EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102915/2022

Held in Glasgow on 28-30 November and 1-2 December 2022

Employment Judge P O'Donnell

Members D McFarlane and L Brown

Mr Daniel Powell	**Claimant** **In Person**
Advocate General For Scotland As Representing MOD	**Respondent** **Represented by:** **Mr A Gibson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that the Claimant's claims of direct discrimination and harassment under the Equality Act 2010 are not well-founded and are hereby dismissed.

REASONS

Introduction

1. The Claimant has brought complaints of direct discrimination and harassment under the Equality Act 2010. He relies on the protected characteristic of philosophical belief for the direct discrimination claims and the protected characteristics of race, sex and belief for the harassment claims.

2. The philosophical belief on which the Claimant relies is a lack of belief in critical theory. The Respondent concedes that this falls within the definition

of this protected characteristic in s10 of the 2010 Act. In terms of race, this is a reference to white people and sex refers to men.

3. The case has been the subject of case management by the Tribunal in advance of the final hearing and, in particular, a list of the issues to be determined at this hearing has been set out as follows:

    a. In respect of the philosophical belief of critical theory was the Claimant treated less favourably by

        i. Whistleblowing claims being ignored.

        ii. Questions at the all-staff unacceptable behaviours dial-in meeting being removed/ignored.

        iii. Being subject to a disciplinary hearing and final written warning conducted in breach of policy?

    b. Was that treatment because of his lack of such philosophical belief?

    c. Was the Claimant subject to unwanted conduct, namely:

        i. The publication of a report entitled “Defence Inclusivity Phase 2 Lived Experience”.

        ii. By the issuing of an email/memo by the then Permanent Under Secretary Stephen Lovegrove and being told that he had no place with the Respondent.

        iii. The publication of a document “An Inclusive Race and Ethnicity Language Guide”.

        iv. Being reported by Peter Ginnever and James Chan to superiors.

        v. By the publication of a blog by Nick Pett.

        vi. By the publication of a photograph entitled “United for Inclusion”.

vii. By the dissemination of a paper entitled “The Psychosis of Whiteness”.

d. Did any unwanted conduct have the purpose or effect of violating his dignity or creating an intimidating, hostile, humiliating or offensive environment?

e. Was that conduct related to a) his lack of philosophical belief; b) his sex and/or c) his race?

f. If not the purpose, but if said conduct had the proscribed effect, was it reasonable for the conduct to have had that effect taking account of the Claimant’s perception and all the other circumstances of the case?

Preliminary issues

4. At the outset of the hearing, the Claimant sought to lodge a supplementary bundle of documents in addition to the joint bundle already lodged. The Respondent objected on the basis that some (although not all) of the additional document were not considered to be relevant to the issues to be determined and, if any of these documents were to be put to the Respondent’s witnesses, there had not been sufficient notice of this for the Respondent’s agent to take instructions.

5. The Tribunal allowed the supplementary bundle to be lodged with the caveat that it had formed no view as to the relevance of the documents or the weight to be given to these. Objections to the relevance could be made on a document-by-document basis and if the Claimant intended to put any of these documents to the Respondent’s witnesses then he should indicate to the Respondent’s agent in advance which documents will be put to those witnesses before they were called.

Evidence

6. The Tribunal heard evidence from the following witnesses:

a. The Claimant.

b. Lewis Morgan (LM), another employee of the Respondent.

c. Steven Bissette (SB), who carried out the investigation element of the Claimant's disciplinary process.

d. Fiona Anderson (FA), the disciplinary decision-maker.

e. Ken Berry (KB), who heard the Claimant's first appeal.

f. Brigadier Clare Philips (CP), who heard the Claimant's grievance about the first appeal.

g. Bridget Morrison (BM), who heard the Claimant's second appeal.

7. There was an agreed bundle of documents prepared by the parties running to 974 pages. A reference to a page number below is a reference to a page in this bundle. The Claimant's supplementary bundle had page numbers running to 424 although it had less pages than this because the Claimant had removed certain document from this bundle before it was lodged but not re-paginated it. Where there is a reference to a page from the supplementary bundle below then it will be preceded by "SB".

8. This was not a case where there was any real dispute of fact between the witnesses. The sequence of events giving rise to the claim was consistent between the witnesses and supported by contemporaneous documents. The Tribunal did not, therefore, have to resolve any dispute between the witnesses although it did consider that all witnesses were honest in the evidence which they gave.

9. However, the Tribunal did consider that a significant proportion of the evidence led by the Claimant was irrelevant to the issues to be determined. The Claimant's evidence-in-chief was very focussed on setting out his view that the Respondent had, in effect, been taken over by their Diversity and Inclusion team (whom the Claimant described as *"radicals"*, *"subversives"* and *"insurgents"*) and that this group was conducting psychological warfare against the Respondent's staff and the British public in general. Indeed, it

was quite clear to the Tribunal that the claim was seeking some sort of judicial inquiry into these matters rather than seeking a remedy in respect of any alleged discrimination against himself which he described as a *"sideshow"*.

10. For reasons which it will set out in more detail below, the Tribunal was only concerned with the question of whether the Claimant was discriminated against as set out in the list of issues and so will only make findings of fact which are relevant to these issues.

11. The Tribunal considered that there were also issues with the adequacy of the Claimant's evidence. In particular, a number of the documents on which the harassment claim is based (that is, the phase 2 report, the photograph and the inclusive language guide) were presented in something of a vacuum with no context as to how these came into the knowledge of the Claimant. For example, it was not said whether these documents were sent to all staff; were placed on the front page of the Respondent's intranet for staff to access if they wish; or whether they existed somewhere on the Respondent's computer network and were stumbled upon by the Claimant. The question of how these documents came into the knowledge of the Claimant are relevant to elements of the test for harassment such as the purpose and/or effect of them.

12. The Tribunal also found the evidence of LM to be of little relevance or assistance. The evidence he gave related to disciplinary proceedings taken against him for making comments on blogs posted on the Respondent's intranet. At best this might be a factor for the Tribunal to take into account in drawing any inferences from the primary facts in respect of the claim regarding the disciplinary process involving the Claimant. However, it was only one instance of another employee being disciplined for comments made by them and there was no evidence that LM shared the relevant protected characteristic of a lack of belief in critical theory.

Findings in fact

13. The Tribunal made the following relevant findings in fact.

14. The Claimant has been employed by the Respondent since 2005. His current role is in witness liaison in the litigation team and he has held this role since 2019.

15. The Respondent is a government department responsible for the running of the UK's armed forces. It has thousands of staff across numerous locations in the UK comprising civil servants and armed forces personnel. The Claimant is based at the Respondent's offices at Kentigern House, Glasgow.

16. The Respondent, like many other public and private sector organisations, has policies relating to diversity and inclusion. They take actions, such as training, to put these policies into effect.

17. The Claimant has formed the view that the way in which diversity and inclusion is implemented in the Respondent's organisation goes against government policy and is divisive. He objects to certain of the concepts underlying this such as critical race theory which he views as an attack on white people. The Claimant's objections are not restricted to the issue of race and he has objections to how issues around sex, sexual orientation and trans issues are addressed within the Respondent.

18. The Claimant takes the view that there is an attempt to manipulate him and other staff by the way in which lived experiences are presented as part of the Respondent's diversity and inclusion program. This is a reference to individuals describing their own experience of discrimination and the degree to which their perception of events is to be respected. The Claimant objects to this as lacking evidence and describes some of the descriptions of these lived experiences as lies.

19. In particular, the Claimant considers that the way in which diversity and inclusion is being implemented within the Respondent breaches the Civil Service Code as he considers that it represents a left-wing and Marxist political ideology.

20. In November 2021, the Claimant sought to raise his concerns about diversity and inclusion within the Respondent with the Respondent's confidential hotline. This is a team which the Respondent has set up to allow staff to raise issues under its whistleblowing policy and, as its name suggests, it is done on a confidential basis.

21. The Claimant emailed the confidential helpline on 15 November 2021. A copy of the email is at pp371-373. The Tribunal does not intend to set out the content of the email verbatim but would highlight the following matters:

    a. The email sets out the Claimant's issues in detail and includes links to various internal documents as well as to external documents such as news reports from the BBC.

    b. He starts by explaining that he has been raising concerns about diversity and inclusion in responses to blog posts for over a year.

    c. The initial focus of the email is on Stonewall and concerns about its Diversity Champion scheme. The Claimant makes reference to various news reports about this and the fact that the BBC and Ofcom had withdrawn from the scheme. He also refers to comments from government ministers regarding this.

    d. He talks about Queer Theory and the fact that this is built upon critical theories which he says has roots in Marxism. He goes on to discuss this being about there being oppressors and oppressed, not just in terms of class but also race, sex and other matters.

    e. He asserts that there has been an *"incursion"* into the MOD by *"idealogues pushing Far Left, Marxist, anti-democratic agendas"* and that this has been *"aided and abetted by leadership, both Military and Civilian"*.

    f. The Claimant explains that his concerns are not just about Stonewall but diversity and inclusion generally. He makes reference to various

documents available on the Respondent's computer network and sets out his concerns about these in some detail.

22. The Claimant received a response to his email by letter dated 16 November 2021 (pp369-370) which stated that his concerns did not fall under the whistleblowing policy and quotes a section of the policy which states that concerns relating to individual treatment of staff, bullying, harassment, a management decision and other employment matters are not covered by the policy.

23. The letter directs the Claimant to the Diversity and Inclusion Portal where he can raise concerns about diversity and inclusion. It also referred to him to a service operated by Defence Business Services (DBS – the Respondent's human resources department) called SpeakSafe where concerns could be discussed. He was also given contact details for the Respondent's Employee Assistance Programme.

24. The Claimant did not know the person who replied to him and confirmed in evidence that this person would not know him.

25. The letter of 16 November was the end of the matter and the Claimant did not take his complaint further.

26. On 16 June 2022, the Respondent conducted what is described as an "all-staff dial-in" at which members of senior management would answer questions posed by staff on particular topics. Staff would, as the name suggest, dial in to the meeting to hear what was to be discussed. The meeting on 16 June was specifically to address issues around inclusion and unacceptable behaviours.

