EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr N Chowdhury	AND	Ministry of Defence

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT BRISTOL	**ON**	**30 & 31 October, 1 to 3 & 6 to 8 November 2023 Members Meeting on 1 December 2023**

EMPLOYMENT JUDGE	J Bax
MEMBERS	Mrs L Fellows
	Mr P English (attending by video during the hearing)

Representation

For the Claimant:	Mr A McGrath (counsel)
For the Respondent:	Ms K Gardiner (counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claims of direct religion and belief discrimination, harassment related to religion and belief and victimisation are dismissed.

REASONS

1. In this case the Claimant, Mr Chowdhury, claimed that he had been directly discriminated against, harassed or victimised on the grounds of his religion or belief. He also brought claims of unauthorised deductions from wages and accrued but untaken holiday.

Background and issues

2. The claimant notified ACAS of the dispute on 2 March 2020 and the certificate was issued on 2 April 2020. The claim was presented on 24 May 2020.

3. At a Case Management Preliminary Hearing on 11 February 2021, Employment Judge Roper dismissed the claim of unfair dismissal on the basis that the Claimant had insufficient service. The claim was listed for a preliminary hearing to determine whether the Claimant was disabled at the time material to the claim.

4. On 2 June and 7 July 2021, Employment Judge O'Rourke heard evidence and determined that the Claimant was not disabled within the meaning of the Equality Act 2010.

5. On 6 July 2022, at a Telephone Case Management Preliminary Hearing, Regional Employment Judge Pirani identified the issues in the case. 18 allegations of direct discrimination or harassment in the alternative were identified.

6. On 3 August 2022, Employment Judge Livesey granted the Claimant's application to amend the claim to include allegations of victimisation.

7. At the start of the first day of the final hearing, counsel only attended the Tribunal. Counsel for the Claimant had been instructed as of the previous Friday afternoon. The issues were discussed.

8. The Respondent accepted that alleged protected acts 2 and 3 were protected acts within the meaning of s. 27 of the Equality Act 2010.

9. The Claimant considered whether to seek to amend his claim by adding two specific comparators for his direct discrimination claims and a further protected act for the victimisation claim. The order of REJ Pirani was not in the bundle and Mr McGrath had not seen it. A copy was provided. After the luncheon adjournment on the second day, the Claimant confirmed that he was not seeking to amend his claim in those respects.

10. The claim also included claims of unlawful deductions from wages, holiday pay and notice pay. Neither the Claimant nor Respondent had addressed these claims in their witness statements and documents in relation to them were not included in the bundle. It was agreed that those claims would be dealt with separately.

11. The Claimant had not addressed all of the allegations of discrimination in his witness statement. The Respondent agreed that he could use the list of issues at pages 98A&B of the bundle as a witness statement.

12. After lunch on 1 November 2023, the Claimant said he was feeling unwell and might require extra breaks. After discussion with the Claimant and both counsel, it was agreed that the Claimant would speak to Mr McGrath about his current state of health. After a short break and an update about the Claimant's state of health, it was agreed that the hearing would adjourn early and the Claimant's evidence would conclude the following day, or a further update on his health would be provided.

13. There was a delayed start on 3 November 2023, so that counsel could take instructions from the Claimant. After that conference the Claimant withdrew allegation 3, although he continued to rely on it as background. It was also confirmed that the first alleged protected act was no longer relied upon. Slight amendments were made to allegations 1, 6, 11, 13 and 15. This included removing Mrs McEvedy from allegation 6 and replacing her name with that of Mrs Kehoe. Counsel for the Claimant was asked what was happening with allegation 4 and Counsel took further time to take instructions from the Claimant, following which allegation 4 was withdrawn. There was then cross-examination of 2 witnesses, including Ms McEvedy.

14. On 6 November 2023, the Claimant sought to set aside his withdrawal of allegation 4, in respect of training he had received. The Claimant gave evidence in relation to that issue on 31 October 2023. The Claimant was asked questions about his access to the systems and he conceded that his difficulties gaining access was not due to his religion or belief. He was then asked questions about training and answered questions about whether what happened with his training was related to his religion and he gave answers. His evidenced continued on 1 November 2023 and after lunch on that day the Claimant said he was feeling unwell, as set out above. The Claimant's evidence concluded on 2 November 2023. We were shown the e-mail the Claimant sent to his GP, asking for a prescription that he could collect from Bristol. On Saturday 4 November 2023, the Claimant sent an e-mail seeking to 'appeal' his position in relation to training. He suggested that he had misunderstood the questions he was asked because system access and training questions were asked together, this did not accord with the Tribunal's note. He also suggested the Tribunals understanding was that he had never raised training issues, however this was incorrect, the Tribunal asked the Claimant's counsel what the position was in light of the evidence the Claimant had given. The Claimant submitted that his mental stress meant he had not properly understood the questions he had been asked and we accepted he had asked for an anti-depressant the following day. It was significant he had a conference with his counsel on 3 November 2023 at which the issues were discussed and advice given, following which

the allegation was withdrawn. In Khan v Heywood & Middleton Primary Care Trust [2007] ICR 24, the Court of Appeal held that the Tribunal did not have power to reinstate a claim once it was withdrawn. There are appellate level authorities suggesting that this is not absolute, where the Tribunal had been too hasty in accepting that there had been a withdrawal in cases where there was a litigant in person. Such circumstances did not apply in this case. The effect of rule 51 is that where the Claimant informs the tribunal that a claim or part of is withdrawn, that claim or part of it comes to an end, subject to any application for a costs or preparation time order the Respondent may make. Allegation 4 was no longer before the Tribunal and could not be reinstated.

15. On 7 November 2023, the final witnesses for the Respondent, Mr Smith, gave evidence. Towards the end of his evidence the Claimant informed his counsel that he had a recording of the meeting on 3 February 2020 between him, Ms Kehoe and Mr Smith, upon which allegation 16 was based. Mr McGrath suggested that the evidence was concluded and he would consider the recording and take instructions. The application was made at 16:30. The Respondent had not heard the recording but was content for the application to be made without doing so.

16. The Claimant submitted that the recording corroborated his account and contradicted the Respondent's account of what happened at the meeting and could be cogent evidence in relation to a discrete allegation of discrimination. It was accepted that the recording was covert and that there would be a need to recall Ms Kehoe and Mr Smith if it was granted. The reason given as to why there was not an attempt to disclose it earlier, was that the Claimant wanted to see what the Respondent's witnesses would say and he did not think he needed to rely on it. Counsel for the Claimant was unable to put forward any submissions as to why it was not ambush. It was submitted that he was not represented throughout the whole of the disclosure process. It was suggested that the recording could be put on a memory stick and the application considered the next day.

17. The Respondent opposed the application on the basis that it was an ambush, which put it on the backfoot against a background of a case with moving goalposts. The Claimant had been represented for a considerable period. The Respondent would need to recall 2 witnesses. The Claimant's explanation was not credible and the explanations were contained in the documents in the bundle and was in in Mr Smith's note of the same day. It was also questioned whether there were any other relevant documents which the Claimant had not disclosed.

18. Procedurally, Employment Judge O'Rourke, on 7 July 2021 ordered that disclosure was provided by both parties by 6 October 2021 and an explanation was given that it was disclosure relevant to the issues identified

and included audio recordings. On 6 July 2022, before REJ Pirani, at which the Claimant was represented by Ms Mallick, Counsel, the issues were discussed, including allegation 16. It was confirmed at that hearing all disclosure had been completed. There was a further hearing on 14 March 2023 at which the Claimant was represented by Ms Mallick, when neither party raised any disclosure issues. The documents in bundle included explanations by Mr Smith and Ms Kehoe as to what happened. The Claimant essentially waited until the end of the evidence to raise the issue with his counsel.

19. We reached the following conclusions. The Claimant knew he had the recording since February 2020 and brought it to the Tribunal on his laptop. This was not a case of a document being discovered late on. The issue was not raised with Ms Kehoe when she gave her evidence the day before. The Claimant had the document for 3 years 9 months and confirmed more than a year earlier that disclosure had been completed. The meeting had been an issue in the case since the beginning of the claim. To keep the information up his sleeve and then to wait to see what was said and then seek to disclose and rely upon it, was effectively an ambush. The overriding objective, under the Tribunal rules, is to deal with cases fairly and justly. This includes ensuring parties are on an equal footing. The Claimant kept the recording to himself and sought to disclose it very late and it did not put the parties on an even footing. Disclosure is on the basis of a cards on the table approach, which had not occurred. Delay was relevant in that witnesses would need to be recalled and it was not clear whether Ms Kehoe would be available and it would reduce the Tribunal's deliberation time. There was significant prejudice to the Respondent, in that it would be faced with evidence kept back from it. It was contrary to the overriding objective to allow the application and it was refused.

20. The Claimant sent the recording to the Tribunal, without copying in the Respondent. It was not provided to the Judge and members and was not placed on the file.

The evidence

21. We heard from the Claimant. The Claimant was not asked any supplementary questions at the start of his evidence. For the Respondent we heard from Ms McEvedy, Mrs Kehoe, Ms Horton Ms Trowbridge, Mrs Clarke (nee Crouch), Ms Wood, Mr Biruls and Mr Smith .

22. We were provided with a bundle of 1061 pages, any reference in square brackets, in these reasons, is a reference to a page in the bundle.

23. There was a degree of conflict on the evidence.

24. In terms of the evidence given by the Claimant, he had a tendency to answer the question he wanted to answer, rather than the one asked of him. There were also occasions in cross-examination where he replied forcefully, with a raised voice whilst pointing his finger. We concluded that he was not dishonest, however he had misconstrued a number of things and was mistaken in his recollection about a number of matters. The Claimant also referred to not remembering things as a reason why allegations had not been mentioned earlier. We were not satisfied his memory was wholly accurate. The following matters, in relation to documents, were of significance:

    a. He misconstrued the text message sent by Mr Biruls on 5 November 2019 saying, "… Just focus on getting yourself into a better place." The Claimant took what was said out of context and tried to turn it into a suggestion to leave, when it was referring to his health.
    b. He misconstrued an e-mail from Ms McEvedy dated 25 September 2019 about whether leave could be claimed back as working from home and the Claimant asserting that it was a challenge as to whether the leave should have been granted.
    c. He misconstrued the e-mail from Ms Horton dated 31 October 2019, titled hot and itchy. This was also something taken out of context and was being used to try and suggest it was a reference to him.
    d. He misconstrued the meaning of Mrs Crouch's e-mail dated 2 October 2019, in that the Claimant suggested that her saying he had made a strong start related to the whole of his probation period, when it referred to his first draft of his objectives only. This again had been taken out of context.

25. The evidence of Ms McEvedy tended to show that she was very direct and at times abrupt, which could be considered abrasive. She had been described in the grievance report as, when giving oral feedback and what she said in e-mails, being in a very matter of fact way and not in an apologetic or sympathetic way, but in expectation that individuals deliver according to the role they are in and need to be told if they are going wrong [p924]. The grievance concluded that the work styles and perceptions of both Ms McEvedy and the Claimant led them to disagree early in the relationship, but no specific root cause was identified. It was recommended in the grievance outcome, that Ms McEvedy's FDO and PDM were given feedback on the opportunity to develop in adjusting management style and approach to giving feedback. This type of behaviour could be seen when giving evidence and we accepted that not everyone would respond well to such a style, in particular the Claimant. The team were recognised that there were problems between them in October 2019.

The facts

26. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

27. The Respondent has a department called Defence Equipment and Support. Within the department is the Air Domain Accounting Inventory Team ("ADAIT"), which is responsible for procurement for the Royal Air Force.

28. The Claimant identifies as a Muslim man of South Asian origin.

29. On 19 August 2019, the Claimant commenced employment with the Respondent as a Part Qualified Accountant: Senior Administrator/Specialist within ADAIT.

30. The role involved completing his mandatory training, being involved in the impairment and sample audit exercises and supporting the month-end process. Mr Biruls met the Claimant on 23 August 2019 and explained the tasks and said that the on-boarding process was often problematic and he should expect delays. The Claimant had been brought into the team on the basis of his CV. The role involved checking and analysing information which had come in from other teams. He was to check it was complete and there were not any error messages. If it was complete he was to enter it onto the master schedule and if incomplete to go back to the relevant team and ask for what was required. By reason of the Claimant's qualifications and his CV, it was thought he was proficient in excel and would pick up the work quickly.

31. The Respondent had a grievance policy which was available on the intranet. The Claimant did not see a copy and he did not ask for one.

32. The Respondent's Probation Procedure provided the following:

    a. "DE&S is supportive of flexible working arrangements; new joiners will have the opportunity to make a Flexible Working Request from the day they join. Employees may join the flexi-time scheme once they have successfully completed their probation." A link was provided for the relevant policy.
    b. At the end of probation the employee must be invited to an End of Probation Meeting to assess performance against expectations for the whole of the probation period. At that meeting a decision will be reached as to whether the probation has been passed, an extension granted or they have failed their probation.

c. The end of probation meeting must have at least 5 days' notice. If the employee cannot attend, the FDO will reschedule the meeting once, to take place no later than five working days from the original date.
d. Under section 3.2, Extension of Probation period, it said, "Where concerns regarding the employee's performance were raised during or following the mid-probation Meeting, or any other employment issues, please refer to Health and Attendance-Policy and the Standards Conduct and discipline – Policy. The PDM must contact the DE&S HR Casework team to discuss an extension. This must take place prior to the End of Probation Meeting." It went on to refer to employees being entitled to one extension of up to three months, which should only be granted in exceptional circumstances. Examples of such circumstances included that it had not been possible for the employee to attend agreed training for genuine reasons and other related employment issues.
e. Under section 3.3, dismissal. Where dismissal is being considered the PDM must discuss it with the FDO and seek advice from the DE&S Casework team. Where the FDO is a Professional 1 or below, a manager at least one level above the FDO must act as the decision manager.

33. The Claimant's contact of employment provided:

    a. The Claimant was to work 37 hours a week over 5 days and had to take a minimum of 30 minutes as a lunch break each day.
    b. The Claimant's starting salary was £33,000 per annum.
    c. In the Claimant's first year of employment he was entitled to 25 days of leave.
    d. The leave year ran from 1 May to 30 April.
    e. Due to the constitutional position of the crown, civil servants cannot demand a period of notice, however in practice DE&S normally applies, for employees with up to 4 years' service, 5 weeks' notice.
    f. The first 6 months of employment was a probationary period.

34. The Claimant's Primary Delivery Manager (PDM) (line manager) was Carole Crouch, Finance Inventory Manager. Ms Crouch was slightly deaf and tended to talk loudly and on occasions she was asked to talk more quietly. Mrs Crouch was aware that the volume of her voice could be disruptive. Ms Crouch was due to move to 'Ships' at the beginning of October 2019. She reported to Mr Biruls, Senior Manager. Mr Biruls was the Assistant Head of Air Domain Inventory Accounting and he had day to day oversight of the team.

35. From mid to late October 2019 the Claimant's PDM was Ms Wood. From 3 February 2020, the Claimant's PDM was Mr Denwood.

36. The Claimant's functional Development Officer (FDO) was Angie Kehoe, Finance Business Partner within the Air Support Operating Centre. An FDO is a 'support buddy' from another office whose role is to help a new joiner with training and development. Mrs Kehoe, was physically located on the floor below where the Claimant's team were located.

37. Mr Smith, was Deputy Chief Financial Officer and led a finance team of 35 people which included ADAIT and he also had responsibility for the equipment programme and a bespoke trading entity. He reported to Grace Horton, Chief Financial Officer for Air Domain.

