



EMPLOYMENT TRIBUNALS

Claimant: Mr A Adu

Respondents: 1. The Department for Work and Pensions
2. Mr D Ireland
3. Mr R Abdul-Khalik

Heard at: Manchester

On: 21 – 25 February 2022
23, 24 and 25 August
26 August 2022
(In Chambers)
17 October 2022
(In Chambers)

Before: Employment Judge Feeney
Mr M Smith
Mrs P Owen

REPRESENTATION:

Claimant: In person
Respondents: Mr P Smith, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's claims of direct race discrimination and victimisation fail against all three respondents and are dismissed.

REASONS

Preamble

1. The claimant by a claim form dated 10 May 2020 brought a claim of direct race discrimination and by a claim form dated 11 February brought a claim of victimisation. The issues were identified in a case management discussion on 21 January 2021 by Employment Judge Hodgson as follows:-

Issues

(i) Direct discrimination

In placing the claimant on an informal performance action and learning plan (PAL) did the first and second respondents treat the claimant less favourably than a person who was in materially identical circumstances to the claimant but who was not black (the named comparator being Mr MacSween) who was white and had not been put on a PAL and had no performance issues as the claimant relied on the fact that he intended to establish he had no performance issues.

(ii) Victimisation

In grievances lodged on (1) 17 December 2019 and/or (2) 13 February 2020 did the claimant do a protected act and/or did the first and third respondents believe the claimant had done or might do a protected act within the meaning of any of the definitions provided by Section 27(2) of the Equality Act 2020.

(iii) Did the first and third respondent subject the claimant to a detriment by deciding to place him on a formal PAL because the claimant had done a protected act and/or because the first or third respondent believed the claimant had done or might do a protected act.

Claimant and Respondent's Opening Submissions

2. The claimant stated that the respondents placed him on an informal PAL on the basis that his performance was deficient when in fact this was incorrect and there was no problem with his performance. The only conclusion being that it was because of his race or colour that they placed him on the informal PAL.
3. In respect of victimisation the claimant claimed that the 17 December 2019 and 13 February 2020 grievances were both protected acts which caused the claimant to be placed on a formal PAL by the first and second respondent, i.e. Mr Abdul Khalik and he also claims he was actually put on this formal PAL.

Respondent's Submissions

4. The respondent stated that they had evidence to show that the claimant was struggling and that the informal PAL was a well-used tool to assist employees in achieving the performance required. The claimant was supervised by a number of people and therefore it was not simply one person making the decision that he was not "scoring highly enough".
5. In relation to the victimisation claim the respondent denied that the grievances were protected acts, particularly the 17 December 2019 one and that if they were, there was no connection between those and the decision to put the claimant on a formal PAL which was well documented, if indeed the claimant

was put on a formal PAL. The reference to the Formal PAL was made before the third respondent knew that the claimant had made a second grievance. The claimant's suggestion that the third respondent put him on the formal PAL after surreptitiously viewing his grievance of 13 February on his (the claimant's) computer (a grievance which was against the second respondent) was pure speculation) and was denied by the third respondent.

Witnesses

6. The Tribunal heard from the claimant himself and for the respondent Mr Rashid Abdul Khalik (RAK) the claimant's immediate line manager, Mr Daniel Keith Ireland (DKI) overall manager of the command that included the claimant's section, Claire Hault (CH) who undertook the investigation into the grievance of 17 December and Ms Sharon Wright (SW) who was the line manager of Mr McSween who was the claimant's comparator. There was a witness statement from Elaine Ockwell but it was agreed that as the claimant had no cross examination for her, her witness statement would simply be accepted in evidence. We have used initials for other workers who did not give evidence and were not parties to the claim.

Credibility

The claimant was mainly credible ,the main issue was the claimant's interpretation of the evidence and the introduction of irrelevant matters. We did not accept that he was unaware of the 80% accuracy mark nor that he said 'probably' to FP as the claimant did not shy away from using language alleging racism. Accordingly we did not accept all of his evidence preferring the respondents. RAK and DKI were cross examined for a long time and we found them open and candid. Also Sharon Wright's evidence although at first it was not expected to be important we found it was in corroborating the processes normally used and being evidence coming from someone not involved in the minutiae of this case.

7. There was an agreed bundle plus an additional bundle with the claimant's documents included. Some documents relating to Mr McSween and other potential comparators were added during the hearing.
8. The claimant began working for the respondents in a temporary role in Preston on 29 October 2018. On 18 March 2019 he transferred to TDMO (debt management) in Salford and completed his probation satisfactorily on 28 April 2019. Between March and June 2019 the claimant undertook a training period under Mike Walkinshaw (MW). During that training period the Tribunal accept that the claimant was advised that an 80% accuracy threshold was required in respect of post 90% threshold of accuracy in respect of telephony. The claimant's training was completed on 16 June and he was allocated to Team 29 which was under RAK's management.
9. On beginning in the team and following training a period occurs which is described as consolidation when the individual is putting their training into

practice and they are under supervision and their performance is monitored. This usually lasts between 2-4 weeks. Between July 2019 and October 2019 it was RAK's evidence that he gave feedback to the claimant regarding his underperformance, The respondent's documentation showed that the claimant's accuracy for calls which were reviewed between July and November were July 71.1 %, August 79%, September 91.4%, October 100, November 97%.

10. RAK did not give the claimant written feedback, but we accept his evidence that he brought to the claimant's attention that he had had two months where he did not meet the standards of call accuracy. As a result RAK gave the claimant formal 'CQM' feedback (call quality management) for five calls he had personally listened to in July, and he arranged further training for the claimant. Whilst there was no specific record of this feedback it was clear from subsequent evidence that RAK had arranged further training for the claimant. RAK initially said that he had advised the claimant that Florence Palmer (FP), a fellow Team Leader would be arranging further training for him however later he agreed he might not have made it as clear to the claimant as he should have done that this was the purpose of meeting with FP, and FP was under the impression that the claimant was aware of the reason for their meeting. We accept that the claimant was not aware of the full background to FP's meeting with him and therefore he was surprised at its content. RAK was due to go on holiday the day of the meeting.
11. On 9 August 2019 FP held a meeting with the claimant and proposed a training plan. RAK had not left for his holiday at this point but although he was present in the office, the claimant did not raise any concerns with him. Prior to this the claimant had been assessed by Mike Jones (MJ) and Agnes Fakoya (AF) and they reported that he was resistant to feedback and felt like he did not need any training.
12. Whilst RAK was on holiday Ms Hannah Royle was covering his role and she attended a meeting on 16 August with the claimant and FP (this was reported by FP when she was interviewed following the claimant's grievance in December 2019).
13. At the meeting on 16 August FP confirmed (in her later grievance interview) that she made clear to the claimant the 80% accuracy expected (although in fact on telephony it was 90%). She showed him his scores and the claimant had asked what was wrong with 60%. She stated that the claimant had been difficult during this meeting and had said that as she was not his manager, she should not be having these conversations with him. FP advised that RAK had asked her to have that conversation with him and asked whether they could continue, and the claimant said no and confirmed he did not want further training
14. At this point the claimant said she was picking on him personally and that the conversation about any performance issues should be with RAK. FP advised

that she was having a lot of discussions with the other people in the same situation.

15. FP said why did he think she was picking on him personally and the interview records "he shrugged his shoulders again and replied the colour of my skin", she records, "I found this highly offensive but was determined to finish the meeting". The claimant said he did not say this but rather that he said, "probably the colour of my skin". The claimant confirmed he did not want any further training and the meeting ended. The interview recorded that Ms Palmer did not want to make an official complaint. Her involvement after that was limited and she recommended Nadine Stephens (NS) and Paul Wheeldon (PW) to work with the claimant in the future. She recorded that the feedback from MJ was that even though he had created a crib sheet for the claimant the claimant was still getting a lot of matters wrong. FP also recommended Abu Sayed Ahmed (ASA) as a mentor for the claimant.
16. On 28 August 2019 the claimant sent a letter emailed to RAK headed "For the Record". This was a three page letter complaining about how he had been treated since July. He said in this that there had never been any negative feedback from RAK, nor that RAK had told him he was going to send him on re-training with another team manager due to under performance (i.e. FP). He described the meeting on 16 August as "adversarial" with a view to "ostensibly bullying and intimidating me in order to justify that my performance has been very abysmal to warrant retraining, I was so savaged to the extent that both Florence and Hannah I should not be making any mistakes/errors at this stage by tearing apart the same performance checks you have had with me and the consolidation check where corrections have already been made on cases worked." He continued "In the meeting I impressed it both on Florence and Hannah that I only knew you as my line manager without any relationship/contact with Florence Palmer and that you never discussed/raised any performance problems with me and/or that you were sending for retraining as you have been positive in my performance and with good performance score". In response to this both FP and Hannah Royle advised that I should raise this, my point, with you as they were not in a position to answer on your behalf as you will be in a better position to explain why and how you did not mention any performance problem with me to warrant the involvement of the third party that I did not have a relationship with. He considered that he was being deliberately picked on, that his career at the DWP was being jeopardised and he was being exposed to unhealth office politics and that he would become a marked person. He also continued to complain that he was in RAK's team and therefore should not be subject to any supervision etc by the team leader of another team. The email was also copied to DK1.
17. RAK replied succinctly "in response to your query I believe there has been some misunderstanding during previous meetings and I feel any future meetings need documenting for all parties concerned". This was following the claimant's querying why Heather Wragg (HW") was going to be present at

a meeting that was arranged for 28 August for Hannah Royle to give feedback to him.

