied in the interaction between PB and the claimant on this occasion. We entirely accept the submission that PB did not provide feedback as he had never met the claimant and did not have enough involvement in his work to be able to comment. There is simply no evidence of a racist motivation in any way. Therefore the harassment claim of the claimant must fail on this ground alone as it is not related to race. It is not necessary to go on to answer the remaining questions as to whether the conduct was unwanted, what its purpose or effect is. In any event our view is that this conduct could not be said to have the purpose that is required, and we also doubt that given the findings of fact

and the evidence of the claimant even at its highest, that it could even have said to have had this effect.

Equality Act, section 27: victimisation

86. The claimant also complains of victimisation. The claimant relies on a number of matters as amounting to protected acts ("PAs"), a large number of which are disputed as being protected acts by the respondent. We set out below our conclusions on each of the matters relied on said to be a PA:

5.2.1 - grievances of 11.1.18 re PB/DA

87. Our findings of fact on this issue are at para 9.66. This grievance was raised on 16 January 2019 (not 11.1.18). Although we did not find that the claimant's complaint of racism against PB was genuine, taking the complaint as a whole we were satisfied that the claimant had a genuine belief at this time that he was being discriminated against. Although there may have been little basis for this belief it was genuinely held and articulated in the claimant's e mail. Therefore, this qualifies as a PA under under section 27 (2) EQA. We are not able to conclude that the claimant made this particular allegation in bad faith within the meaning of section 27(3). This was a PA.

5.2.2 – complaint of 1.10.18 re NB

88. Our findings of fact are at para 9.59. This relates to a complaint made on 1 October 2018. We found that the claimant did not hold a genuine belief that he had been discriminated against and we find this was more a complaint about the nature of interactions than a firm allegation of discrimination. Moreover, the claimant merely speculates about the reason for the treatment here and does not "make an allegation" that there has been a contravention of the EQA. None of the other circumstances which amount to a protected act under section 27 (2) EQA apply. Even if this could be said to have been an implied allegation of discrimination, we conclude that it was made in bad faith as the claimant did not honestly believe that discrimination had taken place. We conclude that the claimant did not do a PA on this occasion.

5.2.3 - a grievance in March 2019

89. Our findings of fact at para 9.75 were that this was not a genuine complaint about discrimination because the claimant fabricated the substance of this allegation that a racist comment was made. The claimant made this particular allegation in bad faith within the meaning of section 27(3) as the claimant did not act honestly when making this complaint. This was not a PA.

5.2.4 - 27 February 2017: Claimant's grievance

90. Our findings of fact at para 9.27-9.29 were that although this grievance was confused and adopted a scattergun approach, that the claimant did have a genuine belief that the reason he was being treated differently was because he was Asian. Therefore, this qualifies as a PA under under section 27 (2) EQA.

This was not made in bad faith within the meaning of section 27(3). This was a PA.

5.2.5 -11January 2018: Claimant's grievance about PB/DA (referred to at 5.2.1)

91. For the same reasons as set out at para 87 above in relation to PA 5.2.1, this was a PA.

5.2.6 - 14 May 2018: Claimant's email to CT

92. Our findings of fact at para 9.43 were that claimant did have a genuine belief that he was being discriminated against and victimised. Therefore, this qualifies as a PA under under section 27 (2) EQA. This was not made in bad faith within the meaning of section 27(3). This was a PA.

5.2.7 - 29 May 2018: Claimant's email to the respondent's grievance coordinator task ID forwarding on the email at 5.2.6

93. For the same reasons as set out at para 92 above in relation to 5.2.6, this was a PA.

5.2.8 - 4 June 2018: Claimant's grievance appeal

94. Our findings of fact at para 9.48 were that claimant held and communicated a genuine belief that he was being discriminated against. This qualifies as a PA under under section 27 (2) EQA. This was not made in bad faith within the meaning of section 27(3).