27. Staff could pose questions in advance by using an app or program called "Slido".

28. On 13 June 2022, the Claimant emailed two people (one from the Respondent's comms team and one from marketing) to ask why two questions had been deleted from Slido; one regarding a lack of belief in

gender identity theory and that staff should be safe to acknowledge there are two biological sexes and the other relating to an Employment Tribunal case involving Stonewall. The email is at p427. The Claimant had not posed those questions on Slido but had liked them.

29. The Claimant received an email response about half an hour later (p426) explaining that the questions had been flagged by colleagues as showing a lack of respect for others and had been *"rightly"* removed. The Claimant replied to this almost immediately insisting that there was nothing disrespectful in these questions and alleging that this amounts to censorship.

30. In the event, the questions were restored to Slido ahead of the meeting on 16 June. There was no evidence led by either party as to how or why the questions were restored.

31. The Claimant did not attend the meeting on 16 June. He produced a transcript of what was discussed at the meeting which begins at SB342. The response to the question on gender identity theory is at SB348-350:

    a. The answer acknowledges that there is a lot of debate about this issue.

    b. It is stated that the Respondent does not discriminate in terms of the Equality Act.

    c. It is said that it has to be recognised in terms of beliefs that staff should be treating colleagues with respect. It is one thing to hold beliefs, but staff must ensure that they are not harassing or bullying people when expressing those beliefs, for example, deliberately mis-gendering someone.

    d. The person responding went on to set out some of their experiences as a gay woman growing up in the 1990s.

32. The Respondent operates an intranet called "Defnet" which is the means by which staff can access internal documents online. It also includes articles and

blogs from members of staff which can be read by other staff if they wish. There is a facility for staff to leave comments in response to blogs.

33. On 2 August 2021, a complaint was made by Lt Colonel Simon Maggs (p277) about a comment posted by the Claimant in response to a blog. The comment is quite lengthy but the following matters can be highlighted:

    a. The Claimant complains about Stonewall *"dispensing bogus legal advice and exercising outsized tyrannical influence".*

    b. He refers to the Pride flag being flown over MOD buildings in terms of *"being representative of having been conquered by an invading army".*

    c. He also refers to the terms *"allies"* as meaning *"partners in war".*

    d. There is also a reference to Trans Day of Remembrance cheapening the actual Day of Remembrance.

    e. He queries why military and nationalist language or iconography is used and then answers his own question by stating that this is being driven by critical theory which demands revolution and seeks to drive a wedge between folk.

    f. He states that the only thing which makes someone gay is their sexual and romantic attraction to someone of the same sex and so questions why there is a clamour of Pride week.

34. This complaint was renewed in November 2021 when the Claimant repeated these comments.

35. Two further complaints were made in relation to comments posted by the Claimant on Defnet:

    a. The first was on 13 January 2022 in response to a comment by a member of staff about being off sick with COVID:

        i. The thread of comments also included another member of staff explaining that her father had died of COVID.

ii. The Claimant speculated that vaccination could have exacerbated or caused the other person's illness, making reference to *"a great deal of qualified medical opinion who believe so"* who the Claimant considered were more believable than *"the medical advice of Behavioural Scientists whose job it is to manipulate the masses"* in what the Claimant described as an *"ongoing cognitive and medical war being waged against society"*.

iii. In response to a comment challenging these assertions, the Claimant commented further:

1. He referred to *"the whole thing"* being *"painfully obviously an outright scam"* suggesting that the inventor of mRNA technology and the former chief science officer of Pfizer had said so.

2. He makes reference to *"all the athletes keeling over with heart problems being vaccinated speaks for itself"*.

3. He also makes reference to the fact that there had been a third vaccination but people were still getting sick as evidence that the *"entire industry built around covid is a fraud"*.

4. He goes on to suggest that the dictionary definition of *"vaccine"* has been changed as part of this, that all the animals in the animal testing phase had died and that *"thousands and thousands of doctors"* cannot be wrong.

5. He suggests that the posters about getting vaccination boosters which had been put up in MOD buildings are reminiscent of Soviet-style propaganda.

6. The comment concludes that official figures around deaths have been fudged to support this propaganda.

b. The second comment (p314) was made on 14 December 2021 states that it is time to openly declare that the government was at war against the folk; psychological war and biological/chemical war.

36. These comments and the complaints about them came to the attention of FA who is in charge of the department in which the Claimant works but is not his direct line manager. She decided that a disciplinary investigation was required to consider whether there was any misconduct and SB was appointed to carry this out. The Claimant was informed of this by letter from FA (pp150-151); unfortunately, the copy of the letter in the bundle was copied with a post-it note obscuring the date of the letter but it must have been sometime in January 2022 given the timeline of the disciplinary process.

37. SB had been a civil servant for 25 years and at the time was on the higher executive officer grade. The investigation into the Claimant was his first disciplinary investigation.

38. SB invited the Claimant to a meeting to discuss the allegations by letter dated 24 January 2022 (pp311-312). The letter sets out the three complaints that had been made about the Claimant's comments and he was invited to a meeting on 31 January 2022 to discuss these.

39. The meeting went ahead as planned. Both handwritten notes (pp317-325) and typed notes (pp326-330) were made of the meeting. These were sent to the Claimant by email dated 1 February 2022 (p316) and he replied by email dated 14 February 2022 (p331) that he was content with them.

40. SB asked the Claimant whether there were any witnesses whom the Claimant considered could assist in the investigation. The Claimant gave two names (one of them being LM) although he indicated that he was not sure what assistance they could provide. SB considered that the witnesses were not relevant to the complaint. The Tribunal notes that these individuals were not involved in the comments which gave rise to the disciplinary action and could not speak to these events. Rather, they were people who shared some of the

Claimant's views and would speak to how they had been treated for posting comments on blogs.

41. SB also spoke to Simon Maggs during the course of his investigation but made no written record of this. The Tribunal was not taken to the Respondent's disciplinary procedure (it was not included in the bundle) but it was not in dispute that this procedure required a written record to be kept of any discussions which formed part of the investigation.

42. SB produced an investigation report which is at pp168-171 followed by a number of appendices containing relevant policies, the meeting notes with the Claimant and correspondence relevant to the investigation.

    a. The report sets out the three complaints giving rise to the investigation and then lists what SB considered to be the relevant policies and procedures.

    b. It summarises the steps taken in the investigation and the evidence available to SB.

    c. In respect of the complaints, SB concluded that there was a case to answer taking account of the following factors:

        i. The Claimant was aware of the blog commenting rules issued by the Respondent and the Civil Service Code.

        ii. The Claimant had previously received informal warnings about comments on blogs. This is a reference to a discussion between the Claimant and FA when previous complaints about his comments had been raised (see further below). It did not result in any disciplinary action and there was some confusion about the status of this discussion arising from the fact that, despite the name, an "informal warning" in terms of the Respondent's disciplinary process is a formal disciplinary sanction.

iii. SB considered that the comments breached the Impartiality, Integrity and Political Impartiality provisions of the Civil Service Code.

iv. One of the comments related to the government vaccination programmes.

v. There was a need for civil servants to be politically neutral.

43. FA wrote to the Claimant by letter dated 17 March 2022 (pp396-397) inviting him to a disciplinary hearing to be held on 28 March 2022. The letter (which was sent by email) included a link to SB's investigation report. It explained that the meeting could result in a final written warning or dismissal.

44. The meeting proceeded as planned on 28 March 2022 and a note of the meeting is at pp398-400. The Claimant did not deny making the comments in question and his position was that the blogs themselves breached the Civil Service Code and were in breach of government policy. He considered that it was unfair for him to be disciplined for pointing this out. The note of the meeting records that the Claimant spent some time seeking to set out his issues with diversity and inclusion which he considered he had a responsibility to challenge. During the course of the meeting, the Claimant indicated that he would refrain from commenting on blogs in the future to avoid similar complaints.

45. FA issued her decision by letter dated 6 April 2022 (pp408-409). She explained that she was issuing the Claimant with a final written warning taking account of the Claimant's comments about the blogs breaching the Civil Service Code, the evidence in the investigation report, the impact of the comments and complaints about them had on the department and the fact that he had indicated he would stop commenting on blogs. She considered that the Claimant had breached the Civil Service Code due to a lack of objectivity in maintaining that his opinions were a matter of fact. The letter confirmed that the Claimant could appeal to KB.

46. The Claimant appealed by way of email to KB dated 19 April 2022 (p129) which attached his grounds of appeal (pp496-500).

47. KB replied to the appeal by email dated 29 April 2022 (p128) which attached a letter (pp415-416) explaining that the appeal was not upheld. The letter explained that the Respondent's policy only allowed for three grounds of appeal; procedural errors, severity and new information/evidence. KB considered that there were no procedural errors and that the Claimant had not provided any new information or evidence. The policy did not allow for an appeal on the grounds of a decision error. A copy of the relevant policy was not produced in the bundle but neither party disputed the limits on what constituted a ground of appal.

48. No meeting had been held between KB and the Claimant prior to this letter. KB had looked at the policy and concluded that it did not say that a meeting must be held. He had consulted with DBS who advised him that it was his decision as to whether a meeting was required. Given that he did not consider that the appeal had any basis then he decided not to hold a meeting. Again, no copy of the policy was lodged in the bundle and, in this instance, there was a difference in opinion between KB and other witnesses as to how the policy should be read in relation to the need for an appeal meeting.

49. The Claimant was unhappy at the fact that no appeal meeting had been held before the appeal decision had been reached. He raised a grievance which eventually came before CP. She met with the Claimant to ensure she fully understood his position.

50. CP looked at the policy (again, this was not in the bundle and so the Tribunal had no opportunity to see the wording) and came to the view that it was not wholly clear on the need for a meeting. Although she could understand how KB had reached the conclusion which he did, she read the policy differently. In her view, a meeting should normally be held and an appeal should not normally be concluded on the papers alone.

51. She, therefore, upheld the Claimant's grievance and confirmed this to the Claimant by letter dated 29 July 2022 (pp453-454). The outcome was that the Claimant's appeal against FA's decision would be heard afresh with BM being appointed to hear it as she had no previous involvement or connection with the case.

