EMPLOYMENT TRIBUNALS

Claimant:	**Mr F. Cocos**
Respondent:	**London Borough of Newham**
Heard at:	**East London Hearing Centre**
On:	**25-28 April and 22 June 2023; and (in chambers) on 23 June 2023**
Before:	**Employment Judge Massarella**
Members:	**Mrs M. Legg** **Ms R. Hewitt**

Representation

Claimant:	In person
Respondent:	Mr S. Bishop (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the claim of unauthorised deductions from wages is dismissed on withdrawal;**

2. **the claims of harassment related to race at Issues 3.2.1 to 3.2.6 are dismissed because the Claimant did not pay the deposits ordered by the Tribunal as a condition of pursuing them;**

3. **the following claims of harassment related to age and/or race and direct race and/or age discrimination are dismissed because they were presented outside the statutory time limits and it is not just and equitable to extend time: Issues 2.2.1-2.2.5, 3.2.7, 4.1.1 and 4.1.2;**

4. **there was a single protected act (for the purposes of the victimisation claims) on 18 June 2020;**

5. **the claims of victimisation under Issues 5.2.1 to 5.2.5 and 5.2.7 are dismissed because the allegations relate to acts which pre-date that protected act;**

6. the following claims of victimisation are dismissed because they were presented outside the statutory time limits, and it is not just and equitable to extend time: Issues 5.2.6 and 5.2.8 to 5.2.16;

7. the following claims of victimisation are not well-founded and are dismissed: Issues 5.2.17 to 5.2.21 (including the claim that the dismissal was an act of victimisation);

8. the claim of unfair dismissal is not well-founded and is dismissed.

REASONS

Procedural history

1. The Claimant was employed by the Respondent between 15 May 2017 and 15 May 2021. He presented his ET1 claim form on 26 July 2021 after an ACAS early conciliation period between 27 May and 3 June 2021.

2. There was a preliminary hearing for case management on 24 January 2021 before EJ Barrett, at which the issues were clarified. The Judge ordered the Claimant to provide further information about his discrimination claims. She listed a further preliminary hearing to finalise the list of issues, to hear any strike-out application the Respondent might make and to make further case management orders.

3. That hearing came before EJ Goodrich on 20 May 2022. Alterations were made to the list of issues by agreement. The Claimant wished to add additional detriments to his victimisation claim. The Judge ordered the parties to lodge written submissions on the amendment application and the Respondent's strike-out/deposit order application. In the event, the Respondent did not pursue a strike-out application, nor did it object to some of the proposed amendments, but it did seek deposit orders. EJ Goodrich set out his detailed decision in an order sent to the parties on 11 July 2022 and attached the final list of issues as an appendix. He made deposit orders in respect of some of the allegations of harassment related to race and direct race/age discrimination.

The hearing

4. The case was listed for four days. We could not proceed on the first day because one of the non-legal panel members was not available to sit. I conducted a case management discussion and further clarified the issues. They are as set out in the agreed list of issues appended to this judgment. The Claimant had paid deposits in respect of some of the claims but not others; the latter are shown struck through. The Claimant confirmed that he was not pursuing a claim of unauthorised deduction from wages, which is dismissed.

5. The Claimant raised the fact that some of the Respondent's witness statements were not signed. He suggested that their contents showed collusion between the witnesses. He argued that the statements should be struck out. He did not raise the issue in correspondence before the hearing; he thought it would be appropriate to raise it on the first day. I explained that it was not unusual for

witnesses to sign their statements when they began their oral evidence; he could pursue his point about collusion in cross-examination; the witness statements would not be struck out.

6. The Claimant then explained that, because he was so confident that the statements would be struck out, he had not prepared questions for any of the Respondent's witnesses (not even for the witnesses who had signed their statements). This presented a practical difficulty. I decided that the Claimant would give his evidence first, which would give him additional time to prepare his questions for the Respondent's witnesses. Mr Bishop (Counsel for the Respondent) confirmed the order in which he intended to call witnesses so that the Claimant could prepare accordingly.

7. Mr Bishop applied to withdraw the Respondent's concession that the unfair dismissal claim was presented in time. He submitted that the Claimant's original contract was terminated on 15 February 2021. The Claimant then accepted a three-month fixed term contract in a different role which terminated on 17 May 2021. Accordingly, there were two terminations; the unfair dismissal claim related to the first of these and was presented out of time.

8. I heard detailed submissions from Mr Bishop, to which the Claimant responded, objecting to the application. For the reasons given orally at the hearing, I allowed the Respondent to withdraw the concession, essentially because it raised a jurisdictional issue. To ensure that the Claimant was not disadvantaged by the Respondent's late change of position, I gave him permission to lead additional evidence as to why he had issued his claim when he did and what his understanding was of time limits; I explained that he could argue that time should be extended; he did this in a supplementary witness statement. I also explained the difference between the two tests for extending time ('reasonably practicable' and 'just and equitable').

9. Starting on the second day, we heard evidence from the Claimant. He also relied on written statements from several witnesses:

    9.1. Ms Rebecca Dyer (Senior Law Enforcement Officer);

    9.2. Ms Vanessa Martinez (Neighbourhood Officer);

    9.3. Ms Sarah Overall (Civil And Criminal Law Enforcement Officer); and

    9.4. Ms Carmen Zapatero (Law Enforcement Officer).

10. Because the Respondent elected not to cross-examine them, they were not called to give oral evidence, but the Tribunal read the statements and took them into account.

11. For the Respondent, we heard from:

    11.1. Mr Jamie Blake (former Corporate Director, Environment & Sustainable Transport);

    11.2. Mr Anthony Bennett (Head of Community Safety Enforcement);

    11.3. Mr Nigel Mould (Head of Corporate and Community Resilience); and

    11.4. Ms Allison Sherwood (Community Safety Enforcement Manager).

12. We also had a statement from Mr David Humphries (Assistant Director of Waste, Recycling and Operational Infrastructure), who was unable to attend the hearing because he had been called into hospital for unplanned surgery. The Respondent did not consider it appropriate to apply for an adjournment, given the age of the case. A witness statement and supporting medical evidence confirmed the position.

13. Because time had been lost from the allocated listing, a further day was listed to hear submissions. Both parties provided helpful written submissions (the Claimant also provided a second document on time limits) and supplemented them orally. The Tribunal then deliberated for the rest of the day and the following day, when we reached our decision, which was unanimous. We had regard to all the evidence and submissions put before us; the fact that we have not referred in terms to a particular point should not be taken as indicating that we did not consider it.

14. The Tribunal apologises for the delay in sending out this judgment, which was caused by pressure on judicial resources and the competing demands of other cases.

Findings of fact

15. The Claimant commenced employment with the Respondent as a Law Enforcement Officer (LEO) on 15 May 2017. He is of Romanian nationality. He was born in 1996 and had just turned 25 when his employment with the Respondent ended.

<u>The alleged harassment related to age by Mr Hillesden and Mr Willis in 2019 (Issues 2.2.1 to 2.2.5)</u>

16. In 2019 the Claimant worked on the Tasking Team alongside Mr Alan Hillsden and Mr Stewart Walls, who were British and significantly older than him.

17. The Claimant alleges that 'with increasing frequency (2–5 times per week during 2019) Mr Hillsden and Mr Walls made offensive comments and jokes referring to the Claimant's age'. He said that these included words to the effect 'how come he is earning the same as us when he's barely learned to wipe his arse'; jokes about young people being sexually active; words to the effect of 'I would shag anything at your age'; pointing out women in the street they said the Claimant would sleep with; and commenting in relation to a large woman words to the effect, 'you would try to do that and you'd slip head first'.

18. Other than the suggestion that these incidents occurred in 2019, the Claimant gave no dates for them. There was no clarity as to which of the two men was said to have made which remarks. For example, in his statement at para 24 he said that 'Mr Walls often contributed to derogatory comments made towards me' without identifying which comments he meant.

<u>The allegation of direct race and age discrimination in March 2019 (Issue 4.1.1)</u>

19. The Claimant also alleged that, in approximately March 2019, Mr Hillsden responded to an urgent call for help from the Claimant (who was dealing with a dangerously aggressive member of the public) by falsely stating that he was

busy and unable to assist. He says that this was an act of direct race and age discrimination.

The alleged protected act on 8 March 2019 (Issue 5.1.1)

20. The Claimant's case is that he did a protected act (in relation to his victimisation claim) on 8 March 2019, by discussing with his manager, Mr Nigel Mould, his concerns regarding the discriminatory behaviour of Mr Alan Hillsden. Mr Mould denied that this occurred.

21. The Claimant made detailed notes in his PACE notebook of certain events, including on 8 March 2019. They do not contain any reference to a conversation with Mr Mould on that date. The Claimant's explanation was that it was an 'informal conversation' and that he raised his 'informal awareness, not a complaint'.

22. When the Claimant was asked about this later, at an investigatory meeting into his allegations against Mr Hillsden on 17 September 2019, he said:

> 'he did not report the matter formally at the time, although he did mention it to a colleague, Andrew Boot, who has since left the Council […] to the best of his belief the first [Nigel Mould] formally knew about the incident was when [the Claimant] had sent the email on 31/17/19. [The Claimant] mentions he raised all these matters to his Senior Rebecca Dyer in the first instance.'

There was no reference to the Claimant raising matters even informally with Mr Mould on 8 March 2019.

23. On 26 July 2019, Mr Mould asked the Claimant to document his complaints about Mr Hillsden and send them to him. The Claimant did this in an email, dated 31 July 2019, which contains no reference to an earlier complaint of discrimination on 8 March 2019. It does contain a reference to an incident on 8 March 2019 when he alleged that Mr Hillsden 'shouted at me in the office and threatened to put my head through a window'. He went on:

> '*This was not reported at the time* as I was trying to deal with the incident professionally as to not create any further tension/division between the team' [emphasis added].

24. Nor did the Claimant mention a meeting with Mr Mould on 8 March 2019 in his witness statement, even though he had already seen the Respondent's witness statements when he filed his own.

25. In his oral evidence he said that 'at the time when I intended to raise matters, I did not know that there were protected characteristics, I simply intended to raise the negative experience I was having and their impact'. He accepted that he did not say to Mr Mould on 8 March 2019 words to the effect that he was suffering from discrimination at the hands of Mr Hillsden. He said: 'I detailed the occurrences of the unprofessional behaviour which would have been considered discrimination, but I did not use that word'. In his closing submissions (para 1) he again said that he 'verbally brought to [Mr Mould's] attention the rude and unprofessional behaviours directed at me' and (para 2)

'the constant derogatory, inappropriate and unprofessional remarks (undesired rude jokes) my colleagues were directing at me'.