5.2.9 - 1 October 2018: Claimant's grievance about NB (referred to at 5.2.2)

95. For the same reasons as set out at para 88 above in relation to 5.2.2, this was not a PA.

5.2.10 - 16 January 2019: Claimant's email to GT at 21:36

96. For the same reasons as set out at para 87 above in relation to 5.2.1 and para 91 for 5.2.5, this was a PA.

5.2.11 - 18 February 2019: Claimant's email to GD and RS

97. Our findings of fact at para 9.70 were that, on balance we have found that there was within this lengthy exchange, a genuine complaint of discrimination. This was therefore a PA.

5.2.12 - 18 February 2019: Claimant's email to AS, forwarding email at 5.2.8

98. For the same reasons as set out at para 97 above in relation to 5.2.11 and para 91 for 5.2.5, this was a PA.

5.2.13 - March 2019: Claimant's grievance (referred to at 5.2.3)

99. For the same reasons as set out at para 89 above in relation to 5.2.3, this was not a PA.

5.2.14 - 3 June 2019: Claimant's grievance appeal

100. Our findings of fact at para 9.80 were that although we found that the complaint as regards CP and JS was not genuine and so make the same findings as regards this element of the appeal, we also found that the claimant's complaint against AT was genuine (albeit misconceived) so in relation to this element of the appeal we do find that the claimant was making a genuine complaint of race discrimination. This was a PA.

5.2.15 - 19 July 2019: Claimant's grievance appeal

101. Our findings of fact at para 9.88 were that the claimant at this stage was genuinely of the belief that he was being discriminated against, so this was a PA and not made in bad faith.

5.2.16 - 25 July 2019: Claimant's email to AB and CT

102. Our findings of fact at para 9.90 were that this e mail did contain a genuine complaint about discrimination which the claimant by this stage was entirely convinced was the case. It appeared to have gone beyond the original incidents now to a wider complaint of discrimination which the claimant was entirely convinced of. This was not made in bad faith and was a protected act.

5.2.17 - 14 August 2019: Claimant's grievance.

103. Our findings of fact at para 9.92 were that the claimant held a genuine belief that he was being discriminated against. This was a PA and not made in bad faith.

5.2.18 - 18 September 2019: Claimant's email to MT.

104. Our findings of fact at para 9.95 were that the claimant held a genuine belief that he was being discriminated against. This was a PA and not made in bad faith.

5.2.19 - Claimant's ET1's in 2020: 22 July, 12 October, 19 October, 19 October, 19 October, 25 October

105. The respondent concedes that these are PAs.

106. The claimant made the PAs as are alleged at 5.2.1; 5.2.4-5.2.8; 5.210-5.2.12; and 5.2.19. We must then consider whether the claimant subjected to the claimant to the detriments the claimant alleges took place because he made these PAs. We have firstly considered whether in respect of each allegation the conduct alleged took place before considering whether it was because of the PA. The provisions on the two-stage burden of proof set out at Section 136

EQA apply equally in victimisation cases. Once a claimant establishes a prima facie case of victimisation, the burden of proof shifts to the respondent to show that the contravention did not occur. To discharge the burden of proof, there must be cogent evidence that the treatment was in "no sense whatsoever" because of the protected act. The claimant makes 3 allegations of detrimental treatment. Dealing with each in turn:

Issue 5.4.1 Issuing the claimant with a First Written Warning in November 2019

107. This can only relate to the PAs that took place before November 2019, so not PA 5.2.19. GD was aware of a number of these PAs having occurred at the time he imposed the first written warning. Our findings of fact on the reason for the imposition of the written warning are at para 9.101 above. We have applied the two-stage burden of proof. We conclude on this question that the claimant has not shown a prima facie case that he was given a written warning because he had done the PAs to shift the burden of proof to the respondent to explain that it was not. We conclude this several reasons.

108. We accepted the evidence of GD in its entirety as to reasons that the written warning had been issued. We found that GD was a credible witness whose account of why he decided to issue a warning was entirely plausible, convincing and supported by the evidence he had before him.

109. We also noted that GD took steps throughout to try and assist the claimant to progress and to try and deal with the claimant's concerns. He was in general friendly and supportive of the claimant in his career at the respondent.