52. BM met with the Claimant on 7 September 2022 and issued her decision by letter dated 14 September 2022 (pp486-488). She decided that it was an error for SB to have not spoken to the witnesses put forward by the Claimant; she considered that, although the Claimant had indicated that they may not assist, it would have been appropriate for SB to have spoken to them to confirm this for himself. However, BM concluded that this error had not materially affected the decision.

53. She also concluded that it was an error for SB not to have recorded his discussion with Simon Maggs. She also fed back to FA that more detail of her rationale for her decision should have been provided.

54. BM decided to reduce the sanction to a first written warning. She considered that the comments from the Claimant lacked emotional awareness and had offended people. She also recommended training for the Claimant to help him consider how such comments could be perceived by others in the future.

55. Starting at p601 is a report entitled "Defence Inclusivity Phase 2: The Lived Experience" which runs for over 200 pages to p837. This report is dated 30 November 2020 and was produced by a number of academic institutions under a contract with the Defence Human Capability Science & Technology Centre.

56. The whole document was not spoken to in evidence and only the following items were highlighted in evidence:

    a. At p608, there are definitions of various terms used in the report and one these is the term "hegemonic masculinity".

    b. The executive summary at p611 sets out the following matters:

i. The MOD recognises that it struggles to recruit and retain women and people from Black Asian and Minority Ethnic (BAME) communities.

ii. A white male prototype was perceived to be pervasive in the MOD. This is described as being characterised by alpha male traits such as dominance, assertiveness and strong physicality. It was said that this impacted on white men who did not conform to the stereotype as well as women and people from BAME communities.

iii. There was evidence of structural discrimination (which was defined as where policies intended to be neutral are discriminatory in their impact) within the MOD.

c. At p621, footnote 16 stated that there was no evidence found by the research team of the matter to which the footnote refers but that it was considered to be generally known and understood by the MOD. There are some other similar footnotes.

57. On 19 June 2020, the permanent under-secretary for the MOD, Stephen Lovegrove issued a communication to all staff (p503). This communication was to address comments that had been posted internally during an all-staff dial-in held in the week before and which dealt with the subject of race and discrimination.

a. The communication stated that some comments posted during the dial-in and on blogs had been very disappointing and had caused distress to colleagues.

b. It noted that most of these comments had been posted anonymously.

c. It highlighted the following comments; conflating the term “indigenous” with white Britons; that white Britons needed to be recognised as different within their own network; that any focus on diversity is at odds with fairness in general; that there is no implicit or explicit prejudice in

the MOD. These were given as examples and were not an exhaustive list.

d. The communication also indicated that the fact that these comments had been heavily "liked" was found to be disappointing.

e. It was said that these were not tenets by which the MOD operate. There needs to be a recognition of difference in the MOD and society in general but that this is often not celebrated as a strength but is expressed as discrimination and prejudice.

f. The communication stated that the comments in question and those who hold them have no place in the MOD. Local managers are expected to make clear that these views are at odds with the ethos of public service and anyone who makes offensive or discriminatory comments would be subject to disciplinary action.

58. At pp462-480 is a document "An Inclusive and International Race and Ethnicity Language Guide". The document is created by the Department for International Trade diversity and inclusion team in collaboration with the BAME Network and the Foreign, Commonwealth and Development Office. The document is undated.

59. The Claimant led no evidence how he became aware of this document. He also led no evidence that this was a document used, disseminated or endorsed by the Respondent. Equally, the Respondent did not seek to argue that this was not a document which they used.

60. The document describes its purpose as enabling people to speak more precisely about race but that it is not intended to police language.

61. As with the Phase 2 report, the Claimant did not give evidence about the whole of this document and highlighted only those matters with which he took issue:

a. At pp469-477 is a glossary of terms used in relation to race and the Claimant highlighted the following definitions:

   i. "Decolonisation" (p471) which is described as active resistance to colonial powers and a movement towards political, economic, educational and cultural independence. It is also described as trying to rid your own mind of ideas that contain racist imagery or thinking.

   ii. "Racism" (p475) which is described as prejudice against a racial group which evolves into a global, systemic and institutional system and is the subordination of a racial group. It states that this can be often integrated into societies to the extent that it is not visible.

   iii. "Structural racism" (p476) which is described as racism and the ways it can form part of the fabric of a society.

b. At p478, there is a section headed "Good Allyship" and a definition of "ally" as someone who actively promotes the culture of inclusion and seeks to understand the obstacles which marginalised groups face. It describes allies as breaking established rules, whether corporate or social and challenging racism or ethnic prejudice.

62. It was not in dispute between the parties that a complaint was made against the Claimant by another staff member named Peter Ginnever regarding comments which the Claimant had made in response to a blog by Mr Ginnever entitled *"Learning about Racism"*.

63. However, a copy of this blog and Mr Ginnever's complaint was not led in evidence by either party. The only evidence produced in relation to this complaint was the following:

a. At SB396, there is a screenshot of a comment by the Claimant dated 13 January 2021 which states *"I really wish people would stop trying*

to incite race wars, gender wars, culture wars etc. No matter what you say, you are not going to convince me to hate anyone".

b. At pp348-349, there is a note of a meeting held on 25 February 2021 (the heading of the note wrongly gives the date as 2020) between the Claimant and FA (who was known as Fiona McCulloch at the time). This was an informal meeting to discuss the Claimant's comments (which are described in the plural throughout the note) on Mr Ginnever's blog and the subsequent complaint from Mr Ginnever. It records the following relevant matters about the complaint:

   i. Mr Ginnever had complained that the blog had resulted in *"fairly extreme commentary and discussion"* and that he had found the Claimant's posts to show *"extreme views and adherence to some odd conspiracy theories".*

   ii. Mr Ginnever had raised his concerns with a number of people within MOD including his line manager and the Civilian Workforce Team.

   iii. DBS had been contacted to check whether action should be taken about the comments. They replied that the comments were *"unpleasantly aggressive reading"* but did not amount to misconduct.

   iv. The complaints had gone to the security and vetting service. If they took action then FA explained that this could impact the Claimant's security clearance.

64. It was this meeting that SB had considered to be an "informal warning" during the investigation he conducted in 2022.

65. The Claimant led no evidence about any complaint by James Chan to his superiors. The only evidence relating to Mr Chan is as follows:

a. At SB402-403, there is a long comment from Mr Chan posted on Defnet on 24 January 2021 in response to comments from the Claimant who, himself, was commenting on something from Peter Ginnever. The post consists of several quotes from the Claimant's comments after each of which Mr Chan posits various questions about what the Claimant has said and asking whether there is evidence supporting the assertions he has made.

b. At SB404-406, there are an exchange of comments between the Claimant and Mr Chan on 25 and 26 January 2021. It starts with the Claimant sending a link to a document with the comment *"that's the badger"*. Mr Chan responds that the link is not to a MOD document and the Claimant asks why it needed to be a MOD document. In response, Mr Chan refers the Claimant to his comment on *"Quote 1"*, a reference to SB402. The exchange concludes with a lengthy comment from the Claimant.

66. Nick Pett (NP) is a member of MOD staff who publishes blogs on Defnet relating to diversity and inclusion. There is no compulsion on any MOD staff to read these blogs or any other blogs published on Defnet. The Claimant holds the view that NP is a *"hostile, militant idealogue"* which is how the Claimant described NP in his evidence.

67. The following blogs were spoken to in evidence:

a. At pp905-910, there is a blog entitled "So you want to be Feminist AF" posted by NP. There is no date on the blog. The blog provides links to various articles, podcasts and videos available online (with descriptions of these) about feminism to which readers can refer in order to learn more about issues around gender equality and feminism.

b. At pp926-927, there is an undated and untitled blog in which NP talks about speaking at an event in the next week about LGBT+ allyship and that speakers at this event had been asked to think about what Pride Month meant to them. He explains that he considers that what he

understands about Pride must come from LGBT+ people rather than being defined by him. He states that Pride is a celebration of LGBT+ issues but that it is also a protest about the discrimination that still exists for LGBT+ people. He states that he has been shown that Pride is under threat from commercialisation, exploitation and divisions encouraged by *"that cishet (and mainly white male) majority"* which NP considers wants groups and people to fight amongst themselves.

c. At pp929-931, there is a blog dated 31 October 2018 entitled *"Allies in Action"*. The blog is from the Civil Service LGBT+ Network archive rather than Defnet. The blog is framed in a Q&A format in which NP describes his role in the MOD and what being an ally to LGBT+ people means for him. He describes this as educating himself and seeking to spot and address ignorance, prejudice and phobic behaviour. He also talks about what he has done to be a visible ally in the workplace which he described as attending lectures and seminars, asking questions about this, organising a trip to a LGBT+ film festival and attending other events.

d. At pp933-936, is an undated blog (although from its content was written in October 2019) entitled *"Black History Month: Prince, Rage and Koko".* The blog starts by discussing how, whilst listening to music on his phone, NP noted many clicks it took him to find music by a black artist and recognising that this was reflective of his music collection. He goes to discuss how he knows next to nothing of Blackness and has more work to do in finding about all areas of diversity. The blog goes on to talk about how people can learn more about these issues based on NP's own experiences making reference to books he has read or podcasts to which he has listened.

68. At p974 is a photograph montage entitled "United for Inclusion: The End Goal". It features pictures of men and women in uniform and civilian dress. It features people from a range of apparent ethnic backgrounds. In one picture, a rainbow flag appears in the foreground.

69. The Claimant led no evidence as to how this photograph came into his knowledge or how it was published or disseminated by the Respondent.

70. The Claimant spoke to the person who created the montage and who appears on it. This person showed the Claimant early drafts of the montage (none of these were led in evidence) and informed the Claimant that the version at p974 was what management preferred but he did not know why. The Claimant replied that he knew why but did not elaborate on that in his evidence.

71. In February 2022, the MOD conducted the first part of what is called "Operation Teamwork". This is not a military operation but, rather, an exercise intended to address the culture and behaviours within the MOD. It involves both military and civilian personnel attending training around various issues, the first of which related to diversity and inclusion.

