



EMPLOYMENT TRIBUNALS

Heard at: Birmingham (by video) **On:** 27 February to 3 March 2023

Claimant: Mr Surinder Madhar

Respondent: Secretary of State for Justice

Before: Employment Judge E Fowell

Mr I Morrison

Mrs E Shenton

Representation:

Claimant Samuel Martins, Consultant for the Employment Law Service

Respondent Niazi Fetto of counsel, instructed by the Treasury Solicitor

RESERVED JUDGMENT

1. The complaint of discrimination on grounds of race is dismissed.
2. The complaint of discrimination on grounds of religion is dismissed.
3. The complaint of victimisation is dismissed.
4. The deposit of £500 shall be paid to the respondent in accordance with Rule 39(5) of the Employment Tribunal Rules of Procedure.

REASONS

Introduction

1. Mr Madhar works for the Prison Service as a Prison Officer. He joined them in 2010 and we heard nothing to suggest that there were any problems in the first seven or eight years of his employment. However, from 2019 onwards there were a series of disagreements over his lack of promotion and other frustrations at work which

eventually led to him being signed off sick from 5 December that year.

2. One particular issue concerned his request for special leave to attend his uncle's funeral in June, which was refused. There was then an issue over the offer of a temporary promotion to a supervisor role, which the respondent says he rejected but which he says was withheld. At around the same time there was a further issue over his annual fitness test, which he failed. He was then placed on restricted duties. The fitness test was rearranged but he was unhappy that he had to do it at another establishment. He passed that test on 4 December but went off sick the next day. During his absence his place of work was moved, against his wishes, from the reception unit to a residential block and a sickness absence process was put in place. He believed that this was designed to end in his dismissal. In the event, the prison governor changed and no such decision was made. By then these proceedings were underway.
3. In short, he says that this was all direct discrimination on grounds of race or religion. He identifies as being of Asian heritage and is a Sikh. Alternatively he says that they were acts of victimisation because he made various complaints about his treatment.
4. The issues to be decided were set out in the Case Management Order on 28 February 2022. A list of issues was prepared following that case management hearing which set out in more detail the alleged acts of direct discrimination, numbered 2.1 to 2.22, which we will work through in turn, although we will vary the order to adopt a more chronological approach.

The legal tests

5. It may be helpful to explain the relevant legal tests at the outset. The test for direct discrimination is set out at section 13 of the Equality Act 2010:
 - (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.
6. The phrase "less favourably" begs the question, "less favourably than who?" If there is no actual person in the same circumstances (apart from race or religion) we have to try to imagine such a person - a hypothetical comparator – and assess how would they would have been treated. Whether an act amounted to less favourable treatment is a question of fact for us to decide.
7. The test for victimisation is set out at section 27:
 - (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

8. A protected act includes making an allegation that someone has contravened the Equality Act, i.e. a complaint of discrimination. The language of this section is slightly different. We have to decide first whether Mr Madhar suffered a *detriment*, rather than less favourable treatment, and if so whether this was because of a complaint of discrimination. There were a number of such complaints, as we shall see.

9. A detriment may be something quite minor and personal. According to the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 HL the question is whether

“the treatment [is] of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment”

10. Again, the question of whether he suffered a detriment is a question of fact in each case. If he did suffer a detriment or less favourable treatment, we then have to go on to consider whether it was because of his race or religion, or because of a protected act or acts.

11. To summarise the case presented therefore, there are 22 alleged acts of direct discrimination (less favourable treatment) and eight alleged acts of victimisation (detriments). These are set out in a separate section of the list of issues, 9.1 to 9.8. Each of these alleged detriments also appears in the list of less favourable treatments, so it will be simpler to work through the longer list, and where necessary to make additional findings about whether the act in question also amounted to a detriment. The two concepts are quite different. A detriment does not have to be unfair; it can be any setback. So, being rejected at interview, for example, or being unsuccessful in any application, will generally be a detriment, although there may be good reason for it, and the individual might have been treated fairly compared with others. In those circumstances it will not also be less favourable treatment.

Procedure and evidence

12. We heard evidence from Mr Madhar, and a colleague of his, Ms Nicola Hodges. From the Prison Service we heard from:

- (a) Mr Adrian Rae (Custodial Manager), who was Mr Madhar's line manager during the first part of these events;
- (b) Mr Ben Wilde (another Custodial Manager), who managed the promotion issue;
- (c) Mrs Janice Webb (Regional HR Business Partner), who dealt with many of the practical arrangements in question;
- (d) Mr Kyle Eadie (People Hub Manager), who dealt with the application for time

off for Mr Madhar's uncle's funeral;

- (e) Mr James Holland (also a Custodial Manager), who took over as Mr Madhar's line manager; and
- (f) Mrs Helen Seymour (Operational Manager), who dealt with the discrimination incident report form.

13. There was also a bundle of about 1000 pages. Having considered this evidence and the submissions on each side, we make the following findings of fact. Not every point is dealt with, only those necessary to deal with the issues in the agreed list and to support our conclusions. Where other members of staff are mentioned, such as the comparators, we will generally just give their initials, unless there is some particular reason to identify them by name.

Findings Of Fact

Background

14. HMP Hewell, near Redditch in Worcestershire, houses male prisoners in different categories. They are placed in a number of House Blocks. Most of the staff, like Mr Madhar, are Prison Officers (PO), which is a Band 3 role. Above them are Supervising Officers (SO) at Band 4. The next level of management is Custodial Manager (CM), a group which includes several of the respondent's witnesses. In that capacity Mr Rae, for example, explained that he had about 30 staff reporting to him. There are then Operational Managers like Mrs Seymour, at Band 8, who is at governor grade and so is referred to mainly as Governor Seymour. Many of the most senior staff have the word governor in their title, while the overall prison governor is referred to internally as the No. 1 Governor or Governing Governor. We shall just use the term Governor unless some further clarification is needed, but of those mentioned only Governor Pearson was at this highest level.
15. For most of the period with which we are concerned, Mr Madhar was managed by CM Rae. CM Holland took over shortly before Mr Madhar went off sick. HR advice was largely provided by Mrs Janice Webb, the Regional HR Business Partner. There was also a separate People Hub, managed by Mr Kyle Eadie, which dealt with day-to-day workforce issues such as sickness absence, Time Off in Lieu, requests for flexible working, recruitment exercises and staff swapping their shifts. These exchanges of duties (XODs or EODs) are quite usual given the complicated staff rota. There was also a separate Equalities Team to whom any concerns about discrimination could be referred, including complaints from prisoners.

Gate manager vacancy

16. We start with **Issue 2.6** which provides:

2.6 On 15 January 2019, the Claimant was told that his application for the role of Gate Manager had not progressed beyond the 'sift' in circumstances where he had expressed a wish to be interviewed and not been asked to complete an application form or provide any other information.