The Claimant's complaints in July 2019

26. The Claimant had a one-to-one meeting with Mr Mould on 26 July 2019, as did all the team. The Claimant raised with Mr Mould an incident involving an intoxicated male, who was taking drugs in the middle of Stratford shopping centre; he says that Mr Hillsden and Mr Wallis refused to come to his assistance. The Claimant described the incident in his statement; no date was given; in the list of issues, it is said to have happened in March 2019.

27. In the email of 31 July 2019, referred to above, the Claimant alleged aggressive/bullying conduct by Mr Hillsden, consisting of shouting at him in the office, losing his temper and making threats against him. The Claimant said that he now felt unsafe on the road and felt that he had to be careful what he did/said around Mr Hillsden so as not to offend him to the point where he would 'lash out and deliver on his threats'.

28. We are not in a position to make any reliable findings of fact as to whether the incidents occurred as described by the Claimant. They are historic allegations which, for reasons which we explain below cannot fairly be determined so long after the event. However, the Claimant was clearly raising serious concerns. Mr Mould's evidence about what he did in response to them was generalised and unsatisfactory.

29. On 2 August 2019, the Claimant came to work and was sent home by Mr Tony Bennett.

The events between 7 August 2019 and 17 June 2020, including alleged acts of victimisation, direct discrimination and harassment

30. On 7 August 2019, Mr Mould moved the Claimant from the night shift to the day shift. The Claimant alleges that this was victimisation (Issue 5.2.1). Soon afterwards, Mr Hillsden went on sick leave. He never returned to work.

31. On 9 August 2019, the Claimant believed that he was himself under investigation. Mr Mould refused to confirm whether that was the case. In fact, Mr Hillsden, Mr Walls and another officer had made allegations against the Claimant. The Claimant was not told at the time what the allegations were. The Tribunal heard some evidence which clarified this; because the allegations were never put to the Claimant, either at the time, or during the hearing, we think it inappropriate to describe them in a public judgment. For all we know, they may well have been entirely malicious counter-allegations.

32. On the same day, the Claimant raised a further concern about Mr Hillsden's providing the police with a factually incorrect statement.

33. On 30 August 2019, Mr Bennett notified the Claimant that he was under formal investigation into disciplinary matters which, if proven, would amount to gross misconduct. He described them in the most generalised terms. The letter had been sent on 28 August 2019, but the Claimant did not receive it; it was re-delivered to him on 30 August 2019. The Claimant alleges that this was victimisation (Issue 5.2.4).

34. Because there were now allegations which potentially affected the whole of the Tasking Team, Mr Bennett decided to appoint an independent manager, Mr Stephen Sherman (an external contractor) to investigate. Mr Sherman had no personal knowledge of the individuals concerned. The Claimant contends that this was contrary to Council policy and an act of victimisation (Issues 5.2.2 and 5.2.4).

35. When Mr Sherman met the Claimant on 17 September 2019, he focused on the Claimant's allegations against Mr Hillsden. He did not explore the allegations against the Claimant. He planned to do so on a subsequent occasion, if he thought there was a case to answer. That never happened because, when Mr Sherman looked into the allegations against the Claimant in more detail, he concluded that they were nothing more than generalised allegations, with no record of the precise nature of the incident, the date or the time.

36. The Claimant attended a further meeting with Mr Sherman on 2 October 2019. He raised health concerns and was referred to Occupational Health. An OH report was produced on 18 October 2019.

37. On 23 October 2019, the Claimant encountered Mr Hillsden in the locker room. According to the Claimant Mr Hillsden 'followed me with a hard stare and took a few steps in my direction unnecessarily'.

38. On 31 October 2019 the Claimant received a workplace stress risk assessment. He decided not to complete it.

39. On 12 November 2019, Ms Wendy Roberts wrote to the Claimant informing him that the disciplinary investigation had been completed and no further disciplinary action would be taken. Mediation and team building exercises were recommended. The Claimant was told that Mr Bennett would meet with him.

40. In the event, the Claimant was never told what the allegations against him had been. This was badly handled; it caused the Claimant considerable anxiety, which was never properly assuaged.

41. On 18 November 2019, Mr Bennett wrote to the Claimant to tell him that Mr Hillsden had left the Respondent's employment; he did not say why.

42. On 26 November 2019, the Claimant emailed HR about his concerns about the investigation and how it had been handled. He was told that nothing could be done because the investigation was now concluded.

43. On 2 December 2019, Mr Bennett met the Claimant to discuss Mr Sherman's recommendations. Mr Bennett commended the Claimant for his professionalism and forbearance. He suggested that with the help of mediation, the team ought to be able to move forward.

44. On 11 December 2019, the proposed mediation was cancelled; Mr Hillsden had left, and Mr Walls was refusing to take part. The recommendations made by Occupational Health for further counselling and for regular meetings with his managers from 17 October 2019 were not followed. The Claimant contends that the failure to carry out mediation and follow OH recommendations was further victimisation (Issue 5.2.5).

45. Around this time the Claimant was moved back onto the Tasking Team on the same shift as Mr Walls. The Claimant contends that the move was an act of victimisation (Issue 5.2.3). He did not object to this at the time. Indeed, Mr Bennett's evidence was that the Claimant was keen to return to the team.

46. Between this date and 28 February 2020, the Claimant does not describe any adverse treatment by Mr Walls.

47. The Claimant alleged that on 25 January 2020, in a return-to-work meeting with Mr Alva Bailey, he was 'treated with disrespect'. He characterises this treatment as harassment related to race (Issue 3.2.7). The Claimant did not mention this incident in his witness statement and there was no mention of any disrespectful conduct by Mr Bailey during the hearing, either in evidence or in the Claimant's closing submissions.

48. On 28 February 2020 (or 1 March 2020, according to the Claimant's statement), Mr Stewart Walls shouted at the Claimant when they were driving together. The Claimant alleges that this was victimisation (Issue 5.2.6). The Claimant lost his temper and shouted back. The Claimant complained by email but, he says, he did not receive a response until 18 June 2020.

49. The Claimant was signed off sick on 4 March 2020. On 5 March 2020, Ms Susan Lewis, the Claimant's new senior officer, notified him that he would begin a new shift pattern with a new team from 30 March 2020.

50. On 11 March 2020, Mr Mould called the Claimant, who by now was on sick leave, and told him that Mr Walls had been suspended. He told him that this had nothing to do with the Claimant or his allegations against Mr Walls. The Claimant alleges that this was an act of victimisation (Issue 5.2.7). The Tribunal heard evidence that Mr Walls was dismissed for gross misconduct. We were also told the nature of the misconduct; it had nothing to do with the Claimant.

51. On 25 March 2020, the first Covid-19 lockdown began. On 29 March 2020, the Claimant complained to Mr Mould about being contacted while he was off sick.

52. On 28 April 2020, Mr Mould held a Stage 1 sickness absence meeting with the Claimant. The Claimant agreed to complete a stress risk assessment form, provided Mr Mould did not see it. During May and June 2020, the Claimant continued to submit fit notes but did not maintain contact with Mr Mould as he was required to do.

<u>The protected act on 18 June 2020 (Issue 5.1.2)</u>

53. On 18 June 2020, the Claimant raised a formal grievance to Mr Jamie Blake (Corporate Director). The thrust of the grievance was that he felt unsupported by his managers. The four-page document covers much of the same ground as the matters outlined above.

54. Insofar as the letter contains a protected act, it is in the third paragraph, where the Claimant complains about the way that he was treated by Mr Alan Hillsden 'and other associates', which we understood to mean other members of the Tasking Team. The only other person the Claimant has made similar allegations against is Mr Walls and we think it likely that the Claimant was referring to him. The complaint was as follows:

> 'Sexual innuendos, racist comments, derogatory comments made about my family and my ethnic culture were a regular occurrence. I tried to rise above all of this and put it down as bad taste banter […] Things came to a head in the summer of 2018 when a senior member of the ASB Team witnessed another aggressive outburst from [Mr Hillsden] directed at me […] The sexual, racist and derogatory comments continued for the next few months but [Mr Hillsden's] aggressive behaviour eased.'

55. This is a complaint of sex and race discrimination. There is no mention of age discrimination. The rest of the grievance focuses on the Claimant's view that he was let down by his managers; these are not expressed, either expressly or impliedly, as allegations of discrimination.

56. The Claimant concludes as follows:

> 'For the last two years I have been seriously let down by management as a new council employee, namely by Nigel Mould and Tony Bennett. Therefore, I feel I have no alternative but feel obligated to raise my complaint through the formal process of the grievance against them.'

57. When asked to put his case on this document to Mr Bennett in cross-examination, in relation to any complaints of discrimination within it, the Claimant said this:

> 'no I don't believe that the complaint of 18 June 2020 about Mr Bennett and Mr Mould made to Mr Blake contained a complaint of discrimination or that I was treated unfavourably because I complained of discrimination in that complaint.'

He then corrected himself and said:

> 'I made a mistake. I meant that it did not contain a complaint of race discrimination, but there is a complaint in relation to age discrimination. Because I raised these complaints, tarnishing your reputation, you labelled me as a problematic officer and used them to push me out.'

58. Mr Bennett replied that he did not accept what the Claimant had put to him. We have already noted that the grievance does not contain a complaint of age discrimination, nor does it contain an allegation of discrimination which would tarnish Mr Bennett's reputation; the only allegation of discrimination is made against Mr Hillsden and associates.

59. We record at this point Mr Bennett's evidence that he did not see this grievance at the time; he was asked some specific questions about it, which he answered, but he was not told that it contained a complaint of discrimination; he only discovered that in the course of these proceedings. We accept that evidence; we found him to be a measured and credible witness. We have concluded that, even if he had known that the Claimant had complained in the grievance about discrimination by Mr Hillsden, it is highly improbable that Mr Bennett would have been upset or irritated by the making of those allegations, given that they did not implicate him and Mr Hillsden had left the organisation over six months earlier.