72. As part of this exercise, the Respondent created guidance for managers who were conducting the training. Annex C of the guidance (pp160-165) lists resources available on the "Ops Teamwork Defence Connect" intranet page. There are 51 items listed and item 27 is a link to an external academic paper entitled *"The Psychosis of Whiteness: the celluloid hallucinations of Amazing Grace and Belle".*

73. A copy of this paper is at pp892-904. It was published in 2016 in the *Journal of Black Studies* and is an analysis of two films about slavery that had been recently released at the time of publication. The paper is a detailed academic treatise and the Tribunal does not intend to make findings about the whole of the paper but, rather, focus on the relevant matters in addressing the issues to be determined.

74. The paper describes "critical whiteness studies" as an academic discipline which has developed in the study of racism. It defines "whiteness" as a Eurocentric worldview that produces the privileges of white skin which can become normalised and invisible. Reference is made to various academics

who describe whiteness as being key to what is said to be a system of global oppression by the West over the rest of the world.

75. It goes on to describe how studies are used to identify the responsibility of White people for addressing racism and make them allies of those who have been oppressed. It also addresses criticisms and problems that have been identified with critical whiteness studies.

76. The paper is concerned with the analysis of the two films which were about the slave trade and how Britain's involvement in that trade was presented in those films.

77. The particular issue which the Claimant has with the paper is the description of Whiteness being a psychosis which he equates with saying white people are psychotic. In the paper, it is said that Whiteness as a particular worldview can create a psychosis where there is a dissonance between this worldview and the reality of events which prevents society from engaging with that reality. It goes on to say that the conditions which create this worldview must be destroyed or it will continue to govern the thoughts of society.

Claimant's submissions

78. The Claimant made the following submissions.

79. He started with reference to the disciplinary process and highlighted those matters which he considered to be procedural errors:

a. The description by SB of the meeting between the Claimant and FA in 2020 as an informal warning.

b. The lack of an adequate explanation for the conclusions of the investigation report.

c. The fact that SB had treated someone reporting a complaint as a complaint in itself.

d. The lack of any record of the interview with one of the complainers.

e. The failure to interview the witnesses put forward by the Claimant.

f. The fact that the Claimant had produced evidence to SB to show that what he had said about vaccines was true (although the Tribunal notes that none of this was led in evidence by the Claimant at the hearing).

g. The failure by KB to convene an appeal meeting.

h. The different interpretations of the Civil Service Code.

80. The Claimant submitted that it was always clear to him that the disciplinary process was about more than these comments. He had been making a nuisance of himself by challenging lies and misrepresentation.

81. In relation to his complaint to the confidential hotline, the Claimant made reference to the response and submitted that this only referred to one element of his complaint. He asserted that he had raised valid complaints which were well within the policy but these were all ignored because he did not share a belief in critical theory.

82. As regards the all-staff dial-in, the Claimant made reference to the email correspondence in which it was confirmed why the questions were deleted. It was submitted that this showed the Diversity and Inclusion team moderating out things they did not like. The questions were asked and the director of Diversity & Inclusion did everything but acknowledge that this was a protected right. It was submitted that there was a failing to affirm those beliefs.

83. Turning to the claim of harassment, the Claimant made the following submissions:

a. The Claimant sought to link the Phase 2 report to what was reported in an article from the Guardian (SB147) as support for his submission that this was targeted manipulation of information that amounted to psychological warfare against the UK. He finds the language of a white male prototype to be abhorrent, dehumanising and insulting because it comes from critical theory. The Respondent has no right to

do this and the research used an interpretivist approach rather than evidence. It was submitting that making the workplace safe for under-represented groups was targeted manipulation as the proper facts did not support what they wanted to do.

b. The email from the permanent under-secretary was harassment as it is a clear attempt to encourage managers to discriminate. Asking if white people need to have their own network is not white supremacy, the Civil Service diversity and inclusion programs ran parallel to that of the government and the MOD was not implicitly biased which was a reference to critical theory. The only thing that people had been criticising was a lack of evidence.

c. In relation to the language guide, the Claimant made reference to the definition of an ally and that this was a fight against society.

d. The Claimant referred to tweets by Nick Pett which he submitted were hostile exchanges and that he harassed officers. It was submitted that he was a proponent of queer theory and critical theory. Reference was made to the evidence of LM.

e. The Claimant read out the comment at SB396 which he submitted was the comment that led to the complaint from Peter Ginnever.

f. It was submitted that on its own the photograph at p974 was not that bad but it was edited by higher-ups and the Claimant thinks he knows why.

84. In rebuttal, the Claimant made the following submissions:

a. There were laws against discrimination but it was still being claimed that it was endemic and this is wrong.

b. Stonewall had been widely criticised.

c. It was not true that he did not want diversity and inclusion; he wanted legitimate diversity and inclusion, not the phony, hateful based stuff such as white privilege and male privilege.

d. The definition of race includes references who belong to a group and he was relying on the plural.

e. The Ops Teamwork training day was mandatory and he had to watch lies and manipulation. The paper entitled "Psychosis of Whiteness" should not be passed round the MOD.

f. If you substituted any other protected characteristic for "whiteness" then it would be discrimination.

Respondent's submissions

85. The Respondent's agent produced written submissions and supplemented these orally.

86. Dr Gibson began by making some comments about things that had been said in the Claimant's submissions. In particular, he submitted that the Claimant's assertion that there was no discrimination in the MOD was insulting to those who had experienced it. He also submitted that the Claimant was not a reliable commentator given the views which he held.

87. Reference was made to the test for direct discrimination and in particular the need for a comparator; there was no evidence of an actual comparator so it must be assumed that the Claimant relied on a hypothetical comparator who would be someone who acted in the same way but did not lack a belief in critical theory (although such a person did not need to actually believe in critical theory).

88. In relation to the complaint to the confidential helpline, it was submitted that this was not ignored as there was a clear response. What the Claimant was really saying that his complaint was not treated as a whistleblowing complaint but there was no reason to say that a hypothetical comparator would have

been treated differently. The circumstances of the comparator must not be materially different; this does not mean that they needed to be a clone and any difference that was not material could be ignored. The relevant circumstances were that the content of the complaint was not considered to fall within the whistleblowing policy and, in such circumstances, a hypothetical comparator would be treated the same.

89. Further, there was no evidence that the person dealing with the complaint knew of the Claimant's beliefs or that she was motivated by this. The Claimant sought to create a link by reference to the nominated officer but no evidence was led that they were involved in the Claimant's case.

90. Turning to the dial-in meeting, it was pointed out that the questions were not those of the Claimant and so it is difficult to see how these being removed amounted to less favourable treatment of him. It was submitted that the Claimant was not treated less favourably at all and the fact that he had liked these questions were not enough to create a link to the Claimant. The comments were removed because others flagged them as showing disrespect and they did not know the belief or the lack of belief of the Claimant.

91. As regards the disciplinary process, it was accepted that there had been errors made during the process but these had been rectified and the sanction reduced. It was submitted that the process had to be looked at in the round.

92. Reference was made again to the question of the comparator who would be someone whose comments were the subject of complaints and did not lack a belief in critical [theory] but who would not be subject to disciplinary action.

93. In respect of SB and KB, the Claimant presented no evidence that their actions were because of his lack of belief; the Claimant did not assert this at all during the internal process and was focussed on the procedural errors. SB did not know what critical theory was. Further, the Claimant's comments about COVID had no connection with critical theory at all. There was no evidence that errors arose from anything other than a misreading of the policy.

In respect of the failure to speak to the Claimant's witnesses, it was submitted that the Claimant himself said that they would not add anything.

94. It may well be that the Claimant's comments were motivated by his lack of belief but that does not mean that the consequent actions of the Respondent are motivated by the same thing.

95. Turning to the harassment claim, reference was made to the definition in the Act; it was submitted that action had to be done by A to B but it was accepted that the action not need be directed to B and that what the Claimant says are acts are so far removed from the relationship described in the legislation.

96. It was submitted that the Phase 2 report relates to women and people from BAME communities and given what it sets out to do it either relates to all people or none. It is difficult for the Claimant to argue this is unwanted conduct as it makes no reference to him and the authors do not know him. It is only unwanted is because the Claimant does not agree with the contact.

97. It is the same for the communication from the permanent under-secretary; he does not know the Claimant and the communication makes no reference to him. It does not say that the Claimant has no place with the Respondent; what it says is that people holding certain views have no place in the MOD and this is perfectly reasonable. The email relates to all employees and not just white people, men or people with a lack of belief in critical theory.

98. Dr Gibson adopted the same points in relation to the language guide in that it is directed towards everyone and not just the Claimant.

99. In terms of being reported by other employees, this is the only matter which relates to the Claimant personally. There is a question as to whether the Claimant invited this on himself. It did not relate to race, sex or a lack of belief but the antagonistic and insulting posts by the Claimant.

100. In particular, it was submitted that the Claimant rails about freedom of speech but claims discrimination when others exercise their freedoms to challenge his views.

101. In relation to the blogs by Mr Pett, Dr Gibson adopted similar submissions.

102. In respect of the photograph, it was submitted that it was ludicrous to suggest this was harassment and anyone who claimed to be insulted by this has a worrying worldview. It was said to be an act of harassment because it did not show a white man in uniform but it does.

103. As regards the academic paper, this was not a MOD publication and simply featured in a suggested reading list for managers and not the Claimant. It may contain views with which people do not agree but its purpose is to stimulate discussion or debate.

104. It was submitted that it was certainly not the purpose of these actions to have the purpose prohibited by the Equality Act; the people involved did not know the Claimant or his characteristics. The purpose was to promote diversity and inclusion; the Claimant is clearly hostile to this and any distinction he seeks to draw between diversity and inclusion generally and how it is implemented in the MOD is disingenuous and hollow. The term white privilege refers to the fact that white people do not face certain challenges because of their race but the Claimant seeks to twist this into an attack on white people. The Claimant seeks to deny there is structural inequality despite the evidence of this.

105. In terms of effect, the evidence heard does not support this; the Claimant simply has a skewed view and sees himself as a spokesperson for downtrodden white men. Further, it is not reasonable for these actions to have the prohibited effect; this has to be assessed by bearing in mind the Claimant's real mindset which is skewed; it is a ridiculous proposition to say that the Claimant has been harassed by things intended to enhance diversity and inclusion.

Relevant Law

106. The Equality Act 2010 protects individuals from discrimination on the grounds of various protected characteristics. These include, for the purposes of this case, race, sex and religion/belief (or the lack of a particular religion or belief).