38. Sarah McEvedy, Senior Professional Inventory Accountant, was a subject matter expert in the team. She was the same grade as Mr Smith.

39. Ms Trowbridge was a Finance Officer/Analyst level 2.

40. Mr Biruls joined the team in 2015. The team had a difficult first year, it was not performing well and was viewed as being at the bottom of the Domain Inventory table. The team was not working well together. We accepted Ms McEvedy's evidence that inventory work was difficult and that the team was new and new teams have difficulties working together. In March and June 2019 two experienced level 3's joined the team. Ms McEvedy was also 'parachuted' in, at this time, as an inventory subject matter expert to support the improvement. Ms McEvedy was to help with driving change in the team and to look at the strategic direction of it. Her role involved training the business in relation to inventory systems and the impact their actions had on the accounts. Ms McEvedy had no line management responsibilities and we accepted that she had no involvement in the Claimant's probation process or evaluation The Claimant filled an existing gapped level 2 post.

41. The office was open plan and had about 200 people working in it. ADAIT was situated in a corner and had about 10 people in the team working at desks near each other. The floorplate on which the Claimant worked had a door into it which led from an atrium where the stairs were located. On entering the floorplate, immediately to the left, there were two desks next to each other where Mrs McEvedy and Ms Crouch sat. Mrs McEvedy's and Mrs Crouch's desks were separated by a filing system and when seated the other desk could not be seen. In front of those desks was a block of 4 desks at which Ms Wood initially sat. The Claimant sat to the left of Mrs McEvedy. When the Claimant was later asked to move, he moved to where Ms Wood had been sitting and Ms Wood moved to the desk next to the Claimant. [p1061]. Another team was situated next to the ADAIT floorplate.

42. On 23 August 2019, the Claimant had a meeting with Mr Biruls at which they discussed that the Claimant was travelling from his family home in Luton on a Monday and returning there on a Friday. We accepted that Mr

Biruls did not want the Claimant to have to leave home very early in the morning and that the traffic would be bad on a Friday afternoon. It was agreed that he could start at 10am on a Monday and leave early on a Friday and he could make up the time, about 1 ½ to 2 hours, on other days, which would equate to just over 30 minutes extra on Tuesdays, Wednesdays and Thursdays. Employees on probationary periods were expected to work between 9am and 5pm so that they overlapped with people available to support and train them, which is one of the reasons why flexitime was not available to those in a probationary period. Ms Crouch was generally in work at 07:00 to 07:30 and the Claimant wanted to come in earlier; because of this Mr Biruls agreed he could start at 07:00 when Ms Crouch arrived. We accepted Mr Biruls' evidence that he explained the team/organisational structure and that the Claimant had access to the intranet to find the information. Further he also explained what the Claimant's objectives were and that in addition to completing mandatory training, the Claimant would be involved in the impairment and sample audit exercises and support the month end processes. He explained the related tasks. We also accepted Mr Biruls explained that the on-boarding process was often problematic and the Claimant should expect delays. During the meeting, Mr Biruls asked what had attracted the Claimant to the MOD. The Claimant said that his uncle had been in the Bangladeshi Air Force and he had been a Cadet in Bangladesh. Mr Biruls thought that he had asked the Claimant if he had been allowed to carry firearms when he was a Cadet.

43. In addition to starting early on Tuesday to Thursday, the Claimant would also work late, i.e. after 17:00. On a number of occasions Mr Biruls told the Claimant that he should go home. The Claimant was working more than 37 hours a week. He was working about 43 hours a week and because he could not work flexitime, until after his probation period, he would not be able to take those additional hours as time off in lieu. On 19 September 2019, Mr Biruls told him that he should not be responsible for locking up at the end of the day.

Training

44. When the Claimant first started his employment, Ms Crouch showed him how to open and close the cabinets and how to open and close the office. The Claimant's evidence was that he was shown how to lock up and if he left late to make sure he was closing up properly. Ms Crouch's evidence, which we accepted, was that she told him new starters should not be first in or last out of the office. What she showed him was standard practice, to explain what was required, but not with the intention that he would be the last person out. We accepted that closing up was a significant responsibility and that if a laptop or document was not locked away, it was a security breach which would lead to an investigation and a likely disciplinary record. We accepted that it was the practice of the team that people on probation

did not have the closing responsibility, in order to protect them whilst they were learning to be a civil servant and starting their roles.

45. When the Claimant first started, Mrs Crouch told him that at the start of each day he should check his e-mails and diary for the day and then go to her and she would give him work to be done.

46. The Claimant informed Ms Crouch that he was accountancy and audit trained. There was a dispute between the parties as to the amount of training the Claimant received. We accepted Mr Smith's evidence that 70% of the training was at the desk working with a number of people, 20% was online and the remaining 10% was Continuing Professional Development. We did not accept the Claimant's evidence that his training was cursory. Ms Crouch, on a daily basis, got the Claimant to sit at her desk with her. She would show him a task and how to use the Excel spreadsheets, in respect of both the impairment and sample audit exercises. The Claimant would take notes. He then went back to his desk and continued with the task independently and then review it with her. The Claimant was provided electronic links with guidance. She also explained the background to the work in the department and explained the structure of DE&S to clarify the team's role in the organisation and the Claimant's role within it. When Ms Crouch moved to Ships, she sent confirmation of the training that she had provided to the Claimant [p169]. When the Claimant's PDM changed to Ms Wood, she provided similar training. We were taken to a number of examples in the bundle which showed that the tasks were being explained to the Claimant.

47. Mrs Crouch would regularly ask the Claimant to come and sit with her when he was ready, so that she could go through tasks with him. The Claimant did not always do this and due to Mrs Crouch being busy she would get on with other tasks. The Claimant was also provided with electronic links to access the online training and told how to access other training courses via the training suite.

48. Ms Crouch wrote the Excel spreadsheets and we accepted that the use of those spreadsheets did not require an advanced level of excel knowledge. Ms Crouch did not have an advanced level of knowledge. On about 18 September 2019, the Claimant asked Ms Crouch for additional excel training and she provided him with a link. The Claimant then replied that he had used the link and was asking for some advanced excel to learn the formulas. Ms Crouch responded by saying that there is little formal training on Excel and suggested a team which might be able to help. We accepted the Respondent's evidence that the Claimant struggled to use excel and that when he had been appointed it was thought he was proficient, however that turned out not to be the case. Ms Crouch expressed her concern about the Claimant's lack of knowledge of Excel in an e-mail to Mr Biruls on 18

September 2019, saying that she believed he needed additional support with the impairment review.

49. On 28 October 2019, after Mrs Crouch had left the department, she forwarded Mr Smith e-mails regarding the impairment exercise. She was then asked whether the Claimant managed to successfully complete the next one. Mrs Crouch replied that there was not an opportunity to assess it because another one had not been submitted before she left. It was suggested by the Claimant that Mr Smith was becoming involved. We accepted Mrs Crouch's evidence that she had explained to and expected the Claimant to collate the information into the master schedule, which was a cut and paste task and ensure all elements of the workbook were completed. The exercise was large and needed to be completed by 18 October 2019 and she had been concerned because she was leaving the team and the Claimant did not seem to have gained the knowledge.

50. The Claimant was also provided with training on the Journal process by Ms Trowbridge, in a similar way to the training with Ms Crouch and Ms Wood. He also received ad hoc training from other members of the team and written instructions.

51. It is the responsibility of employees to write their own objectives. The Claimant asked Mrs Crouch for assistance with his. On 2 October 2019, in an e-mail titled 'Initial Objectives', Mrs Crouch provided him with some wording he could build into the Audit Review and Impairment objectives. She also said that Mrs Kehoe could assist him with his FDO objective and suggested it would be based around undertaking his mandatory training. The Claimant replied and attached his wording and asked if he was going in the right direction and said that he would try and complete it soon. In response to the Claimant's e-mail, about what he had written, Mrs Crouch said on 3 October "I think you have made a strong start." The Claimant suggested in his evidence that what Mrs Crouch said demonstrated that he was performing well in his role generally, we rejected that evidence. We accepted Mrs Crouch's evidence that her comment related to what the Claimant had written about what his objectives were.

52. The Claimant had difficulty accessing some of the online systems, in particular SharePoint, on which some work was undertaken, and access to his CP&F account. Ms Trowbridge worked hard with the Claimant to gain him access to both systems and he had access about 2 months after the start of his employment. Although he did not have access to some systems he had access to paperwork and links and was able to undertake the work he was set by other means. We accepted Mrs Crouch's evidence that this would not have stopped him from doing the work he had been asked to do and the difficulties he had were connected with his knowledge rather than IT matters.

17 September 2019 and raising of prayer times

53. The events of this day were the crux of the Claimant's case.

54. The Claimant's evidence was that on 17 September 2019 he was speaking, in a low voice, to Mrs Crouch at her desk about work. He then said that he needed short breaks for his mandatory prayers, and gave their times and the reason for praying. In his witness statement he said that as soon as Ms McEvedy heard this she angrily said to stop talking.

55. The Claimant did not refer to this incident in his e-mail to Ms McEvedy dated 18 September 2019, in relation to his reasons why he was looking at the intranet. Nor in his e-mail dated 26 September about upsetting issues raised with Mr Biruls, despite saying "things became very stressful and frustrating since 19 September when he was getting instruction from 3/4 people and he was "feeling intimidated, bullied and discriminated." Nor in his written grievance dated 9 January 2020, or in his further information for his appeal against the grievance outcome. The Claimant's explanation was that he might have missed it out. In the grievance interview on 11 March 2020, the Claimant said that when his conversation with Ms Crouch was overheard it changed Ms McEvedy's perspective. He said that she had said, 'you're always disturbing me'.

56. Ms McEvedy had no recollection of the incident and she was not asked about it in her interview for the Claimant's grievance. Her evidence, which we accepted was that she asked her colleagues to keep the noise down if they were being noisy whilst she and others were trying to concentrate. We also accepted that Ms McEvedy was not surprised that the Claimant was a Muslim, because she had seen on his CV that he had come from Bangladesh and thought it was likely he was of the Muslim faith. We accepted that she had briefed the team as to how to respect his religion. In oral evidence she denied saying anything to the Claimant because he had been raising prayer times.

57. Mrs Crouch's evidence was that she had been discussing various matters about DE&S and her experience. Part of the discussion related to prayer facilities and that the Claimant wanted to use a meeting room and she advised that there was limited availability for meeting rooms and he should use the multi-faith room, which was a 5 minute walk away. There was also discussion about both of their backgrounds. Mrs Crouch is slightly deaf and tends to talk loudly. Whilst they were having the conversation, Mrs McEvedy leant across and asked Mrs Crouch to keep her voice down because she was trying to concentrate. Mrs Crouch apologised and tried to talk more quietly. She maintained that the comment was aimed at her.

58. We preferred the Respondent's evidence. It was likely the Claimant had discussed prayer facilities with Mrs Crouch in addition to various other matters on 17 September 2019. We accepted that Mrs McEvedy had no recollection of the incident. The Claimant's account in his grievance interview and his account to the Tribunal differed in terms of what he alleges was said. It was surprising that the incident was not mentioned until 6 months later and had not featured in his letter of grievance when the Claimant's case was that this incident triggered all the subsequent events. Ms Crouch had a tendency to talk loudly. We were not satisfied that Mrs McEvedy was paying attention to what was being said or that she was aware that the Claimant was discussing his religious needs. The level of Mrs Crouch's voice was disturbing Mrs McEvedy. Mrs McEvedy told Mrs Crouch that she was disturbing her and asked her to keep her voice down. This was said in a direct manner.

59. On 25 September 2019, Mrs McEvedy sent an e-mail [p142-143] in which she said that she had spoken to Mr Tregower, Domain HR Lead, and had asked him to clarify the policy on prayer and supporting employees so that "we can send an e-mail asking for a plan of times we need to observe and work around, and inform on what the organisation supports and how". Mrs McEvedy's evidence was, that this was not a querying his prayer times but was an attempt to support him and that they needed to know his prayer times so that they could plan around them. He had been asked about this from the beginning of his employment. She was seeking to clarify what she thought the policy was. Meetings had been booked across times when the Claimant wanted to pray and she was seeking to avoid this because they were trying to arrange matters to facilitate his training and they did not want him to be excluded from meetings. The Claimant's evidence was that was an attempt to try and show he was being supported when it was not the case and restrictions and pressures were being put on him. We preferred Mrs McEvedy's evidence. Mrs McEvedy's evidence was supported by the evidence of Ms Horton, which we accepted, who had also been told that the Claimant was raising that meetings were being booked across his prayer times and she had suggested that he put a meeting in his diary at the relevant times so that this could be avoided.

60. On 19 November 2019, Mrs McEvedy asked Ms Wood to remind the Claimant, at his return to work meeting, to record his prayer times, as per the request by Ms Horton, in his calendar to help his colleagues avoid booking meetings which would clash with his religious requirements and to help the team respect his faith. The Claimant had not inserted any times in his diary and did not do so.

61. The Claimant's evidence was that if he used the multifaith room he had to walk to it, which took him 6 or 7 minutes, and he only needed to use it for 2 or 3 minutes. He wanted to use vacant meeting rooms to save himself time,

however he was told that they were in constant use. Even taking into account the Claimant's late start on a Monday and early finish on a Friday he was working significantly more hours a week than he was required to do.

62. On 19 November 2019, Ms McEvedy e-mailed Mr Biruls and said that the Claimant had spoken to her and had left the floorplate for 20 minutes before he had to leave for a meeting. She asked if the Claimant had been with him and that they needed to get to the bottom of the disappearances. The Claimant would answer his telephone and leave the floorplate. Ms McEvedy's evidence was that the Claimant would leave the floorplate 7 to 10 times a day for 15 to 20 minutes at a time. At this time, the Claimant was having health difficulties, and was receiving telephone calls about them, and also he needed to spend longer than normal in the lavatory. This was not known to the Respondent. If employees were leaving the floorplate they were expected to inform their manager. The Claimant did not accept he was leaving the floorplate 7 to 10 times a day. We accepted that the Claimant would have to pass Mrs McEvedy to leave the floorplate. It was unlikely that the Claimant was leaving the floorplate 7 to 10 times a day for 15 to 20 minutes at a time. However, it was likely that he did leave the floorplate frequently to answer telephone calls and that he spent longer in the lavatory.

63. There was also cross-examination about smokers leaving to go outside. There were not any smokers on the team. We accepted Mrs McEvedy's evidence that smokers were allowed to take smoking breaks, however she would not allow someone to leave a meeting to smoke, whereas she would for prayer needs. Smoking breaks did not get primacy over work, however prayer was different.

<u>18 September 2019</u>

64. On 18 September 2019, at 07:03, Mrs Crouch e-mailed the Claimant and said that the first response to the impairment exercise had come in and when he was ready to come across with his chair and they would go through the ADAIT process together. After the Claimant had been in the office for about an hour, he was watching a message from the CEO on the intranet. He had not read the e-mail from Ms Crouch. The Claimant had also booked onto some Inventory Awareness training that day, however it was not entered into his diary. Inventory Awareness training courses were run every 2 months. The awareness training was not designed to specifically train on how to do Inventory work, this was undertaken by Mrs Crouch. The training was to raise awareness of matters such as accounting practice, calibration and consumer impacts. It was more of a refresher course than training in how to do the Inventory tasks. Mrs McEvedy spoke to the Claimant.

