EMPLOYMENT TRIBUNALS

Claimant: Mr G Marcus

Respondent: Siemens Healthcare Ltd

Heard at: Reading Employment Tribunal

On: 27, 28 February (hybrid) and 1 to 3 March 2023, 14 March 2023 (by CVP) and 15 March 2023 (in chambers)

Before: Employment Judge George
Members: Ms H Edwards (remotely on 28 February 2023)
Ms A Crosby

Representation
Claimant: Mr D Stephenson, counsel
Respondent: Ms L Veale, counsel

RESERVED JUDGMENT

1. The claimant was not dismissed.

2. The claim of unfair dismissal is not well founded and is dismissed.

3. The claims of race discrimination are not well founded and are dismissed.

4. The claims of victimization are not well founded and are dismissed.

REASONS

1. The claim arises out of the claimant's employment by the respondent as a Business Development Manager which started on 13 June 2016, was ongoing at the time of presentation of the first claim form and ended on 16 September 2019 following his resignation on 17 June 2019. The claimant had been absent on sick leave since his resignation.

2. Following a period of conciliation between 6 March 2019 and 6 April 2019 the claimant presented his first claim form (Case No: 3314527/2019) on 6 May 2019. Following a further period of conciliation between 5 September and 3

October 2019, he presented his second claim form on 1 November 2019 (Case No: 3324932/2019). The respondent defends the claims and presented grounds of response to claim 1 on 21 June 2019 and to claim 2 9 September 2019.

3. We have had the benefit of a joint bundle of documents to which additions were made at the start of the hearing. That mean that the last page was numbered 1066 although there were some stroke pages and some blank pages. Page numbers in these reasons referred to those documents as page 1 to 1066 as the case may be. We took into account those page numbers to which we were taken. Some of the additions to the bundle were made following late disclosed documentation by the respondent and there were contested applications in respect of some of that evidence and for disclosure. Details of that are set out below. Some of the documents were spreadsheets of performance reviews or PMPs and we were provided with separate expanded copies of pages 184 and 192 for ease of reading.

4. The claims were case managed at a preliminary hearing conducted by employment Judge Finlay on 25 March 2020 (page 98) when the claims were listed for hearing at which issues relevant to liability only would be determined. The original listing was for six days to take place in May and June 2021. The record of hearing sent to the parties on 12 April 2020 includes a draft list of issues which had been agreed subject to 2 points.

5. Those are referred to in paragraph (6) to (8) of the learne judge's order. The first was that a claim of indirect race discrimination appeared to have been overlooked when producing the agreed list of issues and the second was a breach of contract complaint the details of which did not appear to be clear at the time of that hearing. It was clarified by Mr Stevenson at the start of the hearing before us that the list of issues did not need amendment to incorporate indirect race discrimination or breach of contract but that the issues that we needed to decide remained those that appear in the bundle starting at page 103. The heads of claim are race discrimination (including alleged constructive dismissal), victimization and unfair constructive dismissal contrary to s.94 Employment Rights Act 1996 (hereafter the ERA). The claimant describes himself as black British of Afro-Caribbean origin.

6. The claimant adopted in evidence a witness statement of 336 paragraphs and was cross examined upon it. The respondent relied on the evidence of five witnesses: Mark Borley - Head of Business Development for Enterprise Services in GB and Ireland; Nancy West - who had a number of roles at the relevant period including as Head of Enterprise Services both for GB and Ireland and for Western European & Western Africa; Marlen Suller - Zone Business Manager (who heard the claimant's grievance appeal); Steve Clarke - Senior Business Development Manager and Charlotte Allen (formerly known as Hewett) - Customer Proposal Project Lead.

7. Mrs West was unable on medical grounds to attend the Tribunal and be cross examined on her witness statement. We admitted it into evidence in circumstances which are set out below. Otherwise all witnesses gave oral evidence. Mr Clarke was unable to attend in person and the hearing was converted to a hybrid hearing for him to attend remotely on Day 4 and Day 5.

The hearing was also converted to a hybrid hearing on Day 2 and started an hour late in order that one of the non-legal members, Ms Edwards, could attend a medical appointment.

8. The Tribunal heard applications for case management orders which were determined for reasons given orally and which were requested in writing at the end of the hearing. They are provided below. The Tribunal members were unavailable to sit for the full six days that had originally been listed and it was not possible with the number of witnesses, the size of the documentary evidence and the preliminary applications to condense the timetable into five days including deliberation and judgment. The Tribunal decided that the importance of the issues to the parties and the amount of evidence to be considered meant that it would not be just to the parties to reduce the time available to the parties for evidence and submissions in order to complete it within 5 days. The Tribunal agreed to schedule additional time for discussion and to reserve judgment.

9. The original intention was to hear brief oral submissions at the end of Day 5 but this proved impossible while doing justice to the complexity of the issues. At the start of Day 5 counsel asked to address the Tribunal in the absence of the parties and witnesses. Mr Stephenson informed the Tribunal that, as a result of evidence given the previous day by Mr Borley he was instructed to make an application to amend the claim. Ms Veale argued that we should not entertain the application because of the likely impact on the rest of the timetable. By that point, cross-examination of the respondent's witnesses having taken longer than expected, there remained about 2 hours scheduled for the remaining oral evidence. We took time to consider but decided that, since the claimant was entitled to apply to amend his claim at any stage up to the delivery of judgment, any application needed to be decided at the soonest convenient point. The amendment application was agreed not to affect the questions to be asked of the remaining 2 witnesses whose evidence was completed. We then heard and refused the application to amend, for reasons which are set out in writing below. By that time it was 14.10 and there had not yet been a lunch break. Ms Veale, completed her submissions by 16.00. By 16.30 it was clear that submissions could not fairly be completed by 17.00.

10. The case was therefore adjourned part heard. Directions were made for exchange of written submissions. The claimant's written submissions are referred to as CWS and the respondent's written submissions are referred to as RWS. The representatives also attended and give brief oral submissions in response at a video hearing which took place at the start of two days that had been set aside for Tribunal deliberations. Judgement was reserved.

11. A Cast List and list of abbreviations was agreed on 1 March 2023 and there was an agreed Chronology. We have had reference to but do not repeat the Cast List and Chronology. In order that these reasons might be understood we replicate the list of abbreviations here. There is one other abbreviation found in these reasons: SWOT which stands for Strengths, Weaknesses, Opportunities and Threats (see the claimant's self-development analysis on page 221).

BDM	Business Development Manager
BoQ	Bill of Quantities
ES	Enterprise Solutions/Services Team
HBD	Head of Business Development
IPMP	Informal Performance Improvement Plan
MES	Managed Equipment Service
MFS	Multi-Source Feedback
PIP	Performance Improvement Plan
PLP	People and Leadership Practices
PMP	Performance Management Plan
RBFT	Royal Berkshire Foundation Trust
RIE	Rapid Improvement Event
TPR	Total Performance Rating

Application to rely on the statement evidence of Mrs West.

12. On day one, the respondent made an application for Mrs West's witness statement dated 21 April 2021 to be adduced in evidence notwithstanding the fact that she is unable, because of medical reasons, to give evidence and be cross-examined upon it – whether in person or via CVP. The claimant, understanding that Mrs West was not voluntarily absent, did not oppose the application. We accepted that, in the circumstances, it was appropriate that the statement be admitted in evidence, but it was likely to be given less weight than it would have been given had she been able to be cross-examined upon it.

Application to adduce additional documentary evidence

13. The respondent also applied on day one for a 74 page supplementary bundle to be put in evidence. This would take the total page numbers to 1042. We were told that there were four categories of additional documents: in addition to the respondent's supplementary documents, the claimant applied for ongoing party and party correspondence to be added to the bundle. This was consented to by the respondent and they were inserted at the back of the existing bundle starting at page 1043.

14. A second and third categories of documents from among the 74 pages were also inserted in the supplementary bundle unopposed; this time on the application of the respondent. They were some emails between Mrs West and the claimant and extracts from guidelines said to be relevant to the dispute.

15. The respondent's contested application concerns manuscript notes which the respondent says are photocopies of the daybook kept by Mrs West at a time when she was a line manager of the claimant in 2019 and a supplemental statement prepared by Mrs West which seeks to explain how they came to light. These notes were disclosed on 14 February; about a week and half before the first day of this hearing. As it has been explained to us, their relevance is that they are said to be some notes recording exchanges between Mrs Weston and the claimant and some setting out her thoughts and plans for her management of him. They are said by the respondent to date

from 2019 although we are told by Mr Stephenson that that is not apparent in the face of the documents.

16. According to the supplemental statement of Mrs West, after her first statement had been finalised and signed in preparation for the original hearing dates, prompted by a conference with counsel on 24 May 2021, she found a notebook in her home office. She states in paragraph 1 of her supplementary statement that she forwarded the notes to the respondent's HR consultant on 25 May 2021.

17. The supplementary witness statement is signed by electronic signature and dated 24 February 2023. Although the application was initially described as an application to rely on the notes, in effect, the respondents are seeking not only to put these manuscript notes in evidence, but also to adduce that supplementary witness statement in evidence. As already explained, Mrs West is not going to be available to attend the hearing to speak to the notes, to confirm the truth of the supplementary statement or to be cross-examined about them.

18. It is clear that somebody on the part of the respondent knew of the existence of this daybook from 25 May 2021. The explanation that has been put forward as to why it is only on the 14 February of this year that they were disclosed is, in essence, that the notes had been forgotten until preparation of the relisted hearing began in earnest.

19. As stated above, the medical circumstances concerning Mrs West seem to provide a reasonable explanation as to why she is unable to come to give evidence. The respondent argues that there is prejudice to them not being able to rely on the notes because they are disadvantaged, through no fault of anyone, by the absence of an important witness of fact. They argue that her manuscript notes made, it is said, contemporaneously would offset to some extent the difficulty caused by her unavailability.

20. It is well known that the Tribunal "is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts." (Rule 41 Employment Tribunals Rules of Procedure 2013). Although it would be possible for the Tribunal to waive the requirement for a witness to give evidence under oath or affirmation to identify a document, the normal rules of producing evidence to a Tribunal are that it is done by oral testimony and by a witness speaking to the identity of the document and, furthermore, to explain it.

21. This is particularly the case when the document is manuscript and in the form of notes with abbreviations. Without such a live witness it is difficult for the Tribunal to be sure that any reading they make of the contents of it is accurate or fair. There are therefore two separate problems that arise because of the absence of Mrs West: first she is not here to produce them as a matter of fact (which is not a complete bar) and secondly, that she is not going to be here to explain the notes themselves.

22. We are of the view that there is no reasonable explanation for the late disclosure of these notes. We looked through the party and party

correspondence that is to be added into the bundle and we note that as long ago as October 2020 the claimant's representatives had picked up reference to a daybook in grievance interview notes and had asked for it to be disclosed. We can see from that correspondence that there were a large number of disclosure issues that were being ironed out between the parties. That underlines the conclusion that we reach that that there seems to be no reasonable explanation for why the notes were disclosed late.

23. The claimant is unable to challenge the contents of the notes because of the absence of the relevant witness and, that being the case, it is not going to reduce the prejudice to the claimant caused by the late production if he is given the opportunity to address the contents of the notes in evidence in chief. The difficulty for the tribunal of being be unable to get explanations for the notes in some ways reduces their likely significance to the respondent because that difficulty would be likely to adversely affect the weight we could give them.

24. In the light of all of those matters we refuse the respondent's application to adduce those documents in evidence and they will be removed from the supplemental bundle. It was, of course, right that they were disclosed to the claimant.

25. In principle, a litigant is entitled to inspect the physical document disclosed if there is a rationale challenge to the authenticity of the copy that has been disclosed.

Claimant's application for order for disclosure

26. The claimant has applied for disclosure of Mrs West's daybooks covering, not only exchanges with the claimant, but also the comparators and covering other periods of time.

27. We comment that there seems to us to be a tension between the claimant's argument, when opposing the respondent's application to rely on the daybooks, that the respondent can't prove that the documents are what they say they are and the claimant's suggestion that they might be reliable and provide other evidence about Mrs West's management of him and the comparators during other periods of time.

28. It seems to us that the daybooks covering the period of the claimant's employment are potentially relevant to the issues in the case not only in respect of the period where Mrs West is accused of discrimination but also the earlier periods. This is because of the comparison that the claimant seeks to draw between what he states to be positive performance and reviews at an earlier stage compared with later criticism. We are mindful that partial disclosure of documents can give a misleading impression of what happened and the challenges faced by a claimant seeking to prove discrimination mean that fulfillment of the disclosure responsibilities is an especially important safeguard of their ability to enforce their rights.

29. We focus on whether disclosure and is necessary for the fair disposal of the proceedings: Canadian Imperial Bank of Commcer v Beck [2009] EWCA Civ 619. We think that that means necessary at this point in time.

30. We have concluded that disclosure is not necessary now in the interests of justice. There should be broad considerations of what is in the interests of justice when we make that assessment. Relevant factors include the importance of the documents to the issues in the case, the time and cost involved in searching for the documents, proportionality and the impact of the order on the hearing.

31. We do have the actual PMP documents for the claimant in all of the relevant years (both before and after he states that the respondent unreasonably began to criticize his performance). We also have the PMP documents for his comparators. The claimant can cross-examine the respondent's witnesses and invite inferences to be drawn from the lack of appropriate disclosure in respect of the daybooks. There is some evidence that they were specifically requested at an earlier time. These factors reduce the importance of these documents to the claimant's case (if any relevant comments exist).

32. The interests of justice include enabling this hearing to take place in the time been allocated to it. That is particularly the case when it has already been postponed once through lack of judicial resources from its original scheduled hearing of May 2021. Therefore the Tribunal is already having to consider evidence about allegations which happened between 4 and 5 years ago.

33. Although Ms Veale said that the documents could be available by day 2 were they to be ordered, that was with the caveat that Mrs West had the capacity to find them. Given the circumstances that require her absence from the hearing, that is not something we could presume. If further daybooks were found there would still be the situation that no witness is available to speak to them, to identify them or to explain them. We have already stated that, in the case of manuscript notes made for an individual's own records, this means that there are real challenges in giving weight to unattested documents. In our view, those matters mean that the risk to the hearing is not fanciful.

34. Taking all that into account we refuse the application.

Claimant's application to amend

35. At the start of day 5 the claimant applied to amend his claim after evidence from two of the respondent's witnesses had been concluded and before submissions were due to start as explained above.

36. The nature of the application was that it sought to amend the victimisation claim. That had been agreed at the case management hearing on 25 March 2020 and confirmed at the start of the final hearing before this Tribunal. The claimant sought to add an additional protected act. As clarified by Judge Findlay, the victimisation claim is based on a protected act of submitting a grievance on 3 February 2019. The claimant applies to an add the alleged

protected act of bringing a race discrimination claim against a former employer, AstraZeneca, in 2010.

37. Page 881 is a page from the website called PharmaGossip which includes a report of that claim. A link to that website is contained in an email from Mr Morley to an HR consultant and Mrs West dated 22 January 2019 at page 273.

38. The other amendments sought are to add to the detriments set out in LOI 2.1.2 (the alleged unlawful acts of victimization) a cross-reference to all of the alleged detriments set out in LOI 1.2.1 to 1.2.9 (the specific allegations of race discrimination that are made against Mr Borley).