107. The definition of direct discrimination in the 2010 Act is as follows:

13 Direct discrimination

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.

108. These provisions do not stand on their own and any discrimination must be in the context of the provisions of the Act which makes it unlawful to discriminate in particular circumstances. The relevant provision in this case is:

39 Employees and applicants

An employer (A) must not discriminate against an employee of A's (B)— by dismissing B

109. The burden of proof in claims under the 2010 Act is set out in s136:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

110. The burden of proving the facts referred to in s136(2) lies with the claimant. If this subsection is satisfied, however, then the burden shifts to the respondent to satisfy subsection 3.

111. Although the test for direct discrimination forms a single question, the caselaw indicates that it is often helpful to separate this into two elements; the less favourable treatment and the reason for that less favourable treatment.

112. In order for there to be less favourable treatment, the claimant must be subjected to some form of detriment. The question of whether there is a detriment requires the Tribunal to determine whether *"by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work"* (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL).

113. A claimant can rely on an actual or hypothetical comparator for the purposes of establishing less favourable treatment. There must be no material difference in the circumstances of the claimant and comparator (s23 of the Equality Act 2010). In deciding how a hypothetical comparator would have been treated, the Tribunal is entitled to have regard to the treatment of real individuals (see, for example, *Chief Constable of West Yorkshire Police v Vento* [2001] IRLR 124).

114. However, a difference in treatment and a difference in protected characteristic is not enough to establish that the difference in treatment was caused by the difference in protected characteristic; *"something more"* is required (*Madarassy v Nomura International* [2007] IRLR 246). The Tribunal needs evidence from which it could draw an inference that race was the reason for the difference in treatment.

115. It is important to remember that unreasonable or unfair behaviour is not enough to allow for an inference of direct discrimination (*Bahl v The Law Society* [2004] IRLR 799).

116. It is a well-established principle that Tribunals are entitled to draw an inference of discrimination from the facts of the case. The position is set out by the Court of Appeal in *Igen v Wong* [2005] ICR 931 (as approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] IRLR 870).

117. The *Igen* case was decided before the Equality Act was in force but it is submitted that the guidance remains authoritative, particularly in light of the *Hewage* case.

118. Harassment is defined in s26 of the Equality Act 2010:-

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

119. It is not necessary for any conduct to be directed towards a claimant (*Moonsar v Fiveways Express Transport Ltd* [2005] IRLR 9, EAT) but the fact that the conduct which forms the basis of the claim was not directed at a claimant may be a relevant factor in determining whether the conduct had the prohibited purpose or effect in terms of s26(1)(b) (*Weeks v Newham College of Further Education* UKEAT/0630/11, [2012] EqLR 788, EAT).

120. In *Hartley v Foreign and Commonwealth Office* UKEAT/0033/15 (27 May 2016, unreported) it was held that the question whether there is harassment must be considered in the light of all the circumstances of the case. Where the claim is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording.

121. However, even where certain elements of the test for harassment are met (for example, unwanted conduct and the violation of the claimant's dignity), the Tribunal must still consider the *"related to"* question and make clear findings as to why any conduct is related to a protected characteristic (*UNITE the Union v Nailard* [2018] IRLR 730; *Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495, EAT).

122. The fact that a claimant considers any conduct is related to a protected characteristic is a relevant but not determinative factor for the Tribunal to consider (*Aslam*, above).

Decision - general

123. The Tribunal considers that it would be useful to set out some preliminary comments of general application before addressing the specific issues for determination.

124. In particular, the Tribunal considers that it is important to be clear what it can and cannot determine in these proceedings. As set out above, it was clear to the Tribunal that the Claimant is seeking some form of judicial inquiry or determination into the nature of the Respondent's diversity and inclusion program and how it implements this program. However, this is not something which falls within the Tribunal's jurisdiction.

125. The scheme of the Equality Act is that, where someone considers that they have been unlawfully discriminated contrary to the Act in the workplace, that individual can bring proceedings in the Tribunal to seek a remedy for any such discrimination. It does not have some general power to resolve all workplace disputes nor does it determine how an employer should manage its staff unless such management actions amount to unlawful discrimination. In those circumstances, the Tribunal has the power to make a declaration to that effect and provide a remedy such as compensation or recommendations.

126. In the specific circumstances of the present case, the Tribunal is determining the list of issues set out at the start of this judgment and is not deciding whether or not the Respondent should or should not be taking forward a diversity and inclusion program in the way it which it does (except insofar as it is necessary to determine the issues in this case). Neither will the Tribunal determine whether the Claimant's views on this program are valid (again, except as required to determine the issues in this case).

127. During the course of the hearing, the Claimant made frequent reference to the fact that he belongs to groups whom he considers the Respondent is treating unfairly or discriminating against in their actions. For example, he made reference to s9(2) of the 2010 Act which refers to people of a particular racial group.

128. The purpose of such references by the Claimant was to seek to argue that so long as he was included in such groups then he was being discriminated against by the Respondent. However, this is to ignore the fact that the definitions of the protected characteristics do not operate in a vacuum and there must be some form of discrimination on the grounds of such characteristics; the relevant definitions of discrimination in the Equality Act (that is, those set out in s13 and s26) require there to be discrimination against the individual bringing the claim if they are to succeed.

Decision – direct discrimination

129. The Tribunal considers that, for the reasons it will set out below, that there was no evidence whatsoever that the matters alleged to amount to direct discrimination were done on the grounds of the Claimant's lack of belief in critical theory.

130. There was certainly no express evidence that any of those involved in the matters said to amount to direct discrimination were in any way motivated by the Claimant's lack of belief in critical theory and, in each case, there is an ostensible "innocent" explanation for the conduct in question.

131. Neither was there any evidence from which the Tribunal could draw the inference that the true motivation for the conduct in question was not the ostensible reasons but, rather, conscious or unconsciously, the various people involved in the relevant conduct were motivated by the Claimant's lack of belief in critical theory. Indeed, the evidence before the Tribunal was that most of them did not even know of this particular protected characteristic and so it is difficult to see how they could be motivated, even unconsciously, by a factor which was not within their knowledge.

132. Turning to each alleged act of direct discrimination, the Tribunal starts with the allegation that the Claimant's complaint raised with the Respondent's confidential helpline was ignored. The Tribunal notes that this complaint was not "ignored" in the sense of receiving no response at all. It is not in dispute that the Claimant did receive a response to his email to the confidential helpline and so his complaint was not wholly ignored.

133. The Claimant's case is, in reality, that he did not receive the response that he wanted but that does not mean that this amounts to discrimination. The response received by the Claimant was that his complaint did not fall within the scope of the whistleblowing policy. He disputes this but led no evidence to support his position. For example, he did not adduce the whistleblowing policy in evidence and so there was nothing before the Tribunal to suggest that the position adopted in the response was wrong.

134. More importantly, he led no evidence that someone who raised a complaint with the helpline that did not fall within the whistleblowing policy but who did not share the Claimant's protected characteristic would be treated any differently. The comparator is an important element of a claim for direct discrimination where the alleged treatment is not obviously on the grounds of a protected characteristic. The burden of proof is on the Claimant to show a prima facie case (which includes showing a difference in treatment) and he has failed to do so. This, on its own, would be enough for the Tribunal to find that the claim in respect of the confidential helpline complaint is not well-founded.

135. However, the Claimant has also failed to discharge the burden of proof in respect of the reason for the complaint being dealt with as it was. The Claimant's evidence was that the person replying to his complaint did not know him and he accepted in cross-examination that there was no evidence that this person had any reason to discriminate against him. In these circumstances, there is no basis on which the Tribunal could conclude that the person replying to the Claimant had any knowledge of the Claimant's lack

of belief in critical theory and so, logically, she could not have been motivated by this in her reply.

136. The Claimant sought to create a very tenuous link between the confidential hotline and the Respondent's diversity and inclusion team by reference to the fact that one of the nominated officers for the hotline is the director of the diversity and inclusion team. However, the Tribunal notes that there are three individuals named as nominated officers and the Claimant led no evidence as to the role of these individuals in the operation of the confidential hotline such as whether they would get involved in individual complaint. There was certainly no evidence that the individual person referred to by the Claimant had any involvement in the response to his complaint or that they even knew who he was and what beliefs he did and did not hold. The Tribunal considers that this did not provide any basis on which it could infer that the Claimant's lack of belief in critical belief had any bearing on the response to his complaint.

137. The second allegation of direct discrimination relates to two questions posed by staff (although not by the Claimant) for the all-staff dial in meeting The Claimant alleges that the fact that these questions were temporarily removed from the list of questions to be addressed at the meeting and the content of the answers which were ultimately given at the meeting amount to direct discrimination.

138. The Tribunal does not consider that these matters are capable of amounting to direct discrimination at all. Direct discrimination requires a difference in treatment, specifically that a claimant is treated less favourably than others. In this instance, the Claimant has been treated in exactly the same way as every other employee of the Respondent; if the questions were removed then they were removed for everyone and not just the Claimant; the answers which were given at the meeting were the same for everyone.

139. It may well be that it is the Claimant's lack of belief in critical theory that means that he is unhappy, or does not agree, with the response to these questions

but that is not the test for direct discrimination which is concerned with a difference in treatment.

140. The lack of any difference in treatment between the Claimant and everyone else is enough on its own for the Tribunal to consider that this is simply incapable of amounting to direct discrimination.

141. However, there is also no evidence that the removal of these questions or the ultimate response to them was in any way motivated by the Claimant's protected characteristic. In coming to this conclusion, the Tribunal takes account of the following matters:

a. The Claimant was not the person who asked the questions.

b. There is an ostensible reason for the removal of these questions, that is, there had been complaints about them by other staff. The Claimant led no evidence to dispute this.

c. The Claimant did query the removal of these questions. This was his only direct involvement with the matter other than being one of 60 people who liked the questions.

d. The questions were answered at the meeting.

e. The Claimant did not attend the all-staff meeting.

f. There was no evidence that the persons asking the questions knew who the Claimant was let alone that they had any knowledge of his protected characteristic.

142. In these circumstances, there is nothing to suggest that either the temporary removal of the questions and/or the ultimate response given to these was in any way motivated by the Claimant's lack of belief in critical theory.