65. The Claimant, in his witness statement, said that he told Mrs McEvedy that he was doing training which was mandatory and he had spoken to Ms

Crouch the day before and asked her to provide him with some work she wanted him to do. He said that his training was then blocked by Mrs McEvedy and she said training could be completed by the end of March. In oral evidence he said that Mrs McEvedy harshly said that he was just doing training and not the work tasks. He then became stressed and went to Mrs Crouch and forgot about his training. He later remembered he had not attended and asked Mrs Crouch what to do. The Claimant did not give evidence as to shortcomings or criticism raised about him by Mrs McEvedy.

66. Mrs McEvedy's evidence was that she was aware Ms Crouch had e-mailed the Claimant and after he had been in the office for about an hour she could see he was on the intranet looking at the front page for a long time. She approached and asked him about his time off and how his daughter's first day at her new school had gone. She then asked what he had planned for the day. The Claimant said he was looking at the intranet and was doing some mandatory training. She advised there would be opportunities to do mandatory training over the next 6 months so it would not be urgent and there were opportunities to get involved with the accountancy work and suggested he spoke to Ms Crouch. Ms McEvedy was aware that the Claimant had been on leave and working from home. At this time he did not have access to SharePoint and therefore would have been unable to do work and therefore she thought he could only have been undertaking training from home. Mrs McEvedy denied that there was any discussion of shortcomings.

67. Later that morning the Claimant sent Mrs McEvedy an e-mail [p125-126], thanking her for the query about work that morning. He explained what he had been looking at. Ms Crouch had been waiting for information on the impairment exercise and whilst waiting he had been trying to use his time constructively by doing mandatory training which he now understood needed to be completed by 31 March. He said, "I love to receive constructive criticism from colleagues but expect to receive those in a constructive way." He asked her to discuss shortcomings, if any in a meeting room instead of the open floor.

68. Mrs McEvedy replied to the Claimant's e-mail [p165-166] saying she was confused, because when she spoke to him there was no criticism. She had advised that after his initial weeks he would be involved in the processes and not just mandatory training, reviewing web pages and reading policy. Mrs Crouch had e-mailed him and was waiting to start the impairment process. She said, "I am sorry that you had the impression that I was not polite, but I feel that you were under a misapprehension that you were being told off or criticised which is not correct, and I am at a loss to understand why you would think that from the conversation we had. You are correct that any developmental conversations would be conducted off the floor plate, by your delivery manager and not by me."

69. The same day Mrs McEvedy e-mailed Mr Biruls [p125] and referred to the discussion and said that she had not raised criticisms or shortcomings and had not mentioned the times he spent on his phone or the periods of him inactively sitting at his desk staring at his computer. She said, “This is very disappointing, and I hope it is not a start of things to come.”

70. We preferred the evidence of Mrs McEvedy as to what occurred on 18 September 2019. There was evidence of discussion about training and doing tasks, however the Claimant had not recorded it in his diary and it was against a background when the Claimant had been working from home, undertaking training, for 4 days. There was a lack of evidence as to what the criticism was meant to be. Mrs McEvedy was aware that Ms Crouch was waiting for the Claimant and wanted him to be involved in the work processes. It was likely that Mrs McEvedy was abrupt, however we were satisfied that was part of her general manner.

71. The Claimant said in evidence that before he had raised prayers on 17 September nothing had come up before and that Mrs McEvedy was giving him wrong direction on 18 September. He said this was so that the Respondent could say he was not doing well in his probation and that by preventing him from doing the training he would not be able to perform and they could dismiss him for failing to pass his probation. This was not put to Mrs McEvedy in cross-examination and we did not accept this evidence.

Events from 19 September 2019

72. On 19 September 2019, the Claimant had a conversation with Mrs Crouch. The Claimant’s evidence was that Mrs Crouch referred to soldiers being killed in Afghanistan and the Middle East and bodies were returned to the UK and there was a strong sentiment in DE&S. He suggested that it was said to give him a hint to stop talking about his faith. Mrs Crouch’s evidence, which we accepted, was that she and the Claimant had been speaking about their professional backgrounds and experiences and she was trying to explain the importance of the work they did and the need to understand that importance and the impact on the forces. She explained that she had worked in all 3 service areas and told him about an incident when working with the army. She had been involved in approving business cases for improving weaknesses on 2 types of vehicle and that service personnel were being killed in both. She made a decision as to which to improve, following which service personnel in the other type of vehicle were killed in an explosion. She told the Claimant this upset people in the office and they were telling her, when bodies were being returned, that she had made the wrong decision and it was very upsetting. We accepted that this was an explanation as to why the work they did was important and any reference

to strong sentiments had been in relation to the decision she had taken on that occasion.

73. On 25 September 2019, the Claimant e-mailed Mr Biruls at 09:01, referring to Mrs McEvedy querying his leave and training from home. He also referred to being asked to open his Performance Management on HMRS and to set up his FDM and was told how to do it. She then told him his DM was not Mr Young, but Mrs Crouch or Mr Biruls. He referred to unexpected experiences and was hoping they remained within tolerable levels.

74. The Claimant, in his evidence, referred to Mrs McEvedy becoming difficult with him and that leave granted by Mr Biruls had been challenged. On 29 August 2019, Mr Biruls granted the Claimant leave between 5 and 12 September 2019. The Claimant sought to claim back leave for work he had done at home during some of that time. On 25 September 2019, in Ms McEvedy's e-mail to Mr Biruls [p142-143], referred to above, she also said the following, "In the near term we need to resolve the issue surrounding taking leave then claiming back days as wfh, as a new starter has no requirement to wfh for the benefit of the business, this was not something we requested or agreed to up front, Rob just granted leave. We may be able to compromise on one day of the time, if we are confident that time was spent, but there are no work driven tangible outputs, nothing set or delivered. All new starters need to be clear on the purpose of wfh, smart and flexible working, for the organisation's benefit and requirement." We rejected that this was Mrs McEvedy challenging the granting of leave; it was concern about taking leave and then seeking to claim it back as working from home without evidence of what was being done. It was a point of general application to all new starters and a concern that the practice needed to be clear.

75. On 25 September 2019, Ms McEvedy e-mailed Mr Biruls and said that the Claimant had spoken to her and walked off the floorplate and was gone for 20 minutes. She asked if he had been with Mr Biruls and if not they needed to get to the bottom of his disappearances. She also raised that she did not expect to be spoken to in the manner used by the Claimant. This followed a chain of e-mails which had included the Claimant about a piece of work [p145].

76. On 25 September 2019, Mrs McEvedy asked Mrs Crouch to document the training she had given the Claimant in her tenure [p206].

<u>Meeting on 25 September 2019</u>

77. In the afternoon of 25 September 2019, the Claimant attended a meeting with Mr Biruls and Ms Kehoe. The purpose of the meeting was to try and informally understand perceived issues, the unexplained absences from the

floorplate and to discuss his new PDM after Mrs Crouch left. At the start of the meeting, as way of easing the Claimant into it, Mr Biruls asked the Claimant why had chosen to work for the MOD in Bristol.

78. Discussion took place about the Claimant's working hours. We accepted Mr Biruls' evidence that when Mrs Crouch stopped being the Claimant's PDM she was going to be replaced by Ms Wood. Ms Wood generally started work at 08:30 rather than 07:00. Mr Biruls was aware that the Claimant was working more than 37 hours per week and as probationer he could not work flexitime. Further the Claimant was working far more than the amount he needed to catch up from his late Monday start and early Friday finish. Mr Biruls wanted the Claimant to work at the same time as his line manager so that he was not unsupervised in his work and could be supported. The Claimant was told that he should expect to start later and agree his start time with his new PDM. Subsequently it was agreed that the Claimant could start at 07:30 when Ms Wood became his PDM. Mrs Kehoe offered to provide the Claimant with a spreadsheet so he could record his times. Mr Biruls agreed that he would speak to Mrs McEvedy and ask her to reduce her input with the Claimant.

79. The Claimant, at the meeting, raised that people had an issue with him locking up. We accepted that this was a task which was not given to new starters due to the responsibility and that they were having to learn their role and how to be a civil servant. This was explained to the Claimant.

80. Mr Biruls asked the Claimant why he was away from his desk and was told that it was for only a few minutes at a time. There was limited discussion about the Claimant's prayer needs and Mr Biruls agreed to find out what the policy said. The Claimant was concerned that meetings were being booked across his prayer times.

81. We accepted Mr Biruls evidence that at the meeting there was not any discussion about the Claimant's work abilities or about him working elsewhere.

82. After the meeting, Mr Biruls and the Claimant walked back to the floorplate and they had a discussion. During that discussion Mr Biruls asked the Claimant about his travel to and from Luton. He tried to understand why the Claimant had applied for a role in Bristol, for which he was over qualified, away from his family and could have got a better paid job in London. Mr Biruls jokingly asked if the Claimant was trying to get away from his family. The Claimant said that it was because there were more opportunities for progression in a big Civil Service Organisation.

83. The Claimant's written evidence was that Mr Biruls said to him that he should just admit that he could not do his job and he could be moved

elsewhere. This changed in oral evidence to that he had asked Mr Biruls if he could relocate and Mr Biruls said if he was unable to the job and tasks it would be looked into and he might get another place to work. Mr Biruls was not cross-examined in relation to this. The Claimant's evidence was inconsistent and we rejected it and were not satisfied that Mr Biruls made the comment.

84. The Claimant also alleged that on the way back to the floorplate, Mr Biruls asked him "are you carrying a firearm in your pocket." The Claimant's evidence was that Mr Biruls was saying Mrs McEvedy did not think the MOD was the place for him, i.e. a practising Muslim, and there were links to terrorism. Mr Biruls denied that this was said. At some stage afterwards, the Claimant reported that a comment had been made, but refused to say who had made it. He informed Mr Smith that it was no-one from the floorplate. The Claimant accepted in evidence that at some point there had been discussion about when he had been a cadet. We also accepted that suspicion someone was carrying a firearm would have been a serious matter and would have been a security issue and reported to the MOD police. It was improbable that such a comment would come out of the blue. We did not accept that Mr Biruls asked the Claimant if he had a firearm in his pocket.

Matters in September and October 2019

85. On 26 September 2019, the Claimant e-mailed Mr Biruls, in which he explained that, after being asked about his prayers and approximate times, a prayer would take about 10 minutes and because they were determined by sunlight there would be one prayer in office time during the summer and two or three in the winter, depending on his finishing time. He said that things had become frustrating and stressful since 19 September and worse when he was getting instruction from 3 or 4 people. He was feeling "intimidated, bullied and discriminated." Mr Biruls forwarded the e-mail to Mr Smith and said they needed to discuss the contents and purposively did not share it with Mrs McEvedy.

86. The Claimant alleged that in late September 2019, Mr Smith made comments about his support for Brexit and the need to control immigration. In the Claimant's witness statement, he said that Mr Smith made his support for Brexit well known and there was a lack of detail about what was said. The first time this was raised by the Claimant was in about October 2020, in his further documentation for his grievance appeal. The Claimant's explanation for not mentioning it before was that because of his depression and stress he missed things and might not have remembered. Mr Smith denied making such comments and we accepted that, as a Civil Servant, he was required to give impartial advice to the Government. There was no

other evidence to support the Claimant's assertion and we were not satisfied that Mr Smith made such a comment.

87. Mrs Crouch's last working day was the 3 or 4 October 2019, before she started her new role with Ships on 8 October 2019.

88. On 8 October 2019, Ms McEvedy sent an e-mail to Mr Biruls and Mr Smith saying that she had spoken to Mr Young who had confirmed that in the probation period an individual should be working hours which suit the team and overlap with people who can support and guide them and that was one of the reasons 'flexi' was not available to them. We rejected the Claimant's suggestion that this related to flexible working. It related to the prohibition of people on probation working flexitime.

89. On 16 October 2023, Ms McEvedy e-mailed the Claimant. The Claimant had provided her with a print out of an APS sample, on which he had written a note. She advised that the spreadsheet could be removed, but she needed to get a clean ISOPS print, with no one in work due to the away day. She said, "As a learning point, please only use post it notes to comment on samples – do not write on the sample evidence itself." The Claimant's evidence was that this was Ms McEvedy saying he had ruined her whole day and because she had copied in Mr Biruls she was making a complaint about him. This was not put to Ms McEvedy and she was not questioned about it. This e-mail explained how work should be undertaken and the practices which were followed in the department.

90. On 17 October 2019, Mrs McEvedy sent Mr Smith, Mr Biruls and Mrs Kehoe an e-mail saying she had been in a meeting with Mr Biruls and the Claimant to pass on feedback on audit samples and that they could not be used because the Claimant wrote on them. She said that the Claimant argued back and raised his voice and she asked him to lower his tone. She said this was the second time that week she tried to give him feedback, when he refused to accept her advice and said that she was wrong. She said it would be helpful if he could accept feedback without challenge at every point and accept that there was a fair chance there was value in what she was saying. Mr Biruls, during the grievance process said that he did not consider the Claimant had raised his voice, however Mrs McEvedy had asked him to lower his tone on several occasions and the Claimant raising his voice was not a true reflection. Ms Horton had been copied in to Mrs McEvedy's e-mail and said that in the first instance Mr Biruls should raise it with the Claimant and added if there was trouble brewing they need to stop it now.

91. Mr Biruls responded to the e-mail and said that he was not endorsing Mrs McEvedy's comments. He had discussed the increasing personal conflict between the Claimant and Mrs McEvedy. He said he would set up a meeting with Mr Smith and the Claimant, so Mr Smith could hear how the Claimant

was feeling. He recommended Mrs McEvedy was not included. Mr Biruls was concerned about the Claimant's well-being. We accepted Mr Biruls' evidence that he perceived that there was conflict which could have been in relation to interacting or providing feedback. The Claimant and Mrs McEvedy were both professionally qualified and he considered the Claimant had embarrassed himself when he had referred to an IASS standard which he had got wrong. Mr Biruls considered there was a personality conflict. The Claimant had sent Mr Biruls an e-mail that day saying that he was stressed due to the harassments [p194]. We accepted Mr Biruls' evidence that he was trying to diffuse things and reduce the contact between the Claimant and Mrs McEvedy.

92. Ms Horton responded to Mr Biruls's e-mail by saying that her preference was to resolve the issue at a local level, rather than going through a formal process. She set out that there were 2 bullying and harassment grievances running at that time in the division, one for more than 12 months and the other many months and the process was a 'shocker' for anyone involved. She said it was up to the Claimant if he wanted to take it further. We accepted Ms Horton's evidence she was trying to get them to sort out the issue and she was conscious the formal grievance process was lengthy and difficult for those involved.

The desk move

93. On 21 October 2019, Mr Smith asked the Claimant to move desks so that he was sitting next to his PDM, Ms Wood. The Claimant suggested that this had been at Mrs McEvedy's instigation, we rejected that suggestion. The Claimant accepted that he had not heard Mrs McEvedy say anything to Mr Smith and referred to vague conversations without providing detail. Mr Smith's clear evidence was that Mrs McEvedy was not involved in the desk move. At this time two colleagues in the team needed to sit together due to a project they were undertaking and they also needed to sit alongside the next team on the floorplate. Mr Smith was concerned that the Claimant's work performance was poor and he was not progressing at the rate he was expected to and that he was not proficient in Excel. We accepted that the Claimant's progress was not as expected and it was considered to be poor. Mr Smith considered that if the Claimant sat next to Ms Wood, his PDM and line manager, that she would be better able to help him with his work and "push him up the learning curve." We accepted that Mr Smith was also trying to address the poor performance in the Inventory team. The Claimant did not want to move because he felt the cold and the desk he was sitting at meant he could keep snacks under it. Mr Smith explained the reason to the Claimant on three occasions.