18. DKI also replied saying “thanks for your email I have had a read of this and checked in with Rashid, he has advised me that he has acknowledged your letter and will see you at some point over the next day or so hopefully the concerns you have raised can be satisfactorily addressed. If there is anything further you need me to do please let me know, if not I will ensure that I receive an update from Rashid once your meeting has taken place”.
19. The feedback meeting with Hannah Royle and HW took place on 28 August. We do not have a record of this.
20. There was then a meeting between the claimant and RAK to discuss his email of 28 August on 29 August to discuss the email. We know this because RAK headed up an email which he sent to the claimant on 30 August as a summary of the meeting on 29 August:
 - (i) you stated your main concerns were that I did not make you aware of any performance issues and the need for further training.
 - (ii) as to why another team leader got involved or tried to manage your training performance needs –
 - You stated I never discussed any performance issues with you and I should have approached you in the first instance. I gave your CQM feedback in July with a score of 71% (benchmark being 90%) furthermore you were receiving feedback from both checkers regarding errors from your consolidation sheet on a daily basis for several weeks. After receiving feedback from the checkers I decided I wanted to provide further support for you to help you with reducing the errors as your work was still being checked at 100% for five weeks after your training. As an example, other trainees who had just completed their training were on 100% checks for a minimum period of four weeks as part of the Trafford standard procedure.
 - In order to reduce the impact and resources being exhausted to continue with the 100% checks I approached Florence Palmer and asked for her help. As Flo manages all aspects of training for Command 5 regardless of how long the person may have worked at DM she was the best person for this task. At no stage did Flo interfere or target you in any way. Her sole intention was to simply provide additional support under my instruction. Due to time restrictions and the urgency of the required support for you I asked Flo to manage the support being put in place because I was going on leave for nearly three weeks and she agreed to put measures in place to help you with your training needs in my absence.

- Florence Palmer was a Deputy HEO for our commander Daniel's recent absence. She could make decisions that might affect our command and in that capacity she is not only my line manager but also yours.
- You mentioned at no stage did I tell you about the need for more training and how I had made arrangements for experienced agents to sit with you whilst you were taking calls. As I was not present in the meeting between you and Flo I can only assume there may have been some misunderstanding about how the support was going to be provided and apologise for things not being made clearer.
- I explained to you how from time-to-time other managers may ask you to complete certain tasks and how you might have to ask them to authorise refunds and action team leader call backs for you. This could include being given tasks, checking your letters and refunds etc. As you are required to complete DM level 3 qualification Flo will be managing this for you and will be your Work Base Assessor (WBA) therefore when you are ready for unit assessment she will need to directly liaise with Flo regarding this. On Command 5 we work as a big team and other line managers will step in from time to time to manage you so we can achieve our end goals.
- You asked about how C Command was measured and what criteria was used to score the calls. I agreed to send you the CQM on definition documents for you to get a better understanding of the process (email sent 29 August 2019).
- We have mutually agreed any dips on your performance or high error rates should be discussed between us and I will bring this to your attention ASAP. Your consolidation sheet will continue at 100% checks for a further week. Upon which I will then review it to see whether the checks should be reduced to 50%. I will update you with my decision in a week's time and will continue with CQM and feedback and other checks to monitor your progress.
- We also agreed if I feel there is a requirement for areas to improve on or to re-train on them I would email you or have a meeting with you to discuss my proposals and the reasons for it.
- Finally, going forward I asked if we could put this incident behind us and to start afresh with which you agreed.
- As I explained to you in the meeting as a management team we would have and have taken the same steps in supporting agents fresh out of training regardless of who they are. I hope you agree with the points I have outlined and highlighted, please confirm via

email you are content to positively move forward with the above proposals”.

21. On 30 August the claimant replied it would be desirable to include:-
- (a) you never admitted to having discussed any performance dip problem with me at any time;
 - (b) you admitted that you are my only manager who should be responsible for my performance/appraisal;
 - (c) you admitted that you never discussed any need for training with me at any time;
 - (d) you claim that not scoring 90% does not mean or imply I am doing badly as more experienced staff too don't always score 90% of their performance checks.

Other Observations

- At no time during the meeting did you mention and/or discuss DM Level 3 qualification with me including Florence Palmer being my work base assessor (which I don't have any issue with), I just need to put the record straight and factual.
- You claim that I am no longer on consolidation period because consolidation period lasts only two weeks and that recording my work on consolidation sheets is for the purpose of recording my work.
- You never mentioned to me during the meeting that Florence is also my line manager but rather confirmed that you are my line manager”.

22. RAK then replied on 4 September in relation to each of the claimant's points.
- (a) I did provide feedback to you in your July CQF feedback and the checkers were providing feedback for your checks regularly.
 - (b) This point I agree with. I did address the need for time/situations where other managers will step in in my reply email to you.
 - (c) Again, I do agree with you and it was discussed during our meeting and in my email I advised you of the requirement of circumstances of why I asked another team leader to manage and support your training needs.
 - (d) Agreed. I did discuss this point with you and also confirmed 90% was the benchmark, CQM scores are averaged out over a twelve-month period for your end of report/appraisal.

In response to some of the other points I have raised:-

- (i) Florence Palmer being my WBA. This was not discussed during our meeting however going forwards I am assuming you are aware of having further interactions with Flo and potentially other deputies/team leaders.
 - (ii) Consolidation period lasts only two weeks. There may have been some misunderstanding on my part in explaining this process, consolidation varies from person to person and can be anything from two to four weeks and would continue until your accuracy improves/increases.
 - (iii) *Florence is also my line manager.* I have already addressed this point. All measures put into place are to support you in your development and to help reduce errors and increase accuracy. As there is a notable improvement in your accuracy I am looking to reduce your checks next week to 50% then stopping the checks altogether from the week after provided your accuracy remains at the same level. Again this will be reviewed and I will let you know. I hope this clears any misunderstanding you may have had and we can work together as a team”.
23. The claimant replied on 6 September and said “in relation to the meeting on 29 August RAK needed to include that:-
- (i) you admitted at the meeting you never mentioned and discussed my performance dip problem with me at any time.
 - (ii) since you admitted not to have discussed Florence Palmer being my work based assessment meeting then it should not be part of a note of the meeting However, please can I have a copy of the note taken by Heather Wragg at the CQM with Hannah”.
24. RAK replied saying that he had noted the points and he would be sending a copy of the minutes when available.
25. On 1 November the claimant started work on post alongside doing some work on phones. PW was selected to help with the claimant’s training as the claimant had not worked any post since completing his entrant training. The feedback via Ms Palmer from PW was that when he was giving any guidance the claimant’s response would be “I already know this” and that he was not receptive. Ms Palmer also said that she had observed the claimant fall asleep on the sofa in the reception area leaving PW abandoned at his desk and she also reported that the claimant had been placing completed items of post in the out tray without having them checked by whoever was the suitable supervisor on the day. PW was upset at the claimant’s reaction to his feedback and he discontinued being involved in the claimant’s training at that point

26. The claimant believed that he was now under surveillance however this was at most two incidents when FP was on the same shift as the claimant, and it is more plausible that FP was as a manager alerting RAK to some potential issues. She explains in her interview for his grievance was that she would have tackled these directly other than the fact she felt uncomfortable following the accusation of racism.
27. RAK subsequently had a discussion with the claimant regarding whether how he thought things had gone, he said he thought things had gone fine and that he did not think he would need further training. He advised him the need to have letters checked by a manager before they went out, but he did not speak to him about the allegation he had fallen asleep or that he appeared to be bypassing the checking procedure.
28. RAK stated that when a new entrant carried out post work the work would be checked by other members of the team and it would be 100% checks by way of consolidation sheets which were Excel spreadsheets where the mentor could provide feedback in respect of each piece of work identifying errors and highlighting good practice. There was a separate process called Post Quality Management (PQM) for post. RAK said this had not applied to the claimant as he was subject to 100% checks instead. The claimant did not agree with this and believed that the consolidation sheets should not have been used to assess his performance rather PQM should have been used and therefore in effect that the subsequent actions taken were illegitimate. However, we accept RAK's evidence that it was perfectly acceptable to use consolidation sheets rather than the PQM process at this stage in the claimant's development. PQM was more suitable to an appraisal situation.
29. After PW was taken off training SH and Hannah Royle took over checking the claimant's work. We find he did know that there was a requirement for 80% accuracy before the 1 November. The claimant would later say that he did not know this however there was evidence from Mike Walkinshaw (MW) that he was told this during training and also from FP that she told this to him in the meeting on 16 August.
30. The claimant's mentors reported that he would not agree with any verbal feedback in respect of errors and therefore they resorted to not speaking to him about the errors in order to avoid arguments and disputes but would just record it on the consolidation sheet.
31. RAK stated that they did not have all the consolidation sheets for the relevant period, they had them for 1 to 22 November but due to changes in Windows 10 many folders were now inaccessible. Also, it became clear at some point that some of the feedback sheets were overwritten when a member of staff used an existing sheet to record feedback for the claimant. The claimant raised this as a ninth grievance in March 2020 and it was investigated by the Counter Fraud section. They found that the paperwork was hard to decipher, and they could not readily identify the errors the claimant referred to. On speaking to RAK, he advised that ASA who had been assessing the claimant

since 16 December 2019 (and we would observe generally marked the claimant's work correct) had reused consolidation sheets. The investigator accepted this explanation and recommended that in future each consolidation sheet should be archived at the end of the week. We accept that this was a plausible explanation, in any event ASA's marking was not critical in the decision to put the claimant on an informal PAL.