<u>Mr Blake's handling of the grievance of 18 June 2020 (Issue 5.2.8)</u>

60. The Claimant complains (Issue 5.2.8) that Mr Jamie Blake failed to treat his complaint as a grievance and instead referred to it as a fact-finding exercise; and that he failed to take into account a report from Ms Rebecca Dyer that supported some of the Claimant's allegations.

61. Mr Blake accepts that he decided to order a fact-finding investigation in response to this grievance. He explains in his statement that he did so because he took advice from a senior HR adviser, who suggested that they first needed clarification as to whether or not this was a new complaint or an extension of the complaint which Mr Sherman had already investigated. On the face of it, that did not appear to be unreasonable. There was overlap in terms of the subject matter - although this grievance was essentially directed at the conduct of the Claimant's managers rather than Mr Hillsden. In the lay members' experience, it is not unusual, when a lengthy and complex grievance is lodged, for a fact-finding exercise to take place as a first step.

62. As for the allegation that Mr Blake 'failed to take into account a report from Ms Rebecca Dyer that supported some of the Claimant's allegations', Mr Blake stated that Ms Dyer was spoken to. The Judge was obliged to remind the Claimant a number of times that, if he wished to pursue this as an allegation of victimisation, he needed to put to Mr Blake that any such failure was because he had complained of discrimination. He eventually did so and Mr Blake denied the allegation. The Claimant did not refer to this allegation at all in his closing submissions.

<u>The investigation by Mr Humphreys (Issue 5.2.6)</u>

63. In mid-June 2020, Mr David Humphries was appointed to conduct a preliminary fact-finding exercise into the Claimant's complaint. In late June 2020, there was some correspondence between the Claimant and management about his process and his desired outcomes. The Claimant attended a meeting with Mr Humphries on 24 July 2020.

64. On 31 July 2020 Mr Humphries sent his report to the Claimant. The Claimant alleges that it was a one-sided investigation and that this was victimisation (Issue 5.2.6).

65. Mr Humphries' witness statement on this issue is short and superficial. It gives little detail about why he reached his conclusions. His report begins with an error: he rejects the suggestion that the Claimant had made 'a formal complaint' to Mr Mould about Mr Hillsden on 31 July 2019, which he had; it had been the subject of an investigation by Mr Sherman.

66. As for the specific allegations of race and sex discrimination by Mr Hillsden mentioned in the grievance (para 54 above), Mr Humphries simply found: 'there is no record of this being raised by you to Nigel Mould'. That was correct: the Claimant had not previously complained of race and sex discrimination. It was appropriate for Mr Humphries to focus on Mr Mould's response to the allegations about Mr Hillsden, rather that the allegations themselves, because that was the Claimant's focus.

67. The report ended badly. One of the Claimant's allegations was that he was being 'treated differently to others as he was not allowed to hot desk, was being

blamed for other legal files going missing and being singled out when a blanket email is sent out.' Mr Humphries dealt with this as follows:

> 'I have checked with Tony Bennett and Nigel Mould and can confirm that you are not being treated differently by them. It is unclear why you are bringing this point up when it doesn't appear true. There seems to be some misunderstanding and would suggest an open and honest conversation to discuss this.'

68. Mr Humphries took what appears to have been a bare denial at face value, without further investigation; he went further, concluding that the Claimant must not be telling the truth. It is not difficult to see why the Claimant found this upsetting. He was being told that his grievance could not proceed based on what he regarded, not unreasonably in our view, as a shoddy investigation.

69. On 21 August 2020 the Claimant completed the stress risk assessment questionnaire he had been sent in October 2019. A Stage 2 sickness absence meeting took place on 27 August 2020.

The restructuring exercise

70. From September 2020, onwards a large-scale restructuring exercise (the Community Safety Review) took place. It was conducted by Mr Bailey, who was supported by a team of HR consultants. Our findings about this are grouped together below (para 88 onwards).

Events between September and November 2020: further allegations of victimisation

71. On 2 September 2020, the Claimant sent an email to Mr Blake, Mr Bailey and HR, complaining about Mr Humphries' report. In the opening paragraphs, he repeatedly refers to his complaint as a formal grievance. He criticised the quality of Mr Humphries' investigation, in particular his apparent willingness to take at face value what Mr Bennett and Mr Mould told him. He ended by repeating his request that his grievance be dealt with formally. There is no mention of Mr Hillsden in the email; the focus of the complaint is on the conduct of management. Nor was there any mention of discrimination or victimisation.

72. The Claimant had a Zoom meeting with Mr Bailey in early October 2020. Mr Bailey reminded the Claimant that Mr Hillsden and Mr Walls had left the organisation and so no further taken could be taken in respect of his complaints about them. He suggested that the Claimant draw a line under the matter. The Claimant was dissatisfied with this. He explained in his witness statement that his real concern was with 'my managers' unprofessionalism, inadequate actions and wrongdoings/mistakes'. Nowhere in this long passage does the Claimant mention discrimination or victimisation.

73. On 14 October 2020, the Claimant sent an email to Mr Bailey and others, raising concerns about this meeting with Mr Bailey. It broadly reflects the concerns referred to in the previous paragraph. Again, there was no mention of discrimination or victimisation.

74. On 20 October 2020, Mr Blake told the Claimant that he thought his concerns had been dealt with appropriately and that a further investigation would not be helpful. However, he permitted the Claimant to submit evidence which he (the

Claimant) believed Mr Humphries had overlooked but failed to mention in his report.

75. The Claimant emailed Mr Blake and repeated his allegations of poor leadership and management. This was a formal grievance; it did not mention discrimination or victimisation.

76. On 9 November 2020, Mr Bailey investigated the Claimant's allegations raised in relation to Mr Humphries' investigation and concluded that there was no reason to conduct a further investigation into the complaints (Issue 5.2.16).

77. The Claimant alleges that on 16 November 2020 (he gives the date in his statement as 5 November 2020), Ms Allison Sherwood discussed his health risk assessment within earshot of Mr Bennett and Ms Zapatero (Issue 5.2.9). Ms Sherwood had taken part in an online discussion while sitting in an open plan office. Mr Bennett was sitting nearby; Ms Zapatero approached Ms Sherwood. No one in the office could hear what the other participants in the discussion were saying because Ms Sherwood was wearing headphones. The only thing Ms Zapatero overheard was the phrase 'I was not Florian's manager during that'. There was nothing in evidence or submissions to suggest any connection between Ms Sherwood's conduct and the fact that the Claimant had complained about discrimination by Mr Hillsden on 18 June 2020. We accept Ms Sherwood's evidence that she was unaware of the Claimant's 18 June 2020 grievance, which contained the protected act.

78. In the list of issues there is an allegation that, at a return-to-work meeting on 25 November 2020, Mr Bailey put pressure on the Claimant to draw a line under his complaints and move on (Issue 5.2.10). In his witness statement at paragraph 55, the Claimant says only that he attended the meeting; he does not repeat the allegation, let alone suggest that Mr Bailey's conduct was connected in any way with the 18 June 2020 protected act.

79. The Claimant also alleges in the list of issues (Issue 5.2.11) that when he highlighted a history of nepotism and cronyism to Mr Bailey, he told him to stop acting on hearsay from colleagues and said that the Claimant was the only person who had raised such concerns. No date for this conversation is given. There is no evidence that, even if this was said, it was in any way influenced by the fact that the Claimant had complained about Mr HIllsden and associates discriminating against him in the 18 June 2020 grievance. Indeed, we observe that it is inherent in the allegation itself that the remark, if made, was made in response to an allegation of a different kind (nepotism and cronyism).

80. On 27 November 2020, Mr Blake told the Claimant that he would no longer respond to complaints about Mr Bailey and about how his grievances had been dealt with; he should address them directly with Mr Bailey (Issue 5.2.12). He wrote:

> 'With a view that you have a point of contact to whom you can liaise for all matters in relation to sickness absence and grievance, I had appointed Alva in my correspondence of 20 October 2020. I believe Alva has reviewed the investigation findings and participated in managing your return to work. I confirm again that Alva is your point of contact for these

matters and with this in mind have included Alva into my response to take forward.'

81. He had made a formal grievance, the focus of which was on what he regarded as management failings, and it had not been formally dealt with by the Respondent. In our view, the Claimant was entitled to feel that he was being fobbed off.

82. However, all these matters are pursued as victimisation claims; the initial burden is on the Claimant to prove facts from which we could conclude, not merely that the Respondent treated him unfairly or unreasonably by failing to deal with his complaints, but that there was a causal link between any such failure and the fact that the Claimant had done a protected act; in that respect the Claimant faces very considerable difficulties; we return to that question later in our judgment.

Final allegation of direct age discrimination

83. The Claimant alleges that, on 3 December 2020, Mr Bailey responded to his request to return to work while pursing mediation by adopting an aggressive demeanour and not letting the Claimant speak. This was characterised as a claim of direct age discrimination (Issue 4.1.2). The Claimant made no reference to Mr Bailey behaving aggressively towards him in his witness statement. In his closing submissions he stated that Mr Bailey interrupted him frequently mid-sentence and shouted at him. However, he did not make any connection between this and his age. Consequently, there was no evidence before the Tribunal that age was a factor in Mr Bailey's treatment of the Claimant.

Subsequent events, including further allegations of victimisation

84. The Claimant alleges that his emails to the Respondent's management team dated 4 and 7 January 2021 were dismissed by the management team (Issue 5.2.13). The context is as follows.

85. On 16 December 2020, the Claimant wrote to Mr Bailey, raising queries about his pay. He followed this up with another email to Mr Bailey on 3 January 2021, reminding him that his queries had not been dealt with. Mr Bailey replied on 4 January 2021, apologising for the delay and responding in some detail to the queries the Claimant had raised.

86. In an email of 7 January 2021 to Mr Blake, the Claimant complained that Mr Bailey had not properly understood his concerns, which were in part about the 'subconscious bias' of Mr Bennett and Ms Sherwood being on the interview panel for the new structure, given that he had raised concerns about both of them.

87. On 11 January 2021, Mr Blake sent him a detailed reply. He summarised the Claimant's concerns and gave his view, which was essentially that the Claimant's complaints had been dealt with and no further action would be taken. That was the Council's final position. In relation to the Claimant's complaint about the interview process, he stated that an HR representative had been made available to support the interview panel to address the Claimants concerns. He rejected the suggestion that not providing the same facility for other candidates was singling him out; he concluded that the reverse was true,

that they were making an adjustment to address concerns raised by him. Any outstanding matters relating to the Claimant returned to work would be dealt with under the sickness procedure. All other matters were considered closed (Issue 5.2.14).