17. The role of Gate Manager was advertised in late 2018. It was a temporary role, for six months, and at his existing Band 3 level, and was dealt with through an Expression of Interest notice (EOI). This simply required people to send in an e-mail to say that they were interested. Mr Madhar did so and went for an interview with Mr Eadie and a Mr Andrew Watt, also from the People Hub. He was unsuccessful, and asked for feedback. Mr Watt wrote to him on 3 December (page 767) commenting on the examples he had given in the interview. He made complimentary remarks about Mr Madhar's proposal for a diary system but said he could have gone further, and although he showed a good understanding of the role, Mr Watt said that they were hoping for new and more innovative ideas. Such feedback is often quite positive, while Mr Eadie's evidence to us was that Mr Madhar's answers in the interview were quite short and he appeared rather nonchalant throughout.
18. However, the successful candidate, TW, then withdrew. That posed a difficulty for the respondent. This was a temporary role, which ought to have been filled already, and those who were interested in it had already been interviewed and rejected. So, a further EOI notice was issued, to see if anyone else was interested. Mr Madhar e-mailed to say that he was still interested but there was one new candidate, CB. He had years of experience working in gate security and so was an obvious fit for the role. He was also immediately available, so Governor Gunderson, who was in charge of this exercise, decided to appoint him without further ado.
19. He e-mailed Mr Madhar on 15 January 2019 (page 770) to inform him that he had been unsuccessful stating:

"Hi Surinder,

Thank you for your recent expression of interest for the role of Gate I/C at HMP Hewell. As the sponsor of the project I am writing to inform you of the outcome of our recent sift for this position on behalf of the project leads and recruitment panel Andy Watt from Security Group at HQ and CM Benn Wilde from the Security dept. within the establishment.

Unfortunately we have decided not to proceed with your application on this occasion. The standard of applicants was extremely high and the panel felt that one candidate demonstrated more of the skills they are looking for at this stage, they have therefore decided to appoint this person. Whilst I appreciate you will be disappointed by this decision, I hope you are not put off applying for future opportunities and thank you again for your interest."
20. This was somewhat misleading. As Mr Eadie candidly accepted, there had been

no further sift. The decision had simply been taken to appoint CB. Hence, it is correct that Mr Madhar was told that his application had not progressed beyond the sift, but we accept that CB was the preferred candidate and had better experience. It was not therefore less favourable treatment. Mr Madhar compares his situation with CB, but that is not an appropriate comparison. The reason for CB being appointed was his greater experience. The other comparator is TW, the original successful candidate. We heard no evidence about his merits but we accept the evidence of Mr Eadie and the feedback from Mr Watt that there were clear reasons why Mr Madhar was not chosen, unconnected with race or religion.

Supervising Officer position

21. The next issue, **Issue 2.4**, concerns an application for promotion which began at about the same time:

2.4 In January 2019, April 2019, on 6 October 2019 and on 15 October 2019, the Claimant was not promoted to the role of Supervising Officer despite being on the merit list as of December 2018.

22. This is also an alleged act of victimisation (**Issue 9.2**) so we need to consider whether it was a detriment.
23. There seems to be a fundamental confusion on Mr Madhar's part about this issue. The merit list is essentially a reserve list. When posts are advertised, candidates are interviewed and those with the highest scores are appointed to the vacancies in question. Other candidates who score slightly less well may be placed on a merit list so that if any vacancies arise over the next 12 months they will be appointed, in score order. This was confirmed by a succession of witnesses for the respondent but despite this Mr Madhar insisted that there was no distinction between those immediately appointed and those placed on the merit list. His view was that they had all passed the interview and should all have been appointed straight away, but that is simply not the case.
24. The interviews in question took place on 27 December 2018. There were five immediate vacancies for Band 4 Supervising Officers, with two further vacancies known to be available shortly afterwards, with 18 candidates for these roles. It may be that these two further vacancies gave rise to the confusion. Mrs Webb carried out the interviews. Her intention was to appoint the top five scorers immediately and then the next two shortly afterwards, with a remaining group on the merit list. The relevant scores are set out at page 739. Each candidate was scored against criteria and there were seven who scored 23 or more points. That was therefore the cut-off point. Five candidates scored more than 23 points and two others, PT and AC, scored exactly 23. All candidates who scored 19 or more were then placed on the merit list. One candidate on 22 points later withdrew leaving Mr Madhar on 20 points, tied with AH, and MB on 21 points. They were the three on the merit list.

25. He was not told who else was on the merit list, or even how many, but he came to know that AH was in the same position. His view at this hearing was that the respondent decided not to promote AH because if they did they would have to have promote him too, i.e. they was so intent on preventing his promotion that they were prepared to hold others back. We are baffled by that view, and found nothing to substantiate it. Our view is that Mrs Webb was supportive and wanted Mr Madhar to progress his career.
26. The applications were anonymised before the initial sift was carried out, so the recruiting managers were unaware of who had applied, and this only became clear when candidates were invited for interview. We have no means of assessing whether the scores were appropriately awarded at interview, and they were not challenged, so we start on the basis that these outcomes accurately reflected the suitability of each candidate.
27. As already noted, the first five candidates took up their duties immediately. As an SO they were entitled to wear an epaulette as part of their uniform. The next two candidates, PC and AT, were due to be promoted in April. In the meantime they agreed to start in their new role immediately, to get some experience, without being paid at SO level. One of them, AT, managed to obtain an epaulette prematurely. Mrs Webb described him as getting a bit excited, and she told him that he had got his stripe before he should. Plenty of people noticed, including Mr Madhar. He was resentful. As far as he knew, AT was on the merit list like him and had no business wearing an epaulette. But that was simply a misunderstanding. AT was not on the merit list, and was simply in a period of limbo before he could take up new role. Hence, Mr Madhar did not suffer any less favourable treatment by having to wait - he was treated in exactly the same way as the others on the merit list. He relies on AT and PC as comparators, but they were not in the same position as their scores were better. He also compares his position with the others on the merit list, but he was no worse off than them.
28. Was it also a detriment? The first complaint of discrimination was not until 21 August 2019, and Mr Madhar was placed on the merit list in January that year. He suggests that there was an ongoing duty on the respondent to promote him, but that is not the case. After 12 months on the merit list the opportunity lapses. Unfortunately 2019 was not a typical year and it involved a major reorganisation with the introduction of a new "Offender Management in Custody" or OMIC system. We were given few details of the change but it seems to have occupied a good deal of management and HR time. It also meant that a number of SOs were being reassigned or reallocated to other duties rather than face redundancy and so there was no opportunity to appoint people on the merit list to any vacancies. Hence, in our view, nothing changed from January onwards that could amount to a detriment and no further decision was made on his promotion.
29. As a footnote, Mr Madhar has not only persisted in his misunderstanding over the

merit list but has maintained, in the face of evidence from each of the respondent's witnesses, that he is correct, and was entitled to an immediate promotion to Supervising Officer. He went as far, through Mr Martins, of accusing Mrs Webb of misleading the Tribunal about this. We are entirely satisfied that her evidence was genuine on this and other points.

Working hours

30. The next three issues, **Issues 2.1, 2.2 and 2.3**, concern his working pattern:
 - 2.1 In January 2019, the Claimant's flexible working request was rejected.
 - 2.2 The Claimant's appeal of the decision not to grant his flexible work request was not submitted to an appeal panel.
 - 2.3 The Claimant was not provided with a formal outcome to his appeal.
31. Until 2013 the standard working hours for each prison officer involved a 39 hour week. It was spread out in a pattern of long and short shifts over several weeks. That was then changed to a standard 37 hour week, though members of staff had the option to increase their hours to 41 at that stage. No doubt that helped to cover the shortfall in hours. Mr Madhar was one of those who chose to increase his hours.
32. He was away from work on paternity leave between March and June 2018 and on his return he made a flexible working request, not to change his 41 hour week but to work it in a pattern of condensed hours so that he could have a rest day on Monday and Friday every alternative week.
33. The system operated by the prison service is that any such variation has to be reviewed periodically to make sure that it can be accommodated. A distinction is drawn between a flexible working request and a work life balance request (WLB). We did not explore it in any detail but it appears that a WLB request does not involve any reduction in hours, simply a change from the normal shift pattern.
34. When Ms Pearson took over as the Prison Governor in January 2019 all staff with such arrangements were required to reapply and have their requests reconsidered. Mr Eadie wrote to each person enclosing an application form. He did not decide these applications himself – he described himself as more of a go-between – but he presented them to the Workforce Planning Committee (WPC). This is a group chaired by the Governor, with about a dozen other governor-level managers, together with HR advice from Mrs Webb.
35. Mr Madhar's application was considered by the committee at their monthly meeting on 5 April 2019. The minutes are at page 240. There were a large number of such applications - 32 in total – and there was much else on the agenda, so no doubt each one received limited consideration. Of those 32 requests only one was approved outright. 14 were declined, including Mr Madhar's, and the rest were

required to provide further information. Like him, many of the ones refused had childcare responsibilities and one was a single parent. We take from this that Governor Pearson was a new broom and was attempting to sweep away many of these private arrangements, which no doubt made it much more difficult to plan the rota.