39. It is argued on behalf of the claimant that he could not reasonably have known that this claim was available to him until oral evidence was given by Mr Borley in the afternoon of Day 4 that he had been made aware of the claimant's claim against AstraZeneca fairly early on in his employment by Siemens; earlier than the January 2019 email. He wasn't specific about exactly when he found out; he suggested 2017 and 2018 and said that he had been made aware – possibly verbally – by another employee. He didn't pinpoint a specific time and the issues we were then considering in the litigation meant that it wasn't necessary to seek to pinpoint the date of his knowledge more specifically in his evidence. Mr Borley's evidence was that he was unable to recollect in detail exactly when he found out about the previous complaint against AstraZeneca. He accepted that it was fair to say that seeing the grounds of the claimant's grievance probably did cause the information he had previously received about the claimant's previous employment tribunal claim to resurface in his recollection.

40. The principles to apply when considering an application to amend our well-known and are set out in the case of Selkent Bus Company Limited v Moore [1996] ICR 836, EAT and Vaughan v Modality Partnership (UKEAT/0147/20) and are not repeated here.

41. We start with the question of the nature of the application. This is there is an existing head of claim of victimization contrary to s.27 EQA. However, by this amendment the claimant seeks to add a victimisation complaint based upon an entirely different protected act. This means that different mental processes are alleged. The addition of a protected act of a race discrimination claim prior to employment by the present employer to the existing alleged motivation of the grievance of 3 February 2019 is not, in our view, the same as saying that the claimant wishes both to rely upon a grievance and additionally on a follow-up email, both of which referred to race discrimination.

42. In our hypothetical example a litigant would be seeking to rely upon two separate communications which were essentially about the same thing and the effect on the arguments about the mental processes of the alleged wrongdoer would be slight. Previous litigation against the former employer is quite a different kind of thing than a grievance that had been brought making allegations against Mr Borley himself. We consider that a different kind of motivation on the part of Mr Borley would be alleged – albeit one which if made out would fall under the same heading of victimisation. The proposed

new allegation requires us as a Tribunal to make enquiries about those mental processes in a different way.

43. It seems to us that if we were to agree to the amended application and then hear submissions and find victimisation proved against Mr Borley on the basis that he had not shown that the claimant's earlier claim against his previous employer played no part in his mental processes that would clearly be unfair if he did not have had an opportunity to answer those allegations by them being put to him in evidence. We are of the view that, although there is some overlap with the factual matrix of the existing claim with that which the claimant wishes to introduce, the consequence of allowing the application would be that Mr Borley would need to be recalled. Of course that is not a bar to permitting the application. Potentially each of the allegations against Mr Borley would need to be revisited to try to pinpoint whether at the relevant time he knew about the previous Tribunal claim. It cannot be known until the importance of dating his knowledge of the previous Tribunal claim is canvassed with him whether he would have other positive evidence about the circumstances in which he found out to rely on.

44. As to the manner and timing of the application, it has been argued on behalf of the claimant that he didn't know until yesterday that Mr Borley potentially knew about his earlier race discrimination claim as early as he did. However the document at page 273 which includes the link to the coverage of his earlier claim was apparently disclosed in September 2020. That was after the case management hearing at which the issues were agreed. However the claimant has known since September 2020 that, in January 2019, Mr Borley was circulating details of the claim he had brought against his previous employer. Furthermore, he knew or ought to have realized that that email pre-dated the University Hospitals Birmingham's proposal, which he already alleged involved unreasonable demands on him which amounted to victimization.

45. As we have already said, our view is that it is a different allegation to say that any detriment Mr Borley subjected the claimant to in relation to his directions regarding the UHB proposal, for example, were motivated by the previous Employment Tribunal claim than to say they were motivated by the grievance against himself. The claimant has known for more than two years that Mr Borley also knew about the previous Employment Tribunal claim at the time of the last alleged detriment. We are of the view that the claimant could have applied at a far earlier stage to amend his claim to rely on this alternative potential protected act. He may not at that stage have had precise knowledge about the date when Mr Borley first became aware of the earlier employment tribunal claim but one other of the proposed new allegations of victimization (LOI 1.2.9) post dates the email at page 273.

46. Furthermore, the Tribunal has the power under rule 31 ET Rules of Procedure to order a party to provide information if it is relevant and necessary in the interests of justice for it to be provided ahead of witness statement. A request for specific information could have been made as to when Mr Borley first became aware of the employment tribunal claim.

47. This means that were the Tribunal to have to consider whether the proposed claims were in time, it is not clear that the claimant would succeed in showing that a claim first notified to the respondent and the Tribunal on 3 March 2023 was in time or should be allowed to proceed on the basis that it was just and equitable to do so. There may be a question about when the claimant actually became aware of the potential claim or about whether he was reasonably ignorant of the prospect of this claim. That would not be the only issue which would potentially arise on time limits since the claimant relies on a continuing act or course of conduct but the applicability of time limits is a Selkent factor and whether he was reasonably ignorant of the basis of the claim would be a consideration.

48. On the other hand, this is a claim which the claimant wishes to pursue. We make no assessment of merits but we can see that there would be bound to be some prejudice to the claimant if we refuse this application because he will be unable to pursue this particular allegation of victimization.

49. We consider the balance of prejudice. As we have said, Mr Borley was vague about exactly when he knew about this Employment Tribunal claim. Were the amendment permitted that would mean, in fairness to him, he should be re-called to try to see if he could recall any more specific detail about when, in relation to each of the events that he is said to have been motivated by a knowledge of the previous employment tribunal claim he knew about it. Potentially, there would be the need on the part of the respondent to investigate further as to where this information came from. We are not immediately persuaded that the respondent would need to recall the claimant. Given the time the application is made, were Mr Borley to be recalled it is not certain that it would be fair for that to be done immediately. Either way, the Tribunal hearing would be adjourned part heard in the middle of the evidence. At the time the decision was made, the expectation was still that there would be time to complete deliberations on 3 March 2023. The disruption to the hearing is not in the interests of either party and would be likely to have a knock on effect on the Tribunal Service.

50. Taking all those matters into account, we consider that the balance of prejudice is in favour of refusing the application to amend the claim.

The Issues

51. The issues to be determined remained those in LOI 1 to 4 on pages 103 to 107. Issues relevant to remedy were agreed to be those in LOI 5. Those issues are not replicated here so that the judgment be not unnecessarily long.

The Law relevant to the substantive issues

52. The claimant complains of a number of breaches of the EQA. The Employment Tribunal has no jurisdiction to consider an EQA claim unless it is presented within the time specified in s.123 EQA. For present purposes, that section provides that, subject to the effect on time limits of early conciliation, proceedings on a complaint within Part 5 of the EQA (which relates to employment) may not be brought after the end of,

> "(a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable."

53. Conduct extending over a period is to be treated as done at the end of the period. A failure to act is to be treated as occurring when the person in question decided upon the inaction and that date is assumed to occur, unless the contrary is proved, when the alleged discriminator does an act inconsistent with the action which it is argued should have been taken or when time has passed within which the act might reasonably have been done.

54. The discretion in s.123(2) to extend time is a broad one but it should be remembered that time limits are strict and are meant to be adhered to. The burden is on the claimant to persuade the Tribunal that the discretion should be extended in his favour: Robertson v Bexley Community Services: [2003] I.R.L.R. 434 CA. There is no restriction on the matters which may be taken into account by the Tribunal in the exercise of that discretion and relevant considerations can include the reason why proceedings may not have been brought in time and whether a fair trial is still possible. The tribunal should also consider the balance of hardship, in other words, what prejudice would be suffered by the parties respectively should the extension be granted or refused?

55. In British Coal Corporation v Keeble [1997] IRLR 336 the EAT advised that tribunals should consider, in particular, the following factors:

    (a) the length of and reasons for the delay;

    (b) the extent to which the cogency of the evidence is likely to be affected by the delay;

    (c) the extent to which the party sued had cooperated with any requests for information;

    (d) the promptness with which the claimant had acted once he or she had known of the facts giving rise to the cause of action; and

    (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she had known of the possibility of taking action.

56. Section 136, which applies to all claims brought before the Employment Tribunal under the EQA, reads (so far as material):

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

57. This section applies to all claims brought before the Employment Tribunal under the EQA. By s.39(2) EQA an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment. The definition of dismissal includes constructive dismissal: s.39(7)(b) EQA.

58. Section 13 (1) of the EQA reads:

> "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."

59. The Claimant complains that he has suffered direct discrimination on grounds of the protected characteristic of race. Although the law anticipates a two-stage test to discrimination (i.e. whether the claimant has shown facts from which discrimination might be inferred and, if so, whether the respondent has disproved discrimination) it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue. Further guidance on the correct approach to the provisions of s.136 is set out below.

60. Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of race, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

61. Victimisation is defined in s.27 EQA to be where a person (A) subjects (B) to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. A protected act is defined in the section which reads, in full:

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

> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
>
> (3) This section applies only where the person subjected to a detriment is an individual.
>
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

62. The then applicable provision of the Race Relations Act 1976 was considered by the House of Lords in The Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, HL. The wording of the applicable definition has changed somewhat between the RRA and the EQA. However Khan is still of relevance in considering what is meant by the requirement that the act complained of be done "because of" a prohibited act. Lord Nicholls said this, at paragraph 29 of the report,

> "The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact"

63. The application of the burden of proof in direct discrimination claims has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA (cited in RSA para.8). In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EQA.

64. As explained above, when deciding whether or not the claimant has been the victim of direct race discrimination, the Employment Tribunal must consider whether he has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of race. Section 136 of the EQA applies to victimisation cases as well as to discrimination cases. If we find proved the facts which are the basis of the claim and facts from which the Tribunal could infer, in the absence of any other explanation, that the respondents acted as alleged because the claimant had done a protected act then we must hold that the contravention occurred unless the respondent can prove the protected act was not part of their reasons for acting.

65. We bear in mind that there is rarely evidence of overt or deliberate discrimination or victimisation. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination and victimization can be unconscious but that for us to be able to infer that the alleged wrongdoer's actions were subconsciously motivated by race or by the protected act we must have a sound evidential basis for that inference: Bahl v The Law Society [2004] IRLR 810, CA. Similarly, any conclusions that an

individual's motivation was influenced by a stereotype must be based on evidence from which it might be inferred, and not simply the fact that a particular stereotypical view is common: B v A [2010] IRLR 400, EAT.

66. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the Tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of, in the present case, race or a protected act. The burden of proof provisions may be of assistance if there are considerations of subconscious wrongdoing but the Tribunal needs to take care that findings of subconscious wrongdoing are evidence based.

67. That said, if the Tribunal considers that there is evidence that could realistically suggest that there was discrimination or victimisation it would risk failing to give the claimant to benefit of the burden of proof provision, which are designed to address the difficulties of proving discrimination, were that evidence merely to be added into the balance and weighed against other evidence in the case on the balance of probabilities. If the Tribunal does in that situation move directly to the second stage of the s.136 analysis, it should do so on the basis that it has presumed that the burden of disproving discrimination has passed to the respondent. Where the respondent bears that burden it can only be discharged with cogent evidence. The standard of proof necessary to discharge the burden is the balance of probabilities. The fact that a decision taker is not called to give evidence does not necessarily mean that the required cogent evidence to satisfy any burden on the respondent cannot be provided but there needs, in that situation to be a reasoned analysis of any documentary or other evidence.

68. As Sedley LJ said in Deman v Commission for Equality and Human Rights [2010] EWCA Civ 33 at para.56,

> "The 'more' which is needed to create a claim requiring an answer need not be a great deal. In some instances, it will be furnished by non-response, or an evasive or untruthful answer to a statutory questionnaire. In other instances, It may be furnished by the context in which the act has allegedly occurred."

69. The unlawful motivation, whether (in the case of discrimination) that of race or (in the case of victimisation) the protected act does not have to be the sole or even the principal cause of the act complained of, so long as it was a more than trivial part of the respondent's reasons. However, dismissal (or any other detrimental act) in response to a complaint of discrimination does not constitute victimisation for the purposes of s.27 EQA if the reason for it was not the complaint as such but some feature of it which can properly be treated as separable: Martin v Devonshires Solicitors [2011] ICR 352, EAT; Page v Lord Chancellor [2021] ICR 912, CA.

70. In order to find that an act complained of was to the detriment of an employee, the Tribunal must find that, by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been

disadvantaged in the circumstances in which he had thereafter to work: De Souza v Automobile Association [1986] IRLR 103, CA. This was explained in Shamoon to mean that the test should be applied from the point of view of the victim: if their opinion that the treatment was to their detriment was a reasonable one to hold, that ought to suffice, but an unjustified sense of grievance was insufficient for the claimant to have suffered a detriment.

71. The EHRC Code of Practice on Employment (2011) advises in para 9.8 that a detriment is "anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage."

72. Section 95(1)(c) of the Employment Rights Act 1996 makes it clear that a dismissal includes the situation where an employee terminates the contract of employment (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal and the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or which shows that he no longer intended to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned then the tribunal must consider whether the employer's behaviour played a part in the employee's resignation.

73. In the present case the claimant argues that he was unfairly dismissed because he resigned because of a breach of the implied term of mutual trust and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the authoritative guidance given in the case of Malik v BCCI [1998] AC 20 HL. The term imposes an obligation that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. One question for the tribunal is whether, viewed objectively, the facts found by us amount to conduct on the part of the respondent which is in breach of the implied term as explained in Malik v BCCI. Whether the employment tribunal considers the employer's actions to have been reasonable or unreasonable can only be a tool to be used to help to decide whether those actions amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause.

74. If that conduct is a significant breach going to the root of the contract of employment (applying the Western Excavating v Sharp test) and the employee accepted that breach by resigning then he was constructively dismissed. The conduct may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence (see Lewis v Motorworld Garages Ltd [1986] ICR 157).

75. Once he has notice of the breach, the employee has to decide whether to accept the breach, resign and claim constructive dismissal or to affirm the contract. Any affirmation must be clear and unequivocal but can be express or implied.

76. An authoritative explanation of the last straw doctrine is found in the judgment of Dyson LJ in Omilaju v Waltham Forest London BC [2004] EWCA Civ 1493, [2005] IRLR 35, [2005] 1 All ER 75, [2005] ICR 481 CA. Omilaju is often referred to for the description by Dyson LJ of what the nature of the last straw act must be in order to enable the claimant to resign and consider him or herself to have been dismissed.

> "The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant." (paragraph 19)

77. The doctrine was also considered by the Court of Appeal in Kaur v Leeds Teaching Hospital [2018] IRLR 833 CA. Having discussed the development of the authorities in this area, Underhill LJ gave the following guidance,

> "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para [45], above.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?
>
> None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy." (paragraph 45)

78. The Tribunal must determine whether the repudiatory breach of contract was an effective cause of the resignation: it does not need to be the only or even the main cause of the claimant's decision to resign so long as it is an effective cause of it.

Findings of Fact

79. The standard of proof that we apply when making our findings of fact is that of the balance of probabilities. We took into account all of the evidence presented to us, both documentary and oral. We do not record all of the evidence in these reasons but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions compared with contemporaneous documents, where they exist.

80. We start with our findings about the content of the BDM role. BDM's such as the claimant were site independent (MB statement para 6; the claimant's terms and conditions page 123). This means that they were not assigned to a particular Siemens place of work but were customer facing.

81. There is a job description for a BDM-Health care Enterprise Solutions at page 133 which the respondent states was the claimant's. The claimant disputes this and says that it was not sent to him in December 2015 when he applied for the role.

82. We focus on those tasks and responsibilities identified in the document at page 133 which the claimant accepted to be important elements of the role when it was put to him in cross-examination. He accepted that the role involved what the tribunal has referred to as prospecting; the BDM should "look for and capture opportunities for sales and follow them up". The purpose of the role he accepted was to develop and drive growth and develop support for the countries.

83. Overall, although the claimant disputed that the job description at page 133 had been sent to him he accepted that the purposes and the main task of the role were accurately described in that document.