The restructuring exercise and dismissal, including further allegations of victimisation

88. The decision to carry out a restructuring exercise was primarily driven by funding reductions; these had previously been managed through natural wastage, but it was decided that this was not an adequate response. Under the restructure it was proposed that the Neighbourhood Operation Service would be renamed the Community Safety Enforcement Service. The new service would include the CCTV Control Centre, Neighbourhood Enforcement, Fly-tipping Reduction, Antisocial Behaviour Reduction and the Police Enforcement Partnership Team.

89. In the previous structure certain staff were employed under a generic Law-Enforcement Officer (LEO) job description, they were employed across the service in a number of different roles across four teams, one of which was the Tasking Team. Under the new structure all the LEO roles would be deleted and replaced by new roles, consisting of eight Neighbourhood Enforcement Officers and sixteen Community Safety Enforcement Officers. All the roles were at PO1 grade. There were also two Fly Tipping Investigator roles.

90. The Respondent's change management procedure provided for a slotting process to take place where there were the same number of posts pre-and post-restructure, undertaking the same type of work (generally 75% or more of the duties of the post remain unchanged). There was also provision for employees to be identified for ring fence opportunities where the roles and the two structures were not fundamentally the same but were sufficiently similar to be considered a possible suitable alternative, and they were at the same grade or one grade higher/lower.

91. Under the existing structure there were 31 existing law-enforcement officers and 2 antisocial behaviour nuisance investigators, all of whom were eligible for the LEO posts in the new structure, of which there were 26.

The consultation process

92. A meeting with staff took place on 7 September 2020, marking the beginning of the consultation period. The Claimant was off sick; he attended via Zoom. Mr Bailey explained the purpose of the meeting, outlined the exercise and explained that there would be a 30-day consultation period, at the end of which the final structure would be issued. He explained who would be affected. He highlighted that there were fewer new jobs than there were existing LEOs.

93. Mr Samuel Sefah-Antwi (of HR) gave a presentation, at which the Claimant was present, when he explained the deadline and method for employees to provide their responses. He explained that staff could request individual consultation meetings. At that point it was expected that interviews would take place around 12 October 2020. He went through the various positions employees might find themselves in. The Claimant accepted in oral evidence that he understood from this presentation that not all the current LEOs could be slotted in and that there would have to be a competitive interview process; he did not know of any employee at his level who was slotted into one of the new roles. Mr Sefah-Antwi

also explained that employees who were dissatisfied with the decisions on slotting could appeal.

94. Another staff meeting took place on 6 October 2020, to which the Claimant was invited, at which it was explained that LEOs could apply for both the Neighbourhood Enforcement Officer and Community Safety Enforcement Officer roles. The Claimant accepted in cross-examination that he understood this.

95. On 7 October 2020, the Claimant was informed that he was at risk of redundancy and told of his right to appeal.

96. The original deadline for applications of 9 October 2020 was extended to 14 October 2020. On 12 October, the Claimant was told that he could apply for a further role. In the event he only applied for the Neighbourhood and Community Safety roles. He told the Tribunal that those were the roles to which he felt best suited.

The interview process

97. During one of the consultation meetings a question was asked if HR representatives would be present during the interview process. Mr Bailey said that an HR representative would be present during all staff interviews. In the event, that undertaking was not observed. Mr Bennett queried this and was told by Ms Poonam Chaudhary that it was not possible to have representation at all the LEO interviews.

98. Mr Bailey asked Mr Bennett and Ms Sherwood to conduct all the interviews for the roles of Fly-tip Investigator, Community Safety Officer and Neighbourhood Enforcement Officer.

99. The Claimant raised concerns about the appropriateness of his being interviewed by Ms Sherwood and Mr Bennett because, in his view, they were biased against him. Mr Bennett's evidence was that he and Ms Sherwood had been asked to conduct the interviews because they would be the management team for this part of the service. As a result, an exception was made for the Claimant: an HR representative (Ms Hema Patel) was appointed to sit on his interviews. She shadow-marked the interview as a check on the fairness of the process.

The Claimant's interviews

100. The Claimant's first interview for the role of Community Safety Enforcement Officer was scheduled for 20 November 2020. At the beginning of the meeting the Claimant again raised issues as to the honesty and integrity of the two interviewers because of concerns about 'nepotism and cronyism'. Mr Bennett was concerned that the Claimant appeared to be showing signs of considerable anxiety and he did not think it appropriate to continue. The interview was postponed until 5 January 2021.

101. The interviews consisted of six questions based on the job description. It was a competency-based interview, in which candidates were scored on their ability to demonstrate, by way of examples, the experience and knowledge required for the role. Each question was scored out of 5; with two panel members, the

maximum score was 60. The panel members marked the candidates separately then compared their marks. In the Claimant's case Ms Patel also marked his answers, although her scores did not count towards the result; they were used as a benchmark to crosscheck the marks of the panel members.

102. In his first interview for Community Safety Enforcement Officer, the Claimant scored 25.5/60. Mr Bennett considered that the Claimant made generic statement, rather than giving specific examples. Mr Bennett gave a detailed explanation in his witness statement as to how this manifested itself in practice, by reference to his interview notes.

103. After his interview the Claimant was given individual feedback verbally by Mr Bennett, Ms Sherwood and Ms Patel. Ms Patel's feedback was also sent to him in an email and details, including his scores, were shared with him.

104. On 8 January 2021, the Claimant was interviewed by the same panel for the role of Neighbourhood Enforcement Officer. He scored a total of 28/60. Mr Bennett's evidence was that, although there was an improvement, it was not as great as he would have expected, given the extent of the feedback which had been provided. The Claimant's answers remained historic and generic; again, Mr Bennett provided a detailed analysis of the Claimant's answers in his witness statement, identifying positives and negatives along the way.

105. The Claimant did not challenge Mr Bennett's evidence as to the quality of his answers to any meaningful extent in cross-examination; rather, his position was that his knowledge and experience ought not to have been in question, given the similarity of the old and new roles.

106. At the end of the process, the Claimant was informed that he had not been appointed to either of the roles for which he had applied. Six other officers were unsuccessful and were subsequently made redundant.

107. Two vacancies remained at the end of the process; they were advertised. The unsuccessful internal applicants were neither slotted into the vacancies nor permitted to apply for them on the ground that they had scored less than 30/60, which the Respondent deemed to be the threshold for appointability.

108. We accept Mr Bennett's evidence that, even if there had been slotting into the vacancies, the Claimant would still not have been appointed because others scored higher than he did.

<u>The termination of the Claimant's role</u>

109. The Respondent wrote to the Claimant by letter dated 15 January 2021. The first two paragraphs as follows:

> 'I am writing further to your recent interview outcomes, unfortunately you have been unsuccessful in securing a role in the new structure. Therefore, I write to inform you that your employment for your substantive role as Law Enforcement Officer is to be terminated by reason of redundancy.
>
> You are entitled to 4 weeks written notice of the termination of your employment with the London Borough of Newham and this letter serves

> as that notice. Your notice period will commence from 18 January 2021. Your last day of service will, therefore, be recorded as 12 February 2021.'

110. The letter went on to explain that the Respondent would continue to seek a suitable alternative employment for the Claimant and explained the redeployment procedure.

111. The Claimant applied for a fixed term role as an Outreach Worker. By an offer letter dated 2 February 2021, he was informed that he was successful; the process for accepting role was outlined; the start date was agreed to be 15 February 2021; continuity of employment was preserved. The Claimant accepted in cross-examination that it was 'a completely different role' from his substantive LEO role. In his witness statement he said this:

> 'I was previously employed as a Law Enforcement Officer by the London Borough of Newham from 15 May 2017 until 14 February 2021. I then undergone [*sic*] a three-month temporary contract as a redeployee within the role of Street Population Outreach Officer from 15 February 2021 to 15 May 2021.'

112. Mr Bishop took the Claimant to two documents which were in some ways unhelpful to his client's case in this area. In doing so, he was acting properly and in accordance with his duty to ensure that the Claimant was not disadvantaged as a litigant in person. They were documents to which the Tribunal undoubtedly would have been taken, had the Claimant been professionally represented.

113. In an email dated 11 February 2021, Ms Patel of HR wrote:

> 'Further to our recent conversation about securing a temporary role for three months in commissioning adults in health, I can confirm that the above notice of redundancy is now on pause and your redundancy being deferred [*sic*].
>
> As discussed and agreed, you will be moving across to your new temporary role from the 15 February 2020 143 months with a trial period. Community Safety has completed a transfer form.'

114. There was then a second letter, dated 17 March 2021 (after he had started the fixed-term contract), in which Ms Patel wrote:

> 'I am writing further to my email sent to you on the 11th February 2021 advising you that as you have secured a temporary role for three months in commissioning adults and health services commencing from the 15th February 2021 until 15th May 2021, your redundancy has been deferred.
>
> You will therefore be put back on the redeployment register, from 15th April 2021 and in the event that it proves impossible to find alternative employment for you within the council, compulsory redundancy will result and your last day of service will be 15th May 2021. Any redundancy payment would be paid to you in the following pay month.
>
> […]

> Should you secure a suitable alternative post within the council, redundancy will not apply.'

The Claimant's evidence as to time limits

115. The Claimant had union support from August 2019. Initially he was a member of Unite, but he subsequently changed to Unison. We are satisfied that during this time he had access to legal advice. We think it highly likely that the Claimant, who is an intelligent and well-informed person, was aware of the existence of the Employment Tribunal and his ability to complaint of discrimination to a Tribunal even before then, especially at a time when information about the Tribunal system, and employment rights in general, can be accessed by a simple online search.

116. In relation to the pre-dismissal discrimination claims, the Claimant acknowledged that, certainly by 3 December 2020, when he made a written complaint, he was aware of the Employment Tribunal and that he could bring a claim relating to matters arising out of his employment with the Respondent. The complaint explicitly refers to harassment, discrimination and victimisation. At one point he wrote: 'Dear employer, how do you think this will be viewed by a tribunal?'

117. The Claimant said that he was exploring internal avenues for resolution, but that he was having conversations with acquaintances who could guide him as to how might proceed. We inferred that this was a reference to the possibility of legal proceedings.