36. Mr Madhar relies on three comparators on this issue, LD, HM and NM. The position of LD and NM were also considered at this first meeting in April, and they were required to provide further information. There is no mention in the minutes of HM, so it may be that she was late with her application.
37. After his rejection, Mr Madhar discussed the situation with Mr Eadie, and he was allowed to resubmit his application for reconsideration at the next committee meeting, on 7 May 2019. This time he put in a more detailed written submission setting out his circumstances (page 249). Once again, his application was one of a number considered. (The minutes are at page 257.) There were ten in all, most of which had previously been invited to provide the further information, although HM was considered for the first time, and rejected. Mr Madhar's was the only application considered which had previously been rejected outright.
38. Of the remaining ones considered at this meeting, eight of the ten were rejected, including Mr Madhar's. The minutes simply record (page 260):

“Surinder Madhar – Compressed hours application. Has been late often recently and has a high number of unauthorised absences and negative toil balance, as such REJECTED due to not fitting the business needs as evidence shows unable to work shift pattern.

39. This suggests that the decisions were based more on reliability, and on whether the existing bespoke arrangements were working in practice, rather than the individual's personal circumstances. There is a list of his unauthorised absences at page 350. So far that year he had had three such absences: a day off for childcare issues in February; about five days on another occasion for the same reason and because his father-in-law had had a heart attack; then another day when he stated that he had an exchange of duties but wasn't covered by anyone. There was a further difficulty, explained by Mrs Webb. It was harder to accommodate his 41 hour week on a compressed hours basis. As it was, he was working on reception until 9.30 pm on some occasions, although in fact he had nothing to do from 8 pm onwards.
40. After this second meeting of the committee he was sent an e-mail by Gina Harris from the People Hub (page 263) stating

“Dear Surinder,

The Work Life Balance committee met on 7 May 2019 and your appeal against the decision of your WLB application was considered. The outcome is that your appeal has

been unsuccessful. The reason for this decision was that your WLB request does not meet the business requirements of the department.

If you require any further information please contact Kyle Eadie, People Hub manager.”

41. As this makes clear, the second meeting of the committee was treated as an appeal against the original decision. He did not leave it there however. On 16 July, and again on 15 August 2019, he re-submitted his application to Mrs Webb by e-mail. He did not seem to have accepted that this reconsideration of his application was an appeal and wanted it to be looked at again.
42. In the meantime there were other meetings of the committee. One was on 2 July 2019 (page 271) when it appears that there was a further WLB review of four outstanding cases, three of which were approved. They did not include any of the comparators. The committee met again on 7 August 2019 (page 281) when it was noted that there were no outstanding WLB applications.
43. There is a standard or template letter at page 749 of the bundle. It was sent to NM, and states that her application was considered at a meeting on 17 July of the Work Life Balance *Appeals* Committee. We have no minutes of that meeting, so there seems to be a lack of transparency on this point. It seems from information given in a table at page 750 that both Ms Dove and Ms Mills were successful at that hearing. We also heard from Mrs Webb that an appeal from a decision of the WPC would probably have been dealt with by the Governor alone, or perhaps with a small number of senior staff.
44. From this it seems that others had at least a separate, more formal, opportunity to appeal, whereas Mr Madhar simply had his case considered at two consecutive meetings. That may have been disadvantageous in the circumstances, given the relatively brisk way in which these applications were dealt with at the full committee.
45. We heard that NM was ultimately successful even though her child was an adult, aged 21. However, we also heard that the daughter was disabled, which may have been a factor. We can find no mention of HM having her request approved, but it has not been disputed that it was. However, we did not hear any evidence about their individual circumstances or how easy it was to accommodate their requested working arrangements. This issue is therefore similar to the recruitment decisions already considered. Some people were successful, but we have no basis to conclude that the decisions were not appropriate ones in the circumstances. They were not simply based on need, or childcare responsibilities, since many members of staff in the same position had their applications rejected. There was however a difference in process, as just noted.
46. Mr Madhar persisted in raising this issue, and clearly felt that he had been denied an appeal over his working hours. Mrs Webb seems to have come round that view as well as she e-mailed his on 6 September (page 316) stating:

Hi Surinder,

I am sorry not to have e-mailed you before now with a conclusion to your appeal. I can confirm that you will stay on this current WLB shift pattern until the profiles change in November. At this time the WLB will all be reviewed and you will be asked to resubmit your WLB, I need to be clear with you, that your WLB will be reviewed every three months in line with the local policy at the workforce planning committee meeting.

I trust this concludes your appeal at this stage please accept my apologies for the lack of conclusion until today.

47. In any event, during the six months or so when this matter was under consideration Mr Madhar had been allowed to continue with his compressed hours. Ultimately Mrs Webb formed the view, which was agreed by the Deputy Governor, Amanda Hughes, that it had proved manageable and should be allowed to continue. Hence, he did continue on his old pattern and there was no difference in outcome between him and his comparators, other than a divergence in the process followed.
48. On that basis we conclude that although Mr Madhar's flexible working request was rejected (**Issue 2.1**) he suffered no less favourable treatment. It is correct (**Issue 2.2**) that his appeal was not submitted to an appeal panel, but again, the outcome was the same and he was not ultimately disadvantaged, so we reach the same conclusion. Finally (**Issue 2.3**) he was provided with a formal outcome to his appeal, in the letter from Mrs Webb. That letter is no different in substance to the outcome letter sent to NM, so again there was no less favourable treatment.

Staff Performance Development Reviews (SPDRs)

49. The next two issues (**Issues 2.7 and 2.8**) concern Mr Madhar annual appraisal or SPDR:
 - 2.7 In May 2019, Governor Clare Pearson reviewed the Claimant's performance rather than his line manager Mr Rae, contrary to standard practice and in circumstances where Mr Rae had passed the Claimant's performance review.
 - 2.8 In May 2019, Governor Pearson rejected the Claimant's SPDR.
50. Very briefly, the system involves the officer and his or her line manager completing an annual appraisal form. This should record any areas in which the officer has developed experience or improved over the course of the year, as well as any shortcomings. CM Rae sent the appraisal form to Mr Madhar in July 2018. It was blank, except that the overall outcome was pre-ticked as "good" - CM Rae said that that was how the form came to him and was pre-populated. That is the expected standard, without which pay can be affected. He then advised Mr Madhar to work on the form every month rather than leave it to the end of the year.
51. That was helpful advice, but Mr Madhar did not follow it. The form remained entirely

blank. Hence, there was an onus on Mr Madhar to complete the form, an onus on his manager to review it with him and sign it off, and an onus on the HR department to ensure that this was done. Mrs Webb confirmed that no SPDR was recorded as completed for Mr Madhar that year, so none of this took place. There is no documentary evidence to suggest that Governor Pearson had any involvement in this SPDR and it is difficult to imagine circumstances in which she would review such a form and decide that the assessment of good was not merited, particularly without any involvement from CM Rae.