94. On 19 November 2019, the Claimant was asked to move to sit next to Ms Wood again. Ms Wood discussed this with the Claimant the following day

and it was explained that he suffered with the cold and the desk was nearer the door. Ms Wood then made enquires as to whether they could sit together somewhere else in the team's area on the floorplate. At the meeting on 20 November 2019, it was explained that everyone was moving desks.

95. We did not accept that on 21 November 2019, Mr Smith asked the Claimant why he had left his desk. Mr Smith was very busy and did not have time to check on people's movements from their desks.

96. The Claimant suggested that the move was done so that Ms Wood could keep an eye on her screen and see if he was communicating with a Muslim colleague. The Claimant's evidence was that shortly after the move Ms Wood was looking at his screen when he was e-mailing his union rep, who was a Muslim. Ms Wood denied this. We accepted Ms Wood's evidence that it would have been impossible to look at his screen unless she was standing over him and that this had not happened. We rejected the Claimant's evidence on this issue.

Other matters in October 2019

97. On 22 October 2019, Mrs McEvedy made a note for herself, about the Claimant suggesting that she did not know how links worked and that her understanding about accounting standard IAS 2 was wrong, when she was correct . She noted, in relation to feedback given about writing on sample sheets, he had been aggressively persistent but not loud. He would also ask her questions, which could be answered by the rest of the team. She noted that the Claimant did not seem to react well to taking instruction from women.

98. On 23 October 2019, the Claimant sent an e-mail to Mr Biruls, which included that Mr Smith had said at the meeting on 21 October 2019 that harassment, bullying comments, stress and discrimination should not happen. He also said that Mr Smith would organise an informal meeting with Mrs McEvedy to see in an amicable solution could be found. The e-mail made no mention of the Claimant seeking to raise a formal grievance or that he thought an informal meeting was not a good idea. The Claimant suggested in evidence that this was Mr Smith trying to stop him raising a grievance, this was inconsistent with the Claimant's e-mail and we rejected the suggestion.

99. On 25 October 2019, the Claimant e-mailed Ms Horton, which included that the situation had impacted him significantly and he could not concentrate and he was peaceful practicing Muslim and was being treated like an extremist. On receipt Ms Horton sought advice from Ms Lammonby, the most senior HR person in the Air Division.

100. On 25 October 2019, Mr Tregower sent Mr Smith some ACAS guidance and a good practice document on prayer needs. Mr Smith replied by saying that he thought this meant they needed clarity on frequency, duration and timing for prayer times and that they needed to be sensible about it and it was similar to smokers going for a cigarette.

101. On 29 October 2019, the Claimant attended an informal meeting with Mrs McEvedy and Ms Horton to discuss the ongoing issues. The Claimant's evidence was that during the meeting Mrs McEvedy said, that he had no other problem except that it is led by women. He further said that the things in the note of 22 October 2019 were made up and he was being stereotyped on the basis that because he was Muslim, i.e. that women could not be in supreme leadership. Mrs McEvedy's evidence, which we accepted, was that the Claimant appeared to get on with Mr Biruls and he initially got on with Mrs Crouch, however he did not get on with Ms Wood and did not seem to get on with Mrs Kehoe. Mrs McEvedy accepted that she had said that the Claimant appeared to have a problem being led by women but did not accept that she said he had no other problem. We accepted Mrs McEvedy's evidence in this respect. This was in the context of discussing the issues between the Claimant and Mrs McEvedy.

102. The meeting also discussed the Claimant's prayer needs. The Claimant raised that a previous employer had let him use a mail room and discussion took place about the Claimant using a meeting room. It was explained to the Claimant that the meeting rooms were under a lot of pressure and they were difficult to book, but there was a multi-faith prayer room that the Claimant could use in a different building. At about the time of this meeting, Ms Horton had asked the Claimant to block out times in his calendar, as a private meeting, when he would be praying so that colleagues did not put meetings across his prayer times.

103. After Mrs McEvedy left the meeting, the Claimant raised the issue about being asked if he had a gun in his pocket. The Claimant refused to say who had said it, but after being told nothing could be done if Ms Horton was unaware, he told her it was Mr Biruls. Ms Horton spoke to Mr Biruls who denied he had said it. Ms Horton then told the Claimant that she was limited in what she could do in an informal process and he could raise it formally in the grievance process. She said that he would either need to make a formal complaint or they would have to move on from it, because it was one word against another. We accepted Ms Horton's evidence that she would have welcomed a formal complaint, this was because the Claimant was making allegations but not doing so formally. We rejected the Claimant's evidence that on 31 October 2019, Ms Horton told him that they could make him successful but the condition was to stop his formal grievance. The Claimant accepted in cross-examination that on a number

of occasions he was told to raise a grievance. The Claimant was told and advised by Ms Horton that he should make a formal complaint if he wanted to take it further. We also accepted Mr Biruls' evidence that on several occasions he had told the Claimant if he wanted to proceed down the grievance route he could. Mr Biruls said that the Claimant needed to decide how to take it forwards and consider whether it was something he could put behind him, or if not to raise a formal grievance.

104. On 30 October 2019, Ms Lammonby wrote to Ms Horton and recommended that notes were taken about all interactions with the Claimant and suggested the others did the same. It was also suggested that he was told to listen carefully to what was being said and if he was unclear to ask. She suggested that his objectives were nailed down and the mid-probation review was used to help him see how to achieve them and pass his probation. It was mentioned that in hindsight that putting a new person in that team was unwise and queried whether a more traditional team would have been a better choice.

105. On 31 October 2019, the Claimant contacted his union about his situation.

106. The Claimant's evidence was that in an e-mail from Ms Horton, dated 31 October 2019, titled 'hot and itchy', he was being referred to as the plague and he should not be there too long. The e-mail chain started with Ms McEvedy advising Ms Horton saying she was leaving early and gave details of medical matters, which had been redacted. Ms Horton's reply was "Poor you! Hope the plague does not hang around too long! Not counting your hours." She then went on to address Ms McEvedy and Mr Biruls asking them to minimise meetings with the Claimant and that she had spoken to him and he said he had another conversation with Mr Biruls. Ms Wood said she told him they would not have another conversation and they needed to move on unless he wanted to make it official. The Claimant was not a recipient of the e-mail. The reference to plague was clearly to Ms McEvedy's illness and to Ms McEvedy's hours worked and was nothing to do with the Claimant.

Events in November 2019

107. On 4 November 2019, the Claimant's GP signed him off work with low mood and work related stress until 17 November 2019.

108. Whilst off sick, on 5 November 2019, the Claimant and Mr Biruls had a text message conversation. The Claimant had referred to Mr Biruls saying to him "… Just focus on getting yourself into a better place." In his witness statement he said this was Mr Biruls saying "Are you sure you want to work where you are not wanted. In the claim form he referred to the passage and

said, “He wanted me to move out.” [p32]. The message was taken out of context. It was part of a text conversation with Mr Biruls about the Claimant’s sickness absence from 4 November 2019. There was discussion about the fitness to work statement not being received. The Claimant said that he had left his laptop in the office and could not find Ms Wood’s contact details. Mr Biruls said “Hi Niaz, I found it in junk mail. I’ll make sure you have Dani’s number going forward. Just focus on getting yourself in a better place. Rob.” The text message related to the Claimant’s sickness, and getting well. It was not a reference to moving to a different place of work.

109. On 5 November 2019, Mrs McEvedy sent an e-mail to Mr Tregower, referring to the Claimant’s sick note which had been sent from a business e-mail address. She raised concern as to whether the Claimant had a conflict and whether he had asked permission to work elsewhere. She referred to the business possibly no longer trading, but said he did take a large number of mobile phone calls during working hours, which he took off the floor plate. [p325]

110. On 19 November 2019, Ms McEvedy asked Ms Wood, in the Claimant’s return to work meeting the following day, to remind the Claimant to provide his prayer times in his calendar, to avoid colleagues booking meetings which would clash with them, and to help the team respect his faith [p309]. Ms Horton sent a similar e-mail to Mrs Kehoe asking her to again mention updating his diary as it still did not block out prayer time [p316].

111. On 19 November 2019, the Claimant had a meeting with Mr Smith. Mr Smith explained the seating arrangements and the reasons for the move, namely to provide the Claimant with support. The Claimant then raised his voice and said he was being subject to racism and discriminated against because he was Muslim. He repeated the ‘gun in your pocket allegation’ and was reminded that he had previously said that it was no-one on the floorplate. The Claimant said he was going to raise a complaint and Mr Smith told him that it was his right to do so. We accepted Mr Smith’s evidence that any hint of discrimination or harassment is treated seriously and that he was supportive of the Claimant taking it further. We further accepted that when the Claimant first raised the firearm comment, Mr Smith had asked the Claimant to give more detail and he had refused, to which Mr Smith advised him to raise it formally because there was otherwise nothing he could do, on the basis that he could not investigate it without evidence. The content of the meeting was sent to Ms Horton in an e-mail. Ms Horton advised the Claimant that he should raise a grievance.

112. On 20 November 2019, the Claimant attended a return to work meeting with Mrs Kehoe and Ms Wood. The meeting was in a small room and they sat around a small round table. The meeting started with a

discussion about how the Claimant was feeling. The Claimant referred to the desk move and that he felt he was being singled out. Ms Wood explained that it was so the pillars of the team could sit together and he had been asked to move so they could work more closely as a team and it was a positive move. Mrs Kehoe explained why it was good to be able to sit closer to Ms Wood. It was explained that everyone was moving. The Claimant said that he was being continually harassed, bullied and subject to racism. He then referred to where he had sat when he first joined the team and referred to feeling the cold and that he kept things under his desk. Ms Wood said that she would find the Claimant some drawers.

113. The Claimant was writing down everything which was being said and there were long pauses when he did not answer a question. Mrs Kehoe noticed at one stage that what the Claimant was writing was not what had been said and she told him to accurately record what was being said. Mrs Kehoe asked him to remove mis-recorded notes The Claimant said that he had been advised by his union to create a timeline of racism and discrimination, which included specific dates and he would be pulling together e-mails. The Claimant was asked how he could be supported and he responded by saying he had been continually harassed, bullied and subjected to racism and he felt unwell again. The Claimant raised his voice.

114. Mrs Kehoe then asked the Claimant if he had put his prayer times in his diary. There was a dispute as to whether the Claimant became agitated and shouted. The Claimant denied shouting in the meeting, whereas Ms Wood and Mrs Kehoe said he did on a number of occasions. We preferred the Respondent's evidence. The Claimant raised his voice and asked why people were so concerned when he prayed and he was gone 3 or 4 minutes. The Claimant shouted at Mrs Kehoe and asked whether her team had to tell her if they were leaving the floorplate and she replied that they tell her if they are leaving it. We accepted that Mrs Kehoe's team informed her if they were leaving the floorplate.

115. Mrs Kehoe asked the Claimant to stop shouting and he said that she had a problem with him praying and mentioned the gun incident. The longer the meeting went on, the quieter Ms Wood became and she said that she was feeling intimidated. This was because of the amount of time the Claimant spent writing, he inaccurately recorded what was said and he was shouting at Mrs Kehoe.

116. Mrs Kehoe denied raising the Claimant's behaviour with him because he was alleging discrimination. She said it was because he was shouting in the meeting and that she would not have run upstairs on numerous occasions to check on his wellbeing and at every meeting ask him what could be done to help, if that was the case. Ms Wood denied saying that she had been intimidated was because the Claimant had alleged

racism and discrimination. Further she said that those allegations were not made against her. This was corroborated by the note Ms Wood made at the end of her notes of the meeting about how she felt. We accepted Mrs Kehoe's and Ms Woods' evidence.

117. The Claimant alleged that on 21 November 2019, Mrs McEvedy referred to him as 'Thorny Niaz'. This was not included in the Claimant's witness statement and he relied upon the list of issues as his evidence. In oral evidence he said that he had heard her say it when he was returning from the lavatory. Mrs McEvedy denied ever saying it. There was no evidence as to whom Mrs McEvedy was speaking or detail as to situation on the floorplate. We did not accept that Mrs McEvedy made the comment.

Mid-Probation Review

118. On 21 November 2019, the Claimant attended a probation review meeting with Mr Biruls, Mrs Kehoe and Ms Wood. We accepted Ms Woods' evidence that the PDM completes part 1 of the form, which sets out the objectives and how they were to be achieved and which training had or had not been completed. This was then discussed at the meeting. Shortly before the meeting started, the Claimant was given a copy of the form. The meeting discussed the objectives in the form. The Claimant suggested that Ms McEvedy influenced the discussions in the meeting, although he could not point to a document or specific conversation which tended to suggest this. Mrs McEvedy denied any involvement and Mr Biruls, Mrs Kehoe and Ms Wood denied that she had any involvement or influence. Mrs McEvedy had no line management responsibilities. This was a bare allegation and we were not satisfied that Mrs McEvedy had any involvement or influence at all.

119. The Claimant had not been provided with a document, by the Respondent, as to what his objectives were. However we were satisfied that he had been orally told what he was expected to do and that he had been asked to write them by Mrs Crouch in October 2019. The Claimant had completed 7 out of 23 training modules and this had been impacted by sick leave. In relation to training the Claimant missed his re-arranged Inventory Awareness training on 14 November 2019 due to illness.

120. In relation to the Inventory Audit Sample objective Mr Biruls acknowledged that the Claimant had a short timescale on the task. Mr Biruls said that he had done a reasonable job on the sample, given the timescale. However he added that the narrative distracted from the higher level analysis and what was needed was to say whether it passed or failed, say why and provide advice on the basis of his opinion. Mr Biruls said this was something to build on and identify improvements.

121. In relation to the impairment review it was explained that more was expected. The Claimant was expected to populate and validate the data. Mr Biruls said that it felt like the Claimant had not understood the exercise and there were chunks missing.

122. In relation to the OSI objective Ms Wood explained that the task had been to use matrix information and she gave the Claimant an hour of training on how to use the codex and the Claimant had understood. The Claimant was sent links and e-mails explaining the process. He then completed the first one and gave it to Miss Wood to check and it met the standard. She then gave him the task of completing the remaining 8 whilst she was on leave the following week. The Claimant had only completed 2 of them in that week and Ms Wood said she was disappointed by this. The remaining 6 were given to Bill who completed them in 2 days. She said that the work was not difficult. We accepted her evidence that it was a cut and paste exercise. The Claimant said that he was looking for information, to which Ms Wood said it did not appear to be the case. The Claimant said he had not been well and that he had been doing other things and excel training. Ms Wood had agreed that she had said he could do excel training to break up the repetitive nature of the task. The Claimant said that he could not do the work with bullying, racism and intimidation taking place. Further that his work was being impacted by the work situation and he was being harassed. Ms Wood said her concern was not one of quality but quantity. The Claimant responded by raising his voice to Ms Wood that he could not do the work with bullying, racism and intimidation taking place that he was moved desks without being informed and she did not care about his situation. We accepted Ms Woods' evidence.

123. We accepted Mr Biruls evidence that in relation to the sample audit there was a prescribed template with a black or white, pass or fail answer. If an element was not present it failed and the Claimant needed to say that and explain why; however he was refusing to say pass or fail. In relation to the impairment exercise the Claimant had difficulty populating the workbooks. Mr Biruls asked him if all teams returns had been incorporated and the Claimant said they had, however when Mr Biruls checked two were missing. We accepted that the Claimant's response had effectively been that he knew better. We accepted that in the course of the meeting the Claimant had opportunities to raise matters which were affecting his performance.