32. The claimant also believed that only colleagues in his specific section should be mentoring him. We accept RAK's evidence that using multiple different individuals to check the work of new entrants was a common practice due to availability and leave and to share the workload.
33. In November Nadine Stephens (NS), Hannah Royle, Safina Hussain (SH) and Heather Wragg (HW) were all involved in checking the claimant's work and RAK would be updated daily in respect of the claimant's progress.
34. On 21 November a meeting was held with the claimant to discuss his consolidation in relation to the post and to go through processes. SH also attended that meeting, and a summary was set out in an email dated 25 November. It was recorded in an email of 28 November (page 278). This stated:-

"Further to my email below Daniel and I would like to implement more support to help you to achieve the required standard and for your consolidation to continue until you achieve a pass mark of 80%. By the end of your consolidation you should be able to action all types of post including insolvency, core post, DEA and employers schedules. To help you achieve the expected benchmark along with case activity like affordability, balance adjustments and refunds you will not be going on the phones on Monday and your consolidation is to be extended until Friday 13 December, on Thursday your late night you are to continue working post. From week commencing 16 December you will hopefully go on the phones and have somebody sat with you for the whole week to help further consolidate your training while doing the telephony role.

If, on completion of your consolidation you fail to achieve the benchmark then there will be a requirement for you to go on a PAL (Performance, action and learning plan) to further support you in achieving the 80% benchmark. For consistency purposes Heather will be supporting you through the consolidation and training period however there may be occasions due to differing work patterns when another member of staff could step in on a temporary basis to help out. If you would like to discuss any of the points above please let me know".

35. On 26 November the claimant had sent an email to SH copying RAK in challenging the validity of SH's scoring. On 30 November RAK responded to this stating that the claimant must respond to any feedback in real time (the concern seems to be that the claimant may have been seeing the error

identified and then changing the consolidation sheets so that it looked like he had acted correctly but this was never put to him).

36. On 2 December 2019 the claimant stated that he had never been told that there was a need to score 80% while on post, all the feedback he had had from RAK was that he needed to increase the number of posts worked on and he asked what went into achieving an 80% score. However, we have found the claimant had been advised of this during his training and if he had forgotten it, he had been advised of it subsequently as set out above.
37. On 3 December the claimant challenged HW's assessment of his cases. HW replied explaining the situation reiterating the fact that it was an 80% benchmark, she had pointed out that it used to be 90% but had been reduced to 80%. She pointed out that all employees had compliance checks done every month however long they had worked for the DWP. Team leaders carried out CQM and PQM checks of long-standing employees and more recent employees to ensure accuracy and that happened nationwide not just at Trafford. She also advised him that if she was not there in the morning he should start completing the post left for him rather than doing his corrections as she wished to go through his corrections together with him to prevent any misunderstanding or errors with the marking. Again, this appears to suggest that the claimant was altering the consolidation sheets and the work afterwards however this was never put to the claimant in cross examination or raised with him other than in this oblique way by HW and earlier by RAK.
38. The claimant went home with stress on 6 December however he returned the next day and RAK proposed a stress risk assessment on 11 December. On 12 December RAK confirmed a consolidation extension for a further three days from 15 to 18 December and that ASA would be sat with him to provide support and check his work on those three days. If he achieved 80% accuracy then they would consider the next steps.
39. On 17 December the claimant submitted a grievance (i) against RAK alleging bullying and harassment. There was no allegation of race discrimination in this grievance although the Equality Act was referred to in passing by way of providing a description of bullying and harassment in general. This was a lengthy grievance, and it can be summed up by this quote: "The team leader has been abusing and misusing his power to deploy non-performance issues as a veritable weapon to humiliate, disgrace, intimate, injure my self-worth and creating panicking, intimidating, threatening and uncondusive work environment for me by creating and spreading malicious non-performance allegations against me" and also that he had put him on unwarranted training. "He stated he believed that Safina Hussain had deliberately undermarked him on the instruction of Mr Khalik and that he had never mentioned the existence of an 80% benchmark to him in relation to the post. He stated that the line manager should have completed a line manager assurance document and also PQMs. He also complained that staff from other teams were being used to assess him. He also complains that Mr Khalik wrote up minutes from meetings but left out vital information. He stated at one point moreover there

is “a suspected sting operation against me within the command” and he cited that DKI had been advised he was logging out two minutes early whereas this was not queried with other staff. That he was reported when working Saturday for not having letters checked which showed he was being in effect secretly monitored.

40. CH was allocated to decide the grievance. The claimant was then off sick from 18 December to 30 December, therefore the consolidation period did not end with a discussion meeting and an assessment. The claimant was advised on 31 December that his consolidation was extended with ASA assisting on the 6 January.
41. On 2 January DKI wrote to the claimant stating, “Please continue completing the post for the rest of the week as Rashid is not in, I think he may have advised you already but if not, you now know. Please let me know if you need more post. Monday will be your last day of consolidation of three weeks (to replace the day you were absent) and ASA will continue to check your cases when he returns to work Monday 6 January so could you please continue to file and record them as previously discussed and more information will be available when advised of his scores”.
42. On 8 January DKI wrote again saying he was waiting for the final scores for the three-week consolidation period. On 10 January 2020 DKI advised that ASA had advised his score was 66.67% and confirmed an informal PAL would start on 13 January 2020. At this point RAK was absent.
43. In cross examination the claimant put the scores from certain periods to DKI and stated that they showed he had got a much higher mark than DKI had advised him, namely that from 10 December to 6 January he had scored 93.5%. This was based on 31 cases with 29 being correct. On the basis of 47 cases in that period with 6 being marked as inaccurate,(due to ambiguity in the documentation) the claimant had a score on our calculation of 87.2% which was in any event over the threshold.
44. DKI’s initial reaction was that he was advised by ASA that the claimant had not reached 80%, after further thought and consideration he stated that he believed that the claimant was looking at the wrong dates and that in any event he had to have 80% in every week. To go back to the score sheets for the weeks in question DKI said that the dates put to him in cross examination were actually incorrect. DKI’s evidence was that he had been advised by ASA of the claimant’s mark for the periods and that he had relied on the mark given to him by ASA. He had not looked at the raw data himself.
45. However, he pointed out that in any event the issue was what the mark was per week and the 80% had to be achieved per week. If the last week was 31/12 to 8 January 2020 the claimant’s result was 89% however DKI said because of office closures at over new year the end of the consolidation period was 10 January. On 9 January 2020 he had 4 out of 6 pieces of work incorrect. In addition, the first period was 12-18 December 2019 when the

claimant completed eight pieces of work and four were inaccurate so that he would fail the three weeks because this week was only 50%. However, DKI emphasised at the time he did not look at the raw data but relied on ASA's assessment. We accept his evidence on that.

46. On 10 January DKI had written to the claimant saying "post consolidation lasts one week generally and this has been increased to three weeks to support you however at week three you have a 66.67% pass mark. I have agreed that the above performance and action plan to commence from week commencing 13 January, you did achieve 100% on the last day of consolidation which is great news meaning hopefully the benchmark of 80% will be met after completion of the post part of this period. The second part of the PAL is to ensure that the CQM meets the 90% benchmark which I also believe to be achievable due to your significant period off the phones. Please read the contents, utilise available guidance and policy and raise any questions with Rashid or myself".
47. The performance action and learning plan which was enclosed with that email had an introduction which stated at one point that "the performance action learning plan must be drawn up by the line manager following consultation with the employee as soon as performance issues surface which effectively mean during the informal stage, the purpose is simply to communicate clearly and assist in remembering". It was exclusively a performance tool and not to issue concerns regarding standards of behaviour such as rudeness, bullying etc.
48. The performance plan stated that it would start on 13 January and end on 9 February. It included areas for improvement and what actions were necessary. It stated that he needed to complete 80% weekly pass rate for two consecutive weeks doing the full array of post and was expected to clear at a rate of two an hour in week one, increased in week two to three an hour dependent on the successful pass rate in week one.
49. On 10 January the claimant wrote to DKI saying he wished to appeal the decision to put him on an informal PAL. DKI responded on 11 January emphasising that this was to assist him and stating they were to have an informal meeting on Wednesday 15 January to review how the plan has been going from 13 January.
50. In addition to the performance issue DKI was also concerned about the claimant's behaviour, examples included refusing to meet with his manager to discuss work related issues, alleging that all management actions taken are bullying, being obstructive with additional training provided to the point where an experienced member of staff refused to continue to train him. Spending an excessive amount of time writing to his manager complaining about the situation, speaking to other ethnic members of staff in an African language to the exclusion of English only speaking colleagues. Generally having a negative attitude towards suggestions.