52. The only basis for this allegation is that Mr Madhar says that this is what he was told by CM Rae, but that account is somewhat confused. According to his witness statement:

35. In May 2019, I was informed by my line manager Custodial Manager Ade Rae that Governor Pearson had rejected my SPDR (Performance Review). I had no review with my manager and to date (December 2022) I still do not know what was written in the report.

36. My line manager CM Rae who had been in the role for 30 years, stated that he passed me with no issue or area of concerns (I have never seen the review/report) but also that 'the No1 Governor Pearson does not get involved in SPDRs'. As I am not on the hierarchy of workers. This was witness in the visits hall by my colleague Nicola Hodges.

53. Hence his account is that he was initially told that the Governor had rejected the SPDR, then told that Governors do not get involved in such things. The position is further confused by the evidence of his supporting witness Ms Hodges. She stated:

Whilst on shift in May 2019 I was detailed to work visit during the afternoon shift. This was a regular part of my duties as member of the reception and operations department.

I was working with Mr Surinder Madhar. During this course of the shift Mr Madhar was approached by Custodial Manager Adrian Rae. CM Rae had come to have a conversation with Mr Madhar regarding his current SPDR.

I recall the conversation as I was standing with Mr Madhar when it was taking place. I was close proximity to Mr. Madhar and CM Rae and could clearly hear the conversation.

CM Rae informed Mr Madhar that he had carried out his SPDR and he had passed with no areas of concerns. Mr Madhar replied with thanks. CM Rae then informed Mr Madhar that though he had passed him the No 1 Claire Pearson has rejected his SPDR. CM Rae continued saying that he had been in the job for 30 years and No1s do not get involved in SPDR unless they are trying to dismiss a member of staff.

54. This account is therefore somewhat different. Whereas Mr Madhar claims that he was told in this conversation that the Governor would not get involved in SPDR, her evidence was that he was told that she would not get involved in the SPDR *unless she was trying to dismiss him*.

55. Again, it is difficult to understand either account in the context of a blank form. Mr Rae denied any such conversation, and it seems unlikely that he would choose to come down to the prison visits room, which had at the time about 50 prisoners talking to their family members and other visitors, to discuss this form with Mr Madhar, and would choose to do so in earshot of another member of staff. It also seems unlikely that he would tell Mr Madhar that the Prison Governor was, quite inappropriately, interfering in his annual appraisal.
56. We do not believe that Ms Hodges was intending to give misleading evidence about this. The events in question are now several years ago and this was a single conversation. She may have had a conversation with Mr Madhar in the visits room when he raised the topic. Had this been false evidence on her part it seems to us that these accounts would have been better coordinated. Her evidence goes beyond that of Mr Madhar, and it is surprising that he has made no mention of Governor Pearson was trying to dismiss him. As will become clear, there was in fact no effort by the prison to dismiss Mr Madhar, who was off sick for nearly a year before returning to work, so any such concern was misplaced. Consequently we reject these two issues as factually incorrect.

Request for Special Leave

57. The next two issues (**Issues 2.9 and 2.10**) concern Mr Madhar's request for time off to attend the funeral of his uncle which took place over the weekend of 8 and 9 June 2019. They provide:
- 2.9 On 6 June 2019 the Claimant was told by Dawn Payne that his request for special leave – which previously had been approved – had been rejected.
- 2.10 In July 2019, the Claimant was subjected to disciplinary proceedings (including being required to attend an investigation meeting on 25 July 2019) for unauthorised absence.
58. The essence of issue 2.9 is that he was initially told that he could have this special leave to attend the funeral and it was then refused, but we do not find that that was the case. Mr Madhar's uncle passed away on Wednesday 22 May 2019. Mr Madhar left work that day and did not return until Tuesday 28 May, the day after the bank holiday. Mr Madhar says that on his return he spoke to Mr Eadie about getting time off for the funeral and that this was agreed, but then when he looked at the HR system, Invision, on 4 June, he noted that he was still due to be working that weekend.
59. According to Mr Eadie, about a week before the funeral Mr Madhar came into his office to tell him about the funeral dates and said that he would have to be absent from work; Mr Eadie told him that it should be okay to get leave but he would have to ask the People Hub staff whether there was leave available. There was a process to be followed. It involved completing a form which would be sent to his line

manager who would then send it to the People Hub to process.

60. It is clear that no such form was ever sent to CM Rae, who was only contacted about this much later. However it seems that Mr Madhar did pursue this further with the People Hub, in particular with Mr Wood. According to his letter at page 508 [with original emphasis]:

“Surinder,

You came to see me yesterday Tuesday 4th June at 3:30pm, you asked me if there was any leave for the weekend 8th and 9th because you couldn't come in to work, I told you that this weekend was extremely tight but I would look at it for you. After looking at the detail for the weekend I tried my best to jiggle it round to accommodate your request.

I phoned you back up to let you know that after working on the detail for you, that Saturday morning was a complete no no as it is already very short. I informed you that it was possible for the late part of Saturday and the main on Sunday to be moved to the next weekend 15th and 16th, that weekend is also short.

You told me that you would have to speak with you partner and you would inform me Thursday if this was possible because she works weekends.

I again told you before the conversation ended that Saturday morning was a **NO** and that you would need an XOD for this part of the shift, and you could only have the rest of the weekend off if you transferred these shifts to the following weekend. This would then justify why 9 Officers leave for Saturday and Sunday was denied on 8th and 9th.

I have done this extra work to help you, you have **NOT** requested leave for this weekend on inversion, you have **NOT** been into the people [hub] to try and get cover or change shifts to secure these days off.

You just came into the People Hub two weeks ago to inform us that you would be taking unauthorised days off for this weekend.

Can you please inform me as soon as possible what you would like to do so I can complete the weekend details.

Many thanks

Alan

61. We accept this contemporaneous evidence as to what occurred. This shows not only that he did not make an application for special leave but that efforts were made to assist him in getting the time off, and that for part of the time he would need to arrange his own swap; he had time before the weekend to do that but did not do so. In short, he simply expected that the request would be granted, that other people would fill out the necessary paperwork for him and if necessary they would approve it in retrospect. The fact that nine officers had already applied unsuccessfully for leave that weekend is particularly significant. We also heard that the prison was

facing the possibility of having a lockdown of prisoners that weekend and of curtailing prisoner visits. Further, even senior staff such as Governor Seymour, told us that missing important family occasions was a common problem and affected everyone, her included. On the key factual issue alleged, we are satisfied that this request for special leave was never approved.

62. More generally, we have to consider whether the refusal of his oral request for special leave was less favourable treatment. There was no absolute obligation on the respondent to allow time off in these circumstances, even for a family funeral. That is a well known fact of life for prison officers. There was a procedure to follow, to be fair to all staff, but Mr Madhar did not follow it. Mr Wood clearly tried his best to accommodate the request anyway, and was unable to do so given the number of officers who were already away. In those circumstances the outcome appears to have been unavoidable on this occasion, and no less favourable than any member of staff would have received.
63. The next issue concerns the subsequent disciplinary proceedings for this unauthorised absence. Given the circumstances just recorded, we find it surprising that Mr Madhar thought that he could simply take the weekend off without any adverse consequences. In fact, it seems that the disciplinary process soon petered out. He was informed by Deputy Governor Amanda Hughes in July that he was under formal investigation, but nothing was done immediately. He then e-mailed CM Rae on 21 July with two special leave application forms – one for the initial absence from 22 May and another for the funeral weekend – to have them retrospectively approved. That was no doubt an attempt to avoid any disciplinary investigation, but understandably that request was not actioned in the circumstances. There was then an interview with Governor Penny, at which he was accompanied by his POA union representative. After that, nothing further was heard about the matter. Unfortunately, this failure to see a process through to its conclusion appears to have been the norm rather than an exception, and the same happened in relation to Mr Madhar's subsequent grievances and the attendance management process.
64. Mr Madhar compares his treatment with that of a Tom Ofkants, as someone who had an application for special leave approved in similar circumstances, but the respondent say that Mr Ofkants took annual leave, and we have no information to compare how easy it was for his request to be accommodated. Since Mr Okants did not take unauthorised absence there is no comparator on the disciplinary issue but it seems to us that any hypothetical comparator would have been investigated in these circumstances, so again this allegation is rejected. Quite possibly, the view was taken by the respondent that this was a special family occasion and that no disciplinary sanction was appropriate, despite what would otherwise be insubordinate conduct, but an investigation was certainly understandable in the circumstances.