143. The third and final allegation of direct discrimination relates to the disciplinary process which commenced in January 2022.

144. There is something of a “hole” in the Claimant’s case theory regarding this allegation of discrimination. It arises from the fact that events relating to the disciplinary process had moved on from the factual matrix which applied at the point the Claimant lodged his ET1. At that time, he was subject to a final written warning and the process had apparently concluded. However, the Claimant’s grievance was subsequently successful and a new appeal conducted which resulted in a lesser sanction.

145. The Claimant does not seek to argue that the outcome of his second appeal amounts to direct discrimination but has not considered how this impacts on his case. This is not intended as a criticism given that the Claimant is a litigant-in-person and may not have fully appreciated the consequences of this approach.

146. The logical consequence of the Claimant not seeking to argue that the outcome of the second appeal amounts to discrimination is that he must be taken to accept that the Respondent was not discriminating against him when it decided to engage the disciplinary process, that the decision that he had committed misconduct was not an act of discrimination and a decision to impose some sort of sanction was also not an act of discrimination. He cannot logically seek to say that any of these matters amount to discrimination if he also takes the position that the decision by BM was not discriminatory; BM’s decision has to be predicated on the fact that there was misconduct by the Claimant which was worthy of a sanction.

147. The basis of this element of the discrimination claim can, therefore, only be that the procedural errors by SB and KB as well as the decision by FA to impose a final written warning amount to direct discrimination. However, mindful of the fact that the Claimant is a litigant-in-person, the Tribunal has looked at the whole process in the round and has not taken a restrictive approach to assessing this element of the claim of direct discrimination.

148. As with the other elements of the direct discrimination claim, the Claimant led no evidence about how any comparator, actual or hypothetical, would have

been treated. Any such comparator would have been someone subject to complaints that their comments posted on internal blogs had caused offence to other staff but who did not share the Claimant's lack of belief in critical theory.

149. Again, the burden of proof is on the Claimant in this regard and he has failed to discharge this. There was no evidence that anyone else whose comments had led to complaints from other staff would have been treated any differently than the Claimant in the sense that there would be some form of investigation at the very least and most likely some form of disciplinary process.

150. Further, the Tribunal does not consider that there was any evidence that the Claimant's lack of belief in critical theory motivated the conduct of the disciplinary process in any way. In coming to this view, the Tribunal has taken account of the following matters:

a. The conduct of the process, specifically by SB and KB, was not a counsel of perfection; SB could have spoken to the witnesses suggested by the Claimant to confirm that they could not assist; his investigation report could have been more thorough in terms of its content; KB could have held a meeting with the Claimant to ensure he understood the appeal. Both these witnesses did, very honestly, accept that, in hindsight, they could have handled matters differently.

b. However, a failure to follow the Respondent's internal procedure is not determinative and is only one factor for the Tribunal to take into account. This has to be balanced against the fact that, on the face of it, these were genuine and honest mistakes by both SB and KB.

    i. SB was not an experienced investigator and this was his first disciplinary investigation.

    ii. Whilst he could have spoken to the people put forward by the Claimant, it is worth noting that the Claimant, himself, suggested that they may not be able to assist. In particular, the

people being put forward were not witnesses in the sense of people who could speak to the events giving rise to the disciplinary process but, rather, were people who the Claimant considered shared similar views to him about the Respondent's diversity and inclusion process.

iii. CP, who the Tribunal found to be an impressive witness, indicated that she could understand why KB took the view that the policy did not require an appeal meeting because it was not explicit on this point and required managers to interpret this point. She, ultimately, took a different view on the interpretation.

c. The Tribunal accepted the evidence of SB and KB that they had no awareness that the Claimant had a lack of belief in critical theory. This was not discussed with them by the Claimant and, even by the time they appeared in these proceedings, they had no understanding of what critical theory was said to be.

d. FA did have some awareness of the Claimant's views about diversity and inclusion although not framed as a lack of belief in critical theory. However, there was no evidence that this had any bearing on her decision to award a final written warning.

e. Two of the comments which led to complaints had no connection with the Claimant's lack of belief in critical theory and, rather, related to his views on COVID vaccines.

f. One of those comments expressly criticised the government's policy on vaccinations in strong terms (for example, that they are *"at war against the folk"*). It is difficult to see how this is not something likely to result in, at least, a disciplinary investigation if not actual disciplinary action given the terms of the Civil Service Code.

g. When the Claimant's issues with the process became known to senior management, they took steps to address this, upholding his grievance and granting him a second appeal. The Claimant has expressed no dissatisfaction with these latter matters, either generally or in alleging that these amount to discrimination, and so the Respondent has, on the face of it, remedied these complaints.

151. In these circumstances, the Tribunal does not consider that there is any basis on which it can conclude that the disciplinary process as a whole or the specific criticisms of the process are capable of amounting to direct discrimination. The lack of any evidence of how a comparator would have been treated and the lack of any evidential basis for the Tribunal to conclude that the motivation of those involved was the Claimant's protected characteristic.

152. As well as looking at these various allegations on their own, the Tribunal has also looked at them as a whole to consider if there is any basis on which it could draw any adverse inference of discrimination. However, the Tribunal considers that, when looked at as a whole, there is nothing to suggest that the Claimant has been discriminated against because of his lack of belief in critical theory; there is a lack of evidence overall as to how any comparator was or would have been treated; there is a consistent picture of most of those involved having no knowledge of the Claimant's lack of belief in critical theory; there are ostensible, "innocent" explanations for the various actions giving rise to the claim which the Tribunal have accepted as the genuine reasons for those actions.

153. For all of these reasons, the Tribunal considers that the claims of direct discrimination are not well-founded and are hereby dismissed.

Decision - harassment

154. The first question for the Tribunal is whether the seven matters narrated in the list of issues amount to "unwanted conduct" for the purposes of s26 of the Equality Act.

155. The Tribunal notes that, with one exception, the matters relied on by the Claimant were not directed at him in particular nor did they have any direct connection to him other than the fact that he is an employee of the Respondent.

156. However, the caselaw (for example, *Moonsar* above) is clear that the conduct in question does not have to be directed at a claimant for it to fall within the scope of s26 and so the Tribunal proceeds on the basis that the seven matters relied on by the Claimant are "conduct" for the purposes of s26 of the Equality Act.

157. It was not argued by the Respondent that this conduct was not "unwanted" and the evidence before the Tribunal made it clear that the Claimant did not invite or want the various publications, blogs and other matters; it could be said that the complaints from Mr Ginnever and Mr Chan were a consequence of the Claimant's blog comments and so were something that the Claimant, in a very broad sense, was inviting by his actions. However, the Tribunal consider that this is too broad an approach; it might be that the Claimant could reasonably expect responses to his comments which might not agree with him but the Tribunal does not consider that he would necessarily expect complaints to management.

158. The Tribunal, therefore, considers that the seven matters relied on by the Claimant do amount to unwanted conduct for the purposes of s26 of the Equality Act.

159. This is, of course, not the end of the matter and the Tribunal has to go on to determine whether this conduct, either individually or as a whole, has the purpose or effect prohibited by s26(2) of the 2010 Act. The Tribunal will use the terms "prohibited purpose" and "prohibited effect" below to describe the elements of the definition of harassment set out in s26(2).

160. In terms of the prohibited purpose, the Tribunal considers that it is relevant for this element of the test that, with one exception, none of the matters relied on by the Claimant were directed towards him. All of these matters were

corporate or organisational actions being taken by people far removed from the Claimant and there was no evidence that any of these people knew who the Claimant was, let alone that their actions were motivated by a desire to violate his dignity or create the prohibited environment in terms of s26(2).

161. It may be that the Claimant's reference to belonging to a particular group is an attempt to argue that those involved in the various matters said to amount to harassment had the purpose of violating the dignity of everyone in that group or had created the prohibited environment for them. For example, the Claimant clearly considers that persons within the Respondent's organisations seek to attack white people as a group.

162. The Tribunal returns to the point made above that the definitions of discrimination and harassment are directed towards how the individual claimant is treated.

163. In any event, there was no evidence before the Tribunal that the purpose of those involved in the various matters relied on as harassment was to subject white people, men or those who lacked a belief in critical theory to the prohibited purpose. The Claimant clearly has his view as to the purposes of these actions but, other than his opinion (which the Tribunal will address further below), the Claimant led no objective evidence from which the Tribunal could infer such a purpose.

164. In particular, each of the matters relied upon had, on the face of it, an ostensible, "innocent" purpose":

a. The "Defence Inclusivity Phase 2 Lived Experience" report clearly states its purpose as being research into why the MOD was struggling to recruit and retain women and people from Black and Minority Ethnic (BAME) communities. The Tribunal accepts this was the purpose of that report and there was no evidence of any other purpose, let alone the prohibited purpose. The Claimant's core complaint about this report was that it used the term *"white male prototype"* which he reads as being some attack on men and white people. However, the term is

used in the context of describing a stereotype which exists within the MOD. The report clearly acknowledges that this stereotype disadvantages men and white people who do not live up to it as well as women and people from BAME. The Tribunal does not consider that this can reasonably be read as some attack on white people or men to such an extent that the Tribunal can infer that the real purpose of the report is to have the prohibited purpose in respect of the Claimant or white people/men generally.

i. As noted at the outset of the judgment, the Claimant led no evidence as to how this document came into his knowledge. There is a difference between, for example, a document being sent to all staff from which the Tribunal could draw an inference that it was intended to send some form of message to staff and a document which simply exists on the Respondent's system and which the Claimant has only found because he was looking for documents which would support his views about diversity and inclusion in the Respondent's organisation, with a spectrum of options between these two extremes. There was no evidence led by the Claimant on this issue but the burden of proof lies on him in this regard and there is certainly no evidence that this document was being directly disseminated to staff to achieve or advance the prohibited purpose.

b. The email/memo by the then Permanent Under Secretary Stephen Lovegrove was clearly intended to address certain comments that had been made by staff during an all-staff dial-in relating to race and discrimination. In particular, he sought to make it clear that certain comments were unacceptable to the Respondent and that those making such comments, or holding the views which underpinned the comments, had no place in the MOD. Whilst this might make those who held such views or who made those comments feel they were not welcome with the Respondent, there was no evidence that the