51. DKI wrote a letter on 14 January to the claimant headed “informal meeting performance and action plan (PAL) and standards of behaviour”. This said:-

“I am very concerned at the situation as it stands and the possible outcome if the situation continues so this letter highlights those concerns and associated policies. Unfortunately you have failed to make the standard pass mark of 80% for two consecutive weeks during your extended period of consolidation. As a consequence you have been put on an informal PAL which I must advise you remains in effect from 13 January 2020 and will continue as this is to support you in achieving the benchmark. This means from 13 January 2020 you will be expected to work towards requested objectives in the agreed timeframe on your PAL. There is also an expectation that there will be no conflict in regard to communication with your line manager and other people involved in this, or any other work-related process. This is a reasonable management request and the expectation and the standards of behaviour which every member of the DWP must adhere to. I also appreciate you have an ongoing grievance and you must now allow the grievance to be investigated to an outcome. Until that time there should be no conversations with anyone on this matter outside of with your trade union representative, your email of 14 January indicates you have been discussing work issues with colleagues. Under the standards of behaviour it is unreasonable and excluding to speak in another language and at your workstation, particularly when other people are around and when this is across banks of desks and/or for excessive periods, English is the professional working language of the DWP meaning you will need to converse in English unless you away from your desk or on your break from now on.

I must also advise you you are allowed time to look at guidance in response to a management instruction but this must be discussed and agreed with your team leader or appropriate manager. You had not cleared any post in over four hours of attendance at work yesterday (13 January 2020) and only cleared five pieces of post that day in total. In instances of this kind you should speak to your line manager to agree the appropriate amount of time which although negotiable would have been considerably less time than you are taking of your own accord, you also need to advise your line manager of any meetings with your trade union representative as previously advised.

I also see you have cancelled a meeting tomorrow, although you can agree to do the stress risk assessment with an agreed manager from outside of the command you must still have an informal meeting with me before you finish for your impending leave as again this is a reasonable management request. I would not require a minute taker but you could bring a representative if you so choose.

With all this being said I would like to state that my belief is that this meeting will be helpful and supportive and an opportunity to ask questions and get answers. I firmly believe you can pass this quickly and that I can help you achieve this. With that being said we have hopefully draw a line under

everything so far and we could be clear on what will be happening following your period of leave.

I await confirmation of when the informal meeting will take place before your leave”,

and this was signed by the claimant on 15 January to confirm receipt.

52. The claimant subsequently sent an email to DKI stating that:

“although you did not want me to respond to your letter of 14 January I insisted I needed to make comments to ensure effective communication and you later agreed that I should react to your letter. The summary:-

- You confirmed you are my team leader’s manager.
- You promised to provide me with documentary evidence that states 80% must be achieved during consolidation.
- You promised to liaise with Rashid on my claim that he never had any PQM with me and you claimed he told you he did.
- You promised to provide evidence from Rashid.
- I confirmed to you that I now spend much more time on guidance and policies and every case and issues since I have found that (with evidence) that the performance issue being woven around me has been adversarial with the belief that I am being deliberately marked down.
- I put to you that the PAL is a yearly performance affair and never for consolidation period.
- I confirm to you that I never discussed my grievance procedure with any staff but I had the right to discuss issues with my work colleagues. You are accepting my explanation and you agree that it is true I can discuss with my work colleagues.

53. On the same day DKI forwarded him an extract from the debt management LMA (this appears to be a description of the consolidation period) document which stated that:-

“it is mandatory for all new entrants staff to complete an LMA following completion of the relevant technical training ... the standard accuracy expected by staff undertaking LMA is 80% and the time period to complete the consolidation/LMA period is dependent upon the member of staff’s working pattern”.

54. It was then recorded by the claimant’s mentor ASA that on 15 January the claimant had only completed four cases, that he had not been to see ASA or

responded to his email asking to see him about feedback. The marking of his work had not been completed as he needed to speak to him about how he deals with post which does not have a "NINO" (national insurance number). "Hopefully after my talk with him he will be buoyed and ready to reach the level he needs to be at". The feedback then did take place on 16 January.

55. RAK then wrote to the claimant on 16 January in response to DKI promising an explanation regarding his performance and the issue the claimant referred to as a PQM. Whilst it did not specifically mention PQM, RAK explained that he had discussed with him on 1 November:

"...that PW would be sat with him to help him with post, better letter processing and other things after PW provided that training I asked you if you required further training assistance when actioning DLO and DEA three post and you confirmed there was no further requirement. At this point it was agreed you would action cases unaided and were instructed to record cases on the consolidation spreadsheet. On reviewing your consolidation stats I could clearly recognise that further support was required when actioning DLO/DEA 3 post as you did not achieve the required benchmark of 80%.

- On week one you achieved 54.29%.
- On week two was a huge leap to benchmark of 83.70%.
- On week three was 58.49%.

Two out of a three week period was significantly below the benchmark ... you sent me an email on 26 November 2019 disagreeing with the marking. I responded outlining the marking process and the national benchmark of 80% for all new trainees entrants. Furthermore, the need to check guidance in the first instance, actioning cases as requested regarding corrections and how the feedback process should work i.e. addressing issues and concerns immediately and directly with the buddy.

Following the meeting I sent you an email on 26 November regarding the next stages supporting and aiding you to try and achieve the expected benchmark required. Consolidation is normally for four weeks (*possibly a mistake for 2 weeks*) for all new entrants but it was agreed by HEO that this period would be extended to three weeks to further support and aid you in achieving the benchmark of 80%. I outlined what was to be covered during the consolidation period of initially one week, I sent an email on 28 November 2019 outlining and extended supported consolidation period in place which was supported by your HEO. I stated who would do the feedback and marking, that I would be liaising with them on what could happen if the 80% benchmark was or was not achieved. Once you completed your consolidation you were put on an informal PAL resulting from not achieving the required 80% benchmark."

56. DKI wrote to the claimant on 28 January regarding his bullet point three. He went on to deal with the other bullet points as he said that bullet points two and three had been dealt with by RAK. In relation to the other bullet points he stated:-
- I am responsible for your performance and may bring issues to Rashid's attention.
 - We discussed acceptable time spent on guidance and support of daily work and the expectation/protocols when studying for policies for other purposes.
 - I have explained that your accuracy had been good, 100% the previous day but the clearance figures were very low and to refer to the PAL. You advise you would adhere to the PAL. I also tried to explain that the process was not adversarial, that there was some issues regarding interactions that you did not like. I advised you there were other people on command 5 and in general that had supportive action taken to help them meet the required benchmarks.
 - I advised that this was all part of a continual performance anyway this was informal and it was supportive to help you achieve the standard.
 - You advised that you were speaking to other colleagues from your training group about the process you were following and that you were not talking about the grievance. There were a number of other issues we discussed but as this was an informal meeting as per the letter I passed you on 16 January 2020 it was not officially minuted. I know you wanted to advise me of some of the information in response to the points made in the letter.
57. On 3 February the claimant wrote to Elaine Ockwell (EO) requesting a meeting as he wanted to complain informally about DKI's unfavourable unfair treatment within command 5.
58. Meanwhile, the claimant's grievance number one was then investigated with various grievance meetings. The relevance is that the claimant used some of the information in the grievance meetings for cross examination as did the respondent and so we will specifically refer to or which were matters which were referred to in support of either side's case.
59. On 10 February EO recorded the matter she had spoken to the claimant about. It was clear at the Tribunal hearing that EO's evidence was not germane to the issues and therefore she did not give evidence, but the claimant confirmed that he agreed with the content of her witness statement.
60. Her email of 10 February recorded their private discussion where she recorded that one of the claimant's complaints was that DKI had drawn up the PAL document but it had been signed as if from his line manager which he felt

was fraudulent and that he wanted the PAL withdrawn as it was for a dip in performance which he did not feel he had had and that he also asserted that Daniel Ireland could not take this action it had to be his line manager.

61. EO replied that a PAL is to tackle a dip in performance and also where performance standards are not being met and it can be a formal or informal and in this case he had not been able to meet the 80% required. Therefore mentors had been put in place to guide and coach him, conversations had taken place with his line manager, with DKI and with anybody acting on their behalf. They did not have to be formal and in a room etc and that the PAL document was drawn up by DKI with input from RAK, as RAK did not have the experience having not written one before. It clearly stated, "your line manager is Rashid and the Countersigning Manager is Daniel". All of the information there is correct and none of the document goes against any kind of policy. The guidance does refer to line management action, this can also be taken by persons within the line management chain similar to you approaching me as a person within your line management chain, it can also refer to a person acting as your line manager at the time the action was taken, HR have confirmed this is a correct understanding of the policy and guidance" and she said she could discuss it with him further if he wished. DKI was also interviewed for the grievance.
62. There was some reference in his interview where he was asked about behavioural issues regarding AA which resulted in staff being uncomfortable about him and DKI agreed and he tried to advise the claimant the process was not adversarial. He was aware that Hannah Royle was uncomfortable as she had witnessed the claimant call FP a racist and she was concerned she might be subject to the same treatment.
63. On 13 February the claimant raised a second grievance, this grievance was against Mr Ireland and one of the complaints was that he was not qualified to place the claimant on a PAL as he was not his line manager and that he had never met with him to discuss individual team objectives and never made him aware of any level of performance required. The claimant stated towards the end of the grievance that now "with Daniel Ireland's PAL he has deliberately acted to discriminate and harass me by treating me less favourably in order to derail and retire my career progression and prospects due to my ethnic background and colour as black. I therefore wish to raise this grievance against Daniel Ireland for actions reasonably to be harassment of my person and discrimination because I am black". (The claimant put black in capital letters in his grievance).
64. On 13 February RAK sent a warning to the claimant on the basis of his output and accuracy. This was sent at 6 o'clock. It said:-

"I believe you are on your late today and would have started your shift around 11.30. From your time of arrival to 14.00 hours today I noticed that you did not action any post. May I remind you of the letter which was given and signed by you from Daniel Ireland which stated that any time taken on

non-call work must be agreed with your line manager. Furthermore, since your informal PAL began you have only worked 4 to 5 pieces of post on some days. Your PAL stated for the following weeks 1 – 2:

Target expectation lowered to clearance rate of 2 an hour for week one to be reviewed and increased to week two to 3 an hour dependent on successful pay rate in week one.