118. In relation to the unfair dismissal claim the Claimant explained (among other things) in his supplementary statement:

> 'that I remained under continuous employment within London Borough of Newham. I had no gap in service following my dismissal from the Law Enforcement Service. I was made aware my redundancy had been deferred. Therefore, I could not submit an unfair dismissal claim whilst still being employed by the organisation […] Following the completion of a temporary assignment the redundancy came into effect on 17 May 2021. I swiftly liaised with ACAS on 27 May 2021 for advice on the matter. And early conciliation certificate was issued on 3 June 2020.'

119. The Claimant also explained that he was experiencing mental health difficulties and had been prescribed anti-depressant medication. He found the process of completing the ET1 form distressing.

The law

The definition of dismissal

120. The definition of dismissal relevant to unfair dismissal in a case such as this is contained in s.95(1)(a) Employment Rights Act 1996 ('ERA'). Dismissal occurs when:

> **the contract under which he is employed is terminated by the employer (whether with or without notice) […]**

121. The effective date of termination is defined in s.97(1)(a) ERA:

> **in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, [it] means the date on which the notice expires.**

122. *Hogg v Dover College* [1990] ICR 39 EAT is authority for the proposition that where a person's contract for a specific post is terminated by the employer and the employee accepts a new and different role, there was a dismissal from the original post and the employee can claim unfair dismissal from the original post.

Unfair dismissal: redundancy

123. S.94 ERA provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

124. S.98 ERA provides so far as relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it—**
> **…**
>
> **(c) is that the employee is redundant …**
>
> **…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

125. A redundancy situation is defined by s.139 ERA.

> **(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—**
>
> **(a) the fact that his employer has ceased or intends to cease—**
>
> **(i) to carry on the business for the purposes of which the employee was employed by him, or**
>
> **(ii) to carry on that business in the place where the employee was so employed, or**
>
> **(b) the fact that the requirements of that business—**
>
> **(i) for employees to carry out work of a particular kind, or**
>
> **(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,**

> **have ceased or diminished or are expected to cease or diminish.**

126. An employee may argue that a dismissal for redundancy was unfair either because redundancy was not the real reason; or because, although a redundancy situation existed (and the employee was not selected for an automatically unfair reason) the dismissal was nevertheless unreasonable under S.98(4) ERA.

127. It is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant; if fewer employees are needed to do work of a particular kind, and the employer redistributes, there is a redundancy situation (*McCrea v Cullen and Davison Ltd* [1988] IRLR 30).

128. It is not for the Tribunal to investigate the commercial reasons behind a redundancy situation (*Hollister v National Farmers' Union* [1979] ICR 542).

129. In many redundancy dismissals, the starting-point will be the familiar guidance in *Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT (at [18]).

> **'18. For the purposes of the present case there are only two relevant principles of law arising from that subsection. First, that it is not the function of the Industrial Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The second point of law, particularly relevant in the field of dismissal for redundancy, is that the Tribunal must be satisfied that it was reasonable to dismiss each of the applicants on the grounds of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably in treating redundancy 'as a sufficient reason for dismissing the employee', i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.**

130. In *Polkey v A E Dayton Services (formerly Edmund Walker (Holdings) Ltd)* [1987] IRLR 503, Lord Bridge said this:

> **'in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is not permitted to ask in applying the test of reasonableness posed by s.57(3) [now s 98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken.'**

131. In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection' and it is to these employees that an employer will apply the chosen selection criteria to determine who will be made redundant. Employers have a great deal of flexibility in defining the pool from which they will select employees for dismissal. In *Thomas & Betts Manufacturing Ltd v Harding* [1980] IRLR 255 it was held that employers need only show that they have applied their minds to the problem and acted from

genuine motives. In *Mogane*, the EAT held (at [25]) that the correct question is: 'is it a pool that a reasonable employer could adopt in all the circumstances?'

Time limits in unfair dismissal cases

132. S.111 Employment Rights Act 1996 ('ERA') provides (as relevant):

> **(1) A complaint may be presented to an employment Tribunal against an employer by any person that he was unfairly dismissed by the employer.**
>
> **(2) Subject to the following provisions of this section, an employment Tribunal shall not consider a complaint under this section unless it is presented to the Tribunal—**
>
> > **(a) before the end of the period of three months beginning with the effective date of termination, or**
> >
> > **(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.**

133. The Court of Appeal in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 at [34] held that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' would be to take a view too favourable to the employee; but to limit their construction to that which is reasonably capable, physically, of being done would be too restrictive. The best approach is to read 'practicable' as the equivalent of 'feasible' and to ask: 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'

134. In *Walls Meat Co Ltd v Khan* [1979] ICR 52 at p.56, Denning LJ held that the following general test should be applied in determining the question of reasonable practicability.

> **'Had the man just cause or excuse for not presenting his complaint within the prescribed time limit? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably have been expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences.'**

135. In *Marks & Spencer plc v Williams-Ryan* [2005] ICR 1293, the Court of Appeal upheld a tribunal's decision to grant an extension of time where a claimant had delayed making a tribunal application pending an internal appeal. The claimant had received a letter from her employer which referred to her right to bring a tribunal claim but did not advise her that there was a deadline to do so. The Court of Appeal held that the letter was at least capable of misleading the employee into thinking that any claim could be left until after the internal appeal. The question of whether the letter should have put the employee on notice, obliging her to investigate the question of time limits, was not a question of law but a question of fact. The tribunal's finding that her ignorance was reasonable, while generous, was by no means perverse and the Court of Appeal refused to interfere with it.

136. In *Andrews v Kings College Hospital NHS Foundation Trust* (2102) UKEAT/0614/11, the EAT held that it was not reasonably practicable for an employee to bring a claim within the relevant three-month time period where her employer's head of payroll and pension services had informed her, honestly but

mistakenly, that the time limit was six months. It was obvious that the employee had relied on the information provided and was not at fault in doing so. The EAT decided that it had not been open to a tribunal to conclude otherwise in these circumstances.

Direct race discrimination

137. S.13(1) EqA provides:

> **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.**

138. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [1999] ICR 877, *per* Lord Nicholls at 884). Lord Nicholls considered the distinction between the 'reason why' question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at [29]:

> **'Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…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.'**

139. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan* at 886).

140. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

141. More recently, the appellate courts have encouraged Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at [30].

142. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment' (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [35]). An unjustified sense of grievance does not fall into that category.

Harassment related to race and age

143. Harassment related to race is defined by s.26 EqA, which provides, so far as relevant:

> **(1) A person (A) harasses another (B) if-**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**

144. The Court of Appeal in *Pemberton v Inwood* [2018] ICR 1291 gave guidance on the correct approach to these provisions (*per* Underhill LJ at [88]):

> **'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'**

145. The test for whether conduct achieved the requisite degree of seriousness to amount to harassment was considered (in the context of the formulation in s.3A Race Relations Act 1976) by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 *per* Underhill P. at [22]:

> **'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'**

<u>Victimisation</u>

146. S.27 Equality Act 2010 ('EqA') provides as follows:

> **(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.

[…]

147. Ss.2(d) covers allegations made by the claimant that the employer or another person has contravened the EqA, whether or not they are express. It is not necessary that the EqA be mentioned, but the asserted facts must, if verified, be capable of amounting to a breach of the EqA.

148. The EAT in *Chalmers v Airpoint Ltd* UKEATS/0031/19/SS (unreported 2020) upheld the Tribunal's decision that a reference to actions which 'may be discriminatory' in a grievance was not sufficient to amount to a protected act.

149. In *Durrani v London Borough of Ealing EAT 0454/12* the EAT upheld the Tribunal's decision that references to 'being discriminated against' referred to general unfairness rather than detrimental action based on the Claimant's race, although the EAT emphasised that the case should not be taken as 'any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of s.27 EqA'. All will depend on the circumstances of the particular case.

150. The Tribunal must determine whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as s/he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

151. The Court of Appeal emphasised the importance of focusing on motivation, rather than 'but for' causation in *Dunn v Secretary of State for Justice* [2019] IRLR 298 at [44]:

> **'In the context of direct discrimination, if a claimant cannot show a discriminatory motivation on the part of a relevant decision-maker he or she can only satisfy the 'because of' requirement if the treatment in question is inherently discriminatory, typically as the result of the application of a criterion which necessarily treats (say) men and women differently. […] There is an analogy with the not uncommon case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled: the mishandling is not discriminatory simply because the grievance concerned discrimination.'**

Time limits in discrimination cases

152. S.123(1)(a) Equality Act 2020 ('EqA') provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates.

153. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated and ending with the day of the early conciliation certificate does not count (s.140B(3) EqA). If the time limit would have expired during early conciliation or within a month of its end, then the time limit is extended so that it expires one month after early conciliation ends (s.140B(4) EqA).

154. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

155. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so.

156. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse (*Robertson v Bexley Community Centre* [2003] IRLR 434 at [23-24].

157. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. There are statutory time limits, which will shut out an otherwise valid claim unless the Claimant can displace them. Whether a Claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 *per* Sedley LJ at [31-32]).

158. This is a broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances. Some factors are likely to be relevant in all cases. HHJ Auerbach summarised them in *Wells Cathedral School Ltd v Souter* (2021) EA-2020-00801 at [31-33]:

> **'As a matter of law, there is no particular feature that must necessarily be present in order for a just and equitable extension to be granted, nor that, if present, is automatically sufficient to warrant such a grant. However, some factors are, as it is put, customarily relevant. In every case the implication of refusing to extend time will be that the claimant will not be able to have a complaint adjudicated on its merits, as they would, had time been extended. Conversely, the effect of granting an extension of time will be that a respondent will be obliged to defend a complaint on its merits, and exposed to the risk of losing, in a way that would not be so, were time not to be extended.**
>
> **There are also some essential legal considerations that flow from the statutory time limits framework itself, that form part of the general backcloth in every case, in particular, the inherent importance attached to observance of time limits for litigating, and finality in litigation, even where, as here, there is considerable flexibility in the test that the tribunal must apply when deciding whether or not to extend time. It is also established that the onus is on a claimant to persuade a tribunal that there is some good reason why it would be just and equitable to extend time in the given case.**

> **Beyond those basic principles, what factors are relevant and how to weigh them up in the given case are matters for the employment tribunal.'**

159. Other factors will usually include: the reason for the delay; whether the Claimant was aware of her rights to claim and/or of the time limits; whether she acted promptly when she became aware of her rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

160. The fact that the Claimant was pursuing internal resolution by way of a grievance is a factor which may be taken into account, although it is not determinative (*Apelogun-Gabriels v London Borough of Lambeth* [2002] IRLR 116 at [16]).