110. The respondent had by this stage had to deal with a large number of incidents involving the claimant clashing with colleagues and also making what appeared to them to be unsubstantiated allegations of racism.

111. The allegations against the claimant that led to his written warning being issued were investigated thoroughly by JF who had no involvement in any of the issues the claimant had in the past. The claimant had the opportunity to make any representations on this during his disciplinary hearing which he did.

112. The claimant did not appeal against his written warning at the time.

113. Concerns had been raised by various senior managers about the effect that the claimant's allegations were having on his colleagues. We refer to our findings of fact at 9.84 and 9.85 regarding the complaint made by SM. This accusation of racism which was made against a colleague who the claimant had only a fleeting interaction with and who was making an entirely routine request was entirely inappropriate and unreasonable. To make such a serious allegation against someone on such flimsy evidence was a serious cause for concern. Similar worries about the effect of making such allegations without foundation were raised by other employees and in particular AB during the course of her findings on his appeal.

114. We also accept the submissions of the respondent that if the claimant had

wanted to punish the claimant for making PAs, it could have imposed a much more severe sanction than it did.

115. Therefore, as the claimant has not proved primary facts from which the Tribunal could conclude that the treatment was because of making the protected acts, we do not find that this shifts the burden of proof to explain the reason for the treatment. It is clear from the bare facts found above what the reason for the written warning was. Even if the burden had shifted it, the respondent has clearly discharged that burden. The matters that led to the disciplinary action were separable from any PA that may have occurred at the same time as the conduct the claimant was disciplined for. The allegation of victimisation therefore fails.

Allegation 5.4.2 - that the claimant's grading in his Checkpoint review for 2019 (carried out on 24 September 2020) was because he had done a PA

116. Our findings of fact on this issue are set out at paras 9.136-9.138. We also conclude that the claimant has also not been able to persuade us that there is anything to suggest that the scores he was given had anything to do with him having done a PA. The evidence we have seen and which we went through in our fact finding and accepted is very clear as to why each grade was given. We also accept the respondent's submission that in the main and other than the 2019 review, the claimant's scores in Checkpoint reviews remained consistent throughout his employment. See paras 9.23; 9.39; 9.67 and 9.117. This is despite the fact that the claimant had done protected acts from as early as 27 February 2017 (PA 5.2.4). The checkpoint reviews that were carried out after this PA we carried out by BM and DA both of whom were the subjects of complaints that we have found to be PA. However, there was very little change in the scoring. The one dimension that might be said to have more relevance making PAs was 'Responsibility to Others" and the claimant had received the same rating for that dimension throughout his employment both before and after having done PAs. We were satisfied that again the issues with how the claimant was interacting with colleagues that led to the ratings he achieved were entirely separable from any PA that may have occurred at the same time as the issues with colleagues arose.

Allegation 5.4.3 - Allegation that 5 employees were laughing and joking and smirking around C on a call. These employees were Alistair Atterbury-Thomas, Matthew Wheeler, Chris Keeler and/or Chris Kelly, Jonathon Haywood and Jonathon Sykes

117. The facts behind this allegation were not made out so this allegation of victimisation goes no further (para 9.103).

Jurisdiction

118. Although none of the claimant's complaints of discrimination have been held to be successful, we have also considered the issue of limitation as this was identified on the List of Issues. The claimant presented his first claim for discrimination on 22 July 2020. The early conciliation period was 17 June 2020

to 15 July 2020. Given these dates, any complaint about something that happened before 25 March 2020 is potentially out of time unless they formed part of a continuing act ending with an act of discrimination presented in time. Since we have not found any of the complaints to be well founded on their merits, these cannot form part of a continuing act of discrimination with any later acts.

119. The Tribunal, therefore, only had jurisdiction to consider allegations if it is just and equitable to do so in all the circumstances. Considering the relevant law above, as the evidence had all been collated, presented and heard by the point we were considering the in time issues, by this stage, it caused no prejudice to the respondent for us to consider the out of time allegations with those that were in time, so we exercised our discretion to do so.

Employment Judge Flood

21 June 2022