The First Complaint of Discrimination

65. Mr Madhar went on to complain that the refusal of his leave request was an act of discrimination. **Issue 2.11** provides
- 2.11 There was a delay in providing the Claimant with an outcome to the discrimination form that he submitted on 21 August 2019 (the outcome was provided on 23 June 2020).
66. This is not therefore a complaint about the outcome to his complaint but about the delay. Confusingly, it is accepted in the list of issues that an outcome was provided on 23 June 2020, although we cannot locate it.
67. As already noted Mr Madhar regarded the decision to refuse his permission for special leave as an act of religious discrimination, given that it was a Sikh ceremony. The obvious process for complaining of discrimination is to submit a grievance but on this occasion Mr Madhar used the form provided for prisoners – the Discrimination Incident Report Form (DIRF). It is not clear why he did so. It is possible that he thought that process would be speedier since it provides for a response within a week, but it was clearly the wrong approach. However, rather than dismiss it the respondent agreed to look into it and it was passed to Governor Seymour to deal with.
68. We have already concluded that the refusal of his special leave request was not less favourable treatment and hence that there was no basis for a complaint of discrimination. She may equally have felt that there was little to investigate. It might have been better to have asked him to resubmit the complaint on a grievance form and for it to be dealt with through the normal grievance procedure. As it was, the matter was left in Governor Seymour's hands and she took no particular action until she met with Mr Madhar to discuss it on 16 October, nearly two months later.
69. They met in a private office during the course of his duties when he was assigned to legal visits. These are very different to prisoner visits and there is relatively little to do for the officer concerned, with plenty of downtime, so they were able to discuss things for 20 or 30 minutes.
70. Mr Madhar disputes that there was any such meeting. That is surprising because there are contemporaneous references to it in the bundle, and he did not challenge this in his witness statement. His position only became clear at this hearing. Hence, Governor Seymour located and disclosed a copy of her work diary for that week which records their meeting. She was then accused by Mr Madhar of fabricating this document. We have no difficulty in accepting it however, given the other contemporary references to their meeting, and we conclude that Mr Madhar has simply forgotten about it. It may be that it was relatively informal and so did not lodge in his memory. It was also some time ago and he had a long period of absence due to stress afterwards, which may have affected his recollection of events.

71. Nevertheless it is clear that there was a significant delay in arranging this meeting and Governor Seymour did not do anything afterwards to conclude matters. In November Mr Madhar raised a grievance about this very delay, and that grievance was initially assigned to his line manager, which by then had changed to Mr James Holland. Consequently, CM Holland e-mailed Governor Seymour on 2 January 2020 (page 386) to find out what had happened to the original complaint. She responded that she had been too busy to deal with it and said that she would write a formal response. Even then however, that did not take place. This was followed up by the Equalities Team (Emma Kersey) and Mrs Seymour sent an e-mail response on 31 January stating:

“Hi Emma

I know I have been shocking – I am drowning in stuff and have been for a while.

However something was said in the Equalities Meeting the other day that made me think this may have been dealt with – please can you confirm if you still need a response from me as I am happy to do so as I interviewed Mr Madhar, but don't want to be duplicating work.

72. We can see why there was some confusion on her part. By then Mr Madhar had been off work for nearly two months and there was also an absence management process underway together with other grievances. The situation called out for some central coordination. But it also required some decision about this particular complaint, and that was eventually set out in a letter from Governor Seymour on 8 March 2020 (page 477). This was never sent directly to Mr Madhar, as required in the relevant Policy, but instead was forwarded by e-mail to Governor O'Connor. This was because of her understanding (page 292) that it needed to be checked, or QA'd, by the Deputy Governor. The Discrimination Incident Report (DIR) Policy at page 301 requires that all responses be Quality Assured by the Governor, which is understandable in the context of a complaint by a prisoner, but did not help on this occasion.
73. In her letter she again mentioned that she had spoken with Mr Madhar in legal visits on 16 October, and set out his account. In particular she described the dispute over whether he had been told he could have the weekend off. Her conclusions were very much the same as ours and were based on the letter from Mr Wood. It is a detailed account, showing that she had explored the issue thoroughly. We understand however, that the delay in dealing with all this was very frustrating for Mr Madhar, and it does appear that this letter was never sent to him. We are satisfied however that there was no intentional delay by Governor Seymour or the respondent generally. She was chased on several occasions for an outcome. We accept that she approached her task conscientiously, but was simply too busy to give it her urgent attention. In short, there would have been the same delay whoever had submitted such a form. No actual comparator is relied on here, and we can see no less favourable treatment.

74. This DIRF form was the first protected act, and the delay is also said to be an act of victimisation (**Issue 9.3**). It was clearly frustrating for Mr Madhar and in our view amounted to a detriment.

Temporary Promotion

75. These events played out over several months from the initial complaint in August 2019. The next issue in time (**Issue 2.5**) concerns an apparently favourable turn of events, the offer of temporary promotion:

2.5 In September 2019, the Claimant was temporarily promoted to the role of Supervising Officer for 3 months (as opposed to 12 months or permanently).

76. He argues that this was less than his due and that he ought to have been appointed for 12 months or permanently. This issue is therefore linked to the merit list. It is also an alleged act of victimisation (**Issue 9.1**). For the reasons already given, we do not accept that Mr Madhar was entitled to any automatic or permanent promotions and do not regard this offer of a temporary position as any sort of detriment. On the contrary, it was a positive move to assist his career.
77. The same offer of a temporary promotion was given to the other two candidates on the merit list, and each of them accepted, and so it was not less favourable treatment. (In due course the three months was extended to six months.) Mrs Webb was keen for Mr Madhar to have this opportunity so that he could gain some experience at that level which would support any further applications for promotion. She was conscious that otherwise his 12 months would be up without any progress being made. We note that this concern for his career development was in no way affected by the complaint he had raised about discrimination.
78. Mrs Webb's recollection was that when she spoke to him about this he refused it, on the basis that he ought to have been promoted already and that this was inadequate. He says that he accepted reluctantly. However he did go and obtain an epaulette, which persuades us that he did accept the offer and wanted to take it up. He may not have greeted the offer very positively and so Mrs Webb formed the view that he was refusing it. The intention was that he would take up this post with effect from 6 October 2019 but he was on leave then. He had arranged to go to Turkey for two weeks to have a hair transplant, returning on 15 October, when he was due to take a fitness test.

Fitness test

79. Three issues arise in relation to this fitness test, **Issues 2.13 to 2.15**:

2.13 On 15 October 2019 the Claimant was required to do a fitness test after having had hair transplant surgery, despite having been notified by the Respondent that he had

been advised not to do exercise following surgery by his surgeon.

2.14 Between 17 October and 3 December 2019, the Claimant was placed on restricted duties due to having failed the fitness test contrary to the Respondent's usual practice of placing staff on restricted duties after failing the fitness test twice.