161. In the context of discrimination cases, the importance of recalling not only what is done but the thought processes involved make it all the more likely that memory fade will have an impact on the cogency of the evidence (*Redhead v London Borough of Hounslow* UKEAT/0086/13/LA *per* Simler J at [70]).

162. In exercising its discretion, the Tribunal may have regard to the merits of the claim (*Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132).

<u>The burden of proof in discrimination claims</u>

163. The burden of proof provisions are contained in s.136 EqA:

> **(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.**

164. The operation of the burden of proof provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:**
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
> > **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
> > **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
>
> > **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**
>
> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

165. In *Royal Mail Group v Efobi* [2021] ICR 1263, the Supreme Court confirmed that a claimant is still required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an act of unlawful discrimination. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference which allegedly should have been drawn. Even if the inference is drawn, the question then arises as to whether it would, without more, have enabled the Tribunal properly to conclude that the burden of proof had shifted to the employer.

166. The burden of proof provisions should not be applied by the Tribunal in an overly mechanistic manner: see *Khan v The Home Office* [2008] EWCA Civ 578 *per* Maurice Kay LJ at [12]. The approach laid down by s.136 EqA will require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but where the Tribunal is able to make positive findings on the evidence one way or another, the provisions of s.136 will be of little assistance: see *Martin v Devonshires Solicitors* [2011] ICR 352 at [39], approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 at [32].

Conclusions: time limits in relation to the claims of harassment and direct discrimination (Issues 2.2.1 to 2.2.5 and Issue 4.1.1 to 4.1.2)

Time limits in the claims of harassment and direct discrimination

167. Any act or omission before 28 February 2021 is out of time, unless the acts amount to conduct extending over a period, linked to an in-time act of discrimination. If they are not so linked, they require an extension of time on the just and equitable basis.

168. The allegations of harassment related to age (Issues 2.2.1 to 2.2.5) and direct race/age discrimination (Issue 4.1.1) against Mr Hillsden and Mr Walls relate to incidents said to have happened in 2019. They are at the very least a year and two months out of time.

169. The allegations of harassment related to race (Issue 3.2.7) direct age discrimination (Issue 4.1.2) against Mr Alva Bailey relate to meetings on 25 January 2020 and 3 December 2020 respectively. The first incident is a year and one month out of time, the second some three months out of time. By the time of the latter incident, the Claimant was already threatening legal action against the Respondent (para 116).

170. The Claimant's delay in bringing these claims is substantial. Other than the fact that he was seeking internal resolution, which is relevant but not determinative, he has not provided a good explanation for the delay in bringing these claims. He had access to trade union advice throughout. We are satisfied that he was aware of his rights, and either was aware of time limits, or would have been aware of them, had he taken reasonable steps to inform himself. There was no medical evidence before us that the Claimant was unable to bring proceedings earlier for health reasons. He was able to express himself articulately, in detail and at length, in his internal complaints from June 2020 onwards.

171. We considered the balance of prejudice. Plainly, the prejudice to the Claimant if time is not extended is substantial: he will lose the opportunity to have these claims determined. On the other hand, he is still able to pursue his claims in relation to his dismissal, which are the most valuable claims.

172. As for the prejudice to the Respondent if time were extended, both Mr Hillsden and Mr Walls left the Respondent's employment long before the Claimant presented his case and in adverse circumstances. The Respondent cannot realistically be expected to call them as witnesses so long after the event. Even if they were willing (or ordered) to attend, there would be inevitable prejudice to their ability to recall the alleged incidents and to defend themselves against the allegations, not only because of the passage of time but also because the allegations are so inadequately particularised. These factors also affect the underlying merits of the claims: the Tribunal would be very unlikely to be able to make reliable findings of fact about such generalised allegations.

173. Any conduct of Mr Hillsden and Mr Walls cannot amount to conduct extending over a period, linked to an in-time claim because their conduct ended when they left.

174. As for the allegations against Mr Bailey, while one of these is more recent, the other is historic. The allegations focus on the manner of Mr Bailey's conduct, which is said to have been disrespectful and aggressive. Again, the fact that they are generalised allegations make them all the more difficult to defend, even if they had been brought within the relevant time limits, and less likely to succeed.

175. Further, in relation to the allegations against Mr Bailey, the Claimant does not mention either incident in his witness statement. There was no evidence before the Tribunal that, if Mr Bailey behaved as the Claimant alleged, he was influenced by the Claimant's race or age. In the circumstances, the claims cannot realistically succeed.

176. In our judgment, the prejudice to the Respondent if time were extended outweighs the prejudice to the Claimant, if it is not.

177. Taking into account the length of the delay in bringing the claims, the absence of a satisfactory explanation for the delay, our conclusions as to the merits of the claims and the balance of prejudice, we have concluded that it is not just and equitable to extend time in relation to the complaints of direct race and/or age discrimination and harassment related to race and/or age. Accordingly, we do not have jurisdiction in relation to them and they are dismissed.

178. We turn now to the claims of victimisation and unfair dismissal.

Conclusions: the alleged protected acts in the victimisation claims

Issue 5.1.1: On 8 March 2019, the Claimant discussed with his line manager Mr Nigel Mould his concerns regarding the behaviour of Mr Alan Hillsden

179. In light of our findings above (paras 20-25), we are satisfied that the Claimant did not do a protected act on 8 March 2019: there is no evidence that the Claimant complained to Mr Mould of discrimination by Mr Hillsden (or anyone else) at a meeting on that date; all the evidence suggests that he did not do so.

Issue 5.1.2: On 18 June 2020, the Claimant wrote to Corporate Director Mr Jamie Blake that Mr Nigel Mould and Mr Tony Bennett had victimised him

180. In his grievance of 18 June 2020, the Claimant did complain about sex and race discrimination by Mr Hillsden 'and associates', which we understood to mean Mr Walls (para 54). That was a protected act. He did not make an allegation of discrimination or victimisation against any member of management in this document.

Conclusions: the alleged acts of victimisation in relation to the period between 7 August 2019 and 17 June 2020 (Issues 5.2.1 to 5.2.7)

181. The claims of victimisation in relation to the period between 7 August 2019 and 17 June 2020 cannot succeed because we have concluded that there was no protected act for the purposes of a victimisation claim before 18 June 2020. There cannot be victimisation if the detriment alleged by the employee pre-dates the protected act.

182. The claims under Issues 5.2.1 to 5.2.7 are dismissed.

Conclusions: time limits in the victimisation claims relating to the Claimant's grievances (Issues 5.2.10 to 5.2.16) and the single allegation against Ms Sherwood (Issue 5.2.9)

183. The Claimant makes a series of allegations of victimisation in relation to the Respondent's handling of his various grievances and complaints: Issues 5.2.10 to 5.2.16. They are not in chronological order in the list of issues; the first in date order is Issue 5.2.15 ('a one-sided investigation by Mr David Humphries') which relates to July 2020; the last is Issue 5.2.14 ('on 11 January 2021 Mr Blake dismissed all the Claimant's complaints and concerns').

184. Even if we treat these allegations as conduct extending over a period, with time running from 11 January 2021, the claims are out of time by between six weeks and seven months. For the reasons given below, they cannot form conduct extending over a period, linking with an in-time complaints arising out of the redundancy/dismissal process, because we have concluded that those complaints are not well-founded.

185. The Claimant knew that internal resolution of these issues was no longer possible; the matters were closed (that is one of his complaints). We have already found that he was aware of his rights and had access to advice and his health difficulties did not prevent him from issuing a claim earlier (para 170). In our judgement, there is no satisfactory explanation for why these claims were not issued in time.

186. Further, we have concluded that any prejudice to the Claimant, if time is not extended, is negated because there is a fundamental flaw at the heart of these claims, which profoundly undermines their prospects of success.

187. We have found that the only protected act the Claimant did was a complaint of sex and race discrimination against 'Mr Hillsden and associates.' However, the protected act relied on by the Claimant is identified in the list of issues as follows:

> 'On 18 June 2020, [did the Claimant] write to Corporate Director, Mr Jamie Blake, that Mr Nigel Mould and Mr Tony Bennett had victimised him?'

188. The answer to that question must be no. The document does not contain an allegation that Mr Mould or Mr Bennett had victimised him within the meaning of the Equality Act. The complaint is that they let him down or treated him unfairly; there was no suggestion that they did so because he had alleged discrimination against Mr Hillsden or anyone else. Consequently, the protected act which the Claimant did is not the protected act relied on by him in his pleaded case. For that reason alone, the victimisation claims are not well-founded.

189. This contradiction at the heart of the Claimant's victimisation claims manifested itself when he was questioning the Respondent's witnesses, when he repeatedly had to be reminded by the Tribunal to put his case on victimisation; in almost every case, he did so by suggesting that there was unfair treatment, nepotism, cronyism, a desire to sweep things under the carpet and (in general terms only) that he had become 'a problematic employee'; what was not put was that the detrimental treatment was because he had alleged sex and race discrimination against Mr Hillsden on 18 June 2020.

190. That pattern repeated itself in his closing submissions, in which the terms 'victimisation' and 'victimising' were used interchangeably with, for example, 'unfair treatment', 'managerial incompetence', 'damage control' and 'bullying'. It appears to the Tribunal that the Claimant was not using the term victimisation in the legal sense.

191. Further, there is simply no evidence from which we could reasonably conclude that the alleged discriminators acted as they did because the Claimant had made an allegation of sex and race discrimination against Mr Hillsden in the June 2020 grievance. As we have already concluded, the substance of that grievance (and subsequent complaints) consists of complaints about Mr Mould and Mr Bennett. The mention of discrimination by Mr Hillsden is background only to them. Insofar as we have identified deficiencies in the Respondent's handling of the grievances, we have concluded that in these circumstances those deficiencies are not, in themselves, sufficient to shift the burden of proof to the Respondent.

192. Moreover, we have already found that Mr Bennett did not know that an allegation of discrimination had been made in the June 2020 grievance (para 59).