84. The BoQ is not explicitly stated in the job description to be a key responsibility of the BDM. It was put to the claimant that the BoQ was an element within the responsibility "Develop a successful service and pricing models to meet customer requirements". The claimant agreed "it is a main aspect of the role" but gave clear evidence that he was wasn't asked questions in interview about that bullet point.

85. In addition to facility in populating a BoQ being necessary to develop pricing models and preparing a tender, we accept that the purpose of the BDM role included the following;

    a. Initially support and ultimately lead HECS bid submissions

    b. Drive business growth - the respondent used the word "funnel" when describing activities to achieve this purpose which we understand to mean that the BDM should have many customers in prospect of whom fewer develop into opportunities to submit bids or for upgrades to existing technology.

    c. Interaction/Communication with customers, partners and HQ - we find that this purpose can be achieved at least in part by the BDM being 'visible'.

86. Among the other main tasks and responsibilities the BDM must "develop and orchestrate partnership with internal and external stakeholders". Again this is what the respondent refers to as "visibility" ; taking active steps to develop and orchestrate partnerships with colleagues. In the sense used by the respondent within their organisation it might also be described as presence; the BDM's profile or engagement with customers and colleagues. Visibility is

the measure of this behaviour. An employee's responsiveness is related to that. If the employee shows that they are responsive they increase their visibility. At Siemens, responding to meeting invites, responding to emails and telephone calls promptly is expected behaviour. If an employee does not accept meeting invites promptly the outcome is that their diary is less full. A lack of meetings suggests that employees not prospecting when they are expected to be using opportunities to network. One thing we take from this is that if a manager sees that one of their direct reports appears to have an empty diary that is objective evidence that at least to some extent they are not fulfilling one of the tasks of their role.

87. There are two internal processes about which we set out our background findings what happened in the present case in detail; the PMP and the capability process.

88. The PMP was the process by which, at the relevant time, Siemens provided feedback to employees. It stands for Performance Management Plan. In para:9 of Mr Borley's statement it is what in other organisations might be called an appraisal scheme. Employees are appraised on their targets (known as "WHAT") and expectations (known as "HOW"). WHAT is a measure of whether you have achieved your target for the year or the KPI associated with your role. Examples given by Mr Borley include numbers of prospects added to the business funnel and commercial target such as a revenue target. That revenue target might be a shared target as it was in the case of the claimant for FY 2017 rather than the sales generated by that particular BDM.

89. HOW sets out to appraise how the employee achieved the target. Did they demonstrate good business principles? Did they work inclusively? Were they professional in their communications and were they responsible and accessible?

90. The PMP review period is the same as the financial year (or FY). It runs from 1st October in any given year to 30th September in the next. As an example the PMP for FY 2016 was carried out in 2016 for FY 1 October 2015 to 30 September 2016. The WHAT and the HOW are each rated on a five point scale from 1 to 5 with 1 being the lowest score. These scores are added together to achieve TPR Total Performance Rating of between 2 and 10.

91. The IPP or Individual Performance Percentage is derived from the TPR. The respondent says that how that is done is shown in page 1042 which is one of the documents that was disclosed shortly before the hearing.

92. The graphic on that page shows the scores for WHAT and HOW being added together to get the TPR which, in the graphic, are spread out into nine coloured boxes which feed down into coloured boxes containing percentages. It can be seen that certain percentages then equate to 5 descriptors: not achieved; partially achieved; achieved; partially exceeded; and consistently exceeded.

93. The claimant did not dispute that the scores from 1 to 5 reflected those descriptors: CWS para.28. Mr Borley, in his paragraph 10 with reference to

the claimant's 2017 PMP when he scored a total of 3 and his "individual performance percentage was 40%, categorised as "partially achieved"". The graphic on page 1042 shows that between 40% and 60% appears to be available as a IPP for someone with a TPR of 3.

94. It is clear that 100% is scored by those who are meeting their targets in WHAT and HOW overall with a score of 3 in each. We accept that for WHAT and HOW rating of 3 means a job well done. This is taken from page 903 which is part of the PMP 2018 guidance to managers that starts at page 901.

95. New starters would not be given WHAT targets and we accept the evidence of Mrs West (NW para 7) that they would automatically be awarded 100%. They are starting during the course of the PMP year. That evidence is consistent with the statement in the claimant's 2016 PMP form (page 140) "specific targets were not set for Giles because he started so late in the financial year." This PMP was released on 6 December 2016 and scored a period of three months from June to September 2016.

96. The process of conducting a PMP started late in August or early September. We accept the evidence of Mrs West at paragraph 12 that part of standard practice for the process was for a manager to ask colleagues for feedback on the appraisee. Pages 159 to 165 show Mrs West seeking feedback on a number of individuals including the claimant.

97. There is then a meeting between the line manager and the employee and an online form is completed. In 2017 what was inserted into the online form were the agreed comments of the employee and line manager at a meeting which would take place in around September.

98. That employee is then discussed at what is called the Round Table. So, in 2017, the Roundtable discussion was based on the completed 2017 PMP which sets out whether a particular target has been met or whether a particular descriptor was agreed in the meeting between the line manager and the employee.

99. From the claimant's 2017 PMP form we note the following pages 175 - 176 under the heading "Overall performance rating & feedback":

> "Please be aware that the suggested rating on What, How and IPP (if applicable) will be the starting point for the roundtable discussion. In-country Managers should seek additional input from other relevant managers before completing their proposed ratings.
>
> Based on the Total Performance Rating, please select if applicable an associated Individual Performance Percentage. For employees being discussed at a Round table the IPP value will be finalised during this discussion. Based on a Managing Board decision, the IPP relevant for the Senior Management BONUS payout may differ from the IPP decided at the Roundtable. The Performance rating guidelines may be accessed by CLICKING HERE. *[In the online original this appears to have been a hyperlink]*
>
> NOTE: only the In-Country Manager can send the form to Round table step, thereby confirming that input has been provided according to the Siemens Organisation Handbook *[again in the online original this appears to have been a*

hyperlink] What and How ratings are mandatory prior to sending the form to the Roundtable step.

Total Performance Rating (TPR): 3.0/10.0
What 2 Partially achieved
How 1 Did not meet expectations

Individual Performance Percentage (if applicable): 40%-(Partially Achieved)"

100. We find on the basis of those instructions on the online form that the intended standard practice is for the line manager and employee to suggest a rating for What of between 1 and 5 and for How of between 1 and 5 and for that to be recorded before the form is sent to the Round table meeting.

101. Mr Borley gave evidence about the Round table meeting and so did Ms Suller, in relation to her area. Our findings are that the meeting is set up by HR invites sent to individuals outside ES who might reasonably be expected to have interacted with the ES team in a way that meant they had relevant observations of individuals when carrying out their roles. These would be from areas such as financial and legal where the BDM might have needed to interact with a commercial lawyer in relation to a bid, for example. No minutes were kept of the Roundtable meetings and there were no agendas. They appear to be held in approximately November annually.

102. It is alleged on behalf of the claimant that HR must have sent the draft PMP in order for people to comment effectively; it is alleged that it is implausible that it was not sent out. There is certainly evidence in the rubric on the form that we have quoted from above that the In-Country Manager sends the form somewhere. However, we accept that it is improbable that managers invited to Round table meetings at which a large number of individuals were to be discussed would have been sent all of the draft PMP forms for all of those individuals when there would be little expectation that they would or would be able to read all of them or would have relevant feedback about many of them.

103. We accept that the IPP might be affected by input from those participating in the Round Table. In his oral evidence Mr Borley said that "Roundtable is around calibration - seeking opinion from others who may have worked with someone in a project or task [to provide] that broader view not just the line manager and employee."

104. This seems to suggest that calibration meant balancing scores across the organisation as well as giving the opportunity for other input. The purpose included to take into account as broad a range of opinions as possible before finalising the scores of that individual and it seems likely to us that a discussion of this kind would spend more time on the higher and lower achievers. When asked whether the meeting would look at the comparators, Mr Tanner and Mr Clarke, Mr Borley said "calibration is across the larger business area - the whole organisation" he agreed there would be comparison within the peer group "but also other roles at equivalent grade - looking at BDM within ES and calibrating regional sales managers across the cohort." He described the purpose being to seek input from "other managers who will have had touch points with employees".

105. Mr Borley gave an example that if he evaluated an individual as a 4, at Roundtable there was the opportunity for someone to say “I agree” or “I had a fantastic experience, this individual should be more”. With reference to the IPP, he accepted that this might affect which particular percentage within those open for a particular TPP score an individual was awarded (e.g. in the range 40 to 70%). In cross-examination he said that if there were any moderation “if there were was a change of the submission into Roundtable [it] would be collective decision by the Roundtable”.

106. In summary, we find that the suggested figures for What and How go to the Roundtable and they might be changed depending upon the discussion that happens at the Roundtable but, more specifically, the IPP might be influenced by views of those outside the department about the appraisees. The focus in those Roundtable discussions was on the underachievers and the overachievers. We accept that the individual PMP forms are not circulated. We consider that it would be impracticable to do so. There are valid reasons why the discussions contained in them are confidential. The chances of the information being read by all attendees is slim. We accept Mr Borley’s evidence that the information was taken to the meeting and the manager would be required to give a summary of his team and then discuss the overachievers and the underachievers.

107. The capability process (page 145) was published on 17 July 2017. It contains a definition of poor performance at page 146. There are two aspects to it set out in the first two sentences of the definition,

- where an employee regularly fails to meet the targets or standards of their role;

- where an employee lacks the skills or standards required to fulfil the role properly.

108. The first stage appeared to be “settling things informally” by offering “an appropriate amount of time to improve”. Then, if necessary, the policy provides for “using the Performance Improvement Plan (PIP) to monitor your work and set targets for improvement.

109. Further details of the informal stage are provided at page 148 which is described as “an informal management discussion with your line manager” this part of the policy appears to set out relevant advice to the employee and line manager about the informal discussion stage. It includes advice to the employee that “if an action plan is developed make sure you know what you need to do and how your progress will be monitored”. Advised to the line manager includes to deal with situations as soon as possible and to make sure the employee fully understands how they are underperforming and what is expected of them.

110. Advice to the line manager also includes the following,

- “If appropriate give them the opportunity to correct their behaviour, over the timescale of one month, using an action plan”

- "If the employee has persistently underperformed without improvement, or the issue is serious it may be necessary to move straight to the formal procedure."

111. The policy provides that notes of informal actions agreed will be kept on file for 12 months. This suggests that there would remain for that period of time a record of performance concerns.

112. Taking into account this explanation, we do not think that an informal PIP goes against the policy or against the spirit of the policy. We find that the respondent followed this procedure in their dealings with the claimant and used it well. As we set out in our detailed findings below, the respondent extended the procedure and used it flexibly

113. The formal Performance Improvement Plan is described in the policy at page 150. The fact that the PIP is described here as a formal arrangement does not preclude its use in the informal stage (see the second paragraph on page 150 which refers to there being one PIP during the informal process). That informal PIP is stated under the policy to last up to one month. In the case of the claimant's PIP, the dates on page 186 show that it was initially requiring performance to have improved by the end of two months and, as will be seen, this was subsequently extended.

114. It was alleged by the claimant that when the informal PIP had been signed off it was a breach of the capability process for the next step to be a capability meeting. Focusing for the moment on what the policy provides for, we see (page 150) that there are usually a maximum of three PIPs, one in the informal stage and two during the formal process "which could last between one and two months, accompanying a written warning". The statement is made in terms that, in the formal stage, a PIP can be accompanied by a written warning - they go hand in hand.

115. Additionally we see at page 151 that "if you fail consistently to perform to the targets set in the informal discussion, the issue will be brought to a Work Capability Hearing with your Line Manager." The potential outcomes of such a hearing are set out at page 153 and the third bullet point under the description of a first written warning dovetails with the explanation at page 150 that a first written warning will be accompanied by a PIP. We find that the actions of the respondent in this case are allowed for within the terms of the policy

116. We then move on from our findings about what was intended to happen under the policies relevant to the present case to our findings about the core factual disputes.

117. The claimant relies on two individuals as actual or evidential comparators for the purposes of his race discrimination claim. Mr Steve Clarke who was a witness in the case, joined the ES team in December 2013. He led his first tender within one or two years of his appointment as BDM. Peter Tanner during the ES team 2016 approximately a month after the claimant.

118. Early in his employment the claimant contributed to a bid for a contract with a hospital in Kingston upon Thames. He describes his contribution in his paragraph 25 and following . Evidence was also given about this bid by Mr Clarke (paragraph 5) and Mrs West (paragraph 10). The bid was led by Mr Clarke. The claimant's contemporaneous account of his contribution is in the 2017 PMP at page 175:

> "I believe I supported the lead… By helping to write parts of the Phase 2 tender response, and supporting with strategy meetings throughout this stage of the bid. But also I feel I could of done more to support the lead post tender award and there were some gaps in the work… I could have lobbied more strongly to take on some of this work. Partially met."

119. The claimant has produced handwritten notes of meetings relevant to the Kingston bid (page 884 to 889) covering September 2016 to June 2017 and states in his para 26 that he attended around 15 on-site visits and does not recollect any other member of the ES team attending more meetings. He can only mean in relation to this period. Work on the bid started before the claimant joined.

120. It is common ground that the claimant carried out some research which was helpful and important in connection with this bid. In his para.29 the claimant refers to identifying from his research that radiology equipment with leaking radiation had been identified as an issue in the Hospital Board papers and a CQC report. We reject his evidence that prior to his research the leak was not known to the bid team. As Mr Clarke says in his para.5, they had been informed of that by the client and knew that the system was affecting the service. His oral evidence was that he had seen it himself at an earlier visit. The claimant's contribution, which was noted by the decision-makers, was to notice that this problem had been highlighted internally and externally and this demonstrated that, through him, Siemens had gone outside the tender process. This was the fine-tuning that Mr Clark referred to which we do not think to be an unreasonable undervaluing of the claimant's contribution.

121. An email headed "Kingston debrief" from the claimant on 28 February 2017 shows that Kingston also valued Siemens' product range. The comment that they have "good market leading products in the most important areas" suggest that was a far more weighty factor than the personalised approach.

122. We do not think that this undervalues the claimant's contribution but the claimant's own contemporaneous assessment and the client feedback circulated by the client suggests that Mrs West is entirely fair when she says "his work was a valuable contribution in among many other valuable contributions, a number of which were much more significant than his." (Para 10)

123. The claimant's 2016 PMP was carried out on 6 December 2016. It is at page 140. As we have already said no targets were set because he had been in post for a short period of time and was automatically assessed as achieving the WHAT. In those circumstances we cannot infer from that score that the claimant was performing well. The narrative provides a snapshot. For example, on the HOW, which *was* evaluated, he is described as having "a

steep learning curve, but has taken ownership of his up-skilling." The claimant agreed with this.

124. We find that he was showing promise at this point. It is fair to say, as the claimant does, that the comments from his line manager were extremely positive but that does not equate to an assessment that he is performing well in the role at the standard to be expected of an established BDM. The comments are positive but not exceptional and suggest a belief that the claimant is going to achieve the professional development needed to succeed and has demonstrated that he is up for the challenge. We do not therefore find, as we are invited to do CWS para.17 that the claimant was performing well, if by that is meant well for an established BDM.

125. His goals for FY 17 are set out on page 141 and include that by the end of the year "I hope to be leading on a full MES project from inception through to successful conclusion".

126. Based upon the automatic assessment that he met the WHAT and the assessment that he had achieved his objectives for HOW his FY 2016 Round table assessment was 100% (page 143).

127. The form initiating the 2017 PMP is not separately in the bundle. Evidence before us suggests that it is probably a living document that leads to the final 2017 PMP where entries overwrite previous entries. At some point the document is locked, as Mr Borley put it, in a read-only format.

