EMPLOYMENT TRIBUNALS

Claimant: **Mr A Ikeji**

Respondents: **(1) Office for Rail and Road**
(2) Mr D Wilson
(3) Mr I Prosser
(4) Mr M Farrell
(5) Ms V Rosolia

Heard at: **East London Hearing Centre**

On: **27 – 29 March; 2 – 4 April 2024 (with the parties)**
5 April 2024 (in chambers)

Before: **Employment Judge Gardiner**

Members: **Mrs B Saund**
Ms T Jansen

Representation

Claimant: In person
Respondent: Gordon Menzies, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant's wrongful dismissal claim is well founded and succeeds. The appropriate remedy will be determined at a remedy hearing.

2. None of the rest of the Claimant's claims are well founded. They are accordingly dismissed.

REASONS

1. Until his dismissal in July 2022, the Claimant was employed by the First Respondent as a Trainee Inspector. The decision to end his employment was taken

at a Probation Review Meeting held on 12 July 2022. By that point, he had been employed for just over six months.

2. In these two conjoined sets of proceedings the Claimant raises various complaints about the way he was treated throughout his employment and about the decision to dismiss him. The complaints requiring the Tribunal's determination were clarified at the start of the hearing when the Tribunal discussed and finalised the list of issues. This involved granting the Claimant's application to add an additional basis for arguing that he was automatically unfairly dismissed.

3. In the first claim, the only additional named Respondent apart from the Office for Rail and Road was Mr D Wilson. In the second claim, the additional named Respondents were Mr I Prosser, Mr M Farrell and Ms V Rosolia. For convenience, in these reasons, the Tribunal refers to Mr Prosser as the Third Respondent, to Mr Farrell as the Fourth Respondent and to Ms Rosolia as the Fifth Respondent.

4. The Claimant represented himself. The Respondents were represented by Mr Menzies of Counsel. Witness evidence was provided by the Claimant and by the following witnesses on behalf of the Respondents: Victoria Rosolia, Errol Galloway, Lee Collins, Catherine Hui, Paul Appleton, Donald Wilson, Matthew Farrell, Vinita Hill and Feras Alshaker. The documentary evidence was contained in two lever arch files extending to 1616 pages at the start of the hearing. By the conclusion of the hearing, further documents had been added in the appropriate point in the chronological sequence or at the back of the second bundle.

5. Both parties had prepared their own chronologies. These were not agreed documents. In addition, the Respondents had prepared a cast list of relevant individuals.

6. At the start of the hearing, the Claimant applied for permission to record the proceedings to assist him in presenting his case. This application was refused for reasons given orally at the time. The Tribunal decided that the Claimant would have an effective opportunity to present his case because the Tribunal would provide him with adequate breaks during the evidence and would permit him to note down answers and matters to which he wished to return in presenting his case.

7. The evidence was concluded on the morning of the sixth day. Mr Menzies provided written closing submissions, which he amplified orally. The Claimant also provided written closing submissions and answered clarificatory questions from the Tribunal. There was insufficient time remaining for the Tribunal to deliberate on all matters and announce its decision and reasons orally. As a result, the Judgment and Reasons were reserved and sent out in writing.

8. We refer to the Claimant in these Reasons as Mr Ikeji and to the First Respondent in these Reasons as ORR.

Findings of fact

9. In the middle of 2021, ORR advertised that it was seeking to appoint to two full time posts of HM Trainee Inspector of Railways [671]. The job location was described as London with a base at 25 Cabot Square, Canary Wharf [672]. The job description

described one role with the TfL team and the second role with the Network Rail Southern Region team. The application deadline was 16 August 2021. Mr Ikeji completed the online application form. On the application form, under the section Preferences, he completed the further location preferences as 'Southern Region' [689]. This was a free text box into which he had written those two words.

10. All applications were anonymised before a shortlisting decision was taken. Seven of the applicants were shortlisted for an in-person assessment by a panel of three. Chairing the panel was Donald Wilson. Also present on the panel was Catherine Hui and Dominic Long. Mr Wilson had received training in diversity and inclusion. The purpose of the interview was to select the strongest candidates based on merit. It was not to decide which candidate would be assigned to which vacancy.

11. The same process applied to each of the seven shortlisted candidates. They were given an assessment and were asked competency-based interview questions. Each candidate was scored against ten separate criteria, with the panel members each scoring the candidates' answers during the interview by allocating a number between 1 and 7. After each interview they discussed their scores and agreed a single score against each competency for each candidate. Because the assessment took place face to face, it would have been obvious to the selection panel that Mr Ikeji was a black man.

12. As a result of this exercise, the Claimant scored highest with 49 marks, one mark ahead of Emily Gelder. A third candidate Fu Lee was awarded 47 marks and was initially regarded as the reserve candidate. This is because the panel were under the impression that ORR were seeking to appoint 2 trainee inspectors. Some weeks later, Fu Lee was also appointed when ORR decided to make three appointments.

13. There was an opportunity for the candidates to ask questions and to indicate any particular preferences about how they saw the role. The Tribunal does not accept that Mr Ikeji specifically expressed a preference for the TfL role.

14. Any notes taken by panel members during interviews were sent to HR and were then destroyed following the conclusion of the interview process. This was ORR's standard procedure. It was done based on ORR's understanding of best practice in accordance with data protection legislation.

15. The panel submitted their scoresheet to HR together with comments for each of the candidates. The comment for the Claimant read "This candidate is an excellent communicator who gave strong examples to demonstrate his ability against each of the criteria explored. He demonstrated a clear interest in the job, had done his preparation, and asked some good questions relevant to the role. He showed a positive approach to his own and others' development". The comment against Ms Gelder was as follows: "This was a strong all round performance held together with a clear and engaging communication style. Examples from work experience were strong, including those cited from earlier work in a law firm. The panel felt that the candidate could be a very good ORR representative with duty holders".

16. It is likely that Mr Wilson, as the Chair of the Panel, would have telephoned Mr Ikeji and Ms Gelder to inform them of their success. Written offer letters would have

followed prepared by HR. The Claimant signed and dated his acceptance of the employment contract offered on 26 October 2021. The role was described as a Full-Time role, namely 37 hours per week over 5 days each week. His place of work was described as Office of Road and Rail, 25 Cabot Square, London E14 4QZ. The offer letter recorded his start date as 5 January 2022 [701]. His notice period was described as follows: "The amount of notice of termination of your employment you are entitled to receive is 5 weeks.".

17. There was no reference in the Offer document to ORR having any entitlement to make a Payment In Lieu of Notice ("PILON"), in the event that employment was terminated.

18. The document listed the following against "Paid leave and benefits" – "You are entitled to the following benefits during your employment … Flexible Working".

19. The document did say "Full details of ORR terms and conditions can be read in the 'summary of terms and conditions of service document". Neither this summary document nor the full terms and conditions have been included in the documents in the bundle. As a result, it is unclear whether there was a PILON clause in Mr Ikeji's contract of employment, or whether the Probation Policy (or any other policies) were incorporated as part of his contractual terms. The Probation Policy records the following under the heading "Notice and Compensation":

> "If you are to be dismissed, you will be given a minimum of 5 weeks notice in accordance with Section 11.1.2.d of the Civil Service Management Code. Compensation in lieu of notice will be decided on the individual merits of each case. ORR reserves the right to require people to stay away from the office during their notice period (this is known as gardening leave)."

20. Under the ORR's Flexible Working policy, an application for a changed in the contractual terms to part time work could only be made after 26 weeks employment.

21. Mr Ikeji also signed what was described as a Training Contract on the same day. This stated at paragraph 2 that the employee was being trained in "the Post Graduate Diploma in Occupational Safety and Health (where not already held) and Railway technical knowledge and skills as identified by the competence manager and/or by the line manager in a training needs analysis, to be provided within 2 months of the employee starting in the Trainee Inspector role. The final paragraph of the training contract said that "any changes to this training contract must be agreed in writing by both parties".

22. When the paperwork was provided to and signed by the Claimant, there had been no decision as to the specific role to which the Claimant would be assigned. There were two roles to fill – one working with Donald Wilson on the mainline infrastructure and one working with Catherine Hui working on TfL infrastructure. This included the Elizabeth Line.

23. The decision as to where both of the successful candidates should be deployed was taken by Paul Appleton. He had no particularly strong views on which of the

candidates should be deployed to which role. He had not been on the interview panel and did not know either of them. He had not seen either of the candidates application forms and therefore any preferences expressed when applying. Whilst containing different elements, the two roles were regarded as of equivalent standing.

24. At around the time he was making the decision, Mr Appleton happened to be in the office on the same day as Catherine Hui. He asked her if she had a preference as to which of the two successful candidates should join her team. Her preference that Ms Gelder should join her team. She felt that Ms Hui's recent experience with TfL and particularly with the duty holder for the Elizabeth Line. At that point, the Elizabeth Line had yet to open and was one of her priorities. He did ask Mr Wilson for his views as he was not in the office on that day and Mr Appleton needed to make a decision.

25. Influenced by Ms Hui's view, Mr Appleton decided that Ms Gelder should be assigned to the TfL work and that Mr Ikeji should work on mainline infrastructure with Mr Wilson.

26. Before starting Mr Ikeji underwent a medical. No problems were noted. As Mr Ikeji described it during his grievance meeting on 12 April 2022, "I had a medical and was fine".

27. Mr Ikeji was told of the allocation decision by Mr Wilson on his first day in the office on 5 January 2022. Mr Wilson himself was not party to the decision, despite chairing the interview panel.

28. On 5 January 2022, Mr Ikeji's first day at work, he arrived at 9.30am, although he had been asked to start at 9am. When he was told he had been allocated to work on the NR Southern Region Team rather than the TfL team, he asked if he could work on the TfL team. Mr Wilson told him that the allocation decision was one that had been made at a more senior management level based on business needs. He was issued with a warrant card. The date on the warrant card was 16 October 2015. Mr Ikeji queried why this date had been included. Mr Ikeji did not suggest that the allocation decision amounted to discrimination, either expressly or by implication from any words used.

29. Mr Ikeji also queried his training contract. Mr Wilson agreed to speak to Mr Galloway and Mr Williams to discuss the issues that Mr Ikeju was raising.

30. Mr Wilson emailed them the following day asking if there was a written down process describing Mr Ikeji's training journey. Both responded, clarifying the basis on which training was provided. There was general agreement that the wording in the training contract needed to be tweaked to reflect when the in-house diploma would start.

31. Mr Fu Lee also started as a trainee inspector on 5 January 2022, working in Patrick Talbot's Freight team [727].

32. On 7 January 2022, Mr Ikeji raised concerns about his training contract and his posting to the Southern Team with Mr Wilson. Mr Wilson tried to reassure him

about his allocation to the team. He did not detect any immediate anger or upset regarding the allocation decision. Mr Ikeji did not make any allegation that allocating him to the Southern Region team amounted to discrimination, either by using the word 'discrimination' or otherwise suggesting that there had been unfavourable treatment.

33. On 17 January 2022, Mr Ikeji spoke with Mr Wilson again. He continued to raise his concerns about being allocated to the NR team rather than the TfL team. He asked if he would be able to swap with Ms Gelder. Mr Wilson said he would investigate whether this was possible. He emailed Tom Wake and Ian Skinner and copied the email to Catherine Hui, who headed up the TfL team to which Ms Gelder had been assigned. His email was worded as follows:

> "Hi Tom and Ian,
> I wasn't party to the decision about who went where … What was the allocation decision based on please? Is it too late and are we bothered? I can work with either option, but would like to have a willing recruit, of course. I guess Emily's thoughts might have to be checked if we were to make a change.
> From memory Emily is currently an LUL employee. Adrian was a driver before moving into operations management job in LUL. For the last seven years he's been working for a London housing association.
> Your thoughts/directions please" [736]

34. This email is significant in a number of respects. Firstly, it confirms and the Tribunal so finds, that Mr Wilson was not party to the decision to allocate Mr Ikeji to the NR team. Secondly, it confirms that he was willing to countenance a swap if this was possible so as to enable Mr Ikeji to move to the TfL team. Thirdly, he recognised that this was potentially a decision for more senior managers to take and was willing to accept their direction.

35. The Tribunal does not criticise Mr Wilson for failing to provide a more detailed summary of Mr Ikeji's previous experience. As Mr Wilson said in cross examination, this was a very brief statement. It was always open to Mr Wake and Mr Williams to seek further information about the different skills and experiences of Mr Ikeji and Ms Gelder. He was not seeking to influence Mr Wake or Mr Williams to decide that a sway was not appropriate.

36. Mr Skinner responded the same day. He said he could not recall the decision making process that was followed. He said that Ms Hui was happy with the allocation as it looked sensible taking account of the skills, experience, and priorities of the TfL team. He appeared willing to consider making a change, although said that Ms Gelder's thoughts would need to be considered.

37. That evening, Mr Wilson emailed Matt Raine, who was covering for Ms Hui, who was on sick leave at the time. His email noted that "there could be a swap if all parties wanted it", although he wrote that it would be worth asking Ms Gelder if she had a preference. He added "Adrian appears to be making a strong start, by the way" [740].

38. Mr Wilson also updated Mr Ikeji on the steps that were being taken to consider the wording of the training contract. He said that Mr Galloway would be providing updated wording to HR and he expected that Mr Ikeji would receive an amended version. He told him that he had queried the date on Mr Ikeji's warrant and he had asked for another one to be issued with the correct date. He also told him that he had raised Mr Ikeji's preference for the TfL team with senior managers. He ended his email: "don't hold your breath. If nothing changes you'll be fine in Southern Team" [741].

39. On 19 January 2022, Matt Raine emailed Ms Gelder telling her she had been allocated to the TfL team. He asked her to confirm "whether you have a strong preference for either team or are you happy to join the TfL team" [742]. She responded the same day saying that she was "definitely happy to be joining the TfL team" [743]. This response was forwarded to Mr Wake and Mr Skinner. The latter forwarded this onto Mr Wilson.

40. On 20 January 2022, Mr Wilson conducted a performance review induction meeting with Mr Ikeji. They discussed his performance objectives [719]. The notes entered onto ORR's system contained this positive assessment: "It's early days, but Adrian seems to be quick off the mark in getting to grips with ORR systems and getting his early mandatory training done. Adrian has also completed his online PTS assessment in preparation for his two-day course at the end of this month" [725]. The Tribunal rejects Mr Ikeji's recollection that Mr Wilson told him he could see no reason why his training could not be completed in 12-18 months, given his industry specific experience and qualifications. The evidence of Mr Collins and Mr Galloway, which the Tribunal accepts, was that it would be too difficult to complete the training in less than two years as the classroom elements take at least two years to finish. Only one trainee had previously completed their training programme within 23 months. That trainee had previous regulatory inspector experience, which Mr Ikeji did not have.

41. Mr Ikeji asked about templates for recording progress with training, including a Training Needs Analysis. On 21 January 2022, Mr Wilson emailed Mr Galloway to follow up on Mr Ikeji's questions about forthcoming training. He asked him to point him to the current PPCF templates, RTP and technical and to advise whether we have a template 'development plan' or 'training needs assessment'. He said: "Adrian is itching to get going and I predict he will have me on my toes." [746]

42. Mr Galloway responded on 28 January 2022 [747]. He suggested that Mr Wilson should complete the Training Needs Assessment based on the competence requirements described in the regulatory and technical Professional Practice Competency Frameworks. He said that Mr Ikeji would be receiving a briefing on the training programme during the following week.

43. Mr Wilson emailed Mr Ikeji to suggest that training was discussed later that week [748]. The Tribunal accepts that there was a meeting around this time where Mr Wilson went through the training forms in more detail. However at that point he did not draft a Training Needs Analysis form. This was not part of that particular discussion.

44. Mr Wilson did not complete a specific Training Needs Assessment for Mr Ikeji until March 2022, at a point when he was already absent on sick leave. This was a draft document which was to be discussed with Mr Ikeji and amended in the light of the discussion. Because that discussion never took place, given Mr Ikeji's sickness absence, it was never finalised.

45. Ms Gelder was not due to start her role until the end of January 2022. She and Mr Ikeji were joining a larger group of trainee inspectors about 8-10 in size. They had been recruited a few months early in a larger intake but had yet to start their classroom based learning. From early February onwards, they attended particular training courses organised by the ORR and certified as appropriate training by NEBOSH. This bespoke training course replaced previous training courses for trainee inspectors which were delivered by external providers.

46. The cohort of trainee inspectors attended a Traction and Rolling stock course on 2 February 2022; an introduction to track course in Leicester on 8 February 2022 and a two day long Technical Induction course in Birmingham on 14 and 15 February 2022 led by Peter Darling. This was followed by another two-day course on 16 and 17 February 2022 on "Introduction to Regulation", led by Keith Atkinson.

47. Mr Ikeji was five minutes late for the training session on 2 February 2022 and 10-15 minutes late for the two training sessions on 8 and 14 February 2022.

48. On 11 February 2022, Mr Ikeji emailed to raise what he described as a "health concern" [750]. He said he had benign neutropenia, which made him susceptible to viral infections and was linked to adverse health consequences. He said that attending daily meetings with colleagues had made him "quite anxious about the risk to my health from exposure to air-borne viruses and Covid-19 in class". The email did not make any reference to hypertension or to any mental health condition. Its focus was on his concerns about his physical health. On 14 February 2022, Mr Wilson replied that he had raised this health concern with Mr Galloway and Mr Collins. He said that planning would continue to take into account Covid precautions.