2.15 On 4 December 2019 the Claimant was required to attend a fitness test at another establishment in circumstances where he had requested to do it at HMP Hewell and for it to take place in January 2020 and Occupational Health had recommended the same.

80. There is a requirement for all prison officers to do an annual fitness test. Unfortunately in Mr Madhar's case, his last successful test was on 12 September 2018. On 16 July 2019, and again on 15 September 2019, he was booked to attend a test but did not do so, even though he was at work each day. As just noted, his next test was scheduled for 15 October 2019 and he was aware that this was a potential problem. It had come to the attention of Governor Pearson who wrote to Mrs Webb and Mr Eadie (page 341) as follows:

Hi Janice and Kyle

The most recent fitness test report indicates from memory that three members of staff have failed consecutively.

I am not entirely convinced that we have been picking up and auctioning the national process to assess risk of remaining on full duties, allow a reasonable amount of time before re taking and in addition offering a fitness plan to ensure improvement; with automatic referral to case manager and via FARM. [Formal Absence Review Meeting]

Today I have asked that is picked up and actioned in this way by CM Mark Berwick – he is also collating his periods of sick and AWOL – of which there are a lot and he will package for a FARM. He has reported sick again today.

Surindar Maddah is being picked up by James Wall and has been spoken to today at home. He suggests he has osteoarthritis and is waiting for an injection in both knees and will not pass the third test next week as he is going to Turkey this weekend for a hair transplant (an elective operation). I have asked James to place him on a period of restricted duties and progress him to FARM. As a consequence he will not be in a position to take up a period of A/SO at this time and needs to be advised of that."

81. Hence, it was already expected that he would fail the test and be placed on restricted duties. That is the normal response and no sort of individual sanction. In our view it would have been wrong for him to have remained on active duties when not physically able to deal with the occasional requirements of the job, such as restraint, which prison officers have to deal with from time to time.
82. It also appears from the above e-mail that Mr Madhar had not asked to be excused this test, nor had he provided any medical evidence to the effect that it should be put off, he had simply said that he did not expect to pass and explained why.

83. The tests were run by CM Payne, and Mr Madhar's was one of about a dozen that took place that day. The outcomes are set out in her e-mail at page 343
- "1st Fail – Officer Surinder Madhar – he ran just 2 shuttles – therefore not even completing level 1. He did state to the tester (Vicky) that he would attend so as not to make this a 3rd FTA [Fail to Attend], however would not pass as he would run a little then stop. His reasoning for this is due to him recently having a hair implant overseas and was concerned about it getting sweaty!! I feel that Surinder had no intentions of completing the test. I have made an OH Referral for which he has an appointment on 06/11/2019.
84. This indicates that he thought that he ought to attend, since otherwise it would be a third consecutive FTA, but it was no more than a token effort. But the policy does not distinguish between failures to attend and failures to pass the test. Mr Madhar attached considerable importance to the fact that the above e-mail states that this was a "first fail", asserting that he should not have been placed on restrictive duties for a first offence, but that simply overlooks his previous failures and seems to us almost deliberately to miss the point: a failure to pass is no different from a failure to attend.
85. In those circumstances the policy provides for a referral to Occupational Health. The main medical condition preventing him successfully passing the test at this stage was his osteoarthritis. That was the first issue mentioned in the e-mail by Governor Pearson and the first issue mentioned in the occupational health report at page 355. That review concluded that he was fit to retake the test when he was not experiencing a flare-up of arthritis in his knees. Clearly it was in his best interests to retake the test as soon as possible, and so come out of restricted duties. Not only did restricted duties mean that he was on a performance review process but it also prevented him taking up his temporary promotion.
86. CM Holland asked for enquiries to be made about where and when another test could take place. The first available retest was on 2 December. That was at another prison a considerable distance away, and Mr Madhar opted to go to HMP Olney on 4 December, which was still 86 miles away. Although that was inconvenient, it avoided any further delay, and CM Holland was keen to ensure that he was able to take up his temporary promotion before his 12 months on the merit list lapsed. That seems to us to a supportive attitude, but Mr Madhar describes this arrangement as being part of a personal vendetta against him by Governor Pearson.
87. He relies on a number of comparators who had been allowed to defer tests in various circumstances, including one following a cosmetic operation, but none of them correspond to his position of a third consecutive failure, and we cannot regard this re-test as less favourable treatment – it is the exactly what would be expected in the circumstances.
88. This time Mr Madhar passed the test. Unfortunately he did not then return to work

take up his new promotion, as intended. Instead, he went off sick with stress. There is no suggestion that this sickness was anything other than genuine and he remained off until October 2020, ten months later. He was clearly of the view by then that he was the victim of discrimination at work, mainly because of the fact that he was refused time off to attend his uncle's funeral, and also the promotion issue. His thoughts on this reflected what we regard as a misunderstanding about being placed on the merit list.

89. These three fitness test issues are also raised as acts of victimisation (**Issue 9.5**). We do not accept that being required to do the fitness test was a detriment since he had not in fact asked to have it put off, and it is a requirement. Being placed on restricted duties is the automatic consequence of his failing the test, but that has to be regarded as a detriment. Anyone would see that as an unwelcome development. Having to take the test at another establishment was in our view for Mr Madhar's benefit, and we believe that any reasonable person would see it in that light. Unfortunately, by then, Mr Madhar was very suspicious of management motives and took exception to it, but the test is an objective one and we think his view was mistaken. That remains the case even though it was mentioned in his Occupational Health report on 6 November 2019 (page 366). This simply records that he said that he felt it would be stressful to go to another establishment.
90. Continuing with the narrative, from then on there were a number of overlapping processes in place. No formal conclusion had been announced to the disciplinary investigation into his unauthorised absence in June. A decision was still awaited about his complaint of discrimination (DIRF) following that episode. An absence management process was already underway following the failure of the fitness test in October, and that continued.

The November Grievance

91. Mr Madhar also submitted a follow-up grievance on 14 November 2019. This was the second protected act. This time (page 362) he used the approved grievance form. In it, he recited the whole history of events surrounding his uncle's funeral and complained about the delay in dealing with his DIRF complaint.
92. Just as with the DIRF complaint however, no clear conclusion was ever reached. According to Mrs Webb, this was dealt with by the Equalities Team, and as we have seen they made efforts to chase Governor Seymour for an outcome to the original complaint. By then however further grievances had been lodged, and we agree that no real outcome was received to this grievance.
93. **Issue 2.12** provides:

2.12 There was a delay in providing the Claimant with the outcome of the grievance he lodged on 14 November 2019 (the outcome was provided on 21 December 2020).

94. Hence, once again, this is not a complaint about the outcome of the grievance but about the delay in dealing with this grievance, which was itself largely a complaint about delay. Our conclusions on this issue are the same as our conclusions on the DIRF complaint. Although there was undoubtedly a delay, and a significant one, that simply reflected the degree of confusion on the part of those responsible. It was dealt with essentially by chasing Governor Seymour for a response, and for the reasons already given we conclude that the same delay would have applied to any such complaint in these increasingly complex circumstances. There was no less favourable treatment but this was a detriment, and this issue is **Issue 9.4** on the list of alleged acts of victimisation.

Sickness absence and grievances

95. Shortly after he went off sick a decision was made to move Mr Madhar from his normal place of work in the reception unit back to a House Block. This gives rise to a further issue, **Issue 2.16**:

2.16 In December 2019 the Claimant was notified that he would be required to work in a residential unit rather than on reception duties in circumstances where he had only been doing reception duties for 16 months and contrary to the Respondent's policy that staff would remain working in one place for 2 years.