128. One of the claimant's allegations is that there was a failure to provide him with a copy of the 2016 PMP and that that was race discrimination. In February 2019 he asked Miss Malyon for a copy of the mid-year review and she informed him that she did not have access to the system as it was no longer in operation and the new system was not yet live (page 297). She further explained to him that they had only been required to archive the last year of PMP so she was unable to access his 2016 PMP form as previous years were of little relevance from the GDPR perspective. She states that the claimant should have saved what he wanted when the closure of "4success" was advertised (page 298). The claimant accepted in cross-examination that he probably had been warned that it was necessary to do that.

129. It later emerged (see page 631) that three years' worth of PMP forms had been archived in the new system that came online on 13 March 2019 and at the time of the grievance hearing they had been between systems so the 2016 PMP record was not available at that time. This seems to us to be an entirely reasonable and plausible explanation for the 2016 but it is one that the claimant was not willing to accept.

130. The claimant's goals set out on page 141 are described as his personal objectives. More measurable goals for FY 2017 are set out on page 175 within the PMP 2017. The claimant is not suggesting that they were not achievable. The personal objectives set out on page 141 have been put into a more measurable form. So target 1.4 is "deputise on a MES project through to successful financial close." Contrary to the assertion in CWS para 15, there is no evidence from which to infer that these were particularly stretching either

for the claimant or for a BDM in their first full year. They were, however, agreed targets.

131. The claimant's 2017 PMP midyear review with Mrs West took place in May 2017. It was suggested to him, when he was cross-examined about his recollection of this review in paragraph 54 of his statement, that when there was a discussion about the areas of the business that he needed more exposure to this was, in effect, a discussion about shortcomings. He stated that the term "shortcomings" had not been discussed and asserted that the substance of the mid-year review comments had been replaced so that the end of year review bore no relation to the mid-year review. However he did not appear to take the opportunity in the subsequent October 2017 review to assert either that specific positive comments had been replaced or that he disagreed with the comments that were recorded at that time.

132. On the other hand no positive case was put by the respondent that the claimant was specifically told before October 2017 that there were identified concerns. Mrs West does not say otherwise in her paragraphs 8 to 11. She does say that as a matter of fact she had some concerns – not that she spelled them out to the claimant:

    a. In her paragraph 8 she states that he was slow to respond to emails and difficult to get hold of.

    b. She states that one member of the team discovered that the claimant had "folded a private company at Companies House" and that people speculated about that. She states that relationships with teammates became fractured, that other people felt he lacked responsiveness and that they were frequently unable to get hold of him as he took a day or two to respond to an email. She states "my position was that if he had multiple businesses, I would not have minded as long as he performing in his role." He would have needed to declare an outside interest.

    c. Mrs West produces notes at page 157 to 158 apparently made during a leadership course in the week beginning 24 July 2017.She appears to do so in order to seek to substantiate what she says in para.11. There she comments on what she saw as an inability on the part of the claimant to lead on anything which was troubling her to the extent that she discussed the problem with her peers. "He wasn't contributing and I don't mean by winning business, I mean by having new ideas and prospecting and these were not hard things to ask from him."

133. When Mrs West describes a team member discovering that the claimant had "folded" a private company that is consistent with Mr Borley's evidence, that when he was first told about the claimant's former company it was made clear to him that it was no longer in operation and therefore it did not seem to him to be at all material.

134. The claimant has in his para.82 transcribed the handwritten notes at page 158 to 157. The note starts with the heading "<u>Move Giles Out Of role</u>" and include comments such as "properly prepared PMP session", "get a coach

for Giles" "is he okay with asking the team to give a second chance" "explain to him what made me hire him".

135. For medical reasons Ms West is not here to explain what she meant by these notes. It is clear that she did not raise with the claimant in any direct way the concerns that she now says she had in July 2017 when the claimant had been post for about a year. She goes on to say in her para.13 that when Mr Borley started in August 2017 she was honest with him about the potential poor performance issues with the claimant. It seems to us that she was in effect waiting for Mr Borley. She was, as she states at the start of her witness statement, wearing three hats at this time.

136. The 2017 PMP meeting was on 9 October 2017. In the meantime there had been a Rapid Improvement Event training workshop in August 2017. The claimant argues that the respondent's tender response process was obscure and opaque and refers to part of the trainer's presentation at page 364. That may be but we do not find this to be evidence which assists us when considering whether the respondent genuinely had concerns about the claimant's progress into the role or whether those concerns were reasonable and evidence-based rather than based on an impermissible stereotype. The respondent is free to organise its business in any way that it thinks fit and there is no evidence that Mr Tanner, who joined after the claimant, found the process so difficult to understand or to follow that he was not able to meet the objectives of the role.

137. On 31 August 2017 Mrs West approached relevant team members for feedback in preparation for the PMP. SW's feedback on page 162 is generally positive. JW, the Head of Finance, said he did not have a strong opinion but that the claimant "seeks to be lacking in understanding our internal processes". Mrs Allen describes the claimant is getting on well with team but "sometimes his diary and time management can make working with him a little challenging… I do not see him as hands on and involved on each tender/project as the other BDM's". She also states that the claimant does whatever tasks he is given on a tender but not always to the timeframes set out (page 160).

138. While Mrs Allen's comments do not backup the strength of feeling Mrs West describes the team as having she does provide another person's perspective that time management, reliability in delivering work on time and lack of visibility and involvement had been noticed as issues with the claimant's work. Mrs Allen seems to us to be an entirely straightforward witness who neither overstated nor underplayed her evidence and we consider this snapshot of page 160 to be generally reliable.

139. Mr Borley made a summary at page 165 of the feedback emails and other sources of feedback. His evidence was that where that summary cannot be traced to the emails it is based on personal observations and he described receiving feedback from other sources. When it was suggested to him that the claimant has no idea who has criticised him apart from those whose emails have been disclosed, Mr Borley accepted this and said that naming the source can make business relations quite challenging. The email seeking feedback was sent to 14 different people.

140. He said that the feedback would not be shared in raw form but would be delivered through the PMP. He said that he could recall page 165 with confidence but could not confirm who had created the summary at page 166. Although that page is in the bundle, none of the witnesses who statements we have read actually produce it or speak as to its authorship (see Mrs West para.12 where she produces page 165). Neither side has given direct evidence about when it was created. In those circumstances we give no weight to it. We accept that Mr Borley did not create it and he gave evidence that he created page 165.

141. The claimant's argument about page 166 is that, although all of the comments included on page 165 by Mr Borley do appear on the summary at page 166 so do a number of others which are more positive in tone. Although we give no weight to page 166, this challenge to the selection by Mr Borley stands and needs careful consideration because the emails of Mrs Allen at page 160 and Sarah Walton include more positive comments which do not appear in the summary at page 165. On the other hand, the specific criticisms from Mrs Allen in her email at page 160 are not in the summary at page 165 either save presumably as a contributor to "numerous comments relating to Giles timekeeping".

142. It was originally alleged by the claimant that the 2017 PMP on 9 October 2017 was conducted by Mr Borley. He also alleges that scores were set at this meeting that was subsequently downgraded.

143. The 2017 WHAT objectives were subdivided into four targets and the feedback on each of those is set out at page 175. The form is intended to "be used to document the outcome of the dialogue between employee and manager(s) regarding his/her achievements In (targets and overall contribution) and How (behaviours) end of fiscal year." The feedback on the claimant's 2017 form is as follows,

> "1.1 The recent RIE workshop was very helpful as it mapped out all the stages of the tender response process. Previous to this, I found it difficult to get my head around the entire process as it is complex and there was no defined template. I felt I was missing key stages of the process. I fully participated in the RIE where I could and asked questions and listened where appropriate to help my understanding of the process. There are still key pieces of delivering a tender response that I am not familiar with; I intended to focus on these gaps and close by the end of the year. Partially Met
>
> 1.2 I have taken a thorough look at our opportunities to understand what were the triggers that lead them to MES.I have also looked at opportunities on our portal like Royal Liverpool, to understand where MES opportunities were lost. I developed the acronym F.R.A.N to define MES triggers: Financial , Regulatory (& Risk), Aspirational and Newbuild. Since then I have applied this theory to new prospects like Norfolk and Norwich and Aintree to help the team validate current opportunities. I have also used this approach to examine and anticipate new potential opportunities like St Georges, Croydon and Kings. More recently I have taken this methodology to the SV Development meeting where I am participating in the workstream looking more collaborative approach to identifying and working ES opportunities. The FRAN acronym has been accepted and added to with the inclusion of

> "C" – now becoming FRANC (capacity). More work needs to be done on defining a target list – Partially Met
>
> 1.3 Order intake expected to be £76.134m and revenue at £70.339m – Consistently exceed
>
> 1.4 I deputised on the Kingston tender through to successful close. On this project I believe I supported the lead - Steve Clarke by helping to write parts of the Phase 2 tender response and supporting with strategy and meetings throughout this stage of the bid. But also I feel I could have done more to support the lead post tender award and there were some gaps in the work that led us to the eventual contract signature. I think I could have lobbied more strongly to take on some of his work – Partially Met."

144. Although there is conflict between Mrs West's evidence about the preparedness of the claimant for this meeting and his own that does not impact on our finding about what was discussed at it. His oral evidence was that the above text represents the conversation he had at the PMP meeting with both Mrs West and Mr Borley when they were discussing how he had achieved or progressed with the targets. We also think it more likely than not, given Mr Borley had only recently joined the business, that Mrs West took the lead in the discussions although the 2017 PMP was signed by Mr Borley as the claimant's line manager.

145. The claimant probably was not aware that Mrs West had pre-existing concerns that he had not grown into the role of BDM as effectively and with the speed that she expected and wanted. Although we think she should have raised the concerns openly sooner than she did, the note she has produced (page 157 – 158) does support her statement evidence that she genuinely had concerns before Mr Borley started. Given her more detailed knowledge of the claimant's performance it seems far more likely that it was she who produced the detail of the analysis of the performance in the 2017 PMP.

146. It can be seen therefore that the claimant himself agreed that he had only partially met three of the four targets. It is clear on the face of it that the fourth target relates to a team target for new orders and revenue rather than personal target. That is apparent from the definition of the target on page 174 and the amount of the revenue on page 175. Furthermore, the claimant had not led on a bid yet, so it is difficult to see how he was directly responsible for a particular order. The claimant was asked to accept that target No. 1.3 was the same for all BDM's and they had all achieved it because the company achieved that target. He disagreed but his answer was internally inconsistent because he both said that it was a company achievement and represented the Kingston bid and said that it was only to be applied to everyone who were involved in that bid. The target on page 174 states that the details have been provided by the country business area and there are targets both the new orders and for revenue. We do not see that the Kingston bid on its own could account for figures under both headings because the bid had only just been successful. We reject the claimant's evidence that this was a personal target. Where he states in his paragraph 68 that it was agreed that his rating should be consistently exceed in recognition of his significant contribution to the Kingston project we do not accept that that happened. That statement evidence of the nature of the discussion is inconsistent with the way the target is described.

147. We do not go so far as to say that the claimant is setting out deliberately to mislead; his witness statement which is re-written much more recently than the 2017 PMP form places too much importance on his contribution to the Kingston bid and misunderstands the nature of the target. We think it is indicative of the perception gap on the part of the claimant between his assessment of how well he was doing and the respondent. This affects our view of his reliability as a witness about his own performance as a BDM adversely.

148. He disputed in his oral evidence that the overall feedback for the two categories (set out in page 176) was entered into the document during the PMP meeting. His evidence about the scoring was inconsistent because he accepted at one point that the total score for the WHAT section was out of five. However when he was asked what he said the WHAT scoring had been, he asserted the target 1.3 equated to 5 and that that 5 rating had been significantly downgraded following the Roundtable to a 2.

149. We say this is inconsistent evidence because it does not seem to us to be possible both to say that each of the four sub-targets should be scored out of 5 and to accept that the target for WHAT as a whole should be scored out of 5. The claimant's evidence on this point simply did not make sense mathematically. It also does not make sense that someone should agree they only partially met three out of four targets and yet insist (as the claimant did) that the agreed score overall was 5 our of 5: consistently exceeds.

150. Mrs West's evidence to Mr Dand at the grievance investigation meeting (page 485 to 486) was that the claimant had not come to the PMP having pre-populated the online form.

151. In his paragraph 69 the claimant accepts that Mr Borley said at the time that there was a need to work on a short term development plan; in essence, he agrees that his manager told him that there are development needs. There were development needs; three of his four WHAT targets were assessed as partially met only as was his HOW target. This is made clear in the section the claimant accepts to be a record of the conversation. These seem to us to be uncontested pieces of evidence that there were development needs.

152. Comments in the overall feedback at page 176 include the following:

    a. "When reviewing personal objectives which Giles has had the ability to influence the outcome solely there has been limited success."

    b. Although the claimant's impact on the Kingston bid as "minimal" may have been hurtful it was not, we find, inaccurate. This ties in with the description of the claimant's individual impact on the business financial performance as being minimal.

    c. "One of Giles other assigned projects was around development of the defined methodology for targeting MES customers proactively (and development of the target list), whilst some initial progress has been made on this project, it has not delivered as expected and is still a considerable

way of before being suitable for testing or deployment." We see that this directly relates to target 1.2 and what is stated here is not inconsistent with the claimant's own assessment under 1.2 page 175.

d. It seems to us that the statement that the claimant has been with the business for "14/15 months now and he needs to focus his efforts on ensuring he is at a minimum of "achieved" standard during FY 18" is a fair expectation.

e. The narrative under the 'HOW' evaluation seems to us to be in line with the feedback provided by email that we have seen where it says that colleagues enjoy working with him and he is likeable but there are other critical areas which have not been approached proactively.

f. Again the direction that he should achieve 'met expectations' as a minimum in FY 2018 is both a fair expectation and made clear.

153. There is particular criticism of a failure to arrange ES portfolio training in 2017. The claimant had a complete answer to any suggestion he should have completed it before this because he had been permitted to withdraw from 2016 training due to family illness. However, we accept that Mr Borley's criticism was not about that but about a lack of proactiveness in rearranging the portfolio training so that it was completed at the first opportunity. See also para.225 & 226 below for comparison with Mr Clarke.

154. It is alleged in CWS 34 and 35 that the comments are unfair self-serving, in tune with the comments on page 157 that might suggest that Mrs West wished to manage the claimant out of his role than a reflection of actual events. We reject these arguments. Too much of the content, including the revealing assessment that the claimant has not met expectations, is content the claimant agreed with for that to be true.

155. The extent to which the claimant's concern about downgrading is supported by contemporaneous documents is that page 175 suggests that the 'HOW' target at 2.1 was 'partially met' but it was scored as a one "did not meet expectations". The TPR of 3/10, was translated to an IPP of 40% described as partially achieved which is at the bottom end of range of percentages available for a TPR of 3 so that is not a downgrading, as such.

156. The claimant says that the 3 out of 10 score was a significant departure from the agreed ratings. We disagree. The real question seems to be why he was not scored 2 for his 'HOW'. Mrs West says in her paragraph 14 that those scores and the IPR of 40% were her ratings of him. The implication of Mr Borley para 10 is that those scores were in place before the Roundtable.

157. In the absence of Mrs West there is some uncertainty about whether those figures were notified to the claimant in the meeting itself and why 'HOW' was scored as 1. Nevertheless, it is clear to us that those figures are in line with the discussion held with the claimant on 9 October 2017, even if one focuses only on the sections the claimant accepts were seen by him at the time. Therefore the claimant's case that there was a substantial downgrading is rejected; he is just wrong about that. As we have noted the IPP percentage

is right at the bottom range of that available and was no doubt a disappointment to him.