49. The training session in Birmingham on 14 and 15 February 2022 was conducted by Peter Darling. At the end of the Technical Induction course on 14-15 February, Mr Ikeji spoke to Lee Collins raising concerns about the language used by Mr Darling. He and the other trainee inspectors were asked for their written feedback. Mr Ikeji provided his written feedback on 28 February 2022 [755]. He was asked if he had any additional comments to make about the events. He wrote the following:

> "There were a number of inappropriate and offensive statements made by the presenter, which may reflect unconscious bias against protected characteristics of colleagues (or worse). This was an unfortunate distraction throughout" [755]

50. No other concerns regarding inappropriate language were raised by any of the other 8-10 delegates. Given Mr Ikeji's complaint, Mr Collins arranged a one-to-one meeting with Mr Darling over Teams to discuss whether he had made a derogatory

comment. The outcome of the subsequent investigation was that ORR found there was no evidence to suggest that Mr Darling had made any derogatory comments.

51. During another course in February 2022, Mr Ikeji spoke to Keith Atkinson, who was providing the training. In the course of this discussion, Mr Atkinson said that Mr Ikeji may encounter discrimination in his role from some within the rail industry, but not from within ORR. He said it was a regrettable fact.

52. He also asked Keith Atkinson about part time work. He was interested in part-time working because he had ongoing business commitments and also had childcare responsibilities. Mr Atkinson said that he was semi-retired and was working on a part-time basis. During the conversation, Mr McDermott's name was mentioned as another inspector who was working on a part time basis. Mr McDermott had worked for ORR full-time for over 20 years and wished to reduce his working hours as he approached retirement. Mr Atkinson told Mr Ikeji that he should speak to his line manager but he thought that part-time working would be unlikely to be granted.

53. Prompted by Mr Ikeji's question, Mr Atkinson mentioned to Mr Tom Wake that Mr Ikeji had expressed an interest in part time working. Mr Wake was Mr Wilson's line manager. He told Mr Wilson of Mr Ikeji's interest in working part time. As a result, Mr Wilson decided he should arrange a meeting with Mr Ikeji to discuss this issue, as well as his concerns about Mr Ikeji's punctuality and his behaviour towards colleagues. This was arranged to take place on 3 March 2022.

54. On 1 March 2022, Mr Ikeji attended a Train despatch procedures course in Reading. Mr Ijeki arrived over an hour late. Mr Wilson received reports from those attending that Mr Ikeji had upset a couple of colleagues.

55. On 3 March 2022, Mr Wilson met with Mr Ikeji to discuss his current concerns. These were his lateness and conduct at the training session in Reading on 1 March 2022, his apparent expression of interest in part time working, and an emerging pattern of lateness [761]. This was a normal management meeting where Mr Wilson was properly raising issues of concern with one of the trainee inspectors he was managing. The issues raised were appropriate. The way in which those issues were discussed was also appropriate. The Tribunal rejects Mr Ikeji's allegation that Mr Wilson behaved in a way that involved making false, humiliating and unwanted comments about part time working. The best evidence about what was said and the way it was raised is contained in the subsequent email exchange between Mr Ikeji and Mr Wilson.

56. Following the meeting, Mr Ikeji emailed Mr Wilson saying that he "really appreciated the feedback you shared with me today and the time you set aside to hear from me" [761]. In that email he went on to say this about part time working [762]:

> "I fully understand the point you made about the considerable investment made to develop inspectors and the expectation of long service. I must reassure you of my commitment to ORR …
>
> Please be assured that I have not made any application to work part-time …if the clarification you gave me today about part-time requests is the policy ie when you said I could apply to go part-time at anytime and it would be

declined, then I will have to ask now whether I am required to offer my resignation before further training costs are incurred as I do not want to mislead anyone.

My care responsibilities also mean that I am likely to apply to work part-time (two or three days per week) as early as next year."

57. Mr Ikeji did not complain about the way that Mr Wilson had conducted that meeting, as he now does in these proceedings.

58. On 4 March 2022, Mr Wilson responded to Mr Ikeji's email by writing the following [763-4]:

"I too thought it was a useful catch up and I am grateful for the training progress you are making and your statement of commitment to the job. No toes were trodden on by your forwarding level crossing order progress notes to Adam – your enthusiasm is good to see.

On the part time issue, I accept that the conversation with others seems to have been misinterpreted and that concerns reaching me have not been matched by any actual request by you to me. 'News' sometimes travels this way in organisations.

Reading on, however, I am a little taken aback by the announcement that you are likely to ask to go part time as early as next year. As to part-time policy, staff can ask for alternative working patterns and ORR will consider such requests. My response yesterday was intended as my expectation of the answer you would be likely to receive if you made an early request to go part-time. The reasons for this, as I see it, are:

- The post was recently advertised and filled on a full-time basis. There is plenty of work to do – it is a full-time job.
- Southern Team and the wider RSD need to field inspector resources as fully as budgets allow. Your going to part-time would be an unattractive proposition as it would invitably reduce the team's output. Such a request would not sit well with ORR's business need.
- Part-time staff are likely to experience the same volume of email, training and administration as their full-time colleagues. This can mean that the proportion of time spent on active inspection work is likely to be lower for part-time staff. Again this is not an attractive business proposition for the team.

If you cannot commit to full-time working, with regret, I think it is sensible for you and ORR to 'consider positions' sooner rather than later. We need to make a decision on this.

On other matters, we spoke about timekeeping. I have accounts from others of you being a little bit late for training events on four occasions. I have also made a couple of personal observations of you being a bit late or cutting it

> too fine. We spoke. Always aim to arrive in good time and use the most suitable form of transport. The train will often be the safest and most reliable means of travel.
>
> Do continue to take care in your interactions with colleagues, some of whom are a little emotionally fragile at the moment (Be assured I took on board what you said and I am not saying that anyone did 'anything wrong'). The training in Reading on Tuesday wasn't what you'd hoped for but, nevertheless, in such situations be sure to arrive on time, stay the course and, where necessary, 'go with the flow' a little bit, even if things are entirely to your taste.
>
> Be assured that I have confidence in your abilities, as does Kate Dixon, who said she thought you'll make a very good inspector."

59. The Tribunal considers that this was a pastorally sensitive and appropriate email for a line manager to send to a subordinate following the topics discussed at the meeting on 3 March 2022.

60. Mr Wilson's oral evidence was that he thought that he and Mr Ikeji had a respectful and courteous relationship up until early March 2022 when things seemed to be turned on their head. This was his reflection on the email exchanges that took place over the following days.

61. On the same day, 3 March 2022, Mr Ikeji had sent an email an administrator asking them to update a team tracker recording Level Crossing Orders at sites in Sussex. Mr Wilson formed the view that some of the suggested updates were incorrect. He told the administrator that he would update the tracker. He wrote: "It's all a bit too much for the tracker and the comments might not be based on a full understanding" [759]. Mr Wilson spoke to Mr Ikeji telling him that the amendments were welcome but they were not entirely accurate.

62. In his email to Mr Wilson on 4 March 2022, Mr Ikeji said that he did not mean to tread on Mr Wilson's toes by preparing the Level Crossing tracker updates. On that topic, Mr Wilson responded "No toes were trodden on by you forwarding level crossing order progress notes to Adam – your enthusiasm is good to see". At no point had Mr Wilson said words to the effect that he should be "careful not to go around acting like you run things after two minutes". Those words are not recorded in the contemporaneous emails sent after the meeting which comment on discussions during the meeting; in the Details of Claim attached to the Claim Form issued on 4 April 2022 or in the notes of the grievance hearing on 12 April 2022. Such a remark from Mr Wilson during the meeting would be at odds with the way this Level Crossing tracker issue was addressed in the subsequent exchange of emails.

63. Mr Ikeji responded on 5 March 2022 on the part time work issue. He said "I think I understand the part time policy and expectations you have outlined, and I agree that a decision is best made sooner rather than later to mitigate any undesirable impact on the organisation. Please let me know the regretful options you are considering". He added that due to his private care demands and his health

susceptibility he was "unable to give a further guarantee abut my availability in 2023" [766]. He ended his email by saying that the number of work trips out of London over the last 4 weeks was challenging and he was a bit embarrassed by the travel issue you raised, in all honesty. The particular source of his embarrassment was not explored in evidence.

64. On 7 March 2022 Mr Wilson emailed Mr Ikeji addressing the part time work issue. He said that "the team needs a full timer and the Band A and I will oppose an application to go part-time". "The Band A" referred to his line manager Mr Wake. He said it didn't feel like Mr Ikeji had been wholly honest with him, given "what you really want ins a part-time job". He referred to the extent of the time and energy invested in developing trainees [767].

65. On 8 March 2022, Mr Ikeji emailed Mr Wilson with the subject line: Grievance. The wording of the grievance was as follows:

> "Morning Don
>
> I am saddened to hear you suggest that I have not been wholly honest with you. I categorically reject that assertion, with all due respect, because I have been completely open and honest with you (and ORR) from the first day we met on 18 October 2021.
>
> I note the express decision "to oppose an application to go part-time" at anytime and the new subject of your email "RE: Adrian Ikeji part-time request", despite the fact that I have not make any application for flexible working and the training framework is still being fleshed out at the present time by Kate Dixon. In fact, there are no dates confirmed for legal training in 2023 and the enrolment period within which all training must be completed by Trainee Inspectors is 5 years.
>
> It is unclear what you expect me to do now, but I am aggrieved by the decisions and policy being applied to me, because they are unreasonable, unfair and draconian. I fear that I am being treated this way because of the feedback I shared with you and Lee Collins about my experience, in good faith.
>
> I have done everything required of me to date and I have put in a considerable amount of discretionary effort in my work, under challenging circumstances within the team.
>
> This email should be treated as a formal grievance, and I have copied in Ms Victoria Rosolia in line with the requirements of my contract of employment.
>
> I will continue working as normal until I am instructed not to do so or to follow other lawful guidance" [769]

66. The reference to feedback was a reference to Mr Ikeji's complaints raised about the way that Peter Darling had spoken during the training course on 14 and 15 February 2022.

67. On 15 March 2022, Jo Napper in HR wrote to Mr Ikeji to confirm the next steps in relation to the grievance. He said that Gareth Clancy, Head of Access and Licencing would be the independent investigator. Whilst he aimed to complete his investigation within 10 working days, this timescale might be extended if more time was required. Once the report had been submitted, there would then be a grievance meeting chaired by Mr Richard Coates, Deputy Director RPP.

68. On 15 March 2022, Mr Ikeji sent an email to Mr Clancy clarifying the central issues in his grievance. He said that to deny him the opportunity to work on a part time basis because of his parental and care responsibilities as a single parent could be direct discrimination. It also alleged that there had been disregard for equality legislation by Mr Wilson and that he had witnessed discriminatory language at a training course in Leicester. This email ended by saying he was not comfortable working in Mr Wilson's team. It did not ask for redeployment to a different role, either within ORR or within the Civil Service as a whole, as he subsequently suggested should be the outcome [1093].

69. Mr Clancy met with Mr Ikeji on 16 March 2022 and sent him a detailed email recording his notes of their meeting on the same day. Mr Ikeji replied saying that Mr Clancy had omitted his references to victimisation, breach of contract and Mr Wilson's unwanted and unacceptable behaviour towards him in breach of the civil service code. Mr Clancy then spoke to relevant witnesses including Mr Galloway and Mr Wilson.

70. On 21 March 2022, Mr Ikeji emailed Mr Wilson to raise particular concerns about his health. He said that he had been unable to sleep for the past couple of days and was experiencing high blood pressure, headaches and anxiety "as a result of the uncertainty, threat, gaslighting and ongoing dispute at work". He added that the gaslighting and stonewalling in an email from Mr Galloway "may have worsened my anxiety, and the situation is damaging my health". He said that "as a health precaution and to prevent further deterioration, I feel unable to work within your team until these matters are resolved one way or the other, and I have copied Mr Napper for guidance" [826].

71. Mr Wilson forwarded this to his line manager, Mr Wake saying "Tom, I think this is getting out of hand. I need your help on this please". Mr Wake told Mr Wilson to remind Mr Ikeji that a doctors' fit note was required for absences of 8 days or more [829]. He copied in Jo Napper in HR asking them to support Mr Wilson and noting that he himself may need to take the lead on this. Mr Wilson emailed Mr Ikeji asking him to obtain a doctors' fit note if absent for more than 8 days.

72. On 22 March 2022, Jo Napper emailed Donald Wilson and Tom Wake, copying the email to Matt Farrell. He wrote "May I suggest we keep declarable email comms to the minimum? Happy to chat as needed on this" [833].

73. Mr Napper wrote to Mr Ikeji the same day. He said that normal line management arrangements should continue until the grievance had been concluded. He

proposed that the references to threat and gaslighting should be included in the current grievance [835]. On 25 March 2022, Mr Ikeji sent across his statement of fitness to work [839]. This signed him off with hypertension and lasted for two weeks, from 25 March 2022 until 10 April 2022.

74. On 29 March 2022, Mr Wake emailed Mr Wilson asking when Mr Ikeji's probationary period was up [845]. Mr Wilson responded it was "6 months after his 5th January joining date, I guess. Probationary status doesn't actually mean much, Jo [Napper] advises". There is a dispute as to what was intended by Jo Napper's comment. Whilst the Tribunal has not heard evidence from Mr Napper, Mr Wilson took this as a signal that ordinary due process should be followed even for those in their probationary period.

75. On 30 March 2022, Mr Ikeji chased for an update regarding his formal grievance [849]. Three minutes later Mr Napper responded to say that Mr Clancy's report was about to be finalised and a grievance hearing would follow in the next few days [851]. Further emails scheduled the grievance meeting for 12 April 2022. Mr Ikeji's response was "That's fine. Thank you". Mr Ikeji was sent the investigation report on 31 March 2022. For some reason it was not received. He had received it by 7 April 2022.

76. On 4 April 2022, Mr Ikeji issued his first employment tribunal claim against ORR and Donald Wilson alleging breach of contract, victimisation, direct race discrimination and racial harassment. He did not allege he had suffered disability discrimination. To the question: "Do you have a disability?" He answered "No".

77. On 8 April 2022, Mr Ikeji sent a further fit note to Mr Wilson. This was expressed to last from 25 March 2022 to 1 May 2022. Again, the reason given was hypertension [875]. The covering email said that "I continue to experience palpitations and hypertension and await a 24 hour ECG referral. Daily BP monitoring continues". The covering letter made no reference to anxiety as a distinct mental health condition.

78. Mr Wilson had no further direct involvement with Mr Ikeji after that point.

79. On the morning of the grievance meeting, 12 April 2022, Mr Ikeji emailed Richard Coates to complain about Mr Clancy's investigation report. He said that his complaint had not been fully investigated [876]. The email ended:

> "For all the reasons above and the breakdown of trust, and the negative impact all this is having on my health, I cannot work with Donald Wilson or in his Network Rail Team. I would like to be redeployed internally or externally as soon as possible, to protect me from the unlawful treatment and practices, and the detriments I am experiencing. I would also seriously consider a suitable alternative part-time role or job share opportunity in London" [878]

80. At around this time, Mr Matthew Farrell became Mr Ikeji's point of contact. Mr Ikeji emailed him the same sick note sent to Mr Wilson on 8 April 2022. He said "unfortunately my health has still not improved" [892].

81. On 14 April 2022, Mr Ikeji asked Mr Farrell that he be referred to Occupational Health so "I may be supported back to safe work within or outside ORR, as soon as possible". He went on "The humiliation and trauma I have experienced working with Donald Wilson makes it highly improbable that I will return to work in his team, and if my skills and experience cannot be redeployed elsewhere, I would benefit from the clarity and find a way to live better with the decision" [900]. At that point, he had been absent from work on sick leave for just over three weeks.

82. Mr Farrell responded saying he had already asked Jo Napper to set in motion an Occupational Health referral. He said that "on the matter of the outcome of the hearing, I note what you say, but I would prefer to wait on the outcome of that, if I could just say that I know there has been a hearing, but I don't know any details and actually would prefer not to at this stage" [902].

83. On 27 April 2022, Mr Farrell emailed Mr Ikeji to say he had offered to support him going forwards, by Mr Ikeji directly reporting to him. He described this as "a bit of a unique situation" but said that "at least we get the chance to work together closely". He added "My approach is very much one of supporting people and I am not going to micro-manage – so that that end can I leave it to you please to set something up in our diaries to have a half day together somewhere (maybe not in the London office) to set out what your workplan will be for the foreseeable future … we will need to do a return to work meeting anyway" [963].

84. Mr Ikeji responded positively to this first email from Mr Farrell. He said he was available to attend a "return to work interview with you, at your earliest convenience, to complete the risk assessment, so that I can assist you with some suitable work you propose … please let me know when and where the RTW interview will take place".

85. Despite this enthusiasm for a return to work meeting, he referred in the same email to his symptoms persisting and his occupational health appointment being scheduled for 4 May 2022. The email opened by saying "Thank you for the email. In light of this, I understand that I do not have to send another Fit Note from my GP, unless when I am required to by ORR". Mr Farrell had not said anything about Fit Notes in his email to which Mr Ikeji was responding. He also said he was available to attend a return to wok interview and would complete a stress risk assessment.

86. In his reply, Mr Farrell clarified the position relating to Fit Notes. He said that all the time that he was off due to ill health he would need to have a current fit note. He said that as the current one runs out next week, "if you don't think you are fit, please can you secure that continuation". He queried whether Mr Ikeji was saying that he was currently fit to return now. If so, he would diarise a meeting. He said this about work:

> "In term of work … my priority really for you, and to see you ease back in, is look at stuff to support you in getting as much of your technical ppcf completed. I believe you have some joint visits booked with Cheryl .. keep going with these too" [966]

87. Mr Ikeji answered that email with the following wording "I humbly suggest that your proposal is unreasonable and may worsen the current problems". He did not explain why this proposal was unreasonable. The Tribunal infers from the totality of the email correspondence that he regarded this as unreasonable because it envisaged him returning to his substantive role. He was seeking an alternative role. That is why the next sentence reads "As you have no alternative work available for me at the moment, I have to wait for the outcome of the grievance process" [967].