96. The decision was made by Governor O'Connor at a meeting on 4 December 2019. More experienced staff were needed in House Block 1. Mr Madhar was in fact one of four prison officers reassigned to this House Block, and this was a recognition of his experience. It also gave him the opportunity to mentor more junior staff.

97. There is no formal policy that staff remain in one place for two years but it is the normal practice. It is not clear to us why Mr Madhar takes this objection since he had applied in this two year period to go and work as a Gatekeeper. We are however satisfied that there was a genuine operational reason for this move and it was in no sense of penalty. Mr Madhar relies on no less than 8 comparators on this issue but we did not hear any evidence about their circumstances, even to understand why he regarded it as less favourable treatment. However, he objected to it, and being moved without consent must be regarded as a detriment.

98. It was then the subject of a further grievance. **Issue 2.17** provides:

2.17 The response to the Claimant's grievance lodged on 21 December 2019, in which he alleged that the change to his area of work was race and religious discrimination was considerably delayed (received on 12 February 2020) and inadequate (merely dismissing his complaint on the basis that the reason for the move was unidentified 'operational reasons').

99. There is a detailed log from CM Holland setting out all the contact he had with Mr Madhar during his sickness absence and that shows that he discussed this move with him on 20 December, by telephone, and they agreed to have a meeting at his

house on 23 December. CM Holland recorded a few notes to put in his log but otherwise there are no minutes. However, it was attended by Mr's Madhar trade union representative and also by CM Ingram on the management side. The main purpose of the meeting was a welfare visit but they also discussed the proposed move and Mr Madhar made it clear that he was not happy. It may well be that he had a generally negative view of any management initiatives by that stage and was inclined to assume that there was some hidden agenda. He had already started to prepare a grievance and he handed it to CM Holland before he left. They discussed it briefly. In it he stated (page 391):

I have currently been signed off sick with work related stress by my GP. I have explained to him how I am being bullied and victimised by management of all grades and the only reason behind this is the difference between me and my colleagues being the colour of my skin.

...

In my opinion I am being moved as a one for one swap with this member of staff due to the colour of my skin. She is a BAME member of staff just like myself moving from a residential unit to Ops. And to replace on the residential unit I have been chosen out of the 4 other BAME members of staff to be moved as I feel the "quota" for ethnic minorities has been reached in the Ops group and the residential unit has dropped.

100. The grievance was therefore made in stark terms. On 7 January 2020 CM Holland e-mailed Mrs Webb about what to do with it:

"Janice,

Surinder has submitted a grievance about being moved from Operations to HB1.

I have completed the grievance but not met with him to speak about it. I don't think there is any real point in having a meeting - Do I have to have one?

101. Although there was some discussion at the house meeting, we agree that there ought to have been a further and separate meeting, particularly as Mr Madhar was complaining very broadly about discrimination on grounds of race. The grievance form involves a series of boxes which the employee completes to set out the grievance and the manager in question then uses to respond. On this occasion CM Holland simply completed the form stating that the change was for operational reasons and not discriminatory. We agree that this was an inadequate response to the grievance and amounted to a detriment.
102. Was it less favourable treatment? No actual comparator is provided, and it is difficult to construct one. The complaint is that Mr Madhar had an inadequate response to his grievance, because the thing he was complaining about was an act of discrimination. A hypothetical comparator therefore is someone who complained to CM Holland about something else. We can find no basis to

conclude that the response was any different in this case because of the subject matter.

103. As to the timing of the response, CM Holland signed the grievance form on 7 January, the same day as his e-mail to Mrs Webb, but it seems that it was not sent to Mr Madhar until 12 February, about six weeks after the grievance was submitted. We accept CM Holland's explanation that he thought he had sent it but that as soon as he realised it hadn't been sent he rectified this immediately. There was certainly a delay, but it does not strike us as an unreasonable delay in the circumstances. That is the allegation and on the facts we do not find that that aspect is made out.
104. There was however right of appeal which Mr Madhar exercised. In due course he was invited to an appeal meeting on 16 March 2020 (479) but he did not turn up. Rather than dismiss his appeal however, it was simply rearranged for 22 April 2020. By then of course the country had entered its first national Covid lockdown. It is not clear whether that meeting ever went ahead. There are no minutes, simply an e-mail from a Governor Keene on 24 April to Mrs Webb asking "where do I write up the appeal on this form?" That rather suggests that there was no meeting. Mrs Webb accepted that she was not aware of the outcome, and so neither are we.
105. To complicate matters further there were other developments during this period. In early February 2020 Mr Madhar wrote to his MP complaining about discrimination (another protected act) which led to an e-mail to the prison seeking more information. Then, no doubt frustrated about the delay in receiving any formal response to his complaint about his move to House Block 1, or over the special leave application, he completed an accident report form, stating that he had "been subject to racism, work place discrimination, victimisation and bullying". This was clearly not the appropriate method of complaining about discrimination and it may well be that Mr Madhar was simply exhausting every available avenue in order to get a response. At around the same time he submitted two further grievance forms about discrimination at the prison and this time sent them to an external body in the West Midlands. They were a repetition of the existing complaints.
106. Very little of these last events were covered in the evidence that we heard and we set them out for completeness. It appears that not long after these final grievances Governor Pearson moved on, and indeed has now left the prison service. There continued to be regular and supportive contact by CM Holland throughout the six months absence in 2020 and in June that year he had what appears to have been a supportive meeting with the new Governor, who encouraged him to return to work and assured him that the prison was supportive of him returning and progressing his career. No formal outcome to the grievances appears to have been provided, although these proceedings were begun in May 2020, and it may

have been felt that those internal proceedings had been overtaken by events.

107. We deal next with **Issues 2.18 to 2.21**, which concern the attendance management process:

2.18 Governor Pearson refused to meet with Mr Madhar to discuss the concerns that had led to his stress-related sickness absence despite Occupational Health reports dated 24 January 2020 and 3 March 2020 recommending a meeting.

2.19 On 5 March 2020 Mr Madhar was invited to a Formal Attendance Management Meeting on 16 March 2020 to consider whether he would be dismissed.

2.20 Mr Madhar was not invited to attend a Formal Attendance Management Meeting until 5 March 2020 despite having been off sick for more than 28 days (as of 5 December 2019), contrary to the Respondent's Attendance Management Policy.

2.21 At a formal attendance review meeting with James Holland on 5 March 2020, Mr Madhar was told that Governor Pearson had already made up her mind to dismiss him.

108. There was a further occupational health report, the third, on 3 March 2020 (page 425) This stated the cause of Mr Madhar's ill health was stress at work and this would only be improved when his work situation was resolved, adding:

"I believe that, if he could have a meeting with the governor, this would significantly improve his condition and the prospect of a return to work."

109. By then however there was the formal absence review process underway and Mr Madhar was due to meet the Governor on 16 March in that context. A formal meeting of that sort may have not have been what Mr Madhar had in mind, but it seems to us that it would have been inappropriate for Governor Pearson to have entered into separate discussions at that stage. No doubt Mr Madhar would have wanted to explain his perception that he was being discriminated against, but by then this was all the subject of separate grievance proceedings, which Mr Madhar had initiated, and which might ultimately be referred to Governor Pearson. In those circumstances there seems nothing objectively unreasonable in not having a separate meeting, and apart from this mention in the Occupational Health report, it is not something requested by Mr Madhar. We conclude it was not a detriment, and there is no reason to view it as less favourable treatment.