5 February 2020. Six pieces of post cleared.

6 February 2020. Eight pieces of post cleared.

7 February 2020. Five pieces of post cleared.

10 February 2020. Six pieces of post cleared.

11 February 2020. Seven pieces of post cleared.

12 February 2020. Nine pieces of post cleared.”

He stated:

“Your PAL also stated for the following weeks 1 to 2 to complete a minimum of 80% for two consecutive weeks doing the full array of post including any case related action. The first lot of checks have confirmed you achieved 64.29% for the first batch of marking, dates were between 9 to 14 January. I will be feeding back further results once more checks have been completed. As you are in week 4 of your informal PAL the output and accuracy are both below the required standard, if there is no notable improvement in output and accuracy the next steps will be taken which will include attending a formal meeting and then going on to a formal PAL which will be recorded on SOP”.

65. The claimant believed that RAK had seen his grievance against DKI on his computer and had therefore sent this email in reaction to that threatening him with a formal PAL. RAK denied this, in support of his contention the claimant stated that RAK sat next to him and would pass his desk often during the day, RAK stated that there was an empty desk in between them and that even if he wanted to look at the claimant’s computer he would have to stand around for a significant amount of time to work out what was on the screen and would have to do that whilst the claimant was absent. We find that the claimant’s belief is simply speculation and he has no cogent evidence to support his contention. Further, that the email accords with RAK having received the results for the first few days of the claimant’s consolidation/PAL period and also that he needed to remind him that it was not just about quality, there was a quantity issue involved in the PAL. Further the claimant as will be seen below advised him by email of the second grievance on 20 February 2020 after two emails flagging up a formal PAL.

66. On 20 February RAK sent a further letter to the claimant advising that they needed to have a meeting to discuss a formal PAL being introduced. He set out in this letter that since he had been on an informal PAL he had been on leave from 17 January to 31 January and so he was providing him with statistics for four weeks, 13 January, 3 February, 10 February and 17 February.

“The accuracy achieved was 100%, 85%, 88% and 89% so far for the last week however the average output per hour was 1.5, 1.6, 0.7, 0.63 so he said although you achieved the required accuracy of 80% your work output was below the rate of 2 pieces per hour for week number 1 and in week number 2 it should have increased to 3 pieces of post per hour as your PAL agreement, therefore as previously advised on the 13 January I am now inviting you to attend a formal meeting to discuss a formal PAL on Thursday 27 February 2020”

and he advised him he could bring his trade union representative with him.

67. The claimant replies:

“I received your letter with surprise and disbelief because at no time have you mentioned, discussed or agreed any informal PAL with me to warrant any meeting on the issue with you as scheduled, meanwhile I would like to inform you that the PAL initiated and produced by your manager Daniel Ireland is already the subject of a pending grievance and complaint, please perhaps you are not aware of my grievance as mentioned above, now that you have known it would be advisable for you to postpone the meeting until after the determination of my grievance against Daniel Ireland (who originated and produced the PAL on racial discrimination and complaint of flouting the code of conduct of the Civil Service), therefore it would be difficult for me to attend a meeting with you on the subject matter which is already in dispute”.

Therefore in accordance with this email and RAK’s evidence he only learnt about the second grievance on 20 February. We accept this – it is consistent with the evidence.

68. RAK replied:-

“It was my decision to put you on a PAL due to poor performance, Daniel Ireland only emailed you the PAL in my absence. You were informed on 10 January that if you don’t meet the expected volume of accuracy standard within your informal PAL then you would be starting a formal PAL. In response to the grievance, you have raised this is something which will continue until it reaches the outcome and does not effect the PAL process. The letter I gave you on 20 February 2020 stands that your meeting is to go ahead on a date and time as per the letter. The matter is no longer open for discussion and my decision is final”.

69. However, no meeting did take place on 27 February and the claimant had a meeting with EO regarding a complaint of breach of the DWP Codes by DKI.
70. On 4 March RAK sent an email to DKI confirming he had spoken to the claimant regarding standards of behaviour and appropriate language. This was in reference to an email the claimant had sent to Lisa Eckersley (LE) regarding changing his NVQ assessor from FP to someone else, he had stated in this "it would amount to career suicide if my assessor for the very important NVQ programme is not changed please. Kindly urgently act accordingly before the start of the programme". LE had written to RAK saying, "please can I ask you to discuss the inappropriate language used in this colleague's email. I have dealt with his request as you are aware, but I do not think the sentence below is appropriate" and she highlighted the sentence referred to.
71. On 4 March RAK confirmed to DKI that he had spoken to the claimant about this, however the claimant said he thought the language was appropriate and this is how he expressed himself. He went on to say, "you and your colleagues are making me commit a career suicide". RAK refused to respond to that and reiterated "it is not acceptable to make these types of comments and it is my duty to make you aware". He also discovered that he was not willing to attend the PAL meeting without a trade union representative and that he had still not found somebody to attend a meeting by Thursday.
72. Again on 9 March RAK wrote to the claimant stating that he was still below the agreed clearance rate of the PAL agreement. The average rate for someone working post was three to four pieces of post per hour, therefore 18 to 24 pieces of post should be cleared based on six hours. As there was no improvement in his current work output he needed to attend a formal PAL meeting on either Tuesday, Wednesday or Thursday this week which should give him sufficient time to arrange for somebody to attend with him.
73. He also advised that NS would be marking his work on the consolidation sheet. He was expected to complete any highlighted corrections at the beginning of each day and then action new cases, if he did not agree with errors found he needed to approach NS for advice and feedback. He also needed to email him with NS copied in in relation to any errors where he did not agree with the corrections suggested. RAK said he would be having weekly review meetings to ensure that he was meeting outlined expectations and stated that he expected the claimant to abide by standards of behaviour when communicating with NS whether written or verbal.
74. On 9 March the claimant submitted a grievance against SH (grievance number three).
75. On 10 March he submitted a further grievance against RAK (grievance number four) and on 10 March he sent an email to NS challenging her performance scores. He stated:-

“Hello Nadine. I have gone through all your remarks on my consolidation sheet however I wish to let you know that your checking and marking would best be described as mostly and ostensibly compromised to achieve a pre-determined agenda. If I could have been working on cases since 28 February with no one checking them and you now just started your checks on 9 March, nine days after, and you marked all the cases worked wrong under ostensibly flimsy excuses that could not be independently verified and/or proven as system change could have happened, other staff could have gone into the cases without leaving notes or even possibly removal of correct action once the cases were immediately worked. Even some of the cases were already actioned by another staff, after all I have previously worked cases correctly only for them to be marked incorrect by another checker and where challenged no response or rebuttal. To any independent and discerning observers outside of Anchorage Building of DWP and command 5 management the question that would readily come to their minds and would have been – what has changed from when another member of staff was checking my work with all cases done correctly and now immediately you were made to take over I started to get all cases wrong and incorrect”.

He then put in bold and capital letters, “I will never be cowed or subdued”.

76. On 12 March RAK wrote to the claimant attaching a document outlining the new consolidation process to commence immediately. Furthermore, he stated “after you have completed all your corrections on the old consolidation sheet Nadine will add a new consolidation sheet which you need to start using. Please confirm you understand the expectations” and he went on to remind him about the stress management plan which had never been completed following the claimant’s decision he did not want DKI to do it.
77. A performance review meeting finally took place on 17 March when the claimant’s trade union rep Craig Worsnick attended with the claimant. RAK set out a brief history of the matters which had led up to the informal PAL and then the suggestion of a formal PAL. The claimant asked RAK who had come up with the PAL and it was confirmed that he had worked with DKI to come up with the PAL. The claimant challenged him about that saying he could not have created it as he was on annual leave. RAK reiterated that he worked collaboratively with DKI to get it created. The claimant then said that who was his team leader and he challenged whether DKI could be involved in drawing up the PAL. It was RAK’s position that DKI was allowed to be involved as RAK’s manager, they were in all a management chain.
78. There was further discussion about the consolidation period and Mr Worsnick was concerned that there had been possibly no discussion with the claimant before the PAL was put in place and RAK said he would find out when the meeting took place between DKI and the claimant regarding the PAL. Mr Worsnick also suggested that weekly meetings should have taken place. RAK stated that it did not always take place because he felt uncomfortable giving AA the feedback because of the negative reaction behaviour.

Feedback was given though by the mentors. The trade union official suggested the informal PAL was redone given that it appeared there might have been some failures to follow the policy in relation to them. He stated there was no mention of quantity in the PAL however this was incorrect there was although at the time quality was the most urgent matter. There was a discussion about the 80% pass rate and RAK went through the data compiled on accuracy and clearance rates. The claimant called RAK a liar at that point and for the second time discussed confidential details from a grievance meeting.