Events after the Mid-Probation Review

124. On 25 November 2019, Mr Tregower had a meeting with the Claimant, at which the Claimant discussed being harassed and intimidated. The Claimant was told that there was no tolerance of harassment, intimidation and racial discrimination. Mr Tregower asked the Claimant what

he wanted to do about it and was not been given a response. Mr Tregower recommended that the Claimant made the complaints formal.

125. On 26 November 2019, the Claimant started a period of sick leave, returning on 6 January 2020.

126. On 6 December 2019, an occupational health report was provided on the Claimant. At that stage, following a mental health assessment, the Claimant was still unfit to work. It was suggested that his return would depend on the successful resolution of the issues at work. A further occupational health report, dated 3 January 2020, said that the Claimant's mental health had improved and he would be fit to return on 6 January 2020 and a further discussion with management about the work issues would be likely to assist.

127. On 6 January 2020, the Claimant attended a return to work meeting with Ms Wood and Mrs Kehoe. The Claimant explained that he was not 100% better and had another doctor's appointment the following week. He was told to let them know if he felt unwell and they would have regular catch ups with him, with another meeting on 10 January 2020.

128. On 9 January 2020, Mr Venn e-mailed Ms Wood about work and training he had given the Claimant during the previous days. He had shown the Claimant how to use one-drive and the multi-user inbox and he seemed to understand. He mentioned that there was a lack of ability with IT and various packages. On 7 January 2020 he had shown the Claimant how to prepare and post in two journals and asked him to prepare them from his notes. This was a copying and pasting exercise. The Claimant had only prepared one journal by 11:30 and when he had prepared the second one it failed verification. On 8 January 2020, Ms Trowbridge had shown the Claimant how to complete a TRLPF at 09:45. He was asked to complete it by 14:00 but did not complete it until 1439. The Claimant was in meetings between 1000 and 1100, however Mr Venn checked how long it should have taken and undertook one himself, which he completed in 20 minutes. The Claimant had questioned Ms Trowbridge as to why he should be doing the task.

129. On 9 January 2020, Mr Tregower e-mailed the Claimant and said he was dismayed that the Claimant had not raised a formal grievance.

130. Later on 9 January 2020, the Claimant raised a formal grievance [p435-448], about various matters from 18 September 2019. In the grievance letter he referred to Mrs McEvedy saying 'my enemy's friend is my enemy, my enemy's enemy is my friend, my friends friend is my friend, my friend's enemy is my enemy. In the grievance there were references to matters which occurred on 20 January 2020, however we concluded that

the date was a typographical error and that the meeting referred to occurred on 20 November 2019. In the grievance the Claimant said that he was being discriminated against and harassed.

131. On 9 January 2020, Mrs Kehoe had a conversation with the Claimant, following which she e-mailed Mr Tregower, expressing her concern for the Claimant's well-being.

132. On 22 January 2020, the Claimant attended a catch up meeting with Mrs Kehoe and Ms Wood, this was recorded in an e-mail dated 23 January 2020 [p486]. The Claimant was cross-examined about the contents and said the contents were made up. Ms Wood and Mrs Kehoe were not cross-examined about this meeting or e-mail. The e-mail recorded that there had been discussion in relation to Mr Venn's e-mail, following which the Claimant's body language and tone changed and he said that she was repeating things and Angie did not have time for it. Ms Wood tried to explain, however the Claimant would not let her and therefore Mrs Kehoe tried to explain. During this time, the Claimant's body language and tone of voice was raised and aggressive. Ms Wood did not consider that Mrs Kehoe had raised her voice.

133. The Claimant's evidence was that on 22 January 2020, Mrs McEvedy said openly on the floorplate, "My enemy's friend is my enemy, my enemy's enemy is my friend, my friends friend is my friend, my friends enemy is my enemy." The Claimant's original case was that this was also said on 29 October 2019, however in cross-examination he said it was said once and it could not have been on 29 October 2019. The Claimant's evidence was that he believed it was on 22 January 2020. Mr Smith, in his grievance interview recalled that at some point he had walked past Mrs McEvedy and jokingly said 'you're my friend' and she replied, 'I keep my friends close, but my enemies closer.' Mr Smith had no recollection of Mrs McEvedy saying what was alleged. Mrs McEvedy denied that she had said the phrase. The Claimant's grievance dated 9 January 2020 referred to this incident and therefore it could not have happened on 22 January 2020. The Claimant was unsure, when giving evidence, as to when it happened. We were not satisfied that Mrs McEvedy said the words alleged. We accepted Mr Smith's evidence as to the interaction he had with Mrs McEvedy and we were not satisfied it was directed at the Claimant.

134. On 27 January 2022, the Claimant's GP signed him off work with stress, returning on 2 February 2022.

135. On 28 January 2022, Mr Tregower e-mailed Ms Lammonby forwarding the Claimant's grievance. He informed her that the Claimant had raised a formal grievance and that casework needed to determine what level of decision manager was required. He said he would press for the

lowest possible level and listed the people who had been mentioned. We concluded that lowest possible level referred to the grade of the decision manager applicable within the grievance policy.

136. On 3 February 2020, an informal meeting was arranged with Mr Smith and Mrs Kehoe to discuss how the Claimant had been behaving and to inform him that Ms Wood would no longer be his PDM. This meeting was not referred to in the Claimant's witness statement and he relied upon the bare allegation in the list of issues and his grounds of claim. The Claimant's oral evidence was that the meeting involved laughing, he then referred to his grievance and was told that there was an informal complaint but no action would be taken. The evidence of Mrs Kehoe and Mr Smith was that the Claimant purposively moved his chair and sat with his back to Mrs Kehoe and ignored and would not respond to her. The Claimant denied this. Mr Smith's and Mrs Kehoe's evidence was that the meeting was about how the Claimant's behaviour was affecting his colleagues and was with specific reference to 22 January 2020 meeting. Mr Smith's evidence was that he raised he had received negative comments from others, which included the Claimant raising his voice. During the meeting Mr Smith referred to the Claimant turning his back on Mrs Kehoe.

137. After the meeting Mr Smith sent an e-mail to Mr Abbot [p558], in which he set out that the Claimant took copious notes and disputed his behaviour had caused upset. The Claimant had then gone on to say, that he had raised unacceptable behaviour on several occasions and Mr Smith had taken no action. Mr Smith said he had reminded the Claimant, as said on a number of occasions, that he needed to raise a formal complaint and then was advised that he had done so.

138. We preferred the evidence of Mrs Kehoe and Mr Smith, which was supported by the e-mail, as to what happened in the meeting. Mr Smith raised how he had received comments from others about the Claimant raising his voice and pointing his finger and his behaviour in meetings. The Claimant was asked to moderate his behaviour. During that discussion, the Claimant said that he made complaints and Mr Smith said he needed to make a formal complaint, following which the Claimant said he had.

139. On 4 February 2020, the Claimant's GP signed him off work with 'stress at work' until 2 March 2020.

140. On 4 February 2020, Mr Tregower e-mailed Ms Horton about the grievance and said that the next day he would be seeking answers/clarification on whether the grievance should be accepted as it stood on the basis a number of people had been cited but without specific allegations [p569]. The Claimant said in evidence that this showed he was trying to reject it, we did not accept that assertion. The grievance was not

rejected and we considered that if there were problems the words ‘as it currently stands’ meant that clarification would have been sought.

End of probation meeting

141. On 7 February 2020, Mr Denwood, the Claimant’s new PDM, invited the Claimant to attend an end of probation meeting on 18 February 2020. The invitation said that Mr Denwood would be accompanied by an HR Caseworker and the Decision Maker, Mr Smith would also be present. He was informed that a decision would be taken as to whether the Claimant passed, an extension was required or he had failed the probation period. the probation review form was attached. [p640]

142. The probation review form included that:

a. The Claimant had not reached the required standard despite additional training. The additional training was taking up time and resource from the wider team and was not being reciprocated through the Claimant’s contribution to key tasks
b. The tasks the Claimant was set were deadline driven and he was not able to demonstrate he could complete them to the standard required.
c. He was struggling with his role and the work environment was impacting on his well-being. He was not adding much value to the team and until his personal well-being improved, progress was likely to be impaired.
d. Reference was made to Journal tasks and how the Claimant had struggled with the copying and pasting tasks. Reference was also made to the TLRPF tasks and that the Claimant had been trained twice and he had only managed to complete one out of three in about 3hours. It was noted he needed continuous help and he was not using his notes and was missing deadlines.

143. The Claimant, in cross-examination, denied that the criticisms were justified. There was e-mail evidence supporting what had been written and we accepted that these were the views of the Claimant’s colleagues and managers.

144. On 10 February 2020, the Claimant e-mailed Mr Denwood and said he had noticed some inaccuracies in the review form and asked if the meeting could be rescheduled until after his return to work. Mr Denwood responded by saying that the meeting could not be rescheduled more than 5 working days after the meeting date. He was told that he could send a union representative or other colleague or provide a written submission. Further it was understood that the Claimant had said that although he was signed off that he would still be available to attend meetings.

145. On 18 February 2020, Mr Smith chaired the final probation review meeting, because he was one level above Mrs Kehoe, in accordance with the policy. Also in attendance were Mrs Kehoe, Mr Denwood, Ms S Wood (HR caseworker) and Ms Cox (note taker). Ms S Wood advised that the Claimant had said he was unable to attend until after 3 March, but the meeting could not be rearranged by more than 5 working days. She said that the meeting would proceed in absence and no written submissions were received and advised that there were 3 possible outcomes. Ms Kehoe said that the Claimant was aware of the performance concerns after the mid-probation review meeting. Mr Smith referred to consistent poor performance despite training and support. Mr Denwood said that the Claimant's work was at a significantly low standard compared to others. Reference was made to Mr Smith speaking to the Claimant about his behaviour on 3 February 2020 and that he had witnessed him turn his back on Mrs Kehoe and blanking her. Mrs Kehoe said that when speaking about work the Claimant became very defensive and would not give his delivery manager the opportunity to ask what could be done to support or train him. She further said that he would suggest he had not received training when there was written evidence that he had.

146. Mr Smith concluded that the Claimant's performance was consistently below standard and his behaviour had been aggressive, intimidating and offensive and despite conversations there had not been a change. He concluded that the Claimant should be dismissed.

147. Mr Smith was cross-examined about the probation review policy and that the PDM must contact HR Casework to discuss an extension when performance concerns were raised during or after the mid-probation review. This had not been an allegation identified as part of the list of issues and would have related to Mr Denwood who was not a witness. Mr Smith accepted that the notes of the meeting did not refer to the policy being advised in the meeting. His evidence was that the procedural elements would have been talked about. He was cross-examined on the basis that there was no evidence Mr Denwood had a discussion with HR casework, about an extension. This was something which would not necessarily be within the knowledge of Mr Smith and he believed that they had followed the policy and sought advice and that advice would have been followed to the letter.

148. It was put to Mr Smith that there had been other employment issues, namely discrimination and the reason for dismissing the Claimant was that Mrs McEvedy had influenced him. Mr Smith's evidence, which we accepted was that HR casework were giving advice as was Mr Tregower and Mrs Kehoe and if it was meant he was riding roughshod over it, he disagreed. We were satisfied that Mrs McEvedy had no involvement in the final

probation review. We accepted that Mr Smith thought that the Claimant's performance was below the required standard and he did not consider that it would improve.

149. Mr Smith was not cross-examined about not allowing the Claimant to claim arrears of pay.

150. On 18 February 2020, the Claimant was sent the final probation review outcome letter [p665]. Specific reference was made to: (1) Inventory Audit samples and the criticisms about the work; (2) Impairment review, this had not been initially completed correctly despite training and that there had been missing data; (3) OSI review and that only 2 of 8 had been completed in a week and the task was of low complexity and could have been completed by a lower level member of the team.; (4) Journals and despite additional training he was asking for further support when it was a task regularly undertaken by level 1s with little difficulty. Plus that he had been unable to complete the 3 TLRPs within the deadline and it was a task of low complexity. There was reference to the Claimant not being able to complete tasks to the required standard and he was asking for more training, despite additional support and training being given. He was informed of his right to appeal

151. The Claimant's grievance and his appeal against the outcome was considered after the end of his employment however neither party referred to what happened in that process during the evidence and no allegation was made in relation to it.

Time

152. The Claimant gave evidence that he had been advised by his union about time limits and the need to notify ACCAS, however he could not remember when it was given.

The law

Equality Act claims

153. The Claimant relies upon the protected characteristic of religion and belief.

154. Under section 13(1) of the EqA 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.

155. S. 26 EqA provides:

26 Harassment
(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(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.

156. S. 27 EqA provides:

27 Victimisation
(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

157. Under section 123 of the Equality Act 2010 a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates (s. 123 (1)(a)). For the purposes of interpreting this section, conduct extending over a period is to be treated as done at the end of the period (s. 123 (3)(a)) and this provision covers the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

<u>Direct Discrimination</u>

158. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably on the ground of his religion or belief than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

159. We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):
"*(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."

160. In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. As to the treatment itself, we had to remember that the legislation did not protect against unfavourable treatment per se but less favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (Law Society-v-Bahl [2004] EWCA Civ 1070).

161. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. 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 act of discrimination." The Supreme Court in Royal Mail Group Ltd v Efobi [2021] UKSC 33 confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remained binding authority.

162. In Denman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the "more" which is needed to create a claim requiring an answer need not be a great deal.

163. The function of the Tribunal is to find the primary facts and then look at the totality of those facts to see if it is legitimate to infer that the acts or decisions were done/made on prohibited grounds (Qureshi v Victoria University of Manchester [2001] ICR 863). In terms of drawing inferences, in Efobi v Royal Mail Group Ltd [2021] ICR 1263 Lord Leggatt, after referring to Wisniewski v Central Manchester Health Authority [1998] PIQR 324, said that, "Tribunals should, as far as possible be free to draw, or decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books before doing so."

164. In every case the tribunal has to determine the reason why the Claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question." It is for the claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong), i.e., that the alleged discriminator has treated the claimant less favourably and did so on the grounds of the protected characteristic. Did the discriminator, on the grounds of the protected characteristic, subject the claimant to less favourable treatment than others? The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07). The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

165. "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

166. The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see Madarassy-v-Nomura International plc and Osoba-v-Chief Constable of Hertfordshire [2013] EqLR 1072). At that second stage, the Respondent's task would always have been somewhat dependent upon the strength of the inference

that fell to be rebutted (Network Rail-v-Griffiths-Henry [2006] IRLR 856, EAT).

167. We needed to consider all the evidence relevant to the discrimination complaint, that is (i) whether the act complained of occurred at all; (ii) evidence as to the actual comparator(s) relied on by the claimant to prove less favourable treatment; (iii) evidence as to whether the comparisons being made by the claimant were of like with like; and (iv) available evidence of the reasons for the differential treatment.

168. Where the Claimant has proven facts from which conclusions may be drawn that the respondent has treated the Claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

169. The circumstances of the comparator must be the same, or not materially different to the Claimant's circumstances. If there is any material difference between the circumstances of the Claimant and the circumstances of the comparator, the statutory definition of comparator is not being applied (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337). It is for the Claimant to show that the hypothetical comparator in the same situation as the Claimant would have been treated more favourably. It is still a matter for the Claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

170. If we had made clear findings of fact in relation to what had been allegedly discriminatory conduct, the reverse burden within the Act may have had little practical effect (per Lord Hope in Hewage-v-Grampian Health Board [2012] UKSC 37, at paragraph 32). Similarly, in a case in which the act or treatment was inherently discriminatory, the reverse burden would not apply.

171. When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why'

something happened (see Fraser-v-Leicester University UKEAT/0155/13/DM).

Harassment

172. Not only did the conduct have to have been 'unwanted,' but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (Bakkali-v-Greater Manchester Buses [2018] UKEAT/0176/17).

173. As to causation, we reminded ourselves of the test set out in the case of Pemberton-v-Inwood [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (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). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

174. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 it was held that an employer cannot be held liable simply because the conduct has had the prescribed effect, it has to be reasonable that the consequence occurred. Further that it is important not to encourage a culture of hypersensitivity or create liability for every unfortunate phrase.

175. It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in Grant-v-HM Land Registry [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in Betsi Cadwaladr Health Board-v-Hughes UKEAT/0179/13/JOJ.

Victimisation

176. There was also a claim to consider under s. 27. The Respondent did not dispute the fact that the Claimant had performed protected acts within the meaning of s. 27 (1) by raising a complaint about discrimination on 20 November 2019 and in his grievance raised on 9 January 2020. It disputed the allegations that he had been subjected to detrimental treatment because of those acts.

Detriment

177. A detriment is something that is to the Claimant's disadvantage. In Ministry of Defence v Jeremiah [1980] ICR 13, CA, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, in which Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "*unjustified sense of grievance cannot amount to 'detriment*'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "*If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice*."

178. Detriment is to be interpreted widely in this context. It is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the ET itself. The ET might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes. (see Warburton v The Chief Constable of Northamptonshire Police [2022] EAT 42paragraphs 48 to 51)

179. The test of causation under s. 27 required us to consider whether the Claimant has been victimised '*because*' he had done a protected act, but we were not to have applied the 'but for' test (Chief Constable of Greater Manchester Constabulary-v-Bailey [2017] EWCA Civ 425); the act had to have been an effective cause of the detriment, but it does not have to be the principal cause. However, it has to have been the act itself that caused the treatment complained of, not issues surrounding it.

180. In Martin-v-Devonshire Solicitors [2011] ICR 352 a claim of victimisation failed because the motivation for the unfavourable treatment had not been the fact of the Claimant's complaints, but the way in which they had been made. The Claimant had been dismissed as a result of an irretrievable breakdown in the working relationship between her and her employers. The Tribunal dismissed her claims, holding that there were several things about the Claimant's behaviour in relation to her grievances

(their frequency, repetitive nature and untruthful) which affected the employer's view and which owed nothing to the fact that the grievances had raised allegations of sex and disability discrimination. Having reviewed the law in this area the then President of the EAT, Underhill J, encouraged tribunals to concentrate upon the statutory language on causation (in the context of this case, the word '*because*') and he referred back to Lord Nicholls' test in *Nagarajan-v-London Regional Transport* [1999] ICR 877; "*whether the prescribed ground or protected act 'had a significant influence on the outcome'*" (paragraph 36).

181. In Warburton v The Chief Constable of Northamptonshire Police [2022] EAT 42 when it was held at paragraph 64 that:

The "but for" test is clearly not applicable, setting the bar too low. But the "operative" or "effective" cause sets it too high if it leads to the error of looking only for the main or principal cause. Lord Nicholls' formulation - whether the protected characteristic or protected act "had a significant influence on the outcome" - is the correct test. And "the reason why" is to be preferred to "causation."

182. In order to succeed under s. 27, a claimant needs to show two things; that she was subjected to a detriment and, secondly, that it was because of the protected act(s). We have applied the 'shifting' burden of proof under s. 136 to that test as well.

Conclusions

General matters

183. The Respondent accepted that both protected acts relied upon, were protected acts.

184. The Claimant relied upon the allegations below as allegations of direct discrimination or harassment in the alternative. In respect of allegations 14 to 18 they were additionally allegations of victimisation. We considered each factual allegation and applied the respective tests to each of them. When considering the allegations we also looked at them as a whole when applying the various tests.

185. The Claimant submitted that the principle allegations were allegations 1 and 2 and further that Mrs McEvedy had influenced allegations 9, 13 and 18. Other than the Claimant's oral testimony there was no direct evidence of influence. The Claimant relied upon e-mails by Mrs McEvedy, to other members of the team, from which it was submitted an inference could be drawn that she was influencing matters. The e-mail on 25 September 2019, referring to clarifying the policy on prayer, made specific reference to support and asking for a plan of times the Respondent needed

to observe and work around. This did not tend to show that Mrs McEvedy was hostile to the Claimant's prayer needs, rather that she was trying to understand at what times he needed to pray, so that the Respondent could plan meetings without interfering with those times. The e-mail on 25 September 2019, asking Mrs Crouch to document the training provided to the Claimant, was sent when Mrs Crouch was about to leave the department. It would be necessary for the training provided to any employee to be documented, so that the new PDM knew what had been covered and could identify further training needs. The e-mail on 19 November 2019, asking Ms Wood to remind the Claimant to record prayer times in his diary, referred to Ms Horton asking the Claimant to do this. The e-mail specifically referred to helping colleagues to avoid booking meetings that would clash with his prayer times and to help the team respect his faith. The Claimant had complained that meetings were being booked across prayer times. We were not satisfied that this e-mail suggested hostility towards the Claimant's prayer needs, rather it tended to suggest that they were supported. The e-mail on 5 November 2019 was not to the Claimant's team; it was a query about possible conflict of interest and there was no reference to religious beliefs or practices. Mrs McEvedy sought thoughts and advice. This did not suggest a hostility towards Islam or the Claimant's religious practices. The Claimant also relied upon an e-mail from Mrs Kehoe, dated 22 November 2019, following the return to work meeting. Mrs McEvedy was not copied into the e-mail and was not referred to within it. The Claimant relied on an assertion that Mrs McEvedy was influencing matters, the e-mails relied upon did not tend to suggest that she was and the Respondent's witnesses denied that she had been involved. We were not satisfied that the Claimant had adduced facts which tended to show that she had influenced her colleagues in the various allegations and he failed to discharge the initial burden of proof.

186. The Claimant relied upon his discussion with Mrs Crouch on 19 September 2019, in relation to service personnel returning to the UK in body bags, as background. This was an example of the Claimant misconstruing what had been said and taking matters out of context. The context of the discussion was the importance of the work they did and Mrs Crouch telling him about her decision, which other people thought was wrong. This was not a discussion about faith. The Tribunal was urged to find that this was a hint to tread carefully as a Muslim, this was denied by Mrs Crouch. There was no documentary evidence which tended to suggest Mrs Crouch was giving the Claimant hints to tread carefully. We were not satisfied that such hint was given.

187. Much of the Claimant's case was based on an assertion that events had been motivated by his religion and/or religious practices. The crux of the Claimant's case was based on the events of 17 and 18 September 2019, in combination with inferences being drawn from the e-mails and events generally. There was no evidence of any derogatory remarks or comments

being made about Islam or the prayer needs of those practising the faith. We also had in mind that unreasonable treatment of itself does not create an inference that discriminatory treatment has occurred.

188. An appropriate comparator for the purpose of the direct discrimination claims would be a person with the same qualifications as the Claimant, with the same civil service experience and undertaking a probationary period. The comparator would also need to live at a similar distance away as Luton and stay in the Bristol area during the week. It would be a person who had a different religious or philosophical belief or no religious belief and whose belief meant that they were required to carry out specified activities at certain times of the day.

Specific Allegations of direct discrimination, harassment and victimisation

Allegation 1. On the 17 September 2019, the Claimant requested from Carol Crouch in front of Sarah McEvedy prayer facility, (which was not available) and prayer breaks, Sarah McEvedy was visibly irritated by the conversation and asked the Claimant to 'stop talking' (From there on and throughout his employment, there was repeated querying of the Claimant's prayer times).

189. On 17 September 2019, the Claimant, as a part of conversation with Mrs Crouch, discussed his prayer needs. This was part of a larger conversation. Mrs McEvedy, in the course of the conversation, asked Mrs Crouch to keep her voice down. The Claimant considered that this was aimed at him. The primary burden of proof was on the Claimant to prove facts that Mrs McEvedy told him to stop talking and that it was related to or was because he was discussing his prayer needs or his religion. The Claimant did not refer to this incident until his grievance interview and then said that the words were, 'you are always disturbing me.' The Claimant's evidence was sufficient to require the Respondent to provide an explanation. Mrs Crouch was slightly deaf and tended to speak loudly and she sat next to Mrs McEvedy. The Respondent proved and we accepted that the comment was aimed at Mrs Crouch and not said to or aimed at the Claimant. We found that Mrs McEvedy was not aware of what the Claimant had been saying and that she had asked Mrs Crouch to keep her voice down, because the level of her voice was disturbing her. The Respondent proved that the Claimant was not told to stop talking and that what was said to Mrs Crouch was in no way whatsoever related to or because of the Claimant's religion or the discussing of his prayer needs. The allegations of direct discrimination and harassment were dismissed.

190. The second part of the allegation related to repeated querying of the Claimant's prayer times. The Claimant reported to the Respondent that meetings were being booked across his prayer times. In order to address this, the Respondent asked him to provide details of his prayer times so that colleagues knew when not to book meetings. The Claimant was asked to

provide the times on several occasions. The Claimant submitted that smokers, toilet-goers and coffee drinkers would not have had to provide diary entries as to when they would undertake such activities or if they left the floor plate. We accepted that employees were required to inform the line managers if they left the floorplate. We did not accept that a smoker, coffee drinker or a toilet-goer was a suitable comparator. The Claimant's religious belief required him to pray at various times of the day. The Claimant established no evidence that smokers, coffee drinkers and toilet goers have a belief that they must undertake such activities at particular times and we rejected that would be the case. There is a fundamental difference between observing a religious practice and activities which can be carried out at any time. Smokers were not permitted to leave meetings to have a cigarette break and there was no evidence that the Respondent would seek to arrange meetings around smoking, toilet or coffee breaks for particular people. An appropriate comparator would be someone not of the Muslim faith whose belief required them to undertake a specified activity at specified times of the day. The Claimant did not adduce any evidence which tended to show that such an appropriate comparator would not have been asked to say what times the activity would need to be carried out, or to put it in their diary. The Claimant failed to discharge the initial burden of proof and the claim of direct discrimination was dismissed. Further the Respondent had asked this so that meetings were not booked across the prayer times, i.e. to enable the Claimant to pray, this was therefore not less favourable treatment.

191. The Claimant said that by asking him when his prayer times were this was unwanted conduct. We accepted that it was related to his religion. This was against a background of the Claimant saying meetings were being booked across his prayer times. Whether the conduct had the prohibited effect was not referred to by the Claimant in closing submissions. The Claimant did not give evidence that asking him for the times violated his dignity or that it created an intimidating, hostile, degrading or humiliating environment for him. We concluded that in any event it was not reasonable, in the circumstances for asking about prayer times to have had that effect. The Respondent asked for the times so that it could ensure meetings for the Claimant were not booked at prayer times. In other words the Respondent was positively trying to enable the Claimant to be free to pray at the required times, rather than requiring him to be in a meeting at those times. We also bore in mind what was said in Grant v HM Land Registry. The tone of the conversations and correspondence was one of support and seeking to assist the Claimant and we were not satisfied that it was reasonable for the asking of prayer times to have had the prohibited effect. The claim of harassment was therefore dismissed.

Allegation 2. On the 18 September 2019, Sarah McEvedy accused the Claimant of not working, but spending time on training, as a result the Claimant did not attend

inventory training and did not obtain the necessary training throughout his probation, although mandatory training had to be completed within three months.

192. Mrs McEvedy was aware that Mrs Crouch had e-mailed the Claimant and asked him to go to her desk when he was ready. The Claimant had been in the office for about an hour before Mrs McEvedy approached him. After some initial pleasantries, she asked him what he was doing and he said he was looking at the intranet and doing some mandatory training. The Claimant had not put the training in his diary. Ms McEvedy said that there would be opportunities to do the mandatory training over the 6 months so it would not be urgent and there were opportunities to get involved with the accountancy work and he should speak to Mrs Crouch. The Claimant then spoke to Mrs Crouch and forgot about his training. We were not satisfied he was told that he was not working but spending time on training instead. The Claimant submitted that it was the incident the previous day which tended to show the telling him to stop training and go to Mrs Crouch was motivated by his religion. The Claimant suggested that the motivation behind this was to ensure that he did not complete his training so that he would fail his probation and that this was motivated by his religion. There was no documentary evidence in support of the assertion. A bare assertion or belief is not the same thing as proving facts which tend to show something has occurred. We were not satisfied that the Claimant adduced any evidence that Mrs McEvedy was engineering a situation whereby the Claimant could not complete his training. We found that there had not been discrimination or harassment by Mrs McEvedy on 17 September 2019 and that what had been said was in no way whatsoever related to or because of his religious beliefs and/or religious practices. Having rejected allegation 1 the Claimant adduced no evidence which tended to show that a person of a different religious or no religious belief would have been treated differently. Similarly the Claimant adduced no evidence which tended to suggest that the incident was related to religion.

193. In any event we were satisfied that the Respondent proved that Mrs McEvedy was aware that Mrs Crouch was ready to start the impairment exercise with the Claimant and that he had been working from home at a time when the only work he could do would be training. Further the Claimant had not put the training course in his diary. Mrs McEvedy was aware that there was a good opportunity for the Claimant to start some of the work he would be required to do in the team. We were satisfied that the Claimant's religion or religious practices formed no part of Mrs McEvedy's decision to speak to the Claimant or in what she said.

194. These claims of direct discrimination and harassment were dismissed.

Allegation 5. On the 25 September 2019, Robert Biruls asked the Claimant 'Why are you in the MOD' and suggested that the Claimant should just admit that he cannot do his job, then he could be moved elsewhere and he then sent a message in November 2019 ' asking him to find another job'.

195. We were not satisfied that Mr Biruls suggested to the Claimant that he should admit he could not do his job and then he could be moved elsewhere. The Claimant failed to establish the factual basis for this part of the allegation. Similarly the text message sent on 5 November 2019 was not in relation to the Claimant finding another job, but was with reference to getting his health into a better place, i.e. that he concentrated on getting well, and not that he should find another job. The claims of harassment and direct discrimination in these respects were dismissed.

196. The Claimant was not asked why he had joined the MOD, but why he had chosen to work for the MOD in Bristol. The Claimant suggested that this was because Mr Biruls was questioning why, as a practising Muslim, he would want to work for the MOD. There was no evidence adduced by the Claimant which tended to suggest that Mr Biruls was motivated by the Claimant's religion. This was in effect a bare assertion. Further Mr Biruls was asking why the Claimant was working in Bristol and not for the MOD generally. The Claimant failed to adduce primary facts which tended to suggest that this was said because of his religion or that it was related to his religion. The Claimant also did not adduce primary facts which tended to show that an appropriate comparator would not have been asked the same question.

197. In any event we were satisfied that Mr Biruls asked the question at the start of the meeting as a way of easing the Claimant into it. further we were satisfied that after the meeting, Mr Biruls was trying to understand why the Claimant had applied for a job so far from his home and family. We accepted that the Respondent proved that it was in no way related to or because of the Claimant's religious belief.

Allegation 6. On the 25 September 2019, Robert Biruls and Angie Kehoe, repeated an earlier conversation that Robert Biruls had with the Claimant ,about not being permitted pre-arranged flexible hours and indicated that they did not want the Claimant to be the last team member in the office. At the same meeting the Claimant was questioned about his prayer times and need for prayer breaks.

198. At the start of the Claimant's employment Mr Biruls agreed with the Claimant that he could start late on a Monday and finish early on a Friday and that he could make up the hours, so that he worked his contractual requirement on the Tuesday, Wednesday and Thursday. New starters are not permitted to work flexitime, (i.e. when additional hours are worked, time can be taken off in lieu) until they had completed their probation. The

meeting was held in the context that Mrs Crouch was leaving the division and the Claimant would have a new line manager. The Claimant was told that he should expect to start work later than the 07:00 starts he had when Mrs Crouch was his line manager. The Claimant, in his witness statement, suggested that Mrs McEvedy was seeking to prevent him from working flexitime; however it was MOD policy that people in their probation period could not work flexitime. It was submitted on the Claimant's behalf that this change related to his religion and belief or was harassment. There was no evidence that Mrs McEvedy was involved in Mr Biruls having this conversation with the Claimant. There was no evidence that Mr Biruls or Mrs Kehoe had made any derogatory or inappropriate remark about the Claimant's religion. Further there was no evidence that an appropriate comparator, whose line manager was changing, would have been treated differently. The Claimant failed to prove primary facts which tended to show that he was treated less favourably than an appropriate comparator or it was because of or related to his religion.

199. In any event we were satisfied that the Respondent proved it was because the Claimant's line manager was changing and Ms Wood started work later than Mrs Crouch. Further we were satisfied that a person on probation should work at the same time as their supervisor and the team, to ensure that they got appropriate support, assistance and training. Further the Claimant was starting early and finishing late on Tuesdays, Wednesdays and Thursdays and was working in excess of his contracted 37 hours per week. The Claimant would not be paid for the additional hours worked and could not take time off in lieu. We were satisfied that this was in no way whatsoever related to or because of his religion.

200. In terms of locking up, the policy was that probationers should not be given the responsibility, due to the consequences if the process was not carried out properly. The Claimant had been the last to leave on a number of occasions. Mr Biruls had on occasions told the Claimant that he should go home when he was working late. It was the Claimant who raised that people had an issue with him locking up. The Claimant did not adduce evidence which tended to show that being told he should not be locking up, whilst in his probationary period, would not have been said to an appropriate comparator or that it was motivated by or related to his religious belief. The Claimant failed to discharge the initial burden of proof in relation to this part of the allegation. In any event the Respondent proved that the reason was because its policy was probationers should not be given the responsibility and that it was in no way whatsoever related to or because of his religion.

201. At this meeting, the Claimant's prayer times were briefly discussed. The Claimant said that meetings were being booked across them and he was concerned about it. Mr Biruls agreed to find out what the policy said. The Claimant adduced no evidence which tended to suggest that an

appropriate comparator would have been treated differently if their belief required them to undertake a specific activity at certain times. We were not satisfied that the Claimant proved primary facts from which we could conclude he had been treated less favourably because of his religion. For the same reasons as for allegation 1 we were not satisfied that the discussion caused the prohibited environment for the Claimant.

202. The allegations of harassment and direct discrimination were dismissed.

Allegation 7. Sometime in late September 2019, Stuart Smith made comments about his support for Brexit and the need to control immigration, in front of the Claimant.

203. We concluded that Mr Smith did not make such comments and therefore the factual basis of the allegation was not established. Accordingly these claims of direct discrimination and harassment were dismissed.

Allegation 8. On the 25 September 2019, Robert Biruls asked the Claimant, ' Are you carrying a firearm in your pocket'.

204. We found that Mr Biruls, on 25 September 2019, did not ask the Claimant, 'Are you carrying a firearm in your pocket'. As such the factual basis of the allegation was not established and these claims of harassment and direct discrimination were dismissed.

Allegation 9. On the 21 October 2019,Sarah McEvedy and Stuart Smith said that the Claimant had to move from his desk, despite the Claimants protests then again asked him to move on the 19 November 2019 and then kept a close eye on him, asking him on the 21 November 2019, why he had left his desk.

205. We found that Mrs McEvedy did not ask the Claimant to move desks nor that on 21 November 2019 Mr Smith asked why he had left his desk. The factual basis for these parts of the allegation was not established.

206. The Claimant alleged that in November 2019, after he moved desks, Ms Wood was observing his screen when he was communicating with his union representative and Muslim colleague about his consideration of raising a grievance. It was submitted that this was significant in relation to why he was moved. We concluded that Ms Wood did not observe his screen.

207. The Claimant asserted that another new starter would not have been required to move and that it was a decision which was heavily influenced by Mrs McEvedy. We were not satisfied that there was any evidence that Mrs McEvedy was involved in the decision. It was further suggested that the

Respondent's explanation was not credible. The Claimant relied upon the inference referred to above, in relation to e-mails by Mrs McEvedy. None of those e-mails referred to a desk move. It was important to bear in mind that what happened was against a context of where the Claimant was not picking up how to do the role quickly and was not progressing as fast as expected. Other than the assertion that it was because of or related to his religion, the Claimant did not adduce evidence which tended to suggest that it was motivated by his religion. Further the Claimant did not adduce evidence which tended to suggest that another probationer, who was struggling to make the expected progress, would have been treated differently. We were not satisfied that the Claimant discharged the initial burden of proof that the requests on 21 October and 19 November 2019 were less favourable treatment or that they were motivated by or related to his religion.

208. In any event, we were satisfied that the Respondent proved that Claimant's work performance was lower than expected and it needed him to progress more quickly. Mr Smith considered that the best way to do this was for the Claimant to sit next to Ms Wood, so that she could support and help him. The whole team was moved around. Two members of the team were required to sit together due to the project they were doing. We were satisfied that the reason for the move was to improve the Claimant's performance and also that of the team and it was wholly unrelated to and was not motivated by the Claimant's religion. We were also satisfied that when the Claimant raised that he felt the cold, Ms Wood looked into whether they could sit elsewhere in the team's area on the floorplate.

209. The claims of direct discrimination and harassment were dismissed.

Allegation 10. On the 29 October 2019, Sarah McEvedy suggested that the Claimant had a problem being led by a woman and there was no facility for prayer and prayer times were repeatedly asked about from 29 Oct 2019 until his last day in the office.

210. At the meeting on 29 October 2019, Mrs McEvedy suggested that the Claimant had a problem being led by women. The Claimant said that this was motivated by a stereotype that Muslims believed that women could not be in supreme leadership. There was no evidence that Mrs McEvedy had referred to such an Islamic belief. We were not satisfied that the Claimant had established primary facts from which we could conclude that this was motivated by his religion or related to it. In any event we accepted Mrs McEvedy's evidence that the reason she said this was due to her observations of how the Claimant interacted with Mr Biruls, Ms Wood, Ms Kehoe and her. The Claimant got on well with Mr Biruls but was challenging when being given feedback by Mrs McEvedy and other females. In relation to Mrs McEvedy, we considered that her manner did not assist matters and

concluded that her and the Claimant's personalities would clash and they would struggle to get on. We accepted that the comment was wholly unconnected to or motivated by the Claimant's religion and that it was based on the observation of Mrs McEvedy. The claims of direct discrimination and harassment were dismissed.

211. At the meeting, discussion took place about the Claimant's prayer needs. The Claimant said that he had been using a meeting room. It was explained meeting rooms were difficult to book and they were under a lot of pressure for use in meetings. The Claimant was told that he could use the multi-faith room in a neighbouring building. Discussion also took place about the Claimant putting times in his diary as a private meeting, so that other meetings would not be put across his prayer times. Very little was said about the specific allegation by the Claimant in closing submissions. We interpreted that the Claimant relied upon his general submissions made in relation to allegation 1. This was one of the occasions we considered under allegation 1 and we repeat our reasoning.

212. Accordingly the allegations of direct discrimination and harassment were dismissed.

Allegation 11. On the 22 January 2020, Sarah McEvedy said to the Claimant and/or in front of the Claimant "My enemy's friend is my enemy, my enemy's enemy is my friend, my friends friend is my friend, my friends enemy is my enemy.'

213. We concluded that Mrs McEvedy did not say the phase alleged and that it could not have occurred on 22 January 2020, the Claimant having said it occurred once and he had referred to it in his grievance letter which pre-dated the allegation. We were not satisfied that the Claimant had established the factual basis of the allegation and were unable to ascertain when he was alleging it had taken place. The claims of direct discrimination and harassment were dismissed.

Allegation 12. On the 21 November 2019, Sarah McEvedy refers to the Claimant as "Thorny Niaz,' implying he was angry or an irate person.

214. This was an allegation which the Claimant had not referred to in his witness statement, and in cross-examination his evidence was vague. We did not accept that the comment was made. The Claimant failed to establish the factual basis of the allegation and the claims of direct discrimination and harassment were dismissed.

Allegation 13. On the 21 November 2019 a probation review was conducted by Robert Biruls and Danielle Wood (influenced by Sarah McEvedy). The performance issues of unsatisfactory performance excluded any consideration of Claimants sickness absence/impractical time frames/the Claimants perspective

and his performance objectives were not explained to him He was given the performance form at that meeting but had insufficient time to consider it and respond.

215. The practice adopted by the Respondent was for the probation review form to be completed by the PDM and that would then be used as the basis for discussion as to the progress in relation to the objectives. There was no evidence that this was not the practice used for probationers generally. The Claimant was given the review form shortly before the meeting and again there was no evidence that this was not the practice in respect of probationers generally. The Claimant correctly submitted that he had not been given a document which set out all of his objectives in one place. The Claimant was orally told what his objectives were and, in common with other employees, it was his responsibility to write out what they were, as demonstrated by the e-mails with Mrs Crouch on 2 October 2019. There was no evidence that this was not the practice for probationers generally. We were not satisfied that the Claimant had proved primary facts which tended to suggest that an appropriate comparator would have been treated differently in these respects or that the motivation was his religion. Similarly we were not satisfied that he had proved primary facts which tended to show these matters were related to religion. We were satisfied that the Respondent proved that they were the practices adopted with people on their probationary period and religion played no part in the practice.

216. The Claimant submitted that the procedure did not allow for exceptional circumstances such as: sickness, the failure to explain performance objectives or racism or harassment in the workplace. It was submitted that for those reasons it was imperative he had the review form in advance of the meeting. The tests which we needed to apply are not ones of fairness or reasonableness, rather they are those relating to direct discrimination, i.e. less favourable treatment, or harassment related to religion. The training carried out by the Claimant was identified in the form and it was included that he had not attended the rearranged inventory awareness training due to illness. It was recognised by Mr Biruls that he had done a reasonable job on the Inventory Audit Sample given the timescales. This was recognition that, due to absences and problems, the Claimant had less time than would be expected. However, they went on to discuss that the Claimant was not providing the information required in terms of pass or fail. There was discussion about how the Claimant was progressing in relation to his other objectives and how he was not seen to be performing to the required standard. The Claimant said in the meeting that he had not been well and that he could not work with bullying, racism, and intimidation and had the opportunity to raise matters he considered were affecting his performance. We were not satisfied that the Claimant adduced primary facts that his absence and timescales were not taken into account. These matters

were recognised by Mr Biruls. Further we were not satisfied that the Claimant adduced primary facts which tended to show that an appropriate comparator would have been treated better. Further we were not satisfied that the Claimant proved primary facts tending to show that it was motivated by his religion or related to it. In any event we were satisfied that the Respondent held genuine concerns about the Claimant's performance and it sought his explanations for why he was not progressing at the required standard and that they were wholly unconnected to his religion.

217. The Claimant also suggested that Mrs McEvedy had influenced the mid-probation review. There was not any evidence that she had any involvement and we rejected that assertion.

218. The claims of direct discrimination and harassment were dismissed.

Allegation 14. Grace Horton, Robert Biruls and Stuart Smith discouraged the Claimant from raising a formal grievance and did not commence a formal investigation of discrimination/ harassment / bullying on the 31 October 2019 - 18 February 2020.

219. This was also an allegation of victimisation. Any matters before 20 November 2019 predated the protected acts relied upon. The Claimant's case was that he was discouraged from raising a formal grievance and he relied upon being encouraged by Ms Horton, Mr Biruls and Mr Smith to pursue his complaint informally.

220. When the Claimant first raised that someone had asked if he had a gun in his pocket, he refused to say who had said it to him. He went as a far as telling Mr Smith that it was no one on the floor plate. Mr Smith told the Claimant to raise a formal complaint. We accepted it would be very difficult to investigate a complaint, if it is about a comment and the person alleged to have made it is not identified.

221. The first involvement of Ms Horton was when she was copied into Mrs McEvedy's e-mail dated 17 October 2019. At this stage, the Claimant had not raised a complaint and she suggested that Mr Biruls, as his senior manager, raised it with him. Mr Biruls spoke to the Claimant that day and the Claimant followed it up by saying he was highly stressed by the harassments. Mr Biruls then recommended a meeting took place between the Claimant and Mr Smith. He recognised that there was a conflict between the Claimant and Mrs McEvedy. There was no evidence that at this stage the Claimant wanted to raise a formal complaint. He had raised concerns and Mr Biruls was trying to resolve them. We were not satisfied that the Claimant proved facts which tended to show that he was being discouraged from raising a formal grievance at this stage. Further we were satisfied that

Mr Biruls was attempting to diffuse the situation and reduce the contact between the Claimant and Ms McEvedy,

222. Ms Horton, on 21 October 2019, sent an e-mail saying her preference was for the issue to be resolved at a local level. She was aware of 2 formal grievances which were ongoing in the Division and they had been drawn out and the process had been difficult. She said that it was up to the Claimant if he wanted to take it further. This was not sent to the Claimant and it was an explanation as to the processes and set out that the Claimant had a choice. There was no evidence that this was communicated to the Claimant. It was something which tended to show that the Claimant's options were being considered.

223. The Claimant's e-mail dated 23 October 2019, referred to Mr Smith arranging an informal meeting with Mrs McEvedy to try and find an amicable solution. The Claimant did not object to this. There was no evidence that the Claimant was seeking to go down a formal route at this time, or that he was unhappy with the suggestion of an informal meeting. We were not satisfied that the Claimant had proved primary facts tending to suggest that Mr Smith was discouraging him from going down a formal route at this stage.

224. On 29 October 2019, Ms Horton told the Claimant that she was limited in what she could do in an informal process and he could raise it formally. She mentioned in relation to the 'gun in the pocket' incident that there was little she could do on an informal basis because it was one word against another and he either needed to raise a formal complaint or he would need to move on from it. Prior to this Mr Biruls had told the Claimant that he could raise a formal grievance and he explained that the Claimant needed to decide whether it was something he could put behind him and if not he should raise a formal grievance. The Claimant's options were being outlined to him and he was being told that if he was not happy with the situation he could and should raise a formal grievance. We were not satisfied that the Claimant had established the factual basis of the allegation at this stage.

225. The Claimant started taking union advice on 31 October 2019.

226. On 19 November 2019, Mr Smith had a meeting with the Claimant. When the Claimant said he was going to raise a complaint, Mr Smith told him that it was his right to do so. There was no suggestion that things should be dealt with informally. We were not satisfied that the Claimant had proved primary facts tending to suggest that Mr Smith was discouraging him from raising a formal grievance. In any event the Respondent proved that the Claimant was being encouraged to raise a formal grievance and that this

was consistent with Mr Smith telling the Claimant that he should do so when the 'gun in the pocket' incident first arose.