110. The second issue here is that he was invited to a formal meeting on 5 March 2020, but that is simply part of the normal absence management process. In fact, Mr Madhar also complains about the delay in holding it. This meeting was just a routine attendance management meeting with his line manager and Mr Madhar was accompanied by his trade union representative. No minutes were taken, although CM Holland recorded brief details in his contact log. At that stage the Occupational Health advice was that he was unlikely to make an improvement unless his issues at work were resolved, and the main problem concerned his

perception of discrimination. Hence there was no immediate prospect of a return to work, and in those circumstances a referral to a final meeting seems perfectly understandable.

111. We do not accept that any remark was made at that meeting by CM Holland to the effect that Governor Pearson was going to dismiss him. If there had, we would have expected it to be seized on by Mr Madhar or his representative, as showing that his dismissal had been predetermined and was unfair. Nothing was said of this afterwards, and so we find as a fact that it was never said. Clearly, no such dismissal took place, and even if that had been the intention it is implausible to suppose that CM Holland would tell Mr Madhar that this would happen.
112. Reviewing the process as a whole, this meeting on 5 March then led to an invitation to attend a further meeting with the Governor on 16 March, which may have resulted in his dismissal. Mr Madhar's case is that he did not receive or notice this email inviting him to the final meeting, but it seems to us more likely that he was anxious about the meeting and ignored it to avoid any risk of immediate dismissal. It does not seem to us that there was any such fixed intention on the respondent's part, otherwise there would have been some active follow up from his failure to attend. A new meeting would have been fixed and he would no doubt have been dismissed. We can now see that none of this happened. It may be that a different view was taken after Governor Pearson left but there was nothing inappropriate in the process followed.
113. As to the delay, we heard from CM Holland that he was believed that the policy required a three month gap before a formal meeting, rather than one month, and we accept that simple explanation for the delay. There is no record of any complaint about delay during that period and we cannot see that he suffered any detriment as a result. It allowed the respondent to obtain Occupational Health advice on his case. And again, any member of staff would have waited as long, given the misunderstanding by CM Holland.
114. Hence we conclude that none of these issues involved a detriment or less favourable treatment. The same approach would have been taken for any other member of staff. Although being invited to a performance management meeting may not have been welcome, it is an opportunity to consider Occupational Health advice and steps for a return to work, and Mr Madhar also complains about the delay in holding it.
115. As a footnote, the final grievance which Mr Madhar raised, although dated 5 March 2020 in the chronology, is in fact dated 13 March. This was shortly before the meeting at which Mr Madhar thought that he would be dismissed. This reinforces our view that he was aware of that meeting and was looking for ways to avoid it. That external grievance led to an interview in late April with a governor at HMP Lincoln by telephone, and then it seems the matter was referred back to HMP

Hewell.

116. The final issue, **Issue 2.22**, again concerns the delay in this grievance process
- 2.22 Mr Madhar has not received the outcome of the appeal to the grievance outcome, the hearing of which took place on 13 April 2020.
117. As we have already mentioned, try as we might we have not been able to find any formal outcome to Mr Madhar's various grievances and the most likely explanation, once again, is that the prison service felt that these points had been overtaken by the Employment Tribunal proceedings then underway. It may also be that the pandemic had a significant impact on the prison's ability to deal with this less urgent issues.
118. Before leaving our findings of fact we feel we should record both Governor Seymour and CM Holland said in evidence that they had never had any refresher training on Equality and Diversity. In the case of Mrs Seymour, that covers a period from her initial training in 2000, whereas CM Holland joined the Prison Service in 1991. They were the only witnesses asked directly about this and it may be that the lack of such training is quite usual in the prison service, but we found this surprising for managers in such a large public body. That is no criticism of either individual but the respondent may well wish to address this.

Conclusions

119. Taking stock of these findings, none of them amount to less favourable treatment and so the claims of discrimination must be dismissed. It is not necessary to go on to consider whether any such treatment was because of race or religion. However, we should record that we heard nothing to indicate that race or religion played any part in these events. The only hint of any connection concerns Mr Madhar's request for time off to attend his uncle's funeral, which was an event with religious significance, but without repeating our previous findings, Mr Wood went as far as he could in trying to sort this out for him and it was simply not possible in the circumstances. There is no reason whatever to believe that Mr Madhar's request was refused *because of* this religious context or that it was any more likely to have been approved if he had wanted leave for some other reason, or if some other member of staff had made such a request on this busy weekend and in the way that Mr Madhar approached it.
120. There were some findings of detrimental treatment however. Summarising our findings of detriment, they include the delay in dealing with his DIRF and the follow-up grievance, being placed on restricted duties, the fact that his place of work was moved to House Block 1, the inadequacy of the response to his grievance about this, and the fact that he received no formal outcome to his grievance.
121. The next question is whether any of these detriments were because he was

complaining about discrimination, i.e. because of his protected acts. (There was no dispute that any of these complaints about discrimination, including the complaint to the MP, were protected acts.)

122. Here, our conclusions mirror those on the question of whether this was less favourable treatment. We conclude that the delays in question would have happened to any grievance, and were not held up further because the subject matter included allegations of discrimination. There is nothing to suggest otherwise. Similarly, being placed on restricted duties was simply the normal consequence of a further failure to pass the fitness test. The move to a House Block was, once again, a move that affected four members of staff, and was made for understandable reasons. There is nothing to suggest that this was an act of reprisal for submitting the DIRF or the follow-up grievance. It seems to us more likely that CM Holland would have preferred not to have to deal with this issue at the same time as managing Mr Madhar's absence from work. And the various shortcomings in the subsequent procedures seem to us to be entirely explained by pressures of work, Covid, and the fact that Employment Tribunal proceedings were later underway. Although there was delay in the grievance processes, and no formal outcome, the same is true of the disciplinary investigation and the attendance management process, and certainly nothing to suggest that matters were strung out because of the nature of the complaint.
123. Paragraph 136 of the Equality Act deals with the burden of proof, and a two-stage process for deciding whether there was a breach of a provision, but in **Martin v Devonshire Solicitors** [2011] ICR 352 Mr Justice Underhill stated at paragraph 32:

“It is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.”
124. This is such a situation. We would add that at no point during the hearing was it put to any of the respondent's witnesses that they acted as they did because of any protected act, such as the DIRF complaint. It was not clear to us in fact whether the claim of victimisation was pursued, but it was mentioned in Mr Martins' closing submissions. Even then, it was only to pose the question whether any of the acts in question were acts of victimisation. Hence, this claim must also be dismissed.
125. It is unnecessary for us to go on to consider whether any of these acts of discrimination were out of time.
126. One final issue concerns the deposit of £500 which Mr Madhar was ordered to pay as a condition of being permitted to pursue his complaints of discrimination. This was imposed following the second preliminary hearing on 28 February 2022. The

reasons were expressed as follows:

11. The reasons the claimant's claim appears to have little reasonable prospects of success are:

- 11.1 the claim consists solely of allegations of racial discrimination and racial harassment;
- 11.2 the only basis upon which the claimant thinks his race was a factor in what happened is that he was (he alleges) treated unfairly, and differently from white colleagues, and he cannot think of any reason why he would have been treated like that other than his race;
- 11.3 as a matter of law, unfairness and/or a difference in treatment and a difference in race are not by themselves things from which, in accordance with section 136 of the Equality Act 2010, a Tribunal could decide that unlawful discrimination had taken place.

127. That has been our ultimate conclusion here, and so Mr Madhar has been unsuccessful on this issue. By Rule 39(5) of the Employment Tribunal Rules of Procedure,

If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order – ...

(b) the deposit shall be paid to the other party ...

128. On that basis the deposit of £500 shall be paid to the the respondent and a separate direction will be made to give effect to that.

Employment Judge Fowell

Date 6 March 2023