79. The claimant then stated he would see RAK "in a higher place", he was asked to clarify this, and he was advised that the claimant would be taking this matter to an Employment Tribunal and see him there. RAK asked if the claimant was making a threat to him. The trade union official interjected and repeated that he felt the informal PAL was not done correctly and made the following comments. "Positive enablers are supposed to be included in the PAL, weekly meetings should be held which it seems they did not and there needed to be more clarity about where the figures came from that were being relied on".
80. RAK stated that the claimant did not take feedback well and questioned every comment made and questioned the level of competency of his mentor. The trade union official agreed that the claimant needed to be able to accept feedback and understand that it was to help him improve and recommended the informal PAL should be redone ensuring the focus is on quality before quantity. The meeting was closed and RAK advised that due to the coronavirus pandemic and the DWP HR instruction RAK would not be in the office for the foreseeable future so he would be handing the issue over to a nominated manager.
81. The claimant on 20 March appealed the outcome of CH's grievance (grievance number one). As the grievance is not part of the matters the claimant complains of, we have not covered its outcome in detail but suffice it to say that she did not uphold his grievance.
82. On 21 March DKI advised the claimant that for the week commencing 30 March would he continue to work with NS on post "as outlined in the document Rashid sent you". This was a list of rules on how to conduct feedback and consolidation sheets. We find this was a continuation of the consolidation arrangements.
83. On 25 March NS sent DKI an outline of the claimant's consolidation with a number of cases he had worked each day and pointing out the incorrect actions he had taken. This process was the same as had been in place since late November 2019. At the Tribunal a disagreement arose at this point as to whether the claimant had ever been put on a formal PAL firstly, and secondly what he was working on as DKI stated he believed that the claimant was working on Universal Credit mainly at this point and therefore the supervision of his work was no longer taking place.

84. DKI's evidence was that he felt it would not be fair to proceed with an informal or formal PAL given that the claimant was now mainly working on Universal Credit. The claimant disputed this however this was DKI's perception. It was agreed with EO that the process would be halted, and the formal PAL never took place. DKI was also re-tasked during the pandemic and was responsible for different employees who were in the office.
85. There was no decision at the 21 March meeting with the claimant's union present as to whether the formal PAL was going to be implemented and as RAK was no longer attending work, he did not make that decision although he did indicate in one of the grievance meetings that he was still expecting it to go ahead but he was no longer involved. We accept from DKI's evidence that later a decision was made that the formal PAL was not going to be implemented. We accept this was the position as there was no evidence of a formal PAL only of a further consolidation period. We accept DKI's evidence regarding the situation as there was no documentary evidence whatsoever of a formal PAL being introduced or discussed at any point.
86. Subsequently the claimant obtained a transfer to another team and began work there on 13 July 2020.
87. We also heard evidence from Sharon Wright, an Executive Officer in Debt Manager as the claimant had referred to a member of her team as a comparator. This was S McSween. Ms Wright stated that SM had never had a dip in performance and accordingly had not been on a PAL. She disagreed with some of the claimant's contentions as she said everybody was required to meet an accuracy of 80%. SM on his work on post was subject to this and he was also subject to a consolidation period when he started with her team after completing the new starter training. He was subject to having a buddy who carried out 100% checks on his work starting with telephony and then post. She was absent when SM started and therefore HW actually supervised that process with SM, as there were no issues with his performance his consolidation ended the records of his performance were disposed of.
88. During the hearing SW did find some random check sheets for SM and for another individual ZA which reflected the evidence she had given that SM's performance did reach the 80% standard and the claimant accepted that SM did not have any performance issues.
89. DKI gave evidence that another employee Mr McGluckian had been put on an informal PAL due to a dip on performance however there were no documents to support this however we found Mr Ireland a reliable witness and accepted that this was the case. It had always been the respondent's case that white employees were also put on PALs, this is inherently plausible and without an analysis of the proportion of staff by ethnicity put on PALs (which was not asked for and was not available) we cannot take this point any further than evidencing that the policy was applied across the board.

Other Issues

DWP People's Performance Policy

90. Managing dips in performance (page 920). The DWP's policy on dealing informally with dips in performance states that managers should check performance expectations as still relevant and outline why the employee's performance is below expectations. Consider whether it might be caused by any health factors, discuss what steps are needed to achieve the necessary standards, provide such reasonable support, coaching and advice as necessary, allow the employee to be accompanied if they prefer and then it goes on to say managers must draw up a performance action and learning plan (PAL) in all cases. If the PAL does not fully resolve the issue within a few weeks managers must apply the managing performance policy. There was guidance regarding what to discuss with employees, it also stated "you don't need to get the employee to agree with you and occasionally they may need time to reflect on what you are saying. You may need to explain that you understand they do not agree with you but on the basis of the information and evidence you have collated you have considered their response and you still have concerns". The claimant referred to case studies in this policy however all the case studies concerned people who had already been working for the respondent for some time and had met performance standards for a considerable period so it was a dip in performance. In the claimant's case it was more that the claimant never actually achieved the correct standards.

Team Performance Policy

91. It was the claimant's argument that following the introduction and subsequent roll out of a People Performance Policy in 2019 there were no agreed objectives with him that he had to fulfil, that this should have been rolled out in Command 5 by the time his work was being looked at, that this new policy meant that the procedure adopted by the respondent in performance managing him was redundant.
92. The new policy stated, "our people performance policy is being designed to reinforce our leadership priority about creating strong teams where we all contribute to each other's success for the benefit of our customers" and the heading was then Performance Expectations and Inclusivity.
- There will be clear performance expectations of each of us.
 - All team members will work together towards shared teamed objectives agreed and reviewed in regular group discussion using their different skills and ability for the team to achieve these objectives.
 - We will ensure it is clear how our team objectives fit with DWP's overall objectives.
 - We will create the conditions for success, management support, learning opportunities and appropriate resources.

- We will commit to applying our people performance policy and processes fairly and reasonably in an inclusive way which supports wellbeing and respects diversity and equality.
 - We will face up to and resolve performance issues.
93. In addition a letter of the 18 March 2019 set out by Barry Cox, Head of Debt Management said as follows:

“As you already know through national DWP communications our department is launching a new approach to people performance from April 2019, from next month everyone will start using the new one-to-one wheel to support regular conversations with your line managers ... from 2019 to 2020 reporting year everyone in the DWP will also stop using and conducting individual ratings or box marking, individual key work objectives, mid-year review, end year review. In line with the national DWP implementation approach DWP debt management will form part of trench 2 rollout which will start to be implemented from October 2019. This will allow us to work with other DWP colleagues who are moving to start the new team base approach in trench 1 from April 2019 and give us time to plan and work together to ensure we all utilise the national departmental training products that will be made available to us.... In preparation of implementation we are appointing local delivery single points of contact... I will keep you updated...”

and despite this, there was no evidence in the bundle of any further written communications specifically about dept management team performance objectives even though the claimant provided many documents himself and a point of contact was given in the letter from Barry Cox.

94. It was the respondent’s witnesses understanding via for example DKI that work had been done on drafting team objectives but that was at a higher level management to him and he could not recall any actual document being produced .

Claimant’s Submissions

95. The claimant relied on a number of matters in effect from which we could draw inferences that the real reason for the action the respondent had taken against him was because of his colour. Primarily:-
- (i) The claimant submitted that there was no proof he actually did have performance issues.
 - (ii) That there was no evidence that an 80% accuracy rate was required.
 - (iii) In relation to his comparator he did argue that no 80% was applied to his comparator however he relied on the fact that his comparator had no performance problems as the claimant alleged he himself did not have any performance problems.

- (iv) That the mentors used by the respondents particularly HW and NS were “procured agents” i.e. they were intent on marking him down as a result of instructions given by RAK and DKI.
- (v) That the informal PAL was illegitimate anyway because it was imposed by Daniel Ireland which he could not do as he was not the claimant’s line manager and it had not been agreed with him beforehand.
- (vi) That he should have been assessed using the PQM process not the so-called consolidation process.
- (vii) That no team objectives had been agreed in line with the new procedure introduced by the DWP in the relevant period therefore he could not be assessed.
- (viii) That the respondent did not follow the managing performance procedure (page 952).
- (ix) That consolidation was only for new starters and he was not a new starter.
- (x) The case studies show that the respondents did not follow policy, pages 927 to 930.
- (xi) That the informal PAL had not been agreed with him and therefore was not legitimate.
- (xii) Various inconsistencies of the respondent’s evidence i.e. that RAK did not tell him about the informal PAL and did not tell him about Florence Palmer’s role. DKI made spurious allegations against him that were not evidenced and which if true would have merited disciplinary procedures but none were ever taken.
- (xiii) That it was illegitimate for people assessing him to come from other teams.
- (xiv) That RAK saw his grievance on 13 February 2020 and that is why he accelerated the formal PAL process.

Respondent’s Submissions**(i) Re PAL**

96. This is the lowest level of performance management and occurs before you move to the performance management policies the claimant referred to which put someone at risk of dismissal. They are designed to support someone and are used fairly regularly. There were legitimate concerns regarding his performance on post. There was sufficient evidence from the consolidation process to show that the claimant was not meeting the required targets.

97. The claimant was assessed by same level peers in relation to whom there was no actual evidence they had an axe to grind against the claimant. They were from a variety of ethnic origins. He was assessed by different people at different times. It was legitimate to us people from outside his specific team as there was simply insufficient people available to limit mentoring in this way.
98. On 28 November at a meeting with RAK he was told he would be provided with a PAL and support. This is clear evidence it was RAK's decision to put the claimant on an informal PAL. DKI simply did the first draft and it was agreed with RAK. The information relied on to put the claimant on the PAL was information provided by ASA and DKI was entitled to rely on it. At the time the claimant did not raise that he had been put on the informal PAL because of his skin colour, the claimant did not put that to DKI in cross-examination.
99. The comparator was irrelevant because the claimant did have performance problems and the comparator did not and that explains the difference as to why one was put on an informal PAL and one was not. There were white comparators who were subject to the same measures for example Mr McGluckian Accordingly, there is no evidence that in putting the claimant on an informal Performance Action and Learning Plan the respondents treated the claimant less favourably and that it was because of his race, there being a white comparator who was treated the same amongst other matters.