158. Mr Borley was asked in oral evidence who was present at the 2017 PMP roundtable. According to the note of the grievance hearing at page 479 Ms Malyon, the HR business partner, said that she had a list of attendees. Mr Borley said that he was not privy to that and could not remember "the stakeholders involved in that Roundtable meeting". It was suggested that the meetings were shrouded in secrecy.

159. Mr Borley was cautious and unwilling to speculate on who was there rather than evasive, in our view. This seems to be because he did not recollect the information. He was an observer at this meeting with Mrs West taking the lead on information about the claimant at this time and that means that he was less likely to remember those details. We do not think that this caution in answering the questions adversely affects his reliability as a witness.

160. Ms Suller said that people did not always attend throughout the roundtable meetings in her experience albeit in a different business area. That was not something that Mr Borley specifically said but it might contribute to his inability to be certain about who attended. We can see why the claimant would have been discussed at the FY 2017 roundtable meeting because all of his targets were only partially achieved apart from the shared target.

161. It is argued on behalf of the claimant (CWS para 133) that the explanation of the purpose of the roundtable meeting that it was used for calibration purposes is a new explanation absent from the grounds of resistance both an original and amended form and from the witness statements. However the form itself suggests that this process takes place if one looks at the rubric that the "IPP value will be finalised during this discussion" with appears at page 142 and 175 and therefore appears to be part of the pro forma document. Although the word calibration is not in the grounds of response or the statements we have already explained why we consider that the adjustment to the IPP might arise from the roundtable.

162. A second RIE training workshop on the procurement process took place in January 2018. In the same month the claimant was put on an informal PIP (page 185). There is a reference in the 2017 PMP to instigating a developmental plan (page 176). The claimant did not, at the time, challenge or disagree with that clear statement. We accept that when a developmental plan was mentioned it was there was no pushback from the claimant. We have accepted as we set out above (Para.112) that an informal PIP can be carried out during the informal stage of the capability policy.

163. It is fair to criticise Mrs West, as Mr Stevenson does in CWS para 39, for failing to comply with the capability procedure requirement that the line manager must deal with the situation as soon as they become aware and clearly explain any cause for concern to the employee. Among the concerns that Mrs West now explained that she had was that he might have other outside commitments (NW para nine) and, even if that was only of concern to her insofar as it might explain the lack of responsiveness in his BDM role, it was not something she ever verified with him.

164. Despite this, we do not think it unreasonable for the respondent to implement an informal PIP. The evidence from the 2017 PMP does support a view that the claimant did "lack skills or standards required to fulfil your role properly" which therefore engaged the capability procedure.

165. It appears from page 184 that the review start date was 30 January 2018 and review end date was 31 March 2018. When the claimant was cross examined about the issues outlined in Action Nos: 1 to 6 on page 184 (and expanded for ease of reference on page 185) he did not engage with the questions about his performance. For example,

    a. it was put to him that the first action on page 185 was about improving internal network; visibility internally-and that that have been identified in the 2017 PMP. He said he did not recall that but we consider it to be part of the target at 2.1 and it is in the job description which accurately sets out the tasks and responsibilities of the role.

    b. It was suggested to him that for a BDM on a salary of £65,000 to have to be told to be responsive to internal work communications in the PIP was shocking and his answer was that "what shocking is what is going on in the background" - he directed an attack to deflect from the question but did not dispute the administrative failings encompassed in that particular performance issue.

166. It was put to him that punctuality was mentioned in Action No: 5 because he had been late to customer meetings. He strongly disagreed with this saying that there were two cases where he was late one were his car battery wasn't working on the day of the meeting and one where he was caught up in bad traffic. In fact the first of these cannot have been anything to do with the PIP because it happened on 30 October 2018 (See Mrs Allen para three). The other meeting at Northwick Park was on 6 June 2017, according to Mrs Allen and Mr Clarke (see SC Para). The respondent did have objective evidence of a problem on this occasion. In cross-examination Mrs Allen described the two meetings she dated as being the most substantial because the claimant had been due to leave them and she had been in this supporting capacity. Her evidence was that they had not been isolated incidents. As Mr Clarke said, if the meeting is sufficiently important, you leave time for unexpected contingencies so it is not unfair to criticise him for lateness.

167. Furthermore, there were several different responsiveness issues with emails as well as client facing meetings and this had also been flagged up by Sarah Walton in her feedback. Although there may have been some speculation about the reason for lack of responsiveness based on a erroneous presumption that he had outside business interests, that does not mean that the feedback was invented.

168. In our view the respondent has put forward enough cogent and credible evidence in the contemporaneous documents including the matters that were accepted by the claimant to show that there was substance to Mrs West's concerns about the claimant's performance.

169. Informal PIP reviews took place on 2 February 2018 and 16 February 2018. We are satisfied that the work performance issues discussed relate to key responsibilities of the BDM role and to targets of the claimant in the 2017 PMP the had not been fully achieved. We are satisfied that the purpose of the PIP was to support the claimant in meeting the expectations of his role. The details set out in the PIP makes absolutely clear to the claimant what is expected of him. The fact that the respondent managers took the approach of making their expectations clear is to their credit.

170. The second such review is documented on page 188. The Action Nos. relate back to those page 185. Action No: 4 is role administration. The claimant was asked whether he accepted, as is set out on page 188, that the review of this action point on 16 February 2018 showed that "this week's and next week's diary shows that 50% of invites have not been responded to (accept/decline/tentatively accept)". He apparently said that he was "not going to accept long-term reoccurring appointments and did not know his plans and would 'normally' work through his diary on week by week basis". The benefits to the team of knowing whether he was likely to attend a particular meeting were apparently explained to him. The claimant accepted that those matters could be true, and said he had no recollection of these events but they were not his words. He certainly did not say that the information recorded there was definitely untrue or unrepresentative.

171. A further informal PIP review took place on 2 March 2018 (page 189) by which time diary management appears to have been actioned. This may not have been the most important aspect of BDM role but we accept that it had a knock-on effect on the team and was something that the respondent was entitled to prioritise. There appears to have been a discussion about work on an Aintree bid. We note the comments apparently made that it had been a steep learning curve regarding Aintree and then the question "what is it about Aintree 18 months + being in role which is still classed as learning?". There is also discussion about inputting into BoQs.

172. On 13 March 2018 Mrs Allen (who was Ms Hewett at the time) sent the claimant text messages that are at page 190. Her role as Customer Proposal Project Lead is to project manage the bids and tenders from when they come int until they are sent to the customer. She explains in her para.1 that, if she is concerned about timelines with any project, she updates Mr Borley. In the text, which she states she sent by mistake to the claimant, she intended to tell Mr Borley the following, "just as FYI I've just spoken to Giles he still on question 1 of 16 after 2 weeks so I'm a little concerned"

173. Both Mrs Allen (CA para.2) and the claimant (his para 146 and 160) say that the two of them spoke on the phone immediately before this text was sent. Her account is that the claimant did appear to be making slow progress on the work that they discussed and that Mr Borley had not asked her specifically to keep an eye on the claimant. The claimant considers it to be an example of Mr Borley and Mrs Allen working in concert to undermine him. It appears that Mrs Allen quickly realised that she had sent the message to the claimant in error and apologised but also explained that she had been looking at the time available to do work for the Manchester bid and offer to discuss the

matter with him further. His evidence is that Mrs Allen did not express any concerns during the telephone call. He goes on to say in his para:162 that he had the work completed four days ahead of schedule. When she was cross examined about this text she accepted that she was reporting back to Mr Borley but did not accept that she was seeing anything negative; she was providing a project update and it was "just me doing my job".

174. Our assessment of this is that Mrs Allen was, as she said, simply doing her job. Although the claimant did complete the work asked of him in time he does not dispute that at the time they spoke on the phone, he had only completed question 1 of 16. She was open about the reason she was contacting Mr Borley in the text explanation she sent shortly afterwards and apologised. Her immediate description of what she did made us really confident that Charlotte Allen would do exactly the same with anyone in accordance with the purpose of her role as she describes in her para:1. She struck us as being unabashed about keeping people to timescales despite not being a BDM herself and we accept that if the 16 questions had not been completed Mrs Allen herself would have been in trouble. This causes us to accept that she was not asked for feedback on the claimant specifically.

175. The third informal PIP review is noted at page 191 and took place on 19 March 2018. Matters that stand out to us from this record is that the claimant and Mr Borley discussed FRAN, which was a prospecting methodology that the claimant was developing, but she accepted that he had limited success with. This stands out because he described it in the 2017 PMP at page 175 and funnel development was a target for the 2018 PMP (page 231). By mid March 2018 he is nearly halfway through FY 2018 and this comment suggests that the claimant has made limited progress with one of his targets.

176. He has had coaching sessions and a SWOT analysis is done of his strengths and weaknesses (page 221). Late submission of expenses was commented on with an apparent acknowledgement by the claimant that three months submission was excessive: this is basic administration, in our experience. He states that he considers bid writing to be one of his strengths, but there was a discussion about the "apparent poor quality at the initial stage" of the RBFT document which the claimant had excused on grounds of lack of time.

177. It appears that the informal PIP was extended on 18 June 2018 for a month with a review end date of 20 July 2018 (see page 194). One of the claimant's allegations is that at the meeting on 18 June 2018 Mr Borley stated that he was struggling to understand what the claimant had added to the business in the two years he had been there.

178. We accept that Mr Borley could well have made reference to the claimant approaching the second anniversary of starting work with the respondent. There is a reference to him approaching two years with Siemens on 19 March (page 191). He may well have been asked to explain what his achievements were. Although Mr Borley cannot recall saying the words the claimant remembers him using we think he may well said something of that kind but in the context of a discussion where the claimant is being asked to be self reflective about his strengths and weaknesses as is apparent from the notes of the review meetings. Comments such as "what's stopping you achieving

your target" are also noted in the notes and supportive measures such as a business coach were provided. Overall was recorded is not derogatory but thorough and detailed providing a lot of granular detail to guide the claimant about what is expected in an established BDM. Therefore, although we accept that Mr Borley may well have challenged the claimant to explain his achievements during two years of employment, the context was a frank evidence based conversation about documented shortcomings.

179. On 19 June Mr Borley sent the informal PIP document covering the 30 day extension to the claimant (page 199). He also attaches a career plan also described as a personal development plan (or PDP) saying "as discussed I am happy to work through this form with you, alternatively if you have a format which you feel would work better then please let me know."

180. In the same email he sent a link to the multisource feedback (or MSF) and it encouraged the claimant to carry it out by ensuring he requested feedback from a broad range of stakeholders "this is something I would like you to consider as we have discussed, this could be really powerful in your development. The key thing here is to ensure you request feedback from a broad range of stakeholders. I would suggest you propose a list for discussion on our call at 11 AM on 22.06.18."

181. The claimant criticized this as being a direction that he carry out a MSF. We disagree, it is recommended as a tool for the claimant to see how others see him. As we understand it, responses are anonymous. The reveal positive observations and areas for improvement. In our fact finding we have analysed more closely the contents of documents which pre-date the MSF because the claimant complains that, in essence, it is unreliable as a source of evidence about his performance because it is self-serving, reflecting a generally negative view about him based on false information. We have therefor placed little weight upon its contents but gone back, in particular, to the claimant's own assessment of his performance. However, we reject the claimant's allegation that participating in the MSF was mandated and nothing in the email cited above (para.180) ought to have caused the claimant to think that it was mandatory.

182. As noted in 179 above, a PDP started to be discussed between Mr Borley and the claimant on 18 June 2018. Good evidence of what is to be transferred into the PDP is at page 195 where it appears that areas identified within "weaknesses" and "opportunities" in the SWOT template were to be built into PDP. This page also makes clear which elements are going to be monitored in the 30-day extension of the PIP they include broader networking, prospecting in-depth, responsiveness and we also note "there was an in-depth discussion re activity for Giles in his time in role".

183. In his para.126, the claimant alleges that Mr Borley and the respondent "materially and unilaterally change the core requirements of the BDM role from the requirements that I discussed with Ms West and Mr Roberts in February 2016" and this appears to relate to constructing a BoQ and soul capability as a bid author. However, as we explained when we made our findings about the BDM role, the claimant accepted in oral evidence that writing a BoQ was a core part of the activities of a BDM. Even if sole capability

as a bid author was not mentioned in his interview, he aspired to achieve that in FY 2017. We do not accept the claimant's criticism that it was unfair to judge him by whether he was able to or had carried out these activities. A thread which runs through the paperwork is the need to take responsibility for self-improvement – such as by acquiring facility in a task which the BDM had less experience of on appointment.

184. Besides, the evidence of Mrs Allen and Mr Clarke suggested that the BDMs role in completing a BoQ was not so onerous that it should have been outside his capabilities. As Mr Borley said in oral evidence, it seems that the claimant is overplaying the complexity of a BoQ which Mr Borley described as being central to their bids and "a very, very simple document". We accept Mr Borley's explanation that the technical aspect of a BoQ would be "handed off" to people such as the technical services and the financial team when they calculated the costings. His view was that demonstrable analytical skills would be sufficient to enable the BDM to oversee that. Their involvement required a simple transfer of relevant information.

185. The narrative on page 195 about what the content of the PDP was to be means that when Mr Borley, in his para.28, talks about the development needs being moved onto the PDP that is not inappropriate although when it started the PIP seemed to be in its final month. We see from Mr Borley para 30 that the PDP was revised during the course of the month's extension of the PIP. The plan is at page 209. Among the goals are 'improving internal network' and 'funnel development'. It appears that shadowing with various specialists was to be arranged which is another supportive measure. The requirement to be competent in constructing a BoQ appears to be going to be addressed by constructing a dummy. BoQ.

186. On the one hand Mr Borley says in his para:31 that, by 25 July 2018, most but not all of the claimant's development areas had been satisfied. On the other hand the claimant states that the informal PIP/PDP were concluded and signed off in July 2018 and criticises the respondent for failing to confirm this.

187. We find that it is not accurate to say that performance concerns were not documented even after the informal PIP period had finished. The same areas came up in the PDP which was only drafted in June. We note the email datted 17 July 2018 at page 211 which asks the claimant to focus on the amber categories on page 209. Those include building on relationships with the wider team - the issue of visability. It is also not accurate to say that the respondent provided inadequate training. We think that rather than the informal PIP being signed off it is more accurate to say that it came to an end. It cannot reasonably be inferred from the end of the PIP period in this case that the required improvement had been made in all the areas being monitored. That would be inconsistent with the terms of the PDP. However, there is some inconsistency about the evidence about how the PDP was to be used and whether it was completed (see para.199 below).

188. In the FY 2018 PMP at page 230 Mr Borley says in his 'WHAT' feedback,

> "Giles has been supported throughout FY17 by an informal PIP process, later transitioning into a focused PDP. There were some challenges re progress against the initial PIP which resulted in an extension. There is no doubt that during team

> projects Giles has the ability to positively contribute, especially around customer research and elements re the broader NHS landscape. However there are a few areas which Giles needs to continue to focus on, some of these have been a focus during FY17 and whilst progress has been made, there is still more to be done before Giles reaches a level of performance which the role requires The areas where the most significant improvements can be made are aligned to the focus of Giles PIP and PDP, expanding internal networks, being more decisive and providing more solid leadership to key projects/tasks, being more visible throughout the team and the business. Due to these developmental areas outstanding Giles projects are often scrutinized, primarily as he does not provide the confidence or focus to the broader team and stakeholders that he is indeed focused and in control. Despite Giles tenure now exceeding 24 months within the business there is still self acknowledgment that further development is required."