88. Mr Farrell reiterated that if Mr Ikeji deemed that he was not fit to undertake the activities that he proposed beyond the date of the current fit note "please can you secure a further fit note from your GP so that we can continue paying you sick pay – particularly as we don't know exactly when the grievance outcome will be available … the occupational health assessment and then the risk assessment will be helpful to inform me what is reasonable in terms of work activities" [969].

89. Mr Ikeji reacted against this reminder to provide a further fit note, saying in an email sent at 21:37 on 28 April 2022: "The proposal you make is unreasonable in light of my grievance, and it would be inappropriate for me to restate my position here. For the avoidance of doubt, I am aware that my employer has the power to make deductions from my pay and can penalise me in other ways. However you should not be threatening me in this way". He went on to say that Mr Farrell had not offered him any alternative work "and it is clear that you may be assisted by the guidance you receive from Occupational Health and Mr Coates" [971].

90. Mr Farrell formed the impression that Mr Ikeji was saying he was fit to return to work, either now or after the occupational health assessment [972].

91. The significance of Mr Farrell's repeated references to the need for a further Fit Note if Mr Ikeji was still unfit for work was that the current sick note was about to expire. Mr Ikeji would be expected to return to work on Monday 2 May unless a further Fit Note had been provided covering the period from that date onwards. In practice that would have required a Fit Note to be obtained from his GP on Thursday 28 or Friday 29 April 2022.

92. Mr Ikeji contends that he did obtain a Fit Note on 28 April 2022 and provided it on that day or the following day to cover the period until 12 May 2022. However, there is no covering email in the bundle of documents apparently attaching such a Fit Note. The obvious email to have included such an attachment would have been Mr Ikeji's email on 28 April 2022 at 21:37, responding to Mr Farrell's latest request that he supply a further Fit Note. If, as Mr Ikeji claims, he had indeed obtained a sick note earlier that day and decided to submit it, the Tribunal would have expected him to provide that Fit Note by return. When he subsequently challenged the decision to refuse to pay him from 12 May 2022 onwards in a later grievance, he did not suggest that he had a valid sick note for this period. The Tribunal finds that Mr Ikeji did not provide any sick note on 28 April or subsequently. This is why no covering email attaching a sick note was obtained during the course of disclosure. However, the Tribunal finds that Mr Ikeji did obtain a sick note on that date, signing him off until 12 May 2022. His symptoms had improved sufficiently by that point so that whilst he had persuaded his GP to sign him off work for another fortnight, he felt able to return to work – at least to the extent that he considered was appropriate.

93. The Tribunal finds that Mr Ikeji returned to work on 29 April 2022 on an agreed phased return plan with Mr Farrell as his new line manager. This was the evidence of Ms Rosolia, which we accept. It is also consistent with what Mr Ikeji told occupational health during his assessment on 4 May 2022 [978].

94. Although his sickness absence had by that point stopped, it is clear to the Tribunal that by this stage Mr Ikeji had decided that he would not return to his existing role where he would be working for Network Rail Southern Region on a full-time basis. He was not satisfied to be allocated an alternative line manager. He was hoping that he might be offered an alternative role either in the light of occupational health advice or by way of resolution to his grievance. He reiterated this in an email on 28 April 2022 when he said that "I am available to return to safe work away from the stressful environment … please understand that the nature of the work is crucial here, not only because of the impact on my health but also because of the breaches to my contract, which have not been remedied yet" [973].

95. Given the stance that Mr Ikeji was adopting in the email exchanges, Mr Farrell's suggestion on 28 April 2022 was that Mr Ikeji should be put on special leave from the date he confirms he is fit for work until his grievance is concluded [974]. This was a favourable suggestion in that, if granted, it would have enabled Mr Ikeji to continue receiving pay even though he was not working. This was not thought to be appropriate by HR, given that special leave was granted for bereavement or other special circumstances, rather than waiting for the outcome to a grievance.

96. On 4 May 2022, Mr Farrell had a telephone discussion with Mr Ikeji. Unbeknown to Mr Farrell, Mr Ikeji covertly recorded this conversation and subsequently produced a transcript of the telephone call.

97. During the meeting, Mr Farrell suggested that Mr Ikeji do a stress risk assessment. He replied that this should await the outcome of the grievance, which was the reason for the stress. Mr Farrell agreed with this approach. Mr Ikeji referred to the time that the grievance process had taken. Even though there was no grievance outcome at that point, Mr Ikeji said that there would be an appeal. He referred to breaches of his contract and said that the only reason he had not resigned is that Mr Coates was looking into things and he should hold fire until he got the outcome. Mr Ikeji was keen to discuss redeployment [986]. He said that when he was recruited he had the option of working on the TfL team and it was that which attracted him to apply. As he was assigned to a completely different team, "all my experience and knowledge and training counts for absolutely nothing". He said he could not continue on the trainee inspector programme if it was not fit for purpose.

98. Mr Ikeji said that he was uncomfortable about being paid and not really working. This confirms that his pay had restarted from 29 April 2022 even though he had not in practice started any work. He said he would be happy to go to down to working 2 or 3 days per week. Mr Farrell said that for the time being his return to work had to be on a phased return basis building up to full-time work. He said that life had to go back to normal regardless of temporary arrangements with whatever adjustments are necessary as part of the stress assessment. Mr Farrell said that he expected staff to engage with legal refresher training that was scheduled to take place on 10

and 11 May 2022. Mr Ikeji's response was "That's fine … It's something I definitely want to do. I'll certainly come in for that".

99. Mr Ikeji said that he had a medical certificate taking him to mid-May but he was available to do some productive work [992]. Based on this reference, the Tribunal accepts that Mr Ikeji had indeed obtained a third sick note by that point but, for whatever reason, he had not submitted it to ORR. Towards the end of the meeting, Mr Ikeji expressed his appreciation for what had been discussed in the meeting. He said "Thanks Matt, I appreciate your time".

100. Later that day, Mr Ikeji had a telephone consultation with Helena Margerison, the Occupational Health Nurse asked to review his sickness absence. She produced a report on the same day [978] and this was emailed to Mr Ikeji on 5 May 2022.

101. The occupational health report noted that although he was awaiting a cardiology assessment, "he is keen to be in work as this supports routine, structure and purpose". Ms Margerison recorded that "symptoms appear manageable and not impacting his function". She said that the issues in this case are not primarily medical. She recommended an "open discussion between Adrian and management to discuss the issues within the workplace". She regarded him as fit for his substantive role, with adjustments. The recommended adjustments were a phased return to work over a period of two weeks; short catch up with management; a mixture of remote and in office working; a timely resolution to his grievance; and avoiding visits to the railway on live tracks. She suggested that the HSE Stress Risk Assessment tool should be used. She said that further occupational health intervention was unlikely to be helpful.

102. The outcome of this Occupational Health report was that Mr Ikeji was fit for work, although there should be some supportive interventions to enable him to carry out his role. Whilst she acknowledged he had described ongoing symptoms of anxiety, disrupted sleep and worry, no other treatment was in place or was suggested. In particular there is no reference in the report of Mr Ikeji undergoing any cognitive behaviour therapy, whether from professionals or taking any particular steps on a self-help basis.

103. Mr Napper's HR advice to Mr Farrell, which he copied to Mr Ikeji and Victoria Rosolia was that the management advice from occupational health should be reviewed at a meeting with him to discuss which of the above were occupationally feasible, and what support could be given [1044].

104. On 6 May 2022, Richard Coates sent Mr Ikeji his decision with respect to the grievance. He also sent the minutes of the grievance meeting [1051]. He clarified that he was considering Donald Wilson's behaviour, victimisation, discrimination, breach of contract and a failure to fully investigate his grievance. Mr Coates's report partially upheld Mr Ikeji's grievance – in relation to the failure to carry out a training needs assessment within two months of the start date; the change in the title of the qualification; and certain aspects of Donald Wilson's behaviours. However, he did not consider that there had been any discrimination or victimisation from Keith Atkinson, Peter Darling or Donald Wilson. He did not consider that there was any evidence he was assigned to the Network Rail Southern Region team based on his ethnicity.

105. Mr Coates made eleven recommendations for further actions to be taken forward to address some of the concerns in the grievance, and six wider improvements to ORR processes. Of most relevance to the issues in dispute in this case, he recommended that Donald Wilson should recognise the poorly chosen language in his email of 7 March 2022 and the ill considered change of subject heading, and express his regret to Mr Ikeji, as well as refreshing his knowledge of ORR values. He suggested that ORR should facilitate a meeting between Mr Ikeji and Donald Wilson, Tom Wake, Kate Dixon and Errol Galloway to repair and improve working relationships. He recommended that the HR team confirm that he was entitled to make a request for flexible working after 26 weeks continuous employment either under ORR's Working Hours Policy or an equivalent statutory request. He also recommended that the change in the title of the diploma that HM Trainee Inspectors would receive should be agreed with trainees in writing as soon as possible, and that his training needs analysis should be completed and discussed as soon as possible.

106. This was a detailed document – the grievance outcome was seven pages long and the grievance annex ran to thirty-seven pages. It made a number of findings in Mr Ikeji's favour. In his detailed recommendations, he made no reference to redeployment. The focus was on restoring Mr Ikeji to his trainee Inspector role.

107. Mr Ikeji was not satisfied with this grievance outcome. He chose to appeal, lodging his appeal on 9 May 2022. After he recorded various concerns about the process that had been followed, he criticised the outcome for not making it clear how the breaches would be remedied in a fair and timely way. He added it was unclear what the redeployment or business move process was, within ORR or the Civil Service. This the first time he had suggested that this should be an outcome to his grievance.

108. He also withdrew from the legal refresher training due to take place on 10 and 11 May 2022. As he was now receiving his normal pay and was not on sick leave, he had been booked onto this course to further his training.

109. On 10 May 2022, there was a meeting between Mr Farrell and Mr Ikeji [1119]. The Tribunal accepts that the file note at [1119] is an accurate record of what was said at this meeting. The file note was typed by Mr Farrell shortly after the meeting had concluded, although it was updated the following day to confirm Mr Farrell's follow up action.

110. In the meeting, Mr Ikeji said that he was not prepared to go on any training courses. He said that he believed that if he attended the legal refresher training course then he had accepted the breaches of contract noted in the grievance outcome report. This indicates that he was contemplating resigning and claiming constructive dismissal but was concerned that by attending the refresher training it might be argued he had affirmed the continued existence of the employment contract. He said that he was prepared to go on unpaid leave until the outcome of the appeal. He mentioned bringing a claim at an employment tribunal. He said that there was no point in talking about different roles. He was not prepared to do the workplace stress assessment or the training needs analysis. He did not indicate that he was

signed off sick or was about to obtain another Fit Note for a further period of absence.

111. The same day, Mr Ikeji emailed his recollection of what was said in the meeting. He recorded that he came to the meeting that day under the impression that they might talk about suitable alternative roles or work outside the stressful work area. He added that he was still waiting to consider redeployment to a suitable alternative role outside the Railway Safety Directorate. So far as unpaid leave was concerned, his email broadly confirms what was recorded by Mr Farrell, namely that he would consider taking unpaid leave until the situation was resolved [1123]. The email repeated referred to breaches of his employment contract. It made no express or implied allegation of discrimination.

112. Mr Ikeji was sent home from work on 10 May 2022, but was paid for that day. At 09:36 on 11 May 2022, Ms Rosolia emailed to remind him that he was employed as a trainee inspector and needed to undertake activities associated with this role rather than with another role. She wrote that should be feel unable to undertake the role he could request unpaid leave until the grievance appeal was resolved "alternatively if you feel this is impacting your health then you are able to self-certify as sick". She added that unfortunately ORR could not continue to pay him full pay if he did not engage with the requirements of the role. In his response, Mr Ikeji said that he could not comment further on the decision to deduct his pay [1144]. Ms Rosolia responded that he could self-certify as sick but if he did not want ORR to consider a period of unpaid leave or annual leave, ORR would need to record his current absence from work as unauthorised leave which would be unpaid [1147].

113. Mr Ikeji's grievance appeal was acknowledged on 11 May 2022 by Ms Rosolia. She said that the grievance appeal meeting would take place on 17 May 2022 and would be chaired by Vinita Hill [1157]. She sent a series of questions which she asked Mr Ikeji to answer in advance of the grievance appeal hearing.

114. In his response, also on 11 May 2022, Mr Ikeji said that "your decision to stop my pay is arising out of my long-term medical condition and may also be discriminatory" [1160]. This was the first time he had alleged he was the victim of disability discrimination.

115. On 12 May 2022, Mr Ikeji lodged a formal complaint about the way he had been treated with the Civil Service Commission. The complaint was about the initial role allocation decision and about what he labelled a "deliberate untruth" told by his current line manager Mr Farrell in "an attempt to coerce me to accept unpaid leave". He said that he did not feel safe working within the Railway Safety Directorate at ORR because of the shocking conduct of Mr Wilson and Mr Farrell. He ended the complaint by saying that he "wished to be redeployed on a business move to a suitable alternative role within a different department in the civil service as soon as possible, before I am forced to resign" [1164]. That complaint was subsequently dismissed.

116. On 12 May 2022, Steve Williams, HR officer, wrote to Mr Ikeji advising him that he had moved to half pay on 20 April 2022, given that his sick pay entitlement was one month at full pay and one month at half pay [1175]. In response, Mr Ikeji wrote that his calculations were incorrect. He said the HR Business Partner should be able to

confirm "was available to return to safe work from 14 April 2022" [1177]. This was an attempt to persuade HR that he should have been entitled to full pay throughout the period since 20 April 2022. It also confirms that he did not send a third sick note to ORR on 28 April 2022 for the following fortnight.

117. It further confirms that he had not posted a fourth Fit Note to ORR for a two-month period from 12 May 2022 onwards as he claimed in his oral evidence. The likelihood is that he did not go to his GP at that point to be signed off sick. His first two sick certificates were emailed to ORR. Had he obtained a fourth certificate covering this period he would have emailed it, rather than posted it. Even if he chose to post it, he would have kept a copy. That he has no copy and that ORR cannot find a copy indicates that such a certificate was never provided.

118. By contrast, his stance at that point was that he was fit for what he regarded as "safe work", although the implication was that he did not regard his trainee Inspector role as "safe work". No fourth Fit Note was included in the bundle. Instead, there was a composite Fit Note spanning the period from 21 March 2022 to 12 July 2022, which had been prepared several months later. The Tribunal does not accept this is evidence that he was actually signed off on sick leave for two months on or around 12 May 2022. The absence of a contemporaneous sick note is consistent with his symptoms having improved by May 2022 and with that improvement being sustained until the end of his employment.

119. The grievance appeal meeting held on 17 May 2022 took place on Teams. From the outset of the meeting, Mr Ikeji was covertly recording what was discussed. Early in the conversation he asked if Ms Rosolia had the facility to record to meeting on Teams. He was told that whilst there was the facility, these meetings were not recorded. At one point in the meeting, Ms Hill asked what work he had been offered that was unsafe. Mr Ikeji said that anything to do with my current employment contract under the training program is unsafe. He claimed that all of the recommendations from occupational health had been ignored. He also claimed that because he was the top scored in interview he was "pretty much guaranteed my preference" of role. Ms Hill asked him if anybody actually said that to him. He did not suggest this had been said. Rather he said that this is not uncommon with civil service appointments. Towards the end of the appeal meeting, Mr Ikeji confirmed he had already instructed solicitors to assist him with his dispute about not being paid.

120. The grievance appeal outcome was sent to Mr Ikeji on 23 May 2022, together with typed notes from the grievance appeal meeting. The outcome was to reject his appeal.

121. Mr Ikeji argues that there were significant differences between his transcript of the appeal meeting and the notes prepared by ORR. Inevitably there were differences given that the ORR notes were taken contemporaneously but were not a transcript. Having carefully considered each of the suggested significant differences, the Tribunal does not consider that any of the differences were significant. Ms Rosolia was doing her best to provide an accurate record of the meeting and was not in any way attempting to misrepresent what was discussed during the course of the meeting.

122. On 24 May 2022, Mr Ikeji emailed Elizabeth Thornhill and Ian Prosser with the subject "Whistleblowing complaint under PIDA 1998". Ms Thornhill was General Counsel and Ian Prosser was Director of Railway Safety. He wrote that his disclosure related to the "deliberate actions and statements made by two senior officials at [ORR] who have conspired to conceal breaches to the Equality Act 2010. They have also breached the employer's statutory duty to ensure the health, safety and welfare of employees like me, at work, and they have refused to rectify the untruthful and harmful account of formal internal proceedings, which they published yesterday". The two senior officials were Vinita Hill and Victoria Rosolia and the document published the previous day was the grievance appeal outcome.

123. Later he wrote in the same email "the senior officers presented untruths and had taken deliberate steps to conceal several unlawful acts of other employees, in a comprehensive example of abuse of power" [1331]. This email together with its attachments is alleged to be a protected disclosure, namely a disclosure which disclosed information he reasonably believed tended to show a relevant breach of a legal obligation and/or health and safety. The attachments were described as follows:

    A. Review of minutes from meeting on 17 May 2022 (the grievance appeal meeting)
    B. Email correspondence between Vinita Hill and Victoria Rosolia, and the complainant (From 17/05/2022 to 23/05/2022)
    C. Hearing outcome letter 23/05/2022
    D. CSC complaint and acknowledgement 12/05/2022
    E. 23 05 2022 Minutes – HR Fabricated version (this was the version sent with the grievance appeal outcome)

124. The whistleblowing complaint was discussed with Mr Ikeji at a meeting on 7 June 2022 conducted by Ian Prosser [1358]. It is not alleged in the agreed list of issues that the discussion at this meeting constitutes a further protected disclosure.