(ii) Victimisation

Was there a protected act on 17 December 2019 and on 13 February 2020.

100. Regarding the 17 December there was no reference to any form of race discrimination in that grievance, which was against RAK, whilst parts of the Equality Act were posted into that grievance and there was no actual allegation in the complaint about any sort of race discrimination, it was not referred to in interview with the claimant either throughout the grievance.
101. The second grievance did raise the issue of the claimant's skin colour and therefore that was a protected act however it can only relate to alleged detrimental action taken after that date i.e. 13 February. The respondent says that RAK first heard about the second grievance when the claimant told him on 20 February and DKI did not learn of it until 2 March. There was a suggestion that RAK saw his grievance on his screen and therefore raised the prospect of a formal PAL on 13 February is preposterous.
102. The respondent submits that any actions taken between 17 December and 13 February cannot be victimisation as there was no protected act. If that is wrong then the respondent relies on the fact that there were good grounds for taking the action which the claimant categorises as victimisation and which were referred to in respect of what is now the detrimental i.e. the formal PAL. The only reason for moving the claimant to the formal PAL was that he did not meet the required standards.

103. In any event DKI's evidence was that the formal PAL was never implemented

The claimant's reply

104. The claimant stated that it was not true that he had called FP racist, what did he say was that she was targeting him *probably* because of the colour of his skin and if he had said that why there was no disciplinary action taken against him?

105. That he was placed under surveillance.

Mr McGluckian

106. As far as the claimant was aware, he was never put on a PAL and he sat next to him.

102 (iv) Procured Agent

107. HW and NS were marking down work which the claimant says he had already submitted and that was marked as incorrect the second time around but not the first time around He believed Heather Wragg had overwritten his work to look like he had made mistakes.

Re: NS

108. He believed she was brought in secretly because PW was not doing a good enough job marking him down.

Respondent's Reply

Florence Palmer

109. This was a matter of record at the time.

Steve McGluckian

110. There is no evidence that Mr McGluckian was not on a PAL, DKI's oral evidence that he was should be accepted.

Procured Agents

111. There is no evidence to suggest this, all the mentors have difficulties with the claimant, they all found inaccuracies with his work and NS herself is of the same skin colour as the claimant which must make it less likely she would deliberately mark him down. The claimant will simply not accept any criticism whatsoever and will not accept that his performance did not meet the required standard, even if a different procedure should have been used the outcome would have been the same due to his levels of performance.

Team objectives

112. Regarding the argument about team objectives this is a red herring, there will always be individual standards of performance required in order to deal with the work accurately. In relation to more general personal achievements and team objectives yes that might be decided during a different process where an employee will be subject to a standard.

The Law

Direct discrimination

113. Section 13 of the Equality Act 2010 sets out the definition of direct discrimination. This is where (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.
114. Section 136 of the Equality Act 2010 sets out the burden of proof to be applied in discrimination cases. This says that if there are facts from which a 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.
115. The shifting burden of proof rule assists Employment Tribunals in establishing whether or not discrimination has taken place. In **Martin v Devonshires Solicitors [2011]** the EAT stressed that “While the burden of proof provisions in discrimination cases are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally that is facts about the respondent’s motivation ... they have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or another and still less where there is no real dispute about the respondent’s motivation and what is in issue as its correct characterisation in law”, and in **Laing v Manchester City Council (2006)** Justice Elias then President of the EAT said that if the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination then that is the end of the matter. It is not improper for the Tribunal to say in effect there is an open question as to whether or not the burden has shifted but we are satisfied here that even if it has the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race. At the same time, he also said the Tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to “let form rule over substance”. So, if the matter is not clear a claimant needs to establish a prima facie case of discrimination, which is shorthand for saying he or she must satisfy stage one of a two-stage shifting burden of proof then the burden shifts to the respondent to explain the conduct.

116. In **Laing** Elias suggested a claimant can establish a prima facie case by showing that he or she has been less favourably treated than an appropriate comparator. The comparator must of course be in the same or not materially different circumstances. A paradigm case is where a black employee who is better qualified than a white employee is not promoted where they were the only two candidates for the job. However, the case obviously becomes complicated where there are a number of candidates and there are other unsuccessful white candidates who are equally well qualified. If there are no actual comparators of course hypothetical comparators can be used.
117. The question was asked in **Madarassy v Nomura International Plc [2007] CA**, is something more than less favourable treatment required? Lord Justice Peter Gibson stated in **Igen v Wong [2005] HL** that “The statutory language seems to us plain. It is for the complainant to prove the facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the Tribunal could conclude that the respondent could have committed such an act ... The relevant act is that the alleged discriminator treats another person less favourably and does so on racial grounds. All those facts are facts which the complainant in our judgment needs to prove on the balance of probabilities. **Igen v Wong** also said it was not an error of law for a Tribunal to draw an inference of discrimination from unexplained unreasonable conduct at the first stage of the two-stage burden of proof test. It seems the difference between the approach in **Madarassy** of Mummery in saying that a difference in treatment and a difference in status is not enough, and that of Elias in **Laing v Manchester Council**, which followed **Igen v Wong** stating that it was sufficient to establish genuine less favourable treatment if at the first stage the employer cannot rebut by evidence and it takes into account the fact that a claimant will not have overt evidence of discrimination but could have evidence of how they had been treated differently to other employees who do not share the relevant protected characteristic.
118. An alternative legitimate approach is to consider the “reason why” the treatment arose and if the evidence satisfies the tribunal the answer is non discriminatory then there will be no discrimination.
119. In a situation where direct discrimination is said to exist one approach is to adopt a two stage test. This is to first ask whether there was less favourable treatment, and secondly to ask whether it was on the grounds of a protected characteristic. In other words, to ask the “reason why” question after less favourable treatment has been proved to exist. In simple cases where there is an actual comparator this is often the easiest approach but in **Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) HL** Lord Nicholls said:
- “Sometimes it will not be possible to decide whether there is less favourable treatment without deciding the reason why, particularly where a hypothetical comparator is being used.”

120. This means that the sequential approach adopting the shifting burden of proof is not always required.
121. In **London Borough of Islington v Ladele [2009]** Court of Appeal the EAT gave some helpful guidance:

“The following propositions with respect to the concept of direct discrimination potential relevant to this case seem to us to be justified by the authorities:

- (1) In every case the Tribunal has to determine why the claimant was treated as he was, as Lord Nicholls put it in **Nagarajan v London Regional Transport [1999]** ‘this is the crucial question’. He also observed that in most cases this will call for some consideration of the mental processes (conscious and subconscious) of the alleged discriminator.
- (2) If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial (see Lord Nicholls in **Nagarajan** as referred to in **Igen v Wong [2005] Court of Appeal**).
- (3) As the courts have regularly recognised, direct evidence of discrimination is rare, and Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two stage test which reflects the requirements of the burden of proof directive. These are set out in **Igen v Wong**.
- (4) The explanation for the less favourable treatment does not have to be a reasonable one. It may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of race, sex, religion or sexual orientation of the employee, so the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.
- (5) It is not necessary in every case for the Tribunal to go through the two stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if satisfied that this discloses no discrimination then it need not go through the exercise of considering whether the other evidence, absent the explanation, would be capable of amounting to a prima facie case under stage one of the **Igen** test (see **Brown v Croydon LBC [2007]** Court of Appeal).
- (6) It is incumbent on a Tribunal that seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are (**Anya v University of Oxford [2001]**).

- (7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffman in **Watt v Ahsan [2008]**.
122. In the recent case of **Efobi v Royal Mail [2021] SC** the supreme court confirmed, after this had been doubted by the EAT, that burden of proof in a discrimination case is on the claimant to establish a prima facie case.
123. Another approach is to consider whether a Tribunal should draw inferences from the primary facts which would then shift the burden, and if a non-convincing explanation is provided by the respondent then discrimination would follow.
124. Regarding inferences Employment Tribunals have a wide discretion to draw inferences of discrimination where appropriate but this must be based on clear findings of fact and can also be drawn from the totality of the evidence. In **Glasgow City Council v Zafar [1998]** unreasonable conduct by itself is not sufficient. However, where it is said that the unreasonable conduct is displayed ubiquitously an employee would need to provide proof of that, i.e. A was treated badly not because of his race but because the employer treated all employees badly. There must be some evidence of this, and it not just be an assertion, and likewise with unexplained unreasonable conduct.
125. Inference can be drawn from other matters such as breaches of policy and procedures, statistical evidence, breach of the EHRC Code of Practice, failure to provide information.

Victimisation

126. Section 27(1) of the Equality Act 2010 states that:
- “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.”
127. A protected act for the purposes of section 27(1) are:
- Bringing proceedings under the Equality Act;
 - Giving evidence or information in connection with proceedings under the Equality Act;
 - Doing any other thing for the purposes of or in connection with the Equality Act;

- Making an allegation, whether or not express, that A or another person has contravened the Equality Act.
128. Therefore, it needs to be established that the protected act comes within the definition, then that the claimant was subjected to a detriment of less favourable treatment, and finally that that detriment or less favourable treatment was because the claimant had done a protected act or because the employer believed he or she had done or might do a protected act. Causation is key and requires all the evidence to be looked at to determine the unconscious motivation of the alleged perpetrator of the detrimental treatment.
129. The types of detriment situations which arise are set out in section 39(3) and (4). Section 39(4) states that:

“An employer (A) must not victimise an employee of A’s (B) – as to the terms of B’s employment; in the way A affords B access or by not affording B access to opportunities for promotion, transfer or training, or for any other benefit, facility or service; by dismissing B, or by subjecting B to any other detriment.”