189. In his HOW feedback he says

> "Giles is a likeable character within his immediate team, and still somewhat unknown outside of that. Whilst he has worked hard this year to expand his network there is still significant progress to be made here. Giles needs to focus on his confidence in his role capability, especially when leading internal teams and also when formally presenting with customers. On the latter this Is only really evident in the formal bid setting which suggest its directly related to technical understanding of the core ES business, in general engagement Giles comes across well and seeks conversations with customers. I would really like Giles to focus on his visibility internally, to ensure that he builds confidence of his leadership across project groups, and ensure he continues to focus on development of his internal network."

190. Overall this assessment seems to us to be consistent with the claimant's own wording at the top of page 232 where he recognises that there is still some way to go in terms of reaching the required level of BDM but thinks that he is making significant steps to close the gaps and gain the required experience. That wording is taken directly from the claimant's draft document (page 228).

191. It is alleged on behalf the claimant that there was no criticism of him between 25 July 2018 (the end of the PIP period) and 21 November 2018 (CWS para 48). Preparation for the 2018 PMP have begun at least by 10 September 2018 when the claimant wrote his comments (page 228). The review with Mr Borley probably took place sometime that month. The claimant was assessed as having partially achieved his 'WHAT' targets and partially met expectations on 'HOW' which gave him a TPR 4 out of 10. According to page 232 that translated to an IPP of 70%. It is difficult to understand how that could in be interpreted as involving anything other than criticism of the claimant's achievement.

192. The claimant says in his paras.140 - 142 that there was no assessment of his development needs, no mention of what action to be taken in respect of alleged underperformance and Mr Borley seemed very happy with the standard of work he was producing. That seems improbable, given what is recorded as the claimant's own comments, let alone what is recorded by Mr Borley.

193. If one compares the targets he had under 'WHAT' with the performance he describes in page 228, it is clear that he is not met targets 1.2, 1.3 (although

arguably prospects were in the pipeline), 1.4, or 1.5. The claimant appears to have a prospect of achieving target 2.1 but not fully. In those circumstances it seems improbable that there was no discussion of his ongoing development needs. His evidence in paras.140-142 is a further illustration of the perception gap between the claimant's assessment of his performance and that of the respondent and we reject his evidence on this point.

194. Based on this evidence, we accept Mr Borley's statement that some of the same problems either remained or had re-emerged. The gap between the end of the informal PIP and the next record of performance concerns is in reality only 6 to 7 weeks. The problems came to light and were documented before the next Roundtable meeting.

195. We compare that with page 613 which is a table setting out the PMP FY 17 and FY 18 results for Mr Clarke and Mr Tanner. The IPP for both exceeded 100% in FY 17 as did Mr Tanner's in FY 18. Mr Clarke had IPP of 90% in FY 18. The claimant criticises the respondent for not disclosing the actual PMP forms but we consider there has to be some basis for which to doubt the figures before we rejected them and there is none. The claimant points out that at the time of the grievance appeal investigation by Ms Suller there were documents available in order to produce the table and the core data could have been retained.

196. The FY 2018 Roundtable meeting was held in November. It is argued on behalf of the claimant that Mr Borley must have known the attendees for this and suggested that a decision is taken at it that the claimant should be placed on the formal capability process despite the fact that the PIP/PDP had been closed and the claimant had improved.

197. Although there are aspects of the Roundtable process that are not transparent (the attendees and whether there are any comments about an individual and – if so – what effect that has on the IPP), the factual context going into that 2018 Roundtable meeting is far removed from that alleged on behalf of the claimant. It does not appear to be the case that the PIP/PDP had been closed in the sense that the claimant had achieved everything on the development plan. The claimant had improved in some matters, principally administration. The same areas that had caused concern before were amber on the PDP. He was still not meeting core aspects of the role and the respondent was entitled to set their expectations for this. He had made improvements but he had still not achieved the minimum standard for the role.

198. When Mr Borley meets with the claimant on 21 November 2018 to review the PMP following the Roundtable, he informed the claimant that there was to be a capability hearing. There was an exchange of emails in early December (page 239 to 240) where the claimant sets out his recollection of what was discussed and Mr Borley comments on that. The claimant records him as having commented that "internal stakeholders lost confidence" in the RBFT tender. Mr Borley states that referred to "feedback from the PMP roundtable and through individual project team members relating to the RBFT bid and other projects". He then gives specific examples of what he meant which adds credibility to Mr Borley's evidence on this point and we accept it.

199. It is fair to say that, in the email at page 239 Mr Borley appears to accept that the PIP and PDP were signed off, and the claimant relies heavily on this acknowledgement. The actual words used are "since these documents had been closed down (both associated with your informal PIP review) I stated that I felt some of these issues have resurfaced." That is an important caveat.

200. In our view when for two years in a row an employee has failed to meet their targets that meets the definition of "regularly failing to meet targets or standards of role" within the definition of poor performance on page 146. To take more formal action in this situation is only applying the policy. The claimant, in his para:177 suggests that this is relying on a signed off informal PIP to commence a formal PIP. We think the claimant has misunderstood THE policy. The first sentence at the top of page 151 states "if you fail consistently to perform to the targets set in the informal discussion, the issue will be brought to work capability hearing with your line manager". In our view this applied to the claimant. There was not sufficient or sustained progress on the part of the claimant.

201. The claimant was invited to the capability hearing by letter dated 13 December 2018 at page 244 which was sent by an email at page 242. The email records the different documents that were enclosed with it. They include the MSF at page 214. It seems clear to us, looking through this, that the position put forward by the respondent is that he has been under one process or another for some time and they make clear what the persistent underperformance is said to have been. The claimant is made fully aware of what is being said.

202. In his response to the invitation on 17 December 2018 the claimant raised a concern about being treated differently in comparison with a colleague (page 246). He also raised a number of the concerns that the subject matter of these proceedings.

203. The capability meeting was held on 18 December 2018 (page 250) and was conducted by Mr Borley. The outcome is at page 268. The claimant was given the first written warning and a formal PIP. The claimant particularly complains about comments in the outcome letter that:

> "there is a requirement for more rework with the content which you create than is acceptable and expected" for the BDM role (page 269) and that there was "limited visibility of activity" (page 270).

204. The observation that there was limited visibility we consider to have been based on observations by the respondent managers over a long period of time that his profile was lower than expected for a BDM. The claimant had been told about concerns that his diary seemed empty not only is an indication of a lax approach to administration but also in relation to it an empty diary providing a lack of evidence of commercial engagement. This was not a new problem.

205. The claimant accepted in oral evidence that his work on both the Aintree and RBFT bids had needed reworking - although he did not accept that his work needed more reworking than anyone else. Whether the comments to that

effect by Mr Borley in the capability outcome letter are fair or not involves consideration of whether the claimant and his fellow BDM's had the same level of access to the resources of the solutions author, Sarah Waiton.

206. It was put to Mr Borley that the informal PIP and the PDP had merely been a vehicle to move the claimant out of his role. He rejected this, saying the formal PIP had been the next steps in the developmental review because there had been resurfacing of behaviours that had previously been addressed and that was the reason they were documented in the invite to the capability hearing. He did not think it was necessary for him to inform the claimant that there had been talk of alleged outside business interests because he. Personally, would only think that needed discussion if it had involved a conflict-of-interest. We accept that to have been Mr Borley's genuine belief. When asked by NLM Crosby how he had known there was no conflict-of-interest he said that when Mrs West told him about the business she spoke of it as already closed down and he would have expected her to have explored it prior to his appointment had there been a risk of such a conflict. We consider that to have been a genuine answer; he did not explore it with the claimant because he thought the previous business had folded - he thought the claimant was not running that business when he was managing him. Although her involvement was later in the process Mrs Suller similarly shrugged this off as not being an issue if the claimant had been performing.

207. We find as a matter of fact that such information as Mr Borley and Ms Suller had about this allegation of outside business interests did not cause them to mistrust the claimant and did not cause them to think he was "up to something". We are mindful that we have not heard from Mrs West, but her responses in the grievance interview suggests she was seeking explanations for why the claimant might not be performing rather than considering this to be a reason to be suspicious of him.

208. On the allegation that the respondent was seeking an opportunity to move the claimant out of his role, it does appear that Mrs West at least had had that thought in mid-2017. However what the respondent actually did after that was to invest significant resources in supporting the claimant as an employee. By this we consider they did not merely pay lip service to the process, they went over and above what is required by it. The actions we think lead to this conclusion are

    a. an informal PIP initially set at two months rather than the minimum one which was then extended and ended up lasting for six;

    b. buddying or shadowing by established colleagues

    c. a coach

    d. the PDP and

    e. Although the claimant may not appreciate it, the amount of detailed analysis in the review meeting notes in January to March 2018 speak to the amount of time Mr Borley spent on this.

209. It has been common ground that the claimant came to the BDM role with a different skill set and this would mean he needed fair time to grow into the role. We have found that the respondent had genuine and well-founded concerns. They are entitled to expect particular standards of performance in the interests of the business but the support we have outlined above causes us to think that they did value the claimant's different skills and wanted to help him achieve in areas where he had less experience. The suggestion of a dummy BoQ is an example.

210. There is an exchange of emails between Mr Borley and the claimant at page 282 to 283. In that, on 18 January 2019, Mr Borley gave instructions for the claimant to take the lead "for all BD relevant responsibilities" on a radiology bid which he says "must be approached as a must win" and said:

> "I would like it to ensure that you take sole responsibility for the written content, financial modelling (BoQ) until handover to finance, the leadership of the cross functional project team, developing and defining the strategy, and assuming a lead position on all internal and external communications."

211. He asks that he and Sarah be presented with a completed proposal for review and final copyediting and states that the claimant taking a sole lead on this will support his PIP. The claimant, in his response on 25 January, disagreed with Mr Borley's expectation that he act as "sole author" for the project and states that he regards this as an unfair expectation because:

> "you do not and have not placed this expectation on any other BDM. Sarah has worked on all tenders and pricing proposals from the outset-helping us as BDM's to create content and review content."

212. He goes on to state that he believes this not only to be unfair but to be discriminatory and asks to be allowed to engage with Sarah "in the same way you are now both Pete and Steve the latitude to engage at an early stage". Mr Borley responds at page 281 to say that he expects the claimant to take sole responsibility not to be sole author. He states that what he has asked is for the claimant to make

> "any requests for additional support i.e. content creation visible to myself. This project is part of your PIP with specific focus on you improving the quality of your work… And therefore it is important that this provides the appropriate transparency around the responsibilities of your role".

213. In essence Mr Borley was saying that he wants to be able to see the quality of the claimant's own work because the claimant is on a PIP. We do not accept that the allegation that he was denied access to Ms Waiton is made out; Mr Borley was merely telling him that he could rely on her to do her job not his and that he, Mr Borley, wanted to see the claimant's work because he had just started a formal PIP and was testing the claimant's capabilities. Contrary to the claimant's belief it was not done for an ulterior motive.

214. Overall we accept Mr Borley's evidence that the claimant work required more reworking than other BDM. Although it is a particular criticism that emerges under the formal PIP it is consistent with the pattern of objectively evidenced

concerns that the claimant was not meeting expectations in the role. We accept that it was an observation that was objectively justifiable.

215. At the same time as Mr Borley was drafting the claimant's formal PIP, on 22 January 2019 he sent an email to Mrs West and Mr Shergill of HR to tell them that he would send the draft to them the following day. He also states (page 273) "I wanted to highlight this to you" and includes a link to an article at page 881 which, as we explain above, is about the claimant's previous race discrimination claim.

216. When Mr Borley was asked about this he said he could not recall who had told him that the claimant had brought the previous race discrimination claim but said it was "early in his tenure". He initially said that he had shared the post with Mr Shergill after the grievance being raised; the grievance was dated 3 February 2019 so that is not correct. However when that was pointed out to him he said he thought the grievance was in December. He accepted he might be mixing the dates up. He accepted that it would be fair to say that seeing the grounds of the grievance probably because the information he had received to resurface but that explanation does not make sense with the dates. He could not recall whether he had shared that information with Mrs West sooner.

217. He pointed out that the previous tribunal claim against the employer had involved consideration of a capability hearing process and said "that was the relevance that the claimant has previous experience in performance assessment" and seemed to suggest that it was the factual matrix rather than the fact of the race discrimination claim that was relevant.

218. He was then taken to the 17 December 2018 document at page 248 where the claimant challenges the assessment that he has underperformed in his role and it was suggested to him in cross-examination that the references there to the allegation of different treatment may have caused him to suspect the claimant to be complaining of race discrimination and it was suggested to him that he believed the claimant was "playing the race card", using their race when they don't believe it's a genuine complaint. Mr Borley said that was a difficult question to answer that he did not know whether or not the claimant was genuine in his belief.

219. The claimant appealed against the imposition of his PIP on 23 January 2019.

220. The claimant presented a grievance on 3 February 2019 (page 286 with the detailed complaint starting at 288). The key elements are analysed in CWS para 67. It was investigated by Mr Dand at a grievance hearing on 25 February 2019 (page 279). It was within the investigation meeting with Mrs West on 4 March 2019 (page 484) that she makes the comment that she had been informed that the claimant had outside business interests so it is through the grievance investigation that the claimant discovers that she had this mistaken belief.

221. There was evidence before Mrs West as there is before us that the claimant at the time she managed him was slow to respond to emails and his general administration was poor. This comes from Mr Clarke and Mrs Allen as well

as from Mrs West herself. The claimant had been a company director although the company was dissolved and she did not tell Mr Dand the source of her information. Mr Borley told us that Mrs West had told him there was a reference to a company at Companies House but she had not shown him the document. We do not see evidence that Mrs West would not have had the same concern about anyone else who was relatively slow in responding and whom she had been told had outside business interests. As we say above she seems principally to have been looking for an explanation rather than thinking that a directorship of a folded company was something to criticise the claimant for and then finding something to criticise.

222. Contrary to what Ms Veale says (RWS para.225 to 227), the claimant's only complaint about the grievance investigation process was not that Mr Dand referred to this erroneous accusation and that that demonstrated he did not properly investigate the claimant's complaint, He also complains within these proceedings about a failure to address his concerns about unconscious bias (see para.229 below).

223. Having read the outcome letter and the passage complained of we do not think that Mr Dand accuses the claimant of having outside business interests. He simply says there was a "suggestion of outside distraction". We do not read the outcome letter as leading to the conclusion that Mr Dand believed the claimant to have competing outside business interests. If the claimant alleges he was falsely believed not to be responsive because he was falsely believed to have outside business interests then we reject that. There was objective evidence in the form of an apparently empty diary and being slow to reply to emails that caused the respondent to think that the claimant was insufficiently responsive and they looked for an explanation of that. Overall we do not think it a valid criticism of Mr Dand's investigation or report that he records this point without reverting to the claimant about it.

224. Therefore when the claimant criticises Ms Suller for failing to address this aspect of Mr Dand's report this is not a valid criticism either. Both focussed on the substance of whether there were genuine grounds for concern about the claimant's performance or whether he was being treated less favourably in relation to performance management or the demands of his job.

225. In the investigation meeting between Mr Dand and Mr Borley on 6 March 2019, the latter made the comment that the claimant had to be pushed to attend training in Germany. The interview record starts at page 500 and comment is at page 502 where Mr Borley says that he "pushed GM to attend the week-long BS portfolio training in Erlangen". As we have said, the claimant cannot failure be criticised for not doing the training in 2016 but we do not understand that to have been Mr Borley's position. The claimant contrasts this apparent criticism of him with treatment of Mr Clarke who, as we understand it, attended the same training in November 2017 as the claimant and had not previously undertaken it despite being in the company since 2013.