227. On 9 January 2020, Mr Tregower e-mailed the Claimant saying that he was dismayed the Claimant had not raised a formal grievance. The Claimant raised his formal grievance later that day. On 3 February 2020, Mr Smith told the Claimant that he should raise a formal grievance to which the Claimant said he had. This was inconsistent with the Claimant being discouraged from raising a formal grievance.

228. We were not satisfied that the Claimant had proved facts which tended to suggest that he was being discouraged from raising a formal grievance. The factual basis of the allegation was not made out. In any event we were satisfied that the Respondent was encouraging the Claimant to raise a formal grievance and the allegations of direct discrimination, harassment and victimisation were dismissed.

229. The Claimant also complained that a formal investigation was not started. Mr Tregower forwarded the grievance to Mrs Lammonby and he set the wheels in motion. It was correct that the investigation did not start until after 18 February 2020, however Ms Horton, Mr Biruls and Mr Smith were not involved in organising the process. There was no evidence to suggest that either Ms Horton, Mr Biruls or Mr Smith had any say in when the grievance process started and at the time the Claimant was on sick leave from 27 January 2020. As such the factual basis of the allegation was not made out and the allegations of direct discrimination, harassment and victimisation were dismissed.

<u>Disc & Det 15 . On 20 November 2019, Danielle Wood and Angie Kehoe, accused the Claimant of intimidation. Angie Kehoe became unhappy as the Claimant had complained about racism, bullying and intimidation happening in the work place.</u>

230. There was a dispute of fact between the parties as to whether the Claimant raised his voice and was taking copious notes. We preferred the Respondent's evidence on these issues and found that the Claimant did raise his voice and was taking a note of everything which was said. We also found that the Claimant was not accurately recording what was said and were supported in this conclusion by the way in which he misinterpreted many e-mails and documents, and that he took things said out of context and tried to portray them as saying something very different.

231. In the meeting, the Claimant raised that he had been subjected to racism and discrimination and the Respondent accepted that this was a protected act.

232. The Claimant submitted that he raised he was being discriminated against before allegations of intimidation were made against him and it therefore followed that his allegations were made out.

233. At this stage, the Claimant's complaints had related to Mrs McEvedy, the gun in the pocket incident and the desk move. There was no evidence that the Claimant had alleged that Ms Wood or Mrs Kehoe had been bullying, harassing or discriminating against him. The Claimant's complaints related to other people. The Claimant raised that he thought he was being discriminated against and referred to racism. During the meeting he was taking extensive notes, which Mrs Kehoe noticed were not accurate. The Claimant also raised his voice and shouted at Ms Wood and Mrs Kehoe, to the extent that he was asked to stop shouting. Ms Wood said at the end of her note that she felt intimidated by his notetaking when Mrs Kehoe said he was not accurately recording what had been said. Ms Wood also said that he had been shouting. Mrs Kehoe also recorded in her note that Ms Wood felt intimidated.

234. The hearing bundle did not contain the Claimant's notes of the meeting.

235. In relation direct discrimination, the Claimant did not adduce any evidence that an appropriate comparator, who had raised they had been discriminated against and who had been mis-recording notes and shouting in the meeting, would have been treated differently. The Claimant further did not adduce evidence which tended to suggest that his religion was the motivation for this. As such the initial burden of proof was not discharged and this allegation was dismissed.

236. In relation to harassment the Claimant's prayer needs were discussed and he started shouting at Mrs Kehoe, which Ms Wood commented on. Being told that you have been intimidating is something which is unwanted and we were satisfied that the Claimant had discharged the initial burden of proof. We were satisfied that the Respondent had proved that Mrs Kehoe and Ms Wood were concerned about the Claimant's wellbeing and that the allegations made by the Claimant did not relate to them. We accepted that the Claimant was not accurately recording what was said and both women feel uncomfortable. That, in combination with being shouted at, is something which could be intimidating. We accepted that Ms Wood did feel intimidated in the meeting by reason of the Claimant's behaviour. We were satisfied that it was his behaviour which was the sole reason why they said he was being intimidating and that his religion played no part whatsoever in that thought process. The claim of harassment was dismissed.

237. In relation to victimisation, the Claimant was told he was being intimidating, after he had undertaken the protected act, and we were satisfied that would have been to his disadvantage. We were satisfied that the initial burden of proof was discharged. It was relevant that the complaints the Claimant was making were not directed at Ms Wood or Mrs Kehoe. When Mrs Kehoe raised his prayer needs he shouted at her asking if she asked her team to say when they were leaving the floorplate and accused her of having a problem with praying. The Claimant had already said he was being discriminated against before this. It was Ms Wood who said that she had felt intimidated. We were satisfied that the Respondent had proved that Mrs Kehoe and Ms Wood were concerned about the Claimant's wellbeing and that the allegations made by the Claimant did not relate to them. Mrs Kehoe had on numerus occasions gone upstairs to check on his wellbeing and at every meeting was asking what could be done to help. This strongly pointed away from antagonism towards the Claimant. We accepted that the Claimant was not accurately recording what was said, and both women feel uncomfortable. That, in combination with being shouted at, is something which could be intimidating. We accepted that Ms Wood did feel intimidated in the meeting by reason of the Claimant's behaviour. We were satisfied that it was the behaviour at the meeting which was the sole reason why they said he was being intimidating and that the fact he was saying he was being discriminated against did not have an influence on what was said. Accordingly the allegation of victimisation was dismissed.

<u>Disc & Det 16. On 3 February 2020, Stuart Smith and Angie Kehoe accused the Claimant of intimidation, bullying and harassment.</u>

238. This meeting took place in order to informally discuss what happened on 22 January 2020 and the Claimant's behaviour generally, and to say that Ms Wood would no longer be his PDM. The Claimant did not refer to this meeting in his witness statement. At the meeting, the Claimant positioned his chair so that his back was towards Ms Kehoe. Mr Smith had received comments from other members of the team about how they were being made to feel by the Claimant's behaviour towards them. The concerns were raised and the Claimant denied them. This included raising his voice and pointing his finger. The Claimant was asked to modify his behaviour. During that meeting the Claimant said to Mr Smith that he had raised complaints and Mr Smith told him he should raise a formal complaint.

239. The focus of the Claimant's submissions was that this was an act of victimisation.

240. The Claimant did not adduce primary facts which tended to show that if concerns had been raised about an appropriate comparator in the same circumstances, that Mr Smith would not have held a similar meeting or that

a similar discussion would not have ensued. The Claimant had not discharged the initial burden of proof in relation to the direct discrimination claim.

241. In relation to harassment the Claimant's religion or his prayer needs were not discussed at the meeting. There was no evidence put forward by the Claimant which tended to suggest that the discussion was related to his religion. The Claimant had not discharged the initial burden of proof in relation to the harassment claim.

242. In relation to victimisation, the meeting was something which was unwanted and the Claimant considered it was to his disadvantage. We rejected the Claimant's evidence that when he referred to his grievance, Mr Smith then raised the concerns. The purpose of the meeting was to informally discuss the concerns with the Claimant and those concerns were raised first. When the Claimant raised that he had complaints, Mr Smith told him that he should raise a formal complaint, to which the Claimant said he had. We concluded it was at that point Mr Smith became aware that the Claimant had raised a formal grievance. It was notable that the meeting was informal and that the Claimant was not being subject to any formal disciplinary process and that he was being asked to moderate his behaviour. We were not satisfied that the Claimant had adduced primary facts which tended to suggest that the reason for holding the meeting was significantly influenced by his raising concerns on 20 November 2019 or that he had raised his grievance. The cross-examination of Mr Smith was brief and consisted of simply putting the allegation to him, without drawing on documents to support the allegation.

243. In any event we were satisfied that Mr Smith had received the concerns and members of the team, including the Claimant, were being impacted. The Claimant was told what the concerns were and asked to moderate his behaviour. We were satisfied that the reason they were being raised was that the behaviour of the Claimant was adversely affecting his colleagues and that this was being raised in an informal way. The Respondent proved that the Claimant's protected acts formed no part of the reasoning why Mr Smith held the meeting or why he raised the concerns and we were satisfied that they did not have a significant influence on Mr Smith and Mrs Kehoe.

244. The claim of victimisation was dismissed.

Allegation 17. On 10 February 2020, Robert Biruls sent out the probation review form and an invitation for the six month probation review to take place on the 18th February 2020, although he was certified sick absent until the 2 March 2020.

245. It was Mr Denwood who sent the probation review form and invitation to the final probation meeting. The Claimant in closing submissions said that there was a drafting error in relation to the name of the alleged perpetrator. The Claimant did not apply to amend the claim. The Respondent's case throughout that it was not Mr Biruls who sent it. The factual basis of the allegation was not made out.

246. In any event, the Claimant's employment started on 19 August 2020 and therefore his 6 month probationary period ended on 18 February 2020. Under the probation policy the Respondent was required to have an end of probation meeting. The Claimant adduced no evidence as to the motivation of Mr Denwood. As such he failed to prove primary facts that an appropriate comparator would have been treated differently or that it was motivated by his religion. He further failed to adduce primary facts that is was related to his religion. He further failed to prove primary facts that it was significantly influenced by his grievance and complaint made on 20 November 2019.

247. The claims of direct discrimination, harassment and victimisation were dismissed.

Allegation 18. On 18 February 2020, Stuart Smith held final probation meeting, in the absence of the Claimant, despite his request to delay because he was unable to attend because of sickness, then made the decision to dismiss him and also did not allow him to claim arrears in pay for hours worked.

248. The Probation Procedure required that at the end of the probation period a probation review meeting was held. The last day of the Claimant's probationary period was 18 February 2020. The procedure further provided that the meeting could only be rescheduled once and by no more than 5 working days from the original date. The Claimant requested that the meeting was rescheduled after his return to work, which was on at least 2 March 2020. The policy was explained to the Claimant and he was reminded that he had said he would be able to attend meetings. The Claimant was told that he could send a representative, including a trade union representatives or provide a written submission, he did neither.

249. The Claimant's submissions did not really address the holding of the meeting on 18 February 2020, they were more that there had been a rush to judgment and other procedural failures. There was no evidence which tended to suggest that initially scheduling the meeting for 18 February 2020 and then refusing to extend the date of it to after 2 March 2020 was motivated by the Claimant's religion or related to it. No allegations were made against Mr Denwood who set up the meeting and who dealt with the Claimant's request to defer it. The Claimant did not give any evidence of untoward behaviour by Mr Denwood towards him or that he had been influenced by someone else. Further there was no evidence that an

appropriate comparator would have been treated differently. We were not directed towards evidence which tended to show that Mr Denwood organised the meeting on that date because the Claimant had complained of discrimination and/or raised his grievance. We were not satisfied that the Claimant had discharged the initial burden of proof for the claims of direct discrimination, harassment and victimisation in relation to Mr Denwood scheduling the meeting and then not moving it to after 2 March 2020.

250. At the meeting Mr Smith decided to proceed and held it in the Claimant's absence. He was advised of the policy and that the meeting could not be rearranged by more than 5 working days and the Claimant said he could not attend before 2 March 2020.

251. The Claimant submitted that he fell within paragraph 3.2 of the probation procedure, in that performance issues arose at or after the mid-probation review and that there were other employment issues, namely the Claimant was complaining of bullying, harassment and discrimination. As such his PDM (Mr Denwood) had to contact the casework team to discuss an extension. It was submitted that there was no evidence of this taking place nor that the Health and Attendance Policy or Standards of Conduct or discipline policies were referred to. These matters had not formed part of any allegation in these proceedings, until the cross-examination of Mr Smith. Mr Smith's evidence was that he believed the appropriate steps were followed and that there would have been a discussion with casework. The Claimant invited us to draw an adverse inference in relation to this, so as to infer that prohibited conduct had occurred. This issue was akin to an ambush. The Claimant had never suggested that this part of the policy had been lacking until the Respondent's last witness. The person whose responsibility it would have been to contact casework, Mr Denwood, was not subject to any allegations by the Claimant and had not been called as a witness. We were unable to make findings as to whether or not he had contacted casework to discuss an extension. Mr Smith believed that he was being properly advised by HR and that the policy had been followed correctly. In the circumstances we did not consider that it was appropriate to draw an adverse inference.

252. The meeting considered the Claimant's performance in his role. We were satisfied that he was given extensive training in relation to his role. We were further satisfied that the Claimant was aware of his objectives. The Claimant had been performing at a level below than what was expected. There was documentary evidence which showed that a number of different team members considered that the quality of the Claimant's work was substandard and that also he was not completing it within the expected deadlines. There was also evidence that when feedback was provided the Claimant, rather than listening, would argue back and suggest that he was right. The Claimant, however had raised a formal grievance about

discrimination and the probation review was being conducted before the outcome of his grievance. The Claimant submitted that it was easier for the Respondent to rush to judgment rather than consider policies which might have assisted the Claimant.

253. The Claimant did not adduce evidence which tended to suggest that an appropriate comparator would have been treated differently or that the decision was taken because he was Muslim. The Claimant also did not adduce evidence which tended to suggest that the decision was related to his religion. He failed to discharge the burden of proof in relation to the direct discrimination and harassment claims and those claims were dismissed.

254. In relation to the victimisation claim. We accepted that termination of contract would be something to the Claimant's detriment. The probation review was heard after the Claimant had raised his grievance and he had confirmed to Mr Smith that he had done so. The Claimant was absent on sick leave after making his allegations of discrimination. We were satisfied that it raised a question as to why the Respondent acted as it did and the Claimant just managed to shift the initial burden of proof in relation to his claim of victimisation, in relation to proceeding in his absence and the termination of his contract.

255. As set out above, the policy required the meeting to take place at the end of the probation period. The end of the probation period was 18 February 2020 and we therefore accepted that the meeting needed to be held. The policy also only permitted a rescheduling by 5 working days. Mr Smith was advised as to the policy and the meeting went ahead in the Claimant's absence. There was no reference to the Claimant's grievance at the meeting. The Respondent proved that the reason for proceeding in the Claimant's absence was that it was required to hold an end of probation meeting. Further that it was doing so at the end of the Claimant's probation period and the date could not be extended to a time when the Claimant said he could attend. Further we were satisfied that the Claimant's complaint in November 2020 and his grievance formed no part whatsoever of the thought process of Mr Smith and they did not have a significant influence on his decision and this allegation of victimisation was dismissed.

256. Mr Smith had evidence of poor performance and despite significant training and attempts to assist the Claimant, his performance remained at a sub-standard level. He was required to make an assessment as to whether he thought that the Claimant could improve and Mr Smith concluded that he would not. The evidence on the Claimant's performance came from a number of different people in the team, which Mr Smith was entitled to take into account. We were satisfied that Mr Smith concluded that the Claimant had not met his objectives and that he was unlikely to improve and that this was the reason why the Claimant failed his probationary period. We were

satisfied that the Respondent proved that the Claimant's complaint in November 2019 and his grievance had no influence in the decision making process and the allegation was dismissed.

257. There was no evidence that Mr Smith had been involved with the Claimant's final pay or any arrears of pay due to him. The factual basis of this allegation of discrimination, harassment or victimisation was not made out and those claims were dismissed. No findings of fact were made as to whether there were any arrears of pay.

Overall conclusion

258. The claims of direct discrimination, harassment and victimisation were dismissed. Those claims were dismissed on their merits and it was therefore unnecessary to consider the issues in relation to time limits.

259. Orders in respect of the outstanding wages claim will be made separately.

Employment Judge J Bax
Date: 13 December 2023

Judgment sent to Parties: 14 December 2023

For the Tribunal Office