Conclusions

130. These are our findings and conclusions on the matters the claimant raised incorporating where relevant the parties’ submissions.
- (i) Performance Standards
131. We have already found that the claimant was aware of the 80% pass mark required when working on post and that if he had forgotten this this was another reflection of the claimant’s difficulties with meeting the respondent’s performance standards, if he had forgotten it, he was reminded of it at the latest by FP on 16 August 2019 and RAK on 26 November 2019. DKI also sent the claimant an email confirming that was the requirement. In respect of the cross-examination statistics put to DKI which arguably showed a better compliance rate in the third week of 80%. We accept DKI’s evidence that ASA informed him that the overall mark was 66.6% and that even looking at the figures again whilst the claimant may have reached 80% just in one week and more clearly in a second week, he had clearly not done so in week one and it was incumbent that he passed the mark in respect of each week of the PAL. Therefore, we find there was sufficient evidence to put the claimant on an informal PAL.
- (ii) The claimant’s comparator
132. The claimant’s comparator does not assist us as the claimant’s comparator was somebody who did not have performance problems and who was not put on a PAL. The claimant chose this comparator because he says he had no performance problems but once we found that he did that comparator cannot stand. The respondent referred to a comparator who was white who had

performance problems who was put on a PAL. We accepted this and stated above it would need a statistical analysis to establish that black people were put on PALs proportionately more often than black people to consider drawing an inference and we did not have that information. So as it stands white and black people were put on PALs. Accordingly there is no less favourable treatment, unless we draw an inference from other matters.

(iii) Failure to follow the proper procedure regarding the informal PAL

133. There was evidence that RAK did speak to the claimant about an informal PAL in November and therefore in our view the procedure of having to speak to the claimant had been complied with. This was before the claimant saw the outline of the PAL however it was subsequently discussed with him with Daniel Ireland. Even if this was a breach of procedure, we do not see how the claimant could say this was because of his skin colour without anything more. In respect of the claimant arguing that the PAL had to be agreed with him we have seen from the policy did not have to be agreed with him and that in fact the word agreed was not used. The word used is consultation and shared understanding not agreement. It is simply a word used loosely to mean discussed with him, if not agreed it would still be implemented but if not if the individual did not co-operate then presumably a disciplinary process may ensue, or an escalated performance management procedure. Whilst we note that his trade union representative also had some misgivings about the process used, we do not draw an inference that the reason there were some potential process issues was the claimant's colour. By itself this was insufficient. If we are wrong on this and the burden of proof does pass to the respondent, then we find the use of the PAL process was justified overall and was used across the board and therefore not related to the claimant's colour.

(iv) Procured agents

134. In relation to the procured agents HW and NS we find that all the mentors had difficulties with the claimant, they all marked the claimant as completing matters incorrectly and accordingly we cannot see how HW and NS can be singled out as "procured agents". They were only used for part of the process leading up to the formal PAL. Many other colleagues had been used and they had also reported performance problems with the claimant and feedback difficulties. Accordingly, we find that there was no conspiracy to find that the claimant's work was incorrect when it was not. It was not established by documentation that matters were marked correct were then subsequently marked incorrect. This had been looked into and an explanation provided that some members of staff had overwritten previously used consolidation sheets. We accept that explanation.

(v) Daniel Ireland not being able to put him on a PAL because he was not his line manager

135. We find it entirely disingenuous or at best inappropriately literal. In a management hierarchy it is entirely proper that with agreement another

manager deals with matters in a line manager's absence otherwise organisations would not be able to work. RAK had trialled the fact that there would be an informal PAL and he had agreed it with DKI and DKI finished off the paperwork and sent it to the claimant. We see nothing inappropriate in this.

(vi) Not being assessed using PQM

136. The usual procedure in the department was to use extended consolidation to assess individual performance. This had been used with white members of staff and therefore there was no difference in treatment.

(vii) Regarding the respondents not adhering to introducing the new team objectives procedure

137. We find this is irrelevant. There would always be standards referred to as LMA standards at 80% (reduced from 90% at an earlier point in time). There was a conscious decision that the performance level should be at 80% which is entirely reasonable, it still means that 20% of matters going out will be wrong. There was evidence that this was an LMA standard and was applied across the board to everybody, Sharon Wright's evidence established it was applied to Mr Mcsween. He passed it so there was no need to continue. Team objectives clearly did not obviate the process for each new member of staff to meet basic performance standards explained by Mr Walkinshaw in the training and seemingly known to everyone apart from the claimant of reaching an 80% accuracy rate. Indeed, some of the documentation on team performance clearly cross refers to the management performance documents. Even without that it is plainly implausible and incomprehensible that the introduction of team objectives would mean that without the specific agreement of the individual they could not be held to account about any level of accuracy.

(viii) Consolidation only for new starters

138. Consolidation was for new starters but was also used to continue assessing somebody. The claimant's consolidation related to the post, when somebody started something new this was used and again as in Mr Macsween's case after two weeks he reached the required standard and that was the end of his consolidation. It was a general practice to extend consolidation and in effect the claimant was still a new starter as he had never passed the consolidation period in his new role.

(viii) Case Studies

139. Regarding the case studies We found the case studies were not appropriate to the situation the claimant found himself in and therefore we draw no inferences from them.

(ix) The formal PAL

140. Regarding the formal PAL we find the claimant was never actually put on a formal PAL and therefore that this is irrelevant. He was told this was the next step but it was subject to a meeting. RAK believed the formal PAL was to go ahead but nothing further happened. If we are wrong on this and he was put on a formal PAL this was because his results during the extended consolidation after the informal PAL. It was a legitimate decision based on statistical information. The information was in RAK's email to the claimant on 13 February 2020. The reason why is his performance.

(x) Inconsistencies in the evidence

141. The claimant relied on RAK not telling him about the PAL however the evidence shows that he did refer to it in November. RAK now agrees that he did not explain to the claimant properly what FP's role was going to be whilst earlier in his witness statement he has said that he had presumed that FP would explain things to the claimant and FP had assumed that RAK had done this already. This was an inconsistency but not sufficient to draw an inference as it was not germane to any of the matters in the claimant's claims.

(xi) People should not have been assessing him who worked outside of his team

142. There is nothing in this point, there was simply not enough people on his team to be assessing him so other people was a fishing experience could be used, there was nothing to suggest that this was done deliberately, some of the people that we used gave him better marks than others so accordingly there was no deliberation behind this decision relating to the claimant's race.

Summary

143. Accordingly, we have not drawn any inferences from the matters raised by the claimant and have made primary findings that:-

Direct Race Discrimination

- (i) There was sufficient evidence to put the claimant on an informal PAL, therefore the burden does not shift or alternatively the reason why was his performance. Therefore, we find there was no direct race discrimination in relation to this.

Victimisation

- (ii) In relation to victimisation claims we found that 17 December grievance was not a protected act. The 13 February 2020 grievance was a protected act.
- (iii) Therefore nothing before 13 February could be relied on by the claimant as less favourable treatment arising from the protected act. Matters arising after 13 February could be relied on however the matter the claimant mainly relied on (i.e. the flagging up of the formal PAL on 13 February) to establish causation we have rejected i.e. that RAK saw the

grievance on the claimant's screen. Obviously there had to be some explanation from the claimant's point of view as otherwise it was clear RAK did not know about that grievance until 20 February and his 13 February email could not be linked to the protected act. Neither could his email of 20 February 2020 be relied on as this again was before RAK knew that a second grievance had been submitted. Therefore, the detriment of stating he was to be put on a formal PAL was not victimisation as without knowledge of the second protected act there is no causation. In respect of the first alleged protected act if we are wrong that it was not a protected act then we find that there was no evidence to suggest a connection. RAK had known about it for a long time before the formal PAL was suggested so lack of proximity make a connection less plausible and there was clear evidence of underperformance in that the claimant was only dealing with a small number of cases per day and it was a requirement of the informal PAL that the number of cases dealt with should increase beyond what the claimant was doing.

- (iv) We also find the detriment relied on is not substantiated (although the lack of causation means this point is not crucial) he relies on is the putting him on a formal PAL however having read the meeting minutes of and DKI's oral evidence we found the claimant was never put on a formal PAL, the most mention there is that the claimant should continue working with NS as previously advised by RAK and RAK's previous communication had been about continuing the consolidation period. In addition the formal PAL was subject to a meeting with his trade union as mentioned above and no final decision was made in that meeting or after it as RAK was no longer involved due to lockdown. Although in a grievance meeting he said he thought the formal PAL was going ahead it was out of his hands. Given the absence of any documentary evidence the claimant was working to a formal PAL and given DKI's evidence that he agreed with EO that process should be discontinued we have found he never was subject to a formal PAL.

144. Accordingly, the claimant's claims of victimisation fail and are dismissed.

Employment Judge Feeney
Date: 28 November 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
29 NOVEMBER 2022

FOR THE TRIBUNAL OFFICE

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