226. We do not think that in this respect Mr Clarke is an appropriate comparator for the claimant despite being a BDM since 2013 because we accept the following oral evidence that he gave:

> "I'd come from a product role. I'd been a product specialist. There's an annual meeting where all product specialist meet on the planet somewhere and all new equipment is presented. Therefore when I joined in 2013 I was very aware of Siemens portfolio and was still aware in 2014 and 2015. As knowledge started to diminish when this portfolio training became available – don't think it was available initially - I asked to go on the course so that I could have a refresher."

227. So although Mr Clarke was not criticised for going on the course sooner there are genuine reasons specific to him to believe that he did not need the training until he himself considered it necessary.

228. Although Mr Borley appears to have used the word "pushed" rather than "encouraged", for example, we do not think in context it to be a particularly critical word. Part of what the claimant is being encouraged to do focus on self-development.

229. The grievance outcome was delivered on 13 March 2019 (page 528). The claimant criticises Mr Dand for not dealing with his concerns that there were no checks and balances in place to ensure that there was no unconscious bias in the PMP process. He took Mr Dand to the respondent PMP Roundtable Unconscious Bias Reminder and we have also been taken to that page 447.

230. That document provides an explanation of unconscious bias which is uncontroversial (page 450). Unconscious bias is described as being "when our brains make quick judgements and assessments of people and situations without even realising it" and the following common biases that impact decision-making are listed:

    a. Affinity bias - tendency to favour people who are like us;

    b. Confirmation bias - when we seek to confirm our beliefs, preferences or judgements ignoring contradictory evidence;

    c. Halo effect - when we like someone and therefore are biased to think everything about that person is good;

    d. Social and groupthink bias - the propensity to agree with the majority or someone more senior to maintain harmony.

231. The claimant considers that Mr Borley and Ms West were displaying the behaviour the training was designed to prevent. Mrs West confirmed to Mrs Suller during the grievance appeal investigation that she had not participated in training in diversity and inclusion. Mr Borley told us that he had undertaken unconscious bias training both at Siemens and that a previous organisation. He said that formal equality training would have been part of the standard induction training when he joined Siemens but more formal training on unconscious bias had been with his previous employer. The unconscious bias training with Siemens had been after the claimant's grievance. As Mr Borley says, unconscious bias training covers broader issues than bias caused by racial stereotypes. It does not seem as though the training he received was specifically directed towards identifying and guarding against

racial stereotypes but the guidance that Mr Borley described being given about taking time to think about the decision and not acting hastily is the sort of guidance that encourages good evidence - based decision-making and that is the antithesis of being influenced by stereotypes.

232. A transcript of the respondent unconscious bias training module launched in 2018 is at page 167.

233. Mr Borley was challenged about the view that he formed of the claimant as a result of the information provided to him by Mrs West about the previous business interest. Those challenges did not clearly suggest to him that, if he had been predisposed to make snap judgements about the claimant as a result of information about business interests (which he did not check with the claimant) that that provided any link with race, or that the alleged snap judgements would have been different had the claimant not been black British.

234. The claimant appealed against the grievance outcome and that was decided by Mrs Suller. Her oral evidence was that she did not carry out a rehearing but she clearly investigated those matters she felt she needs to. It was not merely a paper exercise, she carried out further interviews (CMS para.7) and extended the length of the appeal hearing with the claimant as she explains in her paragraph 4. Both the claimant and his trade union representative appeared content with the process at the time. She then met with the claimant on the second occasion and received further written representations from him together with his amended notes of the grievance appeal hearing.

235. The way that the claimant articulated his race discrimination complaint at the appeal stage is set out at page 604. He says that he has catalogued a series of different treatment compared with his colleagues and point out that he is the only black BDM in the immediate team and one of two the ES business unit. He states that neither Mr Borley nor Mrs West had participated in unconscious bias training that had been launched the previous November. In his amended notes at page 696 he disputes that he had slow response to emails or lacked visibility and was unavailable to take calls perceptions which he considers to be prejudiced by gossip an unfounded rumour about him pursuing outside business interests. As we have already explained, our finding is that there was objective evidence to validate Mrs West concerns.

236. Among the interviews carried out by Mrs Suller was one with Mrs West that starts at page 622. In that there is the following exchange about the “outside interests”:

> “MS-was there any discussion that the Roundtable about GM having outside interests?
> NW-I don’t recall any conversations at that forum. Have we wondered about that? Yes we have. I’ve spoken to Louise about it as the relationship that he has with his teammates are seriously fractured and have been for some time. GM’s history was brought up by his colleagues. Second of all, there are problems in the team one of them found that he had recently folded a private company at Companies House. Have people speculated about that? Yes they have
>
> MS-do you think that speculation has been damaging?

> NW-I don't care if you have multiple businesses as long as he's doing his job. It would need to be declared if that was the case but no, this is about his performance in role."

237. These responses tend to support Mrs Suller's view that this was not a major feature of the managers' concern.

238. The capability appeal hearing was adjourned until the conclusion of the grievance appeal. That was delivered by an outcome dated 14 June 2019 (page 728) which upheld the original decision that there was no case to answer. Ms Suller focused on three areas that she set out on page 729 the third being the allegation of race discrimination. Her investigation of concerns raised about lack of unconscious bias training appear at the top of page 732. Her findings about race discrimination was that the difference in treatment was based on performance not on race (see page 733). She does not make reference to the speculation about business interests but we accept her explanation to us that she did not consider it to be a major feature and she had grounds to reach that conclusion. We accept it is a major concern of the claimant but it was open to Ms Suller to accept that it was not a major concern of Mrs West.

239. On 6 June 2019 Mr Borley emailed the claimant (page 705) about a presentation for the UHB bid to take place on 19 June 2019. He states that "as ES lead for UHB I would like you to lead on this time critical project" and sets out the requirements for submission of documents and the timetable for this. What was required was a Request for Information prior to a potential bid for a cardiology contract. The claimant replied the following morning (Friday) asking whether he could be stood down from attending a conference the following Monday or 4 day management course in Munich on Tuesday to Friday. Together these took up a working week of the tight timescale. It appears from Mr Borley's email that the respondent had been debating over the previous couple of days whether or not to put in a bid. The claimant complained that it could have been sent to him on Monday or Tuesday of that week, and that as a result "two vital days" had been lost. He also complained it would be difficult to move at pace and the area is unfamiliar to him.

240. Mr Borley responded that evening (page 713) saying that he will allow the claimant to decide to step out of the Monday conference but not the training and said that he considers that one day should be sufficient to complete the Request for Information. There is also an exchange with Mrs West during which the claimant suggests that he is completing this work on 10 June 2019.

241. Despite the claimant himself saying in the correspondence that two days had been lost this was put as four days. We accept Mr Borley's explanation that two business days was the amount of time taken for them to discuss the bid at senior executive level, including with the managing director. The potential scope of the bid meant that they needed to know whether it was something they wanted to respond to or not.

242. We do not consider these expectations to have been unreasonable. Mr Borley has produced cogent evidence of the reason for the delay in notifying the claimant which we accept. We also accept that what the claimant was

being asked to produce in relation to UHB was a Request for Information which does not need to be as detailed as a bid.

243. As we have previously said the claimant complains about unfair access to Sarah Waiton, the Solutions Author. We accept that her time had to be managed and the use of her as a resource needed to be shared amongst other BDM's. Mr Clarke gave oral evidence, which we accept, about her role and her job description is at page 135. She does not create novel content.

244. We note that during the informal PIP review noted at page 189 Mr Borley asked the claimant how much he is relying on Sarah. The claimant complains of difference in treatment in terms of access to her in his email of December 18 (page 248) and relies upon information that Ms Waiton apparently told him that she had created about 75 to 80% of the content for Mr Clarkes project for Norfolk & Norwich. So the claimant alleges that he is being asked to rely less on Ms Waiton when Mr Borley is happy for her to create the majority of content for a more experienced and senior BDM. The claimant rejected the suggestion that Ms Waiton's role was to ensure that the response was consistent and read well but did not have technical knowledge that enabled her to write up the tender. He said that she was allowed to assemble information on initial tenders for Mr Clarke and Mr Tanner.

245. This was an accusation that was bluntly rejected by Mr Clarke in his oral evidence when he said the following:

> "This access to SW will be purely dependent on tender. We don't reinvent the wheel. If we have a tender fairly similar to an existing one SW may, in the background take that written process from that and adopt it to suit the next tender. The BDM will need to study the bid … aspects of that bid need to be written by BDM, a rough draft will go to SW who was brought in because our – I joined in 2013, my background started as technical writer promoted to technical author [I write] in very technical way. SW's skill is to make technical [text] more easily read by those without technical background."

246. Although this does not directly contradict what Ms Waiton appears to have told the claimant, it does provide evidence that the support she provided was based on need. We were also taken to emails at full 465 and 469. The claimant alleged that page 469 shows Sarah as the author of a large number of sections for the NNUH draft, and that page 465 shows significant involvement in the Manchester bid. Ms Waiton herself was asked about this by Ms Suller in an interview noted at page 626. She stated that she mostly copyedits what the BDM's have written because they were the experts on their customers (page 627). She stated that she often re-writes it but does not create the content from scratch and describes having an aspiration to write more content. This seems to be no particular reason why she should dissemble. When asked whether her involvement varied from one BDM to the next and she states that it does not.

247. We do not think that we can say from the documents it 465 and 469 that Ms Waiton is shown giving a level of support to Mr Tanner that is inconsistent to what she later describes to Ms Fuller. The notes of her grievance appeal interview are the best evidence of what she was providing by way of support to the different BDM's. If anything she states that at the start of her

employment she probably supported the claimant more because he like her had come from outside the industry.

248. The claimant resigned on notice on 17 June 2019 and was placed on gardening leave for the period of his notice and was subsequently certified unfit to work due to work-related stress. In his resignation letter (page 757) he states that he considers his position has been made untenable by what he considers to be an imposition of a PIP and written warning which amount to race discrimination. He cites being subjected to unsubstantiated false rumour which he alleges have undermined his professional reputation. He states that he regards his resignation to be constructive dismissal.

Conclusions

249. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment but we have them all in mind in reaching these conclusions.

250. We are asked to make adverse inferences from the absence of key documents and the late disclosure of Mrs West's notebooks. As we explain in para.22 above, the claimant's representatives had asked for a large number of documents to be disclosed, including notebooks that had been referred to in the grievance meetings. Some, such as minutes of Roundtable meetings, we accept did not exist and have considered what impact that has on our findings about what took place at them but that is not a failure to disclose, as such.

251. Among the documents said to have been missing are other texts from Mrs Allen to compare with the text at page 190 and to test her assertion that she would have behaved the same and contacted Mr Borley had she had any concerns about other BDM's.

252. As we have already said, we considered her to be a very straightforward witness. Her belief was that the text at page 190 had been disclosed by the claimant and she had not provided any texts. She recalled being asked as part of the respondent's response to the DSAR for emails and texts between herself and certain individuals concerning herself and the claimant. She had provided emails but had not submitted any texts because when she was asked for them she no longer had them. She said that her practice was to clear out her phone after each project because the texts were no longer relevant for her. She stated that she had not been asked directly by the solicitors to provide any texts. She was efficient and concise in her answers and came across as a practical person. The practice she described of deleting them rather than keeping them on her phone seemed consistent with that and we accept it to be the truth.

253. The failure to disclose the daybook as soon as it was located by Mrs West does not reflect well on whoever was responsible. However we have no reason to think that that was Mrs West herself who provided a supplemental statement stating she forwarded them to the respondent's HR contact as soon as she found them in May 2021. The explanation put forward for late

disclosure when we were considering the respondent's application to rely on that documentation was not sufficient in that it was not a good reason for delay to set against the potential prejudice to the claimant and to the smooth running of the hearing if the documents were admitted. That is not to say that it was not the genuine reason. The first hearing was adjourned at short notice for lack of judicial resource. It is not an acceptable reason that there should be a failure to disclose the daybook to the claimant's representatives simply because the hearing is no longer the most urgent task but it does seem likely that it is why disclosure was overlooked. We have not seen the contents which were removed from the bundle. Wherever the fault for late disclosure lies we do not think it is grounds to draw an adverse inference against Mrs West or any of the other witnesses.

254. We consider carefully what the forensic consequences in the context of the evidence in the present case are of the practice of using an undocumented Roundtable meeting within the PMP process. We repeat our findings in para.103 where we accepted the respondent's evidence that the PMP forms are not circulated to attendees. It is somewhat surprising that the respondent's witnesses were not able better to recollect who at least some of the attendees in November 2017 or 2018 were, but Mr Borley said he was unwilling on oath to make what, in essence, would have been an educated guess when he could not positively remember who attended. We do not think that this was evasion on his part.

255. Otherwise the PMP and the PIP processes are thoroughly documented with specific details that can be referred back to core elements of the BDM role. Had the input into the Roundtable meeting been in stark contrast to the output, there would have been something to explain. Had there been a change in scoring it would have been prudent to make a note to keep a record or ask the individuals manager to do so. It may be difficult to reveal the sources of the feedback provided by fellow members of the team but where the outcomes are challenged it does seem to us to be fair that an employee can understand what has happened and why.

256. As a matter of fact we were not satisfied that the scores were changed for reasons we explain in paras.142 to 157 above. In essence, we accepted that the scores of 2 for "WHAT" and 1 for "HOW" in FY 2017 were Mrs West's assessment of the claimant and were in place before the Roundtable meeting. In the absence of Mrs West, there are questions remaining about two points, but the claimant's allegation of a substantial downgrading is factually wrong. We are certainly not satisfied the scores were changed dramatically in the way alleged. In the 2017 PMP the IPP was at the bottom end of what was justifiable. The lack of documentation of feedback received in the Roundtable meeting or of any moderation or calibration to the claimant scores in the 2017 or 2018 roundtable meetings means that stage in the process lacks total transparency. That provides a space within which discrimination could occur and it does open the respondent up to criticism of that process. The approach we have taken as a result is to presume that the burden of proving that the reasons for actions in relation to the PMPs and the capability policy were not in any respect tainted by considerations of race transfers to the respondent, where we are satisfied that the core facts amounting to the act complained of have been proved.

257. The following submissions were made on behalf of the claimant in relation to alleged unconscious bias –

    a. It was accepted that it was insufficient to assert that biases are held unconsciously. MB accepted that similarity bias had been included on his unconscious bias training and agreed that it's a risk. He agreed that unconscious bias could occur and that discrimination could occur unconsciously and that should be robust procedure and if not follow they were more likely at risk of committing discrimination. It was asserted that there was evidence before the Tribunal as to how decision making in the present case was affected by biases and prejudice.

    b. It was argued that the respondent's representative misunderstood what was argued and repeated that unconscious bias is an attitude towards a category of people with different protected characteristics and occurs when people make snap decisions about people. The fact that the claimant was the only Afro-caribbean BMD in the ES team made those assumptions all the more likely.

    c. The report of business interests was the catalyst which caused the respondent alarm – caused them to be concerned. It was asserted that, if that person had been white they would not have formed the same negative views. Negative views explain why black people are stopped more often than – you may see someone and you will automatically form a view and if the prejudices are not understood they cannot be mitigated against.

    d. Their failure to ask the claimant about the outside business interests was because they did not trust him. Had they trusted him they would have asked him and accepted what he had to say.

258. The respondent argued that the connection with race appeared during the course of the hearing to develop into the following: that the erroneous belief of the outside interests were in line with a stereotypical assumption black people up to something and were not to be trusted. We were referred to para.57 of their submissions and the argument that the Tribunal cannot find just because there is a common racial stereotype that it was in play in the alleged discriminatory conduct. That was, Ms Veale argued, the error in B v A [2010] IRLR 400, EAT. In that case the Tribunal had considered that it was common to assume that men are more prone to violence than are women and that the manager who dismissed the claimant had been influenced by that stereotype. However, there was no evidential basis for the Tribunal in that case to believe that the manager in question was subjected to that sexist assumption. Here, Ms Veale argued, there was no evidential basis to assume that the claimant was subjected to any racial assumption. There had to be more than an assertion, or even an acceptance in evidence that a particular racial stereotype was common in society in order to infer that the claimant was subjected to it.