Claimant fell into this group; there was no evidence before the Tribunal that the Claimant had made any of the comments in question nor that he held the views underpinning those comments.

c. The "An Inclusive Race and Ethnicity Language Guide", again, has a clearly stated purpose, on the face of it, which is to assist managers and staff in understanding the language they use around race. Again, there was no evidence before the Tribunal that there was any other purpose other than this. The Claimant's objections to this document related to the definition of racism (and structural racism) used in the guide and the use of the term "ally" but these objections do not alter the purpose of the guide and are more relevant to the question of the prohibited effect which the Tribunal will address below.

    i. The Tribunal would refer to its comments above regarding how the Phase 2 report came into the Claimant's knowledge and the same position regarding a lack of evidence about how the document came into the Claimant's knowledge applies to the language guide.

d. The Tribunal was taken to various blogs posted by Nick Pett but no evidence was led before the Tribunal as to Mr Pett's purpose in posting these. The Tribunal, therefore, proceeds on the basis of inferring the purpose from what the blogs say; they talk about issues relating to diversity and equality providing links to other material if people reading the blogs want to read into matters further. The Tribunal infers from this that the purpose is to educate and inform other staff about these issues rather than the prohibited purpose. The Claimant's complaints about these blogs arise from his disagreement with some of the views expressed by Mr Pett (for example, as above, the Claimant objects to the term "ally") and this is a matter more relevant to the question of the prohibited effect.

e. Again, there was no evidence led as to the purpose of the photograph entitled “United for Inclusion” (indeed, there was no evidence led about how this photograph was circulated and came into the Claimant’s knowledge and the Tribunal would refer to its comments above regarding how the Phase 2 report came into the Claimant’s knowledge and the same position applies to photograph) and so, again, the Tribunal has to infer the purpose from the photograph itself. On the face of it, the photograph is showing no more than a more diverse and inclusive armed forces and the Tribunal infers that the purpose is to show exactly that. The Tribunal does not consider that the Claimant has led sufficient evidence for it to conclude that the creation of this photograph was for the prohibited purpose.

f. Although the Claimant refers to the dissemination of a paper entitled “The Psychosis of Whiteness”, it is important to bear in mind that the paper has only ever appeared as one document in a list of 51 documents in one of three annexes to some training materials. It has never been directly disseminated to staff nor was there any evidence that it has been used in any training delivered to the Claimant or any other staff. On the face of it, the purpose of the 51 documents of which this paper is a part was to provide additional resources for managers if needed and there was nothing which particularly promoted this paper. There is no evidential basis on which the Tribunal could conclude that this particular paper was included in the list for the prohibited purpose.

165. The one matter which is different from the other conduct are the alleged complaints by Peter Ginnever and James Chan which were specifically about the Claimant as opposed to corporate decisions being made at a distance. There was no evidence led from either of these individuals and so, again, the Tribunal needs to infer any purpose in making these complaints from the evidence which it has before it.

166. A further evidential difficulty for the Claimant is that he did not adduce the actual complaint from Mr Ginnever in evidence so the Tribunal has no information as to what he actually said in his complaint. The only evidence before the Tribunal is a note of a meeting between the Claimant and FA in February 2020 where the complaint from Mr Ginnever is discussed and there is reference to the concerns which he had about comments by the Claimant.

167. In respect of Mr Chan, there was no evidence whatsoever that he actually complained about the Claimant as alleged. The only evidence of an interaction between them was Mr Chan seeking to challenge and dispute assertions that the Claimant had made in comments posted on Defnet.

168. On the basis of the evidence before it, the Tribunal finds that the purpose of the complaint from Mr Ginnever was to raise concerns about the Claimant's comments. There was no evidence of any other purpose and certainly not the prohibited purpose.

169. The Tribunal finds that there was no complaint by Mr Chan at all. In respect of the comments he posted in response to comments by the Claimant, the obvious purpose of these was to challenge the assertions being made and question the evidence for these. There was certainly nothing from which the Tribunal could infer that Mr Chan had the prohibited purpose in making these comments.

170. Having looked at these individually, the Tribunal has also looked at the conduct complained of as a whole to determine whether there is any basis to conclude that it had the prohibited purpose. However, this conduct has been carried out by different people, at different times with no apparent connection other than this has been done as part of the work of the Respondent, a very large organisation covering the whole of the UK. There is certainly no evidence of some larger strategy to violate the Claimant's dignity (either personally or as part of a larger group) or to create a prohibited environment for the Claimant (either personally or as part of a larger group).

171. For all these reasons, the Tribunal finds that the conduct in question did not have the prohibited purpose.

172. The next question for the Tribunal is whether the conduct, instead, had the prohibited effect. In assessing this, the Tribunal has to consider whether it was reasonable for the conduct to have that effect.

173. The Claimant did not lead any particular evidence that the conduct in question violated his dignity; it was quite clear that he has strong objections to the content of the documents in question and the Respondent's diversity and inclusion program in general but he did not lead evidence that there was any violation of his dignity. Rather, the Tribunal considered that the Claimant sought to present the environment in the MOD as having the prohibited effect in that he argued that it was hostile or intimidating towards him as a white man.

174. The real question is whether it was reasonable for the conduct in question to have this prohibited effect.

175. In assessing this question, the Tribunal takes account of the fact that, as noted above, none of the conduct in question, with the exception of the complaints from Mr Ginnever and Mr Chan, was directed to the Claimant and was taken at a corporate level far removed from the Claimant.

176. The Tribunal also considers that it has to bear in mind that the Claimant holds very strong views that the MOD has been taken over by its diversity and inclusion team and is waging what he describes as psychological warfare. He objects to much of the diversity and inclusion program being implemented in the MOD which he described as *"subversive"*, *"immoral"* and *"criminal"* in the course of his evidence. These were not views held by the witnesses led by the Respondent and even LM, who was called by the Claimant, did not give evidence that he shared this view.

177. The Claimant's view of the effect of the conduct said to amount to harassment is undoubtedly affected by his view of how the MOD is operating generally. It

was clear from his evidence that he does not approach matters relating to diversity and inclusion with a wholly open mind.

178. It was also clear from the evidence that the Claimant conflates his opinions with facts and is very unwilling to accept that other views or interpretations can be vaild. For example, the Claimant has a particular objection to the term "ally" which is used in some of the documents led in evidence. He specifically referred to this as meaning *"a partner in war"* in one of the comments which led to the disciplinary process that started in January 2022. When it was put to him in cross-examination that there were other meanings for this term in the dictionary he refused to accept that there could be any meaning other than which he ascribed to it.

179. These matters are important because s26 of the Equality Act requires the Tribunal to bear in mind the view of a claimant as to the effect of any conduct. However, where a claimant holds views that are outliers or could be described as immoderate then the Tribunal has to bear this in mind as well.

180. Looking at each of the matters relied on as founding the harassment claim, the Tribunal notes the following matters:

    a. As noted above, the Claimant's complaint about "Defence Inclusivity Phase 2 Lived Experience" report is that it used the term *"white male prototype"* which he reads as being some attack on men and white people. The Tribunal would refer to what it says above as setting out why it does not consider that this can reasonably be read as some attack on white people or men. There is absolutely nothing in the report that can be read as an attack on white people, men or white men. It simply notes an unhelpful stereotype which exists with the MOD which impacts on women, people from BAME communities and white men as well.

        i. The Claimant sought to draw a link between this report and a newspaper report about an aborted contract between MOD and Cambridge University to research about psychological warfare

on the sole basis that both matters were said to have been overseen by the same department. The Claimant considered that this link effectively proved that his view that the MOD was conducting psychological warfare on its staff and the public was true. However, this requires such a huge leap of logic and is so devoid of any actual evidence linking these matters that it is simply not reasonable to make this link.

ii. The Tribunal would refer to its comments above about the lack of evidence about how this document came into the Claimant's knowledge. If the report was being sent directly to all staff then this would be a factor which weighs in favour of it being reasonable for this to have the prohibited effect (although it would not be determinative). However, there was no evidence to this effect.

b. The Claimant argues that the email/memo by the then Permanent Under Secretary Stephen Lovegrove effectively said that the Claimant was not wanted at the MOD. As noted above, what was said would likely have the effect of making those who made the comments which prompted the communication feel that they were not welcome with the Respondent but there was no evidence that the Claimant was one of the people making the comments in question. It is, therefore, difficult to see how this communication can reasonably be viewed as having the prohibited effect.

c. The Claimant made submissions about the detail of the communication from Mr Lovegrove which were not borne out by the evidence.

i. For example, he stated that asking if white people need their own network was not white supremacy but nothing even remotely close to this was said by Mr Lovegrove; the phrase

"white supremacy" was not used at all let alone linked to a need for white networks (which was also not mentioned).

ii. The Claimant also stated that the comments which prompted the communication only related to people saying there was a lack of evidence. However, he led no evidence about what comments were made beyond what was said in the communication.

d. The Claimant also sought to argue that this communication put people at fear of disciplinary action. The terms of the communication are important; the only reference to disciplinary action is that those engaging in offensive or discriminatory comments would be subject to such action. It is difficult to see how it is reasonable for this to have the prohibited effect on anyone except those who intend to engage in making offensive or discriminatory comments.

e. It is also very difficult to see how "An Inclusive Race and Ethnicity Language Guide" is capable of having the prohibited effect. The guide is clearly seeking to assist people in talking about race by providing them with definitions for terms used to discuss race and to avoid confusion or offence which might arise in such discussions. A document which aims to avoid the sort of environment which is prohibited by s26 is not one which can reasonably considered to create such an environment.

i. The Claimant's objections to this document related to the definition of racism (and structural racism) used in the guide. The Tribunal do not consider that these are particularly unusual or extreme definitions of these terms such as to reasonably lead to the prohibited effect. To the extent that the Claimant seeks to say that they are somehow an attack on white people then the Tribunal does not consider that these can reasonably read

in this way and, rather, the Claimant's view of these definitions arises from his particular views on diversity and inclusion.

ii. As noted above, the Claimant also has issues with the use of the term "ally", generally and in the language guide, which he views in a very narrow way as meaning that there is some form of "war" being waged and allies are partners in this war. The Tribunal considers that any reasonable person would read the term "ally" in the context in which it appears in the guide as meaning someone who supports those who face discrimination rather than as meaning someone who is assisting others in waging a war.

iii. The Tribunal also adopts its comments about the lack of evidence about how the Phase 2 report came into the Claimant's knowledge in respect of this document.

f. In relation to the blogs by Mr Pett, the Tribunal refers to what is said above about what the contents of these blogs and the inferences drawn from this. The Tribunal does not consider that blogs which seek to provide people with resources they can use to educate themselves on diversity issues can reasonably be read as having the prohibited effect. It was clear that the Claimant did not agree with some of the views or opinions expressed by Mr Pett but it is not reasonable for a difference of opinion, in and of itself, to have the prohibited effect. It is essential to the functioning of any democratic society that people can disagree with each other and so long as those disagreements are conducted respectfully and within the confines of the law then it is not reasonable for these to have the prohibited effects.

i. In the course of his evidence, the Claimant made reference to tweets from Mr Pett and to comments he made in response to comments from others. However, the list of issues (which is based on what is understood to be the Claimant's pled case)

only identifies the blogs as the conduct giving rise to harassment. The Claimant was given the opportunity during the case management process to seek to revise the list of issues if he considered that it did not fully capture his pled case and he did not do so. The Tribunal, therefore, has confined itself to the case before it for determination.

g. The Tribunal found it very difficult to understand how the photograph entitled "United for Inclusion" could reasonably be considered to create the prohibited effect. As noted above, the Claimant led no evidence as to how this photograph was circulated, how he became aware of it or any context for it. It was presented to the Tribunal in a vacuum and the only evidence led about its creation was that the Claimant said he had spoken to the person who created it and was told it had been edited by someone in management from earlier drafts. Other than saying that it represents what the *"radicals"* (a reference to the diversity and inclusion team) want to achieve, the Claimant did not lead any evidence as to what he found objectionable about the photograph.

    i. Again, the Tribunal adopts its comments about the lack of evidence about how the Phase 2 report came into the Claimant's knowledge in respect of this document.

h. On the face of it, the photograph is showing no more than a more diverse and inclusive armed forces and, to the extent that the Claimant seeks to say that it somehow seeks to exclude white people from the armed forces, the Tribunal does not consider that this is a reasonable interpretation of the photograph. The photograph does include white people and, although greater prominence is given to women and people from BAME communities, the Tribunal finds this unsurprising where the MOD is seeking to recruit more people from these groups and wants to present the armed forces as a place which welcomes people from such groups. The Tribunal considers that the Claimant's

strongly held views have undoubtedly affected how he views this photograph.

i. The Tribunal does note that, in his submissions, the Claimant stated that the photograph was not that bad in itself. On the face of it, the Claimant does not seek to say that the photograph in itself has the prohibited effect although his case is not consistent on that point.

ii. Rather, the Claimant's submissions sought to shift his case to a complaint about the fact that someone had edited the photograph from earlier drafts for some purpose about which the Claimant did not elaborate. However, this is not the case set out in the list of issues and the Claimant did not seek to amend this. The Tribunal has, therefore, restricted its determination to the list of issues.

i. The Claimant placed considerable reliance on the paper entitled "The Psychosis of Whiteness" in support of his case. However, the Tribunal considers that this paper has to be viewed in context and, more importantly, that the Claimant has fundamentally misread this paper:

i. As noted above the paper has only ever appeared as one document in a list of 51 documents in one of three annexes to some training materials.

ii. It has never been directly disseminated to staff nor was there any evidence that it has been used in any training delivered to the Claimant or any other staff.

iii. There was no evidence that the Respondent endorsed the contents of the paper.

iv. The paper is a commentary on what was portrayed in two films dealing with slavery.

v. The paper does not, as asserted by the Claimant, say that all white people are psychotic, cannot be reasoned with and must be destroyed. This is certainly not said in express terms and the Claimant's view arises from a misreading of what is meant by the term "whiteness"

vi. This term is an academic term which is defined in the paper as being *"a Eurocentric worldview"* and, whilst it is a worldview that can be held by white people, the paper does not seek to equate it wholesale with white people. Rather, it argues that this worldview must be challenged if progress is to be made in eradicating racism. The Tribunal does not consider that this can reasonably be read as saying white people must be destroyed.

vii. This is an academic paper which was clearly written for an audience who would be familiar with the concepts and ideas being discussed. It does set out views in strong terms and it can be appreciated why someone reading it, who was not familiar with such matters, would find it challenging and may disagree with the arguments it makes.

viii. As set out above, however, a functioning democratic society has to allow for people to have different views on matters and even for people to seek to change the views of others. This, in and of itself, cannot be reasonably considered to create the prohibited effect.

ix. The Claimant also made reference to another academic article from Harvard Magazine and published in 2002 which appeared in the list of references at the end of the "Psychosis of Whiteness" paper. This was not something which appeared in any MOD materials or on their intranet but, rather, something found by the Claimant in his own research. The Tribunal

considers that this is irrelevant to the issues which it is determining.

j. Finally, there are the complaints by Mr Ginnever and Mr Chan. It must be the case that employees can raise concerns about the conduct of another employee without that, of itself, having the prohibited effect. Otherwise whistleblowing policies, grievance procedures, and harassment policies would have no real effect as no-one could raise complaints under these without potentially raising the spectre of harassment. Obviously, if such complaints are used in an oppressive manner (for example, raising false or vexatious complaints) then it can potentially be reasonable for the prohibited effect to arise. However, taking account of the following factors, the Tribunal does not consider that it is reasonable in this case:

i. The Claimant led very little evidence about the complaint by Mr Ginnever; he made reference to the comment which he said gave rise to the complaint but this was presented with no context; the comment was clearly in response to something but that "something" was not adduced in evidence; the actual complaint was not produced and the only evidence as to its nature was contained in FA's note of her meeting with the Claimant in 2020; that note states that Mr Ginnever was concerned about the Claimant's *"posts"*, *"comments"*, and an *"extreme commentary and discussion"* which suggest that there was more than the singular comment adduced by the Claimant. In these circumstances, there was no evidence from which the Tribunal could conclude, for example, that the complaint was false or frivolous.

ii. There was more evidence regarding the Claimant's interactions with Mr Chan who had sought to challenge some of the views being expressed by the Claimant in responding to his comments. The Tribunal considers that there was nothing in

this which crosses the line into creating the prohibited effect. In particular, none of this amounts to a complaint about the Claimant or his comments being made to management as alleged in the proceedings.

iii. There was no evidence whatsoever that Mr Chan did anything more than dispute the Claimant's views in what the Tribunal considers to be a reasonable and logical manner questioning some of the assertions being made by the Claimant and asking for evidence of these assertions. There is simply no basis on which the Tribunal could conclude that these comments by Mr Chan could reasonably have the prohibited effect.

181. Taking into account of all the matters set out above, the Tribunal does not consider that it is reasonable for any of these matters individually to create the prohibited effect.

182. The Tribunal has also considered whether, viewed as whole, it is reasonable for these matters to create the prohibited effect. As with the prohibited purpose, the Tribunal finds that there is no connection between these matters; they are different things done by different people at different times. There is certainly no evidence of anyone directing the various people involved and, at most, the only connection is that they may be part of the broader strategy within the Respondent to promote diversity and inclusion. However, it is very difficult to see how it is reasonable for the promotion of diversity and inclusion, in and of itself, to have the prohibited effect when it is the opposite effect which is trying to be created.

183. For all these reasons, the Tribunal does not consider that it is reasonable for the various matters relied on, either individually or as a whole, to have the prohibited effect.

184. The Tribunal now turns to the final question in determining the harassment claim, whether the conduct in question was related to the relevant protected characteristics. The question is somewhat academic given the Tribunal's

findings on the prohibited purpose and effect but it will address this for the sake of completeness.

185. There was certainly no evidence that the conduct in question was directly related to the Claimant and his specific protected characteristics. As has been noted several times above, almost all of the conduct relied upon are corporate matters being decided upon by people at some distance from the Claimant and with no knowledge of him or his protected characteristics.

186. In relation to the complaints which were directly related to the Claimant, there was no evidence that these were related to his race or sex but, rather, to his comments. At most, this could mean that they could be related to his lack of belief in critical theory but there was no evidence of this.

187. However, the test for harassment in s26 is not restricted to the situation where the conduct relied on is motivated by a claimant's protected characteristics and the phrase *"related to"* is capable of broader application.

188. It is not in question that, in the very broadest sense, most of the matters complained of by the Claimant are related to race or sex. For example, the Phase 2 report is about why the MOD struggles to recruit and retain women or people from BAME communities, the language guide relates to talking about race, the email from the permanent under-secretary was in response to what was perceived to be racist comments and the blogs from Mr Pett discuss issues related to racism and sexism.

189. Further, the Tribunal has to take into account that the Claimant's case is based on his race and his sex. The Claimant asserts he has been harassed because he is white and because he is a man. The Tribunal does not consider that there is any evidence that the conduct in question is related to people, generally as opposed to the Claimant specifically, being white or to men. Rather, the connection to race and sex only arises in the sense that the conduct in question seeks to address potential discrimination relating to race and sex.

190. In these circumstances, the relationship between the conduct and the particular protected characteristics is so remote that it strains the bounds of the phrase *"related to"* almost to breaking point. The phrase cannot have unlimited scope and there must come a point when the links are so tenuous that they cannot fall within this definition of harassment. The Tribunal considers that this such a point has been reached in this case.

191. The Tribunal should be clear that there was no evidential basis that, even in the broadest sense, the conduct in question related to the Claimant's lack of belief in critical theory. This might be why he objected to some of the content of documents but that does not mean that the content was related to this lack of belief.

192. For all these reasons, the Tribunal finds that the Claimant has not satisfied the test for harassment under s26 of the Equality Act. In summary, the Tribunal finds that the conduct relied on did not have the prohibited purpose, it was not reasonable for it to have the prohibited effect and the conduct was not related to the relevant protected characteristics. The claim of harassment is hereby dismissed.

Employment Judge: **P O'Donnell**
Date of Judgment: **22 December 2022**
Entered in register: **23 January 2023**
and copied to parties