193. The prejudice to the Respondent, if time were extended, is less than it would be in relation to the historic allegations we have dealt with above: they have been able to defend the allegations. That, in itself, does not provide good grounds for extending time. Having regard to the length of the delay, the lack of a good explanation for it, the Claimant's awareness of his rights and our view as to the

merits of the claims, we have concluded that it is not just and equitable to extend time in relation to these claims and we decline jurisdiction.

194. Consequently, they are dismissed.

195. For all the same reasons we decline to extend time in relation to the single allegation of victimisation against Ms Sherwood (Issue 5.2.9). Further, this claim cannot succeed in view of our finding (para 77) that Ms Sherwood did not know about the protected act and so cannot have been influenced by it. We note that, in his closing submissions, the Claimant dealt with this as a 'confidentiality and GDPR breach', rather than as an act of victimisation.

Conclusion: time limits in relation to the unfair dismissal claim

196. On the first day of the hearing, I allowed the Respondent to withdraw its concession that the unfair dismissal claim was presented in time. Having now heard all the evidence, the Tribunal is satisfied that the claim was presented out of time.

197. The Claimant accepted in evidence that his duties under the fixed-term contract were 'completely different' from those of the LEO role; it was a different job altogether. We accept Mr Bishop's analysis that the Claimant's contract of employment as an LEO was terminated on notice by the letter dated 15 January 2021. The notice period began on 18 January 2021 and ended on 12 February 2021. The effective date of termination of the Claimant's employment as an LEO was 12 February 2021. The unfair dismissal claim relates to that termination, not the later termination of the fixed-term contract.

198. The three-month time limit expired on 11 May 2021, before the Claimant contacted ACAS on 27 May 2021. The claim was issued on 26 July 2021. The unfair dismissal claim is out of time by over two months. The Claimant's other claims, including his claim of discriminatory dismissal are out of time by at least two months.

199. Should time be extended for the unfair dismissal claim? We accept that the Claimant's evidence that, when Ms Patel said (paras 109 and 113) that his redundancy had been 'paused' and 'deferred', he thought this referred to his *dismissal* for redundancy. We think that was a reasonable understanding for a lay person in the circumstances. Mr Bishop put to the Claimant that what the email really meant was that his redundancy payment was being deferred, not his dismissal for redundancy. That the Claimant did not understand this at the time was clear from his bafflement at this line of questioning at the hearing. That may have what Ms Patel meant to say, but it was not what she said; if it was a badly drafted email, that was not the Claimant's fault. It is equally possible that Ms Patel misunderstood the position herself and meant to say what the Claimant understood her to be saying. In any event, the Claimant was positively (even if not deliberately) misled by what Ms Patel told him in these emails.

200. It might be suggested that the Claimant ought to have spotted the point himself. We reject that: the principle in *Hogg v Dover College* is counter-intuitive for a lay person ('how can you complain of unfair dismissal when you are still working for the employer; how you can you be dismissed twice from the same employment?' etc.).

201. It might be suggested that the Claimant could have sought legal advice on the point. We reject that: why should he, when his understanding of the position appeared to tally with what his employer was telling him?

202. If he had sought advice, it is far from certain that he would have been given the correct advice. The principle in *Hogg v Dover College* arises relatively infrequently and, when it does, it is not unknown for even experienced employment practitioners to miss it. That was the case here: neither the Respondent nor its legal advisers identified this as a *Hogg* case until shortly before the hearing began; prior to that, the Respondent had conceded that the unfair dismissal claim was in time.

203. We reminded ourselves of the guidance of the Court of Appeal and EAT in *Williams-Ryan* and Andrews (paras 129-130). In all the circumstances, we are satisfied that the Claimant's ignorance as to the correct position in law was reasonable. Consequently, it was not reasonably practicable for him to present his claim in time; he presented his claim within a reasonable period thereafter, that is to say within three months of the date on which he had been led to believe by the Respondent that his dismissal for redundancy would take effect.

204. Accordingly, the Tribunal extends time and accepts jurisdiction to determine the Claimant's complaint of unfair dismissal.

Conclusion: time limits in the victimisation claims relating to dismissal (Issues 5.2.17 to 5.2.21)

205. The test for extending time in a victimisation claim is the broader 'just and equitable' test. Our observations about the merits of the Claimant's victimisation claims must apply equally to the claims that the dismissal (and the process leading up to it, which would usually be treated, *prima facie* at least, as conduct extending over a period) constituted acts of victimisation.

206. However, the applicability of the other factors differs in relation to these claims: the delay is shorter; the Claimant has a good explanation for it; the Respondent was to blame for the Claimant's misunderstanding; the Claimant's belief that he was issuing his claim in time was a reasonable one (the Respondent shared it at the time); and there was no significant impact on the cogency of the evidence.

207. For these reasons, we think it is just to extend time in relation to these claims, so that they may be determined on their merits. However, we repeat the concerns we have already identified as those merits (para 187 onwards).

Conclusions: the victimisation claims about the restructuring/dismissal process

<u>'Taking advantage of a restructure to place the Claimant at risk of redundancy' (Issue 5.2.17)</u>

208. Our starting-point is that we are satisfied that this was a business-driven process that was in no sense targeted at the Claimant. Almost everyone in the organisation was affected by it.

209. We have concluded that there is no evidence of the process being manipulated to disadvantage the Claimant or place him at greater risk of redundancy than any of this fellow LEOs: he went through the same process; he was asked the

same questions; he was scored against the same criteria. We are satisfied that the sole reason why he was placed at risk of redundancy was because of his scores in interview.

'Having an HR representative attend the Claimant's interview for an alternative role' (Issue 5.2.20)

210. The only difference of treatment was that there was an HR officer present at his interviews, shadow-marking his performance. In our judgment, no reasonable employee would take the view that this was to his detriment; on the contrary, it was a safeguard, put in place to ensure fairness of treatment. Consequently, there was no detriment, and the claim must fail. If we are wrong about that, we are satisfied that the sole reason why an HR representative attended the Claimant's interviews was because he had requested it.

'Failing to slot the Claimant into a suitable alternative role' (Issue 5.2.18)

211. The Claimant was not slotted into a suitable alternative role because this was not a slotting situation; it was a competitive interview situation; none of the LEOs was slotted into an alternative role. The claim is misconceived.

212. If the Claimant is to be understood to be referring to the failure to fill the roles which remained vacant at the end of the process with internal candidates, there is no evidence that that decision (which applied equally to other unsuccessful candidates) was influenced in any way by the fact that the Claimant had complained about discrimination by Mr Hillsden in June 2020 and the claim would fail for that reason.

'Scoring the Claimant down in his interview for an alternative role' (Issue 5.2.19)

213. We note that in his closing submissions (para 15.3) the Claimant relied on the 8 March 2019 conversation (which we have found was not a protected act); he referred in general terms to other 'formal grievances about subsequent injustices (acts of victimisation)'; he did not specifically refer to the protected act we have found did occur as being the cause of the alleged undermarking.

214. There is no evidence that Mr Bennett or Ms Sherwood scored him down. Both gave a detailed account in their statements as to how they had arrived at their scores, by reference to the Claimant's answers to the structured questions. The Claimant made no specific challenge, based on an analysis of the interview notes in the bundle, to any of that evidence, either in cross-examination of the witnesses or in his closing submissions. The only challenge he made was in his witness statement and was by way of a general assertion that he believed certain individuals, including himself, were marked down because they were not appointed when he believed they should have been. Of course, he had no access to any of the scores other than his own. This was pure speculation on his part.

215. In any event, we have already found that neither Mr Bennett nor Ms Sherwood was aware of the protected act when they interviewed the Claimant; consequently, they cannot have victimised him by way of their scoring or otherwise.

'Dismissing the Claimant' (Issue 5.2.21)

216. In view of our conclusions above, the Tribunal is not satisfied that there is evidence from which we could reasonably conclude that the Claimant was dismissed in 2021, in whole or in part, because he made generalised allegations of sex and race discrimination against Mr Hillsden, which allegedly took place in 2019, and which he raised in his grievance of June 2020.

217. For all these reasons, these claims are not well-founded and are dismissed.

Conclusions: unfair dismissal

218. We are satisfied that the sole reason for dismissal was redundancy. The requirement of the Respondent for employees to carry out work which had previously been carried out under the generic job description of LEO had diminished: 33 posts were reduced to 26. For the reasons given above, it was not unfair not to slot the Claimant into one of the roles; this was not a slotting situation.

219. The pool for selection was a logical one: it consisted of all the current LEOs; there was no challenge to that.

220. We are satisfied that there was adequate warning and consultation: the proposals were clearly laid out at a meeting on 7 September 2020, which initiated a 30-day consultation period; staff were given the opportunity to ask for individual consultation meetings within that period; there was a further group consultation meeting on 6 October 2020; the information provided was clear; there was flexibility in the interview process, as a result of which deadlines were extended as necessary.

221. The matter which gave us cause for some initial concern was the fact that employees were being assessed as to their suitability for jobs which were broadly similar to the roles they had already been performing by way of a competency-based interview process. A process of that sort is more commonly adopted when the roles are entirely new. The Tribunal members observed that, had they been devising a process in the circumstances, they might have preferred to adopt criteria based on past experience in the predecessor roles.

222. We reminded ourselves that the band of reasonable responses applies to all aspects of a dismissal process, including the choice of selection process. Ultimately, we concluded that the fact another employer might have adopted a different approach does not mean that the approach taken by this Respondent was not a reasonable one. The process was applied consistently to all the roles in the new structure; it was an objective method of assessment; it gave every candidate the opportunity to demonstrate by way of specific examples their relevant experience in an interview setting; there were safeguards built into the process by virtue of the fact that it was a panel decision, rather an individual decision, which might allow more subjective considerations to come into play; in the Claimant's case there was the additional safeguard of an HR officer shadow-marking his performance at interview. We are satisfied that the Respondent acted reasonably in adopting this method of selection.

223. We were also satisfied that the Respondent took reasonable steps to identify suitable alternative employment for the Claimant. He was given the opportunity to apply for alternative roles but he was unsuccessful in his application.

224. The Claimant took the point that one of the alternative roles he applied for was advertised externally after he had been turned down for it. He argued that it was unfair not to slot him into the vacant role. The Respondent accepted that this role should have been offered to existing employees. However, we have concluded that, insofar as that gave rise to unfairness, it was to the employees who were higher in the ranking than the Claimant and who would have been appointed; there was no unfairness to the Claimant because he was too low in the ranking to be placed into the vacant role.