259. Much of the factual context relied on by the claimant as leading to an inference of unconscious stereotyping has been rejected by us. In particular,

we do not accept that the report of outside business interests was the catalyst which caused the alarm. Approaching our fact finding with the caution appropriate to the absence of Mrs West and looking for contemporaneous statements and documents, we are satisfied that the experience of managers and team members alike was that the claimant was not as responsive to emails and not as visible as they expected; for example, failing to accept invitations to meetings, for example, caused inconvenience and his diary appeared empty. We are satisfied that that concern came first and talk of business interests was seeking an explanation for that. We have also given considerable weight to the claimant's own acceptance through the PMP forms for FY 2017 and FY 2018 that he had not fully met the respondent's expectations. We have rejected allegations of less favourable treatment in respect of access to Ms Waiton's services as Solutions Author, for example. Taking all that into account, Mr Borley's acceptance that unconscious bias could occur and the fact that the claimant was the only black British person of Afro-caribbean origin in the ES team does not demonstrate more than that the potential for unconscious bias existed.

260. The first allegation (LOI 1.2.1), is that Mr Borley failed to provide a fair assessment of the claimant as part of the 2017 PMP. This allegation is not made out as a matter of fact. In the first place the assessment was principally that of Mrs West's and not Mr Borley but, more to the point, we are satisfied that the assessment was fair and based on genuine and objectively justified concerns that the claimant had not met his targets for FY 2017 based on the claimant's own description of his performance.

261. It is common ground that Mr Borley placed the claimant on an informal PIP in January 2018 so the factual basis of LOI 1.2.2 is made out. However we have been persuaded that the decision to do so was not in breach of policy. The claimant had been in post for just over a year and had scored 3 out of 10 in his PMP. We have rejected the claimant's assertion that he was significantly scored down at the Roundtable meeting which followed his PMP review. When Mr Borley was appointed he was informed that it was going to be necessary to address the claimant's performance issues. The policy permits an informal PIP to be used within the informal stage. The claimant himself accepted that he had only partially met his targets and his scoring before the Roundtable was a considerable way off the 100% IPP expected in the role. We are satisfied that a white employee who was in substantially the same position as the claimant would have been treated the same.

262. As to LOI 1.2.3, we do not consider the allegation that the claimant's position was undermined by Mrs Allen sending Mr Borley the text at page 190 to be a fair reading of what happened. The text was not critical of the claimant, it was factual; it was stating - as was indeed the case - that the claimant was then working on question 1 of 16 of the document that needed to be completed to a timetable. Mrs Allen had an obligation in her role as Customer Proposal Project Lead to ensure that all BDMs and other members of the team completed their work on schedule so that the ES team would comply with time critical deadlines. We accept that she had not been asked to feedback to Mr Borley about the claimant specifically but would contact him whenever she had a concern that might affect work schedules. This was not a personal criticism and did not undermine the claimant's position in the team. The

allegation is not made out as a matter of fact. Furthermore we are satisfied that she would have contacted Mr Borley had she had similar concerns about any of the other BDM's

263. The claimant has not established that the comment alleged by LOI 1.2.4 was made in the way alleged. We think it likely that something similar to it was probably made in the context of regular reviews of the claimant's performance in the series of meetings that took place during the informal PIP stage between January and June 2018. We find that the claimant's achievements and need for future development were being constantly reviewed. We conclude that, in context, the reasonable employee would not consider themselves to be disadvantaged in the circumstances in which they have to work as a result of that comment or something like it having been made. At worst it betrays a sense of frustration. But we take into account the cogent evidence of performance issues that we have accepted were well-founded. We do not see an evidential basis to conclude that the hypothetical white BDM about whom the respondent had similar performance concerns and who was undergoing an informal PIP so close to the two-year anniversary of them starting would not have been subject to a similar comment. The claim based upon this allegation is not made out either because the claimant is not shown he was subjected to a detriment by what was said or because this was not less favourable treatment.

264. The nub of the complaint in LOI 1.2.5. is that Mr Borley misled the claimant into believing that participation in MSF was mandatory when in fact it was voluntary. The claimant appears to consider this to have been gathering evidence against him. The email sent by Mr Borley makes quite clear that the claimant was encouraged to obtain MSF as a development tool but there was nothing it in would reasonably have caused the claimant to think it was mandatory (see para.181). The core facts underpinning this allegation are not made out.

265. The respondent did commence formal capability proceedings against the claimant in December 2018 but we find this was not unfair or unreasonable. it was entirely in accordance with the capability procedure. If it did arise out of a discussion at the Roundtable meeting in November 2018 we are persuaded by the respondent that it was a decision justified by the claimant performance over the course of the previous 2 years. The claimant compares his position with that of Mr Clarke, who also scored an IPP of less than 100% in FY 2018 but was not given a formal PIP warning under the capability procedure. We do not consider Mr Clarke to be a suitable comparator because the claimant had failed to achieve his targets into successive years and in both measures. Mr Clarke had failed to achieve his "WHAT" rating in one year having scored maximum marks the previous year. This means that the claimant fulfilled the definition of persistent poor performance under the capability procedure and the evidence does not suggest that Mr Clarke did

266. To the extent that this allegation is made out we do not find evidence that a suitable hypothetical comparator would have been treated more favourably than the claimant and the respondent has persuaded us that there were entirely non-discriminatory reason for their actions.

267. The claimant complains of a number of comments that he describes as being unfounded, negative and disparaging. The first of these, LOI 1.2.8.1, is based on the statement by Mr Borley to Mr Dand in the grievance investigation that he had pushed the claimant to attend training in Germany. It appears to have been Mr Borley's perception that the claimant needed to be encouraged to attend. Even taking into account the breadth of the definition of a detriment we struggle to see how it could be said that a reasonable employee would consider themselves disadvantaged by this comment and the claimant's stance we consider to be an unjustified sense of grievance. In any event for reasons we explain in para.226 above we do not consider that Mr Clarke was a suitable comparator because of his background and pre-existing portfolio knowledge prior to starting work with Siemens. The fact that this comment was made about the claimant not about Mr Clarke does not show less favourable treatment of the former, therefore. The claimant has not made out that there was less favourable treatment than an actual or hypothetical comparator in materially the same situation.

268. However, we think that in comments such as these, based on perception - in this case the perception of Mr Borley that the claimant did not show expected enthusiasm to attend this training - we should carefully consider the arguments raised by and on behalf of the claimant that an unfounded rumour about him pursuing outside business interests caused people to view him negatively and that this, it is now argued, is influenced in some way by negative racial stereotype such as that black people are up to something and are not be trusted, to the extent that this is a different argument to that covered above.

269. As Ms Veale argues, this way of putting the case only emerged during the course of the hearing, when counsel was pushed to explain how arguments of unconscious bias or negative stereotyping was said to be linked to race. It is not immediately apparent that, even if based on unverified rumour, the respondent had concerns that one of their employees had interests outside business hours that involved any assumption on their part that was connected in any way with that employee's race. Besides as we have found above Mrs West was seeking an explanation for a lack of visibility which she had actually observed, this was not a perception of lack of responsiveness derived from the rumour of outside business interests. We are satisfied that it represented a genuine concern that she had.

270. In those circumstances we are satisfied there are no grounds to think that any subconscious negative racial stereotype was in the minds of the managers.

271. In relation to LOI 1.2.8.2 and 1.2.8.3 these are statements which were made in the capability outcome. We have found that the statements were well-founded and based on an objective assessment of the claimant's performance. Including these in the capability outcome is not therefore a detriment to the claimant. We accept that it is more likely than not that they would have been included in a capability outcome letter of a white BDM undergoing a capability hearing of whom those things could justifiably be said.

272. The claimant became aware that Mrs West had said that she had concerns that he "may have other outside commitments" because she made those comments in her interview with Mr Dand in the grievance investigation (page 485). These comments were therefore made as we have found. When considering the circumstances in which Mrs West said this and why she might have said it we are mindful that she has not given evidence before the tribunal and although her reasons for absence are good and reasonable ones the fact remains that the claimant has not had the opportunity to cross-examine her about the statements recorded both in the interview with Mr Dand and when she was asked about this in the grievance appeal (page 624). We think the context in which she was asked about it in the two investigation meetings is probably the best evidence we have because it was in the moment are not preprepared.

273. The full context of the comment is,

> "GM got off to a fairly good start and no particular concerns other than NW noted that he lacked response. He is relatively slow in responding. NW expressed concern to John Wright and Clive West about this. Concerned that GM may have other outside commitments."

274. As we have explained in a number of other places, there is evidence outside Mrs West (including from Mrs Allen who did give evidence) that the claimant did not keep to timescales. We accept the respondent's evidence that there was nothing particularly negative about the claimant having outside commitments had it been true provided it did not affect his performance. Simply making that statement within the grievance investigation does not seem to us to have been detrimental to the claimant at all. Since we are satisfied that the possibility of outside commitments was mentioned as a possible explanation for lack of visibility which is objectively evidenced and not the cause of a presumption of lack of visibility we do not see that this was something that actually caused people to think worse of him.

275. Having said that it is clearly something that has very much upset the claimant. We can understand that a reasonable person might be aggrieved to discover that their manager had this belief and to presume from it that they had been the subject of inaccurate gossip. Nevertheless, in all of the circumstances we do not see evidence which it might be presumed that this was less favourable treatment than anyone else in a similar situation would have received. The relevant circumstances of the situation are where a new colleague appears not to reply quickly to emails, appear to lack responsiveness in other ways and was discovered to have a recently dissolved company at Companies House. We see no racial stereotype at play here.

276. Mr Borley, on 18 January 2019, directed the claimant to take sole responsibility for the Gloucester radiology bid (LOI 1.2.9) and not seek support from Ms Waiton for content creation but copy him, Mr Borley in on all requests for support. We found as a fact that, when he did so, his purpose and intention was to be able to see the work that the Claimant himself was carrying out during the time that he was being monitored under a formal PIP. While the claimant's work was being copy edited by the Solutions Author, Mr Borley would not be able to see what the claimant's own contribution to

drafting the bid was. That was clearly important and in the interests of the claimant's development.

277. We have considered the claimant's allegations that he was treated differently in respect of his access to Ms Waiton and rejected it for reasons which we set out at paras.243 - 247 above. Quite apart from Ms Waiton's own evidence in the grievance appeal investigation that her contribution was much the same in respect of all of the BDM's, neither Mr Tanner nor Mr Clarke were under performance review. To the extent that it is reasonable to regard the instruction given by Mr Borley as a detriment (and we are far from thinking it was) we are quite satisfied that Mr Borley has given the genuine and entire reason why he gave it. It had nothing to do with race.

278. It is true that at first in February 2019 the respondent was not able to provide the claimant with a copy of his PMP 2016 (LOI para 1.2.10) for reasons we explain in paras128 - 129 above this was entirely to do with transition between the online systems used for storing and retrieving HR data and he was later provided with a copy. This was nothing to do with race and there is no basis for concluding that anyone else who made a similar application at the same time would have received any other response.

279. In LOI 1.2.11 the claimant alleges that his grievance and grievance appeal was treated unfairly and unreasonably and his allegations of race discrimination were not treated seriously. We do not consider this allegation to be made out as a matter of fact. The allegations of race discrimination were treated seriously. We do not agree that there was anything unfair or unreasonable about the handling of the grievance.

280. The complaint about Mr Borley from June 2019 in relation to the UHB request for information is that he did not pass on to the claimant as soon as he could have done the instruction to be ready to draft the submission and then made unreasonable demands on the claimant given the claimant's commitments which he was not permitted to avoid in the period available to do work. See paras.239 - 242 above.

281. We do not consider the demands of Mr Borley to have been unreasonable or unfair. The role of a BDM is demanding and Mr Borley in one sense was seeking to manage the claimant to operate at a higher level because he had up to that point, not been achieving the level the respondent reasonably demanded of BDM. To the extent that this allegation is made out factually we do not consider it to amount to a detriment because an employee in the claimant's position could not reasonably consider themselves to be disadvantaged by those instructions. The claimant clearly considered that he was being asked to do something unreasonable but this we consider is linked to the perception gap the claimant had between how well he was doing and what the respondent expected a reasonably competent BDM to achieve.

282. Whether as an allegation of race discrimination or victimisation LOI 1.2.12 fails because it did not, properly understood, amount to a detriment. In any event we do not see evidence from which we could infer in the absence of any other explanation that the claimant was subjected to unlawful treatment in relation to this issue.

283. If we presume that we have to look to the respondent for cogent evidence to explain their actions we are quite satisfied that the two-day delay before notifying the claimant that the respondent needed him to take the lead on drafting the request for information response was due to the time taken to consult with senior management about whether or not the respondent wished to make a bid. This was not at all unreasonable, nor is it unreasonable for the respondent, as Mr Borley explained, not to allocate valuable resource until they knew that they did wish to make a bid.

284. Although one might read the exchange of correspondence on this issue (see para.239 - 240 above) as including an element of micromanaging of the claimant's time Mr Borley letter to the claimant to decide whether or not to cancel his attendance at a conference to free up time to do this work but insisted upon the claimant attending a management training programme. For him to do so is entirely consistent with the personal development objectives that have been documented in the PDP. The claimant appears to think that he was being put under unreasonable pressure or being set up to fail when in fact this is another example of the respondent seeking to ensure that he participated in training which would advance his skills to the next level.

285. Given our conclusions above, all elements of the race discrimination claim fail. Although the claimant did resign in response to some of those matters none have been made out as allegations of race discrimination and victimisation and therefore his complaint of discriminatory constructive dismissal also fails.

286. It is accepted that the claimant's grievance of 3 February 2019 was a protected act within the meaning of section 27 EQA 2010.

287. For reasons we explain above, Mr Borley's actions in respect of the UHB do not amount to a detriment. Alternatively, we are quite satisfied with the explanations Mr Borley has given for the two-day delay in notifying the claimant of this work and for the direction he gave to the claimant in executing it. The victimisation claim based on LOI 2.1.2.1 fails.

288. For reasons we have explained in paras:223, 224, and 238 above, we see no justifiable criticism the way in which the claimant's grievance was conducted and his allegations of discrimination were treated seriously so LOI 2.1.2.2 is not made out.

289. The victimisation claim fails.

290. The conduct relied on by the claimant as conduct amounting to a breach of the implied term of mutual trust and confidence is the same conduct is that which was alleged to be race discrimination and victimisation. Although the respondent is not beyond criticism - for example Mr Borley may have expressed herself less sympathetically than he ought to have in relation to the claimant's contribution to the business - overall in their management of the claimant the respondent did not act in a manner calculated or likely to destroy the relationship of trust and confidence.

291. Concentrating on the central criticism of the assessment of the claimant's performance and the actions taken to address it, our findings are as set out above but, in summary, Mrs West ought to have been more transparent with the claimant at an earlier point about her concerns and the capability policy does recommend a more proactive approach. However once the performance concerns started to be managed we consider that the respondent took a supportive approach and tried to develop the claimant because they valued the diverse skills he brought coming as he did from a different background as Mrs West says in her paragraph 3.

292. For those reasons our view is that the claimant has not shown there to have been a breach of the implied term of mutual trust and confidence. He was not dismissed.

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Employment Judge George

10 September 2023

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Date: 11 September 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

FOR EMPLOYMENT TRIBUNALS