125. The outcome to the whistleblowing complaint was sent to Mr Ikeji on 10 June 2022. Mr Prosser concluded that there was a reasonable explanation for the differences between the typed notes and the transcripts from the two grievance appeal meetings. He rejected the other matters raised by Mr Ikeji.

126. On 17 June 2022, Mr Ikeji made a formal complaint regarding the whistleblowing policy to the Civil Service Commission. He said that his whistleblowing complaint had been mishandled by Mr Prosser in a deliberate cover up. He also criticised the accuracy of the notes of the grievance appeal hearing, referred to these notes as fraudulent. He said that Ian Prosser, Victoria Rosolia and Vinita Hill were all dishonest and in breach of the Civil Service Code and were deliberately concealing racial discrimination and victimisation at ORR [1383].

127. On 20 June 2022, Mr Ikeji lodged a formal grievance in relation to the deduction of his pay. This was sent to Mr Napper with a copy to Elizabeth Thornhill [1385]. He claimed that deductions had been made without his agreement, from as far back at 21 April 2022. This was when he went onto half sick pay.

128. The complaint made to the Civil Service Commission was acknowledged on 29 June 2022.

129. There followed an exchange of emails between Mr Ikeji and Mr Napper on the issue of the deductions from his pay. On 30 June 2022, Mr Ikeji wrote to Mr Napper saying that he would not waste any more of his time discussing this matter with him. He said that Mr Napper's "dishonesty is clear for all to see and you may be made accountable for the role you have played, by others. You are not above the law".

130. Mr Farrell arranged to have a meeting with Mr Ikeji on 1 July 2022 as Mr Ikeji's probation period was about to expire. Little notice was provided to Mr Ikeji of the date of this meeting. Mr Ikeji spoke to Mr Farrell on the telephone about this proposed meeting. He said that he would not be attending as he had the opportunity to take part in cab pass training at Waterloo. Mr Farrell said that this was voluntary and could be rearranged and a meeting to discuss the forthcoming probation review meeting was a higher priority. Mr Ikeji replied that he was not prepared to co-operate with the probation review process until he was paid for the time when he was not working. Mr Farrell asked him if he would complete the Training Needs Analysis document. Mr Ikeji said he was not prepared to complete it. The phone cut off at that point and there were no further verbal communications between the two of them.

131. Mr Farrell prepared a three-page long report to be considered at the probation review meeting. He did not speak to Mr Wilson. Mr Farrell's report contained three sections, headed Conduct, Timekeeping and Work Performance. Under Conduct he noted that Mr Ikeji had declined to undertake any work associated with the role he was recruited to perform. He said he had explained that he was only able to offer him work associated with his substantive role. He noted the grievance outcome. He also noted that at the meeting on 10 May 2022, Mr Ikeji had said that he was not prepared to agree to the recommendations made by Mr Coates. This was because he did not believe that Mr Wilson's apology would be sincere. He concluded that Mr Ikeji's conduct was unacceptable and not in line with the collaborative values we aim for in ORR. He recorded that as a result of the missed training events he would be set back by one year in achieving his regulatory diploma. Under Timekeeping, he noted his absence since 11 May 2022, his prior sick leave from 21 March 2022 to 28 April 2022 and had been late for various training sessions on particular dates. Under Work Performance he noted that the work he had delivered up until 11 May 2022 had been acceptable. This report made no reference to Mr Ikeji having expressed an interest in working on a part time basis; to an ongoing dispute about the failure to pay him from 11 May 2022 onwards; or to any whistleblowing complaint. Mr Ikeji has not shown that the contents of this three-page report were inaccurate as he alleges.

132. On 5 July 2012, Mr Napper invited Mr Ikeji to probation review meeting on 12 July 2022. It was conducted by Feras Alshaker, Director Railway Planning and Performance. Mr Ikeji did not attend. Mr Alshaker considered the probation review report prepared by Mr Farrell on 1 July 2022 and countersigned by Paul Appleton. Although the date of the countersignature is recorded as 04/04/22, this was clearly a typographical error. It is likely to have been countersigned on 4 July 2022, which is the date of Mr Appleton's covering email.

133. Mr Alshaker was not aware that Mr Ikeji had previously raised a complaint which he considered amounted whistleblowing complaint. Nor was he aware that Mr Ikeji had complained about allegedly discriminatory comments made by any trainers whilst attending training courses. He did know that Mr Ikeji had previously lodged a grievance about working for Mr Don Wilson (as this was referenced in the most general terms in the probation report) but did not otherwise know the details of the grievance. He did not know that Mr Ikeji had lodged a grievance about his lack of pay from 11 May 2022 onwards. This is because whilst Mr Napper in HR had told him that there were other background matters which were ongoing, he had not provided him with the details. As a result, he did not know that Mr Ikeji was asserting a right to be paid from 11 May 2022 onwards.

134. Mr Alshaker wrote to Mr Ikeji on 13 July 2022 stating he had decided to endorse the review findings. He said Mr Ikeji would receive five weeks pay in lieu of notice. It stated that his employment ended on 12 July 2022. The letter asked that all property that belonged to ORR currently in his possession was returned to Steve Williams in HR. The letter stated that this would include warrant card, security pass, keys, laptop and mobile phone. It stated that HR would arrange a courier to collect these. If he chose to appeal against the dismissal then this should be addressed to Ms Rosolia within ten working days [1442].

135. On 13 July 2022 [1444] Mr Ikeji emailed to appeal against his dismissal. His email ended “Treat this matter seriously and respond promptly, before I am forced to take the necessary legal action to protect my statutory and contractual rights” [1445]. The appeal was conducted by Kate Staples, a Consultant. She prepared a ten-page letter dated 23 August 2022 in which she dismissed his appeal.

136. On 15 July 2022, Mr Ikeji issued his second Employment Tribunal claim. This time he named the Respondents as ORR, Ian Prosser, Matthew Farrell and Victoria Rosolia. This was a claim for disability discrimination, holiday pay and arrears of pay. Again, he ticked the box stating that he did not have a disability [86].

137. Several emails were sent to Mr Ikeji chasing for the return of ORR property- the letter from Mr Alshaker on 13 July 2022; a further letter on 14 July 2022; and an email attaching a letter on headed notepaper on 20 July 2022 [1458]. The letter warned him that “if you fail to comply with this request, we will need to refer this matter to the police”. Mr Ikeji’s stance was that “the employment relationship continues until the lawful determination of the ongoing internal and external disputes” [1460]. A fourth request was made on 21 July 2022 giving him 48 hours to respond. It ended “in the event of continued unreasonable behaviour, any further actions will be taken without further notice to you” [1462].

138. On 29 July 2022, acting on behalf of ORR, Ms Rosolia contacted the police to report that property had been stolen. The report was worded as follows:

> “Adrian Ikeji is a former employee of Office of Rail and Road. His probation period was terminated and he was asked to return his equipment that was issued at the start of his employment. This includes a laptop, mobile phone, PPE equipment and an HM Inspector of Railways Warrant Card. There is a risk that Adrian may use this warrant card and impersonate a HM Inspector,

> this is because he is disputing his dismissal. We have written to Adrian on 13, 14, 20 and 21 July requesting the return of equipment which he refuses to do and therefore we view this matter as theft"

139. Mr Ikeji was contacted by the police on 31 July 2022. He was told to return the company property the following morning to ORR's Cabot Square offices [1483]. He apparently did so following the Police involvement and no further action was taken either by the Police or by ORR.

140. Back on 20 June 2022, Mr Ikeji had lodged a grievance about not receiving pay from 11 May 2022 onwards. This was investigated by Tess Sanford who reported on 14 July 2022. There was a grievance hearing chaired by Martin Jones on 19 July 2022 and a grievance outcome letter dismissing his grievance on 29 July 2022. He then appealed against this outcome on the same day. There was a grievance appeal hearing on 19 August 2022 conducted by Russell Grossman. Mr Grossman's grievance appeal outcome dismissed the appeal in a three-page long letter sent to him on 25 August 2022.

141. On 13 July 2022, Mr Ikeji appealed against his dismissal decision [1444]. There was an appeal meeting on 9 August 2022 conducted by Kate Staples. Ms Staples published her appeal outcome on 23 August 2022 dismissing Mr Ikeji's appeal.

142. In terms of his notice pay, he was paid £4610.21 gross by way of Payment In Lieu of Notice in August 2022, which after deductions amounted to the net sum of £2964.68 [1665]. This appears (according to another payslip also dated August 2022) to have been paid as an advance. Mr Ikeji contends that this has undercompensated him for the full extent of his contractual entitlement to financial payments during his five week notice period.

143. On 26 January 2023, ORR was asked to provide Westminster City Council with a reference as Mr Ikeji had applied to that local authority for a particular role. The reference supplied was dated 3 February 2023 and was a bare reference [1583]. It identified his name, the dates of his employment, the position he held and his employment status. The dates of employment were given as 5 January 2022 to 12 July 2023. His employment status was described as "Full Time, Permanent". It did not explain why he had been dismissed. The reference went on to set out ORR's standard practice, namely "Please note that we do not provide an opinion as to the character of an employee. This reference is given in good faith and without any legal responsibility".

144. On 23 February 2023, Westminster City Council wrote to Mr Ikeji withdrawing their job offer. The reason given is that there were disparities between the reference and the job application. This disparity related to the date on which his employment at ORR ended. In his application on 29 November 2022 made to Westminster City Council he had given his current employer as ORR from "January 2022 to present". In subsequent Employment Tribunal proceedings against City of Westminster in relation to the withdrawal of the job offer, a panel chaired by Employment Judge Elliott found that the job offer was withdrawn as a result of discrepancies on the application form. This included as to the date on which his employment with ORR ended. The ET held that Mr Ikeji knew or ought reasonably to have known that in maintaining to Westminster City Council that he remained in ORR's employment

that was untruthful. They noted that in the current proceedings Mr Ikeji had maintained that he had been dismissed with effect from 12 July 2022.

Issues to be decided

145. The issues to be decided by the Tribunal are set out in the List of Issues which is an Appendix to these Reasons.

Legal principles

Burden of proof for Equality Act 2010 claims

146. Section 136(2) and (3) of the Equality Act 2010 ("EqA 2010") is worded as follows:

> (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.

147. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 25-32). In *Efobi v Royal Mail Group Limited* [2021] ICR at paragraph 26, Lord Leggatt made it clear that Section 136 EqA 2010 had not made any substantive change to the previous law.

148. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of any other explanation, that the treatment was at least in part the result of his protected characteristic. At the first stage, when considering what inferences can be drawn from the primary facts, the Tribunal must ignore any explanation for those facts given by the Respondent and assume that there is no explanation for them. It can however take into account evidence adduced by the Respondent insofar as it is relevant in deciding whether the burden of proof has moved to the Respondent.

149. The initial burden of proof is on the Claimant. In order for the burden of proof to shift from each Claimant to the Respondent on a particular allegation, it is well established that it is insufficient for the Claimant merely to show a difference in status and detriment treatment (see *Madarassay* at paragraph 54). In *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865, Elias J at paragraph 15 said that the mere fact that an unsuccessful candidate was a black woman and successful candidates were white men would be insufficient to be capable of leading to an inference of discrimination in the absence of a satisfactory non-discriminatory explanation. To shift the burden of proof a claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between the protected characteristic of race and the detrimental treatment, in the absence of a non-discriminatory explanation.

150. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the impugned decision. If the Tribunal accepts that the reason given for the treatment is genuine, then unless there is evidence to warrant a finding of unconscious discrimination, such that the Tribunal is really finding that the alleged discriminator has concealed the true reason even from himself, there will be no basis to infer unlawful discrimination at all.

151. In *Hewage v Grampian Health Board* [2012] ICR 1054, in a passage endorsed by Lord Leggatt in *Efobi* at paragraph 38*,* Lord Hope reminded that it was important not to make too much of the role of the burden of proof provisions:

> "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other" (paragraph 32).

152. The Tribunal has also born in mind the nuanced approach to the burden of proof explained by His Honour Judge James Tayler in *Field v Steve Pye & Co* [2022] IRLR 948 at paragraphs 33 to 46. At paragraph 46, he said that where a claimant contends that there is evidence that should result in a shift in the burden of proof they should state concisely what that evidence is in closing submissions, particularly where represented.

Direct discrimination

153. Section 13 of the Equality Act 2010 is worded as follows:

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

154. The Claimant seeks to compare himself against identified individuals who do not share his ethnicity, or to how a hypothetical comparator would have been treated. Such a comparator, whether actual or hypothetical must in all other respects be in a comparable position to the Claimants apart from their ethnicity.

155. As with other strands of discrimination, victimisation or detrimental treatment, the focus is on the mental processes of the person that took the impugned decisions. In a direct discrimination claim, the Tribunal should consider whether that person was influenced consciously or unconsciously to a significant (i.e. a non-trivial) extent by the Claimant's ethnicity. The decision makers' motives are irrelevant.

156. Paragraphs 3.4 and 3.5 of the Equality and Human Rights Commission's Code of Practice on Employment (the EHRC Code) states:

> "If the employer's treatment of the worker puts the worker at a clear disadvantage compared to other workers, then it is more likely that the treatment will be less favourable …

> The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated another person".

157. The less favourable treatment needs to be because of the relevant protected characteristic. It does not need to be the sole reason. As was said by Lord Nicholls in *Nagarajan v London Regional Transport* [1999] ICR 877, at 886E-F: "If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out". Significant means more than trivial.

158. Unreasonable treatment is not, on its own, a basis for making an inference of unlawful discrimination. An employer does not need to prove that he behaves equally unreasonable to everybody.

159. In *JP Morgan Ltd v Chweidan* [2012] ICR 268 the Court of Appeal considered whether it was necessary for the Tribunal to carry out a two-stage approach in each case. This is what Elias LJ said at paragraph 5:

> "In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment".

160. In *D'Silva v NATFHE* [2008] IRLR 412, the claimant had sought to argue that the Tribunal had failed to construct the hypothetical comparator correctly before considering how such a hypothetical comparator would have been treated. Underhill J commented (at paragraph 30):

> "It might reasonably have been hoped that the Frankensteinian figure of the badly-constructed hypothetical comparator would have been clumping his way rather less often into discrimination appeals since the observations of Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 (see in particular paragraph 11 at p.289) and the decision of this tribunal, chaired by Elias J, in *Law Society v Bahl* [2003] IRLR 640, at paragraphs 103–115 (pp.652–654)."

161. The passages quoted by Underhill J from *Shamoon* and *Bahl* emphasise that it is not necessary to construct a hypothetical comparator in order to test whether there is less favourable treatment. It is not possible to state whether the chosen comparator would have been differently treated independently of knowing why the alleged victim was treated in the way in which he or she was. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was.

Harassment

162. Section 26 of the Equality Act 2010 is worded as follows :

> (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 (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.

163. In relation to a claim for harassment under Section 26, it is open to a Tribunal to find that conduct was unwanted even if a claimant chooses to stay in employment and even if a claimant chooses not to object whether formally or informally (*Munchkins Restaurant Ltd v Karmazyn and others* EAT 0359/09). The EHRC Code states as follows:

> 7.7. Unwanted conduct covers a range of behaviour, including spoken or written words or imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.
>
> 7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not meant that express objection has to be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

164. When considering whether a comment was "related to" a protected characteristic under Section 26 Equality Act 2010, this covers a wider category of conduct than conduct "because of a protected characteristic" under Section 13 Equality Act 2010. A broader enquiry is required involving a more intense focus on the context of the offending words or behaviour (*Bakkali v Greater Manchester Buses (South) Limited t/a Stage Coach Manchester* [2018] UKEAT/0176/17).

165. In order to assess the "purpose" of the alleged conduct, the Tribunal must consider the alleged harasser's motive or intention. When considering the "effect" of the alleged conduct, the Tribunal needs to analyse the three specific factors set out in Section 26(4)(a) to (c). This has both a subjective and an objective aspect. As to the former, the claimant must have felt or perceived his dignity to have been violated or an adverse environment to have been created. As to the latter, if the claimant had experienced those feelings or perceptions, the Tribunal must consider if it was reasonable for him to do so. If a claimant is unreasonably prone to take

offence, there will have been no harassment within the meaning of the section (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 at paragraph 15).

166. In assessing whether the conduct met the required threshold by producing the proscribed consequences, Tribunals should not place too much weight on the timing of any objection (*Weeks v Newham College of Further Education* UKEAT/0630/11). Whether it was reasonable for a claimant to regard treatment as amounting to treatment that violates his dignity or has an intimidating, hostile, degrading, humiliating or offensive environment is a matter for factual assessment of the Tribunal having regard to all the relevant circumstances, including the context (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336). In that case the EAT said at paragraph 22:

> "Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct … it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase".

167. In speaking of the statutory language in Section 26(1), Elias LJ in *Land Registry v Grant* [2011] ICR 1390 said (at paragraph 47):

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment".

<u>Victimisation</u>

168. Section 27 of the Equality Act 2010 is worded as follows:

> (1) A person 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.

169. Protected acts include bringing proceedings under the Equality Act 2010 (section 27(2)(a)) and making an allegation (whether or not express) that A or another person has contravened the Equality Act 2010 (section 27(2)(d)).

170. In *Beneviste v Kingston University* [2007] (UKEAT/0393/05) the EAT (HHJ Richardson) discussed at paragraph 29 the minimum requirements for a communication to satisfy the requirements of Section 27(2)(d), by reference to helpful examples:

> "There is no need for the allegation to refer to the legislation, or to allege a contravention, but the gravamen of the allegation must be such that, if the allegation were proved, the alleged act would be a contravention of the legislation. If a woman says to her employer, "I am aggrieved with you for holding back my research and career development" her statement is not protected. If a woman says to her employer, "I am aggrieved with you for holding back my research and career development because I am a woman" or "because you are favouring the men in the department over the women", her statement would be protected even if there was no reference to the 1975 Act [Sex Discrimination Act 1975] or to a contravention of it."

171. Merely making reference to a criticism, grievance or complaint without suggesting that the criticism, grievance or complaint was in some sense an allegation of discrimination is insufficient.

172. A complaint that a person is being "discriminated against" may or may not fall within the scope of Section 27 depending on an analysis of complaint in its context. It depends whether the word "discriminated" is a reference to unfair treatment generally, rather than specifically because of race (*Durrani v London Borough of Ealing* [2013] UKEAT/0454/12). It is relevant to consider whether a claimant was articulate and well-educated and knew the appropriate language to use to allege race discrimination.

173. A detriment will only exist if a reasonable worker would also take the view that the treatment was to his detriment: *Ministry of Defence v Jeremiah* [1980] ICR 13 at paragraph 31. An unjustified sense of grievance does not amount to a detriment.

174. In order to succeed with a claim of victimisation, there must be a sufficient causal connection between a protected act and the alleged detriment. It is enough if the protected act had a significant influence on the outcome.

175. If the alleged detriment is a failure to investigate a complaint of discrimination or harassment, there must be a causative link between the fact of the employee making the EqA complaint and the failure to investigate it. It is insufficient for the protected act to be a "but for" cause. Langstaff J commented as follows at paragraphs 21-23 in *A v Chief Constable of West Midlands Police* (UKEAT/0313/14/JOJ (21.4.15):

> "But omissions to act must be carefully scrutinised in this regard. The purpose of the victimisation provision is protective. It is not intended to confer a privilege upon the person within the hypothetical bubble I have postulated, for instance by enabling them to require a particular outcome of

> a grievance or, where there has been a complaint, a particular speed with which that particular complaint will be resolved. It cannot in itself create a duty to act nor an expectation of action where that does not otherwise exist.
>
> It follows that in some cases – and I emphasise that the context will be highly significant – a failure to investigate a complaint will not of itself amount to victimisation. Indeed there is a central problem with any careful analysis and application of section 27 to facts broadly such as the present. That is that, where the protected act is a complaint, to suggest that the detriment is not to apply a complaints procedure properly because a complaint has been made, it might be thought, asks a lot and is highly unlikely. The complaints procedure itself is plainly embarked on because there has been a complaint: to then argue that where it has not been embarked on with sufficient care, enthusiasm or speed those defects are also because of the complaint itself would require the more careful of evidential bases…
>
> It might be different in some circumstances. An example might be if the particular nature of the complaint meant that it would not be discussed or dealt with in a way in which other complaints of a different nature would. For instance, if a particular employer found the prospect of dealing with a complaint of sexual harassment embarrassing to the extent that it took no action on such a complaint when otherwise it would have a duty to do so, or there was a well-established expectation that the complaint would be dealt with, it is in my view possible that a Tribunal might conclude that the omission to act, if it caused the victim of the alleged harassment a detriment in terms of the particular effects of her disappointed expectations, could conceivably come within the scope of victimisation."

176. *Iwuchukwu v City Hospitals Sunderland NHS Foundation Trust* [2019] IRLR 1022 is an example of a case where a Tribunal found that the failure to investigate the claimant's grievances was materially influenced by the content of the grievances (which had alleged race discrimination) and was therefore an act of victimisation. This conclusion was upheld by the Court of Appeal.

177. It is open to an employer to allege that the reason for the treatment was not the protected act but some feature of it which could "properly be treated as separable" (*Martin v Devonshires Solicitors* [2011] ICR 352 (Underhill P)).

178. In order for the burden of proof to shift from a claimant to the respondent, the claimant must establish more than that the claimant has suffered a detriment and has done a protected act. There must be some factual basis for potentially inferring that the protected act has influenced the detrimental treatment.

Disability

179. The statutory definition of disability in Section 6 of the Equality Act 2010 is as follows:

> "A physical or mental impairment which has a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities."

180. The Tribunal must assess whether this definition is satisfied as at the date of the alleged discrimination, by reference to the evidence as to that point in time. The Tribunal is to deduce the extent of the impairment caused by the underlying condition, where possible, if the Claimant was not taking medication.

181. An impairment is long-term if it has lasted or is likely to last for at least 12 months. The phrase 'likely to last' means 'could well' last. An impairment is substantial if it is more than trivial. The focus is on what the Claimant cannot do, rather than on what he can do.

182. The Tribunal must have regard to the Secretary of State's Guidance on matters to be taken into account in determining questions relating to the definition of disability. Of relevance to the present case:

> "C2. The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person.
>
> C4. In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination takes place. Anything that occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example general state of health or age)."

183. It is for the Claimant to prove, on the balance of probabilities, that he satisfies the definition of disability.

<u>Knowledge of disability</u>

184. The statutory provision prohibiting discrimination arising from disability in Section 15(1) Equality Act 2010 does not apply if the person alleged to have committed this discrimination shows they did not know and could not reasonably have been expected to know that the claimant has a disability.

185. An employer is not subject to a duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that the claimant has a disability and is likely to be placed at a substantial disadvantage (Equality Act 2010, Schedule 8, paragraph 20).

186. As a result, actual or constructive knowledge is relevant to both causes of action. The required knowledge for actual or constructive knowledge are of the facts constituting the employee's disability, namely the following three elements:

> "(a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day to day duties"

187. Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know

that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' (*Gallup v Newport County Council* [2014] IRLR 211 at paragraph 36).

188. The EHRC Code provides as follow:

> Paragraph 5.14 "Employers should consider whether a worker has a disability even where one has not been formally disclosed".
>
> Paragraph 5.15 "employers must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially".

189. Where a Respondent has failed to make enquiries, the Tribunal must go on to decide what the employer might reasonably have been expected to know had it made such an inquiry. This includes assessing whether the claimant would have suppressed information about symptoms even if reasonable enquiries had been made (*A Limited v Z* [2020] ICR 199).

190. Information known by Occupational Health about a disability will be attributable to an employer if the Occupational Health adviser was acting as the employer's agent. The decision as to whether or not an employee is disabled, so as to trigger the duty of reasonable adjustment, is one for the employer to make. It is not a decision that can be delegated to an Occupational Health advisor. Contemporaneous medical opinion as to the likelihood of an employee's impairment continuing is likely to be of the very greatest value (*Donelien v Liberata UK Ltd* UKEAT/0297/14/JOJ at paragraph 31).

<u>Discrimination arising from disability</u>

191. Section 15 Equality Act 2010 is worded as follows:

> (1) A person (A) discriminates against a disabled person (B) if-
>
> a. A treats B unfavourably because of something arising in consequence of B's disability; and
> b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

192. The first issue for the Tribunal to assess is whether the Claimant's treatment was influenced to any significant extent by any consequences of the disability. This requires a focus on the reasoning in the mind of the person making the decision. The Tribunal needs to consider the conscious or unconscious thought processes of the alleged discriminator, keeping in mind that their actual motive in acting as they did is irrelevant. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial)

influence on the unfavourable treatment, and so amount to an effective reason for or cause of it (*Pnaiser v NHS England* [2016] IRLR 70 at paragraph 31).

193. The second issue, namely whether the reason/cause is "something arising in consequence of B's disability" was explained in as follows *Pnaiser* at paragraph 31:

> "the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. […]
>
> This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator."

194. In *York City Council v Grosset* [2018] ICR 1492, the Court of Appeal considered the extent of knowledge that was required under Section 15. In short, there is none beyond actual or constructive knowledge of the disability itself. If there is a causal link between the consequences of the disability and the unfavourable treatment, it is not necessary that the alleged discriminator knew of that connection (see paragraph 39).

195. If the unfavourable treatment was influenced by any consequences of the disability, then it is for the Respondent to show, under Section 15(1)(b) on the balance of probabilities that the decision was justified. That requires that the Tribunal form its own assessment of whether the unfavourable treatment was a proportionate means of achieving a legitimate aim. This is a different analysis from the range of reasonable responses approach required when considering an unfair dismissal claim.

196. So far as legitimate aim is concerned, the EHRC Code provides that it "should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. Reasonable business needs and economic efficiency may be legitimate aims, but solely aiming to reduce costs is not [4.28 & 4.29].

197. In assessing proportionality, the Tribunal must assess whether on a fair and detailed analysis of the working practices and business considerations involved, the decision was reasonably necessary in order to achieve the legitimate aim (*Hardys & Hansons Plc v Lax* [2005] ICR 1565).

198. There must be an assessment of "the balance between the discriminatory effect of the measure [or treatment] and the legitimate aim" (*Harvey, Industrial Relations and Employment Law* paragraph 338.03).

<u>Failure to make reasonable adjustments</u>

199. Section 20(3) Equality Act 2010 provides:

> "… a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter

> in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage"

200. Section 21 Equality Act 2010 provides:

> (1) A failure to comply with [this] requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

201. The Tribunal must assess whether the Respondent applied a provision, criterion or practice which placed the Claimant at a substantial disadvantage in comparison to those employees not sharing his disability. If so, the duty to make reasonable adjustments is engaged. The Tribunal must then consider whether a reasonable adjustment might have eliminated or reduced that disadvantage.

202. Paragraph 6.10 of the EHRC Code provides:

> "The phrase [PCP] is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, or qualifications including one-off decisions and actions …"

203. In *Ishola v Transport for London* [2020] IRLR 372 Simler LJ discussed the extent to which the words 'provision criterion or practice' could apply to one off acts. She said "To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply … the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply" (paragraph 36).

204. She added (at paragraph 38):

> "all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."

205. The substantial disadvantage must be "in comparison with persons who are not disabled". This requires a comparative exercise. However, there is "no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances … rather the matter ought to be measured by comparison with what the position would be if the disabled person did not have a disability" (*Sheikholeslami v University of Edinburgh* [2018] IRLR 1090 at paragraphs 48 and 49).

206. Paragraph 20 of Schedule 8 to the Equality Act 2010 is worded as follows:

> An employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know …

that the employee has a disability and is likely to be placed at a disadvantage.

207. In *Secretary of State for Work and Pensions v Alam* [2010] IRLR 283 (EAT) at paragraph 17, Lady Smith stated that the Tribunal ought to ask itself two questions:

a. First, did R know both that C was disabled and that his disability was liable to disadvantage C substantially by reason of the impugned PCP?

b. Second, and if the answer to the first question is "no", ought R to have known both that C was disabled and that his disability was liable to disadvantage C substantially by reason of that PCP?

208. In *Newham Sixth Form College v Saunders* [2014] EWCA Civ 734 at paragraph 14, Laws LJ said as follows:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP.'"

209. The burden of proof is on the claimant to establish the existence of the provision, criterion or practice and to show that it placed him at a substantial disadvantage - see *Project Management Institute v Latif* [2007] IRLR 579 at paragraph 45. In other words, to establish that the duty to make reasonable adjustments has been engaged.

210. Thereafter the onus remains on the claimant to identify the potential reasonable adjustments with a sufficient degree of specificity to enable the Respondent to address them evidentially and the Tribunal to consider the reasonableness of providing them. The claimant must establish not only that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. At that point where the claimant has identified one or more potential reasonable adjustments, the burden of proof is reversed. The Respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved – *Latif* at paragraphs 53-54.

211. The reasonableness of the steps to be taken to avoid the disadvantage is to be determined on an objective basis: *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 at paragraph 73.

212. Further guidance as to the considerations that are relevant in assessing reasonableness is provided in paragraph 6.28 of the EHRC Code. These are "whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer's financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to

Work) and; the type and size of the employer". Examples are also given in paragraph 6.33.

213. The reasonable adjustments duty is "primarily concerned with enabling the disabled person to remain in or return to work with the employer". As a result, it would be a "very rare case indeed" where merely giving higher sick pay beyond the end of the contractual entitlement (and therefore than would be payable to a non-disabled person) would be considered necessary as a reasonable adjustment" (*O'Hanlon v Commissioners for HR Revenue & Customs* [2007] IRLR 404 at paragraph 67).

Law on time limits under the Equality Act 2010

214. Section 123 of the Equality Act 2010 is worded as follows:

> (1) …proceedings on a complaint brought within Section 120 may not be brought after the end of –
>
> a. The period of 3 months starting with the date of the act to which the complaint relates; or
>
> b. Such other period as the employment tribunal thinks just and equitable
>
> (2) ….
>
> (3) For the purposes of this section _
>
> a. Conduct extending over a period is to be treated as done at the end of the period;
>
> b. Failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something:
>
> a. When P does an act inconsistent with doing it, or
>
> b. If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it

215. Under Section 123 of the Equality Act 2010, proceedings on a complaint 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. An act "occurs when it is done, not when you acquire knowledge of the means of proving that the act done was discriminatory" (*Mensah v Royal College of Midwives* [1995] EAT/124/94). The act is complete for the purpose of the time limitation when the decision is taken rather than when it is communicated. Therefore, time does not start from when the employee acquires knowledge of the act or deliberate failure to act (*Virdi v Commissioner of Police of the Metropolis*) [2007] IRLR 24).

216. A failure to make a reasonable adjustment is not a continuing act and is instead an omission. Time runs from when the person is taken to have decided on a failure to do something, as explained in subsections (a) and (b) of Section 123(4) Equality Act 2010 above (*Kingston Upon Hull v Matuszowicz* [2009] IRLR 288 (CA). The principles set out in the authorities were summarised as follows by HHJ Beard in *Fernandes v Department of Work and Pensions* [2023] IRLR 967 at paragraph 16:

a. The duty to make an adjustment, under the statutory scheme, arises as soon as there is a substantial disadvantage to the disabled employee from a PCP (presuming the knowledge requirements are met) and failure to make the adjustment is a breach of the duty once it becomes reasonable for the employer to have to make the adjustment.

b. Where the employer is under a duty to make an adjustment, however, limitation may not begin to run from the date of breach but at a later notional date. As is the case where the employer is under a duty to make an adjustment and omits to do so there will be a notional date where time begins to run whether the same omission continues or not.

c. That notional date will accrue if the employer does an act inconsistent with complying with the duty.

d. If the employer does not act inconsistently with the duty the notional date will accrue at a stage where it would be reasonable for the employee to conclude that the employer will not comply, based on the facts known to the employee.

217. Conduct extending over a period is to be treated as done at the end of the period (Section 123(3) Equality Act 2010). There is conduct extending over a period if there is a continuing discriminatory state of affairs as opposed to a succession of unconnected or isolated specific acts. If so, then the three-month time period for bringing a claim only runs from the date on which the state of affairs ends (*Metropolitan Police Commissioner v Hendricks* [2003] ICR 530). However, if any of the constituent acts is found not to be an act of discrimination, then it cannot be part of a continuing act (*South West Ambulance NHS Foundation Trust v King* [2020] IRLR 168).

218. The three-month time for bringing Tribunal proceedings is paused during Early Conciliation such that the period starting with the day after Early Conciliation is initiated and ending with the day of the early conciliation certificate does not count (Section 140B(3), Equality Act 2010). If the time limit would have expired during Early Conciliation or within a month of its end, then the time limit is extended so that it expires one month after Early Conciliation ends (Section 140B(4), Equality Act 2010).

219. If the claim has been brought outside the primary limitation period, then the Tribunal has jurisdiction to consider the claim if it was brought within such other period as the Tribunal considers just and equitable. The Tribunal has a wide discretion and the EAT has a limited basis on which it can interfere. This is the proper principle to derive from *Robertson v Bexley Community Centre (t/a Leisure Link)* [2003] IRLR 434, CA, as explained by HHJ Tayler in *Jones v Secretary of State for Health and Social Care* EAT 23.1.24 at paragraphs 27-38).

220. Factors which are almost always relevant to an exercise of the discretion are the length of and the reasons for the delay, and whether the delay has prejudiced the Respondent (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 at paragraph 19). However:

> There is no … requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard (*Abertawe* at paragraph 25)

221. It is not necessary for a Tribunal to consider the checklist of factors set out in Section 33 of the Limitation Act 1980, given that that Section is worded differently from Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

222. It will frequently be fair to hold Claimants bound by time limits which they could, had they taken reasonable steps, have discovered. If the delay in issuing proceedings has been caused by the fault of an adviser, this is a potentially relevant factor that potentially excuse a failure to issue proceedings in time, or a delay in issuing proceedings thereafter (*Hunwicks v Royal Mail Group plc* EAT 0003/07; 20 March 2007 per Underhill J at paragraphs 9 and 13). However, to be a relevant factor, the bad advice must have been the reason for the delay.

223. Awaiting the outcome of an internal grievance procedure before making a complaint is just one matter to be taken into account by a tribunal considering the late presentation of a discrimination claim (*Apelogun-Gabriels v Lambeth London Borough Council* [2002] ICR 713, CA per Peter Gibson LJ at p719).

224. Where it is asserted that the claimant's medical condition is the reason for the delay in issuing proceedings, the Tribunal is not bound to accept untested medical evidence as a sufficient basis for concluding that a claimant had difficulty in taking the necessary steps to issue proceedings. It is appropriate to evaluate that medical evidence in the light of other evidence as to what the claimant was capable of doing during the limitation period. This may include evidence of seeking legal advice or of writing coherent letters on this or unrelated matters (*Chouafi v London United Busways Limited* [2006] EWCA Civ 689). The question is whether it is just and equitable to extend time in the light of the claimant's medical difficulties, which are one relevant factor to be considered - even if they were not such as actually to prevent the claimant commencing proceedings (*Watkins v HSBC Bank plc* [2018] IRLR 1015 at paragraph 50).

225. When balancing the prejudice to each party as a result of granting or refusing to grant an extension of time, the Tribunal may have regard to the following factors:

    a. The obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence;

    b. The forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents and losing touch with witnesses;

c. The prejudice to the claimant in not being awarded a remedy for an otherwise legally sound complaint if the Tribunal holds the complaint to be time barred.

226. If there is no forensic prejudice to the Respondent that is (a) not decisive in favour of an extension and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts (*Miller v Ministry of Justice* (UKEAT/0003/15/LA) (15.3.16).

Automatically unfair dismissal - protected disclosure

227. An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one) the principal reason) for the dismissal is that the employee made a protected disclosure.

228. A protected disclosure is defined in Section 43A as "a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of sections 43C to 43H".

Qualifying disclosures

229. Section 43B is in the following terms:

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

230. Only those disclosures that meet the statutory requirements set out in Section 43B qualify for protection. The starting point is that the disclosure must be a "*disclosure of information*" made by the worker bringing the claim. That disclosure must have two features. Both are based on the belief of the worker, but that belief must be a reasonable belief.

231. The first is that at the time of making the disclosure the worker reasonably believes the disclosure tends to show a 'relevant failure' in one of five specified respects; or

deliberate concealment of that failure. The second is that at the time of making the disclosure, the worker reasonably believes the disclosure is made in the public interest.

(1) Disclosure of information

232. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 the Court of Appeal rejected the view that allegations could not amount to a disclosure of information. Sales LJ noted that allegations could amount to disclosures of information depending on their content and on the surrounding context. By itself, an allegation made by an NHS employee that "*You are not complying with health and safety requirements*" would be so devoid of specific factual content that it would not fit within the statutory language – such a statement does not disclose information tending to show health and safety is being endangered. If such a statement was made whilst pointing to sharps lying discarded on the ward floor, then this context would give the disclosure sufficient factual content to amount to a qualifying disclosure.

233. Sales LJ set out the following test for determining whether the information threshold had been met so as to potentially amount to a qualifying disclosure: the disclosure has to have *"sufficient factual content and specificity such as is capable of tending to show"* one of the five wrongdoings or deliberate concealment of the same. It is a matter *"for the evaluative judgment of the tribunal in the light of all the facts of the case"* (paras 35-36).

234. Protected disclosures will commonly be made in grievances, particularly where there is no formal whistleblowing policy. However, section 43B does not limit the manner of the disclosure. Verbal disclosures can be qualifying disclosures - although verbal disclosures may be disputed, and a claimant will have to prove that the disclosure was made as alleged. Qualifying disclosures can also be made having regard to a series of communications viewed as a whole, even where the recipients of those communications are different. The disclosure can still be a qualifying disclosure if the recipient is already aware of the information – Section 43L(3).

235. However, the Tribunal will need to assess whether, given the factual context, it is appropriate to analyse a particular communication in isolation or in connection with others. In *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540 (EAT), Slade J (at paragraph 22) said that *"an earlier communication can be read together with a later one as embedded in it, rendering the later communication a protected disclosure, even if taken on their own they would not fall within Section 43B(1)(d)"*. Whether or not it is correct to do so is a question of fact.

236. In *Kilraine,* one of the alleged protected disclosures was made using these words: *"There have been numerous incidents of inappropriate behaviour towards me, including repeated sidelining, and all of which I have documented"*. In itself, this lacked sufficient factual content and specificity. The oblique reference to other documented instances did not incorporate other documents by reference. In *Simpson v Cantor Fitzgerald Europe* [2021] ICR 695, the Court of Appeal upheld the ET's decision not to aggregate 37 communications to different recipients in

order to assess whether there was a protected disclosure. Whether communications are read together is a question of fact for the Tribunal.

(2) Reasonable belief disclosure tends to show wrongdoing

237. There are two separate requirements here – (a) a genuine belief that the disclosure tends to show a relevant failure in one of the five respects (or deliberate concealment of that wrongdoing); and (b) that belief must be a reasonable belief. Reasonableness involves applying an objective standard to the personal circumstances of the discloser. The reasonableness test might differ depending on whether the discloser was a lay person or an expert. For example, a consultant surgeon would generally be expected to check medical records before it would be reasonable for them to believe their disclosure tended to show medical malpractice. A lay observer may reasonably believe the same disclosed information indicated wrongdoing without first making such checks (*Korashi v Abertawe Bro Morgannwg Local Health Board* [2012] IRLR 3, EAT). The definition is concerned with what the worker believed at the time when they made the disclosure, not what they may have come to believe later on (*Dodd v UK Direct Solutions Limited* at paragraph 55 [2022] EAT 44 (18.3.22)).

238. If the disclosure has a sufficient degree of factual content and specificity, then that belief is likely to be regarded as a reasonable belief (*Kilraine* at paragraph 36). The belief has to be that the information in the disclosure tends to show the required wrongdoing, not just a belief that there is wrongdoing (*Soh v Imperial College of Science, Technology and Medicine* EAT 0350/14*).* The disclosure may still be a protected disclosure even if the information does not stand up to scrutiny. A belief may be a reasonable belief even if it is wrong: *Babula v Waltham Forest College* [2007] ICR 1026. Unlike disclosures made to a regulator (see below), where a disclosure is made to the claimant's employer there is no additional requirement that the claimant must have had a reasonable belief that the information disclosed, and any allegation contained in it, were substantially true. Therefore, the Tribunal will not usually need to determine whether the employee believed that the disclosed information was correct or not. That said, in many cases, the determination of the factual accuracy of the disclosure will be an important tool in determining whether the worker held the reasonable belief that the disclosure tended to show a relevant failure (*Darnton v University of Surrey* [2003] IRLR 133).

239. In relation to each of the five prescribed types of relevant failure - there is a potential past, present or future dimension. For instance, in relation to breach of a legal obligation, the reasonable belief must be that the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation. So far as future wrongdoing is concerned the phrase *"is likely to"* has been interpreted as meaning more than a mere possibility. In *Kraus v Penna* [2004] IRLR 260 the EAT held that to be a qualifying disclosure, the information disclosed should tend to show, in the claimant's reasonable belief, that failure to comply with a legal obligation was *"probable or more probable than not"*. Although *Kraus v Penna* has been overruled by the Court of Appeal on a different issue, it remains good law on this point.

240. ***Breach of a legal obligation*** (Section 43B(1)(b)): Any legal obligation potentially suffices, including breach of an employment contract: *Parkins v Sodexo* [2002]

IRLR 109]. ET cases have held that a wide range of legal obligations are relevant, in addition to the employment contract itself:

a. Breach of an equal opportunities policy;
b. Pressurising parking attendants to meet targets, such that they falsified entries in a log book – this was breach of the obligation to fairly administer provisions of road traffic legislation;
c. Pressure to include false lines of business so as to artificially inflate the accounts;
d. A complaint that hospital staff were unable to take proper rest breaks.

241. A belief that particular conduct amounts to discrimination would be "*breach of a legal obligation*".

242. Unless the legal obligation is obvious, Tribunals should consider the particular wrong that the claimant alleges they believe has been breached. However, there are no sub-rules requiring that the worker should expressly accuse the employer of acting in breach of a legal obligation, still less identify a particular legal obligation in the disclosure. Such additional requirements go beyond the statutory wording and are inconsistent with the purpose of the legislation. However, what the worker said about the legal obligation, and whether the matter is obvious are relevant evidential matters in deciding what they believed and the reasonableness of what they believed. If the nature of the worker's concern is stated – e.g. they say that they consider that the report information shows a breach of a legal obligation - *"it will be harder to dispute that they held this belief and that the professed belief that the disclosure tended to show the specified matter was reasonable"* (*Twist DX Limited v Armes and others* at paragraph 87).

243. In *Eiger Securities LLP v Korshunova* [2017] ICR 561, the claimant complained to her line manager that it was wrong for him to trade from her computer without identifying that he was the person trading rather than her; and told him what her clients thought of this behaviour. The EAT remitted the case to the ET to consider whether the claimant believed that there was a legal as opposed to a moral obligation that had been broken. Merely believing that conduct 'was wrong' could be a belief that the employer had breached a moral or lesser obligation, which would be insufficient.

244. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850, the disclosure in issue related to an occasion when the worker had raised a child safeguarding issue and claimed to have received an inadequate response. The ET held that this did not tend to show breach of a legal obligation, and this was upheld in the Court of Appeal. As the Court of Appeal noted, nothing in the Particulars of Claim or the witness statement indicated that the claimant had a particular legal obligation in mind. It was only later that her representative suggested a potential breach of the Children Act 2004 and the Education Act 2002.

245. ***Endangerment of health and safety*** (Section 43B(1)(d)): The nature of the health and safety danger needs to be specified, but this can be done in general terms. So in *Fincham v HM Prison Service* 0925/01 the EAT held that a statement: *'I feel under constant pressure and stress awaiting the next incident'* was sufficiently

detailed to identify the danger to health and safety – it inferred that the claimant's own health was at risk. Disclosures which in the reasonable belief of the worker tend to show that the health or safety of any individual has been, is being or is likely to be endangered will generally be reasonably believed to be in the public interest (see below).

(3) Reasonable belief that disclosure is made in the public interest

246. There must be a reasonable belief on the part of the worker that the disclosure was in the public interest. This requirement has two components – first a subjective belief, at the time, that that the disclosure was in the public interest; and secondly, that the belief was a reasonable one.

(a) Genuine belief

247. This component may not be apparent to a litigant in person or even to some professional representatives. As a result, it may be incumbent on a Tribunal to ask a litigant who does not address the issue in their witness statement, whether they believed that they were acting in the public interest. If the answer is yes, then they could be asked for an explanation, which could be the subject of cross-examination as to whether it was a belief only formed at a later stage: see *Ibrahim v HCA International plc* [2020] IRLR 224 at paragraph 25. In the present case, it was clear from the way they had worded their grievances that each of the Claimants were aware they needed to show a genuine belief that the information being disclosed was made in the public interest. Furthermore, this issue was raised with them in cross-examination. As a result, the Tribunal did not ask each claimant in relation to each alleged qualifying disclosure whether the disclosure was believed to be in the public interest.

(b) Reasonable belief

248. Secondly, that belief must be a reasonable one. What amounts to a reasonable belief that disclosure was in the public interest was considered by the Court of Appeal in *Chesterton Global Limited v Nurmohamed* [2018] ICR 731. Mr Nurmohamed was the manager of the Chelsea branch of Chestertons Estate Agents. He and other managers were remunerated in part based on the extent to which their sales enhanced the businesses profits. He believed his employers had been adjusting the business' accounts so as to depress the profits and so deprive managers of bonuses. He shared his view in three meetings, stating he believed that the bonus payable to 100 managers was affected. The Tribunal found he reasonably believed this was in the public interest. That decision was upheld by the EAT and the Court of Appeal.

249. The Court of Appeal considered that a disclosure could be in the public interest even if the motivation for the disclosure was to advance the worker's own interests. Motive was irrelevant. What was required was that the worker reasonably believed disclosure was in the public interest in additional to his own personal interest. So long as workers genuinely believed that disclosures were in the public interest when making the disclosure, they could justify the reasonableness of the public interest element by reference to factors that they did not have in mind at the time.

250. Underhill LJ, giving the leading judgment, refused to define "public interest" in a mechanistic way, based merely on whether it impacted anyone other than the claimant or whether it impacted those beyond the workforce. Rather a Tribunal would need to consider all the circumstances, although the following fourfold classification of relevant factors was potentially a "*useful tool*":

    (a) The **numbers in the group whose interests the disclosure served** – although numbers by themselves would often be an insufficient basis for establishing public interest.

    (b) The **nature and the extent of the interests affected** – the more important the interest and the more serious the effect, the more likely that public interest is engaged.

    (c) The **nature of the wrongdoing** – disclosure about deliberate wrongdoing is more likely to be regarded as in the public interest than inadvertent wrongdoing.

    (d) The **identity of the wrongdoer** – the larger or more prominent the wrongdoer, the more likely that disclosure would be in the public interest.

251. There may be more than one reasonable view as to whether a particular disclosure was in the public interest. All that matters is that the claimant's subjective belief was objectively reasonable (*Chesterton* at paragraphs 28-29). Applying these factors to Mr Nurmohamed's disclosure, the factors indicated he did reasonably believe it was in the public interest – he believed it potentially affected 100 managers; he believed that profits were being depressed by £2m - £3m; he believed that it was being done deliberately; and the wrongdoer was a very substantial and prominent business in the London property market.

252. Underhill LJ said that Tribunals should be cautious about concluding that the public interest requirement is satisfied in the context of a private workplace dispute merely from the numbers of others who share the same interest. In practice, the larger the number of individuals affected by a breach of the contract of employment, the more likely it is that other features of the situation will engage the public interest.

Reason for dismissal

253. The reason for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to dismiss, or which motivates them to do so: *The Co-operative Group v Baddeley* [2017] EWCA Civ 658 at paragraph 41. Unless the employee has less than two years continuous service, the burden of proof is on the employer to show that the reason for the dismissal is a potentially fair one. Where an employee has less than two years continuous service, the burden of proving on the balance of probabilities that the principal reason for the dismissal is a protected disclosure rests with the claimant.

<u>Automatically unfair disclosure – assertion of a statutory right</u>

254. Section 104 Employment Rights Act 1996 provides:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee-

…

(b)Alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)-

(a) Whether or not the employee has the right, or

(b) Whether or not the right has been infringed

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

255. The wording of the statutory section makes it clear that relevant statutory rights include any rights conferred by the Employment Rights Act 1996 for which there is a remedy in the Employment Tribunal. These include the right not to suffer an unauthorised deduction from wages (Section 13) and the statutory right to request contract variation (Section 80F).

Unauthorised deductions from wages

256. Section 13 Employment Rights Act 1996 provides:

(1) An employer shall not make a deduction from wages of a worker employed by him unless-

a. The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision in the worker's contract; or

b. The worker has previously signified in writing his agreement or consent to the making of the deduction.

257. An employee has a duty to comply with their employer's reasonable requirements, whether they took the form of instructions or management decisions, as long as they fell within the scope of the employment contract. If there is nothing in the contract of employment or in the employment relationship which entitles an employee to set the terms on which they would return to work, then failure to return to work as directed amounts to a situation of "no work, no pay" (*Luke v Stoke-on-Trent City Council* [2007] ICR 1678).

Wrongful dismissal

258. It is a breach of contract to summarily dismiss an employee without providing the contractually required period of notice unless the employee is in fundamental

breach of contract or unless there is a specific clause permitting the employer to make an equivalent payment in lieu of notice (a PILON clause): *Abrahams v Performing Right Society Limited* [2005] ICR 1028.

Conclusions

Direct discrimination because of race

259. The Tribunal first considers whether it has found any facts from which the Tribunal could decide, in the absence of any other explanation, that the relevant decision makers at ORR in relation to the alleged discriminatory acts have contravened the prohibition against discrimination in the Equality Act 2010. In other words, are there facts from which an inference of race discrimination could be drawn? If there are, then the burden of proof switches to the Respondent to show that Mr Ikeji's race formed no part of the reason for the relevant treatment.

260. The Tribunal does not consider it has found any such facts. Mr Ikeji relies upon the fact that he was the highest scoring candidate at interview, and yet was not allocated his preference for the TfL role. This does not provide any grounds for drawing an inference of discriminatory treatment, given the Tribunal's other relevant factual findings – at no point in the application process had ORR indicated that the top performing candidate would be allocated their preferred role; Mr Ikeji had not expressed a particular preference during the application process for the TfL role; and had indicated a willingness to be considered for the Southern Region role on his application form.

Failure to allocate him to the Transport for London role upon appointment

261. This failure was not influenced by Mr Ikeji's race. Rather it was the result of Mr Appleton's decision following his conversation with Catherine Hui. Ms Hui had a preference for Ms Gelder because she had more recent experience working with TfL and had worked with one of the clients involved in finalising the implementation of the Elizabeth Line.

262. There had been no promise or any expectation that the top scoring candidate would be entitled to choose which of the two roles they wanted. This had not been said in the paperwork advertising the position, during the interview, or in any communication with Mr Ikeji before his start date.

263. In any event, Mr Gelder was not an actual comparator in that her circumstances were materially different. She had more recent experience working with TfL.

Conducted a performance review induction meeting on 20 January 2022 without consideration for the Claimant's development requirements, commitments and preferences

264. In relation to this allegation Ms Gelder is said to be an actual comparator. By 20 January 2022, Ms Gelder had not yet started work. There is no evidence as to whether she had an equivalent performance review induction meeting and if she

did, what was discussed at that meeting. The alleged comparison does not assist Mr Ikeji in establishing unfavourable treatment.

265. Mr Wilson had clearly considered Mr Ikeji's preferences when they were expressed to him on Mr Ikeji's first day. He had explored whether there was any scope for Mr Ikeji to swap roles with Ms Gelder. There is no basis for concluding that he did not consider her development requirements or commitments. In any event, there is no basis for inferring that his stance towards Mr Ikeji was influenced by Mr Ikeji's race. He had chaired the panel that had conducted a face-to-face interview with him and the other candidates. Despite clearing knowing that Mr Ikeji was black he and his colleagues on the panel scored Mr Ikeji highest of the candidates interviewed.

3 March 2022, Mr Wilson told the Claimant that he would block his part time work request

266. The Tribunal's factual findings as to what was said by Mr Wilson in the meeting are recorded above. He did not say he would block any part time work request. Rather he set out his expectation of the negative answer Mr Ikeji would be likely to receive if he made an early request to go part-time. He explained the reasons for this in the meeting on 3 March 2022 and reiterated those reasons in his email of 4 March 2022. The Tribunal accept that those reasons were the entirety of the reasons for his stance on part-time working. His stance was not influenced to any extent by Mr Ikeji's race.

267. In any event, Keith Atkinson and Ian McDermott were not comparable employees. They were not engaged in the training process to become qualified inspectors at the start of their careers. Rather they were experienced inspectors who had worked on a full time basis for many years and were reaching the end of their careers.

<u>Harassment related to race</u>

Mr Wilson feigned ignorance of the Claimant's preferences for the Transport for London vacancy and breached the Civil Service Code in respect of fair appointment according to merit, based on location and preferences.

268. Mr Wilson was not told in advance of Mr Ikeji's first day at work that Mr Ikeji had a preference for the Transport for London vacancy. Such a preference was not clear from the application form and did not arise during the discussion at interview. As a result, his ignorance was not feigned but genuine. In any event, the deployment decision was taken by Mr Appleton rather than by Mr Wilson.

269. Therefore, there was no harassment related to race by Mr Wilson in this respect.

20 January 2022, Mr Wilson conducted a performance review induction meeting without consideration of the Claimant's development plan requirements, commitments and preferences.

270. In the light of the Tribunal's factual findings, Mr Wilson's treatment of Mr Ijeki during the meeting did not have the effect proscribed by Section 26(1) EqA. Furthermore, the treatment was not related to race for the reasons given in relation to the identical allegation of direct race discrimination.

3 March 2022 Mr Wilson told the Claimant that

(1) he would block his part time work request

(2) he accused him of being late to a meeting

(3) he accused him of sharing a level crossing order with the team administrator, saying the Claimant should be careful not to go around acting like he runs things after two minutes.

271. The factual allegation relating to "blocking his part time work request" is dealt with above in relation to the equivalent allegation of direct race discrimination.

272. During the meeting, Mr Wilson did discuss Mr Ikeji's lateness to a training session in Reading on 1 March 2022. He discussed this because Mr Ikeji had been late to the training session; and this had happened on several previous occasions. It was entirely appropriate for him to do so as his line manager. Had he failed to address this issue with Mr Ikeji he would have been failing in his line management responsibilities. His decision to broach this subject had nothing to do with Mr Ikeji's race.

273. Mr Wilson also discussed Mr Ikeji's decision to update the Level Crossing tracker and send this to the administrator. He did not accuse him of any wrongdoing in this respect, nor did he say that Mr Ikeji should be careful not to go around acting like he runs things after two minutes, as Mr Ikeji alleges. Therefore, this allegation fails as being factually incorrect.

7 March 2022, in an email, Mr Wilson said that the Claimant "had not been entirely honest with me"

274. This allegation is factually correct. Mr Wilson wrote this because this was genuinely how he felt about how Mr Ikeji had dealt with this issue – he had applied for a full-time role, not mentioned during the interview that he would like to carry out the role on a part-time basis within a year or so of starting, and then first mentioned his interest in part-time working in discussions with other managers so that Mr Wilson learnt about it second-hand, rather than directly from Mr Ikeji in line management discussions. In those circumstances, Mr Wilson's feeling about how Mr Ikeji had treated him on this issue was a reasonable one. It was also reasonable for Mr Wilson to share his feeling with one of his direct reports. This conduct did not violate Mr Ikeji's dignity or create an intimidating, hostile, degrading or offensive environment for him, having regard to his perception and whether it was reasonable for the conduct to have that effect. In any event, the conduct was not related to Mr Ikeji's race. Mr Wilson would have written the same emailed comment if the issue of part time working had been broached in this way by a white employee.

21 March 2022, Mr Wilson fabricated a training needs assessment for the Claimant without his input and whilst he was on sick.

275. The training needs assessment document was drafted around 21 March 2022, which was on or shortly after the date on which Mr Ikeji went on sick leave. It was a draft document intended to be discussed with him before it was finalised. Mr Wilson ought to have done this within the first two months ie by 5 March 2022. It was not

fabricated by Mr Wilson and, because it was never finalised, it never became operational.

276. There is no factual basis on which to draw any inference that the timing of the training needs assessment or the contents of the document were influenced by Mr Ikeji's race.

From 11 May 2022, suspending the Claimant from work without pay

277. Mr Ikeji was not suspended from work. Rather, he had not self-certified as sick and had not requested to take annual leave or unpaid leave. As a result, his absence was recorded as unauthorised absence which was not paid. This was clearly explained by Ms Rosolia in the email exchange on 11 May 2022. The allegation fails as being factually incorrect.

1 July 2022, Mr Wilson and Mr Farrell deliberately produced inaccurate records to support a recommendation that the Claimant be dismissed

278. Mr Ikeji has not shown, either in his witness statement or in his oral evidence, any respect in which the probation assessment form supporting document [1422] was inaccurate, still less that this was done deliberately. This allegation fails as being factually incorrect.

Victimisation - Protected acts

Orally to Mr Wilson on 5 January 2022 and 7 January 2022 about the allocation of role

279. The complaints made orally to Mr Wilson on 5 January 2022 or 7 January 2022 about the allocation of role were not protected acts. Whilst he stated he was unhappy to be allocated the Network Rail Southern Region role because he wanted to be allocated to the TfL role, on neither occasion did Mr Ikeji allege that amounted to race discrimination or was unfavourable treatment because of any protected characteristic.

23 February 2022 and 28 February 2022 in training course feedback about discriminatory comments made by Mr Atkinson and Mr Darling

280. Mr Ikeji did allege that discriminatory comments had been made by Mr Darling when he provided feedback orally on 23 February 2022 and in writing on 28 February 2022. These were protected acts.

281. He did not make any allegation about the way that Mr Atkinson had spoken to him during a training course – either on 23 February 2022 or on 28 February 2022. Therefore, these alleged protected acts are rejected.

3 March 2022 orally to Mr Wilson, about the discriminatory comments made by Mr Atkinson

282. There was no reference during the meeting held with Mr Wilson on 3 March 2022 to any discriminatory comments made by Mr Atkinson. Therefore, this alleged protected act is rejected.

8 March 2022, grievance and supporting documents sent on 15, 16 and 23 March 2022

283. Mr Ikeji's grievance on 8 March 2022 is admitted to be a protected act. In it, he effectively alleged he was being victimised, because of the feedback he had provided about Mr Darling in that he said: "I am being treated this way because of the feedback I shared with you and Lee Collins about my experience, in good faith". His email of 15 March 2022 also amounts to a protected act in alleging breaches of equalities legislation.

284. The 16 March 2022 email makes no allegations of discrimination. There is no email from Mr Ikeji of 23 March 2022, as confirmed by the absence of any such reference in Mr Ikeji's Chronology.

First employment tribunal claim

285. This is obviously a protected act.

10 May 2022 email sent by Mr Ikeji to Mr Farrell

286. This email repeatedly referred to breaches of contract. It made no allegations of discrimination, whether expressly or by implication. As a result, it is not a protected act.

15 July 2022 second employment tribunal claim

287. This is obviously a protected act.

24 May 2022 – whistleblowing grievance sent to Ms Thornhill and Mr Prosser

288. This is admitted to a protected act. Mr Ikeji was alleging that two senior ORR employees had conspired to hide breaches of the Equality Act 2010.

<u>Detrimental treatment because of protected acts</u>

Failed to agree to appoint Mr Ikeji to the Transport for London role (20 January 2022)

289. This is an allegation made against Mr Wilson. It is correct that he did not appoint Mr Ikeji to the Transport for London role on 20 January 2022. It was not within his gift to do so. There was no vacancy because the role had already been allocated to Ms Gelder, albeit she had not yet started. The original decision was taken by Mr Appleton, who is more senior than Mr Wilson. It would have been for Mr Appleton rather than Mr Wilson to reverse his original decision. Mr Appleton was never asked to do this.

290. It is clear from the Tribunal's factual findings that Mr Wilson had no objection to Mr Ikeji swapping with Ms Gelder if Ms Gelder was willing to do so. However, she had indicated she wanted to remain in the Transport for London team.

291. In any event, by 20 January 2022, there had been no protected acts. As a result, the "failure to agree to appoint Mr Ikeji to the Transport for London role" cannot have been because of a protected act.

7 March 2022 – Mr Wilson said that he would block the Claimant's request to work part time

292. That is not a fair characterisation of Mr Wilson's stance on the issue of part time working. His email of 7 March 2022 saying he would oppose a part time application needs to be viewed in the light of the whole chain of email correspondence on the same issue, and in particular his measured and detailed response in his email on 4 March 2022. In the 7 March 2022 email, he was transparently sharing with Mr Ikeji what his stance would be on any application to continue his present trainee role on a part-time basis, namely that he would oppose such an application, for the detailed reasons provided in his email of 4 March 2022. However, it would be for others to decide that application.

293. His email was entirely based on his view of the demands of the role of trainee inspector given ongoing training courses spread throughout the week and on the needs of the business. It was not in any way influenced by any of the previous communications said to be a protected act.

4 March and 7 March 2022 Mr Wilson sent emails about the Claimant's probation period which threatened his employment.

294. Mr Wilson did say in his email of 4 March 2022 that "if you cannot commit to full-time working, with regret, I think it is sensible for you and ORR to 'consider positions' sooner rather than later" [764]. In the same email he said: "Be assured that I have confidence in your abilities, as does Kate Dixon, who said she thought you'll make a very good inspector". Read as a whole, this email did not threaten his employment. Rather it indicated his view that a lack of commitment to full-time work was incompatible with the nature of the role. This was entirely prompted by the nature of the role rather than by any previous protected act.

295. He made the same point giving the same reason in his email of 7 March 2022, when he said that the role was advertised and filled on a full-time basis, and that the team needed a full-timer. Whilst he said he would oppose an application to go part time and regarded Mr Ikeji's current intention as a problem, he said he would "indeed raise all of this with HR". As a result, he was not threatening Mr Ikeji's current full-time employment but was signalling that HR would need to be involved in any discussion about changing his existing full-time role. Again, his stance was entirely prompted by the nature of the role rather than by any previous protected act.

From 10 May 2022, failing to pay the Claimant

296. It is correct that Mr Ikeji was not paid from 10 May 2022. However, this was entirely because he had not supplied a current Fit Note signing him off sick from that date and he was not ready willing and able to return to his substantive role under the line

management of Mr Matthew Farrell with appropriate reasonable adjustments. As a result, it was not in any way influenced by any previous protected acts.

12 July 2022, dismissed the Claimant

297. Mr Ikeji was dismissed as the outcome of the probation review meeting conducted by Mr Alshaker on 12 July 2022. Mr Alshaker was aware Mr Ikeji had lodged a grievance but was not aware of the contents of the grievance. In any event, his decision that Mr Ikeji should be dismissed was taken for the reasons set out in the two-page letter dated 13 July 2022 notifying him of his dismissal with immediate effect. In so deciding, he was relying on Mr Farrell's probation review findings. Those in turn had not been influenced by the contents of any protected acts, but by Mr Farrell's view of Mr Ikeji's performance as documented under the three headings, "Conduct", "Timekeeping" and "Work Performance".

29 July 2022, complained to the police that the Claimant had committed theft of its property

298. Ms Rosolia did complain to the police that Mr Ikeji had committed theft of its property. This complaint was prompted by Mr Ikeji's ongoing failure to return the items belonging to ORR which had been requested on several occasions starting with the dismissal letter of 13 July 2022. It had nothing to do with any previous protected acts.

3 February 2023, supplied a reference to prospective employer, the City of Westminster by giving negative and inaccurate information about his employment

299. The reference provided to City of Westminster was factually accurate. It recorded his name, the length of his employment, the position he held and his employment status as a full-time permanent member of staff. The format was the same as ORR would have provided for any departing employee regardless of the reason for their departure and regardless of whether they had previously done any protected acts. It was not in any way influenced by any previous protected acts.

<u>Automatic Unfair Dismissal</u>

300. The Tribunal needs to determine the reason or where there is more than one reason the principal reason for Mr Ikeji's dismissal. The Tribunal accepts the evidence of Mr Alshaker that the only reason for dismissing Mr Ikeji was that he endorsed the findings in the probation review report written by Mr Farrell. This noted that there were concerns about his conduct and his time keeping.

301. Mr Alshaker did not know about Mr Ijeki's whistleblowing complaint. As a result, even if it was a qualifying and therefore a disclosure, it could not have influenced his reasoning for dismissing Mr Ikeji. By way of completeness, the Tribunal does not find that the email to Ms Thornhill and Mr Prosser on 24 May 2022 [1331] was a qualifying disclosure. This is because Mr Ikeji did not have a reasonable belief that the matters he was disclosing were in the public interest. The disclosures in the email and attachments only concerned his own treatment, rather than the treatment of other employees. His reference to the need "to ensure the health, safety and

welfare of employees like me" does not make any belief he had that it was of potential significance a reasonable belief that this was in the public interest.

302. In so finding there was no reasonable belief that disclosure was in the public interest, we have considered the factors suggested by the Court of Appeal in the case of *Nurmohammed v Chestertons*. In particular we have considered the number of people potentially impacted (one), the gravity of effect (the outcome of a grievance appeal), whether it was deliberate or inadvertent (there was no plausible basis for concluding that any errors were deliberate) and the prominence of wrongdoing (Office of Rail and Road is a public authority and Ms Hill and Ms Rosolia were senior employees). Weighing these factors, it is clear that the necessary public interest element was not satisfied.

303. Having so found this was not a qualifying disclosure on that basis and given that this whistleblowing complaint did not influence Mr Alshaker in any event, it is not proportionate to further analyse whether the alleged qualifying disclosure satisfies other elements of the necessary requirements to amount to a qualifying disclosure.

304. Mr Farrell's written probation assessment on which Mr Alshaker's decision was based made no reference to Mr Ikeji's assertion that he should have been paid from 11 May 2022 onwards. It did not refer to Mr Ikeji's subsequent grievance about the failure to continue his full pay from that date. The Tribunal has found that Mr Alshaker did not know that Mr Ikeji had asserted a right to be paid. As a result, to the extent that this amounted to the assertion of a statutory right, this could not have formed any part of Mr Alshaker's dismissal decision. As already stated, the only reason was because of the factors set out in Mr Farrell's report.

305. Finally, Mr Ikeji had not made any application to work on a part time basis. At that point he did not have a statutory right to do so, because he had not been employed for at least 26 weeks. Mr Ikeji does not allege he believed he had a statutory right to request a contractual change to his weekly hours. In any event, there was no reference in the probation report to Mr Ikeji's interest in working on a part time basis. Mr Alshaker did not know Mr Ikeji had indicated an interest in part time work. The reason for the dismissal was not because Mr Ikeji had asserted a statutory right to request part time work, but because of the factors set out in Mr Farrell's report.

<u>Disability status</u>

306. The Tribunal starts by considering whether Mr Ikeji's anxiety amounts to a disability.

307. First it is necessary to decide when symptoms started. The first reference to anxiety as a separate condition is in Mr Ikeji's email to Mr Wilson dated 21 March 2022 where he complained that the treatment he was experiencing at work had worsened his anxiety. In terms of specific symptoms, he said that he had been unable to sleep for the last couple of days. That was at the start of his period of sickness absence, albeit that the reason given on the Fit Note was "hypertension". Up until that point, Mr Ikeji had been able to carry out all his duties at work. Although Mr Ikeji had made a previous reference, on 11 February 2022, to being anxious, that was in the context of his concern that his "benign neutropenia" was

putting him at risk of contracting Covid-19. The focus of that email was on his physical health rather than his mental health.

308. It is telling that Mr Ikeji's disability impact statement says he had been struggling to cope with his day-to-day activities "since March 2022" [331]. By way of example, he said "such as sleeping, reading, cooking, shopping, caring and financial responsibilities". The Tribunal dates the start of this struggle to the point when he was unable to sleep. This would be around 19 March 2022. At that point the symptoms from his anxiety amounted to an impairment, which had a substantial (ie more than trivial) effect on normal day to day activities.

309. Next it is necessary to decide on the gravity of those symptoms. The Tribunal accepts that the anxiety symptoms continued to amount to an impairment which continued to have a substantial impact on normal day to day activities throughout the period covered by the first two sick notes. The Tribunal is aware that some GPs choose to document physical symptoms rather than mental health symptoms as the reason for absence where both are present. It is clear that Mr Ikeji still had some symptoms of anxiety by the time he was examined by occupational health on 4 May 2022. She recommended that Mr Ikeji seek out various forms of help with stress and symptoms caused by stress.

310. However, the Tribunal does not accept that the level of his anxiety symptoms from 21 March 2022 onwards was as severe as he suggests in his disability impact statement. Having observed the way in which he has given evidence, the Tribunal considers that he has a tendency to embellish matters in an attempt to make points more compelling. That is the case with his descriptions of his symptoms and how they were addressed at the time. For instance, he sought to suggest he had private cognitive behaviour therapy in February 2022 when this was not required at that point (given the absence of significant symptoms) and was not provided (on his own admission, under questioning). Mr Ikeji did not consult his GP until 25 March 2022. There is no evidence that his GP made an entry recording anxiety in his medical records at that point. There is no evidence that his GP prescribed any medication or suggested any form of treatment until September 2022, well after the end of his employment.

311. The Tribunal rejects Mr Ikeji's contention that he had been diagnosed by his GP with chronic anxiety in March 2022. Had he been so diagnosed, this would also have been noted on the medical certificate.

312. Whilst Mr Ikeji says in his disability impact statement that he benefited from "some private cognitive behavioural treatment and stress reduction techniques" since February 2022 (at paragraph 6) [331], he accepted in evidence this was self-help rather than professional treatment and he did not pay for it. To the extent that he did use self-help techniques, this is likely to have occurred after the occupational health report following assessment on 4 May 2022. The report does not record he had already tried self-help techniques, although various helpful websites are suggested. It is likely that any self-help would have been tried as a result of the occupational health advice given, rather than several weeks before it started.

313. Therefore, the Tribunal accepts that Mr Ikeji had some level of anxiety from 25 March 2022 until the date of his dismissal on 13 July 2022 prompted by his

workplace concerns. However, the low level of that anxiety is reinforced by the occupational health nurse's view that the issues in this case were not primarily medical; that he was fit for his substantive role with reasonable adjustments which would be required over the following two weeks. The occupational health nurse anticipated that the symptoms were likely to resolve with appropriate resolution of his workplace issues.

314. Mr Ikeji did not request any treatment for anxiety until he returned to his GP in September 2022. That was the point when he told his GP that anxiety he had experienced in 2013 had restarted. This indicates that until September 2022 any symptoms were at a sufficiently low level that they did not warrant him even mentioning them to his GP as having continued throughout the preceding months when he reattended in September 2022. Although at a low level, the impairment was at just a sufficiently intrusive level that it had a substantial adverse effect on normal day to day activities. The occupational health advice in early May 2022 was that he should avoid working with live railway lines and there should be other adjustments to his normal working duties, and additional management support provided.

315. The most difficult question for the Tribunal to determine is whether this low-level anxiety, not warranting that Mr Ikeji be signed off work from 12 May 2022 onwards or undergo any treatment (whether through medication or talking therapy), was likely to last for twelve months at any point before the date of dismissal. On that issue there is no medical evidence. The onus is on Mr Ikeji to show on the balance of probability that he meets the statutory definition of disability, including that the condition was likely to last for 12 months.

316. In answering that question, it is impermissible for the Tribunal to look at events subsequent to the date of the alleged discrimination to see whether symptoms of anxiety and any resulting substantial impairment has in fact lasted for 12 months.

317. Given the low level of his symptoms of anxiety during the less than four-month period from 19 March 2022 until 13 July 2022 (particularly from 12 May 2022 onwards), the optimistic occupational health advice given on 4 May 2022, the absence of any consultations with his GP for anxiety help during the period from 12 May 2022 to 13 July 2022 and the absence of any specific expert evidence to support the Claimant's position as to the potential extended prognosis at this point, Mr Ikeji has not established that there was ever a point during this period of his employment with ORR where the anxiety symptoms were likely to last for at least 12 months, in the sense that this "could well happen" or was a real possibility.

318. Although Mr Ikeji had previously had anxiety in 2013, the Tribunal does not find that the further episode of anxiety in early 2022 was part of a recurring underlying condition, so as to thereby satisfy the legal requirements of a long-term condition. There is no specific evidence relied upon by Mr Ikeji to make that submission.

319. As a result, looking solely at the anxiety, the Tribunal does not find that this satisfied the legal test for disability.

320. So far as the symptoms of hypertension are concerned, there is no reference in the medical records to this being a particular problem before early 2022. It was not

noted as a problem in his pre-employment medical. Mr Ikeji did not mention high blood pressure in his health disclosure email on 11 February 2022. This health issue started around the same time as he experienced difficulty sleeping on 19 March 2022. The Tribunal accepts that his high blood pressure was diagnosed by his GP on 25 March 2022 and led to him being signed off work until 12 May 2022 (although he chose not to submit his third Fit Note). However, at no point was he was prescribed medication to treat his high blood pressure. There is no medical evidence establishing the specific symptoms that were the direct result of his hypertension.

321. Based on the three Fit Notes, Mr Ikeji was unable to work as a result of hypertension from 21 March 2022 until 12 May 2022. Therefore, during this period, the hypertension had a substantial adverse effect on normal day to day activities.

322. When Mr Ikeji was seen by occupational health on 4 May 2022, there was limited reference to hypertension itself as a current physical problem. Mr Ikeji has not established that the cardiology investigations that were carried out on 23 May 2022 and were followed up subsequently were linked to his hypertension. The Tribunal does not accept that the hypertension symptoms themselves amounted to an impairment which had a substantial impact on normal day to day activities from 12 May 2022 onwards until the point when he was dismissed.

323. In any event, the Tribunal does not consider that the impairment resulting from the hypertension was a long-term condition. Each medical certificate signed him off with hypertension for a short period of time, thereby anticipating that he may be potentially fit to return to work at the end of the period covered by the certificate. There is no expert evidence indicating that if a person has been signed off work with hypertension for a period of seven weeks (ie from 21 March to 12 May) that any subsequent symptoms flowing from the hypertension could well last for 12 months. No such inference can be drawn from the other evidence before the tribunal.

324. It is not permissible for the Tribunal to have regard to subsequent medical evidence in order to determine whether the condition has in fact lasted for 12 months. The Tribunal must address the question of whether the hypertension is likely to have (ie could well have) a substantial impact on normal day to day activities for more than 12 months as at the date of the alleged discriminatory acts, rather than with the benefit of hindsight.

325. Even taking the anxiety and hypertension conditions together, at no point during his employment did the resulting symptoms amount to an impairment with a substantial impact on normal day to day activities that could well have lasted for more than 12 months.

326. Therefore, Mr Ikeji was not a disabled person at any point during his employment with ORR. In case the Tribunal's assessment is incorrect, it goes on to consider the allegations of disability discrimination on the assumption that Mr Ikeji has established he was disabled.

Disability discrimination: Discrimination arising from disability

Sending him home without offering a safe way of working

327. Mr Ikeji was sent home on 10 May 2022 because he was refusing to carry out any aspect of his contractual role. Specifically, he was unwilling to participate in a two-day legal refresher course he had previously indicated he would be able to complete. ORR was willing to make the adjustments recommended in the Occupational Health report. Mr Ikeji was not willing to work with these changes, even though the Occupational Health advice was that this would be safe. As a result, the decision to send him home was not because of something arising out of his disability.

Imposing unpaid leave without notice on the Claimant's consent

328. There was no need for Mr Ikeji to consent to unpaid leave before this could be imposed. His absence was an unauthorised absence in circumstances where he was fit to work in his substantive role with adjustments. The decision to stop paying him was taken, as explained by Ms Rosolia, because he was not ready willing and able to carry out his existing duties to the extent that occupational health indicated was possible. He had not provided an ongoing Fit Note to contradict the advice from Occupational Health. The decision to stop his pay was not because of something arising in consequence of his disability.

11 May 2022, Ms Rosolia accused the Claimant of being absent without leave

329. Mr Ikeji was absent without leave. He had not provided any medical justification for not returning to work. Again this 'accusation' was not something arising from disability. Rather it arose from his failure to return to work in accordance with the Occupational Health advice.

Has the Respondent shown that it did not know and could not reasonably have been expected to know that the Claimant was unable to undertake his normal duties?

330. The Tribunal does not find there was a medical reason why Mr Ikeji could not have returned to work on 10 May 2022, with the recommended adjustments. Even if there was, then ORR did not know this, nor ought they to have known this. Mr Ikeji had chosen not to provide any further Fit Notes extending beyond 1 May 2022 and had returned to work from 29 April 2022, returning to full pay at that point. ORR were entitled to assume he was medically fit to return to work to the extent reported in the Occupational Health report.

Disability discrimination: Failure to make reasonable adjustments

Did the Respondent apply a provision, criterion or practice of requiring employees to undertake the full duties of their substantive role?

331. ORR did have expect employees to undertake the full duties of their substantive role. This is an entirely normal expectation for all employees.

Did that put the Claimant at a substantial disadvantage in comparison to non-disabled persons?

332. The Occupational Health report recommended that Mr Ikeji was fit to return to work with adjustments. The Tribunal infers that the reference to adjustments, at least on a temporary basis, was because he was at a substantial disadvantage in comparison to non-disabled persons (on the assumption that he satisfied the definition of having a disability) in carrying out the full range of his duties.

Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at a substantial disadvantage?

333. ORR did know the position as to the extent of Mr Ikeji's disadvantage because it received the occupational health report on 5 May 2022.

Should the Claimant have been given 'amended duties' as a reasonable adjustment?

334. ORR would have been prepared to allow Mr Ikeji to return to work in his substantive role, granting him the adjustments recommended in the Occupational Health report. These were a phased return to work for a period of two weeks; short catch ups with management (catch up meetings with Mr Farrell took place on 4 and 10 May 2022); and a mixture of remote and in office working. In addition, ORR had already changed his line manager from Mr Wilson to Mr Farrell. They would have been prepared to grant him regular breaks. They also finalised his grievance on 6 May 2022 and concluded his appeal within a further 17 days. This was entirely reasonable as a timescale, given the complexity of the matters raised. They would have been prepared to excuse him the need to visit the railway on live tracks, which was another Occupational Health recommendation.

335. It was clear that Mr Ikeji was not prepared to return to his existing role and his existing duties, even if they were amended in the manner recommended by Occupational Health. Rather, he wanted to be redeployed to a suitable alternative role working outside his current work area, not just offered amended duties. As he stated in his email of 10 May 2022 10:45, he wanted to work in any of the other directorates in ORR, outside the Railway Safety Directorate. He had not identified any particular vacancy to which he should be moved. Insofar as he is arguing that a role should have been created for him, the Tribunal does not consider that this would have been a reasonable adjustment. It was not warranted by the Occupational Health advice.

336. Therefore, the failure to make reasonable adjustments claim fails.

<u>Unauthorised deductions/Breaches of Contract</u>

337. There was no unauthorised deduction from Mr Ikeji's wages from 11 May 2022 onwards. He had not self-certified that he was not well enough to work, nor had he provided a valid sick certificate. He did not post a Fit Note covering the two- month period from 13 May 2022 to 12 July 2020 as he now contends. He had not asked to take a period of annual leave. He had no contractual entitlement to special leave. As a result, under the terms of his employment contract, he had no entitlement to

pay. He was not ready willing and able to do the role he had been engaged to perform.

Wrongful dismissal

338. ORR has not established on the balance of probabilities that there was a clause in Mr Ikeji's contract entitling ORR to make a payment in lieu of notice (PILON). It has not produced a copy of those contractual terms. Mere reference to a discretion to do so in the Probation Policy is insufficient to persuade the Tribunal that this was a contractual term.

339. As a result, it was a breach of the terms of his employment contract to dismiss him with immediate effect and purport to pay him the sums to which he was entitled to receive during his notice period. He ought to have been given five weeks' notice of dismissal, once it had been decided by way of probationary view outcome that he should be dismissed. ORR has not argued that Mr Ikeji was in fundamental breach of his employment contract, thereby entitling it to dismiss him summarily.

340. The claim for wrongful dismissal therefore succeeds. There is a dispute as to whether the sum paid fully compensated Mr Ikeji for the sums to which he was contractually entitled during the notice period, including his entitlement to pension contributions. At the outset of the Final Hearing, it was agreed with the parties that evidence on any issue of remedy would be deferred until after a decision has been made on liability.

341. That remedy dispute will need to be resolved at a further hearing, together with any other matters arising from the outcome of this Judgment.

342. With the agreement of the parties, this further hearing has been listed to take place on 29 May 2024 with a time estimate of one day.

Time limits

343. The only complaint that the Respondent says falls outside the statutory time limits is the complaint that there was a failure to make reasonable adjustments in relation to the failure to provide Mr Ikeji with 'amended duties' from 10 May 2022 onwards.

344. Although this allegation relates to events around two months before the second claim was issued, the allegation was first raised in an amendment application made on 4 October 2022 [149] granted by Employment Judge Russell on 29 December 2022. She granted the amendment application subject to the Respondent being able to rely on the time limitation issues as part of their case.

345. Taking into account the one-day pause resulting from early conciliation in relation to the second claim, this complaint falls outside the statutory three-month limitation period by just under eight weeks. As a result, Mr Ikeji must show that it would be just and equitable to extend time by that period to allow this complaint to be determined on its merits. The Tribunal considers that it would. The allegation relates to the same factual matrix that is already before the Tribunal. No prejudice

is caused to the Respondents. Had there been merit in this allegation, it would not have failed on jurisdictional grounds.

Employment Judge Gardiner
Dated: 17 April 2024

LIST OF ISSUES

Time limits

1. Were the complaints presented within the prescribed time limits, having regard to ACAS early conciliation? This may require consideration of whether there was a continuing course of conduct.

2. If presented out of time, would it be just and equitable to extend time?

Direct discrimination because of race

3. Did the Respondent subject the Claimant to the following treatment?

    a. Failure to allocate him to the Transport for London role upon appointment. The comparator is Ms Emily Golder, white.

    b. 20 January 2022, Mr Wilson conducted a performance review induction meeting without consideration for the Claimant's development plan requirements, commitments and preferences. Comparators: Ms Golder, hypothetical.

    c. 3 March 2022, Mr Wilson told the Clamant that he would block his part time work request. Comparators: hypothetical, other inspectors (Keith Atkinson, Ian MacDermott 'amongst other know to the first respondent'

4. Was that treatment less favourable than received by a comparator or hypothetical comparator?

5. If so, was this because of the Claimant's race?

Harassment related to race

6. Did the Respondent engage in conduct as follows:

    a. Mr Wilson feigned ignorance of the Claimant's preference for the Transport for London vacancy and breached the Civil Service Code in respect of fair appointment according to merit, based on location and preferences;

    b. 20 January 2022, Mr Wilson conducted a performance review induction meeting without consideration for the Claimant's development plan requirements, commitments and preferences and failed to give him a decision on his informal grievance about his preference for Transport for London;

c. 3 March 2022, Mr Wilson told the Clamant that he would block his part time work request. He accused the Claimant of being late to a meeting and for sharing a level crossing order with the team administrator, saying that the Claimant should be careful not to go around acting like he runs things after two minutes;

d. 7 March 2022, in an email, Mr Wilson said that the Claimant had "not been entirely honest with me".

e. 21 March 2022, Mr Wilson fabricated a Training Needs Assessment for the Claimant, without his input and whilst he was off sick;

f. From 11 May 2022, suspending the Claimant from work without pay;

g. 1 July 2022, Mr Wilson and Mr Farrell deliberately produced inaccurate records to support a recommendation that the Claimant be dismissed.

7. If so, was it unwanted?

8. If so, was it related to race? The Claimant feels he was treated differently to the way that a hypothetical white comparator would have been treated and will rely on this to infer that the conduct was related to race.

9. If so, did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect), the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Victimisation

10. Did the Claimant do a protected act as follows?

a. Orally to Mr Wilson on 5 January 2022 and 7 January 2022 about the allocation of role;

b. 23 February 2022 and 28 February 2022, in training course feedback about discriminatory comments made by Mr Atkinson and Mr Darling;

c. 3 March 2022, orally to Mr Wilson, about the discriminatory comments made by Mr Atkinson;

d. 8 March 2022, grievance and supporting documents sent on 15, 16 and 23 March 2022;

e. 4 April 2022, first Employment Tribunal claim.

f. 10 May 2022, email sent by the Claimant to Mr Farrell

g. 15 July 2022, the second Employment Tribunal claim.

h. 24 May 2022, the whistleblowing grievance sent to Ms Thornhill and Mr Prosser.

11. Did the Respondent subject the Claimant to any detriments as follows:

a. 20 January 2022, failed to agree to appoint the Claimant to the Transport for London role;

b. 7 March 2022, Mr Wilson said that he would block the Claimant's request to work part time;

c. 4 March 2022 and 7 March 2022, Mr Wilson sent emails about the Claimant's probation period which threatened his employment;

d. From 10 May 2022, failed to pay the Claimant;

e. 12 July 2022, dismissed the Claimant;

f. 29 July 2022, complained to the police that the Claimant had committed theft of its property.

g. 3 February 2023 supplied a reference to a prospective employer, the City of Westminster, by giving negative and inaccurate information about his employment and that the Claimant remains unemployed as a direct consequence.

12. If so, was it because of a protected act?

Automatic unfair dismissal

13. Did the Claimant disclose information which he reasonably believed tended to show a relevant breach of a legal obligation and/or health and safety in his email to Ms Thornhill and Mr Prosser, including its attachments.

14. If so, did the Claimant have a reasonable belief that it was in the public interest?

15. Was the sole or principal reason for dismissal the fact that he had made a protected disclosure?

16. Was the sole or principal reason for dismissal the fact that the Claimant had asserted a statutory right to pay from 11 May 2022?

17. Was the sole or principal reason for dismissal the fact that the Claimant had asserted a statutory right to request flexible working?

Was the Claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the mental impairment of chronic anxiety and/or the physical impairment of essential hypertension?

Unfavourable treatment because of something arising in consequence of disability

18. Did the Respondent treat the Claimant unfavourably in the following way?

    a. Sending him home on 10 May without offering a safe way of working;

    b. Imposing unpaid leave without notice or the Claimant's consent;

    c. 11 May 2022, Ms Rosolia accused the Claimant of being absent without leave.

19. If so was it because of something arising in consequence of disability? The Claimant says that the "something" was the Claimant's inability to undertake his normal duties.

20. If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

21. Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability?

Reasonable adjustments

22. Did the Respondent not know and could it not reasonably have been expected to know that the Claimant was a disabled person?

23. Did the Respondent apply a provision, criterion or practice (PCP) of requiring employees to undertake the full duties of their substantive role?

24. If so, did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that he could not do so due to his health?

25. If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

26. If so, were there steps that were not taken that could have been taken by the Respondent to avoid such disadvantage? The Claimant says that he should have been given amended duties.

Unauthorised deductions/Breach of Contract

27. Was the Claimant contractually entitled to be paid wages from 11 May 2022? The Claimant relies on the express term of the contract relating to pay and contractual benefits.

28. If so, to what such should have been paid?

Wrongful dismissal

29. Was the First Respondent entitled to dismiss without notice?

30. If so, was the amount he received correct?