EMPLOYMENT TRIBUNALS

Claimant: Mr M Dad

Respondent: Birmingham City Council

Heard at: Birmingham **On:** 2, 3, 4, 5, 9, 10,11, 12, 15 & 16 (panel only) May 2023

Before: Employment Judge Maxwell
Ms S Campbell
Mr T Liburd

Appearances
For the claimant: in person
For the respondent: Mr Wilson, Counsel

RESERVED JUDGMENT

1. The Claimant's claim of harassment related to race is well-founded and succeeds to the extent set out below.

2. The Claimant's claim of direct race discrimination is well-founded and succeeds to the extent set out below.

3. The Claimant's claim of victimisation is not well founded and is dismissed.

4. The Claimant's claim of health and safety detriment is not well-founded and is dismissed.

5. The Claimant's claim of unlawful deductions is well-founded and succeeds to the extent set out below.

REASONS

1. By a claim presented on 25 August 2018, the Claimant brought claims against the Respondent.

   Procedural Matters

2. The Respondent applied for a hybrid hearing. This was not because of any difficulty in attending at the Tribunal on the part of a witness or Counsel, rather it was for the convenience of whichever employee of the Respondent might be assigned to take a note of the proceedings, so they could do so from home. This was a weak application. In-person hearings are to be preferred. They are especially appropriate in long, complex, multi-day discrimination cases, such as the matter at hand. The Presidential Road Map clearly explains to parties they should expect to attend in person, save unless there are good reasons not to. Remote or hybrid hearings create an additional administrative and technical burden. Furthermore, connection difficulties sometimes delay proceedings. If the Respondent wished to have an employee sit behind Counsel, they could do so in the hearing room. We note the Respondent is the local authority within which the Tribunal hearing centre is located. This is not a case where the Respondent's witnesses or representative are travelling from afar. The interests of justice do not call for a remote or hybrid hearing in this case.

3. We agreed a timetable with the parties, taking into account the reduced listing (10 days instead of 12):

   3.1 Day 1 - reading;

   3.2 Days 2, 3 & 4 - Claimant's evidence;

   3.3 Days 5, 6 & 7 - Respondent's evidence;

   3.4 Day 8 – closing submissions (1 hour each),Tribunal begins deliberation;

   3.5 Day 9 – deliberation;

   3.6 Day 10 – deliberation, followed by judgement if possible.

4. The timetable was, largely, adhered to. We allowed a small overrun with respect to the 3 days allocated to the Respondent's evidence, so the Claimant might complete his cross-examination. The Judge reminded the Claimant a number of times that he should focus on the list of issues and ask questions of the witnesses that they would be able to speak to.

5. Toward the end of the oral evidence, the Claimant said he needed more time to finalise his written submissions and we adjourned early on day 7 to accommodate this request, before hearing submissions on day 8.

6. On the morning of day 8, the parties presented their written submissions. The Claimant's document ran to 239 pages. Rather than representing a summary of his position and identifying particular features of the evidence or law, he sought

to litigate the matter fully on paper. Because it was necessary to read his submissions before hearing from the parties orally, we adjourned and resumed after the weekend.

Issues

7. A considerable amount of time had been spent at more than one preliminary hearing, attempting to clarify the Claimant's indirect discrimination claim. This had been unsuccessful. No employment Judge had been able to extract from the Claimant's representations, the elements for what appeared to be a claim under EqA section 19. The matter had been left for a determination by this Tribunal as a preliminary issue. We decided it would be a better use of time, especially in circumstances where the listing had been reduced, for a determination on this point to be made in our deliberations at the end of the case. If the Claimant had an indirect discrimination claim, it would be found in the correspondence referred to in the case management order made by EJ Gilroy KC. Whilst this meant there was a degree of uncertainty, both parties were content we approached it so.

8. In all other respects, the parties agreed the issues arising on the Claimant's claim were as set out in the order of EJ Harding of 10 April 2019.

Evidence

9. The parties had agreed a bundle of documents for use at the hearing, running to 2,608 pages. The Claimant did, however, complain about the extent of disclosure previously made and said many important documents were provided only in a heavily redacted form.

10. We were provided with witness statements and heard oral evidence from:

Claimant

10.1 Mazar Dad, the Claimant;

10.2 Noel Delaney, formerly employed by the Respondent as Assistant Service Manager;

10.3 Anab Isman, a current employee of the Respondent who formerly held the position of Assistant Service Manager;

10.4 John Leach, an employee of the Respondent and Unison Shop Steward

10.5 Adrian Williams, Assistant Service Manager.

Respondent

10.6 Robert James, formerly Strategic Director, City Operations;

10.7 Darren Share, Director of Street Scene.

Facts

Witness Evidence

11. The Claimant and each of his witnesses gave clear and credible evidence in relation to the matters they could speak to. Notwithstanding the passage of time, it was apparent that each of them was much affected by these events. Whilst the Claimant tended toward verbosity in his answers, we were satisfied it was only through an abundance of caution and wish to be comprehensive. His supporting witnesses were more concise and direct, in some cases to the point of bluntness. Three had been managers in the Refuse Collection function at the Respondent's Redfern Waste Management Depot when these events unfolded and one a shop steward for Unison. Each had, thereafter, chosen to leave the function, the depot or the Respondent's employment entirely, as a result of feeling targeted, undermined or unsafe.

12. We were very much less impressed by the evidence given on the Respondent's behalf.

13. Early in the cross-examination of Mr James, he was taken to a statement made by one of the Driver Team Leaders at Redfern, Darren Morgan. This was evidence prepared for the Tribunal claim of Mr Leach. In this statement, Mr Morgan explained he was the first signatory of the petition, which later became a collective grievance and triggered the process resulting in Mr Williams, the Claimant and Mr Delaney facing disciplinary allegations of bullying and intimidation. Mr Morgan went on to say that he and his colleagues had been misled into signing this petition, having been given a false account of the background, omitting the prior warnings and opportunities afforded to Mr Peach to change his stance on signing for PPE. Mr Morgan's statement also said that Mr Ricketts and Mr Beddows (respectively, the Unite shop steward and convenor) prevented him and other colleagues from giving evidence in the disciplinary proceedings against the Claimant and other managers. Asked whether such evidence might have affected his decision in the Claimant's case Mr James appeared largely unmoved. He said he would wish to know whether this had been taken into account by the investigator. We were astonished by this answer. The evidence of Mr Morgan, if true, would undermine the original grievance, suggesting the petition had been procured by false information and that subsequently, attempts were made to pervert the investigation. It would also cast doubt on the honesty and integrity of Mr Ricketts and Mr Beddows, both of whom the Respondent had relied upon heavily. We were also unimpressed by the Response of Mr James where asked about evidence which tended to undermine the credibility of Mr Peach, the principal complainant. The Claimant in cross-examination, referred Mr James to the interview with Mr Peach, which included that he had not previously been required to sign for PPE. Mr James was then taken to the conclusion of the investigator after having reviewed the signature sheets, which showed that contrary to his interview, Mr Peach had been required to sign for PPE previously and did so. Mr Dad asked whether that demonstrated Mr Peach was not a credible witness. After a very long pause thinking about this, Mr James responded that he had not read the statement of Mr Peach as meaning that he had "never ever" been required to sign. We found this a most unconvincing response to a clear point against the credibility of Mr Peach. As a result of this and other unsatisfactory evidence from Mr James, to

which we will refer later in this decision, we were driven to the conclusion that Mr James was not merely unreliable but in some respects was saying that which he did not genuinely believe to be true.

14. There were also very many features of the evidence given by Mr Share that we found to be unsatisfactory. Referred to an email received from Mr Ricketts, sent about a year after the Claimant's final written warning and enforced move away from the Redfern depot, in which Mr Ricketts can be fairly described as "singing [the Claimant's] praises" before calling for his return to Redfern Depot to carry out project work, Mr Share struggled with the simple proposition that Mr Rickett's stance in this email contradicted his earlier position. Given Mr Ricketts was one of the principal drivers behind the accusations of bullying and intimidation which had forced the Claimant out of Redfern, it was difficult understand how anyone could disagree with the point being put. Our conclusion was not merely that Mr Share held an unrealistic view on this point but rather that his answer to us was not true. He could see the contradiction but pretended otherwise. Mr Share was also asked questions about the statement of Mr Morgan. As with Mr James before him, Mr Share did not appear overly concerned. Again, this response is difficult to understand. The account of Mr Morgan, if accepted, went to the genuineness of the disciplinary case upheld against the Claimant. Furthermore, Mr Share, was involved in the earlier successful Tribunal claim made by Mr Leach. In the course of that, he must have been made aware of the witness statement given by another employee, Mr Mason, who also made allegations of serious impropriety. Notwithstanding this, Mr Share had made no subsequent enquiry into these matters. Where disciplinary action has been taken against managers and punishments imposed in good faith, then when new information comes to light might suggest a serious injustice was done, then we would have expected that matter to be looked at again. It is difficult to understand Mr Share's lack of curiosity or action. Such inaction would, however, be consistent with a circumstance where he did not want to uncover evidence which undermined the case against the Claimant or already knew the proceedings against him were fundamentally flawed. For these and other reasons, as set out below, we did not find Mr Share to be a reliable witness. On some points he must have known that what he said was untrue.

<u>Background</u>

15. The Claimant is a very long serving employee of the Respondent, having started with it in 1989. At the time with which this claim is concerned, he was based at the Redfern waste management facility at Tyseley, Birmingham ("Redfern"). The management structure at Redfern comprised a Senior Service Manager, Les Williams, to whom two Service Managers reported, the Claimant and Peter Marley. The Claimant was responsible for commercial and private refuse collections, along with clinical waste. Mr Marley dealt with Street cleaning. Several Assistant Service Managers reported into the Claimant, including were Noel Delaney, John Green, Anab Isman, Adrian Williams and Brian Wilson. Refuse collections were undertaken by crews of three or four, comprising a Driver Team Leader, a Leading Hand and Loaders. About two thirds of the circa 300 employees at Redfern worked in the Claimant's side of the business.

16. Many of those employed in the Respondent's waste management function are union members and there are several unions which are active in this regard,

including Unite and Unison. On the refuse collection side of the business, Unite had by far the greatest number of members. For Unite, Richard Beddows was the full-time convenor covering all of the Respondent's waste management depots and Richard Ricketts was shop steward at Redfern. Jason Peach was a Driver Team Leader at Redfern, a Unite member and although not himself an official, the brother of a shop steward. For Unison, John Leach was the on-site shop steward at Redfern.

17. Mr Leach brought separate proceedings against the Respondent under case number 1301714/2018 for trade union detriment. Mr Leach's claims were upheld in part and reasons given in a reserved judgement issued by EJ Woffenden dated 23 September 2019. There is a considerable factual overlap between the matters Mr Leach complained of then and in the present claim. The written reasons in Mr Leach's case were included in the agreed bundle for this hearing and we were asked to read the same before hearing any evidence. Neither party sought to persuade us to make findings of fact in this case, which contradicted those made by EJ Woffenden and her colleagues. Ms Isman brought a claim against the Respondent under case number 1308812/2019, which was later withdrawn.

18. Prior to these events, Redfern was a high performing depot. Much of the credit for this was due to the effective management of Mr Dad and his colleagues. There has been no material challenge to this proposition. We have already referred to the email written by Mr Ricketts about a year after the Claimant's enforced removal, in which he speaks of a deterioration in performance at Redfern, his admiration for Mr Dad and suggested his return in some capacity. Given Mr Ricketts part in the events described below, his subsequent turnabout is one of many surprising features of this case. It also casts doubt on the good faith of the complaints which forced the Claimant out.

<u>Mentoring</u>

19. On 26 April 2016, the Claimant completed an application form under the Respondent's mentoring programme. He had been encouraged to apply and this was approved by his line manager, Mr Williams.

20. On 27 April 2016, an email was sent to Mark Rogers, the Respondent's Chief Executive, enquiring whether he might act as a mentor. Mr Rogers replied to this saying "Thoughts please?". Jacqui Kennedy, then Acting Strategic Director Place offered her advice:

> **I think that he would benefit from a Mentor and one from outside Place Directorate as most go his career has been in around these services. I think someone from wider JNC cadre would be appropriate or a good head of service Grade 7.**

21. Mr Rogers appears to have accepted this view, in part at least because he was already busy:

> **Yes - much as I would wash to, I can take on more presently as I am (sort of) mentoring two people already.**

22. Ms Kennedy replied to the Claimant on 3 May 2016:

> **Mark Rogers has asked me to respond to you or an email re securing you a mentor. Unfortunately Mark cannot fulfil this role but has asked me to help you to Ind someone appropriate. On that basis I have asked Jane to get us together tor half an hour to discuss your needs and wants from such a relationship.**
>
> **Mark sincerely apologises but I know we can find the right person for you**

PPE Policy

23. On 30 October 2015, following consultation with local trade union representatives, the Claimant introduced a new policy at Redfern, which required employees to sign a register when they were provided with additional PPE gloves, over and above the two pairs issued at the beginning of each week. The reason for this policy was twofold. Firstly, the cost of PPE was substantial and the Respondent wished for this to be controlled. Secondly, the register would provide a record of when additional gloves were issued and this could be relied upon in evidence when responding to personal injury claims made by operatives or in the event of any other legal proceedings, to show the provision of additional PPE. This policy was confirmed in a memo of 30 October 2015, issued to Driver Team Leaders, Leading Hands and Loaders. The policy of signing for additional PPE was then extended to other items, including hi-vis jackets and wipes. This was a local policy at Redfern, which is the Respondent's largest depot.

24. Despite the policy having been agreed with the local trade union representatives at Redfern, Mr Beddows (based at Perry Barr but as convenor also covering Redfern) objected on the basis that an agreement had not been reached on this with the Unions across the Respondent's entire territory and at all depots. He made a number of points, although none included any reason why an employee at Redfern would be unable to comply with this policy. In response on 10 November 2015, Steve Truman, the Respondent's Safety Adviser, wrote to offer his strong support for the new PPE policy, saying he had been trying for years to get management to adopt the same. Mr Beddows did not, thereafter, further pursue his objections until late 2016, in the circumstances we will come to.

25. The signature sheets later obtained as part of the Respondent's investigation, suggest and we find that between March and June 2016 the signing for PPE policy was enforced lightly, between July and August 2016 the policy was not being enforced and then from the beginning of October 2016 it was strictly enforced. A pattern of this sort is not necessarily surprising, where new policies are introduced.

Peach Refusal

26. On 3 November 2016, Mr Peach approached Mr Delaney (who was on duty at the time) and asked for a tub of wipes. Mr Delaney handed over the wipes and in accordance with the policy, asked Mr Peach to sign for their receipt. Mr Peach refused, responding that Mr Beddows had told him not to sign as it was an infringement of his human rights. A conversation then ensued in which Mr Delaney reiterated the reasons why Mr Peach was being asked to sign. Mr Peach said that Mr Delaney would have to show him where in the code of conduct it said he had to sign. Whilst maintaining his refusal, Mr Peach did not

suggest he was being singled-out in the requirement to sign for wipes. We pause to note that no other employee adopted this stance or said they had received such advice from Mr Beddows. No particular human right was identified, Mr Peach did not say how signing for the wipes would cause an infringement and we can see no basis for any such an assertion. In the circumstances, the actions of Mr Peach would appear to have been deliberately obstructive.

27. The incident with Mr Peach had occurred at about 5am, which is a busy time in the depot. The Claimant learned of this when he arrived for work, at 7.30am. Having received a report from Mr Delaney, the Claimant spoke with Mr Wilson and Mr Ricketts. He learned that both had sought to defuse the situation, Mr Wilson offering a tub of wipes without a signature and Mr Ricketts offering to sign the form, neither of which Mr Peach accepted.

28. Following discussion between Mr Delaney, the Claimant and Mr Williams, it was decided that a letter would be sent by Mr Delaney to Mr Peach. Mr Delaney drafted the letter and the Claimant approved it. The letter was sent on 4 November 2016, in the following terms:

> **I write to advise that Under the Birmingham City Council code of conduct you are expected to follow reasonable management instructions.**
>
> **Yesterday morning you refused to sign to say that you had received a container of wipes. The reason you are required to sign is so management have an auditable record**
>
> **The code of conduct states the following. -**
>
> **Employees are expected to follow all reasonable and lawful instructions by a person with the authority to issue such instructions unless:**
>
> - **There is a danger to a person's health and safety**
> - **A conflict of interest may exist.**
> - **It does not comply with Council policy and practice.**
>
> **Managers must be able to justify their instructions and decisions in line with their delegations, authority, and Council policy and procedures and be open and respond promptly to constructive questions.**
>
> **By asking you to sign for acknowledgment of any item is justified and reasonable and any further instances of refusal may lead to formal action being taken against you.**
>
> **If you have any concerns, questions or comments please let me know and I will be happy to discuss this.**

29. On 7 November 2017, Mr Beddows wrote to Mr Delaney about this matter, asserting that employees were not required to sign for anything they receive from their employer, saying that managers could sign on their behalf and asking to be shown where a requirement to sign found in the code of conduct. Mr Delaney sent this to the Claimant, who in turn forwarded it on to Mr Williams for

his advice. Mr Williams discussed the issue with his more senior managers, Antony Greener, Director and Darren Share, Assistant Director.

30. Mr Greener replied on 8 November 2017, supporting a firm line:

> **It is perfectly reasonable to expect an individual to sign for stores issues (of any description) and this constitutes a reasonable management instruction. Stores issues are the property of BCC and are issued to enable operatives to do their work in accordance with SWPs. It is good practice to expect individuals sign for items they have been issued with.**
>
> **A manager signing on their behalf does not amount to the same thing - who is to say a manager cannot falsify records in the aftermath of a serious incident or accident to suggest the correct equipment has been issued to individuals concerned. Getting the individual concerned to sign for items issued to him or her removes this ambiguity - period. It is also not common practice to apply different standards - we do not operate different rules for different people.**
>
> **Failure to comply with a reasonable management instruction is a disciplinary offence. That is what the Code of Conduct states. It is nothing to do with signing or not signing - it is wilful refusal to follow a reasonable management instruction which is the issue.**
>
> **If by virtue of refusing to sign, the manager concludes that the operative is not able to complete his job safely, he can suspend him for his own safety. You might be pushing the point here with cleansing wipes, which in this instance should therefore not be issued. If this leads to disruption in respect of productivity as a direct consequence on non-issue, then there are grounds to pursue disciplinary proceedings at this point.**
>
> **However non-issue of other PPE due to refusal to sign will, and should, lead to suspension and disciplinary proceedings with immediate effect. Are we sure the issue is not one of literacy? A discrete conversation about the potential difficulties of signing for items may be required in order to establish whether there is an underlying issue which we as an employer can assist with.**
>
> **I'm concerned that this incident resulted in a heated exchange. The individual should be told of the potential outcomes of his refusal to sign and that is all. However, it takes two to have a heated "exchange" and it appears that the individual is resistant to signing for anything so could be reasonably perceived as being confrontational in such situations.**
>
> **Is there an undercurrent between the individuals concerned, and if so, would the situation be resolved through redeploying the individual to another depot, under the authority of a different ASM, for every bodies benefit, particularly if the issue is escalates?**

31. Before going much further into the relevant sequence of events, we note that the Claimant would subsequently be found guilty of gross misconduct for supporting the steps set out above, in circumstances where he took advice from and acted on instruction from his own line manager, all of which was in accordance with the direction of even more senior management.

32. On 9 November 2016, Mr Delaney replied to Mr Beddows:

> **It is perfectly reasonable as a manager for me to expect an individual member of staff to sign for work related items to acknowledge receipt. This constitutes a reasonable management instruction.**
>
> **Materials issued are the property of BCC and further issued to enable operatives to do their work, or follow instruction / guidance, it is good practice to expect individuals to sign for items they have been issued. Mr Peaches' refusal has initially warranted a letter of warning to ensure he understands the outcomes of refusing reasonable management instructions.**
>
> **Failure to comply with a reasonable management instruction is a disciplinary offence. That is what the Code of Conduct states. Employees are expected to follow alt reasonable and lawful instructions by a person with the authority to issue such instructions unless:**
>
> **• There is a danger to a person's health and safety.**
>
> *** A conflict of interest may exist.**
>
> **• It does not comply with Council policy and practice.**
>
> **The issue here is about an employee, who also happens to be in a management role who is wilfully refusing to follow a reasonable management instruction which is an issue that management has to take seriously and resolve.**
>
> **I do not accept your comment that a manager signing on the employees behalf amounts to the same, especially when everybody else is adhering to reasonable instructions.**

33. Mr Beddows responded the same day saying it was unreasonable to instruct an employee to sign for something and saying it was not in the code of conduct. He also suggested that Mr Peach was being treated differently from others who would not sign.

34. Beyond Mr Beddow's assertion, there was no evidence of any other employee being asked to sign for PPE and refusing. A very small number of entries in the relevant PPE log sheets were either unsigned or had a false name put in. Unsurprisingly, evidence obtained in the later investigation revealed that sometimes this was missed when the office was very busy. Employees who were seen not to be completing sheets properly were immediately told to do so. Informal advice proved to be sufficient in all other cases. The overwhelming majority of all entries were properly signed for. Mr Peach was the only person who refused to cooperate with informal advice and adopted a demonstratively obstructive stance in the face of a reasonable management request.

35. On 10 November 2016, Mr Peach again refused to sign for PPE, namely gloves. The two Assistant Service Managers on duty at the time, Mr Green and Mr Wilson, sought to diffuse the situation. On this occasion, Mr Wilson handed the gloves over notwithstanding Mr Peach's stance. The matter was referred to the Claimant and he sought advice from Mr Williams, writing:

I am really disappointed with Richards stance on this matter, we have process in place that apply to everyone. From my view JP is failing to comply with working practices and his code of conduct fail short.

We really need some guidance or. this matter very urgently as this matter will have direct impact on discipline for (he whole of the depot, I think Richard fails to understand what is reasonable for audit purposes and accountability, especially If all employees have been made aware of processes then a reasonable management instruction, cannot be deemed as questionable but needs to be adhered and it is a shame that Richard is not advising his member accordingly.

36. On 11 November 2016, Mr Beddows lodged a formal complaint about various matters. These did not include the requirement made of Mr Peach to sign for PPE. He did, however, complain about different paperwork at other depots.

37. On 14 November 2016, Mr Williams wrote to Mr Dad and Mr Delaney, instructing them to enforce the policy of signing for PPE. This included advice to respond to refusals in the first instance with an informal, private explanation of the importance of complying with health and safety rules, before dealing with matters in any more formal way. This appears eminently sensible. A measured and gradual approach was advocated.

38. On 18 November 2016, Mr Peach again refused to sign for PPE, namely Hi Viz clothing. On this occasion, he grabbed the items from the worktop next to Mr Delaney and walked away with them. Further advice from Mr Williams was sought and he wrote to Mr Delaney and the Claimant the same day:

With this scenario though we would need to reiterate-that you would like a discussion in a private office, I would always suggest this is good practice. if the employee continued to refuse then you would have been left no alternative but to send him home. I am more than concerned that a manager is refusing once again to sign for PPE (Hi Viz) which in this case it does clearly say in the Code of Conduct.

Employees are expected to follow all reasonable and lawful instructions by a person with the authority to issue such instructions unless

- **There is a danger to a person’s health and safety.**
- **A Conflict of interest may exist.**
- **It does riot comply With Council policy arid practice**
- **Health and Safety**
- **Every employee has a duty to take reasonable care of themselves and to cooperate with management under the Health and Safety at Work Act 1974 These responsibilities are identified in the Councils Health and Safety policy.**
- **Employees are required to act at all times in accordance with this policy and generally to act in such a way to ensure their own safety and that of others;**

- **Any action which potentially puts at risk the health and/or safety of themselves or others will be viewed seriously and may result in action**

My advice would have been to not issue the PPE and to send him home. The criticism is around how conversations get heated. As you have explained to me this conversation wasn't the case today and I understand that you tried to have a reasonable conversation

Maz

We now need to proceed with formal disciplinary action with this employee you will need to have him in to speak to him officially.

39. Accordingly, along with reiterating the general approach endorsed by more senior managers, the Claimant was given a direct instruction to commence disciplinary action against Mr Peach.

40. In the afternoon of 18 November 2016, the Claimant spoke with Mr Peach and his shop steward, Mr Ricketts. They discussed the recent history of refusals. The Claimant explained the reasons why everyone was required to sign for PPE. He also reminded Mr Peach that he had been signing for PPE prior to 3 November 2016. The Claimant referred him to the code of conduct which required compliance with reasonable management instructions and also the section on health and safety. Mr Peach said he had been advised by his union not to sign for anything. Mr Ricketts (the local shop steward) disagreed with this. Mr Peach then said it was Mr Beddows who had told him not to sign. Mr Peach did not take issue with the fact of local consultation having taken place and a resulting memo on the new policy put on the noticeboard.

41. On 21 November 2016, yet again Mr Peach refused to sign for PPE, namely a Hi Viz vest. On this occasion, he was not sent out with his crew. When the Claimant was told of this, he asked to speak with Mr Peach. Mr Peach said he would not speak without his union rep present. Arrangements were made for Mr Ricketts to return to the depot (Mr Peach refused to be accompanied by another Unite shop steward, Mr Shine, who was already on site). When the meeting began, the Claimant reiterated what he had said in their discussion just a few days before. He hoped Mr Peach would be prevailed upon to change his position. Mr Peach would not move. In light of this the Claimant spoke with Mr Williams. The Claimant said he did not believe Mr Peach should be suspended but as an alternative to suspension he should be moved to another depot, temporarily, without driver team leader responsibilities but maintaining his pay. The Claimant's rationale was that Mr Peach could not be left with the responsibility of managing health and safety on his crew, when he was refusing to comply with health and safety policies. Since it would be embarrassing for Mr Peach to be demoted to the position of loader with his colleagues at Redfern he would instead, again temporarily, be transferred to the Lifford Lane depot. Mr Williams agreed with this proposal and telephoned the other depot to make the practical arrangements for this to be done. Thereafter, Mr Peach was instructed to report to Lifford Lane. We pause to note that redeployment was one of the steps suggested by Mr Greener.

42. Shortly thereafter, Mr Beddows telephoned Mr Share to complain about what had happened to Mr Peach.

43. On 22 November 2016, Mr Share wrote to Mr Williams:

    I'm sure you won't be surprised I had a call from Richard Beddows yesterday. I totally support your initiative to get staff to sign for equipment, supplies etc. It sounds like Jason has a particular issue with this and he does need to understand he needs to comply with a reasonable manageable request.

    There are a couple of observations, we do need a consistent approach across all depots and agree what to do if someone continues to refuse to sign.

    I'm not sure there was a need to move him to Lifford whilst an investigation was undertaken. He couldn't influence anything, can you ensure the this is completed as quickly as possible.

    I'm meeting all the senior stewards this morning I'm sure they will raise this and ask for a consistent approach.

44. We note that whilst expressing some reservation about the necessity of moving Mr Peach to another depot, Mr Share did not instruct or even suggest a reversal of that decision. Mr Share did not disagree with the removal of Mr Peach's management responsibilities. Furthermore, Mr Share offered his total support for the requirement that staff sign for PPE and, correctly, identified that it was Mr Peach in particular who was choosing to make and issue of this. Mr Share agreed that Mr Peach had to comply with this reasonable management request to sign for PPE.

45. Terms of reference for an investigation into Mr Peach were drafted, as was a letter confirming the details of his redeployment as an alternative to suspension. HR advice was sought on both.

46. Given the Claimant acted in an entirely transparent manner, with advice from HR, only after Mr Peach had been given multiple informal warnings and explanations, with the support and on the instruction of his own line manager, who in turn had sought and obtained the support of more senior management, including from Mr Share, it is astonishing to note this was later found by the Respondent, in particular Mr James acting as decision-maker, to amount to gross misconduct. In his evidence at the Tribunal Mr James stood by that decision. The one other witness called by the Respondent, Mr Share, when taken through the relevant sequence of events did not agree with this view.

47. Mr Beddows continued to apply pressure to Mr Share, who went back to Mr Greener on this. Mr Greener maintained his support for the action which had been taken, on 23 November 20216 writing:

    Morning Darren, With reference to your separate e mail re. Jason Peach, this is my advice to Les below.

    The issue is about following reasonable management instruction, and the issue is therefore whether asking employees to sign for stores issues is reasonable.

> **I believe it is reasonable, and it is for Mr Peach to demonstrate otherwise in any disciplinary process and not for us to demonstrate that it is through specific reference to policies or we would not be able to operate a service on this basis.**

48. Mr Williams wrote to Mr Greener and Mr Share to confirm their continued support on 23 November 2016:

> **R Beddows has approached me today and asked if I have reconsidered my moving of Mr Peach to another depot. Whilst I have considered it I do feel that I have taken the appropriate step in this case.**
>
> **I am keen to get a quick turnaround to this case and I have asked HR for some advice and support.**
>
> **My current concerns are that he is currently at home after refusing to sign for the induction at Lifford Lane. I am waiting for HR but I will be asking the question around stopping his pay**
>
> **Can you confirm that you are happy with my course of actions in this case**

49. By this time, in addition to Mr Share, other senior personnel within the Respondent appear to have become involved, including Russell Johnston and Lisa Cockburn from HR. It appears that Mr Johnston was in direct communication with Mr Beddows. Mr Share wrote to Mr Johnston on 23 November 2016:

> **Can you help assign a HR rep for Les. I understand there was a union meeting at the depot today to calm the staff down because of the way this is going.**

50. Mr Johnston replied on 24 November 2016:

> **Will you have time to link with Les on the issue below. Les has indicated in a note he has had HR advice but it seems disproportionate measures are being taken; particularly if the comment from Richard is accurate that others have not signed and had no action taken.**
>
> **I am at SMT and then back to back so if you can take a look at why Les is taking this approach.**

51. Mr Johnston's remark about disproportionate measures is difficult to understand. Mr Peach was the only operative maintaining a refusal. Managers at Redfern had sought to address this in a careful way, including seeking advice at more senior levels. Mr Johnston appears to have attached a great deal of weight to the assertions of Mr Beddows, without seeking a response from Mr Williams, the Claimant or Mr Delaney.

52. Later on 24 November 2016, Mr Share wrote to Mr Johnston and Ms Cockburn in a message which suggests growing alarm on his part at the industrial relations position:

> **Can you give me a call about this please if you are able to review. I have been told everyone went in and asked for gloves this morning and no one**

> **was asked to sign for anything. I've also been told others regularly request items and are not asked to sign. Following the meeting last night there might be a collective grievance being put in for the way this individual has been treated.**
>
> **I'm willing to allow Les to review his actions after talking it through with you but otherwise I will need to act before we are made to look a laughing stock**

53. It is unclear where Mr Share's information had come from but it would seem most likely his source was Mr Beddows. His account suggests a coordinated refusal to comply with signing rules mounted by operatives earlier that day. Whilst his concern at the escalation is understandable, such a protest does not evidence a general practice of employees not being required to sign for PPE previously.

54. The Claimant prepared a letter to send to Mr Peach about his redeployment as an alternative to suspension, having taken advice from HR. He wrote to Mr Peach on 24 November 2016. Following his transfer to Lifford Lane, Mr Peach refused to sign for the depot induction he received at that site. As a result of this, he was sent home by one of the managers there, Mr Airey. The Respondent took no disciplinary action against Mr Airey.

55. On 29 November 2019, Mr Share met with Mr Williams to discuss this matter, pressing him to reverse the move of Mr Peach to Lifford Lane because of the complaints from Mr Beddows. Following this, Mr Williams wrote:

> **In this case there were clear steps that demonstrated that we have tried to manage the employee to come into line with the rest of the refuse collection services.**
>
> **We in the first instance warned him that refusing management instruction or requests could end up in a disciplinary case being looked into and he chose then on two other occasions to ignore and challenge the instruction.**
>
> **The actions we took we not taken lightly and we have discussed this as a management team more recently.**
>
> **The employee was moved not for refusing to sign but for the fact that he was refusing management instructions/requests. I feel that this is not in line with his job role as a GR4 team leader and it needs to be looked into.**
>
> **I fully support Maz's decision to move him whilst an investigation takes place and I would not consider bringing him back until the investigation is completed.**

56. On 30 November 2016, Mr Share wrote to Mr Williams:

> **Fundamentally, did he refuse to do his job or has he simply refused to sign for something... i.e. is he trying to do his jo without a piece of essential H&S equipment which might be construed as a refusal to do his job, or, has he got the right equipment and is willing to do his job but simply refusing to sign for a piece of equipment which may even be spare?**

> **Re moving him from his job because he has failed to comply with an instruction:**
>
> **• We might do so if we felt he will impede an investigation or interfere with witnesses. As the investigation is factual; he either did or did not sign. I don't see how he can influence an investigation. Similarly it does not appear that you considered this to be a risk as he has not been suspended.**
>
> **If what I am led to understand is correct that others in the same depot, and across the different depots do not always sign for equipment and have not had similar action taken: you might conclude that moving him from his job is a form of punishment. If that is the case this should be stopped and he returned to his normal duties.**
>
> **I understand your frustrations and what you are trying to do at Redfern but we have to treat everyone the same.**
>
> **I would be happy to talk it through with you and Russell if you want. But**
>
> **I think he should return to his post as quickly as possible**

57. We are surprised by the position Mr Share adopted, which appears to have been based upon advice from Mr Johnston. The requirement to sign for PPE, to confirm training or the receipt of important documents, is commonplace in many workplaces and an obviously sensible measure. The reasons it was introduced at Redfern, namely to monitor the supply of materials and be able to prove their issue, were quite proper. This had been agreed with local trade union representatives. In the event of subsequent litigation or public enquiries, such records often become crucially important. Mr Share had previously been supportive of the steps taken by Mr Williams. It seems likely that other factors were in play by this time. The obvious reason for Mr Share's change of heart is his concern about industrial relations and an escalation in tension. Whilst the Respondent's most senior managers were, of course, at liberty to decide upon a strategy of making concessions to the union, that cannot mean that the original steps taken by local managers were improper, less still that they amounted to misconduct. Mr Share having given private advice to his line report in the email to which we have just referred, the last thing we would have expected is for him to then forward this to Mr Beddows and yet that is exactly what he did. It is difficult to see this other than as undermining of Mr Williams. There was at the time very frequent communication and coordination between Mr Share, Mr Johnston and Mr Beddows.

58. At a point late in the day on 2 December 2016, Mr Share suspended Mr Williams, for alleged gross misconduct. Mr Greener confirmed the fact of having given the instruction for this to be done in an email at 11.34 pm that night:

> **The allegation is that contrary to the Code of Conduct regarding leadership and integrity that Leslie has abused the power which his position holds by treating an individual, namely Jason Peach (Driver-Team leader) differently, therefore pre-empting the potential outcome of a disciplinary process being undertaken against Mr Peach.**

> **The allegation is that Mr Peach was redeployed to Lifford Depot as a Loader (albeit maintained on a Driver team Leader Jary) pending the outcome of the Disciplinary Process against him. This occurred whilst Driver-Team leader vacancies are currently back-filled by Agency staff. Mr Peach has since taken annual leave because he feels that he has been victimised and this does not amount to a disciplinary sanction under the Disciplinary Code.**

59. Mr Greener also confirmed in the same email he was expecting a grievance:

> **I am expecting a collective grievance signed by over 70 members of staff from Redfern Depot against the management practices undertaken at Redfern Depot, specifically naming Leslie Williams, Maz Dad (Service Manager) and Noel Delaney (Assistant Service Manager), all three of which are involved in Disciplinary investigation against Mr Peach.**
>
> **In the Spring of 2016 Mr Peach successfully lodged a grievance against Maz Dad in respect of previous treatment received.**
>
> **The terms of reference for the investigation are currently being drawn up and will be undertaken by Lesley Ariss beginning Monday.**
>
> **Measures are underway to reinstate Mr Peach into a drivers post, albeit not at Redfern.**

60. The stance adopted by Mr Greener represented a complete about turn on his previous position. It is difficult to see how Mr Greener can have arrived at this by way of an objective assessment of the information before him. It would seem much more likely he was prompted to do as he did by a fear of industrial action. In order to satisfy Mr Beddows and reduce the risk of industrial action, it was necessary to reinstate Mr Peach. A reversal of his suspension would require a retrospective conclusion that Mr Williams had acted improperly in deciding to suspend in the first place.

61. Ms Kennedy, who was plainly being kept in the loop, was concerned the steps taken by Mr Greener did not go far enough. She wrote, also on 2 December 2016:

> **Can you confirm that you considered suspension of the other tiers of management please**

62. This was a reference to the Claimant and Mr Delaney. Mr Greener replied:

> **That will be a key subject of the investigation and we will respond appropriately if evidence emerges which implicates wider conspiracy or joint enterprise or collusion which implicates other colleagues.**

63. The involvement of such senior officers of the Respondent in the decision of a local manager to suspend a GR4 employee for failing to follow reasonable management instructions with respect to PPE, is very surprising, as is the fact of Ms Kennedy pressing for the suspension not only of the depot manager but of his deputy (i.e. the Claimant) on the refuse collection side and an Assistant Service Manager (Mr Delaney). The contemplation of such draconian action, at such short notice and on such a flimsy basis, again suggests other considerations must have been in play and the obvious factor is the risk of

industrial action. Indeed, we were persuaded by the Claimant's argument, namely that the only reason he and Mr Delaney were not also suspended immediately is because Mr Share, Mr Greener and Ms Kennedy, recognised that at this busiest time of the year (immediately pre-and post-Christmas) the service would have 'fallen over' if all three had been hastily removed.

64. At the hearing in the Tribunal, it was common ground that "bin strikes" had been a problem in Birmingham. The costs incurred by the Council when these occurred are staggering. The associated political damage is also substantial, even extending to the resignation of the Council Leader.

65. Notwithstanding the suspension of Mr Williams, Mr Beddows kept up the pressure, on 5 December 2016 writing:

> **I just wanted to give you an overview of the situation at Redfern in regards to the treatment of Jason Peach & the unrest of the rest of the workforce in regards to his treatment and their frustration/annoyance of the bullying and intimidation culture that exists at that depot form management towards them.**
>
> **Jason has been removed from his post as DTL post at Redfern & moved to Lifford as a loader for refusing to sign for PPE and hand sanitation 9this took place on the 21/11/16, both Jason and I feel this action/sanction is unwarranted his colleagues feel this is excessive and have demonstrated so by requiring a urgent members meeting and requesting my presence this took place on the 23/11/16 with management permission at the end of their shift. Their frustration was so they requested an avenue to protest into the treatment of Jason & the bullying and intimidation towards them from management within Ref Col, I advised them they could pursue a collective grievance they also wished to lodge a vote of no confidence in the management. I revisited the depot on the Friday 25/11/16 at lunchtime and assisted them in compiling the grievance & vote of no confidence signatures were obtained freely and others added their names over the next couple of days, this was not an organised meeting just simply assisting my members within their lunchtime I have worked in waste management for nearly 25 years now & have been the Unite rep and Convenor for the past 8 years I'm aware that manipulation takes place by managers and has done for some time across the depots but this has been taking to another level at Redfern I have never know a whole workforce protest in this manner before, I know have over 70 signatures for the collective grievance/vote of no confidence.**

66. Mr Peach was reinstated to the role of driver team leader on 6 December 2016, albeit staying at Lifford Lane to begin with. Mr Share sent this instruction by email to local management at that depot, requiring they contact Mr Peach immediately.

67. On 9 December 2016, Mr Beddows submitted two grievances. One on behalf of Mr Peach complaining about his suspension and another ("the collective grievance") on behalf of a number of workers, complaining of bullying and intimidation by local management at Redfern generally.

68. The grievance from Mr Peach complained about his removal from post as a Driver Team Leader at Redfern. It was stated to be directed against his line

manager and his line manager's line manager (i.e. Mr Delaney and the Claimant). The next manager up in the hierarchy, Mr Williams, was by this time already accused of gross misconduct and had been suspended. The text of the collective grievance provided:

> **we the collective workforce wish to protest against the treatment of our colleague Jason Peach. We feel it is harsh and excessive, we also wish to protest against the culture of bullying and intimidation towards us from Ref Col management were entitled to be treated with dignity and respect**

69. Attached to the grievance form was a petition, the declaration at the top of which provided:

> **we the undersigned are employees within waste management at the Redfern Road depot. We wish to lodge a collective grievance against the depot management in Ref Col for the intimidation and bullying culture that is present towards us from the management. We also wish to lodge a vote of no-confidence in the Ref Col management at Redfern Road.**

70. No information was provided in support of the alleged culture of bullying and intimidation. From the earlier correspondence passing between Mr Beddows, Mr Share and Mr Johnston that "management" for these purposes included Mr Williams, the Claimant and Mr Delaney.

71. Variously, it was said the collective grievance had 70, 75, 76 or 77 signatures. What has been put in evidence before us shows nearer 20. The Claimant suggested the Respondent must have been lying all along about the numbers. We think, however, it is likely there were more signatures presented at the time but what has been produced subsequently is simply the first page of the petition, with the declaration at the top (i.e. the proposition those putting their names on the petition appeared to support). It would have been folly for Mr Beddows to repeatedly assert the numbers he did and then to put in a grievance with only a fraction of that. Furthermore, a number of employees subsequent complained they were misled into signing the grievance because they signed blank sheets (i.e. continuation sheets, without the declaration at the top of the page) being told it was to support the return of Mr Peach and not knowing their names would be relied upon to support a wide-ranging grievance against management generally.

72. A formal letter of suspension was sent to Mr Williams on 13 December 2016. The allegation under investigation was said to be:

> **Please note that your suspension is not considered as disciplinary action in itself. A Disciplinary investigation will now take place into the allegation(s) that you took a course of action against an individual that is different to the way others have been treated. It is further alleged that you went on to unnecessarily redeploy the individual to a lower graded role. These allegations may contravene the Council Code of Conduct and if proven may amount to gross Misconduct and result in your dismissal.**

73. On 14 December 2016, Alison Harwood was appointed as commissioning officer. This was, however, a matter of form rather substance. The processes which were followed, including the appointment of Ms Ariss as investigating officer and drafting terms of reference for the investigation of Mr Williams, were

steps taken to give the appearance of objectivity and due process when in fact those important requirements were set aside. We noted the terms of reference for the investigation into Mr Williams were not drafted by Ms Harwood, as would be expected of the commissioning officer, rather they were prepared by Mr Share and sent by him to both Ms Harwood and Ms Ariss. Indeed, having looked through the enormous volume of correspondence included in the Tribunal hearing bundle, we could find little evidence of Ms Harwood taking steps. Her name appears far more frequently as the recipient rather than author of emails.

74. We are satisfied Mr Share, Mr Johnston and Mr Beddows were closely involved in the investigation carried out by Ms Ariss. Ms Harwood was nothing more than a figurehead. The intention was to identify evidence which could be used to support findings of gross misconduct against Mr Williams in the first instance, followed by the Claimant and Mr Delaney further down the line. The investigation was not intended to be a balanced exercise, also looking for evidence which might exculpate the Redfern managers. The primary objective was to enable the Respondent's more senior managers to provide a pretext for reversing the action taken against Mr Peach, in order to satisfy Mr Beddows and the Unite representatives at Redfern, thereby reducing the risk of industrial action.

Brennan

75. On or about 8 January 2017, Kevin Brennan, a Loader at Redfern, told the Claimant he was on his "deathbed". This remark was mocking. We do not, however, find that Mr Brennan attempted to mimic what the Claimant described as an "Asian accent". We note, the Claimant does not say this in his witness statement, nor was it included in his claim form or any contemporaneous correspondence. Given his complaint about this is one of harassment related to race, the use of such an accent would be directly relevant and we think the Claimant would have mentioned it at some point prior to his oral evidence in the Tribunal. Ms Isman was present on this occasion and heard the remark, yet she did not recollect the use of any particular accent when it was made. Had Mr Brennan attempted to mimic a Pakistani or Indian accent (which is what we understand the Claimant to mean) we think it most unlikely Ms Isman would have failed to recognise and remember this. Indeed, we think she would have challenged a blatant display of racism. Whilst we found the Claimant's evidence, generally, to be reliable and accurate, in this instance his recollection is mistaken.

Counter Grievance

76. Following the suspension of Mr Williams, a number of employees who had signed the collective grievance raised concerns, suggesting they had been misled. Mr Leach began to receive such reports, in his capacity as Unison shop steward. In particular, Mr Leach was told that individuals had signed their names on a blank sheet of paper (i.e. without the declaration at the top) having been told it was merely a petition calling for the return of Mr Peach and not informed their names were being taken in support of an allegation of bullying and intimidation by management at Redfern generally. A number of Unison officials, including Assistant Branch Secretary Shelley Francis and Regional Officer Mark New, were involved in drawing up a new declaration, whereby employees could sign to withdraw their support for the earlier collective grievance which Mr

Beddows had organised. Mr Leach and another member of Unison spoke to colleagues and signatures were obtained on the counter-grievance.

77. When Unite found out about the counter grievance, objections were raised about this by, Steve Foster, City Convener for Unite. On 30 January 2017, Mr Beddows wrote to Mr Foster, Mr Share and others:

> **Thank you for raising Unites concerns, I have just been sent a picture (attached) of the wording of the mentioned grievance/statement & I would also like to add that today the individual who is circulating the document (Gr4 DTL) instructed one of our members whilst in the refuse collection office to sign it as he had signed the Unite grievance originally /**
>
> **This was in the presence of Maz Dad and Noel Delaney. I too am very concerned how the signatures of Unites grievance have become public knowledge. Only myself the local rep and the Investigation officer have plus HR have copies of it. I too feel this issue will exacerbate an already tense situation**

78. The attached photo disclosed the following text:

> **We the undersigned wish to state that we had no idea that a quote grievance" had been submitted against Management of Redfern Depot from Unite Trade Union. We signed what we believe to be a petition to get our colleague Jason Peach back to work Redfern Depot. This was allegedly spoken about in a Unite only meeting and we were asked by a United representative to "sign a petition".**
>
> **I am not aware or have I been given a copy of this "grievance" from that Unite Representative, therefore I wish to remove my signature from the original document submitted to BCC.**

79. Mr Share forwarded this to Mr Johnston, who replied:

> **We need a case review of the current inv and weight of evidence against Les & Maz. If Management are orchestrating this then that review needs to be accelerated and possibly further suspensions to follow - or is the Grade 4 referred to doing so on behalf of a union in which case we also tackle the union.**

80. Mr Johnston's email is surprising in a number of ways. His conclusion that the Claimant and Mr Delaney appeared to be "orchestrating" the counter grievance is a considerable leap from the information provided by Mr Beddows. His reference to accelerating a review and the possibility of further suspensions is consistent with disciplinary action against the Claimant and Mr Delaney already being in prospect. We note the central complaint in the text of the counter grievance appears to have been ignored. The suggestion made was that signatures had been obtained for the original petition under false pretences. This would be a serious matter pointing toward wrongdoing on the part of Mr Beddows or Mr Ricketts. Yet Mr Johnston did not make or suggest any enquiry into this. Time and time again we were struck by the remarkable lack of curiosity on the part of those involved in the disciplinary proceedings with respect to any line of enquiry that might be turn up evidence supporting the Refern managers.

81. Notwithstanding the main thrust of Mr Beddows complaint was against Unison and Mr Leach, it appears that Mr Share and Mr Johnston were looking for evidence of wrongdoing by the Claimant and Mr Delaney. On 6 February 2017, Mr Beddows put forward Paul Williams as a witness:

> **I have just spoken to another Unite member at Redfern a Paul Williams Gr4 DTL he has been approached twice to sign the petition/document once by a fellow GR4 DTL in the office and once by J leach, he is willing to be interviewed if necessary**

Suspension

82. On 6 February 2017, Mr Share suspended the Claimant, telling him this was because of an allegation that he had interfered in an ongoing investigation.

83. The suspension letter dated 7 February 2017, which was not sent to the Claimant until two and a half months later, included two allegations:

> **A Disciplinary investigation will now take place into the allegation(s) that you took a course of action against an individual that is different to the way others have been treated. It is further alleged that you went on to interfere with an ongoing investigation. These allegations may contravene the Council Code of Conduct and if proven may amount to gross Misconduct and result in your dismissal.**

84. The allegation of treating an individual (i.e. Mr Peach) differently was not mentioned by Mr Share on 6 February 2017. We rejected Mr Share's evidence that it was Ms Harwood who decided to suspend the Claimant and he had merely been following her instruction. This is wholly unrealistic and inconsistent with documentary evidence, which demonstrates Mr Share and Mr Johnston discussing this matter and deciding what to do. Mr Share's evidence on this was an attempt to avoid responsibility for the decision. Mr Delaney was suspended the same day for the same reason.

85. Given the fact of suspension taking place on 6 February 2017, the day before Mr Share and Mr Johnston spoke to Paul Williams, it follows this decision was based upon nothing more than the information provided by Mr Beddows, which was limited to the Claimant and Mr Delaney having been present when an employee, Mr Williams, was asked to sign the Unison counter grievance.

86. Whilst Mr Share denied having made the decision, he was asked for his opinion on whether the information at hand from Mr Beddows was sufficient to justify the suspension of the Claimant. Mr Share replied that a convenor was an important post, with support from whole trade union and it was more than just an individual saying it. We do not see why more weight should be attached to emails from Mr Beddows, simply by reason of him being a Unite Convenor. If the factual content of Mr Beddows emails failed to show interference in an investigation by the Claimant, the author's position within the union would not remedy that deficit. It certainly was not the case that the "whole" union supported the allegation of interference by the Claimant. On the contrary, Mr Beddows told Mr Share and Mr Johnston of one witness only, who would say the Claimant was present when he was asked to sign the counter grievance.

87. This was an astonishingly thin basis upon which to suspend the Claimant and yet that is what Mr Share and Mr Johnston decided to do. There was nothing to suggest either of the newly suspended managers was "orchestrating" the counter grievance. On the contrary, Mr Beddows made it clear this was a Unison endeavour, being pursued by Mr Leach and another GR4.

88. Whilst suspension is often described as neutral step and in some respects this is so, in practice it can have devastating consequences, especially where it is prolonged. To suspend a manager on the basis it was suspected he had interfered in an ongoing disciplinary investigation is an incredibly serious step to take. We were astonished that a senior manager could be suspended from work, supposedly because of a serious allegation, where the basis for this appeared so flimsy. This calls into question the genuineness of the exercise carried out.

89. On 7 February 2016, Mr Share Mr Johnston spoke to Paul Williams at some length. Given he was the only witness put forward to substantiate the allegation upon which the Claimant had been suspended the previous day, what he had to say would, obviously, be important. Despite this, no note was made. We are quite satisfied Mr Share and Mr Johnson, the latter an HR professional, would have been well aware that a note of what Mr Williams told them should have been made. Mr Share gave unsatisfactory evidence about this discussion with Paul Williams. Asked why no note had been taken of what Mr Williams said, Mr Share said this was because the purpose had merely been to establish whether there was any witness to support what Mr Beddows had said told them and then to forward that name on to the investigator. This was not, however, consistent with the record of Paul Williams' subsequent interview, in which Ms Ariss put to him a highly detailed account of what he was said to told Mr Share Mr Johnston. Ms Ariss can only have done that in circumstances where such an account was first relayed to her.

Mr Leach

90. Mr Leach, one of those who was actually asking employees to sign the counter-grievance, was not suspended. A preliminary investigation was conducted in his case. Also, following lobbying from Unison, the Respondent agreed to instruct an external investigator. Mr Leach was, subsequently, offered a deal by the Respondent, whereby the disciplinary proceedings against him would be withdrawn if he agreed to withdraw his complaints against others. He also attended a meeting at the Unison office with Ms Isman and several other managers from Redfern, where they were all invited to accept deals that involved them withdrawing their complaints against Mr Ricketts. Mr Leach refused to agree any such deal and was, eventually, issued with a final written warning in connection with this matter.

Williams Investigation Report

91. Ms Ariss produced her investigation report with respect to the Depot Manager, Les Williams, on 9 February 2017. There was a very substantial overlap between this investigation and the Claimant's. There had been four allegations against Mr Williams initially, although in substance they were all different ways of putting the same complaint, namely that Mr Peach had been treated differently. Two further allegations were then added, the first of which was a fifth way of

suggesting the action taken against Mr Peach involved treating him differently and the second was Mr William's responsibility for a culture of "bullying" at Redfern. Ms Ariss' report concluded the allegations were well-founded and recommended a gross misconduct hearing.

Williams Disciplinary Outcome

92. Mr Williams' disciplinary hearing took place on 7 April 2017. Mr James was the decision-maker. Mr Williams faced allegations in the following terms:

> **1. That on 21st November 2016 you treated an employee differently to others and failed to follow a reasonable management instruction to reinstate the individual to his substantive post whilst an investigation took place.**
>
> **2. […]**
>
> **i. That the actions were excessive**
>
> **ii. And there is a culture of "bullying" at Redfern**

93. By letter of 10 April 2017, Mr Williams was given a final written warning for 12 months. Mr James upheld allegations 1 and 2(i). He did not uphold 2(ii) on the basis no evidence had been presented:

> **In respect of the allegation of a "culture of bullying at Redfern", I am aware that a collective grievance has been submitted concerning this matter. However the presenting officer did not provide any evidence that this allegation was specifically directed towards yourself. I have therefore discounted the allegation in my judgement.**

94. The decision to offer no evidence on 2(ii) is difficult to understand. Mr Beddows indicated the collective grievance was a complaint against Mr Williams, the Claimant and Mr Delaney. The addition of this allegation part-way through the William's investigation is consistent with this. We have received no or no adequate explanation for why this position changed. The heavily redacted interviews with various employee witnesses in which they were asked for examples of bullying, to which we will return later this decision, plainly include complaints about other managers. It would be very surprising if Mr Williams' name was not mentioned in the now redacted text.

95. Mr James' decision in Mr Williams' case included an immediate return to work for him in the Waste Management Department. The outcome letter included an appointment with Mr Share on 18 April 2017, to make arrangements for this.

96. We note that, notwithstanding Mr Williams had been found guilty of singling out Mr Peach for excessive treatment and refusing a direct instruction from his own line manager (i.e. Mr Share) to reverse that decision, there was no question of him having to give up his career in Waste Management and go to work in another part of the Council.

Peach Return

97. Mr Peach returned to work at Redfern on 19 April 2017.

Claimant's Grievances

98. On 17 February 2017, the Claimant submitted his first Dignity at Work Grievance. He set out the background to the PPE signing policy being introduced, the steps taken with respect to Mr Peach, his belief that the investigation and disciplinary proceedings against him were intended to appease the union, coordination with the union in this, alleging bias on the part of those currently involved and requesting a full independent investigation.

99. The Claimant submitted further dignity at work complaints/grievances on 22 April and 10 May 2017. In both of these he made complaints of a similar nature to those he had raised initially. He wrote an email on 3 July 2017, making a number of the same points but also including that he was the victim of "institutional racism".

100. The Respondent decided the Claimant's grievances would be considered as part of the disciplinary proceedings. Unsurprisingly those involved in the investigation and disciplinary proceedings, did not find any impropriety or racism on their own part.

Advert

101. The Claimant's position of Service Manager at Redfern was advertised on 15 May 2017, as a development opportunity for an initial period of three months. The investigation conducted by Ms Ariss would appear to have been substantially completed by this point and a conclusion to the disciplinary proceedings might have been thought likely to be reached sooner rather than later. In the circumstances, the timing of this advert is somewhat odd. It is consistent with a decision having been made that the Claimant was unlikely to return to Redfern in the near future or at all.

Claimant's Mental Health

102. The Claimant's mental health was seriously affected by his prolonged suspension and the outstanding disciplinary proceedings. He was signed off work by his GP on 24 May 2017 because of:

anxiety with depression (psychological injury)

Delaney Resignation

103. On 31 August 2017, Mr Delaney resigned. He believed that he had been treated unfairly and his grievances ignored. He had no confidence in the processes being conducted.

Industrial Action

104. By an email 12 April 2017, Mr Beddows informed Mr Greener, Mr Share, Mr Johnston and various others of a 96% yes vote in favour of industrial action, arising out of the Respondent's proposals for a five-day working week and the removal of the grade 3 position of Leading Hand.

105. Strikes took place at all of the Respondent's waste management depots and the bins went uncollected. This caused great disruption to residents and much political fallout, including in due course the resignation of the Council leader.

106. There were also difficult and sometimes heated altercations at the Redfern depot. Managers, including Ms Isman, complained of harassment and raised grievances. Several employees were accused of intimidation or misconduct on the picket line. Mr Ricketts was one of those suspended from work as a result of such allegations.

107. Separately from what going on inside the workplace, Unite sought to challenge the Respondent's proposals by way of High Court proceedings. An injunction was applied for to restrain the Respondent from giving notice of dismissal to affected employees. There was a hearing in that case on 20 September 2017.

108. Eventually, a deal was done between Unite and the Respondent. This included reinstating the suspended employees, withdrawing the disciplinary proceedings against them and taking no action on the grievances raised by managers, such as Ms Isman. As part of this, Mrs Isman, Mr Green and Adrian Williams, all moved to different depots or a different function within Redfern. These managers felt they had been undermined and in particular, were unable to work with Mr Ricketts.

109. In his evidence at the Tribunal, Mr James said he was aware of rumours relating to deals having been done with the unions but no more than that. Notwithstanding Mr James worked in Housing at the time, we thought his professed ignorance most unlikely. Given his seniority within the Respondent and involvement in these disciplinary proceedings, he must have known more. Furthermore, we accepted the evidence of Ms Isman, to the effect she had a number of conversations with Mr James and he confirmed to her the fact of such deals having been made. We think Mr James sought to underplay his knowledge of this industrial action and the manner in which it was resolved, so as to avoid the implication that it was a factor in his decisions with respect to Mr Williams, Mr Leach and the Claimant.

<u>Investigation</u>

110. When Ms Ariss began her investigation it was, formally at least, only concerned with alleged misconduct by Mr Williams. Not long thereafter, the Claimant and Mr Delaney were also suspended and she was appointed to be the investigator in their cases too. Much of the material which was relied upon to support the management case against the Claimant, was obtained before he had been told he was under investigation.

111. The bundle included terms of reference for an investigation into the Claimant dated 17 February 2017. Whilst these were signed by Ms Harwood as commissioning officer, for the reasons already given we find these were drafted by Mr Share and Ms Ariss.

112. The position of Mr Beddows in the investigation is remarkable. He was the instigator of the complaints about management at Redfern in respect of both Mr Peach's redeployment as an alternative to suspension and the collective

grievance. Mr Beddows was in discussion about these matters with Mr Share, Mr Johnston and others before either complaint was presented in a formal way. The email correspondence shows him repeatedly applying pressure and intimating the prospect of industrial action. Mr Beddows was acting as the representative both of Mr Peach and of the Unite members at Redfern more generally.

113. Notwithstanding his obvious partiality, Mr Beddows was allowed to pick the non-management witnesses. Only those operatives he put forward were interviewed by Ms Ariss. This was not a remotely fair way of proceeding. Ostensibly, the Respondent was investigating an alleged culture of bullying and intimidation perpetuated by senior management (depot manager, service manager and assistant service managers) at the Redfern depot. This would seem to necessitate, as a minimum, conducting interviews with all of the senior managers together with an appropriate sample of the workforce. It is difficult to see how something approaching a fair picture could be assembled in any other way. We do not accept that Ms Ariss can have believed it was fair to interview only a handful of employees selected by Mr Beddows. The most likely reason for proceeding in this obviously unfair way is that Ms Ariss intended to conduct a one-sided investigation, looking only for evidence in support of the allegations.

114. Furthermore, Mr Beddows was allowed to sit in on each of the interviews with the witnesses he had chosen. Even if witnesses were entitled to be accompanied, it is difficult to see how Ms Ariss can have believed it was appropriate for Mr Beddows to carry out that role given he was, in effect, the complainant for the purposes of the collective grievance. He would have a vested interest in controlling the flow of information, so as to ensure what came out supported the collective grievance he had presented. The interests of the employee witnesses could easily have been protected by another union representative, someone who was not an interested party. Nor was Mr Beddows a mere passive observer, rather he was allowed to ask questions and provide information during the interviews. When giving his evidence at the Tribunal, Mr James was asked how thought this all looked and replied as though Mr Beddows was “trying to pull the strings”. Our conclusion is not merely that Mr Beddows tried to do this but rather he was allowed to by Ms Ariss. Mr Beddows was endeavouring to keep a very tight control upon the evidence received. This was a wholly unfair approach. Quite obviously, where an allegation was made in general terms about the management at Redfern creating a culture of intimidation and bullying, if Ms Ariss considered it disproportionate to interview every member of staff (and given the number we can see why this might be so) then at the very least, she should have approached a representative sample. Allowing Mr Beddows to cherry pick in this way, was likely to produce evidence which supported the complaints only. The job of an investigator is to the fair, to look for evidence going both ways, that which supports and that which might undermine the alleged misconduct. Ms Ariss must have been aware of her duties in this regard and it is difficult to see her failure as other than deliberate.

115. The investigation report of Ms Ariss, including the notes of interviews with witnesses and other appendices were very heavily redacted, both when given to the Claimant at the time and as presented at the Tribunal. We asked for an explanation and beyond Counsel offering his speculation, none was forthcoming. Counsel told us he had requested instructions on this point from his client.

Notwithstanding the Claimant received only redacted documents, Mr James told us he had been provided with at least some of the material in unredacted form. Asked whether he thought this was fair, Mr James said it was not. Our finding is that the redactions made by Ms Ariss included evidence relating to other managers. We draw this conclusion because many of the redactions appear at stages during the interviews when the questions asked by Ms Ariss suggested she was seeking examples of alleged bullying or intimidation. In some responses it is clear the witness named a number of individuals as doing a thing and only the Claimant's name remains unredacted. Also, in this case as in many, the redaction undertaken by the Respondent has been completed imperfectly. We noticed "ND" (i.e. Mr Delaney) which the redactor may have misread amongst the "MD"s (i.e. the Claimant). We also found one first name which had slipped through the net, when "Anab" (i.e. Ms Isman) was accused of using psychological bullying techniques. Such information would be relevant to the Claimant's defence, as the evidence of those managers (if they refuted what was said against them) would go to the credibility of the tiny number of employee witnesses (out of a workforce of circa 300) Ms Ariss chose to rely upon. Furthermore, if some managers who were accused of bullying had not faced an investigation (and it appears there was at least Ms Isman) then this would tend to support the Claimant's argument that he had been picked upon.

116. We do not accept the multiple departures from a fair enquiry can be explained by mere inadvertence or incompetence. The investigation was a device to secure a predetermined end, namely findings of misconduct against the Claimant and Mr Delaney.

<u>Claimant's Interviews</u>

117. As above, Ms Ariss' investigation began before the Claimant was told he faced any disciplinary allegations.

118. By letter of 29 December 2016, the Claimant was invited to attend an interview. The letter said Ms Ariss was investigating whether Mr Williams "and/or his management team" treated Mr Peach differently. The letter also said that two grievances had been received and that the Claimant had been named in connection with complaints that: "the actions relating 21 November 2016 were excessive" (i.e. the commencement of a disciplinary investigation and suspension of Mr Peach); there was a culture of bullying Redfern."

119. The Claimant was interviewed by Ms Ariss for the first time on 11 January 2017. Understandably, he was concerned about his status. The letter requiring him to attend suggested that he was the subject of allegations, notwithstanding the interview was concerned with Mr Williams. The Claimant asked to see the grievances in which he had been named. Ms Ariss refused, saying he was merely a witness. The prospect of a subsequent investigation into the Claimant had, plainly, occurred to him and it would be surprising if Ms Ariss had not considered the same. The interview he gave on this occasion was indeed used as part of her later investigation into him. The Claimant gave a full and seemingly plausible account of events, which if accepted would disclose no misconduct. He also told Ms Ariss about the correspondence and discussions between him, his line manager and more senior managers that had come before any action taken against Mr Peach. Any fair-minded investigator would have

immediately recognised the potential relevance of correspondence passing between the Claimant and more senior managers, preceding the redeployment as an alternative to suspension of Mr Peach, as this might shed light on whether such steps have been taken hastily or following careful consideration of all the circumstances. Ms Ariss, however, did not include this correspondence in her investigation into the Claimant, notwithstanding it was provided to her by Mr Share.

120. In a letter of 17 February 2017, the Claimant was invited to a further investigatory interview and this time told it was in connection with four allegations of gross misconduct against him:

> **1. It is alleged that on 21st November 2016, Mr Maz Dad treated an employee differently to others.**
>
> **2 It is alleged that Mr Maz Dad has potentially interfered with an ongoing disciplinary investigation.**
>
> **3. It is alleged that the actions taken in relation to Mr Peach were excessive.**
>
> **4. It is alleged that there is a culture of intimidation and bullying towards the workforce by management at Redfern Road depot.**

121. The Claimant was interviewed twice more following this letter, on 27 April 2017 and then 18 May 2017. The Claimant referred to his dignity at work grievances. He raised his objections to Ms Ariss as investigator, along with his concern about various matters he believed were departures from the Respondent's policies. He also pointed to his suspicions in the sequence of events. He questioned the delay in taking action against him initially as well as the slow progress thereafter. Asked about an entry in the signature sheets relating to Mr Mason, the Claimant confirmed that he had spoken to him about this. The Claimant said that if employees did not comply with the policy, the first thing he did was speak with them. Ms Ariss told the Claimant there were 7 missing signatures. In response, the Claimant referred to the pressure of work and said that sometimes there were between 30 and 40 people clustered in a small area (the office) and it may be that managers had not have noticed. The Claimant was then asked about three named witnesses (to which we return below) who Ms Ariss would subsequently rely upon in connection with the collective grievance of bullying and intimidation. The Claimant had no recollection of the conversation referred to by Mr Shakespeare. He pointed out that he was responsible for managing 200 people and had a lot of conversations each day. He did, however, invite Ms Ariss to check the personnel records of Mr Shakespeare in connection with the sick leave matter she had raised, which it does not appear she did. Asked about Mr Clinton, the Claimant said that in response to concerns raised by Mr Clinton, he temporarily moved an operative away from his round. The Claimant said that employees did sometimes say they were fearful of colleagues and this was always followed up, although it could be difficult to progress such concerns if the individual was unwilling to make a formal complaint. Ms Ariss did not ask questions based on what was said by Mr McMullen, notwithstanding he was one of those she would later rely upon him to prove bullying and intimidation. The Claimant was asked about and did not

recollect any conversation in which Paul Williams was asked to change his support for the collective grievance.

122. At his third interview the Claimant expanded upon the complaints in his grievances, including the action taken against him to appease Unite and Ms Ariss not being an impartial investigator.

<u>Witnesses</u>

123. Jason Peach was the first person interviewed by Ms Ariss, on 15 December 2016. He was accompanied by Mr Beddows. Mr Peach's account included that previously (i.e. prior to the recent events for which a disciplinary investigation had been commenced and he had been sent to Lifford Lane in the role of operative, as an alternative to suspension) he had never been asked to sign for PPE. Mr Peach admitted there was a policy at Redfern of signing for PPE, he complained however the position was not a consistent one across all of the Respondent's depots. Mr Peach gave his account of being singled out. Notably, Ms Ariss never asked Mr Peach to comment upon the simple proposition that he was treated differently because he behaved differently, namely maintaining an obstinate refusal to sign for PPE in the face of repeated informal warnings and advice. If Ms Ariss had been unaware this was the explanation given by Mr Williams and the Claimant as at the time of her first interview with Mr Peach, she could have interviewed him again later and did not do so. Both Mr Williams and the Claimant set out their position on this very clearly.

124. When asked about being intimidated and bullied, large parts of the answer given by Mr Peach are redacted. It is likely, given the context, that he was then complaining about managers other than the Claimant, including Mr Williams and Mr Delaney.

125. On 30 December 2016, Ms Ariss invited Mr Beddows to attend interview as the representative of the collective grievance. Mr Beddows replied, saying he would attend with the local representative, Richard Ricketts. On 10 January 2017, Ms Ariss conducted a joint interview with Mr Ricketts and Mr Beddows. We have been shown nothing to suggest that interviewing witnesses jointly is part of the Respondent's standard procedure. This tag-team effort was most unusual. As with the other interviews, at points where these two appeared to be setting out their complaints against various managers, large sections of the text have been redacted. In passages where the Claimant's name appears, there have been short redactions immediately before and after, strongly suggesting that other managers were then named and complained about in precisely the same terms. In large measure, this interview involved Mr Beddows and Mr Ricketts providing hearsay information rather than complaining about the behaviour of the Claimant or other managers, which they had experienced directly.

126. Ms Ariss interviewed Mr Share on 5 January and 6 June 2017. We pause to note the lack of impartiality inherent in Ms Ariss interviewing the person who had appointed her to investigate this matter and with whom she was liaising in conducting the investigation. Mr Share told Ms Ariss about the email correspondence passing between himself, Mr Williams and Mr Greener prior to any action against Mr Peach being taken.

127. The notes of interview with Mr Share include a long list of email correspondence which Ms Ariss received from him. As above, whether or not the Claimant consulted with his own line manager and discussed the situation of Mr Peach before acting would be highly relevant to the occurrence of any misconduct. Evidence of careful and thoughtful deliberation before acting would tend to be inconsistent with Mr Peach being singled out for arbitrary unfair treatment. This would also provide contemporaneous evidence of motivation. An examination of the relevant correspondence reveals the Claimant did not act in haste. He took advice from Mr Williams, who in turn raised the matter with his own more senior managers Mr Greener and Mr Share. Those managers were aware of the situation and the course it was proposed to adopt. Not only did Mr Greener, Mr Share and Mr Williams fail to speak against this action, they provided positive and reasoned support. This goes beyond mere mitigation. It is difficult to see how the steps taken in such circumstances could amount to any misconduct whatsoever, let alone gross misconduct justifying dismissal or a final written warning. In his evidence at the Tribunal, Mr James agreed there could be no gross misconduct by the Claimant on this matter. We find it difficult to imagine a scenario in which an investigator acting in good faith, looking into alleged misconduct by the Claimant regarding the action taken against Mr Peach, would not have considered and included the email correspondence passing between the Claimant, Mr Williams and more senior managers prior to this event. Yet Ms Ariss excluded this material from his investigation report. We know that she had it and was aware of it because it was provided to her by Mr Share and included in the investigation report for Mr Williams. This was a most egregious omission.

128. Noel Delaney was interviewed on 12 January 2017. Almost the entirety of his interview note has been redacted. A further short interview, again much redacted, was conducted on 23 May 2017. Mr Delaney was a witness for the Claimant at the Tribunal. His evidence, which we found to be reliable, was strongly supportive of the Claimant. It is highly likely that he gave responses to Ms Ariss that would have been of assistance to the Claimant. The redaction of this material was most unfair.

129. On 31 January 2017, Craig Clinton was interviewed. He spoke of an occasion when there was tension between him and three colleagues who had been suspended for alleged drugs misuse. They believed Mr Clinton had reported them. Mr Clinton said he raised this with managers. Mr Delaney's response had simply been they (i.e. the crew) "were not paid talk". The Claimant was said to have "shrugged it off" as "mudslinging". Mr Clinton said he felt unsupported. He also said that if anyone had a serious issue the Claimant "will not listen" but gave no example of this, beyond the matter to which he had already referred. Subsequently, Mr Share had offered to write a letter "exonerating" Mr Clinton, by saying the reported drug misuse came from outside of the workplace. When Mr Clinton asked the Claimant about Mr Share's letter, on a Friday, he had replied "what letter". Mr Clinton did not know whether the Claimant had then received Mr Share's letter. Mr Clinton himself received Mr Share's letter the following Monday. The Claimant was said not to have allowed the crew to change rounds as he was worried about "greenlighting" such round changes.

130. We struggled see how Ms Ariss could have believed Mr Clinton's account supported the allegation levelled against the Claimant. She was not a witness at the Tribunal and could not, therefore, answer any questions about this. When Mr

James was asked to explain whether this amounted to bullying or intimidation, he said it did not. Mr James did, however, suggest the Claimant "could have been more supportive". We note that being unsupportive was not the allegation put forward by Ms Ariss in her report or subsequently upheld by Mr James.

131. Mr James told us that the workforce at Redfern tended to comprise robust individuals. There were several recognised unions, with Unite representing most of the refuse collectors and Unison representing those working on street cleaning. He said this was not an environment in which it was difficult for employees to raise a complaint about managers. We accepted his characterisation on this point as accurate.

132. Interviewed on 1 February 2017, Mr Shakespeare gave an account of asking the Claimant whether he could be put on light duties as a result of a shoulder strain. The Claimant was said to have responded that if he could not do his job he should not be there. Mr Shakespeare said the Claimant had suggested he was making excuses to be moved to another job. Mr Shakespeare carried on with his duties until December 2015, at which point his shoulder got worse, he then went to his doctor and was signed off work. When he returned in January 2016, he had an occupational health referral which recommended he be given light duties and this was then done. He applied successfully for a job in garden waste collection. Mr Shakespeare said that when he asked for meetings with the Claimant he was put off, but gave no details this regard. Mr Shakespeare also raised annual leave, saying workers were refused leave with the reason being given that the depot was busy and it would affect productivity.

133. Once again, we struggled to see how this account tended to show bullying and intimidation by the Claimant. When taken to Ms Ariss' interview with Mr Shakespeare, Mr James said he would not expect the Claimant to accede to a request for a change in job duties, merely on the basis of a self-report and unsupported by medical evidence. Mr James did not think it wrong for the Claimant to say, in effect, if you are not well enough to work you should not be at work. The Claimant had done nothing wrong in not acting on what Mr Shakespeare said about his shoulder, when he had not been to see his doctor about this and obtained some evidence (e.g. a fit note suggesting lighter duties). Mr James was unable to point to any wrongdoing on the part of the Claimant in the events described by Mr Shakespeare up to the point when he returned to work in January, at which point he did have a fit note and appropriate steps were taken. A reference to occupational health was then made and the recommendations complied with. Mr James found nothing wrong in the Claimant refusing annual leave because the depot was too busy. Once again, asked if there was bullying or intimidation by the Claimant in these matters, Mr James said no.

134. Paul Williams was interviewed on 13 February 2017. The notes show Ms Ariss putting an exceedingly long and leading question to him:

> **LA stated that she understood that on 7th February, there was a phone-conversation between PW, Darren Share and Russell Johnston as a result of Richard Beddows providing his name as a witness for the purposes of this investigation. LA went through what DS and RJ advised her of the conversation with PW: DS and RJ stated that you told them that in front of**

Maz Dad you were told by Martin Rafferty, another driver team leader, to change your support to the collective grievance; that MR had said to you that John, Leach a Unison steward, said you have to sign this document (LA showed PW a copy of the document which includes "I wish to remove my signature from the original document submitted to BCC.") because the original one wasn't worded properly; then at a later date you were approached by John Leach who said the Unite grievance is about management, you're a GR4 manager, you didn't know what you signed, you need to sign this (document already shown to PW). Russell Johnston stated that he asked you that if you were asked to sign something now, what would you sign and that in response you said you thought you were signing to get Jason Peach back because if management can do this to him, they can do it to anyone and by signing the collective grievance you were wanting this to stop; you further stated that you felt you were being used as a football between John Leach and Richard Ricketts and that you felt surprised that MR and JL were talking to you about this because of confidentiality. LA stated that she will break this down into sections. LA - DS and RJ stated that you told them that in front of Maz Dad you were told by Martin Rafferty, another driver team leader, to change your support to the collective grievance; that MR had said to you that John Leach a Unison steward, said you have to sign this document (LA showed PW a copy of the document which includes "I wish to remove my signature from the original document submitted to BCC.") because the original one wasn't worded properly. Is this correct? Where was this, when this did happen?

PW confirmed that this is correct and this is the document, and stated the conversation took place in the office. Maz Dad & Adrian Williams was also present at the time. PW stated he did not know whether or not there was anyone else present behind the screen in the office. PW also added that he cannot recall when this conversation took place exactly.

135. We were surprised at the way in which this interview was conducted. A proper way of addressing this would have been to ask open questions, such as "Were you asked to sign a subsequent petition? Can you tell me what happened?" Again, our conclusion is this was not inadvertent poor practice but indicative Ms Ariss working toward a predetermined end.

136. With respect to the allegation of interfering with an ongoing investigation, the extract set out above was the extent of the evidence against the Claimant. Following a long and entirely leading question, Mr Williams said the Claimant was present when he been asked by Mr Rafferty to sign the counter grievance. Ms Ariss did not ask whereabouts in the office Mr Williams and Mr Rafferty were, how far away the Claimant was and whether he would have heard this conversation. Certainly Mr Williams did not suggest the Claimant said anything or participated.

137. We did not see how this evidence could be thought sufficient to uphold an allegation of interfering in an investigation. Mr Share was asked about the interview with Paul Williams, it being the account of a conversation with him that Ms Ariss was, apparently, putting. Mr Share told us he could not see any evidence from this of the Claimant interfering in the investigation.

138. Mr McMullen was interviewed on 1 March 2017. He was asked about the collective grievance and his reasons for signing it. His response was noted as:

> **RM stated that it was in support of the other members who have signed it too, in reference to Jason Peach, and just to show support for the membership. RM added that he has never personally felt bullied but always felt there was an 'underlying thing' there.**

139. Unperturbed by Mr McMullen saying, expressly, that he did not feel bullied, Ms Ariss pressed on and asked him for examples of the "underlying feeling". Mr McMullen, who was a driver team leader and responsible for managing a crew, referred to a member of his crew who was "stuck in his ways" and made a complaint about Mr McMullen to management. Mr McMullen said that he requested the crewmember be moved to another crew but the Claimant responded "you are the manager, shut up and get on with it". The problem continued, Mr McMullen found this stressful and lost sleep. When he told the Claimant his doctor had said the situation was not good for him, then the crewmember was moved. Mr McMullen said he had raised this three or four times with the Claimant or another manager (whose name was redacted) and had been told by the Claimant "your a GR4 manager, manage it".

140. It was difficult to discern intimidation and bullying in the account given by Mr McMullen. The high point of the management case appeared to be the Claimant allegedly saying "shut up". When referred to the evidence of McMullen, Mr James did not say it was wrong for the Claimant to tell a driver team leader, a junior manager, that it was his responsibility to manage a difficult crewmember.

<u>Signature Sheets</u>

141. The signature sheets obtained by Ms Ariss were a central plank of the case against upheld against the Claimant, in support of the proposition that Mr Peach was "treated differently". Ms Ariss contended the signature sheets demonstrated the policy of signing for additional PPE had been applied inconsistently and other refusals had not been dealt with in the same way as was that of Mr Peach. There was some support in the documentary evidence for the first part of this proposition but none for the second.

142. The periods for which Ms Ariss obtained PPE signature sheets were:

142.1 hi viz - January to December 2016;

142.2 wipes – February to November 2016;

142.3 gloves - February to November 2016.

143. As far as glove were concerned, there were relatively few signatures for February and March, none for April, more for May and June, none for July to September and then a very large volume of signatures from the beginning of October through to the end of November 2016. Making the assumption most supportive of the management case against the Claimant, namely that all of the signature sheets for the material period had been obtained, this would suggest that enforcement of the new policy requiring signing for additional gloves was patchy in the early part of 2016, ground to a halt in the summer and then was

enforced far more rigorously from October 2016 onwards. Experience suggest that some initial fluctuation in enforcement when new policies are introduced is not uncommon. There was, however, nothing whatsoever in this pattern to suggest that Mr Peach was being targeted. His refusals did not begin until November. He was signing before that point.

144. Furthermore, when Mr Peach began his refusals, these were not limited to gloves but extended to PPE and Hi Viz as well. The volume of these items was less and the signature sheets show a consistent approach to enforcement throughout the year.

145. In support of her conclusion that Mr Peach was treated differently (by which she must mean more harshly in like circumstances) Ms Ariss' report included:

> **7.4 The actions taken in relation to JP were in stark contrast to how other employees were treated e.g. nothing was put in writing to Dave Mason (6.17 of this report). Furthermore, no action was considered, however the action taken against JP was considered, however the action taken against JP was considered potentially gross misconduct. It can only be concluded that MD treated JP differently to others and his actions in doing so were excessive compared to how he treated other employees.**

146. The starting point for this finding by Ms Ariss was her identification in the signature sheets of a small number of instances where an individual had either put down a false name or not signed at all. A number of possibilities might explain such an occurrence, in addition to the conclusion settled upon by Ms Ariss, including that an Assistant Service Manager working at the counter of this busy depot did not check what had been written down after the employee returned the clipboard to which the signature sheet was affixed. Notwithstanding the heavy reliance placed upon this point, Ms Ariss conducted a remarkably modest enquiry into the surrounding circumstances.

147. The Claimant was asked about the false or missing signatures on the sheets produced during interview (without any prior warning). Unsurprisingly, he was unable to speak to all of the specific instances. He did, however, say that when managers (i.e. the Assistant Service Managers who would be dealing with the issue of additional PPE) saw things of this sort they would speak to the employees concerned. The Claimant also referred to the possibility that managers might not have noticed this at the time, given the pressure of work.

148. Mr McMullen and Mr Clinton said there had been times when they had not been asked to sign for PPE. This would be consistent with the patchy enforcement of signing for gloves prior to October 2016. Both admitted they had signed for PPE previously. Neither said they had refused to sign when asked.

149. Ms Ariss identified only one specific individual as having been treated more leniently, namely Dave Mason. Mr Beddows had put him forward as a potential witness. Subsequently, Mr Mason appears to have been withdrawn. He signed a statement expressing the fear that he might be victimised by managers or face repercussions from colleagues, dependent upon which side he supported. Mr Mason was one of two witnesses Mr Beddows withdrew, providing an identically worded signed statement from each of them. Ms Ariss simply accepted their withdrawal. She did not ask who had written their statements (it would seem

unlikely they just happened to express themselves identically). She did not contact Mr Mason or the other witness and attempt to secure their evidence by offering reassurance.

150. The only other evidence relating to the treatment of Mr Mason, came from the interview conducted with Mr Delaney. Unfortunately, seemingly relevant parts of this interview have been redacted. The part which remains visible and is relevant to this point includes:

> **• What action was taken against the second person who wrote "eBay" as the reason for gloves?**
>
> **ND confirmed action was taken against this member of staff.**
>
> **• What action was taken against this member of staff?**
>
> **ND advised Dave Mason had refused to sign at all for any PPE, so he was spoken to. He apologised and assured him that this would not happen again.**
>
> **• What this carried out verbally or in writing?**
>
> **ND confirmed that Dave Mason was just spoken to verbally.**

151. In light of the account from Mr Delaney, which was the only evidence Ms Ariss had of the circumstances surrounding Mr Mason's refusal to sign for PPE, her conclusion at paragraph 7.4 is outrageous. According to Mr Delaney, when Mr Mason failed to comply with the policy he was pulled up on this and warned about his behaviour, in response to which he apologised and promised not to do it again. Mr Peach was afforded precisely the same opportunity but chose to reject that. He was warned, informally and repeatedly. Unlike Mr Mason, he did not apologise or undertake to comply with the policy. This does not begin to demonstrate Mr Mason being treated more leniently. To the extent that Mr Peach was treated differently, it is because he behaved differently. Mr Peach maintained an obstinate refusal to comply with the policy of signing for PPE. There was no evidence of any other employee at Redfern adopting this stance. When Mr James was invited to comment upon the evidence to this effect he said that Mr Peach was "a very difficult individual to deal with". Whilst this appeared to us a realistic position, it is one that cannot be reconciled either with the finding made by Ms Ariss in her report or Mr James' subsequent decision to uphold an allegation of gross misconduct on the basis she had advanced.

<u>Report Conclusion</u>

152. Ms Ariss' report concluded that all of the allegations against the Claimant were well founded and she recommended a gross misconduct hearing. In light of our many concerns, we are not satisfied the findings she set out were arrived at genuinely and in good faith.

153. For the reasons set out above, we can see little evidence to support a conclusion that Mr Peach was treated differently (in the sense of more harshly than others in similar circumstances). To the extent he received different treatment it was, quite obviously, because he behaved differently, maintaining an

obstinate refusal to comply with the PPE signing policy despite informal warnings and advice, which no one else did. Nor do we see evidence of the Claimant interfering in an ongoing investigation. Mr James and Mr Share, the Respondent's two witnesses at the Tribunal, were taken to this material and asked to explain where the evidence of interference was to be found and neither was able to do so.

154. In upholding the allegation of bullying and intimidation, Ms Ariss relied upon the evidence of Mr Clinton, Mr Shakespeare and Mr McMullen. We have carefully considered what each of those men were noted as saying. We have taken their accounts at their highest, disregarding what the Claimant said in response. Nonetheless, we struggled to see any evidence of bullying and intimidation. We were not alone in finding this difficult. Mr James was invited to explain where the evidence of bullying and intimidation could be found. He conceded there was no evidence of bullying. He also accepted, to begin with at least, there was no evidence of intimidation either with respect to Mr Clinton and Mr Shakespeare. When referred to the interview Mr Mullen, however, Mr James appeared to backtrack somewhat and suggested there was intimidation because individuals felt they could not raise their concerns. We did not find Mr James' evidence on this to be persuasive and will return to it later in our decision.

155. Whilst we did not hear from Ms Ariss or have the opportunity to ask her any questions, we find it difficult to accept that she can genuinely have believed the evidence obtained supported the conclusions in her report. Our finding is that those conclusions were put forward notwithstanding they went against the weight of evidence. They were a means to an end, namely supporting the reversal of the action taken against Mr Peach and appeasing Mr Beddows, along with the other Unite representatives at Redfern.

Disciplinary Hearing

156. The Claimant attended a disciplinary hearing on 17 November 2017. Mr James was the decision-maker. The Claimant was accompanied by his union representative, who read out an opening statement. This included a challenge to the fairness and impartiality of the proceedings, in addition to a robust denial of the substantive allegations. Mr James adjourned the hearing, saying these representations called into question whether the Claimant had been treated fairly whilst on suspension.

157. By letter of 24 November 2017, Mr James wrote to the Claimant addressing two matters that had been raised in his opening statement. Mr James said that checks were made and the Claimant had been correctly paid. The response to the second point was that Ms Harwood, the Commissioning Officer, had received no contact from Ms Probert and the contents of a letter referred to would have no bearing upon the outcome of the disciplinary hearing. The Claimant was invited to a reconvened disciplinary hearing.

158. The Claimant's disciplinary hearing resumed on 8 December 2017. Ms Ariss presented the management case. She did not call any witnesses. Mr James did not ask for any witnesses to be called. Ms Ariss spoke to her report. Mr James asked questions of Ms Ariss, which did not appear to be especially probing, including whether she believed the allegations of bullying and intimidation to be

correct. The Claimant and his trade union representative asked questions of Ms Ariss. His union representative also made a presentation. The hearing was, again, adjourned.

159. The Claimant's disciplinary hearing was recommenced for the last time on 15 December 2017. The Claimant made his own presentation, which involved numerous challenges to the fairness of the proceedings as well as addressing the substantive allegations. He worked through the documentary exhibits to Ms Ariss' report at length. The Claimant and his union representative answered many questions asked by Mr James and Ms Ariss. The hearing was adjourned for Mr James to consider his decision.

160. Whilst giving evidence, Mr James was asked whether he had seen the various emails passing between Mr Peach, Mr Beddows, Mr Delaney, the Claimant, Mr Williams, Mr Greener and Mr Share, which preceded the action taken against Mr Peach. He responded "probably but I cannot now recall". Asked the same question again in re-examination, he replied he had no recollection. It was then, drawn to our attention by Counsel that the relevant correspondence was not included in the Claimant's investigation report. As noted above, however, it had been included in the report for Mr Williams' case. Mr James was the decision-maker in that case and, therefore, did have sight of the same. The correspondence was just as relevant to the Claimant's case, if not more so, given he was following an instruction from his line manager in taking the action he did against Mr Peach.

Disciplinary Outcome

161. By letter of 4 May 2018, the Claimant was provided with an outcome to the disciplinary proceedings. This long delay, in the case of a manager who had already been on suspension for a very long period of time, has not been adequately explained. We note the proceedings against Mr Williams were concluded far more swiftly. All of the allegations against the Claimant were upheld, save for interfering in the investigation. A final warning was imposed. The material part of the rationale provided:

> **Action was taken against Mr Peach in relation to the refusal to sign for PPE and supplies. It is clear that on occasion, other employees signed a false name or provided an inappropriate reason for requiring equipment. This could be interpreted as refusing to comply with a reasonable management request; however there was no evidence that you had taken any action against these employees or any other employees who failed to sign for equipment. It was also clear from the evidence presented that there were some months throughout the year when the requirement to sign for gloves, Hi-Vis and hand wipes wasn't implemented.**
>
> **The action you took in relation to Mr Peach who had refused to sign for PPE on 3 separate occasions was in stark contrast to how other employees were treated, for example another employee who had refused to sign at all for any PPE had only been spoken to and this had not been put in writing to him. It can only be concluded that you treated Mr Peach differently to others and your actions in doing so were excessive compared to how you treated other employees.**

In mitigation you stated that you took the action you did against Mr Peach because he was putting his subordinates at risk by not having the right equipment readily available. However, it is unclear how this was the case; although he had refused to sign for PPE, he had been issued with it on each occasion. No evidence was presented by you that justified the actions you took and why the letter dated 24 November was issued to him alleging there was a breach of the Code of Conduct or that the action was potentially gross misconduct, it can only be concluded therefore that you treated Mr Peach unfairly

As part of your mitigation, you also put forward to the Hearing on 15 December examples of how you had taken action against other employees; (your evidence 116 and 116B), however these letters reaffirmed the stark contrast in how you had treated Mr Peach differently to others e.g. these letters refer to issues with these staff, they didn't result in sanctions but reflected a level of empathy and support.

Considering an alternative to a suspension was a correct course of action. However, placing Mr Peach in a lower graded post as a Leading Hand was unfair treatment and could be determined as a disciplinary sanction; by changing Mr Peach's status, this action was undermining his position and could also be construed as an act of bullying.

You stated you opted to move Mr Peach as you didn't want him embarrassed at Redfern Depot as he wouldn't be driving; however the Waste Management Service carries a number of Driver Team Leader vacancies across the service which are covered by Agency; there was no reason for him to be removed from his Driver Team Leader post it can only be concluded that you failed to follow BCC Disciplinary Suspension Managers Guidance in undertaking the actions you took. Therefore the response of the employee when taking account of the difficulty you articulated about managing this employee could have been foreseen.

[…]

The City Council's managers' guide to harassment and bullying sets out how all Council employees should be treated. The Equality Act 2010 protects staff from harassment at work by their employer or colleagues.

A number of examples that would come under the City Council's definition of harassment and bullying were highlighted by the investigation and presented to the Hearing. For example, David Shakespeare stated he couldn't approach you about anything; that you would put him off; he felt extremely stressed and couldn't sleep. Craig Clinton stated you won't listen, that he had a feeling of being coerced and pressurised. Rob McMullen stated that when he raised an issue with you about his crew, you responded saying you're the manager, shut up and get on with it leading him to become stressed and having io see his GP. These examples meet the definition of bullying and harassment.

In mitigation you put forward a number of witnesses to support your case; however none of these were witness to any of the events that are the subject of allegations relating to bullying and harassment.

From the evidence presented I can only conclude that you have subjected employees at Redfern Depot to bullying and harassment and that you are

part of the culture of intimidation and bullying at Redfern Depot. Furthermore, the evidence presented demonstrated an ongoing pattern of behaviour by you of intimidation and bullying towards the workforce and that it is frequent and ongoing.

162. The rationale advanced for the finding with respect to treating Mr Peach differently and taking excessive action does not stand up to scrutiny. Contrary to the assertion in this letter, action was taken against other employees if they were seen not to sign for PPE, namely they were given informal advice to which they responded.

163. When Mr Mason failed to comply with the policy he was pulled up for it and warned about his behaviour. He apologised and promised not to do it again. Mr Peach was afforded precisely the same opportunity, several times, but maintained an obstinate refusal. Mr James was unable to explain or defend the conclusion he reached on this point. He agreed there was no evidence of anyone else behaving as did Mr Peach. He agreed that on the vast majority of occasions PPE was signed for and there were hundreds of such signatures in the evidence before him. Mr James' refutation of the Claimant's suggestion the credibility of Mr Peach was undermined by his denial of having signed for PPE previously and the fact of it being discovered he had done so previously, was unsatisfactory and unconvincing. Mr James conceded Mr Peach was "a very difficult individual to deal with". Quite obviously, Mr Peach was treated differently because he behaved differently. We do not accept the many deficiencies in the management case can have been lost on Mr James at the time. He arrived at a decision, which was demonstrably against the weight of evidence. This was a predetermined outcome, intended to be consistent with the steps already taken at Redfern, to appease Mr Beddows and the other Unite representatives.

164. In the circumstances applying at the time, it would have been entirely appropriate for the Claimant simply to have suspended Mr Peach and sent him home, given a blatant and persistent refusal to follow reasonable management instructions. Mr Peach was a junior manager, in charge of a refuse collection crew. Not only should he have been complying with the policy on PPE, he should have been leading by example. Instead of imposing a suspension, however, the Claimant adopted a lesser course. Temporarily, while the investigation was underway, Mr Peach was removed from his supervisory position as a Driver Team Leader. He was also moved to another site so that in working as a Loader, he would not be working alongside those he had previously supervised. The removal of supervisory responsibilities from a junior manager who refused to comply with rules on the provision of PPE was entirely appropriate. Furthermore, this was done by the Claimant not only with the support of his line manager but on his instruction. Nor was this a hasty manoeuvre. The matter had been canvassed with more senior managers and HR involved.

165. A conclusion that the Claimant's treatment of Mr Peach amounted to bullying is ludicrous. We do not accept that Mr James arrived at such a view, genuinely and in good faith. It is unrealistic to suppose the weakness in the management case against the Claimant were lost on him, then or now.

166. For the reasons discussed in connection with the conclusion reached by Mr Ariss in her report, the examples taken from the accounts of Mr Shakespeare, Mr Clinton and Mr McMullen come nowhere near showing bullying and intimidation by the Claimant. Emphasis appears to have been placed on how they felt, as a result of the lack of evidence of what it was the Claimant had done that was wrong. At the Tribunal, Mr James was taken to each interview in turn and invited to explain where the evidence of bullying and intimidation could be found. Mr James accepted there was no evidence that any of these three men had been bullied by the Claimant. When we came to the last of them, Mr McMullen, Mr James suggested there was intimidation. Asked to explain this, Mr James told us that each of the three witnesses felt they could not raise issues with the Claimant, they were in effect being told to "shut up and get on with it" and their positions (i.e. employment) were under threat. We were not, remotely, persuaded. The interview references to being ignored were vague and unparticularised. Mr James accepted the specific matters complained of by Mr Clinton, Mr Shakespeare and Mr McMullen, did not show bullying or intimidation. The notion that they might consider their employment at risk was wholly unsubstantiated. The witnesses did not say they were put in fear for their employment during their interviews. In this heavily unionised environment, the suggestion that operatives could be dismissed on the whim of a manager is absurd. This could not happen and these three witnesses did not say they believed it would happen. Sadly, our conclusion is this was James 'grasping at straws', recognising that his answers tended to undermine the conclusion he reached at the time. The accounts received from Mr Clinton, Mr Shakespeare and Mr McMullen came nowhere near supporting a conclusion that the Claimant was party to a culture of intimidation and bullying.

167. Mr James gave the decision he did on the Claimant's disciplinary not because it reflected the weight of evidence but rather in spite of it not doing so. The decision was intended to be consistent with the measures taken at Redfern, including the action taken against Mr Peach having been reversed, and more generally, to appease Mr Beddows and the other Unite representatives.

168. Industrial relations at Redfern were not merely part of the background against which the Claimant and other managers had been subjected to disciplinary proceedings. On the contrary, the fear further unrest and strike action was the main driver. By the end of 2016, tension was high. Mr Beddows repeatedly referred to this in his correspondence. The implication was clear, if Mr Peach was not restored to his position immediately the Respondent would face the consequences. Underlying this limited dispute there was, of course, a far more explosive issue, namely the Respondent's proposal to make changes to refuse collection across the city, changing the working pattern and removing the role of leading hand. The Respondent's senior managers were in fear of industrial action at the beginning of the events we are concerned with. That fear materialised in 2017, with a prolonged and hugely disruptive bin strike, the additional costs of which amounted to circa £14m and the political fallout included the leader of the council resigning.

169. By the time of the Claimant's disciplinary outcome, the industrial unrest had been abated and a deal done with Unite. Whilst the tension which had started the action against the Claimant was no longer there, nonetheless the Respondent, in the person of Mr James, wished to make a decision consistent

with the steps that had been taken. The entire process against the Claimant and outcome were a means to an end. This had never been an objective or impartial exercise.

170. The sanction imposed on the Claimant was set out in the letter as follows:

> **In light of this, one of the options I must consider is termination of your contract of employment as an outcome to the Hearing. However, I have taken into account your previous good record and in view of this and as an alternative to dismissal, my decision is to issue you with a Final Written Warning for failure to meet the expected standards as an employee, set by Birmingham City Council as set out above.**
>
> **I do believe there has been a breakdown in trust and confidence between you as an employee and manager and the management and workforce within Waste Management making a future working relationship within this service as untenable. I have therefore determined that you will transfer to a post within Housing. Services which will be at your current grade. You will be contacted shortly by Martin Tolley, Head of Asset Management, regarding the details and to arrange for your immediate return to work from suspension.**
>
> **This Final Written Warning will be effective from 08 December 2017, the date of the reconvened Hearing and for a period of 24 months; this will expire on 07 December 2019. After this period, although the warning will be retained on your personal file, it will normally be disregarded for future disciplinary purposes provided that satisfactory conduct is maintained. However, should you be subject to further allegations of misconduct/ gross misconduct between the above dates, then further action may be considered in accordance with the Disciplinary Policy and Procedure, and a potential outcome of this could be that further formal disciplinary action is taken against you which may result in your contract of employment being terminated.**

171. If Mr James had genuinely believed the Claimant was guilty of perpetrating a culture of intimidation and bullying, then we would have expected a decision to dismiss. The Claimant's good record would be difficult to reconcile with the findings made. The allegation was not of a single event or even a small number of instances, rather it required a pattern of behaviour. The failure to dismiss is yet another factor which causes us to doubt the genuineness of Mr James' decision. Furthermore, if Mr James had decided to give the Claimant another chance, notwithstanding his bullying and intimidation of the workforce at Redfern, then we would have expected this to be accompanied by a requirement for training and monitoring. The Claimant having demonstrated a pattern of unacceptable behaviour towards the Respondent's employees amounting to gross misconduct, he would need to be re-educated and supported in maintaining appropriate workplace behaviours. None of this was done. It is another indicator of bad faith.

172. We also note the Claimant was transferred to Housing Services as part of this outcome. This represents a more severe sanction than was imposed on anyone else. Mr Williams was allowed to return to Redfern, albeit he chose to move to a different depot. Other employees caught up in this episode were also permitted to stay within Waste Management.

173. Finally, before leaving the outcome letter, it is appropriate that we record our rejection of Mr James' evidence that he wrote the outcome letter and denial of any involvement in that by Ms Ariss. We were referred to a draft of the letter, reflecting much of what was sent to Claimant. We were then shown the properties tab of this draft. The author is recorded as Service Birmingham. We were told this is the case because that is the name of the Respondent's IT service. The document had been last modified by Ms Ariss. The time spent editing this was 390 minutes. Mr James accepted the properties tab could be construed as showing no involvement by him whatsoever in this draft. We find that the disciplinary outcome letter was substantially drafted by Ms Ariss. Mr James may have added something to the final version but his evidence of Ms Ariss having no involvement was untrue. Allowing the investigator to draft the outcome was manifestly inappropriate. It is also further evidence of a predetermined process.

Appeal

174. The Claimant appealed against the disciplinary outcome and final written warning. Subsequently, however, he withdrew this. Claimant had lost all confidence in the Respondent to address his appeal in a fair objective manner. Given everything that had happened, his feelings are entirely understandable.

Mr Ricketts

175. Following the Claimant's removal from the waste management department, an expression of regret in this regard came from the most surprising source, namely Mr Ricketts who wrote to Mr Share on 10 May 2019, including:

> **1. Since the removal of Maz Dad and most of his team following the collective grievance that took place, Redfern has never recovered going from best performing to now worst performing yard which upsets me greatly. Since Maz has gone we have suffered significantly due to little Discipline and Order at depot level. I appreciate that the collective grievance was to address a Bullying and Intimidating culture at Redfern and a vote of no confidence in local management, I did not anticipate what the consequences would be following that investigation and would have hoped for a different outcome. The point I am making Darren is that although myself and Maz Dad had several disagreements I always respected and admired his leadership and management style which I feel our service is sadly missing at this moment in time. It may sound contradictory of me since I signed that grievance but I have been longing to share this with you for a considerable amount of time, and I feel that our service would greatly benefit with him involved in some capacity such as project manager etc. We have a massive issue with sickness at Redfern and unable to deliver a reliable service because of this as last Bank Holiday Monday showed.**

176. Mr Share was asked whether it appeared Ricketts was adopting a contradictory stance to that which he had previously. Mr Share told us he could not see that. This is one of many answers from the Respondent's witnesses we did not believe were true.

Pay

177. There was a dispute as to whether the Claimant had been correctly paid during his period of suspension. This related to the treatment of bank holidays. The Claimant says he was entitled to triple pay for such days.

178. The parties agree the relevant terms in the Claimant's contract of employment are:

> **the annual\public holiday performance for full-time employees, as approved by Birmingham City Council, is normally (dependant on Easter bank holiday dates and individual leave year) eight days for bank/public holidays. These days are in addition to the annual leave entitlement outlined above.**
>
> **If you are a part-time or job-share employee your annual leave and bank/public holiday entitlement will be proportional to your hours of work.**
>
> **Employees who work term-time only will also have their bank/ public holiday entitlements included in their salary calculation and no further leave is permitted.**
>
> **Employees required to work on a bank/public holiday shall, in addition to the normal pay for that day, be paid plain time rate for all hours worked for that day.**
>
> **In addition, at a later date, time off with pay shall be allowed as follows.**
>
> > **• Time worked less than half the normal working hours on that day — half day;**
> >
> > **•Time worked more than half the normal working hours on that day - full day; or,**
> >
> > **•By agreement between employee and manager payment instead of time off in lieu.**
>
> **Further details of the arrangements for bank/public holidays are available from the Intranet or from your line manager.**

179. The Respondent's disciplinary policy provides that during a period of suspension where gross misconduct is alleged, an employee may be suspended on "normal pay". Although the contractual status of this policy has not been addressed by the parties, both proceeded on the basis it governed what the Claimant was entitled to be paid during the period when he was suspended from work.

180. The Claimant's evidence was that over the two-year period prior to suspension, he had worked 6 of the 8 bank holidays in each of those years. His evidence on this point was not challenged and we accepted it.

Law

Direct Discrimination

181. In the employment field and so far as material, section 39 of **the Equality Act 2010** ("EqA") provides:

> **(2) An employer (A) must not discriminate against an employee of A's (B) -**
>
> > **(a) as to B's terms of employment;**
> >
> > **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
> >
> > **(c) by dismissing B;**
> >
> > **(d) by subjecting B to any other detriment.**

182. As to the meaning of any other detriment, the employee must establish that by reason of the act or acts complained of a reasonable worker might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. An unjustified sense of grievance cannot amount to a detriment for these purposes; see **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL**.

183. EqA section 13(1) provides:

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

184. The Tribunal must consider whether:

    184.1 the claimant received less favourable treatment;

    184.2 if so, whether that was because of a protected characteristic.

185. The question of whether there was less favourable treatment is answered by comparing the way in which the claimant was treated with the way in which others have been treated, or would have been treated. This exercise may involve looking at the treatment of a real comparator, or how a hypothetical comparator is likely to have been treated. In making this comparison we must be sure to compare like with like and particular to apply EqA section 23(1), which provides:

> **(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.**

186. Evidence of the treatment of an actual comparator who is not close enough to satisfy the statutory definition may nonetheless by of assistance since it may help to inform a finding of how a hypothetical comparator would have been treated.

187. As to whether any less favourable treatment was because of the claimant's protected characteristic:

    187.1 direct evidence of discrimination is rare and it will frequently be necessary for employment tribunals to draw inferences from the primary facts;

    187.2 if we are satisfied that the claimant's protected characteristic was one of the reasons for the treatment complained of, it will be sufficient if that reason had a significant influence on the outcome, it need not be the sole or principal reason;

188. In the absence of a real comparator and as an alternative to constructing a hypothetical comparator, in an appropriate case is may be sufficient to answer the "reason why" question - why did the claimant receive the treatment complained of.

189. The burden of proof is addressed in EqA section 136, which so far as material provides:

> **(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 occurred.**

190. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider the entirety of the evidence, whether adduced by the claimant or respondent; **see Laing v Manchester City Council [2006] IRLR 748 EAT**.

191. Furthermore, a simple difference in treatment as between the claimant and his comparators and a difference in protected characteristic will not suffice to shift the burden; see **Madarassy v Nomura [2007] IRLR 246 CA**.

192. The burden of proof provisions will add little in a case where the ET can make clear findings of a fact as to why an act or omission was done or not; see **Martin v Devonshires Solicitors [2011] IRLR 352 EAT**, per Underhill P:

> **39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head "the devil himself knoweth not the mind of man" (per Brian CJ, YB 17 Ed IV f.1, pl. 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law […]**

Harassment

193. Insofar as material, EqA section 26 provides:

(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.

194. Whilst the unwanted conduct need not be done 'on the grounds of' or 'because of", in the sense of being causally linked to, a protected characteristic in order to amount to harassment, the need for that conduct be 'related to' the protected characteristic does require a "connection or association" with that; see **Regina (Equal Opportunities Commission) v Secretary of State for Trade and Industry [2007] ICR 1234 QBD**. Notwithstanding it was decided under the prior legislation including the formulation "on the grounds of", the observations made by by the EAT in **Nazir v Asim [2010] ICR 1225** may still be of some relevance:

69 We wish to emphasise this last question. The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law—such as a person's race and gender.

195. In relation to the proscribed effect, although the Claimant's perception must be taken into account, the test is not a subjective one satisfied merely because the Claimant thinks it is. The Tribunal must reach a conclusion that the found conduct reasonably brought about the effect; see **Richmond Pharmacology v Dhaliwal [2009] IRLR 336 EAT**.

196. Guidance on the threshold for conduct satisfying the statutory definition was given by the EAT in **Betsi Cadwaladr University Health Board v Hughes [2014] 2 WLUK 991**; per Langstaff P:

> **10. Next, it was pointed out by Elias LJ in the case of Grant v HM Land Registry [2011] EWCA Civ 769 that the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words. As he said:**
>
> > **"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."**
>
> **11. Exactly the same point was made by Underhill P in Richmond Pharmacology at paragraph 22:**
>
> > **"..not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."**
>
> **12. We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.**

Indirect Discrimination

197. Insofar as material, EqA10 section 19 provides:

> **19 Indirect discrimination**
>
> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—**
>
> > **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
> >
> > **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
> >
> > **(c) it puts, or would put, B at that disadvantage, and**

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

198. The conventional approach to establishing, for the purposes of section 19(2)(b), whether those who share the claimant's protected characteristic were at a particular disadvantage compared with those who do not share that characteristic, is to identify a relevant pool of employees, or potential employees, and to look for evidence of disparate impact as between those who do or do not have the particular characteristic.

199. As to identifying the correct pool for comparison, see the observations of Potter LJ in **London Underground v Edwards (No.2) [1998] IRLR 364 CA**: is

> **24. […] The identity of the appropriate pool will depend upon identifying that sector of the relevant workforce which is affected or potentially affected by the application of the particular requirement or condition in question and the context or circumstances in which it is sought to be applied. In this case, the pool was all those members of the LU workforce, namely train operators, to whom the new rostering arrangements were to be applied (see paragraph 3 above). It did not include all LU employees. Nor did the pool extend to include the wider field of potential new applicants to LU for a job as a train operator. That is because the discrimination complained of was the requirement for *existing* employees to enter into a new contract embodying the rostering arrangement; it was not a complaint brought by an applicant from outside complaining about the terms of the job applied for. […]**

200. In **Rutherford v Secretary of State for Trade and Industry (No.2) [2006] IRLR 551** the correct pool for comparison was held to be the national workforce over 65, in connection with an indirect dissemination claim arising from the prohibition then in place on unfair dismissal claims being brought by those who were over that age. Per Lady Hale, discounting the argument that the pool ought to have been those aged 16 to 79, or those aged 55 to 74:

> **82. The common feature is that all these people are in the pool who want the benefit – or not to suffer the disadvantage – and they are differentially affected by a criterion applicable to that benefit or disadvantage. Indirect discrimination cannot be shown by bringing into the equation people who have no interest in the advantage or disadvantage in question. If it were, one might well wish to ask whether the fact that they were not interested was itself the product of direct or indirect discrimination in the past.**

201. EqA section 19(2)(d) affords a defence to what would otherwise be discrimination, in that it permits the employer to justify measures which have a discriminatory affect. Once disadvantage has been shown, the employer has the burden of making out that defence.

202. The ECJ in **Bilka-Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317** addressed the question of objective justification for a pay policy which adversely affected part-time workers:

> **45 […]**

> **2. Under Article 119 a department store company may justify the adoption of a pay policy excluding part-time workers, irrespective of their sex, from its occupational pension scheme on the ground that it seeks to employ as few part-time workers as possible, where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.**

203. The Court of Appeal in **R (Elias) v Secretary of State for Defence [2006] IRLR 934 CA** at paragraph 151, adopted the same formulation; per Mummery LJ:

> **151.[…] As held by the Court of Justice in Bilka Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317 at paragraphs 36 and 37 the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. It is not sufficient that the Secretary of State could reasonably consider the means chosen as suitable for attaining the aim.**

204. Accordingly, when considering whether the employer has shown that which is required to justify an otherwise discriminatory measure pursuant to EqA section 19(2)(d), the following must be established:

204.1 the measure corresponds to a real need on the part of the employer;

204.2 the measure is appropriate with a view to achieving the employer’s objective;

204.3 the measure is necessary to that end.

205. Per Balcombe LJ in **Hampson v Department of Education and Science [198] ICR 179 CA**. justification in this context requires an objective balance to be stuck:

> **34. However, I do derive considerable assistance from the judgment of Lord Justice Stephenson. At p.423 he referred to:**
>
>> **'... the comments, which I regard as sound, made by Lord McDonald, giving the judgment of the Employment Appeal Tribunal in Scotland in the cases of Singh v Rowntree MacKintosh Ltd [1979] IRLR 199 upon the judgment of the Appeal Tribunal given by Phillips J in Steel v Union of Post Office Workers [1977] IRLR 288 to which my Lords have referred.**
>>
>> **What Phillips J there said is valuable as rejecting justification by convenience and requiring the party applying the discriminatory condition to prove it to be justifiable in all the circumstances on balancing its discriminatory effect against the discriminator's need for it. But that need is what is reasonably needed by the party who applies the condition; ...'**

In my judgment 'justifiable' requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.

206. The required balancing exercise will include a consideration of:

206.1 the nature and extent of the discriminatory impact of the PCP;

206.2 the more serious the impact, the more cogent must be the justification;

206.3 the reasonable needs of the business;

206.4 whether the employer's aim could have been achieved less discriminatory means.

207. The employer seeking to establish justification should produce cogent evidence in that regard rather than merely making assertions. Note, however, the observations of Elias P in **Homer v Chief Constable of West Yorkshire Police [2009] IRLR 262 EAT**:

48. We also have reservations about other aspects of this part of the decision. We think there is force in the appellant's submission that it is unjustified to put any real weight on the fact that there is no evidence in the short period subsequent to the changes having been made to demonstrate an improvement in the quality of recruits. An employer might be reasonably justified in making changes which he genuinely and on proper grounds considers will improve the standard of his workforce and these may well be capable of justification, notwithstanding that with the benefit of hindsight the improvements which he reasonably anticipated were not realised. It is an error to think that concrete evidence is always necessary to establish justification, and the ACAS guidance should not be read in that way. Justification may be established in an appropriate case by reasoned and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions. Moreover, the timescale is in any case too short to reach any satisfactory conclusion on the point.

208. Justification needs to be shown at the time when the measure was applied to the employee; **Cross v British Airways plc [2005] IRLR 423 EAT**.

Health & Safety

209. So far as material ERA Section 44 provides:

44 Health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer, the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),]

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

210. Whereas for the purposes of an automatic unfair dismissal claim the ET must be satisfied that reason or principal reason for dismissal was an inadmissible reason, the test for causation in detriment cases is whether the protected act materially influenced, in the sense of being more than a trivial influence, the employer's treatment of the Claimant; see **Fecitt v NHS Manchester [2012] IRLR 64 CA**, which although a case of protected disclosure must be applicable here given it concerns equivalent detriment provisions under ERA - per Elias LJ:

43. […] liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act. […] Igen is not strictly applicable since it has an EU context. However, the reasoning which has informed the EU analysis is that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions. In my judgment, that principle is equally applicable where the objective is to protect whistleblowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing.

211. As for who is a designated employee, guidance was provided by the Employment Appeal Tribunal in **Castano v London General Transport Services Ltd [2020] IRLR 417**, per Eady J:

26. In seeking to understand what is meant by that requirement, I am bound to refer back to the Framework Directive 89/391, notwithstanding Mr Neckles' decision not to rely on this. In so doing, I note that Directive 89/391 requires member states to put in place protection against

disadvantage being imposed on 'workers representatives with specific responsibility for the safety and health of workers'. Such representatives are defined by art 3(c) of Directive 89/391 as follows: '… any person elected, chosen or designated in accordance with national laws and/or practices to represent workers where problems arise relating to the safety and health protection of workers at work.' Under domestic law, that protection is duly afforded by sub-s (1)(a) within the context of both ss 44 and 100 of the ERA.

27. In respect of the Claimant's attempt to lay claim to the protection afforded to designated health and safety representatives, I therefore consider the ET was right to find that his case had no reasonable prospect of success: the Claimant had not been 'designated', as would be required for this protection; rather, as was common ground, another employee had been specifically designated to carry out that role. The fact that other employees – specifically, bus operators such as the Claimant – also had some health and safety obligations as part of their duties did not mean that they had been designated to carry out this far more specific role; they had not. Indeed, if the Claimant's argument was right, all of the Respondent's drivers holding PCV licences would have been designated for the purposes of sub-s (1)(a). They plainly were not. Subsection (1)(a) is directed towards the situation in which a particular employee has been designated, over and above their ordinary job duties, to carry out specific activities in connection with preventing or reducing risks (essentially, a health and safety officer's function). Appointing an employee to do a job in which they must exercise some responsibility to take care of their own health and safety and that of others (which, per Von Goetz, could extend beyond other workers) is not the same

Conclusion

<u>Indirect Discrimination</u>

212. We carefully considered the content of the three emails the Claimant relied upon, as setting out his claim of indirect discrimination. We were not persuaded that a viable claim falling within EqA Section 19 could be found either in his claim form or those emails. The Claimant refers to matters such as being kept on suspension for 18 months as bearing more harshly upon those who share his protected characteristic of race. If this were intended to be his PCP, a claim of indirect discrimination could not succeed. There was no evidence of the Respondent having a general policy of practice to suspend for 18 months, such that was or might have been applied to others. Furthermore, even if this had amounted to a PCP, there was no evidence of disparate impact. We need little persuasion that removing a senior manager from his role on suspension and then maintaining that position for 18 months is likely to be very damaging. This would, however, be likely to damage any such manager, irrespective of their race. There was no evidence before us to support a conclusion that those sharing the Claimant's race would suffer more. Similar points can be made about the Claimant's complaint that the Respondent ignored the evidence he submitted, which identified him as suffering with poor mental health. There was no evidence of a general practice in this regard and even if there had been, it would tend to disadvantage anyone to whom it was applied irrespective of their race. There was again no evidence of disparate impact.

213. To the extent, if at all, the Claimant has advanced a claim of indirect race discrimination, this is not well-founded and is dismissed.

Harassment Related to Race

214. We will first address the harassment related to race claim. There appears to be a factual overlap between the matters the Claimant complains of as amounting to harassment and direct discrimination. The statutory scheme is such that we cannot find the same conduct amounts to both harassment and direct discrimination. We must first consider whether there was harassment. If there was not, then we go on to consider direct discrimination.

Brennan

215. On or about 8 January 2017, Kevin Brennan told the Claimant he was on his “deathbed”. This remark was made in a mocking fashion. We do not, however, find that Mr Brennan attempted to mimic what the Claimant described as an “Asian accent”. We note, the Claimant does not say this in his witness statement, nor was it included in his claim form or any contemporaneous correspondence. Given his complaint about this is one of harassment related to race, the use of such an accent would be directly relevant and we think the Claimant would have mentioned it at some point prior to his oral evidence in the Tribunal. Ms Isman was present on this occasion and heard the remark, yet she did not recollect the use of any particular accent when it was made. Had Mr Brennan attempted to mimic a Pakistani or Indian accent (which is what we understand the Claimant to mean) we think it most unlikely Ms Isman would have failed to recognise and remember this. Indeed, we think she would have remarked at the time on such a blatant display of racism. Whilst we found the Claimant’s evidence, generally, to be reliable and accurate, in this instance his recollection is mistaken.

216. Mr Brennan’s conduct was unwanted by the Claimant.

217. Mr Brennan (and no doubt many of his colleagues) expected the Claimant to be dealt with in the same way as was Mr Williams, namely suspended and then made subject to discipline. Mr Brennan will have been aware of the collective grievance. Furthermore, it is quite clear there was very regular communication and coordination between Mr Share and Mr Beddows. It is likely that Mr Beddows fed information back to Mr Ricketts, which was then disseminated more widely. In his evidence to the Tribunal, Mr Delaney told us that he had learned Mr Beddows said in union meetings in early January that other managers “feet would not touch the ground”. In these circumstances, the refuse collection crews would have been aware that disciplinary action was likely for the Claimant and Mr Delaney.

218. There is nothing in the mocking comment made by Mr Brennan which is indicative of race being a factor. We could not in the absence of an explanation, make a finding that Mr Brennan’s comment was related to race. In those circumstances the burden does not shift and the Claimant’s harassment claim fails.

Advert & Office

219. The Claimant's job was advertised in May 2017, albeit only as a development opportunity for three months in the first instance. The photograph of his office shows his possessions on the floor. The room appears to have been used for general storage, his possessions having been dumped haphazardly on the floor.

220. The advertisement of the Claimant's position and disregard for his office and possessions was unwanted conduct.

221. There is nothing in the conduct which is, expressly, referable to race. We have gone on, however, to consider whether there is any other connection with the Claimant's race.

222. Both of these measures adopted, suggest the Claimant was not expected to return to work, imminently or at all. This is surprising, given that in May 2017 disciplinary investigation should have been thought near completion.

223. We note the disciplinary proceedings against Mr Williams were concluded far more swiftly. His position was not advertised as a development opportunity and there is no evidence of his office being turned over. Proceedings started against Mr Delaney at the same time as the Claimant and in May 2017 he was still suspended. His position was not advertised.

224. Although the complaint here is not one of less favourable treatment, there is the clear appearance of the Claimant being dealt with more harshly than two White managers who were in similar circumstances (not the same, per EqA section 23). In addition to suggesting the Claimant would not be returning to his job, the conduct was undermining and disrespectful.

225. In the absence of an explanation, this would allow for an adverse inference and conclusion that the conduct was related to race. The burden, therefore, shifts to the Respondent.

226. We have received no satisfactory explanation for this conduct. Mr Share said that cover was needed for the Claimant but we note the same would have been true for Mr Williams and Mr Delaney. Cover might be provided from outside or inside the depot. There is no satisfactory explanation for why it was only the Claimant's post that had to be advertised and covered by a formal acting role. In his closing submissions, Mr Wilson argued the disciplinary proceedings were far from being concluded when the Claimant's post was advertised, pointing to a disciplinary hearing in November and December 2017. Whilst it is true, the Claimant's disciplinary did not take place until that point, this enormous and detrimental delay in proceedings has not been explained, adequately or at all. There is no evidence to show why, in May 2017, the investigation would not have been thought near an end. The Claimant was interviewed for the last time on 18 May 2017. A handful of interviews with others were conducted thereafter. No reason has been put forward for the failure to deal with this matter within a reasonable period of time. Ms Ariss appears to have approached the Claimant's investigation in a leisurely and lackadaisical manner. Nor do we accept the subsequent appointment of Ms Isman to this development position proves that race was not factor in the Claimant's treatment. Her race is not the same as the

Claimant's. Furthermore, her appointment provides no answer to why an Asian manager was dealt with more harshly than a two White managers in similar circumstances.

227. As for the Claimant's office, Mr Wilson merely says this was being used. Whilst the use of office in the absence of its occupant might be understandable, we would have expected their possessions to be treated in a respectful way not merely dumped haphazardly on the floor. Again, this all points to it being known the Claimant would not be coming back.

228. The Respondent has failed to satisfy us that the Claimant's race was no part whatsoever of the reason why his post was advertised and his office turned over.

229. We are satisfied that upon discovering these matters, the Claimant would have been led to and reinforced in the conclusion that he would not be returning to Redfern depot. This would, reasonably, have the effect of creating a hostile and humiliating environment for him.

230. Accordingly, therefore, his claim of harassment related to race succeeds, with respect to the advertisement of his position and his possessions being dumped haphazardly on the floor of his office.

Prejudged Disciplinary

231. The disciplinary proceedings were prejudged. As set out above, a number of the Respondent's most senior managers were engaged in an exercise intended to reverse the disciplinary action taken against Mr Peach and appease Mr Beddows, as well as Mr Ricketts and other Unite representative at Redfern. The Respondent was most anxious to reduce the risk of and/or curtail any industrial unrest. The action taken against Mr Williams, the Claimant and Mr Delaney, was a means to that end. This was not an exercise carried out in good faith. The outcome was predetermined. Misconduct would be found as this was necessary to support the steps that Mr Share and others had decided to take.

232. This was unwanted conduct.

233. This conduct was not, however, related to race. In each of these three cases, that of Mr Williams, the Claimant and Mr Delaney, the outcome was prejudged. Given the consistency of this unfairness, the circumstances are not such as would allow us, in the absence of an explanation, to find a connection to race. The burden of proof does not shift and the claim is dismissed.

Briefing Note

234. The Claimant's claim includes a complaint that "between July and September 2017 during a period of industrial action the respondent failed to provide the claimant with a briefing note and/or instructions as to how he should respond to comments and enquiries. The nearest the Claimant comes to addressing this in his witness statement is where he says:

> **202. During this time, I was suffering sever anxiety, stress and was very depressed, having impact on all aspects of my family and social life. Given my well-known personality in the community and around**

Birmingham I was approached by people asking about my wellbeing and reasons for not been at work or making comments about what they had heard referring to my suspension. I was not eating, sleeping or interacting with my friends and family and was put on higher dosage medication by my GP / NHS.

235. The lack of a briefing note was unwanted conduct.

236. We see no grounds upon which we could, in the absence of an explanation, draw an inference that the reason the Claimant was not provided with a briefing note or instructions on how to respond to enquiries was related to race. There is no evidence of Mr Williams, Mr Delaney or anyone else being provided with such a briefing note or instructions. Nor is this something we would have expected to see, at least in the case of an employee in the position of the Claimant. He was not, for example, someone expected to be 'door-stopped' by the press and indeed, he does not say this happen. The burden of proof does not shift and the claim is dismissed.

Direct Race Discrimination

Comparators

237. As far as comparators are concerned, the Claimant relies upon the following individuals:

237.1 John Leach;

237.2 Rickard Ricketts;

237.3 Anab Isman;

237.4 Mark Airey;

237.5 Leslie Williams.

238. None of these individuals were in precisely the same circumstances, such as would satisfy EqA section 23.

239. Mr Leach was involved in seeking signatures for the counter grievance but was not accused of singling out Mr Peach or bullying and intimidation of the workforce generally. Notably, Mr Leach was not suspended, he benefited from a preliminary investigation, an independent investigator and he was offered a deal to withdraw the disciplinary proceedings. The reason for these differences in treatment, however, is entirely obvious, namely pressure brought to bear by his union, Unison. This is amply reflected in the correspondence.

240. Mr Ricketts was not accused of any of the same misconduct as the Claimant. He faced separate disciplinary proceedings arising from alleged intimidation and misconduct on the picket line. Complaints had been made about him by a number of the managers who remained at Redfern, including Ms Isman. The proceedings against him were withdrawn entirely as part of a deal done with Unite. The reason for his favourable treatment is, again, entirely obvious. Very considerable pressure was applied to the Respondent in this, not least by the

prolonged, disruptive, expensive and politically damaging industrial action we have referred to earlier in this decision. The Respondent went to great lengths to appease Mr Beddows, Mr Ricketts and other Unite representatives or members. This was, at different points, done so as to reduce the risk of or bring an end to industrial unrest.

241. Ms Isman was named as a manager who had been guilty of bullying at Redfern, in the witness evidence obtained by Ms Ariss. We have seen at least one unredacted reference to her name. It seems to us likely that a number of other more junior managers were also named as a result of Ms Ariss trawling for evidence to support the disciplinary cases against Mr Williams, the Claimant and Mr Delaney. These others were not, however, the focus of the investigation. Mr Beddows was driving the collective grievance forward. He targeted Mr Williams and the Claimant as the two most senior managers. Mr Delaney was also included because he had dealt with Mr Peach and it was the reversal of that action, which was sought in the first instance. Whether other more junior managers remained at Redfern does not appear to have much concerned Mr Beddows, Mr Ricketts or their members. Once the senior leadership team at Redfern had been removed, the remaining managers would, effectively, be neutered.

242. Mr Airey at Lifford Lane was not subject to discipline because this was not pressed for by Unite, in the same way as had been done by Mr Beddows and Mr Ricketts at Redfern. Their objective was to return Mr Peach to his role as Driver Team Leader at Redfern. They were not concerned to facilitate him being allowed to work as a loader at Lifford Lane.

243. The closest comparison would seem to be between the Claimant and Mr Williams. While their circumstances were not identical, there was a substantial overlap and this may be a useful guide to how a hypothetical comparator would have been treated. Mr Williams was accused of singling out Mr Peach for different treatment and perpetrating a culture of bullying and intimidation. He also faced a charge of failing to follow a reasonable management instruction from Mr Share to reverse the action against Mr Peach.

<u>Suspended, Investigated & Final Written Warning</u>

244. We do not find any less favourable treatment in the Claimant being suspended or investigated. The same steps were taken against his comparator, Mr Williams and also against Mr Delaney.

245. Whilst these actions were unfair and not carried out in good faith, the reason for this is clear, namely to support the reversal of the action against Mr Peach and to appease Mr Beddows and the Unite representatives at Redfern. The same action was pursued against Mr Williams and Mr Delaney, both of whom are White. There are no circumstances, which in the absence of an explanation, would allow us to make a finding that the suspension and investigation were carried out because of the Claimant’s race.

246. As far as the outcome of this process is concerned, both Mr Williams and the Claimant were recommended for gross misconduct proceedings and received

final written warnings. Whilst, superficially, this might appear to be the same treatment, on closer analysis there are important differences.

247. In her report and presentation in the case of Mr Williams, Ms Ariss did not argue for the allegation of bullying and intimidation allegation to be upheld. Indeed in his case, she finalised her report swiftly and whilst the investigation into alleged intimidation and bullying was still, ostensibly, under way. This is a most surprising way in which for her to proceed. If local management at Redfern were perpetrating a culture of bullying and intimidation, that might have been expected to start at the top. Furthermore, the email correspondence from Mr Beddows about the collective bullying and intimidation grievance, which prompted the investigation into all three managers, plainly indicated this was pursued against Mr Williams, as well as the Claimant and Mr Delaney.

248. Ms Ariss' report into Mr Williams is dated 9 February 2017. This included interviews with Mr Peach, Mr Share, Mr Beddows, Mr Ricketts, the Claimant, Mr Delaney and, lastly, Mr Williams himself on 30 January 2017. The report, presumably, took several days to write up. Ms Aris did not put forward any evidence in support of the allegation of bullying and intimidation. It is apparent, however, that Ms Aris had not then finished her investigation into the alleged culture perpetrated by management at Redfern. She conducted a number of further interviews. Ms Aris did not speak with Mr McMullen until March 2017.

249. At their disciplinary hearings, whilst they both received final written warnings, there was a marked difference in the circumstances in which the Claimant and Mr Williams would be allowed to return to work for the Respondent.

250. In the case of Mr Williams, he was allowed an immediate return to the Waste Management Department. This meant he was able to resume his career following a short pause at a different depot. The skills and experience he had built up in the field, would still be relevant and could support his future career progression.

251. The Claimant on the other hand was not permitted to return to the Waste Management Department at all. Mr James made it a condition of the final written warning that the Claimant transfer to the Housing department. This put a complete end to the Claimant's career in Waste Management. The Claimant had many years and a wealth of experience in his chosen field. This would be of little or no use in the Respondent's housing department. No other manager at Redfern affected by this dispute was required by the Respondent to move to out of Waste Management against their will.

252. The advertisement of the Claimant's position in May 2017 and the up-turning of his office are both consistent with a decision having been made at an early stage that the Claimant was not coming back.

253. On the face of it, therefore, the Claimant was treated less favourably than a white manager in similar circumstances (not the same, per EqA section 23). In both cases, the investigation and disciplinary outcomes were predetermined. Those processes were a mere pretext. The Respondent acted as it did to appease Mr Beddows and the Unite representatives at Redfern. The question remains, however, why that end required an Asian manager to be dealt with far

more severely than a White manager. These are facts from which, in the absence of an explanation, we could find the Claimant's treatment, namely the recommendation he face an allegation of intimidation and bullying and the condition attached to his final written warning that he transfer to Housing, was less favourable because of race on the basis that a hypothetical White Assistant Service Manager in like circumstances would not have been dealt with as the Claimant was. The treatment of the hypothetical white comparator would be informed by the way in which Mr Williams was dealt with, recognising their circumstances were not identical, and the other facts to which we have referred. Accordingly, the burden shifts to the Respondent to satisfy us the reason for the difference in treatment was in no sense whatsoever race.

254. We heard no evidence from Mr Ariss.

255. Mr James' evidence was that the reason for this difference in the final written warnings was that the allegation of bullying and intimidation was upheld against Claimant but not against Mr Williams. We are not satisfied by that explanation.

256. As set out above, the evidence Ms Ariss and Mr James purported to rely upon, namely the interviews with Mr Clinton, Mr Shakespeare and Mr McMullen came nowhere near evidencing bullying and intimidation by the Claimant. We do not believe Mr James genuinely believed the case to have been made out at the time. Had he truly thought the Claimant a bully then he would either have dismissed him or the very least put in place some form of remedial training to address the Claimant's unacceptable workplace behaviour. Mr James did not do these things because he did not make the findings against the Claimant genuinely and good faith. They were a means to an end, namely to support the reversal of the action against Mr Peach and to appease Mr Beddows and the Unite representatives at Redfern. In every other case, however, this reversal and appeasement was achieved without the manager affected having their career in Waste Management ended, by being removed from the department against their will. Only the Claimant had this outcome visited upon him. Mr James' purported explanation for this having fallen away, we are left without an explanation. The Respondent has not satisfied us that the reason for the treatment of the Claimant in this regard, was in no sense whatsoever because of race. This claim succeeds.

<u>Mediation</u>

257. The Claimant's suggestion is that instead of facing disciplinary proceedings, the Respondent should have offered him mediation and the failure do so was discriminatory.

258. He relies upon mediation having been offered to comparators, Ms Isman and Mr Leach.

259. As set out above, Ms Isman was not one of the managers targeted by Mr Beddows. For that reason she was not drawn into the disciplinary investigation relating to Mr Williams, the Claimant Mr Delaney. The mediation in her case related to later events involving Mr Ricketts. She had complained about Mr Ricketts' behaviour, by which she felt threatened. Mr Ricketts was returning to Redfern as part of the deal done between the Respondent and Unite. Mediation

was not offered to Ms Isman as an alternative to disciplinary proceedings against her, rather it was part of the Respondent's efforts to persuade her to withdraw her complaint against Mr Ricketts. This is an entirely different situation to that faced by Claimant.

260. As far as the position of Mr Leach is concerned, the comparison is somewhat closer. Mr Leach was accused of interference in an investigation because he sought signatures for the counter grievance. As set out above, however, the reason for a more lenient approach in his case was the pressure brought to bear on his behalf by Unison. Although the Claimant was represented by Unison during the disciplinary proceedings, that union did not apply sustained pressure on his behalf in the same way it did for Mr Leach, who was a shop steward.

261. More appropriate comparators for this purpose would be Mr Williams and Mr Delaney. Neither was offered mediation as an alternative to disciplinary proceedings.

262. There are no facts from which in the absence of an explanation we could find that the reason the Claimant was not offered mediation was his race. This claim fails.

<u>Dignity at Work Grievances</u>

263. The Respondent's investigation of and response to the Claimant's dignity at work grievances was limited and perfunctory. Given the disciplinary proceedings were a device, pursued in bad faith and his treatment unfair, the complaints made by the Claimant were entirely reasonable. They ought to have been taken seriously and investigated objectively. Had that happened, it is difficult to see how the disciplinary proceedings against him could have continued.

264. The Claimant was not, however, alone in raising justified grievances. Mr Delaney did this also. He too failed to receive any meaningful redress.

265. There are no circumstances from which in the absence of an explanation we could find the reason for the lack of redress in the Claimant's case was his race.

<u>Mentoring</u>

266. the Claimant was not offered mentoring by the Chief Executive. This was because the Chief Executive was already busy and it was thought offering to provide the Claimant with a mentor who was a more senior manager in a another directorate was an appropriate response.

267. We see no grounds upon which we could, in the absence of an explanation, find that the reason the Claimant was not mentored by the Chief Executive was race.

268. Had the burden shifted, we would have been satisfied by the explanation which appears on the face of the papers, namely the Chief Executive being too busy and the belief it was appropriate for the Claimant to be mentored by a senior manager from another directorate.

269. This claim fails.

Victimisation

270. The Claimant's victimisation claim is predicated on him doing a protected act of 28 July 2017, by way of a grievance.

271. There was no, grievance of 28 July 2017. The Claimant submitted three grievances, on 17 February, 22 April and 10 May 2017. None of these appear to involve the Claimant doing a protected act within EqA section 27.

272. The Claimant did, however, do a protected act by way of his email dated, 3 July 2017, which included he was the victim of "institutional racism".

273. There is no evidence of this particular passage in the Claimant's email having any impact whatsoever on the subsequent events about which he complains. Indeed, one of the Claimant's principal arguments is that his grievances and emails were ignored. This the opposite of what he would need to show in order to establish victimisation.

274. This claim fails.

Health & Safety

275. The Claimant was not designated by the Respondent to carry out activities in connection with preventing or reducing risks to health and safety at work, within the meaning of ERA section 44(1)(a). In light of **Castano**, this definition is a narrow one. It does not encompass all employees who have as part of their duties, a responsibility to take steps aimed at reducing risks to health and safety. Instead, this provision is intended to protect those who are employed in a specific health and safety role. The Claimant was not such a person. In his witness statement, the Claimant identifies the person in his workplace who was so designated. This was Steve Trueman of Safety Services. In an email of 10 November 2015, Mr Trueman strongly endorsed what was then a relatively new policy at Redfern, namely the requirement to sign for PPE. Mr Trueman's job title is given as Safety Adviser.

276. Whilst the case management order made by EJ Harding did not expressly state the Claimant's ERA section 44 claim was one arising under subsection (1)(a) it is apparent from the terms in which this is recorded that she so understood it. In subsequent correspondence and closing submissions, the Claimant referred to circumstances of imminent danger. This language intimates claim under subsection (1)(e). It is not apparent the Claimant has been permitted to pursue such a claim. His original claim form particulars expressly plead a number of statutory claims under EqA. There does not appear to be a claim in that document under section ERA 44. It is not entirely clear, whether this was construed as being present or EJ Harding, in effect, gave him permission to amend. In either case, he would now need permission to amend to add a claim under (1)(e). It would not be in the interests of justice to give the Claimant permission to amend his claim in this way at such a late stage, not least because it would have no reasonable prospect of success. The test of serious and imminent danger represents a high hurdle. The Claimant could have no reasonable belief there was a serious and imminent danger, which it was necessary for him to avert by the action with respect to Mr Peach. The rationale

for introducing the policy on signing for PPE was twofold. The control of expense and the maintenance of a record when additional PPE was issued, which may become important in subsequent legal proceedings. Whilst these are worthy aims, neither is concerned with addressing a danger which is both serious and imminent. The position would be otherwise if Mr Peach had been disciplined for refusing to wear PPE. In such a circumstance it would have been possible to say there was an immediate risk to Mr Peach, for example if he would not wear gloves he might suffer a needlestick injury after leaving the depot. In those circumstances, it might have been reasonable to prevent Mr Peach from going out on his round. That was not, however, the case here. The concerns the Claimant was seeking to address were longer term matters.

277. This claim fails.

Direct Sex Discrimination

278. For his complaint of direct sex discrimination, the Claimant compares his treatment with that of Ms Isman, who did not face a disciplinary investigation and final written warning.

279. The Claimant argues his case in the following way, all of the managers at Redfern were white except for him and Ms Isman. The Respondent could not face the prospect of removing both ethnic minority managers. Ms Isman was saved from the Claimant’s fate because of the combination of her race and sex. His dismissal was, from the Respondent’s perspective, the lesser of two evils.

280. We do not agree. The collective grievance put forward by Mr Beddows targeted Mr Williams, the Claimant and Mr Delaney. Proceedings against them were pursued to support the reversal of the action against Mr Peach and to appease Mr Beddows and the Unite representatives at Redfern. Ms Isman and the other more junior managers were not targeted in the same way. Action against her and them was not needed for the same reasons.

281. There are no circumstances which in the absence of an explanation we could find the reason action was taken against the Claimant was his sex.

Unlawful Deductions

282. The terms upon which the Claimant was suspended included that he would be entitled to normal pay. This term is not elsewhere defined, either in the Claimant’s contract of employment or the Respondent’s disciplinary procedure. Looking at the matter objectively, the most natural interpretation of normal pay would be the same pay the employee would normally receive when at work.

283. We reject the interpretation urged upon us by Mr James, namely that normal pay must mean basic pay and exclude any increments which resulted from the employee choosing or being rostered to work on bank holidays, as that would be less than the pay the employee normally receives. To exclude such increments would mean that the employee on suspension was penalised, less well off than they would have been when at work. We do not believe it was the intention of the parties that employees during their period of suspension should be subject to a penalty. Suspensions are intended to be neutral.

284. In the present case, the Claimant normally works 6 of the 8 bank holidays in each year. During his suspension, he should have received triple pay for 6 of the 8 bank holidays in each year. To the extent that his suspension included a part year, then his entitlement in that period should have been calculated on a pro-rata basis.

EJ Maxwell

Date: 1 August 2023