225. Finally, the Claimant says that the dismissal was unfair because the two interviewers on his interview panel for the alternative role had been involved in his complaint of discrimination. As we have already found, neither Mr Bennett nor Ms Sherwood were aware of the protected act; there were no allegations of discrimination against either of them. It is right that the Claimant had made complaints of a different kind about both in the course of his grievances: (complaints of 'unprofessionalism' according to the Claimant's statement at para 65). We observe that, by the time the interviews took place, the Claimant had made wide-ranging complaints about many of those in the management structure above him. We do not consider that it fell outside the band of reasonable responses for the Respondent to decide that the decisions about who should be appointed should be taken by those who would be running the relevant department. Further, we are satisfied that the potential for actual bias, or an appearance of bias, was cured by the presence of an independent HR officer, cross-marking the Claimant's performance at interview.

226. For the reasons given above, we have already rejected the Claimant's allegation that he was deliberately marked down by either decision-maker. We have concluded that the fact that he was the only LEO to have an independent HR officer present at his interviews was not unfair; on the contrary, it was to his advantage.

227. Having regard to all the circumstances, we are satisfied that the Respondent acted reasonably in treating redundancy as a sufficient reason to dismiss the Claimant. Accordingly, his claim of unfair dismissal is not well-founded and is dismissed.

Employment Judge Massarella

25 September 2023

APPENDIX: FINAL LIST OF ISSUES

The issues the Tribunal will decide are set out below.

1. Unfair dismissal

1.1 What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy. The Claimant says he was selected for redundancy because he had complained about being discriminated against.

1.2 If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal will usually decide, in particular, whether:

1.2.1 The Respondent adequately warned and consulted the Claimant;

1.2.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;

1.2.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment;

1.2.4 Dismissal was within the range of reasonable responses.

1.3 The Claimant says the procedure followed was unfair because:

1.3.1 He ought to have been slotted into an alternative role because the job description was an over 70% match for his current role.

1.3.2 The alternative role he applied for was advertised externally after had been turned down for it, showing that the Respondent ought reasonably to have redeployed him into that role.

1.3.3 Two interviewers on his interview panel for the alternative role had been involved in his complaint of discrimination.

1.3.4 Those interviewers scored him down because he complained about discrimination.

1.3.5 He was the only employee going through the redundancy process who had an HR representative sitting in on his interview panel.

2. Harassment related to age (Equality Act 2010 section 26)

2.1 The Claimant was born in 1996 and had just turned 25 when he left the Respondent.

2.2 Over a period from late 2017 to July 2019, did Law Enforcement Officers Mr Alan Hillsden and Mr Stewart Walls with increasing frequency (2–5 times per week during 2019) make comments and jokes referring to the Claimant's age including:

2.2.1 Words to the effect, *"How come is earning the same as us when he's barely learned to wipe his ass".*

2.2.2 Jokes about young people being sexually active.

2.2.3 Words to the effect, *"I would shag anything at your age".*

2.2.4 Pointing out women in the street they said the Claimant would sleep with.

2.2.5 Commenting in relation to a large woman words to the effect, *"you would try to do that and you'd slip head first."*

2.3 If so, was that unwanted conduct?

2.4 Did it relate to age?

2.5 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

2.6 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

3. Harassment related to race (Equality Act 2010 section 26)

3.1 The Claimant has Romanian nationality and heritage.

3.2 Over a period from 2018 to July 2019, did Law Enforcement Officers Mr Alan Hillsden and Mr Stewart Walls regularly make comments and jokes referring to the Claimant's Romanian nationality including:

~~3.2.1 Jokes about Romanians doing antisocial behaviour and street drinking;~~

~~3.2.2 Jokes about Romanians wearing red shoes;~~

~~3.2.3 Jokes about Romanians eating sunflower seeds in the street and littering the shells;~~

~~3.2.4 Words to the effect, *"how come you're not joining them?"* in relation to people they perceived to be Romanians on the street;~~

~~3.2.5 Words to the effect, *"I bet when you finish work you will be back here eating sunflower seeds"*;~~

~~3.2.6 Words to the effect, *"I bet you're a pimp for the Romanian prostitutes in the borough".*~~

3.2.7 In his return to work meeting on 25 January 2020 with Mr Alva Bailey the Claimant was treated with disrespect.

3.3 If so, was that unwanted conduct?

3.4 Did it relate to race?

3.5 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.6 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. Direct race and / or age discrimination (Equality Act 2010 section 13)

4.1 Did the Respondent do the following things:

4.1.1 [Age and race] In approximately March 2020, did Mr Alan Hillsden respond to an urgent call for help from the Claimant (who was dealing with a dangerously aggressive member of the public) by falsely stating that he was busy and unable to assist?

4.1.2 [Age only] On 3 December 2020, did Mr Alva Bailey respond to the Claimant's request to return to work while pursing mediation by adopting an aggressive demeanour and not letting the Claimant speak?

4.2 Was that less favourable treatment?

4.2.1 The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

4.2.2 If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

4.2.3 In relation to the allegation concerning Mr Alva Bailey, the Claimant says other colleagues who had 'heated' topics to discuss with him did not experience the same type of response.

4.3 If so, was it because of race and / or age?

4.3.1 In relation to the allegation concerning Mr Alan Hillsden, the Claimant says Mr Hillsden did not come to assist because he disliked the Claimant, and the reason for the dislike was because the Claimant was a young Romanian earning the same amount as him.

4.3.2 In relation to the allegation concerning Mr Alva Bailey, the Claimant says he would not have been spoken to in the same aggressive way if he had been English or if he had been older.

5. Victimisation (Equality Act 2010 section 27)

5.1 Did the Claimant do protected acts as follow:

5.1.1 On 8 March 2019, discuss with his line manager Mr Nigel Mould his concerns regarding the behaviour of Mr Alan Hillsden?

5.1.2 On 18 June 2020, write to Corporate Director Mr Jamie Blake that Mr Nigel Mould and Mr Tony Bennett had victimised him?

5.2 Did the Respondent do the following things:

5.2.1 On 7 August 2019, [Mr Mould] moved the Claimant from the night shift to the day shift.

5.2.2 [Around 28 August 2019, Mr Bennett] assign[ed] a private investigator to investigate the Claimant's complaint, outside normal procedures.

5.2.3 [Around 11 December 2019] returned the Claimant to work in the same team as Mr Stewart Walls.

5.2.4 Being sent a letter dated 28 August 2019 by Mr Tony Bennett informing the Claimant that he would be subject to a disciplinary investigation for gross misconduct; and engaging an external investigator, Mr Steve Sherman, to conduct the investigation.

5.2.5 Not following a recommendation in Mr Sherman's report dated 7 November 2019 for mediation to take place for the team the Claimant worked in; nor following recommendations made by Occupational Health for further counselling and for regular meetings with his managers recommended from 17 October 2019.

5.2.6 On 28 February 2020 [1 March 2020 according to the Claimant's statement], Mr Stewart Walls shouted at the Claimant when they were driving together.

5.2.7 On 11 March 2020, Mr Nigel Mould telephoning the Claimant while he was on sick leave and telling him that Mr Stewart Walls

had been suspended but that this had nothing to do with the Claimant.

5.2.8 Mr Jamie Blake failing to consider the Claimants complaints as grievances and instead referring to them as fact-finding exercises; and failing to take into account a report from Ms Rebecca Dyer that supported some of the Claimant's allegations.

5.2.9 On 16 November 2020 [the Claimant gives the date is 5 November 2020 in his witness statement], Allison Sherwood discussing the Claimant's health risk assessment within earshot of Tony Bennett and Carmen Zapatero.

5.2.10 At a return to work meeting with Mr Alva Bailey on 25 November 2020 being pressured by him to draw a line and move on.

5.2.11 When the Claimant highlighted a history of nepotism and cronyism to the Bailey, he told him to stop acting on hearsay from my colleague and stating that the Claimant was the only person that has released such concerns.

5.2.12 On 27 November 2020 Mr Blake telling the Claimant that he would no longer respond to his complaint about Mr Bailey and how his grievances had been dealt with and he should address them with Mr Bailey.

5.2.13 The Claimant's emails to the Respondent's management team dated 4 and 7 January 2021 were dismissed by the management team.

5.2.14 On 11 January 2021 Mr Blake dismissed all the Claimant's complaints and concerns.

5.2.15 A one-sided investigation by Mr David Humphries [in July 2020].

5.2.16 A one-sided investigation by Mr Alva Bailey [in November 2020].

5.2.17 Take advantage of a restructure to place the Claimant at risk of redundancy.

5.2.18 Fail to slot the Claimant into a suitable alternative role.

5.2.19 Score the Claimant down in his interview for an alternative role.

5.2.20 Have an HR representative attend the Claimant's interview for an alternative role.

5.2.21 Dismiss the Claimant.

5.3 By doing so, did it subject the Claimant to detriment?

5.4 If so, was it because the Claimant did a protected act?

6. Time limits

6.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 28 February 2021 may not have been brought in time.

6.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

6.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

6.2.2 If not, was there conduct extending over a period?

6.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

6.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

6.2.4.1 Why were the complaints not made to the Tribunal in time?

6.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

7. Remedy for unfair dismissal

7.1 Does the Claimant wish to be reinstated to their previous employment?

7.2 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

7.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

7.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

7.5 What should the terms of the re-engagement order be?

7.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

7.6.1 What financial losses has the dismissal caused the Claimant?

7.6.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

7.6.3 If not, for what period of loss should the Claimant be compensated?

7.6.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

7.6.5 If so, should the Claimant's compensation be reduced? By how much?

7.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.6.7 Did the Respondent or the Claimant unreasonably fail to comply with it?

7.6.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

7.6.9 If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

7.6.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

7.6.11 Does the statutory cap apply?

7.7 What basic award is payable to the Claimant, if any?

7.8 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

8. Remedy for discrimination

8.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

8.2 What financial losses has the discrimination caused the Claimant?

8.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

8.4 If not, for what period of loss should the Claimant be compensated?

8.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

8.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

8.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

8.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

8.9 Did the Respondent or the Claimant unreasonably fail to comply with it?

8.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?

8.11 By what proportion, up to 25%?

8.12 Should interest be awarded? How much?

9. Unauthorised deductions / holiday pay / redundancy pay

9.1 Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted?