Case Nos.: 1311073/2020;1405631/2020;1300452/2021; 1300542/2021; 1300675/2021; 1300857/2021; 1301367/2021; 1301368/2021; 1304669/2021; 1304670/2021; 1404230/2021; 1303599/2022 and 1303607/2022

EMPLOYMENT TRIBUNALS

Claimant:	**Mr T Azam ('C')**
Respondent:	**IBM United Kingdom Limited ('R')**
Heard at:	**Birmingham**
On:	**17, 18, 19, 22, 23, 24, 25, 26, 29, 30, 31 January, 1, 2, 5 & 6 February 2024**
Before:	**Employment Judge Flood** **Mrs Forrest** **Mrs Keene**

Representation
Claimant: In person
Respondent: Mr Edge (Counsel)

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 ("ET Rules"), the following reasons are provided:

REASONS

The Complaints and preliminary matters

1. C had previously presented six claim forms between 22 July 2020 and 25 October 2020 bringing complaints of direct race discrimination, direct disability discrimination, discrimination arising from disability, direct religion / belief discrimination, race harassment and victimisation ('Claims 1-6'). These claims were heard before a Tribunal consisting of Employment Judge Flood, Dr Hammersley and Mr Stanley at an 11 day hearing in January 2022 all claims were dismissed (see judgment at page 271-2). The written reasons for the judgment ('Claims 1-6 Reasons') were at pages 273-367. We were referred on many occasions during this hearing to findings of fact made by the Tribunal in Claims 1-6

and to the extent relevant to findings and conclusions we needed to make in the current proceedings we have been cognisant of the Claims 1-6 Reasons.

2. Between 7 December 2020 and 16 August 2022, C presented 13 further claim forms on the following dates:

2.1 Claim 7 - 7 December 2020;

2.2 Claim 8 - 20 October 2020;

2.3 Claim 9 - 6 February 2021;

2.4 Claim 10 - 15 February 2021;

2.5 Claim 11 - 1 March 2021;

2.6 Claims 13 and 14 - 28 April 2021;

2.7 Claim 12 - 17 March 2021;

2.8 Claims 15, 16 and 17 - 31 October 2021;

2.9 Claim 18 - 15 August 2022; and

2.10 Claim 19 - 16 August 2022.

3. In those 13 claims C brought complaints of direct race discrimination; direct discrimination on the grounds of religion/belief; direct disability discrimination; disability and race related harassment; victimisation and failure to comply with a duty to make reasonable adjustments. A number of those claims were presented before judgment in Claims 1-6 had been issued so proceedings were stayed pending that judgment.

4. At a preliminary hearing for case management before Regional Employment Judge Findlay on 9 November 2022 the stay was lifted, and particulars of the remaining claims were identified and recorded in a list of issues within a case management order ('CMO') (pages 425-437). It was recorded in the CMO that the list of issues was the complete list of the 79 complaints that C was making in Claims 7-19. R made a strike out application and at a preliminary hearing in public held on 10, 21 and 22 February 2023, 22 of the complaints were struck out under rule 37 and 9 complaints were made subject to a deposit order under rule 39 of ET Rules. As the deposits ordered were not paid, the complaints subject to a deposit order were struck out pursuant to a judgment sent to the parties on 24 May 2023 (page 574). Accordingly, the final list of issues recording the matters in dispute between the parties and recording the 48

remaining complaints ('LOI') is set out below and was referred to throughout the hearing.

5. The final hearing in Claims 13 to 19 took place over 15 days from 17 January to 6 February 2024.At the outset of the hearing, adjustments to be made to accommodate C's health were discussed. It was agreed that C would indicate when he felt a break may be needed. R indicated that one its witnesses, Ms Abel, may also need breaks because of her health concerns. Both requested and took breaks as needed.

6. R also informed the Tribunal that it would no longer be calling Ms Forshew who had provided and submitted a witness statement which had been exchanged. Ms Forshew no longer worked with for R and had indicated that during the last 48 hours she no longer wished to attend to give evidence. R informed the Tribunal that the decision had been made not to call her rather than apply for an order requiring her attendance. C also explained that he was unsure whether his witness Mr Khan would attend as he was abroad (he did not in fact attend). The parties understood that the Tribunal would therefore attach such weight to the written statements submitted from Ms Forshew and Mr Khan as it deemed appropriate. Mr Edge also explained that R would not be calling Mr Arora as a witness or submitting a written statement (even though allegations were made directly against him) as he was on long term compassionate leave as his wife was terminally ill.

7. Mr Edge raised two issues at the outset. Firstly, his concern that a great number of the allegations made as complaints by C were not addressed in his witness statement. Secondly, he stated that there were some factual allegations made as one type of legal complaint that had been struck out or dismissed pursuant to the orders of Regional Employment Judge Findlay, which were also made as different types of legal complaint which had not (R thought purely by omission) been struck out or dismissed. C pointed out that he had appealed the judgment of Regional Employment Judge Findlay and had also appealed the judgment in Claims 1-6. C felt that the hearing of Claims 13-19 should have been postponed pending the outcome of this appeal. R acknowledged that the appeal in Claims 1-6 was still live as it was still awaiting a decision from the Employment Appeal Tribunal (although alleging it had been brought 155 days out of time). I informed the parties that the previous postponement application had already been dealt with and refused by Regional Employment Findlay on 25 October 2023. That decision had been appealed by C and refused by a decision of His Honour Judge Tayler on 15 January 2024. As there was no change of circumstances since that original case management decision had been made, it would not be revisited. In terms of outstanding appeals, then the parties were informed that pending any decision, findings of the

Employment Tribunal in Claims 1-6 stood and were binding in so far as they were relevant to these proceedings.

8. C also asked the question at the outset as to why the same judge had been allocated to the Tribunal hearing these claims as had been allocated at the hearing of Claims 1-6. I explained that the allocation of judges and members was a matter for the Tribunal administration and the Acting Regional Employment Judge and was dependent on matters such as judicial availability and the caseload of the Tribunal more generally. I explained that this Tribunal was an entirely differently constituted Tribunal and would decide jointly as a panel of 3 with each member of the Tribunal having an equal say and input. I asked the parties whether they wished to make any application in respect of this matter and they confirmed that they did not.

9. On day 2, C sent by e mail further versions of his witness statements which be believed to be different to the ones submitted. Upon checking these were in fact the same documents that the Tribunal already had. When the Tribunal had completed its reading on Day 4 of the Tribunal, R requested that some additional documents be admitted, namely a signed version of Ms Forshew's written witness statement and copies of inter partes correspondence since the date that the bundle of this correspondence had been submitted in November 2023. R also asked that a document relating to C's delayed checkpoint (which allegation had been struck out as a complaint of harassment but not as an allegation of victimisation perhaps by oversight). C did not object and so such documents were admitted.

10. The evidence was heard on days 4 to 9 (with day 10 being a non sitting day). The parties both submitted written submissions on day 11 and then made further oral submissions. The Tribunal deliberated on days 12, 13 and 14. At the conclusion of the hearing on day 15, the Tribunal gave an oral judgment dismissing all claims and made a finding that all the complaints made were 'totally without merit'. R made a request for written reasons at the conclusion of oral judgment on 6 February 2024 and C also made a request in writing on 26 February 2024. The Tribunal's reasons are set out in this document.

<u>Documents before the Tribunal</u>

11. We had before us the following:

11.1 An agreed bundle of documents ('Bundle') in four volumes (where page numbers are referred to in this document, these are references to the printed page numbers in the Bundle) together with additional document admitted as referred to above.

11.2 R's Opening Note (with attachments);

11.3 Confidential Client Key Code;

11.4 R's Reading List;

11.5 C's reading List;

11.6 R's Cast List;

11.7 C's Cast List;

11.8 Witness Statement Bundle containing statements from the individuals listed as witnesses below;

11.9 A bundle of inter partes and Tribunal correspondence;

11.10 A remedy bundle; and

11.11 A bundle of protected acts.

12. In the remainder of this written reasons document, the Tribunal has used initials to identify the people listed below rather than their full names in the interests of brevity. Other terms used may also be defined in a similar manner throughout the document.

<u>Witnesses and other individuals</u>

13. The following people attended to give evidence on behalf of C:

13.1 C.

14. The following people attended to give evidence on behalf of R:

14.1 Ms D Abel ('DA'), Professional Development Manager – UKI Security Services C's 'Bluepages' manager from October 2018 to May 2022;

14.2 Mr B McGlone ('BM'), Regional Leader of IBM X-Force Red – CST, EMEA, C's 'Bluepages' Manager from October 2015 until September 2018 and Task Manager from October 2015 until November 2019;

14.3 Mr R Conner ('RC'), X Force Red Security Testing Manager for the UK and Ireland ("UKI") C's Task Manager from November 2019 to present

14.4 M V Lowe ('VL'), HR Partner who conducted C's disciplinary appeal

14.5 Ms C Lynch ('CL'), Global Leader of Delivery Operations, X-Force Red, Involved in allocating C to projects, based in the USA

14.6 Mr I Tyrrell ('IT'), Operations Manager for the European X Force Red team

15. The parties also admitted written statements from :

15.1 Mr M A Khan ('MK'), Security Consultant and former employee of R, on behalf of C.

15.2 Ms L Forshew (previously Turner) ('LF'), Client HR Partner for the Security Business, on behalf of R.

16. The following individuals are referred in our findings of fact and conclusions below:

16.1 Dr V Agrawal ('Dr Agrawal'), Consultant Psychiatrist who assessed C in July 2020

16.2 Mr S Arora ('SA'), Executive Partner and C&D Leader – UKI, Consulting C's second line manager in 2021 / 2022

16.3 Mr G Davies ('GD') Partner, IBM Security, DA's 'Bluepages' manager in 2020

16.4 Ms E Daugherty ('ED'), Project Manager, X Force Red Based in the USA, member of CL's team.

16.5 Ms C Edney, ('CE') LeasePlan Client Relationship Manager Not an IBM employee

16.6 Mr M Fitch ('MF') Analyst - Security Innovation and Colleague of C in the X Force Red team until September 2021

16.7 Mr A Herlands ('AH'), Andrew Associate Partner and Global Leader X-Force Red Delivery

16.8 G Lyszkowski ('GL'), Senior IT Specialist, GTS team based in Poland Worked with C on Project P

16.9 Ms S McIvor ('SM') HR Partner, Provided advice to BM & DA regarding C in 2020

16.10 Mr N Melvin ('NM'), Tester in the X Force Red Team, Colleague of C in the X Force Red team and Alleged comparator

16.11 Mr V Nikolić ('VN'), Senior Managing Consultant EU team leader for the X Force Red team, based in Serbia

16.12 Ms N O'Neill ('NON'), Personal Development Manager Cybersecurity Services UKI, C's line manager since May 2022

16.13 Ms S Paulin ('SP') HR Partner, Provided HR support in relation to C in 2020

16.14 Mr J Podzunas ('JP') Senior Manager and Hacker, X-Force Red Based in the USA

16.15 Ms S Shirley ('SS'), UK SSRC Manager C's temporary First Line Manager from February to October 2019

16.16 Ms S Skerry ('SSk'), HR Partner Provided HR support in relation to C

16.17 Ms M Storey ('MS'), Budapest COE Fleet Manager for European Major Markets

16.18 Mr L Szychowski ('LS'), IT Specialist, in the GTS Poland team. Worked with C on Project P

16.19 Mr G Taylor ('GT'), Risk Consultant, Delivery Excellence Heard C's appeal against the finding of S Grinham and investigated other grievances raised by C

16.20 Mr C Thomas ('CT'), European Technology Lead in the X-Force Red Team Worked with C on Project P

16.21 Dr Valanejad, Occupational Health assessor Produced OH report on 2 December 2022

16.22 Mr R Ward ('RW'), Security Consultant, X-Force Red, Colleague of C

16.23 Dr Weadick, Occupational Health practitioner Produced OH report on 30 November 2020

16.24 Ms A Webb ('AW'), Member of the Employee Relations team Assisted LF with C's disciplinary investigation

16.25 Ms O Woods ('OW'), Customer Relations and Quality Manager at LeasePlan Not an IBM employee

16.26 Ms A Zhou ('AZ'), Occupational Physician – Corporate Health and Safety Assisted VL with disciplinary appeal investigation

<u>The Issues</u>

17. The issues to be determined by the Tribunal were as follows:

1. TIME LIMITS

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before the date in square brackets (calculated from the relevant EC certificate) for each complaint above may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010 (‘EQA’)? The Tribunal will decide:

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

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

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

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

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

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

2. DISABILITY

2.1.6 R accepts that C was a disabled person with effect from 23 June 2020.

3. DIRECT RACE/RELIGIOUS DISCRIMINATION (EQUALITY ACT 2010 SECTION 13)

3.1 C describes his racial group as Asian and relies upon colour as his protected characteristic. He describes his religion as being of the Muslim faith.

3.2 Did R do the following things (unless otherwise specified, the allegation is of race discrimination):

3.2.1 Claim 9: remove C's car allowance in February 2021?

~~3.2.2 Claim 9: failing to promote C or award him a pay rise, C accepts that he raised these issues in his previous six claims but says that there have been 2 further instances of white colleagues being promoted since then; [Subject to deposit order]~~

3.2.3 Claim 11: delaying quality assurance of C’s reports by an average of five to 10 days. C says that it is RC who did this;

3.2.4 Claim 11: failing to sanction other colleagues [RW] who swear [and talk over C] at Friday meetings ~~[Subject to deposit order] and asking C to join these calls when they are of no benefit to him;~~

~~3.2.5 in Claim 11, Rhonda Childress blaming C in an e-mail chain for missing something which was not his responsibility (page 306/7); C believes that Charles Henderson influenced Rhonda Childress to do this;~~

~~3.2.6 Claim 12, promoting Alexander Forbes, Alexander Beck and Nick Melvin but not promoting the claimant. C relies on the three named individuals as his comparators; [Subject to deposit order]~~

3.2.7 Claim 13, RC failing to put C on projects until Ramadan in 2021, then giving him controversial projects (race/religion);

3.2.8 Claim 13, an internal client speaking to C in an unpleasant manner during Ramadan 2021 (race/religion)(page 342); [C has confirmed the name is MJH.

3.2.9 Claim 13 sending C emails after 6:00 PM; [C has confirmed this is BB]

~~3.2.10 Claim 14, "Sam"/Norma Southam discouraging C from applying for a band 8 job between 26 and 28 April 2021 (race/religion) p360; [Subject to deposit order]~~

3.2.11 Claim 19, RC complained about C missing a meeting when C had "laptop" issues, resulting in C having to attend a meeting with his new manager, NON on 8 July 2022;

3.2.12 Claim 16, C's 2nd line manager SA failing to get in touch with him after C raised a query about report submission (disability)

3.2.13 Claim 16: member of Project P Team based in Poland making C telling C he needed to request an admin account then saying he did not need it, thereby sending him on a "wild goose chase" (race discrimination). The perpetrators are said to be CT, GL and LS who were employed by R but who left to work for "[Client K]"

3.2.14 Claim 16: CL failing to tell C to whom he should send his report for "QA" (disability)

3.3 Was that less favourable treatment?

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

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

been treated.

C says he was treated worse than BM and RC regarding the car allowance, ~~and Nick Melvin and one other person in respect of promotion (claim 9). C has been directed to provide information about the name of the other person (now provided, Alex Forbes and Alexander Beck). In relation to claim 14, Band 8 job, C mentioned someone called "Greg" (Davies?);~~ claim 19, C compares his treatment to RC's treatment of NM when he missed a meeting (p406)

3.4 If so, was it because of race?

3.5 Did R's treatment amount to a detriment?

REASONABLE ADJUSTMENTS (EQUALITY ACT 2010 SECTIONS 20 & 21)

4.1 Did R know or could it reasonably have been expected to know that C had the disability? From what date?

4.2 A "PCP" is a provision, criterion or practice. Did R have the following PCPs:

4.2.1 Claim 7 : not telling C what meetings were about in advance;

4.2.2 Claim 7: expecting C to work "usual hours"

4.2.3 Claim 17: RC repeatedly questioning C about why he needed access to a TOOL license on or about 20 August 2021

~~4.2.4 Claim 15: Making Cwork with Martin Mitchell and George Bucklow-Hebbard [Subject to deposit order]~~

4.2.5 Claim 16: Sending C's reports to BM and RC for "QA" (Quality Assurance)

4.3 Did the PCPs put C at a substantial disadvantage compared to someone without C's disability, in that this exacerbates his anxiety and depression?

4.4 Did R know or could it reasonably have been expected to know that C was likely to be placed at the disadvantage?

4.5 What steps could have been taken to avoid the disadvantage? C suggests:

4.5.1 claim 7, 4.2.1 informing C of the reason for meetings in advance

4.5.2 claim 7, 4.2.2 refusing to allow C to work the hours requested (page 256);

4.5.3 claim 15, 4.2.3, not repeatedly questioning C as to why he needed the license;

~~4.5.4 Claim 15, not making Cwork with George Bucklow-Hebbard and Martin Mitchell; [Subject to deposit order]~~

4.5.5 Claim 16: Sending C's reports overseas for QA, not to BM and RC

4.6 Was it reasonable for R to have to take those steps and when?

4.7 Did R fail to take those steps?

HARASSMENT RELATED TO DISABILITY /RACE (EQUALITY ACT 2010 SECTION 26)

5.1 Did R do the following things (the following allegations are of disability related harassment unless specified otherwise):

5.1.1 Claim 7, DA, using a mocking tone towards C;

5.1.2 Claim 7, DA, refusing to allow C to work different hours during the day and contradicting herself as to which I was were the "usual hours";

~~5.1.3 Claim 7, page 256, asking C to join a call first to question him and then giving others credit for his ideas [note: C accepted that he may have covered this in claims one to six];~~

~~5.1.4 Claim 7, page 257, giving C" the silent treatment and playing mind games" with him, and generally delaying responses to his queries [note: C accepted that he may have raised this in his first six claims];~~

~~5.1.5 Claim 8, repeatedly delaying the award to C of a mentor badge; C accepts that he raised this in his first six claims, but says that he continued to pursue the issue in several calls in May July and August to September 2020. he alleges that Brian McGlone and Delia Abel where responsible for delaying the award of the badge and hence affecting his career progression.~~

~~5.1.6 Claim 8, page 218, continuing to play mind games and giving C silent treatment;~~

~~5.1.7 Claim 8, page 219, during and before August 2020, Delia Abel not taking the claimant's requests for a checkpoint meeting seriously and delaying it;~~

~~5.1.8 Claim 8, in September 2020, Delia Abel failing to invite Sarah Shirley to a checkpoint meeting~~

5.1.9 Claim 9, DA removing C's car allowance;

5.1.10 Claim 10 R removing C from certain "slack channels";

5.1.11 Claim 10, R delaying getting C's 2021 checkpoint for submission to his up line manager; [Subject to deposit order]

5.1.12 Claim 10, failing to send C notification that his application for an internal competition, which he had sent on the 4th of February 2021, had been received until after the competition had closed (notified on the 11th of February 2021 when the competition closed on the 8th). C says that this was a weekly competition on R's intranet re tickets to Wimbledon. C does not know the names of those responsible;

~~5.1.13 Claim 11 calling Cto meetings with people he has complained about and when the meetings are of no benefit to him (race);~~

~~5.1.14 Claim 11, Rhonda Childress (in an e-mail chain) blaming C for missing something (disability and race) - p306/7;~~

~~5.1.15 Claim 12, Alex Montaire including Scott Brink and Daniel Pagan on an e-mail chain in order to humiliate C by suggesting there was "no issue" when C said there was, and when the true situation was that Alex Montaire simply could not replicate the issue (claimant says this is racial and religious harassment);~~

~~5.1.16 Claim 12, Delia Abel continuing to delay the issue of the claimant's mentoring badge (page 324)- race/religion;~~

~~5.1.17 Claim 12, on the 17th of March 2021, Delia Abel calling C"out of the blue" late in the day;~~

~~5.1.18 Claim 13, page 343, Delia Abel contacting Cat 12.01 saying that she had him down for a meeting at 12; And Delia Abel complaining that she had been waiting for C to join the meeting for 25 minutes, on the 23rd March 2021 (race and disability);~~

5.1.19 Claim 13, "mind games" C says this refers to telling him he is on a project and then telling him that he is not on the project – C says that this refers to BM and RC, in around March or April 2021;

~~5.1.20 Claim 14, Delia Abel trying to obtain the claimant's medical records then pretending Medigold had asked for them;~~

5.1.21 Claim 14, on 28 April 2021, DA telephoning C saying she was concerned about his health but then mentioning things he had not done, causing him stress and anxiety;

5.1.22 Claim 17, after C sent a report about a project he worked on between 13 and 16 August 2021, RC and BM failing to reply back to him/run quality assurance check on his report;

5.1.23 Claim 17, on or about 20 August 2021, RC repeatedly questioning why C required a TOOL license for the job;

5.1.24 Claim 17, MF re "Project B" - MF questioning C when C said there were high risk issues and when MF said he "hadn't found much" and then claiming credit for C's work (C accepts this partially replicates complaints from claims 1-6);

5.1.25 Claim 17, p376, RC trying to reduce the number of days C had worked;

5.1.26 Claim 18, giving C a written warning following his interaction with a car company regarding his company car (this relates to SA) p392;

5.1.27 Claim 18, SA listening to a recording of C's call with the car company without seeking permission;

5.1.28 Claim 18, VL deliberately delaying investigation of C's appeal against his warning.

~~5.1.29 Claim 15, making C work with Martin Mitchell and George Bucklow Hebbard – disability and race/religion or belief [Subject to deposit order]~~

5.1.30 Claim 16 Moving C from Project S to Project P, where C had to work with staff based in Poland, after there was racial abuse of the England Soccer Team by Polish fans. C believes that BM or RC was responsible for this (racial harassment)

5.1.31 Claim 16: As 3.2.13, race

5.2

5.3 If so, was that unwanted conduct?

5.4 Did it relate to disability?

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

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

6. VICIMISATION (EQUALITY ACT 2010 SECTION 27)

6.1 Did C do a protected act as follows:

6.1.1 bring previous claims about various types of discrimination, and the grievances mentioned in claims 1 -6?

6.2 Did R do the following things:

6.2.1 claim 7 : 26th of November 2020, DA refusing to allow C to work different hours;

~~6.2.2 claim 8 : see paragraphs 5.1.5 to 5.1.8 above;~~

6.2.3 claim 9: removing C's car allowance (C says that it was DA who made this decision);

6.2.4 claim 10: 5.1.10-5.1.12 and delaying responses to C's holiday requests

~~6.2.5 claim 12, 5.1.17;~~

~~6.2.6 Claim 12, page 325, Delia Abel telling C that his promotion is not guaranteed and ignoring his requests for promotion; [Subject to deposit order]~~

~~6.2.7 Claim 12 R promoting Nick Melvin, Alexander Beck and Alexander Forbes [Subject to deposit order]~~

~~6.2.8 Claim 13, 5.1.18 above;~~

6.2.9 Claim 14, 5.1.20 and 5.1.21 above;

6.2.10 Claim 17, 5.1.22;

6.2.11 Claim 17, 5.1.23; 5.1.24; 5.1.25;

6.2.12 Claim 17, in or about August 2021, BM sending out the report on Project A without telling C it was ready to go out, then telling C to "document his concerns" without explaining that process to him;

6.2.13 Claim 17, MF and RC expecting C to write the whole report on "Project B";

6.2.14 Claim 18, 5.1.26; 5.1.27 ; 5.1.28;

~~6.2.15 Claim 15, making C work with Martin Mitchell and George Bucklow Hebbard [Subject to deposit order]~~

6.2.16 Claim 16, CL failing to tell C where to send his report for QA purposes

6.3 By doing so, did it subject C to detriment?

6.4 If so, was it because C did a protected act?

6.5 Was it because R believed C had done, or might do, a protected act?

7. REMEDY FOR DISCRIMINATION OR VICTIMISATION

7.1 Should the Tribunal make a recommendation that R take steps to reduce any adverse effect on C? What should it recommend?

7.2 What financial losses has the discrimination caused C?

7.3 Has C taken reasonable steps to replace lost earnings, for example by looking for another job?

7.4 If not, for what period of loss should C be compensated?

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

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

~~7.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?~~

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

7.9 Did R or C unreasonably fail to comply with it ?

7.10 If so is it just and equitable to increase or decrease any award payable to C?

7.11 By what proportion, up to 25%?

7.12 Should interest be awarded? How much?

Findings of Fact

Credibility

18. The issue of credibility had been raised in relation to findings made in Claims 1-6 (in particular that C had been an unreliable witness who had on occasion fabricated evidence). This Tribunal also had serious concerns as to the reliability of the evidence that C provided and made the following observations:

18.1 On some of the key allegations he makes, C failed to adduce any evidence at all to support his case. In particular in relation to his complaints of failure to make reasonable adjustments, C provides no evidence at all as to what disadvantage he is said to have been put to by the PCPs he relies upon. He is unable to give any account of key conversations said to amount to direct discrimination and harassment (such as the conversation said to have occurred between him and MJH which is the allegation at paragraph 3.2.8 of the LOI) and on the harassment allegation in relation to an internal

competition (paragraph 5.1.12 of the LOI), C was unable to tell us what competition he was complaining about at all meaning that this allegation simply could not be supported even with the most basic of evidence.

18.2 C failed to challenge the evidence given by many of R's witnesses. We note that C had told us that on the last day of cross examining R's witnesses he was unable to do this as well as he had hoped due to personal issues that had arisen over the weekend. He was unwilling to provide further information and therefore we were unable to adequately assess the impact whatever these matters might have had. In any event, even before this last day, there were significant parts of the evidence of R's witnesses rebutting the complaints made that went unchallenged by C.

18.3 C did on occasion make statements in evidence, when cross examining witnesses and in submissions that were patently incorrect and continued to stand by such assertions even when the clear errors in what were being said were pointed out to him. C's assertion that the report of Dr Weadick had stated that R was "*in breach of the Equality Act 2010*" when as pointed out to him, on any reading of what is set out in that report it says no such thing. In addition, the assertion made on several occasions that he had been informed by R's HR team that they would no longer consider any complaint he was making, which again was clearly not correct.

18.4 We found on occasion C had fabricated evidence and had retrospectively created allegations about issues that at the time did not concern him but when submitting his claim, he attached greater significance to or attributed a discriminatory motive. The allegations in relation to Project P at paragraphs 3.2.13, 5.1.30 and 5.1.31 of the LOI; the TOOL license issue (paragraphs 4.2.3, 5.1.23 and 6.2.11 of the LOI) and allocation of projects during Ramadan (paragraph 3.2.7) are examples of this.

18.5 C acknowledged during cross examination that some of the allegations of discrimination and harassment he was making could possibly have been a result of his symptoms of paranoia. The Tribunal has sympathy with the health problems C has and seems still to be suffering from, but such a statement clearly affects the weight we can place on C's recollection of events and his perception as to the reason why individuals behaved as they did.

18.6 C has accused numerous different individuals within R (at least 34 on R's count), its suppliers and clients of exhibiting racial bias towards him. He has accused R's legal representatives, previous Tribunal, REJ Findlay and the Tribunal administration of exhibiting racial bias and abuse of power. The sheer number of allegations made against such a large number of

unconnected individuals must cast some doubt on C's ability to provide an accurate account of what is taking place.

18.7 C's conduct in cross examining DA became oppressive and hectoring despite him being made aware of her health concerns in advance. He made accusations to this witness that were unrelated to the issues in dispute in particular that the witness had threatened him, that she wanted him to take his own life and that she was trying to destroy his career. It is true that C had been asked robust questions by Mr Edge related to his own credibility but given the nature of the very serious allegations C makes and the large number of claims that he is pursuing in this Tribunal, R must be entitled to challenge the veracity of such allegations. Even allowing for robust cross examination, this line of questioning by C of DA was as submitted by Mr Edge unacceptable. We concluded (and he admitted his intention to do this during cross examination) that C behaved in this way as he wanted to effectively punish R's witnesses for him having been subject to such cross examination, rather than to serve any probative effect.

19. On the other hand, R's witnesses gave evidence that was detailed, measured and made very clear reference to contemporaneous documents. It was internally consistent and broadly consistent with the accounts of other witnesses and notes and documents recording what took place at the time the events occurred. So much of what took place is recorded in e mails and slack messages that the facts of very many of the events alleged to be discrimination were not in dispute but rather it was the interpretation of what had taken place and the motives of actions taken that were being said to be tainted by discrimination. Whilst it is rare for express evidence of a discriminatory motive to ever be available, the very many contemporaneous documents very often provided clear explanations as to why certain things took place which was wholly consistent with the explanations given by R's witnesses in their oral evidence.

20. To determine the issues, it was not necessary to make findings on all the matters heard in evidence. We have made findings though not only on allegations made as specific discrimination complaints but on other relevant matters raised as background. These findings may have been relevant to drawing inferences and conclusions. We made the following findings of fact on the balance of probability:

20.1 C describes his racial group as Asian and relies upon colour as his protected characteristic. He describes his religion as being of the Muslim Faith. In Claims 1-6 it was determined that C was disabled person for the purposes of section 6 EQA because of Anxiety and

Depression from 23 June 2020 and that R was aware of this disability from the same date.

20.2 R is part of a wider global corporate group and provides IT, technology, hardware, software, new business solutions and services. We took note of the findings of fact about the business structure and culture of R made at paragraphs 9.1 to 9.7 (page 281-283) and 9.13 (page 285) of the Claims 1-6 reasons.

C's employment and relevant policies

20.3 C started work on 12 October 2015 with R as a security consultant in its Cyber Security and Response team ('CSAR') team (later named X-Force Red). He works as a penetration ('pen') tester which involves searching for security risks or holes within a client's IT networks, applications, hardware and systems looking at how hackers could exploit any vulnerabilities. He was and remains employed at Band 7 in R's grading structure. C's contract of employment comprising of an offer letter and addendum was shown at pages 672-682. C made references on very many occasions during his evidence that he was promised by BM during his interview that he would be provided with the benefit of a company car. There was no reference to this benefit in his contract of employment and BM denied that this was promised to him. We find that the possibility of C participating in one of R's car schemes (more of which below) was likely to have been discussed during C's interview although we find no offer of the benefit of a company car was made. In any event, C signed to confirm his acceptance of the terms set out in the contract of employment (with no entitlement to a company car) on 28 September 2015 (page 680) and so no contractual benefit was ever agreed in relation to a company car.

20.4 We were referred to various policies, procedures and guidance materials of relevance to the issues in dispute throughout the hearing, in particular with reference to R's car schemes. This included the following:

- Essential Car User ('ECU') Policy (pages 578-581)
- ECU allowance Ts and Cs dated 5 December 2017 (page 589)
- You* Cars FAQs dated 8 February 2018 (pages 590-9)
- Current WS Pages – Main Car/Allowance Policy (pages 611.6)
- Disciplinary Policy (pages 602-6)
- Harassment, bullying and other inappropriate behaviour section of

the Employee Handbook (pages 608-10)

- Business Conduct Guidelines (pages 617-664)

20.5 C worked in R's X Force Red Team and again we take note of paragraphs 9.9 to 9.11 of the Claims 1-6 reasons (pages 284-5) for a summary of the work done by X Force Red and C. Paragraph 9.12 of the Claims 1-6 reasons summarises the Quality Assurance ('QA') process that takes place on reports produced by pen testers such as C. To summarise, once testing is complete a pen tester will write a report either individually or jointly with other pen testers allocated to the project. This is sent to a (usually) more senior member of the team who will review it for accuracy, consistency, to ensure it contains evidence supporting findings and a narrative of what was done and for formatting, typos etc. The QA manager usually sends the report back to the tester after they have done this with comments and suggested amendments, it may go back and forth between the pen tester and the QA manager several times. When the report is completed to the satisfaction of the QA manager it is sent to the client and this can be done by the pen tester themselves or the QA manager. Different clients have different processes for issuing of reports which can include sending by e mail or uploading to secure online portals. A report completed by a particular pen tester or group of pen testers is sent from the team as a whole and whilst the names of pen testers and who carried out QA may be shown, it is not the property or authored by any individual.

20.6 C had a challenging role and at paragraphs 9.20 to 9.21 of the Claims 1-6 reasons (pages 288-289) are summarised some of the issues that arose as a result of C's stress in 2016. C was absent from work for stress related reasons for short periods of time during 2017 and 2018 as well.

Previous grievances and protected acts

20.7 On 27 February 2017 C raised a lengthy and detailed grievance complaining about a number of matters arising in the workplace (including complaints against BM). The Claims 1-6 reasons paragraphs 9.27 to 9.29 sets out full details of this grievance (pages 291-292). The Tribunal in Claims 1-6 concluded that this was a protected act under section 27 (2) EQA (see paragraph 90 Claims 1-6 reasons at page 362). SG was appointed to investigate this grievance on 19 May 2017 (paragraph 9.31 Claims 1-6 reasons at page 292). Further complaints were added to the grievance as it was being investigated (paragraph 9.36 Claims 1-6 reasons at page 294). C mailed GT on 14 May 2018 chasing for the outcome of his grievance and making further complaints about incidents occurring between January and April 2018 (paragraph

9.43 Claims 1-6 reasons at page 296). This was also found to be a protected act (paragraph 92 Claims 1-6 reasons at page 363). C sent a further e mail on 29 May 2018 in relation to this grievance which was also found to be a protected act (paragraph 93 Claims 1-6 reasons at page 363). The outcome of this grievance was communicated to C on 4 June 2018. A number of the complaints made were not upheld but 2 complaints about lack of support were found to be partially valid and recommendations made. The Claims 1-6 judgment noted at paragraph 9.47 (page 297) that this outcome was "*in general a measured and balanced response to the claimant's many complaints and offered practical solutions to try and resolve issues.*" A second grievance was raised on 3 April 2018 but was not relied on as a protected act.

20.8 C appealed against the grievance on 4 June 2018 and this appeal was found to be protected act (paragraph 94 Claims 1-6 reasons at page 363). The investigation of this appeal was carried out by GT. C added a number of additional items to this grievance and this included complaints about BM (paragraph 9.55 Claims 1-6 reasons at page 301). On 26 September 2018 DA was allocated by GD to become C's Blue Pages Managers to address working difficulties between C and BM at the time.

20.9 C raised a further grievance on 1 October 2018 complaining about someone he had worked with on a project. The Tribunal in Claims 1-6 found that this was not a protected act (paragraph 99 Claims 1-6 reasons at page 363-4). On 16 January 2019 C made a further complaint to GT in which he complained about a senior manager, Mr P Briscoe and about DA's actions in a meeting that had taken place the previous day. The Tribunal in Claims 1-6 found that this was a protected act (paragraph 87 Claims 1-6 reasons at page 362). He made further complaints about DA to GD on 18 February 2019 and again this was found to be a protected act (paragraph 97 Claims 1-6 reasons at page 363). In February 2019, GD appointed SS as C's temporary Blue Pages manager, pending the outcome of his grievance against DA. C raised a further grievance on 19 March 2019 which was found not to be a protected act (see paragraph 89 Claims 1-6 reasons at page 362). In April 2019 RC started to act as Functional Line Manager for C. A further protected act was done by C on 3 June 2019 when he appealed against the findings of an earlier grievance (paragraph 100 Claims 1-6 reasons at page 364). The outcome of the grievance raised by C in January 2019 (complaining about DA) was provided to him on 11 July 2019 by GS. C appealed against this grievance on 19 July 2019 which was also held to be a protected act as per paragraph 101 Claims 1-6 reasons at page 364. The Tribunal noted at paragraph 9.88 of Claims 1-6 reasons (page 313) that C was at this time genuinely of the belief that he was

being discriminated against in almost every interaction he has. C appealed against the outcome of an earlier grievance appeal on 25 July 2019, and this was found not to be a protected act as it was made in bad faith (see paragraph 102 Claims 1-6 reasons at page 364). Further protected acts were carried out by C when he raised a grievance on 14 August 2019 and 18 September 2019 (see paragraphs 103-4 Claims 1-6 reasons at page 364).

Investigation into C's conduct and disciplinary sanction

20.10 In August 2019, SSk began investigating issues around C's conduct arising from complaints received about his interaction with other employees. The investigations concluded that the clamant appeared to be making unfounded allegations of racial discrimination which was causing an adverse impact on the working relationship and in possible breach of R's Business Conduct Guidelines. C attended a disciplinary hearing on 31 October 2019 chaired by GD and on 4 November 2019 was issued with a first written warning (see paragraphs 9.100-102 Claims 1-6 reasons at pages 316-8). Mr Edge pointed out that in its findings of fact on this issue the Tribunal found that C had told GD during this hearing that he was on suicide watch by his doctor but had admitted in cross examination that this was not the case at all (see paragraph 9.102 Claims 1-6 reasons at page 317). On 16 October 2019 DA resumed her role as C's Blue Pages manager following the conclusion of the grievance raised against her.

Absence from 14 October 2019 until 30 April 2020

20.11 C was off sick from 14 October to 28 October 2019, returned to work for 7 working days and then remained off sick from 7 November 2019 until 30 April 2020. The reasons provided for his absence in seven fitness for work statements from his GP were "*stress related problem*", with no further details (pages 315 and 318). Just prior to returning on 8 April 2020 DA sent R's 'standard' absence management letter (usually sent during the 26th week of absence) which mentioned a referral to occupation health ('OH') and asked him to provide consent by completing a form linked in that letter (page 726A to 726D). This letter also mentioned return to work planning and that after the OH report was received, that a meeting would be arranged. C told DA the day after the letter was sent that he was returning to work on 1 May 2020. C, DA and SP had a call on 16 April 2020 at 12pm for about an hour. C kept his camera off during the call and DA reported he seemed "*withdrawn*". DA suggested a phased return to C with C using accrued holiday so that he worked 3 days a week for a period to adjust to returning to work. C said he would discuss with his GP. DA e mailed C after this call (page 726B). She told us that she had intended to send this e mail before the

call but had forgotten to send it. C replied with details of his annual leave (page 726).

20.12 At a further call between C, DA and SP on 22 April 2020, C told DA he had not discussed it with his GP, but it was agreed that he would work Tuesday to Thursday each week, taking Monday and Friday as annual leave for the first 12 weeks after return. There was a further call between the 3 on 1 May 2020 (C's first day at work) and DA e mailed after that call with details of a return to work (RTW') plan with C confirming he agreed with this (page 726F). During May 2020 DA and C had weekly 30 minute calls to discuss his return to work. C did not during these calls raise that he had any difficulties because he was not being informed of meetings in advance; that he found the QA process difficult or that the expectation that he would return to his usual hours after 6 July 2020 was a problem.

Discussions re working hours June-August 2020

20.13 During his phased return to work period, as well as the working pattern set out above, C had been working during the day between the hours of 8am and 4pm (which was outside the standard working hours of 9am to 5:30pm). In June 2020, C asked BM whether he could continue to work between 8am and 4pm after his phased return to work ended but did not mention anything about this assisting with his health. BM considered this request and on 30 June 2020 when responding to a holiday request from C, he confirmed to C (copying SP and DA) that carrying on with this working pattern would not be possible (page 796-7). He stated:

"*Whilst I understand during your return to work plan you have been working non-core XFR hrs (8am - 4pm). I need to remind you that the operating model hrs for XFR is 9am - 5:30pm, I would therefore appreciate from w/c 6th July that XFR operating model hrs are followed. Starting at 8am, when all of XFR management, XFR team and clients don't start till 9am is just not effective for your own/business utilisation target. Happy discuss further it needed.*"

BM explained that because of the collaborative nature of the work done by the XFR team, it requires testers on projects to talk to each other constantly during tests on live systems to check whether other testers are experiencing similar results as they carry out the tests. He explained that the timing of testing is also strictly agreed in advance with clients so that any infiltration of systems is part of the test and not a hacker accessing the system. C did not raise this request further with BM.

20.14 DA followed up this discussion during a 1:1 around 5 August 2020 and she e mailed C a copy of R's flexible working policy. At page 778 we saw C's response to an e mail sent by DA and headed 'Flexible Working Information' in which he responded "*Great. I will look over this and discuss further*". No flexible working request was submitted, and this appears to have been the end of the discussions at that time.

Dr Agrawal appointment

20.15 On 1 July 2020, C attended an appointment with Dr Agrawal at his own request arranged via R's private health insurance supplier, Nuffield Health. Dr Agrawal produced a report after this consultation which was shown at pages 728-731. Dr Agrawal diagnosed C as having "*Mixed anxiety and depressive disorder with possible overvalued ideas*". It recommended that C start anti-depressants and noted that C was quite sure he did not want this but would think about it. It recorded that C had no imminent suicidal risk, self harm risk or risk of harm to others. This report recorded a number of matters reported by C as being problems at work including racism and mentions complaints about not getting credit for his work, others passing off his work as their own and not getting promoted. It also recorded C reporting symptoms of paranoia, more so at work. This report was not shared with anyone at R at this time.

Issues 3.2.1; 5.1.9 and 6.2.3 – November 2020 - Removal of car allowance

20.16 C had been a member of R's ECU Scheme since 2016. He was put forward to participate in this scheme by BM on 4 January 2016 (page 682B-C) on the basis that his role required him to travel around the country to complete testing. At pages 682F-G we saw a letter sent to C dated 9 February 2016 confirming that he was eligible to participate. This confirmed that at that time eligibility to participate was based on an employee's need to travel more than 7,000 business miles per year (page 682G) with additional criteria being applicable listed as (1) regular call outs from home; (2) regular need for a car at night; or (3) regular need to carry goods. This also confirmed that HR reviewed eligibility for the ECU scheme annually. It also noted:

"Please note that participation in the Essential Car User Scheme and the provision of a company car under the Essential Car User Scheme is at the absolute discretion of IBM and does not form part of your terms and conditions of employment"

The ECU scheme provided either for the provision of a particular car, or in the alternative for contributions to be made by R to a car lease for a car of the employee's choice via a lease entered into by the employee

('ECU Choice Car'). C chose the ECU Choice Car option and at page 682C we saw a form completed by C at the time which included the following statement:

"*IBM will provide an ECU payment paid into your benefit fund for the duration of your ECU eligibility. If you opt for an ECU CHOICEcar and become ineligible for the ECU scheme, the IBM payment will cease and you must retain the car and continue to pay the FULL PAYMENT yourself to end of lease"*

20.17 We also heard about other car benefit schemes operated by R. For those employees of R at band 8 and above, there was an entitlement to participate in the E-Car Scheme as part of the contractual remuneration package upon being promoted to Band 8. This is not linked to any business need but is rather a benefit of employment. BM and RC both became entitled to participate in this E-Car Scheme upon being promoted to Band B and retained this benefit on subsequent promotions (BM being band 10 and RC being Band 9).

Changes to ECU Scheme in 2018

20.18 In January 2018 the criteria for the ECU scheme changed and it became a matter of manager discretion as to whether there was a business need for a car, removing the requirement to drive 7000 miles business miles (page 683-5). At page 687, we saw the announcement of this change. However, the existing criteria as to whether an employee's job involved regular call outs from home, use of car at night or need to carry goods remained. In late 2018, the lease that C had entered for an ECU Choice Car was nearing its two year term and he started discussions about a new lease car. On 5 October 2018, C e mailed BM asking him to provide his approval to C's continued participation in the ECU Scheme (page 704). BM was content that C still qualified for the ECU scheme as he still at this time needed to travel from home to other sites (including regularly to Portsmouth). On 16 October 2018 BM e mailed C with the terms and conditions of the ECU scheme asking him to confirm he accepted the terms and conditions so that he could implement this (page 703). BM's e mail included an extract from R's fleet website setting out the terms and conditions of the ECU Scheme including that R could update, amend or remove the policy at its discretion any time and that any benefits were discretionary and could be revoked at any time. C replied that he agreed (pages 702). BM e mailed his approval to Fleet Management (who operated the ECU scheme) on the same date (copying C and DA) (page 709). This confirmed:

"As the responsible Manager I will review the ongoing business need for the ECU status. – [DA] on copy will be his manager shortly and will be reviewing this.

I have discussed the T's and C's with [C] n the below link and they have confirmed they will adhere to these".

20.19 On receipt of this approval, C received an e mail from Fleet Management confirming that as the ECU Scheme had changed that C could either choose the standard ECU assigned car (Skoda Octavia) or alternatively receive a cash allowance of £266 per month which could either be used towards a self funded car through the ECU scheme or use to arrange a private lease themselves (page 708). C queried this with MS through a series of messages sent on 16 October 2018 where he complained that the "benefit" had been reduced and he felt the arrangements under the current scheme should continue. MS confirmed that this was the new scheme and there were no exceptions going on to state:

"I would also confirm that the ECU scheme is not a benefit as it is a tool for the job"

And then suggested that C take up any concerns he had regarding contractual issues with HR.

20.20 BM emailed DA confirming that he had discussed this with C on 18 October 2018 (page 710) stating that C *"understands the ECU thing now".*

20.21 C e mailed HR on 16 October 2018 raising issues about the ECU scheme and stating that his view was that a benefit had been removed that he had negotiated from the start of his employment (page 718). N Hamza, a member of the HR team responded on 24 October notifying that changes had been made to the scheme and suggested he contact the Fleet Management department (page 717-8). C sent a further e mail challenging this and stating that he felt that he did not expect to be on the same benefits now as when he started at R and was:

"*expecting that there would be increases in salary and increase in allowances*" and that had he known he would still be on the same scheme he would have "*left the company years ago*". C then contacted Fleet Management on 15 November 2018 raising the issue (page 716) and stating that he felt he should not be on the same car scheme and "*surely there would be an increase considering the amount of time I have been at [R].*" A response was provided on 20 November stating that following a policy change in January 2018 that a new vehicle could

be ordered until 31 December but that if not, then a cash allowance would be provided, and the current vehicle collected (Page 712).

20.22 C had discussions with MS and DA after this (see page 714). On 4 December 2018, DA e mailed C setting out a summary of the current provisions of the ECU scheme (pages 712-4). During a call later that day MS suggested to C that he lease a cheaper standard car (the Skoda) than the one he had chosen (Mercedes) because if he ever lost ECU eligibility in the future that he could then return the Skoda, whereas he would still have to pay for the Mercedes without the contribution. C decided he wished to carry on with the car of his choice. DA e mailed C after the call with MS and in this she stated:

"Moving forward just as a reminder that I will regularly review with you the ongoing need for ECU status as per the ECU car scheme policy."

Removal of ECU

20.23 During 2019, C was spending less time travelling to customer sites and worked remotely on many projects as many clients at this time operated from cloud based systems. From March 2020 with the onset of the Covid 19 pandemic, the need for business travel stopped almost completely and C, alongside other testers, was no longer required to travel to different sites to carry out his work due to the further increased use of cloud based systems. SP suggested to DA around this time that she review whether C still needed to be included in the ECU scheme (C was the only person reporting to her in the ECU scheme and the only member of the X Force red in the ECU scheme). This was delayed during C's sick leave, but DA looked at the position again in August 2020. She decided that there was no business need for C to be in the ECU scheme having considered the rules in place at the time, that C was no longer required to carry out call outs from home, use the car at night or carry goods. DA discussed this with MS and SP on 13 August 2020 (see invite for meeting at page 743) who agreed with her conclusion about C's eligibility. She e mailed MS after this meeting sending her the e mails where C had accepted the T&Cs in October 2018 (referred to above) and MS replied stating that these covered the allowance only and the terms regarding the car were on a separate page that C would have had to agree to at the time the car was ordered (page744-5). MS also provided details about the current lease end date (6 September 2022) for C's car and the monthly cost he was paying(£572.27).

20.24 DA spoke to GD about this on or around 29 October 2020 and he approved the decision of DA to give C 3 months notice to end of his inclusion in the ECU scheme. DA e mailed SP and MS on 29 October

confirming this decision and GD's support (page 761). DA e mailed GD to ask for written approval on 3 November 2020 stating:

"As blue pages managers we should review within our teams those recipients of the Essential Car User benefit at the end of each year, to ensure criteria is still met.

[C] is the only recipient within my teams of an ECU benefit. I have also checked with XFR Regional Leader & XFR team have no recipients of an ECU benefit.

Employee had been on sickness absence Q4 2019 to 02 2020. Employees return to work has been in line with a rehabilitation plan (reduced hours, building up). The ECU benefit now needs to be addressed by the business. The employee is no longer eligible for Essential Car User benefit (no longer meets the criteria) and therefore we would be seeking to give 3 months notice on the benefit, in line with the policy. The Ts&Cs the employee signed & confirmed they understood. will require employee to personally fund the remaining lease. (£572.27 per month until 6 Sept 2022).

I have taken guidance from the C&C HRP & Fleet Management in relation to next steps but would first like to gain your business management support further to our recent conversation & before I proceed with the ECU termination notice with the employee."

20.25 GD provided his written approval for the decision on the same date (page 768). DA arranged for a call to discuss this with C and when C suggested this take place via a slack chat, she said that a written conversation was not appropriate (page 770). The call took place on 5 November 2020 with DA communicating her decision. C seemed to understand the call and did not give any indication of being shocked or upset. DA said she also gave C some positive feedback on his performance that she had received (forwarding the screenshot of this to C later (page 790) and congratulating him). She e mailed C later that day sending him notice that his participation in the ECU scheme would end on 5 February 2021 (when the monthly payment he had been receiving of £425 would cease) and that he had to retain the car and continue to make the payments which would take place via salary sacrifice (page 776).

20.26 C complained to DA via a slack message sent on 12 November 2020 about this decision stating that he would have not taken this car if he had known this would happen and would not be unable to afford the increased payments. He also alleged that when he joined, he had asked for a company car as part of his package and felt that this had

now been "*taken away*". DA responded by e mail the same day stating that it was part of the terms and conditions that the car was retained, and payments continued even if the ECU scheme was withdrawn. She also stated:

"Participation in the Essential Car User Scheme and the provision of a company car under the Essential Car User Scheme is at the absolute discretion of IBM and does not form part of an employees terms and conditions of employment."

20.27 When it was put to C during cross examination that his removal from the ECU scheme was because he was no longer eligible and that this had nothing to do with his race or disability, C pointed out that as this was done after he had complained about DA (which he agreed was the complaint made on 16 January 2019) and shortly after he returned from sick leave that this was why he thought it was. He agreed there was no document in the Bundle that showed any link to the earlier grievance.

Issues 4.2.2; 4.5.2; 5.1.2 and 6.2.1 - 26 November 2020 Claim 7, DA, refusing to allow C to work different hours during the day and contradicting herself as to which were the "usual hours";

20.28 On 5 November 2020, at one of the weekly meetings between C and DA, the issue of flexible working was discussed. Following that meeting DA forwarded again her earlier e mail of 6 August 2020 where she sent him a copy of R's flexible working (page 778). In this e mail she stated that if C had any questions, he should let her know. C did not respond to this e mail.

20.29 At around this time, a number of issues were arising in relation to C and at page 781 BM sent 3 lengthy e mails to SM raising concerns about a number of C's interactions with colleagues (pages 781-790). These were that: firstly C appeared to be refusing to include a finding carried out by a colleague called Tom in his report (pages 781-4); C had been adding passwords to documents that RC needed to access for QA which preventing him accessing (pages 787a to 788) and that he was not co-operating with another colleague called Venkat (pages 788-9). A call took place and on 24 November 2024, SM sent an e mail with advice (page 791). This recommended scheduling a 1:1 to discuss issues arising and generally his return to work and that DA should also continue to work on this. This e mail noted that an OH referral had been made regarding possible adjustments and that DA had already provided C with a link to R's flexible working information as C had reported he was considering reduced hours. BM said he was surprised that the advice from HR was not to commence a disciplinary investigation as he

felt that the matters he had raised were serious and that C's conduct had been poor, but nonetheless he accepted this recommendation.

20.30 C was sent a calendar invite by DA to join a meeting with her on 26 November 2020 at 2:30 pm with the heading Monthly 121 Catch up which included a detailed agenda about the matters she wanted to discuss (page 792). C joined this call by webex (page 793). C made a request to work different hours during the meeting. He told us that this was made because at the time he was working on a project based in the USA and so these hours would have coincided with the time zone for the people he was interacting with. When asked specifically about this, he said he was making this request on a temporary basis only to coincide with this project. DA told us she understood C to be making a request for a permanent change to his hours. We accept that C may have been making this request related to a current project, but he did not explain this to DA at the time. He agreed in cross examination that when the request was made, he did not mention that the reason he was requesting this change in hours was because of or related to his disability.

20.31 Following the meeting on that same evening DA sent an e mail to C summarising discussions (page 794-5). This included a note about the discussion around various flexible working arrangements. DA set out that having reviewed the documentation sent, C would not be pursuing a request because of the financial impact (noting that C had also mentioned the forthcoming withdrawal of ECU allowance). DA's email went on to note that C:

"*raised a question on could he request to work outside of XFR teams core hours operating model moving forward (late morning start/working in the evening*)".

The e mail recorded that she

"*advised that individualized non standard working arrangements is not an IBM offering*"

noting that in discussions that took place in June 2020 involving BM had had advised "*on the core hours XFR team operating model & rationale*". The e mail noted that DA would check with BM if anything had changed.

20.32 DA sent a further e mail to C that same evening (page 796-7) and stated that she had double checked with BM and that he had "*made it clear that the core hours operating model for XFR team is 9am - 17:30 pm as per his e mail of 30 June*" which she then attached. She then stated:

> *"IBM flexible working options that IBM do offer have also been shared on a couple of occasions since your return in May 2020 which as an employee you can ask the business to consider.*
>
> *In our conversation today you made me aware that you do not wish to pursue any of the IBM flexible working offerings at this moment in time*

Issue 5.1.1 - 26 November 2020 Claim 7, DA, using a mocking tone towards C

20.33 C alleged that it was during this meeting on 26 November 2020 that used a mocking tone towards him. DA denied speaking in a mocking tone during this meeting and C was unable to tell us exactly what it was about the way DA was behaving in this meeting that he regarded as being mocking. His claim form provided some detail (page 36) stating that "*During the call it seemed as if she [DA] had people with her, I would not put it past the company if they had a lawyer present*" and that he felt that after such calls taking place that R were "*having a laugh and a joke about it afterwards*". It further stated that "*She [DA] was also talking to me as if she was planning something in the background. I have no doubt that they had their solicitor on in the background of that call…"*; During cross examination, C accepted that what he meant by saying that DA had a "*mocking tone*" was that he believed that she had someone with her in the background and was "*planning something*".

20.34 We were referred to the fact that C submitted this claim form at 2:33am and in it stated that he was in a state of sleep deprivation. We were further referred to medical evidence from a few months before this took place which indicated that one of the symptoms of C's mental health condition as described by him was "paranoia" and that he had a feeling that people were talking about him behind his back.

20.35 In light of this we could not accept C's contention that DA was using a mocking tone during this meeting, given the nature of the matters discussed, the lack of detail about what this meant, and the features referred to above which indicate that this may have been as R submits a figment of C's symptoms of paranoia. We find that DA did not speak to C with a mocking tone during this meeting.

PCP 4.2.1: not telling C what meetings were about in advance

20.36 On 30 November 2020 BM sent an invite to C and DA to attend a meeting with him to be held on 3 December 2020. This was headed 'XFR discussion' page 807 but no further detail was included. This meeting was to address the issues that BM had raised around C's behaviour at work and had discussed with SM. BM decided not to provide detail about the contents of this meeting in advance as he was going to raise sensitive issues with C about his behaviour and he did

not want to list these in advance which would defeat the purpose of having a gentle informal meeting with C to address issues without contributing to his stress levels. Upon receipt of this invite, C messaged BM to ask him what the meeting was about (page 802). BM replied to say he needed to go through a few things with C, with C replying that it was a little vague and that was why he asked. C did not mention that the failure to provide this information was impacting his health or further follow up on this before the meeting took place on 3 December 2020. In BM's view the meeting that took place on that day went well and he had a constructive meeting with C about the various issues that had arisen. BM asked C to consider how his communications to the various people concerned may have appeared to them. C disagreed that the meeting had been constructive but did not make a complaint to BM at the time or after the meeting about what was discussed. He could not explain to what disadvantage he was put by not knowing in advance what was going to be discussed at this meeting.

<u>OH referral and report received by R on 9 December 2020</u>

20.37 C sent DA his completed consent form for an OH referral on 29 July 2020 (page 737A). There was a delay in actioning this referral and DA explained that she was dealing with other issues arising in relation to C and her other reports and wanted to seek advice on what needed to be done. She submitted the referral to R's OH provider, Medigold on 21 November 2020 and C attended a consultation with Dr Weadick on 30 November 2020. His report (pages 810-811) was sent to DA on 9 December 2020. This report records what C reported to Dr Weadick about his issues at work. It recorded that C's *"perceived issues relate to apparent verbal and racial abuse, victimisation, alleged bullying and general disrespect".* He made a diagnosis that C was experiencing symptoms "*seemingly suggestive of a moderate to severe depression, including (but not limited to) sleep disturbance, cognitive impairment (poor memory and concentration), marked low mood and anxiety".*

The report further noted that C was able to continue working albeit he had a "*pronounced mistrust of Management and the Company*". It went on to note:

"Mediation between both parties would appear a reasonable initial step, although given the extent of his distrust, I would suggest that external mediation is considered.

20.38 The report made a recommendation for follow up information to be provided from C's GP about possible treatment he may be receiving, stating:

"It would also seem helpful to seek information from his General Practitioner, regarding the awaited intervention. As and when such a report is received, it would seem prudent to review [C] again. We can arrange for such appointments upon receipt of your further instruction and [C]'s written consent to do so."

In response to specific questions posed, it recorded the following:

"Does the employee need any adjustments to their role? If so for how long? Are these temporary or permanent?

None appear indicated at present.

Is the employee likely to be covered by the Equality Act?

If his assertions regarding the severity and duration of his symptoms are correct, then it would seem likely that, if so assessed at Tribunal, said legislation would be found to apply.

Issue 6.2.9 (DA trying to obtain C's medical records then pretending Medigold had asked for them)

20.39 C declined the invites sent by DA to the next 2 121 meetings on 18 December 2020 and 15 January 2021. DA queried this in a slack exchange with C on 15 January 2021 and C told DA that he was "*badly affected*" by the last meeting that had taken place on 26 November 2020 (page 813-5). C queried whether the OH report had been received and DA replied to say wanted to discuss at the next 121 (page 813). She tried to schedule a meeting on 28 January 2021 and this invite was declined by C (page 819) with him stating in his message that he thought "*it might be best if I discussed with Occupational Health first*". DA e mailed C on 3 February 2021 stating that she was confused about C's message and went on to note:

"I have contacted Medigold Health and asked them to obtain additional information from your general practitioner so that they can issue an updated occupational health report but in the interim it is important that we have an open dialogue in relation to the contents of the Medigold OH report that was received on 9 December 2020."

DA explained that she had taken the action of contacting Medigold to get GP information because this had been recommended by Dr Weadick in his report (see above). She went on to explain that the purpose of meeting with her was to discuss any reasonable adjustments and to explore stress management information to see what further support could be put in place. She included a number of links to

sources of support available through R including the Employee Assistance Program and its health and wellbeing pages.

20.40 C further declined an invite sent on 4 February 2021 (page 820) and suggested third party mediation take place as recommended by the OH report. He also queried why DA was asking for his GP's involvement. He e mailed on 5 February 2021 asking why a consent form had been sent to him as he had already had an OH appointment, mentioning that mediation had been recommended and he would not provide consent until this had taken place. On 8 February 2021 DA e mailed and stated that R had not requested consent to write to C's GP for a medical report but that a consent letter will have been sent directly to C via Medigold as a follow up recommendation to the OH report. She explained that this was common practice where the OH provider considered that some information from the GP would be useful in formulating follow up arrangements. She emphasised the importance of discussing issues with management. On 19 February 2021 a further meeting request was sent and declined (page 828-31). DA wrote on 11 March 2021 chasing for him to provide his consent for OH to write to his GP (page 837). She attached a copy of the consent form required and in that e mail she also addressed C's requests for mediation, stating:

"*I am aware that the Occupational Physician set out his opinion that mediation between both parties would appear a reasonable initial step. With this in mind my intent was to discuss this suggestion further with you such we can consider it. It is not standard IBM practice to initiate external mediation and so in the consideration it would be helpful to discuss the intended outputs and practicalities for example."*

C replied to this with a lengthy e mail setting out his complaints about the way DA had managed him, alleging that she had been rude and aggressive and showed no interest in his health. He also complained about the removal of his car allowance and lack of promotion and an increase in salary. He also stated:

"You keep mentioning my health should be a priority but you send emails that make me suicidal but you have no issues sending those emails. you don't have any concerns for my health whatsoever, you seem to make my issues worse"

<u>Issue 5.1.21 and Issue 6.2.9 - On 27/28 April 2021, DA telephoning C saying she was concerned about his health but then mentioning things he had not done, causing him stress and anxiety</u>

20.41 C accepted that this was in fact the call that took place with DA on 27 April 2021. C did not give an account of this call in his witness

statement and in the claim form where this allegation comes from he makes reference to this call but does not state what it is that DA has done. He makes allegations that DA is *"microagressive /passive aggressive*". During cross examination C said that this meeting took place after 5pm and that he believed that the real reason for the meeting was to find out something that DA was not aware of. He said that DA told him she was concerned about his health but he believed she was not and it "*seemed like*" she was trying to get information about something but he did not know what. The calendar entry for this meeting indicated that his meeting took place at 11:30 (page 888) and DA's note of this phone call was shown at pages 890-896. At the start of the call, BM joined to discuss project specific issues and then the conversation carried on with just DA and C. There was then a discussion around the new Checkpoint tool that was in operation.

20.42 There was then a discussion about C's health and he raised that he was waiting for a psychiatrist referral but was having issues getting an appointment. DA stated that she was sorry C was having difficulties There was a discussion about C's ear problem and DA asked about any reasonable adjustments needed for this and C said there were none. There then followed a lengthy discussion about C's career and learning, with DA providing input on some documents C had been working on. There was a brief mention of Medigold during this conversation where C stated that Medigold had said that DA wanted an update from him or a new report but he had not heard from them and had been too busy on projects to chase. DA said she could contact Medigold and ask them to contact C if he was busy.

20.43 We were unable to make a finding that DA behaved in a way that was dismissive of C's health concerns or passive aggressive in this meeting. She made general enquiries about C's health, expressed sympathy that he was having difficulties accessing his doctor and offered to assist to ask Medigold to call him.

<u>Issue 5.1.10 and Issue 6.2.4 -18 January to 9 February 2021 - Claim 10 R removing C from certain "slack channels"</u>

20.44 R used its slack messaging system for much of its day to day communication needs and we have seen slack messages throughout these proceedings. In addition, R used slack channels which were effectively group chats on slack to communicate on a particular project. This was used as a forum for those on a project to discuss day to day issues. This was a work related chat function and C agreed with R that it was not a forum for social interaction. In general once someone stopped working on a project, they would be removed from the slack channel as otherwise they would be receiving messages that would

have no relevance to their day to day work. IT was responsible as Operations Manager for setting up and adding team members to slack channels for projects as they arose. He would then remove team members when it was no longer required. However there were a large number of channels and it was not always possible to keep on top of doing this and so he occasionally carried out what he described as 'Slack Channel housekeeping". He looked at all the channels he was responsible for and removed anyone on that channel who was no longer working on a project, sometimes removing individually and sometimes several people at a time.

20.45 On 18 January 2021 C was removed from the slack channel for client D1 (page 1496D) and this was shown as having been done by an individual called H Alhaddad, as Associate Partner based in Dubai. This project was worked on by C between 1 and 14 September 2020.On, 25 January 2021 C was removed from the slack channel for client A2. He worked on this project from 24 to 28 August 2020 (page 1496D). Altthough IT has no recollection of doing so, he agrees that it appeared C was removed by him and that this was most likely to have been done was part of a slack housekeeping. He was able to see that others had been removed from this channel at various points. On 9 February 2021 C was removed from the slack channel for client F, again by IT.C worked on this project between 16 to 26 June 2020. We were entirely satisfied that IT (and Mr AlHaddad for that matter) removed C from slack channels in the normal course of business and because C was no longer assigned to the project to which they related.

<u>Issue 5.1.12 Claim 10, failing to send C notification that his application for an internal competition, which he had sent on the 4th of February 2021, had been received until after the competition had closed (notified on the 11th of February 2021 when the competition closed on the 8th). C says that this was a weekly competition on R's intranet re tickets to Wimbledon. C does not know the names of those responsible;</u>

20.46 C alleged in Claim Form 10 that he sent an application for an internal competition at R on 4 February 2021 and only received notification of his entry on 11 February 2021 which was after the closing date for the competition (8 February 2021). This had been recorded at the preliminary hearing before REJ Findlay as being a competition on R's intranet to win tickets for Wimbledon. C was unable to provide any further information about this competition in evidence although he said this was not for Wimbledon. He did not have copies of the e mails sent or received by him and he did not know who at R sent him the e mail in question or indeed whether it was an individual had sent the e mail or whether it was automated. We accepted the evidence of VL that there was no competition for Wimbledon tickets around this time and the only

internal competition she was aware of was a weekly quiz called the IBMer News Quiz which was in fact launched on 18 February 2021. This quiz generated an automated response when an individual applied for it and the entries that were submitted the quickest with the most correct answers could win recognition points for R's internal rewards scheme. She told us that in 2021 there was an internal competition to win Wimbledon merchandise (not tickets) which took place in June and July.

20.47 We were unable to find that the events C alleged occurred not least because it is not clear when or what is alleged to have happened. C provided no evidence at all on this allegation.

Issue 6.2.4– delaying C's Holiday requests

20.48 When DA took over as blue pages manager, she would have been main contact for holiday but it was agreed that BM would be responsible for approving holiday as C's task manager and with more awareness of working requirements (pages 721-723) At the end of June 2020 DA reminded C to check his holiday in advance with BM (page 727). BM reminded C again in October 2020 (page 759) stating that it was important it was checked before a request made as although most would be approved, sometimes there were planned engagements that team members would be unaware of. Between November 2020 and January 2021 C had 3 days annual leave to take which he discussed on slack with BM first and requested in correct way (page 764). On Friday 12 February 2021 at 12:27, C made a request to take two periods of leave in March and April 2020. This e mail was responded to by BM and approved on the next working day Monday 15 Feb at 10:52 (page 825). C was not able to point to any occasions when his requests for holiday were delayed by BM and in light of the findings we have made, we are unable to make a finding that there was ever any delay.

Issue 6.2.4 - 25 February 2021 - Claim 10, R delaying getting C's 2021 checkpoint for submission to his up line manager

20.49 On 25 February 2021 C sent a slack message to DA stating that the checkpoint review form had not been completed in R's online checkpoint tool (page 831A). DA replied to state that all her checkpoint review meetings had been carried out in January including the meeting with C and that the outcomes had been shared with C. However she had not been able to upload the outcomes to the online tool as she had a new laptop and did not have access to the system to be able to do this. She informed C that his would be done in the next few working days. We accepted that any delay here in finalising the checkpoint

review data was because DA did not have access to the system and that this delay applied to C and other direct reports of DA at the time.

Issue 3.2.3 - 16 February 2021 - Delaying QA of C's reports by 5-10 days

20.50 R used a system called Box at the relevant time and a web based application; Trello for its QA process described above. A separate Trello card was created for each individual project and as the project was progressed that card was moved through lists to show its progress. The various stages generally being 'In Planning', 'Tests in Progress' (when the tester was carrying out their tests and writing up the report), 'QA Queue' (when the tester had uploaded that report for QA) and 'Completed Jobs'. Once a report had been uploaded and the card marked as 'QA Queue' it then had to be taken out of the Box folder by the senior member of the team who carried out the QA who sent it back to the tester with any proposed changes/further work to be carried out (if necessary). The tester would make any changes and send it back for final approval. Once done, the report would be sent to the client and the 'card' would be moved to the 'Completed Jobs' list. There was no system notification of a report being uploaded to the QA Queue at the time and it relied on the senior member of the team checking Trello at regular intervals to see what was marked as being awaiting QA. RC told us that the speed by which a particular report was QAd varied as it depended on how many other reports were in the QA queue and how busy either RC or BM were at the time (including accounting for periods of annual leave). He said a standard turnaround time for a job remaining in the QA Queue was around 5-10 working days (although this was not documented anywhere). We accepted this evidence.

20.51 C complains about a report he submitted for QA on 16 February 2021 remaining in the QA Queue "*nearly a week later*". C was working on Project 2298 for an internal client GTS between 18 January and 16 February 2021. For GTS projects there was a requirement to QA within 10 working days of testing ending. C uploaded his completed report to the Box Folder on 16 February 2021 at 12.27pm attaching a link to the relevant Trello card. The system then updated the card to indicate that the report was in the QA queue (this is done automatically via its Butler system as a result of settings put in by the relevant user) on 17 February. C then added further detail to the Trello board on 19 February 2021 indicating the due date as being "*end of date of test +1 week or if urgent date QA needs completing on this card*". No specific date was added. RC then reviewed this report 1 week later 26 February 2021 and made some changes (these were shown as various updates on the Trello card at 11.59 on this date). There was an exchange of slack messages between C and RC on this date regarding suggested amendments (page 832) and the report was finalised and sent to the

US team that same day at 12.47pm (page 834). The card was then updated and moved to 'Completed Jobs'. This was 8 working days after the report was submitted and thus was completed within the 10 working days applicable to GTS.

20.52 C did not give any direct evidence of this or any other instances when he said this QA process was delayed. He told us that he had noticed that when he sent his reports to be QAd that the reports would sit in the QA section of the Trello box for 5-10 days but that other testers (he mentioned Nick and Struan) would have the reports they submitted QAd much quicker and before his. We had no evidence to support C's assertions that other testers had their reports QAd more quickly around this time or any other time. C was unable to point to any examples of occasions when this happened in relation to any other employees. During his cross examination of RC C suggested that he had more recently had his reports QAd by other individuals, mentioning Struan and Yannick and in such cases his reports came back within a couple of days or within a day. RC accepted that this could be the case and that it was possible that other people were able to QA reports more quickly stating that he had a heavy workload and had to balance his other duties with the need to QA. He denied that C's race or religion had any influence on the speed at which he QAd reports and pointed out that if a report was delayed in being sent as a result of QA delay, it reflected poorly on him and BM as they held the relationships with the clients. We accepted this evidence.

<u>Issue 3.2.4 – March 2021 – Failing to sanction 'RW' for swearing in meetings</u>

20.53 On 11 March 2021, C sent a slack message to DA and BM about a request he had received from RC (via an e mail sent on 24 February 2021 see page 863) to do a talk in front of his colleagues (page 845). In that message C said he did not feel comfortable doing this in front of this group "*given past experiences and current health issues*". He complained that this would play on his mind when he was on vacation. He went on to state that he found the team meetings that were held of no benefit as they stopped him doing his job and that he had to listen for an hour to people "*bad mouth their colleagues, swear and talk over me*". He complained that "*[RW] is constantly swearing on the calls, and it affects me*". He went on to ask that doing a talk be delayed until he was more comfortable doing this. Both DA and BM responded stating that they would discuss and come back to C. DA responded to C the same day having discussed with BM suggesting some alternative ways that C could do this talk but agreeing that this could be delayed giving C more time. In relation to the issues raised about the call, she said that there was a 15-30 minute segment of the meeting that was voluntary and purely social which had been implemented during Covid 19 to

provide a way for employees to interact and that C could leave the call if he wished. However she went on to say that she would take away separately the allegation of swearing, talking over people and bad mouthing colleagues (page 847). C sent a slack message to RC on 16 March 2021 stating that he would not be able to present at the meeting and referring to raising this with BM and DA and RC responded thanking C for letting him know.

20.54 DA sent her response to RC and arranged a call with RC on 18 March 2021 (page 861). RC told DA that he could not recall RW swearing on any particular occasion but that he was aware that RW had sworn during conversation as this was how he naturally spoke. RC said he did not believe there was any intention to offend anyone but agreed with DA that he would have a follow up conversation with RW to remind him about his use of language and that he must always follow R's Code of Conduct. RC told us that the reason he did this was because he believed C that RW had sworn during team meetings and that some people might be offended by this. However he said that he did not believe it merited anything more severe than a reminder because there was nothing to suggest that this had been targeted at anyone or had any malicious intent. This decision was confirmed in a follow up e mail from DA to RC and BM on 6 April 2021 (page 873) . RC told us that he then did take this action with Ryan and agreed to add a comment to the powerpoint slide for the next team meeting which took place on 19 March 2021 reminding participants in the call of its purpose stating:

"*This call is for everyone and is used to share business information, ideas and experiences as a group. Please be mindful of the topics and each other*" (page 862A)

Issue 3.2.9 – BB sending C e mails after 6:00 PM on 9 April 2021

20.55 BB was an employee of a client of R's (Client AB) who was working on a project that R was providing testing services for. We were referred to e mails between BM, BB and RC on 8 April 2021 about the names of the testers that would be allocated to carry out the work that was due to start the following week in order that he could set up the required accounts for this to take place. RC informed BB at 16:30 on 9 April 2021 that accounts were needed for C and himself and provided C's e mail address. Later that day still on 9 April 2021, C and RC received an e mail (with BM being ccd) from BB, at 6:01pm with details of the accounts that they should use when carrying out the work (pages 875 to 876). BM replied the same day, at 6.11pm, saying "*Thanks bal. Regards*" (page 875), and BB sent a further email to C and RC at 6.25pm with a brief further description of some additional information about those accounts (page 875). Neither of the e mails sent indicated

that C or RC (or indeed BM) was required or requested to respond to it. C explained during cross examination that he was in fact complaining about being allocated to this project without any prior knowledge and then receiving e mails directly from the client about this new project after 6pm. He told us that he could not recall a conversation about this project before receiving the e mails but it is possible that after receiving them he would have been asked to go on the project, He suggested in cross examination that the failure of RC or BM to tell him about being allocated to this client before being put on it was done because of his race, although this particular allegation was never put to either RC or BM. This allegation was not in the LOI and thus our findings were related to the events that occurred relative to the recorded allegation.

Issue 3.2.7 - failing to put C on projects before Ramadan and then putting him on 'controversial projects during Ramadan 2021 (13 April to 12 May 2021)
Issue 5.1.19 Claim 13, "mind games" C says this refers to telling him he is on a project and then telling him that he is not on the project – C says that this refers to BM and RC, in around March or April 2021;

20.56 At page 1496E we were directed to a copy of the planner used by R's managers to allocate pen testers to project and to manage such allocations. This showed C's allocation to projects from February to June 2021. BM, RC, CL and IT were involved in the allocation of pen testers including C to the various projects that X Force red worked on. RC and BM were involved in the allocation of testers for work that came in to them directly but work related to R's GTS team primarily came in and was managed by CL and IT.

20.57 C was allocated to a GTS project between 1 February and 19 February 2021 and appears to have been unallocated or 'on the bench' for the last week of February 2021. C was then on annual leave between 1 and 5 March 2021. He then worked for three days on the GTSpr project from 8-10 March 2021. It is not clear who allocated C to this GTSpr project, but we find that given that it is a GTS project and that when C was working on this project later in May 2021, this came via CL's team in the US, the decision to allocate C to this particular project at this time was made by CL and IT.

20.58 C agreed that he had been due to start on a 11 day project (Project A) between 15 and 26 March 2021 but that this had been delayed at the last minute and in fact was carried out in June 2021. At pages 865 we saw a slack exchange between C and BM where C informed BM on 22 March 2021 that he had been told to "*hold fire*" by the contact at Client A whilst they onboarded him correctly but was ready to go once he got the green light. C initially agreed that it was not the fault or decision of

RC to delay this project but then alleged that the project had in fact been delayed because of his race. When asked if it was this project that C felt that RC and BM were playing mind games with him about C said he did not think this was the case but he was in fact referring to the GTSpr project which we address below.

20.59 C was then on annual leave (including 2 days public holidays) between 29 March and 5 April. C was then 'on the bench' for 2 days on 6 and 7 April, and then put on project L for 2 days on 8 and 9 April 2021. Therefore we were not satisfied that C was not put on projects in the period before 13 April 2021 as he was in fact put on 4 separate projects during March and early April 2021 albeit that one such project was delayed at the last minute.

20.60 C was allocated to Project AB on12 April 2021 and worked 5 days until 16 April. RC told us that he did not believe this was a particularly controversial or challenging project and referred us to some e mail exchanges between himself and C on this project on 26-27 April when he was carrying out the QA process suggesting that these were standard matters. We accepted this evidence. C agreed that it was not controversial.

20.61 C was then put on Project IHD which started on 19 April and ended on 30 April 2021. RC told us that C had mentioned to him that he thought this project was under resourced and he suggested that C focus on one of the three main elements and do what he could during the timeframe. C was referred to notes of a 1:1 meeting held between him and DA on 27 April 2021 (which we deal with in more detail below) which BM briefly joined (page 890-1) where the IHD project was discussed along with other work C was carrying out. C asked BM for a claim code for the IHD project and stated that testing he was carrying out was 'huge' and that RC had told him to do what he could in the timeframe. BM agreed with C that he should do what he could within the timeframe allocated and caveat what he was unable to do in the limitations section of the report. C finished this conversation by stating "*Awesome, cheers [BM*]". He did not during this meeting raise any complaint about the project being controversial. We find that this may have been a difficult project which had been underscoped (there was too much work for C to have completed in the timescale). However we also find that C was given clear instructions from both RC and BM to carry out only those tasks he was able to do in the timeframe and to record what he was unable to complete in the limitations section of his report.

20.62 Following a public holiday on 3 May 2021 C worked 4 days on Project NG until 7 May 2021. He was then on annual leave for a week between 10 May and 14 May 2021 and on his return he started on the GTSpr

project (the project referred to as Project Rock which we deal with below) starting on 10 May 2021 which ran through to 18 June 2021.

20.63 It became clear that C was making a more general complaint about the way he was allocated to projects and suggesting that he had been put on a difficult project (IHD) during Ramadan deliberately because of his race and religion. C had not made any requests that during the period of Ramadan that any different arrangements should apply to his work or work allocation to reflect any requirements for religious observance. Both BM and RC denied that any decision to place C on projects during this period was linked to his race or religion or the fact that these projects were taking place during Ramadan. RC told us that he did not think he would have been aware that Ramadan was taking place at this time and that C did not raise with him any difficulty he may have with being allocated to projects during Ramadan. We accepted this evidence.

20.64 The related allegation about the decision to allocate C to projects during this period was that BM and RC were playing 'mind games' with him in the way they allocated him to projects telling him he was on a project and then telling him he was off the project. It was unclear what decisions C was complaining about. It firstly appeared that it was the allocation to project A which we deal with above. C then indicated it was about his allocation to the GTSpr/Project Rock project that we refer to below. The allegation being that having been initially allocated to this project in April 2021, that he was then removed from that project (having carried out preparatory work) and then put back on that project in May 2021. It does appear that C did some work for the GTSpr project between 8 and 10 March 2021, but BM or RC were not directly involved in C's allocation to this project as this came via CL and IT in the GTS team. C then suggested he was in fact complaining about being moved from a different project S to Project P which we deal with below and that this happened on two occasions. However C could not explain when these things happened and could not remember as it was so long ago. We were simply unable to make a finding that any of these decisions, some of which did not involve RC or BM, amounted to the playing of mind games.

<u>Issue 3.2.8 – C being spoken to in an unpleasant manner by MJH on a call during Ramadan</u>

20.65 MJH was a Project Manager that worked for IBM Denmark ApS, the Danish branch of the wider IBM group. C was assigned to work on a project involving MJH called Solution 2330, also known as Project Rock. C told us that he was involved in a telephone call about this project where MJH was "*showing signs of racism*" and "*stamping their*

authority" and that he was "*being told internally that they are the client and you do what is asked of them*". Whilst the date of this phone call was not stated, this allegation was first raised when C presented his 13th claim form on 28 April 2021 and in this, C alleged that this telephone call had taken place "*yesterday*" which was 27 April 2021. C agreed that he had never come across MJH before this telephone call took place. When asked what was said or done, C said that he did not use openly racist words but it was "*his tone of voice*" was the main thing that led C to believe he was being racist and that he was condescending; tried to belittle C and ignore C on the call. When pressed further to try and recall the words and tone that was used that made C feel he was being racist, C told us that he could not remember as it happened 3-4 years ago. He agreed when asked that it was possible that his reaction was a function of the symptoms of paranoia that he was experiencing at that time (albeit alleging that it was R that had caused those symptoms). C did not complain to anyone at the time of this call about MJH's behaviour.

20.66 CL gave evidence that she was unaware of a call being held on Project Rock at the time alleged by C and referred us to various documents about this project in the Bundle. On 4 May 2021 ED (a member of CL's project team in the US) added C to a slack channel for this project informing him that it was due to start on 17 May 2021 for 6 weeks and providing him with some instructions about what was required (see page 946). On 6 May 2021, she provided C with some account information (page 947). CL told us that her understanding was that a kick off call had been scheduled to take place on this project on 6 May 2021 but did not know whether this had taken place or not or whether C had attended as he had contacted her on 17 May 2021 (on his return from annual leave) asking about whether a kick off call was planned. On 24 May 2021, ED asked C about how the testing was going on 24 May 2021 and C replied, "*Good thanks*" and going on to have various exchanged messages with ED, CL and BM about issues he was having with obtaining the correct access to carrying out all the required tests between then and 4 June 2021 which was causing delay. During these messages he mentioned 'Michael' taking various actions, referring to a call which took place back in May.

20.67 We were not able to find that C was involved in a call involving MJH at all on 27 April 2021 on Project Rock as this project did not start, nor was C allocated to this until 4 May 2021. As this was a complaint made to the Tribunal in a document submitted on 28 April 2021 before he was allocated to this project, we find that C has not been able to prove on the balance of probabilities that a call ever took place involving MJH at all let alone that he behaved in a racist manner towards him. Even on

the basis that C may have been mistaken about the date of the call and the person involved and was in fact complaining about a different client call that took place on 27 April 2021, we were unable to find that C has shown that anything untoward was said by MJH in a call on any other occasion.

Issue 5.1.22 and 6.2.10 Claim 17, after C sent a report about a project he worked on between 13 and 16 August 2021, RC and BM failing to reply to him/run quality assurance check on his report;

Issue 6.2.12 Claim 17, in or about August 2021, BM sending out the report on Project A without telling C it was ready to go out, then telling C to "document his concerns" without explaining that process to him;

20.68 C carried out testing on Project A between 13 and 17 August 2021 and submitted a report for QA on 17 August 2021. C had been asked to carry out this work at short notice and we saw an e mail exchange between BM and C about this at pages 976-77 where C agreed to travel to London to carry out the work before starting a project he had already been allocated to. There was a brief exchange of slack messages between BM and C about the report on 17 August where C queried the template and reported that he had only found "medium and low" findings. He was informed by BM that any issues with font could be picked up in QA (page 980). C informed BM that he had uploaded his report for QA on 19 August 2021 and BM told him he would send for QA (page 983).

20.69 On 31 August 2021, C sent a slack message asking about the report RC responded asking him to check with BM but that he thought it "*got QA'd and send to the client*" (page 994). C replied that he was worried that the report did not come back to him as he wrote it and went on to say "*I dont feel comfortable writing reports and people convincing the client its all their own work. this happened alot in the past and continues to happen. I feel like the mind games continue to happen. I am not happy"* (page 994). On 31 August 2021, C then sent a to BM querying what happened to the report as he had not heard back and BM responded:

"*Was with ric for QA. We have both been extremely busy with other client work, people management, sales etc. I had to QA in the end and will make a copy available in box today.*

Report was delivered to client via their secure portal"

20.70 C then responded that he felt it was a "*constructive QA process*" and that he felt that when "*trouble wants to brew each sentence [sic] is QA'd/style etc. When things need to be done its quick and out the door.*

I am not happy" and complained that the same thing had happened to be for 6 years. BM responded that R was a "*dynamic business*" and it was *"not always possible to be going back and forth when things need to leave. The normal process would be to send things back to change if needed, QA process is same for everyone. You are not alone in things needing to go out the door quickly"* . C then sent further messages saying he had been "*singled out*" and was unhappy and worried and his health was affected *(page 984*). BM suggested he speak to DA but again said he was not treated differently and that he should not worry about matters that were not an issue. C then said he felt that DA would *"side with" BM* and that she was there to inconvenience him and delay his career progression. He added that it was *"like a gang culture"* at R. He went on to refer to health issues he had during 2017-18 and having time off work and that the only reason he was not off sick at the moment was because he did not have any sick leave to take. BM then responded that DA was there to look after C from an HR perspective and then added:

"Our job is stressful some more than others and people cope with stress in a variety of ways. I can forward you all the guidance and help as I have done before if you think it will help you. What can I or [R] do to make the situation better for you" He then sent a link to C to R's internal portal to raise a concern. Therefore we do not find as C alleges that BM told C to document his concerns without explaining that process to him as this is clearly set out in this e mail.

20.71 C replied with a lengthy response complaining of various matters including that he had not been promoted and that his work was being "recycled", He stated "*The main thing is money and always has been this. I want to be promoted and get much more money than I am now*". He also complained about the removal of his car allowance.

20.72 On the basis of the above, we were not satisfied that R had failed to run quality assurance on a report that he had done as this had been done by BM. BM did not send the report back to C after he had carried out the QA, but decided to send the report out to the client direct. BM did however reply to C when he raised this.

Issues 4.2.3; 4.5.3; 5.1.23 and 6.2.11, on or about 20 August 2021, RC repeatedly questioning why C required a TOOL license for the job;

20.73 This relates to an exchange of messages between C and RC (page 992-3). On 20 August 2021 C sent a slack message at 10:03 asking RC to provide a Nessus licence and key. We heard about there being a distinction between online licences and offline licences for this software. To use this software online was very straightforward and would usually

involve the tester going to a box folder on their desktop and accessing a licence themselves. However to use the software offline, a process had to be followed which would need either R's Tooling Team or a first line manager to activate that licence for offline use on the supplier's website (thus putting it out of use for other pen testers). RC assumed that C was asking about an offline licence given that testers only really needed to only contact him about offline licences as they did not have easy access. He replied at 10.05am, asking "How is the VM connected?" and said "*If you have direct access to it over SSH then you don't need one cutting. Offline activation is only for tests where you don't have any direct access*". He then asked C a question about access to determine whether he could work on the software online and C's responses indicated that he had online access. RC told C to "*pick a key from the box note that is either free or at the end date for the existing project has expired*". At 10.11am C asked RC to send him the location as he was not able to access it. RC then realised that C was trying to access an online licence (not an offline) but was unable to see the box file as it was not where it usually was. He messaged C saying, "*Just realised what you were after now – yes location has vanished for the keys!!!".* He stated he had "*got confused*" and would look to see where the new location of the key was.

20.74 RC subsequently provided C with a code he could use whilst he sorted out with the US team what had happened with the box location: "*FYI, I used this one on CLS last week – so should be good for you to use and we can update box note later when access issue is resolved…*". He later informed C that the box note had been located and updated and sent C a link to the new location. RC did ask C a number of questions about his need for this license but we were entirely satisfied that this was due to a genuine misunderstanding as to what type of licence C was looking for, caused largely by the box file not being in its usual location. We accepted the explanation of RC that he had no knowledge that asking C these basic questions of this nature had any impact on his health.

<u>Issue 5.1.24 Claim 17, MF re "Project B" - MF questioning C when C said there were high risk issues and when MF said he "hadn't found much" and then claiming credit for C's work (C accepts this partially replicates complaints from claims 1-6);</u>

<u>Issue 6.2.13 Claim 17, MF and RC expecting C to write the whole report on "Project B";</u>

20.75 C worked on project B between 16 August and 1 September 2021. On 19 August 2021, MF, another tester who was a Band 7 Security Consultant, was also assigned to this project started to work alongside

C. We saw a number of messages between the two between 12 August and 9 September about this project (pages 1010-1024). Much of this exchange related to mundane work matters such as obtaining credentials, timing of starting testing etc. MF asked C a number of questions about what was taking place which C responded to. We noted that MF noted on 20 August 2021 that the Nessus licence box was not in its usual location. There were further messages about what each had found and C said to MF that he had a "*fair number of issues*". C also provided MF with some guidance as to get a particular issue working. On 2 September 2021 MF sent a message to C to ask him how it was going and informed C that he had "*not found much*" and when C replied to say that he had found some vulnerabilities MF said, "*Well glad you're here to make up for my failings*". C sent a message to MF on 3 September 2021 asking him whether he had any issues to report as "*the report needs to be done*" stating, "*by the sounds of your last messages you didn't have much to report*". MF replied stating that he would get back to C asap as he had reporting on a different project that he had not finished yet. C then asked him whether he was working the jobs at the same time and then asked, "*are you expecting me to write this report*?". MF replied: "*Hadn't thought that far ahead. My week has been a bit mental though. Plus I start a new role on Monday. Not sure how busy I'll be*"

20.76 C then sent a response stating: "*im mental. I still happen to manage my time. If I had known this I could have completed the job myself. You should have mentioned this from the start*." MF told C that he could write up the parts he had been involved in but that it would not happen until Monday. There was then an exchange with C asking MF how many days he was claiming for. On the same day, 3 September 2021, MF messaged RC saying "*May have pissed [C] off by mentioning that I have two projects on the go just as a heads up*" (page 1086), He went on to say that the issue was about writing the report noting that he had not made many findings so his write up "*should be minimal*". C also messaged RC at a similar time querying whether he had asked MF to be on another job during the time that they had been assigned to work on Project B, stating, "*are you expecting me to carry [MF] through this. We had this conversation many years ago, but still I am carrying the team. I am not happy about this. I feel like I am teaching him as I go along*." RC responded that MF was helping with a small task on a different project that he had been on a few months and should not have an impact on Project B and asked C to explain what he meant when he said he felt like he was teaching MF (page 994). There was a further exchange about the project and C said he felt "*wound up*" by differing people he was working on and stated that he had already asked to "*work alone*". RC said that on some projects collaboration was needed

and that he would take up with MF to see if there were any issues with him not pulling his weight. MF sent his findings to C on 7 September 2021 (page 1024).

20.77 We did not find that MF questioned C about finding high risk issues other than these mundane and general communications about the project as it progressed. We also do not find that this exchange indicated that MF was in any way claiming credit for C's work. Neither does anything in the above exchanges suggest that either MF or RC expected C to write the whole report. There is simply nothing in this exchange to suggest that this was the case.

Issue 5.1.25 and 6.2.11, RC trying to reduce the number of days C had worked;

20.78 The X Force red team had a team planner which was used primarily by managers to work out where pen testers were and how they could be allocated to projects. It was different from the central system of actually allocating testers to projects for the purposes of charging their time and recording their overall utilisation. This team planner was largely updated by managers but could be accessed by other team members. On 19 August 2021 C messaged RC saying that he had noticed that there were 3 days recorded on the team planner document for his work on Project L. C said he reported on Tuesday but felt he had been told to "*go for only 2 days*" and then queried who would claim for the 3rd day. RC responded that he should "*claim 3 days in total 2 +1*" . C responded that he had "*meant 3 day testing*" and had as instructed "*claimed 2(Fri/mon)+1(Tues)*" (see page 992). There was then a further exchange between C and RC on 3 September 2021 (at page 995) where C pointed out that the team planner was wrong as it recorded that he worked on Project L for one day, when it had in fact been three (and also queried other days when he was on leave was not shown. RC replied acknowledging that it appeared the planner was not updated and he would check with BM and update it (see page 995). RC was unsure whether he in fact did this or whether the planner was updated to show the correct days. We accepted his evidence that was what shown on the planner had no impact on C as his utilisation figures were based on the days he claimed for, not what the planner showed as this was an internal team document. RC had already told C to put in his claim for 3 days on the project which he did. Therefore we find that RC dd not try to reduce the number of days that C had worked on Project L, as these were claimed for and recorded by C, albeit that the team planner did not necessarily reflect these.

Issue 3.2.12 – C's 2nd line manager SA failing to get in touch with him after C raised a query about report submission (disability)

20.79 C had a meeting with CA on 6 August 2021 where he raised a number of matters and following this meeting sent a slack message to SA thanking him for the meeting (page 987). On 3 September 2021, C sent a slack message to SA complaining that he was having "*more issues and concerns with parts of the team*" (page 998). He went on to complain about having the time frame he was being allocated for testing reduced (presumably complaining about RC's actions as referred to above) and that another was asking him to provide a "*step by step guide for testing*" (presumably a complaint about MF's actions referred to above. He said to SA that he felt that he was being "*racially discriminated again by the gang in UKI X-force*". SA responded the same day by a slack message and informed C that he should "*share a detailed email about the incident you're referring to here ... if possible pls loop HR in that email I'm out of office early next week but I'll make sure this is acted upon. Do share as much details as possible.*"

20.80 On 4 September 2021 C sent an e mail to SA making a detailed complaint about incidents which he believed to be racially motivated (page 999-1006). This e mail did not include or copy anyone from R's HR team.

20.81 On 6 September 2021, C sent a further slack message to SA stating that he sent over the information and that he would "*wait to hear back from you before submitting my report*" and sent another message stating "*I completed my report today and is ready for submissions, Please let me know when I can submit given the information I provided to you on Saturday*" (page 1009). He sent a further caser message by slack on 8 September 2021 and SA responded by stating "… *I had suggested you to put in a formal request/complaint to HR. Have you done that ??*" to which C replied that he had "*already done that multiple times over the years but they don't do anything about it*" and that he had "*raised an issue previously and HR mentioned that they would no longer look into my complaints*". C was asked about the statement he made about having been told that HR would no longer investigate his complaints during cross examination and was referred to page 120 of the Protected Acts Bundle which contained a response to a grievance raised by C as follows:

"After careful consideration I must advise you that we will not be starting any new investigations on the issues you have raised below.

You have already raised related concerns through multiple grievances in the past, all of which have been (or are being) thoroughly investigated.

We have open cases for you with cross over on the issues described below and will seek to fully close these."

We find that this message from HR did not on any reading inform C as he suggests that HR told him that they would no longer investigate his complaints but related solely to this matter.

20.82 C sent a further message on 8 September 2021 stating: "*According to some sources within [R] you are effectively HR. Hence the reason raising the concern with you"* and sent a further message on 9 September 2021". He went on to state that he had spoken to SA originally upon advice from HR. C then sent a message asking SA to approve his people skills badge.

20.83 SA replied to C stating that he was not HR and informed C that he should raise his concerns with the "*designated forum*" and that he should do that "on priority". When C responded he stated that he had issues and concerns with his first line manager and that in relation to his badge requests that his requests had been ignored. At which point SA asked C to share the e mails where his requests had been ignored. C did not do that but then there was a further exchange of messages about the people skills badge. We were unable to find that SA had failed to get in touch with C after he raised a query. There was clearly a two way conversation at this time which continued. Moreover the topic of this interaction only briefly touched on report submission and was largely focused on C's more general complaints and the approval of C's people skills badge.

Issue 3.2.14 and 6.2.16 CL failing to tell C to whom he should send his report for "QA" (disability)

20.84 On 16 September 2021, C sent a slack message to CL stating: "*I need a report QA'd for a GTS job that I completed last week. I asked for advice from my 2LM manager about releasing but he did not get back to me. If you suggest someone other than Richard, Vladan or Martin please".*

When asked C said it was the Project B report (referred to above) (page 1067). When CL informed C of the usual process that the report needed to be QAd by the local EU team before being sent to GTS for QA, and asked him whether he had "*pinged rick, vlad, martin with no response yet*", C told her that he would not send his report to RC as it took at least 5 days to QA and that RC put his report to the back of the queue. He said he felt like an "*outcast*" and had asked his second line manager for advice who said he should take it to HR (page 1068).C also confirmed that he had not asked Vlad and Martin, the other people on

the EU QA team. CL responded to C saying that she was sorry he was feeling that way and said she would contact the team to see if the report could be sent straight to GTS QA effectively by passing the EU team. Later that day CL informed C that he should send his report to RC and BM for "*local QA as standard process*" (page 1069). Therefore we find that CL did in fact tell C to whom he should send the report.

20.85 On 17 September 2023, C replied saying "*But there is a problem there*" and when asked by CL what the problem was, he did not reply. C agreed during cross examination that at this stage he did not make any reference to the problem being in any way related to his disability. There then followed 5 messages from CL to C between 21 and 27 September 2021, where CL asked C to send the report. This included a message asking C to send the report as it was "*due Friday*" on 22 February 2021. CL sent an e mail to C on the same day again requesting C to share the report for QA (page 1079) which mentioned that it was due on Friday 24 September. This e mail was copied to RC and BM. On 24 September 2021 RC also sent C a slack message asking him to "*please share the repor*t" with him for EU QA today as he believed that the report needed to be shared with the client before the weekend. He also added, "*If there are problems being able to do this please reach out and explain*". RC also sent an e mail to C requesting he release the report (copying DA). C did not reply and a further slack message was sent to C by RC later that day stating, "*we haven't heard from you for a few days now, hope everything is ok. In regard to the GTS report if you can tell me what I can do to help with getting that report across the line and into QA please reach out*". DA sent an e mail to C on 23 September asking if he had shared the report and that he should raise any problems so that they could be resolved (page 1077).On 24 September 2021 DA left C a voicemail to ask about the report and to check on his welfare and confirmed this to RC and BM (page 1075).

20.86 By 27 September 2021, C had not released the report to be QAd. CL again messaged C asking him to provide access to the report (page 1070) as did RC again asking if C was ok (page 1073). RC then sent an e mail to C at 11:01 on 27 September asking C for an "*urgent update on the GTS report*" as R was facing a customer satisfaction issue. He again asked C if everything was OK and whether he needed anything from him to get the report sent out (page 1089). BM then e mailed C as follows:

"Not sure if there is any Issues with releasing the [Project B] report for QA. This has been escalated to me and I have called your IBM phone & personal one around 2PM yesterday to talk it through. I left 2 voice malls in total as there was no response. You are online as I can see

from slack and have not been made aware of illness or vacation. Can you please release or can you let us all know If there are issues concerning the report. Really need to fix this as we are already experiencing customer sat Issues. The bigger picture here is a loss of business for XFR longer term, as this could damage our reputation in the people we are delivering to. Issues happen during the reporting phase occasionally. so we all need to work together as a learn to resolve. Can I count on your support to release asap, so It can be QA'ed and released to our client GTS. We may need to pause your current GTS project If needed in order to get this issue resolved."

When asked about this in cross examination and it was put to C that this was a friendly and concerned response, C said he did not believe it was a customer satisfaction issue as GTS was an internal client and that he had already reported his findings to them by a powerpoint slide and also that the client got the report "*eventually*". We found this to be a strange reaction and were perturbed that C did not appreciate that his refusal to release a report to his managers was a problem at all.

20.87 On 30 September 2021 BM sent a further message to C asking C to explain the issue with releasing the report so that they could assist and there then followed an exchange where C stated that he would release the report for QA once he had got a "*response or reasonable outcome*" to concerns he had raised with CA and others. When asked further C said he would release the report once there was "*an appropriate member to QA the report*". He was asked by BM to send the report to him for QA and C stated, "*you are part of the problem*" and them mentioned that BM had not sent him the Client L report after it had been QAd. BM then sent a message as follows:

"*As European lead for X-Force red I am requesting that you send me the outstanding report*" to which C responded

"Are you threatening me ?

??

BM replied, "*As the business lead for X Force red I am requesting a reasonable business instruction*". C then said he would report BM externally.

This was a quite extraordinary way for C to have been communicating with his senior managers and colleagues. He was, in effect, holding work he had completed on behalf of R to which it was entitled to have access to, 'to ransom'. C's behaviour in this exchange was extremely

poor and we noted that after this BM raised a complaint about C's behaviour to his senior managers (page 1100).

20.88 On 1 October 2021, AH, the Global Head of XFR sent a slack message to C asking him to send that report to him without delay. He indicated that he did not want to get involved in any local issues or concerns but was concerned with the customer relationship and therefore required the report to be released to him so that R could comply with its obligations to its customers (page 1113). C repeatedly made the allegation during the hearing that having this number of people repeatedly ask him to provide his report amounted to bullying behaviour. We did not accept that this was the case but find that these messages reflected increasing concern from managers as to why C was refusing to release work completed on R's behalf that was required to be sent to its clients. In the circumstances the messages were perfectly reasonable for R's employees to have sent to him. R submitted that what took place at this time amounted to C effectively becoming "*unmanageable*". Considering our findings above, we agree that at this time this was in fact a fair assessment of what was taking place.

Issue 5.1.30 Moving C from Project S to Project P, where C had to work with staff based in Poland, after there was racial abuse of the England Soccer Team by Polish fans. C believes that BM or RC was responsible for this (racial harassment)

20.89 This project had initially been allocated to another tester on 25 August 2021 who was due to start it on 6 September but due to a delay and a clash with a project that tester was involved in, it was reassigned (page 1194). C was then allocated to this project on 9 September 2021 by ED on 9 September 2021 who added him to a slack channel and informed him that he was due to start this project on 27 September 2021 (see page 1195). C's response at the time was "*Wonderful. Thank you*". He was asked about his reaction upon being allocated and C told us he was shocked as this was near enough the same time as the England match where an issue of racism had occurred and was therefore shocked to be on the project. He told us that his belief was that he had been deliberately placed on the project as whoever made this decision thought that he might be racially harassed by the Polish member of this team. The Tribunal took judicial notice of the fact that on 8 September 2021, the England men's football team played a world cup qualifying match against Poland and on 9 September 2021 it was reported in the UK media that the England team had lodged a complaint that one of its players was racially abused during the game by a player on the Polish team.

20.90 CL and IT gave evidence that it was their decision to allocate C to this project as it was a GTS project for which they had responsibility for. We accepted this was correct and C could not point us to any evidence which would suggest that anyone else made this decision. We accepted CL's evidence that she had no knowledge at all of the incident of alleged racism and did not follow English football. IT told us that he was a follower of English football at club rather than international level and he had no recollection of this incident of racism being reported at the time. We accepted this evidence. C did not report any concerns that he felt he may be racially abused by anyone whilst working on this project, nor mention race at all. C did e mail CL on 13 September 2021 to raise "*issues and concerns"* about ED scheduling him on jobs complaining that he was *"being put on jobs that have not been done before and require access and problematic jobs and then considered low complexity, whilst others can hand pick their jobs which have been previously done*". CL replied to tell C that it was not ED that allocated him but that it was her and IT and that they were *"attempting to work schedules based on availability and skillset with the many new projects that are coming in, the required start times, end dates etc".* She went on to state that if there was a *"specific challenge*" with this allocation, she should let him know. There followed a brief exchange about who was working on what part of the job, but no mention of racism was made.

20.91 We did not accept C's contention that he had a concern at this time that he had been allocated to this project because of racism and find that this is an allegation that he has created after the event to try and connect the decision to allocate him to this project to race and racism. We did not accept C's explanation that he was afraid to raise issues because of concerns he would be disciplined about this. We simply do not believe that this was a genuinely held concern at the time C was allocated to the project. We accept the submission of R that this allegation was constructed by C to bolster his case.

Issue 3.2.13 and Issue 5.1.31 : member of Project P Team based in Poland making C telling C he needed to request an admin account then saying he did not need it, thereby sending him on a "wild goose chase" (race discrimination). The perpetrators are said to be CT, LS and GL who were employed by R but who left to work for "[Client K]"

20.92 The three individuals accused by C of being responsible for the acts complained of were employed by Client K and at page 582A we were shown some information about how the legal entity comprising Client K came into effect. This had originally been part of the managed infrastructure part of the wider IBM's GTS business but was hived off to become a wholly owned subsidiary of the wider IBM group on 1 September 2021. It became an entirely independent publicly owned

company from 3 November 2021. Therefore we find that none of CT, GL or LS were employed by R as at the time of the events in question. C accepted in cross examination that these three employees were at the time of these interactions operating as employees of a client of R to which R was providing services.

20.93 This interaction appears to have started on 14 October 2021 when C sent an e mail to a number of named individuals (with CT, GL and LS on copy) asking for access to client K's system to carry out testing (page 1169). On 14 October a project manager on the account, D Nowak ('DN') responded staring that C needed to request privileged access as he could not bypass the security process. C asked how he could do this commenting that if he had known this was required he would have asked sooner. There was then a response where information was provided by DN about what to do who also noted that he had written to C about this previously (page 1167). C responded that he had now done this, was unaware he had to and that he had not been told he needed to do this on 2 calls. He sent a further email to DN later that day asking him to approve the next stage of the process to get him the user accounts (page 1165). DN then responded saying that the admins on the account wanted C to state why he needed privileged accounts and what he was going to do with them explaining:

"They are personally responsible for integrity of our systems and they don't feel comfortable with giving a such high authority to someone outside their team.

What is the point of pen tests if you have a full access to everything?

Could you kindly elaborate in more technical details on your planned tasks?".

20.94 C then responded questioning why "*at the very last stage*" there were questions being raised about why he needed credentials referring to an earlier message sent to which he did not get a reply. On 15 October 2021, LS then e mailed C explaining why C was being asked the questions he was stating that "*granting unsupervised access to any system with admin privileges immediately creates a security risk*" and asking C to explain what he wanted to do and why and asking whether it could be done from someone internal to Client K who would then pass the information to C. LS then suggested a solution to allow C access via a Webex shared screen with a system administrator at Client K (page 1162-3). C then sent an e mail stating that he was not comfortable with the request and stated that LS was "*refusing access to systems and denying me the ability to conduct authenticated scans*". A call was then arranged and there was a communication from the Project Manager to

C on 14 October 2021, that he would attempt on the call to alleviate the concerns of the individuals at Client K (page 1160).

20.95 On 18 October 2021, a manager at Client K, T Coody sent an e mail explaining why the access requested was needed but that if the solutions team did not want to provide that level of access the tester would identify in the report what areas they wanted to test but could not because of that lack of access (in the limitations section) (page 1175-6). C then sent a response to all those copied into that e mail, including himself, stating that he "*had already lost 4 days worth of testing*" due to this issue and that he had already provided a justification in a call and in a prior e mail but "here they are again" (page 1173-4). There was then a further e mail from LS setting out his views (1172-3) explaining why he was concerned with "*allowing someone outside the team to have unsupervised privileged access*" to its systems. GL also e mailed on 19 October stating that he did not agree with some of the points C made and stating that they were trying to assist C to carry out his testing but was concerned about compliance and GDPR issues with allowing access without knowing exactly why that was required (age 1189-90). C then sent a message setting out his views frankly and complaining about losing days testing.

20.96 At this stage it was clear that the relationship between C and these individuals had broken down and the e mails on all sides were fractious as each tried to justify why they were correct. C exchanged several messages with CL about the issues he was having at the time (pages 1196 -99) and we noted that at page 1198 on 18 October 2021, CL advised C to "*Let Troy make the final decision and we can determine any additional actions needed*". The report produced on Project P was sent to Client K on 12 November 2021 (see page 1200)

20.97 Our attention was drawn to an e mail at page 1203 which was sent by R Powell a manager at Client K on 12 November 2021 where he stated that the testing activity had been a "*challenge on all sides*" and had been the worst experience he had coordinating pen tests over the past couple of years. He went on to state that by the end of the test period the trust between C and the Poland team was lost of both sides and that there had been complaints again on both sides. He stated that attempts to bridge the issues on calls had been unsuccessful. He went on to state:

"I don't want to over-react with a review of the details of either side, but I will say that we cannot have [C] assigned to any of our offering's future tests. Our relationship with the country teams is very important and his approach did not go over well. Sorry to have to share the bad review but this became a much bigger issue than should have been the case"

When C's attention was drawn to this e mail in cross examination he stated that he was "*happy*" that they did not want him to work with them given the number of issues he had and he would prefer not to deal with this client. He did not accept that this request from a client that they no longer work with him because of his behaviour might be a problem for R.

Issues raised September and October 2021

20.98 On 7 October 2021 JP sent a message to DA to raise a complaint about the way that C had interacted with a member of his team (page 1155-1156). DA tried to arrange a meeting with C to discuss this issue and the issue that had arisen with the Project B report and it appeared that C sent a message to reschedule the meeting. As part of this exchange, C sent the following message to DA on 12 October 2021 (page 1158):

Thank you for your email. I have made a reasonable request to re-arrange the meeting for the time and date mentioned. I don't think my next of kin would want to talk to you and they are concerned about your actions, as you are the one of the main causes [sic] of my health issues and my disability. In the event of my death I have named you amongst other people that are a direct cause for my passing. I would liek[sic] to take this opportunity to remind you that this is very serious, and I urge you to re-arrange the meeting ahead of my concerns that I have raised above. Declining my reasonable meeting request is very disrespectful and continues to have a detrimental affect on my health. You are well aware of my health issues, soemthing[sic] you ignored on multiple occasion when we had meetings"

When asked about this message in cross examination C agreed that looking back now objectively it was an outrageous message to send but at the time it seemed reasonable. When asked if he wanted to apologise to DA for doing this C said he did not and if anything that DA should be apologising to him. He disagreed that by sending this e mail to DA he was bullying her. We find that C's conduct in sending such an offensive e mail to DA at this time was completely inappropriate and did amount to bullying of DA. We accepted the evidence of DA that receiving this e mail was devastating for her and that she had considered raising a formal complaint but decided not to do so as she was worn out and could not face doing so. DA was signed off work with a stress related illness on 6 February 2022 (shortly after attending the hearing in Claims 1-6) and did not return to work until 12 September 2022.

20.99 On 22 October 2021 C commenced a period of sickness absence until 11 April 2022. During that period of sick leave he communicated with LF in relation to the provision of sick notes etc. On 31 March C e mailed LF regarding his return to work attaching a fit note (again noting C suffered from mixed anxiety and depressive disorder) and stating that he had

discussed his return to work with his GP who had suggested a phased return to work from 11 April 2022 (page 1207). He also mentioned that he had been referred to a psychiatrist. He went on to state:

"A few options that were available were a phased returned to work. amended duties, altered hours and workplace adaptations.

I have previously asked for workplace adaptations which included working by myself but were paired with people who caused me issues in the past but this was not done and ended up worsening my condition and more psychological abuse which gave me suicidal thoughts."

There was an exchange of slack messages between LF and C on 4 and 5 April 2022 about his return (pages 1216- LF informed C that DA was on long term sick leave and suggested that C be referred to OH to get their view on workplace adjustments. C suggested he did not want to do this and alleged that R had not followed previous advice from OH/ LF provided some reassurance and C agreed that he would be happy to have another assessment.

20.100 On 6 April 2022, LF wrote to C, acknowledging receipt of his latest fit note and suggesting that C get in touch after his next appointment with his GP on 8 April (page 1220A). She again suggested an OH referral and went on to ask C some questions about the matters he had mentioned in his e mail of 30 March 2022. She asked about his suggestion to work alone and what that mean and asked what he meant by working different hours, whether that was part of a phased return or an ongoing basis. She set out R's guidelines on pay during a phased return.

20.101 An OH referral was made by LF on 19 April 2022 (page 1230B-F) and it was agreed that whilst waiting for his OH appointment, C would carry out light duties including catching up on online training and IBM news (page 1231). C also explained to what he was looking for in relation to his request that he work alone suggested that he be allocated to projects with no shared responsibilities, leading and conducting the pen testing stating that there would then be

"no emotional abuse, people are not claiming they find issues when they are asking me to walk through the findings and then claim they found them. Also being cc'd on all reports that I produce, there have multiple occasions over my time at IBM where reports have been sent to clients with my knowledge, how will i know when its sent, if sent at all. for and many other clients i was able to send out by myself, there had been no issues then, so not sure why after i had highlighted concerns that this changed".

LF sent this for RC for his comments and 20 April 2022 RC responded suggesting that it was difficult to allocate projects for C to work alone as much of the work that had been for in GTS had dried up since the move of the GTS work to Client K. He said that all testing involved some interaction with the XFR team in particular that any report produced had to be QAd. He also commented that sometimes testers sent the reports direct buts sometimes the QA manager had to send the report due to onboarding restrictions of because of a secure portal. He suggested that the example that C provided about having worked on a large project alone previously was a 'one off'. He said that wanting to work alone and not sharing results was difficult to accommodate as this was standard across pen testing which involved working in a team and collaboration.

Issues 5.1.26 and 6.2.14 Claim 18, giving C a written warning following his interaction with a car company regarding his company car (this relates to SA) p392;

20.102 On 7 April 2022 , MS sent an e mail to DA forwarding an e mail she had received from CE at Leaseplan, R's contractors for its car scheme. In that e mail CE reported a "*difficult/delicate conversation*" that had taken place between one of its employees and C (page 1223-4). It reported that C had brought the car for a service (as its service light had come on) but this was declined. The e mail then reported that during a conversation with an i247 agent, where that agent reported that C was "*Not in a fit state of mind, threatening to take their own life"*. She noted that they had spent some time discussing the matter with C and felt he was safe but were essential raising the matter as a welfare issue for IBM. DA (who was on sick leave at the time) forwarded this e mail to LF (who was on annual leave and did not see this e mail). MS then sent a further e mail to LF on 13 April 2022 (page 1228) forwarding an e mail from Leaseplan reporting that C had failed to attend the appointment for his service; when he attended the week before there was substantial damage to the car suggesting an accident (although this had not been reported) and that they had called multiple times since his non attendance but had no reply. On 14 April 2022, CE e mailed MS stating that Leaseplan's Client Relationship manager had listened to the 3 calls involving C on 7 April 2022 (page 1230A). She went on to state:

"In ordinary circumstances, we would never share this information however out of genuine concern and our duty of care to our people we feel that we need to make you aware of the driver's behaviour as its extremely shocking.

We would like to raise a complaint based on the driver's behaviour on these calls and hope IBM would support us in taking some action with the driver."

It went on to suggest a different process for dealing with C via his line manager or that

"Alternatively, could IBM please put in writing that the driver has been spoken to, understands their behaviour is not acceptable and will not be accepted moving forward by LeasePlan or any of our partners/suppliers."

20.103 On 26 April 2022, MS sent a further e mail to LF reporting a further incident involving C. It forwarded an e mail from A Robinson, an employee of FMG, a supplier of LeasePlan. He reported that following an accident on 2 March 2022, C required a replacement vehicle whilst his car was being repaired and had been offered a Vauxhall Corsa by the garage and had refused this. After this AR had telephoned C to ask if he wanted a hire car booked instead and what his requirements were and AR told him that a like for like vehicle to his current car related to size of engine not model and that it was likely that he would not get a Mercedes on hire. The email then stated:

"*It was at this point he became quite angry and was saying that he had mental issues and depression and no-one takes him seriously, He them asked the question "well what if I commit suicide tomorrow"*

AR went on to state that this had been said over and over and that C insisted that the C had to be a Mercedes and that AR was concerned that on the date of service of 14 May 2022 he was concerned that C might *"do something to himself"* if a car other than a Mercedes was delivered. MS e mailed C direct on 26 April 2022 informing him of the like for like policy and that as a courtesy car had been offered the policy was that C would have to cover insurance on a hire car for the period required. C responded complaining that he was not at fault for the accident and would be paying for repairs as his car was self funded and that he should not have to take a car lower than that of his current car.

20.104 On 27 April 2022, CE further e mailed MS providing more details about the various incidents and stating:

"Based on the language used, accusations and threatening behaviour we would like to raise a complaint to IBM about this driver"

and asking that she confirm that action be taken with this driver and that all future communication takes place via C's line manager. In this e mail CE had noted that MS had "*confirmed that you are unable to receive*

recordings of the calls" but that "*due to the safety and wellbeing of our staff, myself and the Head of Customer Services have reviewed them. and they are extremely shocking and concerning*". MS forwarded this to LF and suggested that this was not acceptable professional behaviour and asking what next steps would be taken so that she could inform R's suppliers that R was dealing with the matter. She noted that she had never had such a request from a supplier not to deal with an employee in her time at R's fleet management.

20.105 Following discussions with R's Employee Relations team, R decided to commence a formal investigation into the matters leading to the complaints from Leaseplan. This would normally have been conducted by an employees first line manager, but as DA was off sick, R decided to ask LF to investigate. The steps taken by LF to investigate were detailed in the written witness statement she supplied and documented at pages 1254-1259; 1413 to 1415 and 1260. The investigation itself is not the subject of any complaint in these proceedings so we have not examined in in any further detail. C was invited to attend a disciplinary hearing by SA by a letter sent on 16 May 2022 (page 1266). C asked for further information about the allegations and a summary was sent to him on 17 May 2022 (page 1265 and 1267-71)).

OH report received 16 May 2022

20.106 Following an OH appointment with C conducted by Dr C Owum on 4 May 2022, a report was prepared and sent to C and R on 16 May 2022 (page 1262-4). This report stated that C had, *"described significant management barriers to work, including feeling demotivated about work due to non-progression in career, despite his hard work."* It noted that C's medical history "*along the lines of his anxiety and depression which appears currently severe".* It stated that this was being managed by his GP who had referred him to a specialist and it was anticipated that this "*would improve his recovery and functional capacity*". It went on state:

"From my assessment and based upon the information provided to me by [C], I would advise that he remains fit for work but would benefit from workplace adjustments to manage the condition". In response to a question posed as to whether workplace adjustments would be required, the report noted:

"*Yes, [C] is likely to require adjustments in the form of a phased return and alternate/adjusted duties, please see the following:*

- *Can consider a managed workload based on his level of concentration, a graded approach would be helpful.*

- *May wish to consider providing altered work hours, on the basis that one day off a week is likely to help him readjust to work, while seeking further medical support.*

- *May I suggest a change in team dynamics, if this is possible to support him to overcome perceived work barriers.*

- *I would strongly advise a stress risk assessment is conducted and a stress prevention plan is put in place alongside providing him with access to stress management and resilience training."*

It noted that C's mental health condition was likely to be considered a disabling condition covered by the EQA but that this was a legal question to be determined by the courts.

20.107 C and LF had a telephone conversation on 18 May 2022 to discuss the OH report (LF's note of that conversation at page 1276). She e mailed C after that discussion (pages 1277-8). She summarised all the discussions on each adjustment suggested in the OH report setting out the structure of C's phased return. It informed C that his new line manager would be NON. The e mail contained links to various courses available on R's intranet on stress management and resilience. It also went on to address the recommendation relating to a change of team dynamic and C's wish to work alone. She set out RC's views on the difficulties with working alone within the XFR structure and suggested that C could also look at the R's intranet to see if any opportunities for such roles might come up . LF also sent C a link to R's flexible working policy.

Disciplinary hearing

20.108 C attended a disciplinary hearing chaired by SA with LF in attendance on 23 May 2022 and the notes of that hearing taken by LF were at pages 1318-24). In advance of that meeting C had e mailed SA on 18 May 2022 (page 1272-3) providing further information about the incidents, stating that as SA was aware of his health condition, the meeting should be delayed. He provided further details about the car accident that had taken place and what he had done to report it. He also stated that he was "*shocked*" at the behaviour of Leaseplan employees towards him when he called them and that there was laughing and joking in the background. The e mail also went on to state:

"I am suicidal as you are aware and the doctors are aware of this and my condition, you should be aware also as their is a statement from Medigold for the same."

SA had responded to C stating that he would have an opportunity to discuss at the forthcoming disciplinary meeting; reminded him he could bring a companion and asked C if he wanted any further adjustments. It also reminded C of the EAP and provided details to contact.

20.109 During the meeting C gave his account of the car accident he had been involved and the interactions with Leaseplan about this and the service. He stated that he had made a complaint about a consultant at the Mercedes garage being rude and suggested it was because of his colour. C was asked about the complaint made against him and about the tone of the call that had taken place and some of the self harming messages C had used during that call. C responded that he could not remember what he said on the call and that there may have been such messages. He also stated that it was hard to control his emotions with his mental health condition and that there had been a lot of obstacles in the way to getting is car serviced and he felt that he was being deliberately provoked. C agreed when it was suggested that he was suggesting that the behaviour he demonstrated was because of health challenges. C said he when asked about self harming that it was instilled within him and was working on this with psychiatric help and the support of his family. The meeting was adjourned as SA felt that further investigations were required in relation to the matters raised by C about the complaints he had made. On 23 May 2022, LF e mailed MS to ask further questions (page 1284) and a response was provided on 27 May 2022 (pages 1307-10).

20.110 C was issued with a first written warning under R’s disciplinary procedure on 7 June 2022. LF’s written witness statement included a description of the discussions she had with SA about the basis for his decision. This stated that he had concluded that the allegation about C not reporting an action would result in no further action but he felt that he did need to take action about C’s behaviour to Leaesplan and FMG. She recounted that SA had taken on board what C had said about his mental health but that this did not fully excuse or explain the behaviour. SA felt that C’s explanations on the one hand stating that he could not remember the behaviour and on the other stating he had got angry having been provoked had been contradictory. LF prepared a script for SA (page 1314) and at the meeting (at which LW was in attendance and took notes at pages 1323-24) SA communicated his decision to issue C with a first written warning. The notes recorded the following being communicated to C:

“SA explained that to be fair, he completely acknowledged TA’s medical condition, and the help and support TA is getting on that side, but at the same time it is important as IBMers to be a brand ambassador and to behave in a particular manner. SA added that the behaviour that TA

showcased during some of the conversations with Leaseplan and other folks was not up to the mark and was not acceptable and did not meet the standard IBM employees are expected to showcase to external parties and internal colleagues."

20.111 He informed C that he would have a first written warning that would remain for 12 months and c had the right to appeal. This decision was confirmed to C in writing (page 1317), stating that "*Your conduct is unsatisfactory for the following reasons: You behaved in an unprofessional manner towards a Third Party Supplied contrary to Business Conduct Guidelines. In future, you will be expected to always behave in a professional manner and observe Business Conduct Guidelines"*

Issue 5.1.27 Claim 18, SA listening to a recording of C's call with the car company without seeking permission;

20.112 C gave evidence that SA told him during the disciplinary meeting that he had listened to the recording of C's calls that led to the complaint being raised. The notes of the disciplinary meeting do not note this being said at any time by SA. We also note that at one point SA is noted as saying that during the call in question that C had 'apparently' used self harming messages (which would not suggest that SA had himself listened to a call). There was a comment noted by SA stating that Leaseplan had "*shared their call log where they called [C] 4 times and left a voicemail*' (page 1324) but there was no other comment noted as SA stating he himself had listened to any recording. We find that SA did not tell C that he himself had listened to the recording during the disciplinary meeting. We further find that SA did not in fact listen to any recording of this meeting. We make this finding firstly because of the comment noted about the call apparently containing messages of the nature alleged. More significantly, when this point was investigated during C's appeal, SA was asked whether he had listened to the call and he stated that he had not (see page 1408). LF responded in a similar manner (page 1387) and MS also confirmed that she had not received a recording of the call. Further investigations also took place with Leaseplan and during the e mail exchange at pages 1417-1421 having checked the matter internally, an email was sent by OW at LeasePlan confirming that they had "*not released the phone calls to anyone outside of Leaseplan".*

Further discussions around adjustments

20.113 There was a further call between LF and C on 25 May 2022 and following that meeting LF again e mailed C with a summary of the

discussions (page 1298). This provided an update on the phased return plan and noted the following:

"*Also, you asked about whether the QA process could be adapted so that instead of the QA being completing by a UK/European employee, it could be sent to someone in the US. I understand you said you had previously discussed this with [AH]. I have asked [BM] to investigate and discuss this with [AH] and I will come back to you once I have a reply."*

20.114 LF raised this with BM and on 21 June 2022, BM sent a response to LF referring to a meeting to be attended by RC the next day. In this e mail he stated:

I have spoken with X-Force Red - North America team. We as a business unit have agreed on a trial period of 4-6 weeks that reports can be QA'ed by the North American team out of the region as longas they are not projects that are confidential to EMEA or GDPR related. This is out of our normal global process, and we are making a temporary reasonable adjustment to see if it works for the employee and X-Force Red. Any urgent QA may default to the normal process EMEA. This is where we cannot wait for the US in a different time zone. [RC] as the X-Force Red task manager for UKI, will require a copy of the report after QA has been completed and it will follow the X-Force Red release process of being sent by XFR EMEA operations manager or XFR UKI Delivery Manager.

BM did not recall LF specifically explaining to him that this was a request made to help C with the effects of his mental health condition. He said that as the request had come via HR he assumed that they would not have asked if they did not think it would help and so he gave this request consideration and provided a response. We accepted this evidence. A meeting took place between C, RC and LF on 22 June 2022 (see e mails arranging the meeting at pages 1325-1328). The agenda for that meeting had been prepared at page 1327 and one of the items was noted as "*Explaining how the QA process will work for you".* RC told us that whilst he could not recall the exact discussions C seemed content with what had been agreed. This arrangement remained in place beyond the trial period with no concerns.

Issue 3.2.11 Claim 19, RC complained about C missing a meeting when C had "laptop" issues, resulting in C having to attend a meeting with his new manager, NON on 8 July 2022

20.115 There was a XFR team meeting scheduled to take place on 22 July 2022 which C did not attend. RC told us that he thought that given the

proximity of the meeting to C returning to work that he assumed C may not have seen the invite. We accepted this evidence. A further XFR team meeting took place on 6 July 2022 and C did not attend nor say why he was absent. RC e mailed NO that same day as follows:

"Just letting you know [C] did not attend the XFR UKI Team call again this week and was showing as offline (Wed 6th July 4:30pm) He also missed the one before on the 22nd June 2022 but I appreciate that was very close to his return to work discussion and would give the benefit of the doubt he did not see it.

Wanted to bring this to your attention, one, to ensure he is ok and secondly that he needs to attend these meetings. They are mandatory as set out in his return to work agenda and should provide a valid reason if not able to attend ahead of the meeting occurring."

RC said the reason he sent this message was because he was concerned about C as he had just returned from sick leave and as it had been agreed as part of the return to work plan that he would attend. We accepted this evidence and do not find that RC was making a complaint at all. When he asked in cross examination why he did not send a slack message or telephone C, RC told us that he did not send a slack message as C was not showing online so would not have seen it and it would have disrupted the start of the meeting he was chairing to make a telephone call to C about this. We accepted this explanation. On 9 July 2022, C informed RC via a slack message that he was having laptop issues (page 1351) and on 21 July 2022, C told RC that these had now been resolved (page 1357).

20.116 There was a further XFR team meeting which took place on 21 July 2022 at 3:30 pm. At the start of the meeting, RC told us he noticed that another team member, NM, was not on the call but was showing as online on slack, so he sent him a message via slack at 3:31 pm stating "*You able to join the UKI team call*?" to which NM replied at 3:32 pm "*ofc, I forgot but joining now*". RC said that he sent a message via slack as he was expecting NC to join and noticed that he was online so would see a slack message so was in his view a different scenario to the one involving C as C was not online so would not have seen an instant slack message to be able to quickly join. We accepted this evidence.

Issue 5.1.28 and 6.2.14 - Claim 18, VL deliberately delaying investigation of C's appeal against his warning.

20.117 C appealed against the decision to issue him with a written warning on 13 June 2022 (page 1330). On 21 June 2022, VL was informed that she had been appointed to investigate this appeal (page 1329-31) and

started to gather some initial information from LF and others about the matter. On 5 July 2022, VL sent C a meeting invitation to attend an appeal meeting on 7 July 2022. C then messaged VL the same day and requested that the meeting be rearranged and VL confirmed that she would reschedule (page 1392). She e mailed C the same day rescheduling the meeting for 12 July 2022 and asked him to share any documentation he wanted to in advance of the meeting (page 1341A). On 8 July 2022 C sent a further message asking for the meeting to be rescheduled as he was having issues with his laptop(page 1393). VL responded that she was keen to get on with the investigation as she had allocated time to do this and suggested it be moved to the "*end of next week*" to which C agreed (page 1393). VL met with SA on 6 July 2022 (page 1344-45). C sent a third message to VL on 14 July 2022 asking to rearrange the meeting that had been due to take place on the following Tuesday (page 1394). VL responded stating she was unable to attend on that day as she was on a business trip and asked C if he could attend by webex on any device and suggested a telephone call if he could not access this (page 1395).

20.118 On 15 July 2022, VL suggested that a telephone call take place that day and C responded that he tried not to have meetings on Fridays because of "*past issues and concerns*" and stated that he had been in touch with HR "*to reassign to someone else as you had other commitments for next week. Think it may have been best to reassign.*" C then suggested he could have a call on Monday to which VL responded it was her non working day. There was an exchange of messages between the two about when the meeting could take place and VL suggested that it take place on 28 July at 4pm as this was her "*next availability*". C replied that he was currently testing which was "*paid client work*" and again suggested it should be reassigned suggesting this was because "*its taken a while to make the appeal and be looked into*". VL responded that if C wanted another investigator then he could ask but that given that it was in the mid year reflections timetable and given annual leave that it was unlikely that another investigator would be available sooner than her. She suggested meeting "*today or next Friday*" and if they were not suitable that the meeting take place on 28 July (page 1397).VL had a meeting with LF on 13 July 2022 (notes at pages 1353-4. VL asked LF about the issue of C's disability and whether it might have explained C's behaviour. LF did not mention or send to VL the OH report that had been received.

20.119 We find that during the period between 5 July 2022 and 28 July 2022, there was no deliberate delay by VL in investigating C's complaints. The delay to the meeting between C and VL was caused by C making

requests to reschedule on 3 occasions. In the meantime, VL was taking steps to investigate the grounds of appeal in any event.

20.120 The meeting between C and VL took place on 28 July and the notes of that meeting were at pages 1367-8. C stated that he had raised complaints about the service and the way that he had been spoken to by an individual at Mercedes. He explained he was appealing on the basis that there was no evidence to support the written warning and suggested that during the call in question there were people laughing and joking in the background. C was asked whether he wanted to listen to the call and he said he did not but suggested that VL listen to it as part of her investigations. During the meeting C was asked about his disability and whether any adjustments were needed. C said that Leaseplan were aware of his disability and that he was struggling to access support from GPs and did not want to take medication. C sent further information after the meeting (pages 1369-70) again raising issues about the way he was spoken to and dealt with by Leaseplan on the call and by Mercedes which he had raised complaints about. On 3 August 2022, VL e mailed C setting out the scope of her investigation (page 1390-1). This included a proposal to listen to the recording of the call in question. C did not reply to this e mail.

20.121 Between 29 July 2022 and 4 August there were some initial communications between VL and MS about whether Leaseplan could provide a recording of the call in question with MS confirming on 4 August 2022 that this could be done, if C consented (1384A). When VL asked C to provide his consent he refused (page 1422) and stated that he was concerned that the recording had been listened to already by R without his consent. It was at this point that VL contacted SA, LF and MS ask them to confirm whether the recording had been released to anyone at R to which they all confirmed they had not (pages 1385 and 1387). C contacted VL on 11 August 2022 to ask her how the investigation was going and VL asked him to reply to her e mail sent on 3 August 2022 about the scope of the investigation. VL also informed C that she would be on annual leave later that week until 31 August 2022. Further messages were exchanged and on 12 August C complained that the delay was causing him "*alarm and distress*".

20.122 On her return from annual leave VL started to finalise her report using R's template document and on 6 September contacted R's HR team to ask someone to carry out a case review (which was standard practice). At this time VL decided that it might be necessary to obtain medical evidence about C's health given that he raised that it was his health that had caused his behaviour. She made a query not naming C on 13 September 2022 and asking OH to confirm whether an employee's reaction to a situation and general behaviour could have been caused

by depression (page 1437-8). VL received a response from AZ the following day giving some general advice (1436) and noting that Depression can manifest differently in individuals, and there is evidence to suggest that anger, irritability, and poor impulse control can be associated with depression. He went on to suggest an OH referral to determine whether this was the case. VL considered this response between 14 and 29 September, concluded that she would ask C to consent to an OH referral and on 29 September 2022 contacted C to ask for his consent to an OH referral.

20.123 There were then various messages exchanged between C and VL about getting C's consent to the referral. C provided his response consenting to the referral on 2 November 2022 and he was assessed on 30 November 2022 (C having rescheduled an appointment due to take place on 22 November 2022). The OH report was provided on 2 December 2022 from Dr Valanejad (pages 1462 to 1466). In this report it was noted:

"there is a possibility that the behaviour and conduct problems he showed in 2(a)-(e) were relating to his underlying mental health condition although I cannot confirm or rule this out" and

"I cannot quantify the likelihood that [C]'s behaviour and conduct was because of the above measures".

VL felt this did not particular assist her in decision making as it was caveated. VL decided to uphold the original decision to issue a written warning as she felt she could not determine that C's ill health was the cause of the incidents that took place in April 20222 due to lack of evidence. She also concluded that even if this had been a partial cause, the conduct was still unacceptable. This was communicated to C on 22 December 2022.

20.124 We were unable to conclude that any of the delays that took place between 28 July and 22 December 2022 were deliberate delays on VL's part. There was an initial short delay in the first two weeks of August which arose because of C's change of position in relation to whether VL should listen to the recording of the call in question and the issues that flowed from that. VL was then on annual leave for the last two weeks of August 2022. The delays were then largely due to the process of obtaining an OH report and in particular the fact that C himself did not provide the appropriate consent to an OH referral until 2 November 2022. Once the appointment had taken place on 30 November and report provided on 2 December 2022, there was only a short delay during which time VL prepared her response and decision.

The Relevant Law

21. The relevant sections of the EQA applicable to this claim are as follows:

4 The protected characteristics

The following characteristics are protected characteristics: …
…disability;….race; religion or belief"

13 Direct discrimination
(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".

15 Discrimination arising from disability
(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'.

23 Comparison by reference to circumstances
(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."

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

20 Duty to make adjustments*(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
(2) The duty comprises the following three requirements.

(3) The first requirement is 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.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third 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.
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act."

123 Time limits

(1) [Subject to [sections 140A and 140B],] proceedings on a complaint 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.

(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.

136 Burden of proof

(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.

22. In addition, **Section 212(1) EqA** defines substantial as being "*more than minor or trivial*".**Paragraph 20 (1) (b) of Schedule 8** provides that 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 had a disability and was likely to be placed at the relevant disadvantage.

23. The relevant authorities which we have considered on the direct discrimination and victimisation claims are as follows:

Burrett v West Birmingham Health Authority 1994 IRLR 7, EAT is an example of the proposition that it is for the tribunal to decide as a matter of fact what is less favourable treatment and the test posed by the legislation is an objective one. The fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment, although the claimant's perception of the effect of treatment is likely to be relevant as to whether, objectively, that treatment was less favourable.

Anya v University of Oxford & Another [2001] IRLR 377 **-** it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Igen v Wong and Others [2005] IRLR 258 and Madarassy v Nomura International PLC [2007] IRLR 246.

The employment tribunal should go through a two-stage process, the first stage of which requires Cto prove facts which could establish that R has committed an act of discrimination, after which, and only if C has proved such facts, R is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether C had established a prima facie case, the tribunal is to examine all the evidence provided by R and the claimant.

Madarrassy v Nomura International Ltd 2007 ICR 867 - the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

Nagarajan v London Regional Transport [1999] IRLR 572, HL,-The crucial question in every case was, *'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some*

other reason, for instance, because the complainant was not so well qualified for the job?'

Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for …'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: *'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.*'

Bahl v Law Society [2003] IRLR 640 – "*where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups.*"

24. In relation to a claim for failure to make reasonable adjustments under sections 20 and 21 EqA, the importance of a Tribunal going through each of the parts of that provision was emphasised by the EAT in *Environment Agency –v- Rowan [2008] IRLR 20*.

25. The Equality and Human Rights Commission Code of Practice on Employment ("the Code") paragraph 6.10 says the phrase "provision, criterion or practice" ("PCP") is not defined by EqA but

"*should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions*".

26. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is considered in the Code. A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case.

27. The duty to make reasonable adjustments arises when a disabled person is placed at a substantial disadvantage by the application of a PCP etc. *Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA*, -the duty to comply with the reasonable adjustments

requirement under S.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage.

28. *Ishola v* Transport *for London [2020] EWCA Civ 112, [2020] IRLR 368, [2020] ICR 1204 confirmed that whilst a one-off decision or act could amount to a practice, it will not necessarily be one and the term generally connotes 'some form of continuum in the sense that it is the way in which things generally are or will be done'.*

29. *Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA* **-** The nature of the comparison exercise under s.20 was to ask whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they were treated equally, and might both be subject to the same disadvantage when absent for the same period of time did not eliminate the disadvantage if the had a more substantial effect on disabled employees than on their non-disabled colleagues. In addition, in relation to whether an adjustment is effective the Court of Appeal said '*So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.'*

30. Tribunals *must* consider the essential question whether a particular adjustment would or could have removed the disadvantage experienced by C*Romec Ltd v Rudham EAT 0069/07.*

31. *Hendricks v Metropolitan Police Commissioner [2003] IRLR 96, [2003] ICR 530*. This makes it clear that the correct focus must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably.

32. *Kingston Upon Hull City Council v Matuszowicz [2009] EWCA Civ 22, [2009] IRLR 288, [2009] ICR 1170* - a failure to make a reasonable adjustment can be a 'continuing omission', and that the provisions of the legislation stating that the expiry of the period in which P might reasonably have been expected to do something was the relevant date for time purposes applies equally to deliberate and inadvertent omissions to making reasonable adjustments.

33. The duty to make an adjustment which is reasonable may amount to a continuing duty - 'if there is such a duty it requires to be fulfilled on each day that it remains a duty' (at para 25 of *Secretary of State for Work and*

Pensions (Jobcentre Plus) v Jamil UKEAT/0097/13 (26 November 2013, unreported).

34. In Wilcox v Birmingham CAB Services Limited [EAT] 0293/10 the EAT confirmed that in relation to knowledge, an employer would not be liable for a failure to make reasonable adjustments unless it had actual or constructive knowledge of both the disability and the substantial disadvantage said to have been caused by the application of the PCP etc.

35. In relation to harassment the following authorities were relevant:

Richmond Pharmacology V Miss A Dhalliwell [2009] ICR 724. There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that R may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so. A respondent should not be held liable merely because his conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as C felt, about the treatment in question, and C must, additionally, subjectively feel that their dignity has been violated, etc.

Grant v HM Land Registry & EHRC [2011] IRLR 748 CA emphasised the importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading,
humiliating or offensive environment was created: "*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."*

Pemberton v Inwood [2018] EWCA Civ 564. Underhill J *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).*

Ali v Heathrow Express Operating Co Limited [2022] EAT confirmed that the context was relevant in determining whether it was objectively reasonable for the conduct in question to have had the required effect.

36. In relation to issues of vicarious liability, the Tribunal was referred to Ministry of Defence v Kemeh 2014 ICR 625, CA, the Court of Appeal held that common law principles are relevant when deciding whether there is a principal-agent relationship for the purposes of the predecessor provisions of the EQA. As to whether it would be possible for an employee of one company to act as an agent for another, Elias LJ held as follows:

"*I would respectfully agree that the fact that someone is employed by A would not automatically prevent him from being an agent of B, and I would not discount the possibility that the two relationships can co-exist even in relation to the same transaction. But in my judgment there would, particularly in the latter case, need to be very cogent evidence to show that the duties which an employee was obliged to do as the employee of A were also being performed as an agent of B. It is in general difficult to see why B would either want or need to enter into the agency relationship. That is so whichever concept of agency is employed. There is a complete lack of such cogent evidence here."*

37. R referred us to the guidance of Mrs Justice Elisabeth Laing DBE (as she then was) at paragraph 139 of Nursing & Midwifery Council v Harrold [2016] IRLR 497:

"Finally, in their oral arguments, both sides recognised that, now that this court has recognised that the power to make CROs [Civil Restraint Orders] under the inherent jurisdiction extends to orders to protect the process of the ET from abuse, it would be desirable for ETs, when they make decisions in weak claims, expressly to consider, and to make a finding on, the question whether the claim (or application) is TWM ["Totally Without Merit"]. I echo that, and hope that ETs will take notice of this suggestion. It will greatly help to have the views of the ET on the TWM issue in any case in which a respondent to ET claims applies for a CRO in this court. It may also be that those who draft the rules governing the procedures in the ET and in the EAT may wish to give some thought to this topic."

38. As to the meaning of "'totally without merit'", we were referred to Sartipy v Tigris Industries Inc [2019] 1 WLR 5892, the Court of Appeal provided guidance on the meaning of the term "'totally without merit'". It held the following:

"A claim or application is 'totally without merit' if it is bound to fail in the sense that there is no rational basis on which it could succeed: R (Grace)

v Secretary of State for the Home Department [2014] 1 WLR 3432 and R (Wasif) v Secretary of State for the Home Department (Practice Note) [2016] 1 WLR 2793. It need not be abusive, made in bad faith, or supported by false evidence or documents in order to be 'totally without merit', but if it is, that will reinforce the case for a civil restraint order."

39. We have also considered the comments of Mrs Justice Stacey in London Underground v Mighton [2020] EWHC 3099 reiterating the comments in Harrold in this case where 10 unsuccessful tribunal claims had been brough in a six year period and where in this case a CRO was ultimately imposed to protect both the resources of the Tribunal and the respondent and its other workers from this claimant's persistent vexatious litigation.

Conclusion

40. The issues between the parties which fell to be determined by the Tribunal were set out above. We have considered the other application made by R in these proceedings and that is to ask this Tribunal to make an express finding or in other words to certify that the claims brought by C are all 'totally without merit'. We find that the thirteen claims before us clearly fall within the category where we should consider making a finding that he claims are 'totally without merit' in light of the comments that we make above about C's credibility and conduct. In particular the fact that many claims have been brought and C has effectively failed to properly pursue or prosecute these claims by in many cases failing to adduce any evidence at all to support the claims but continuing to pursue these on bare assertion alone. We have nonetheless examined every allegation made by C in these proceedings to determine whether based on our findings of fact and applying the relevant legal provisions it amounts to the unlawful discriminatory conduct which is set out in the various sections of the EQA upon which C relies. We also considered in relation to each unsuccessful complaint whether we can conclude it is a complaint 'totally without merit'

41. We have approached some of the issues in a different order but set out our conclusions on each issue below:

Direct discrimination on the grounds of race or religion/belief

42. C makes 7 allegations of discrimination on the grounds of race/religion and 2 of discrimination on the grounds of disability. In order to decide these complaints, we had to determine whether R subjected C to the treatment complained of (which is set out at paragraphs 3.2.1 to 3.2.14 of the LOI and then go on to decide whether any of this was 'less favourable treatment', (i.e. did R treat C as alleged less favourably than it treated or would have treated others ('comparators') in not materially different circumstances). We had to decide whether any such less favourable

treatment was because of either C's race/religion or because of his disability (for the issue) or because of race/religion or disability more generally.

43. We applied the two-stage burden of proof. We first considered whether C had proved facts from which, if unexplained, we could conclude that the treatment was because of race/religion or disability. The next stage was to consider whether R had proved that the treatment was in no sense whatsoever because of race/religion or disability. We set out below our conclusions on these matters for each allegation listed in the LOI with reference to each paragraph number where the allegation is listed:

Issue 3.2.1 Claim 9: remove C's car allowance in February 2021?

44. This complaint arises from Claim 9 presented on 6 February 2021. The allegation in the claim form at page 45 is that this allowance was removed because C is Asian. As per our findings of fact at paragraph 20.25 above DA informed C on 5 November 2020 that his participation in R's ECU scheme would terminate with effect from 5 February 2021. We accept that this was a detriment to C as from 5 February 2021 he was no longer paid the monthly allowance of £425. We therefore had to determine whether this was less favourable treatment and if so whether this was because of C's race/religion. In respect of this allegation C says he was treated less favourably than BM and RC who are both white and non Muslim. We conclude firstly that neither BM or RC were in materially the same circumstances as C, and thus are not direct comparators and this is because neither BM nor RC participated in the ECU scheme at the time that this benefit was removed from C. They participated in a different scheme which gave them a contractual entitlement to a car because of their higher banding (see paragraph 20.17). This entirely different entitlement was not removed or changed at this time.

45. However, we have also considered whether the removal of the ECU car allowance from C was because of his race/religion and we conclude that C has not proved facts which could lead us to conclude that this was because of his race. Even if he had, we conclude that R would have satisfied the burden of showing that the treatment was in no sense whatsoever because of race. We reach this conclusion because:

45.1 Although not directly relevant, because of our findings of fact at paragraphs 20.16 and 20.18-20.22 above we conclude that C never had any contractual entitlement to participate in the ECU scheme or to have a company car provided. C's arguments that he was promised a company car by BM at interview do not assist him (even if correct) as his signed contract of employment and all contractual information and

documentation issued to him after this point made it clear that he had been provided with a car allowance pursuant to R's ECU policy, that this was a discretionary policy based on showing a business need. At the time he entered the scheme in 2016 (and signed his acceptance of its terms and conditions), he met the criteria as he travelled over 7000 miles per year (but even then, the scheme rules set out clearly that continuing eligibility was subject to review – see paragraph 20.16). When the rules changed in 2018 to remove the mileage requirement, eligibility was subject to management discretion, but the criteria remained that having use of a car was essential to the job, setting out particular considerations including call outs, night work and carrying goods (see paragraph 20.18). When entering into the lease for his current car in December 2018, the issue of eligibility was discussed in detail and C was warned that there would be yearly eligibility checks and that in the event that the benefit was removed, C would still be required to maintain the lease on his current car (see paragraphs 20.18-20.22).

45.2 It is abundantly clear that C no longer qualified as an essential car user under the terms of the ECU scheme (see paragraph 20.23). C accepted that he now carried out his role entirely from home and did not need a car to do this. He acknowledges the impact of the Covid pandemic, and the increasing use of cloud based systems meaning he did not need to travel to client sites.

45.3 C was the only person who reported to DA at the time who was still a participant in the ECU scheme (indeed the only person in the wider XFR team with this benefit) and thus this explains why DA did not remove this benefit from anyone else (see paragraph 20.23). We accepted that she reviewed C's eligibility in line with the policy and its requirements and this was the reason for its removal.

45.4 C had adduced no evidence whatsoever to suggest that his race or religion played any part in the decision making of DA. He points to his race and unfavourable treatment but is unable to show the 'something more' that would connect the two.

46. For the above reasons, we conclude that this allegation is dismissed and conclude for the same reasons, that this was a complaint that was 'totally without merit'.

<u>Issue 3.2.3 Claim 11: delaying quality assurance of C's reports by an average of five to 10 days. C says that it is RC who did this;</u>

47. This complaint arises from Claim 11 presented on 1 March 2021 and within that claim at page 87 C refers to a report he submitted for QA on

16 February 2021 which was still in the QA queue "*nearly a week later*". He goes on to make a general complaint made against RC in respect of the delaying of QA reports and that this was because of his race. We found at paragraph 20.51 that on this occasion RC QAd the report submitted by C within 8 working days and thus within the standards that applied to this particular client. Therefore, we conclude that there was objectively no 'delay'. We were unable to find that any other individual had their reports QAd more quickly on any other specific occasion (see paragraph 20.52). Therefore, this allegation is not made out on the facts. Nonetheless we also considered whether C's race/religion was the reason why RC acted as he did in relation to the way he carried out the QA process on this occasion or more generally and we conclude that it was not. C has adduced no evidence that could lead us to conclude that race/religion was the reason for any actions of RC to transfer the burden of proof to R. Any delay in carrying out the QA process would reflect badly on the person carrying out the QA not C (see paragraph 20.52) and there was no impact on C in terms of pay/progression relating to delays in QA. This allegation is therefore dismissed.

48. We were also satisfied that this is an allegation that is 'totally without merit' in that not only has C failed to establish a prima facie case of discrimination, but he has also failed to establish the factual basis for his complaint.

<u>Issue 3.2.4 Claim 11: failing to sanction other colleagues [RW] who swear [and talk over C] at Friday meetings</u>

49. This complaint arises in claim 11 presented on 1 March 2021and at page 87 we see where C complains about swearing in meetings and how it affected him. The essence of this complaint is that RW was not sanctioned or disciplined when he used bad language in meetings and C compares this treatment to how he was treated when he was issued with written warnings for using 'inappropriate and unacceptable' language. C here refers firstly on what he believes were first or final warnings he was issued with on 3 occasions previously. Whilst we did not hear direct evidence of such matters, we refer to paragraph 20.19 for our finding that C was issued with a first written warning in November 2019. C also refers to the first written warning he was issued with on 7 June 2022 (see paragraphs 20.108-20.101 above). Ultimately here the complaint that has been made is the decision by R to not formally sanction RW following C's complaint but to deal with this matter informally. We have considered whether this amounted to less favourable treatment and whether this is because of race. We were not satisfied that this was the case. We conclude this because:

49.1 R acted on the complaints made by C and decided to address the matter informally and remind RW of his obligations rather than to treat this as s disciplinary matter. This was a proportionate response and appeared to address the problem raised. It is difficult to see how this is less favourable treatment in relation to C as he informally raised a concern, and it was dealt with appropriately and the conduct he objected to stopped.

49.2 C has not provided any evidence to suggest that the decision to deal with the matter in relation to RW this way was in any way linked to his race or indeed RW's race

49.3 It does not appear to the Tribunal that the circumstances involving RW were directly comparable to the two occasions upon which C was issued with a written warning. The first written warning given to Ct in November 2019 related to three separate matters that had come out of a disciplinary investigation into C's conduct particularly about the making of unfounded allegations of racial discrimination causing an adverse impact on the working environment. This is an entirely different set of circumstances to the circumstances in which the issue around RW swearing on a call arose. The second written warning given to C arose out of complaints made by an external supplier of C about C's shocking behaviour in threatening his own suicide to its employees on the phone. This is of an entirely different nature and gravity than the matter that arose with RW and C.

50. For these reasons this complaint is dismissed, and we conclude for similar reasons that it is a claim that was 'totally without merit'.

Issue 3.2.7 Claim 13, RC failing to put C on projects until Ramadan in 2021, then giving him controversial projects (race/religion);

51. This claim arises from Claim 13 presented on 28 April 2021 and at page 175 we saw how C put this claim which is about being 'on the bench' for a period before Ramadan started and then being put on what C termed 'controversial' projects during Ramadan (13 April to 12 May 2021). Our findings of fact at paragraphs 20.56 to 20.64 above were that during this period from 1 March 2021 and 12 April 2021 RC did not fail to put C on projects as he had been put on 4 projects during that period (although one was postponed at the last minute) and had been on leave for 10 days of this period. It had fully intended that C be utilised in this period and we could find no deliberate attempt to not place him on projects at this time. We also were unable to find that any of the projects that C worked on between 13 April until 12 May 2021 were controversial. This allegation is therefore not made out on the facts and is dismissed. C did not make any request that he should not been placed on project work

during Ramadan due to religious observance and there is no evidence at all that the fact of it being Ramadan had any significance at all to the decisions made about C's allocation to projects either before or after. C simply seeks to draw a connection between the very fact of it being Ramadan and the fact that he was unhappy with events that occurred at the same time without making or even seeking to adduce evidence to support this connection. There is simply nothing to suggest that C's race or religion was anything to do with decisions about project allocation. This was not the reason for any treatment and the complaint fails. Given our conclusions above, we also conclude this complaint is 'totally without merit'.

Issue 3.2.8 Claim 13, an internal client speaking to C in an unpleasant manner during Ramadan 2021 (race/religion)(page 342); [C has confirmed the name is MJH.

52. This allegation also arises from Claim 13 presented on 28 April 2021. We conclude that this particular complaint fails on the facts on the basis that C has not shown he had any interaction at all with MJH on 27 April 2021 as alleged as the project upon which MJH was project manager did not involve C until 4 May 2021 at the earliest and C did not start work on this project until 17 May 2021 (see paragraphs 20.65 to 20.67). Even if such a call had taken place, C has not shown that MJH said anything to him or behaved in a way that was unpleasant to him on any such call. C was unable to point to any evidence to suggest that anything MJH may have done or said was related to his race or religion, save that MJH would have seen his name, assumed that he was Asian and a Muslim. Moreover, at the time MJH was not employed by R or acting as its agent and thus R was not liable for his actions in any event. This claim is dismissed in its entirety on all bases, and we conclude that it was also 'totally without merit'.

Issue 3.2.9 Claim 13 sending C emails after 6:00 PM; [C has confirmed this is BB]

53. This allegation arises from Claim 13 presented on 28 April 2021. In this claim, C complained about R not informing of a project and emails being "*sent late Friday after 6PM for credentials*". C confirmed in a response to the Order of REJ Findlay that it was BB that had been sending these emails to him. Our findings of fact at paragraph 20.55 above were that C was sent 2 e mails by BB on 6:01 and 6:25 pm on 9 April 2021 about a project he had been allocated that was due to start on 12 April 2021 (the following Monday). We also accepted that C had not been informed of his allocation to that project before receiving these e mails.

54. We have therefore gone on to consider whether either the sending of these e mails by BB or (even thought this was not pleaded) the fact that C was not informed by RC or BM that he had been allocated to this project before the e mails was sent was because of C's race or religion. We conclude that it clearly was not because:

54.1 BB sent e mails not only to C but to BM and RC who were not the same race/religion. There was no difference in treatment.

54.2 BB was not employed by R and had nothing to do with R as a client (as C acknowledged). R would not be responsible for his actions in any event.

54.3 C has adduced no evidence to suggest that the reason he was not told by RC/BM about his allocation to this project was because of race/religion. This was never put to either RC or BM to allow them to comment on it and only really arose during the hearing itself. We conclude that this was not the reason why this took place in any event and C acknowledges that it was possible he was told of his allocation to the project after these e mails (and presumably must have been to have carried out the work).

55. This claim is dismissed, and we also conclude it was one 'totally without merit' given our conclusions.

<u>Issue 3.2.11 Claim 19, RC complained about C missing a meeting when C had "laptop" issues, resulting in C having to attend a meeting with his new manager, NON on 8 July 2022;</u>

56. This allegation arises from claim 19 presented on 16 August 2022 and at pages 395 and 396, this claim is explained as being that RC reported him to his line manager NON for not attending a team meeting which meant he had to attend a meeting to discuss this with NN on 8 July 2022. C complains that he was treated differently to a white employee, NM in that when NM did not attend a similar team meeting RC sent him a slack message at the start of the meeting and did not report the matter to NM's line manager. We refer to our findings of fact at paragraphs 20.115 to 20.116 above and firstly conclude that the e mail sent by RC was not a complaint as such it was simply an e mail informing C's then line manager that C had not attended team meetings primarily out of concern for C. We could not see how this could really bee seen as detrimental treatment at all. In any event we were also not satisfied that there was any less favourable treatment between the way that RC dealt with C's absence from the meeting to the way he dealt with NC's. The circumstances were entirely different in that firstly NM was online on slack at the time and so would have seen and could

respond instantly to a message whereas C was not. In addition, C had only recently returned from sick leave and it was the second XFR meeting he had missed. RC was primarily concerned as to C's wellbeing and reminding his manager that he did need to attend the meeting. These were materially different circumstances. C has not provided any evidence to suggest that RC was motivated by either his or NM's race or religion in the way he handled this matter. This complaint is dismissed and again is for the same reasons 'totally without merit'.

Issue 3.2.12 Claim 16, C's 2nd line manager SA failing to get in touch with him after C raised a query about report submission (disability)

57. This allegation arises from claim 16 presented on 31 October 2021. C suggested that the reason SA had behaved as he did was because SA knew GD (C's former 2LM and a witness in Claims 1-6) as his name had been mentioned in an earlier call. C suggested that this showed that this amounted to disability discrimination as GD and SA had been "*plotting*" against him. In the first instance C has not made out this allegation on the facts as SA did not fail to get in touch with the C but there was a clear exchange of communication between the two between 6 and 10 September 2021 (see paragraphs 20.79 to 20.83). In any event, C has not shown any evidence that whatever SA did or did not do during this exchange of correspondence was in any way connected to his disability. The suggestion that because SA knew an individual who C had previously interacted and knew he was unwell is well below the threshold of evidence to suggest a discriminatory motive. He has not shown a prima facie case of direct disability discrimination and thus this complaint fails, and we also therefore conclude it is 'totally without merit'.

Issue 3.2.13 Claim 16: member of Project P Team based in Poland making C telling C he needed to request an admin account then saying he did not need it, thereby sending him on a "wild goose chase" (race discrimination). The perpetrators are said to be CT, GL and LS who were employed by R but who left to work for "[Client K]"

58. This allegation arises from claim 16 presented on 31 October 2021 and C provided details of this complaint being that the three named individuals had showed "*signs of passive aggression*" had made him request account details that were not needed and then refused those and that they "*praised the non-asian person*" and that this made him feel suicidal. We set out our findings of fact on this issue at paragraphs 20.92 to 20.97 above. C has not proved this allegation on the facts, but it was clear to us that there was a significant difference in opinion between C and at least 2 of the above named employees of Client K in

relation to the access he needed to carry out his tests. The e mails on both sides became fractious and as noted at the end of the project by the manager at Client K, the trust had been lost on both sides. However, we were not able to conclude that anything that was said or done by the three named individuals amounted to direct race/religious discrimination or indeed detrimental treatment of C at all. We accepted the submissions of R that at its height this amounted to a decision by Client K that it did not want to allow R the access it wanted to carry out the testing it had commissioned. Whilst C was the tester assigned to do this testing, the decision related to granting access to R to the systems of Client K. C was clearly frustrated that he was unable to get the access he felt he needed (and indeed may have been correct that to do the role to the best of his abilities he needed this access) but ultimately the level of access to be granted is a decision solely for the client, not R as the provider of services. This was not connected to C or C's race or religion at all but was a purely commercial decision about the level of access. C had been provided with an acceptable way to address his concerns by both CL and others that if access was not provided, this should be recorded as a limitation in the report, but he continued to persist and complain about how the decision was affecting him.

59. Moreover, none of the actions of the named employees were actions that R has any responsibility for as they were not the employer of any of these individuals at the time and thus could not be vicariously liable for such actions under section 109 EQA.

60. For these reasons the complaint is dismissed, and we find it is 'totally without merit'.

<u>Issue 3.2.14 Claim 16: CL failing to tell C to whom he should send his report for "QA" (disability)</u>

61. This complaint arises out of claim 16 presented on 31 October 2021. This allegation fails on the fact as CL did not fail to tell C to whom he should send this report but gave him a clear instruction on 16 September 2021, that he should send it to RC and BM (see paragraph 20.84) . C's suggestion that in doing this CL was joining in with bullying him and that this was related to disability is entirely unsupported by any evidence at all. This complaint is dismissed, and we have no doubt in finding that this allegation was 'totally without merit'.

<u>Harassment related to disability or race</u>

62. C makes 15 allegations of disability related harassment and 2 of race/religion related harassment. C relies in some cases on the same acts as were said to be direct discrimination as set out above. However,

the test for a harassment complaint under section 26 EQA is different. To determine these complaints, we need to decide whether C was subject to unwanted conduct of the type described; then determine whether the conduct was related to disability or race (as applicable). We are then required to consider whether the conduct had the purpose or effect of violating C's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, having regard to: (a) the perception of C; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. We set out our conclusions on each matter below:

<u>Issue 5.1.1 Claim 7DA, using a mocking tone towards C;</u>

63. This claim arises out of claim 7 presented on 7 December 2020 and in that claim form C stated that this related to a telephone call which took place with DA on 26 November 2020 Our findings of fact about this telephone conversation were set out at paragraphs 20.33 to 20.55 above. C has not shown that DA used a mocking tone during this conversation and thus this complaint is not made out on the facts and is dismissed. We found C's evidence on this allegation to be lacking in any detail upon which we could make a finding of tone being mocking and moreover he made no connection at all to whatever tone DA was alleged to have had with his disability. This cannot amount to harassment whatever the effect this conversation had on C as it was not related to disability. This complaint is dismissed, and we conclude it was 'totally without merit'.

<u>Issue 5.1.2 Claim 7, DA, refusing to allow C to work different hours during the day and contradicting herself as to which I was were the "usual hours";</u>

64. This claim arises out of claim 7 presented on 7 December 2020 and in that claim form C stated that this again related to a telephone call which took place with DA on 26 November 2020. We again refer to our findings of fact at paragraphs 20.28 to 20.35 above. The allegation about DA contradicting herself as to what usual hours appeared to relate to a comment about the hours that IBMers tended to work rather than anything directed at C and so we conclude was not a contradictory statement. In addition, we were not satisfied that the response of DA to the request made by C during this call amounted to a refusal of a request to work different hours. DA stated to C that individualised non standard working arrangements was not an IBM offering and that having checked again with BM that the core hours operating model for the XFR team was between 9 and 5:30. However she did at the same time refer C to R's flexible working policy (which she had already sent to C on occasions earlier that year) and informed C that he could make a request to ask the business to consider this. She recorded that C had

told her he did not want to pursue such a request. We conclude that this part of the allegation is not made out on the facts.

65. However, we have also gone on to consider whether any of the comments that were made by DA in relation to C's request to work different hours could amount to disability related harassment. Firstly, it is hard to see how DA responding to a request made by C can really amount to conduct that was unwanted. Presumably C asked this question because he wanted DA to answer it. We also considered whether C had shown that the request he made to change his hours, or the response provided by DA was related to C's disability. On this point, we conclude that it was not. On C's pleaded case he stated that he "*made a valid request to work different hours during the day as I am on an individual project and the time zones interconnect*". C agreed during cross examination that he was making the request because of this project and agreed that he did not at the time make any reference to his disability (paragraph 20.30 above). There was no evidence at this time from anywhere else about C's working hours and how these might be connected to his disability. Therefore, we conclude that this was not a request made or dealt with that was in any way related to disability and thus cannot amount to disability related harassment.

66. We therefore do not need to consider whether the response of DA had the purpose or effect required by section 26 EQA but we do say that it clearly did not have this purpose as DA was simply responding to a question in an appropriate and measured way and provided C with a clear and helpful response referring him further to R's flexible working policy. It is hard to see how her response could have had the effect required either. This complaint of disability related harassment is dismissed, and we conclude it is 'totally without merit'.

Issue 5.1.9 Claim 9, DA removing C's car allowance;

67. Addressing each of the constituent elements of this complaint, we conclude as follows:

Was this unwanted conduct?

68. We refer to our findings of fact at paragraph 20.26above and conclude that this was unwanted in the sense that C objected to the removal of this car allowance.

Did it relate to disability?

69. We were unable to find that the removal of C's car allowance had any connection at all to C's disability. C did not explain why he felt that this was the case simply referring to the fact that it was removed after he had returned from a period of sickness absence and that R knew that he was

disabled at the time as found by the Tribunal in Claims 1-6. Therefore, this complaint of harassment fails, removing the car allowance was not related to disability. We have set out our detailed conclusions at paragraphs 44 to 46 above about why it was removed (which were in summary because C was no longer eligible). Therefore, this cannot amount to disability related harassment. This complaint is dismissed and is a complaint 'totally without merit'.

Issue 5.1.10 Claim 10 R removing C from certain "slack channels";

70. We refer to our findings of fact at paragraphs 20.44 to 20.45. C was removed from slack channels on the dates in question. We have therefore firstly considered whether it was unwanted conduct related to disability. C has been unable to show even the slightest connection to disability in relation to this complaint. He did not challenge the evidence of IT that he was unaware of C's disability at the time he removed C from slack channels. We accepted the evidence of IT as to why C was removed. This was not related to disability and therefore cannot amount to disability related harassment, and we do not need to go on to consider the purpose or effect issues. This is a claim that is patently one 'totally without merit' and we dismiss it on all bases.

Issue 5.1.12 Claim 10, failing to send C notification that his application for an internal competition, which he had sent on the 4th of February 2021, had been received until after the competition had closed (notified on the 11th of February 2021 when the competition closed on the 8th). C says that this was a weekly competition on R's intranet re tickets to Wimbledon. C does not know the names of those responsible;

71. This claim arises out of Claim 10 presented on 15 February 2021. C was entirely unable to make out this claim on the facts having adduced no evidence at all on the matter (see paragraphs 20.46 to 20.47) and it is dismissed. Again, this claim was very clearly 'totally without merit'.

Issue 5.1.19 Claim 13, "mind games" C says this refers to telling him he is on a project and then telling him that he is not on the project - C says that this refers to BM and RC, in around March or April 2021;

72. We refer to our findings of fact at paragraphs 20.56 to 20.64 above. We were not satisfied that the decisions around allocation of C to projects in March and April amounted to BM and RC playing 'mind games' with him by telling him he is on a project and then telling he is not on a project. In relation to Project A, C became aware of this project being stalled before BM as it was C who notified him that this was the case. In relation to the GTSpr/Project Rock project which C had taken some work form between 8 and 10 March 2021 and was placed again on the project on 10 May 2021, this was a decision made by CL and IT as part

of the GTS client work and was not something that either BM or RC decided upon. The later vague allegation in relation to projects S and P was unclear, confused and unsupported by evidence. In any event, we entirely accepted the submission of R that the allocation of C and any other pen tester to was related to R's dynamic business and required decisions to be made to move resources around (which C acknowledged). This allegation fails on the facts, and we conclude is 'totally without merit'.

Issue 5.1.21 Claim 14, on 28 April 2021, DA telephoning C saying she was concerned about his health but then mentioning things he had not done, causing him stress and anxiety;

73. This allegation arises out of claim 14 presented on 28 April 2021 and relates to a call that in fact took place on 27 April 2021. C's evidence on this allegation was confused and non specific. Our findings of fact on this allegation at paragraphs 20.41 to 20.43 were that DA did not behave in a manner that was in any way dismissive of C's health and this was generally a supportive call. We have considered whether any of the matters discussed in this call could be conduct that could be seen as disability related harassment. There were some brief discussions in that call which related to C's health so in that sense, in particular his mental health condition, so there was some connection to C's disability. We cannot however conclude that any of the discussions amounted to unwanted conduct, as DA asked some perfectly appropriate questions during this meeting which C provided the answers too. None of this was inappropriate and amounted to a general management conversation about wellbeing. We were entirely satisfied that any questions that were asked of C by DA in this meeting were not done with the purpose of violating C's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. We were also not satisfied that any of the interactions that C had with DA on this call had the required effect on C considering the perception of C (which he acknowledged may have been affected by symptoms of paranoia) the other circumstances and whether it was reasonable for the conduct to have that effect. This complaint is dismissed, and we conclude was 'totally without merit'.

Issue 5.1.22 Claim 17, after C sent a report about a project he worked on between 13 and 16 August 2021, RC and BM failing to reply back to him/run quality assurance check on his report;

74. This arises out of claim 17 presented on 7 December 2020 and relates to a report C submitted on 17 August 2020. We found at paragraphs 20.68 to 20.72 that BM did carry out quality assurance on C's report albeit that he did not then send that report to C to send to the client but

sent it out to the client directly. He responded to C about this when raised. We have gone on to consider whether this was conduct that could amount to disability related harassment. Firstly, we can see no connection whatsoever here to C's disability or disability more generally. BM chose, as he was perfectly entitled to do to send out the report directly to the client . C himself agreed that there was no obligation on BM or anyone to send a report back to C or any tester before it was sent out. This was a time sensitive job and BM took the decision which was entirely unrelated to C's disability. It is also difficult to see how such a decision by BM could be conduct with either the purpose or indeed the effect required. This claim is dismissed, and we conclude is a complaint that is 'totally without merit'.

Issue 5.1.23 Claim 17, on or about 20 August 2021, RC repeatedly questioning why C required a TOOL license for the job;

75. This claim arises out of Claim 17 and C complains about being asked questions about his needed for a TOOL license on a particular job on 20 August 2021. Our findings of fact about this matter were at paragraphs 20.73 to 20.74 and conclude that RC asked C a number of questions about a request C made to provide him with a Nessus licence. We have considered whether this was unwanted conduct related to a disability as the first stage of considering whether this was an act of unlawful harassment. We conclude that in no sense were the questions RC asked anything at all to do with disability. It was clear to us that RC asked C the questions he did to understand why C was asking for this licence as he mistakenly thought C was asking for an offline rather than an online version of the licence. That is abundantly clear from a brief review of the exchange and understanding the context. This was not related to disability and in no sense could this be conduct that had the purpose of creating a hostile environment etc. We also sincerely doubt that being asked these questions had this effect and C give no indication that this was the case. Even in the unlikely event that being asked these questions did have the required effect on C, it is completely unreasonable for this to be the case in any objective sense. This complaint is dismissed and is one very clearly 'totally without merit'.

Issue 5.1.24 Claim 17, MF re "Project B" - MF questioning C when C said there were high risk issues and when MF said he "hadn't found much" and then claiming credit for C's work (C accepts this partially replicates complaints from claims 1-6);

76. This claim also arises out of claim 17. Our findings about what took place in relation to Project B and the involvement of MF were set out at paragraphs 20.75 to 20.77 above. We did not find that MF questioned or

challenged C about his findings over and above general day to day exchanges about work that was being carried out. It is also not the case that MF or anyone else was trying to take credit for C's work. This complaint is not made out at all on the facts and is dismissed. This is clearly a complaint 'totally without merit'.

Issue 5.1.25 Claim 17, p376, RC trying to reduce the number of days C had worked;

77. We found as a fact that RC did not try to reduce the number of days C had worked (see paragraph 20.78). This complaint is dismissed on the facts without any further consideration. We also note that during cross examination C appeared to accept that even if the planner kept by RC showed an incorrect number of days that is of itself did not amount to RC discriminating against him but referred to his contention that historically similar sorts of issues had been happening to him. We could not find anything at all untoward in this matter and could not see what in fact C was complaining about. This is a complaint that is 'totally without merit'.

Issue 5.1.26 Claim 18, giving C a written warning following his interaction with a car company regarding his company car (this relates to SA) p392;

78. Our findings of fact about the matters that led to C being issued with a written warning are set out at paragraphs 20.102 to 20.105 and 20.108 to 20.111 above. Again, considering each of the constituent parts of a complaint of disability related harassment.

Was this unwanted conduct?

79. We refer to our findings of fact above and conclude that this was unwanted in the sense that C did not want to be issued with a written warning.

Did it relate to disability?

80. We have considered very carefully whether this warning could amount to conduct that was related to C's disability. There was no clear evidence in place at the time the warning was issued suggesting that one effect of C's disability could be behaviour of this nature. Whilst this medical evidence was obtained after C had been issued with the written warning, an OH practitioner provided his nuanced view that it was possible that the conduct in question could have been caused by his disability (see paragraph 20.123). It is also clear that when issuing this warning that SA did consider the impact of C's health. He asked C about this during the disciplinary hearing and C gave his view that his behaviour was because of his mental health. SA considered this and told C at the time he issued him with the written warning that he had considered C's health issues but felt that this could not mitigate or excuse his behaviour. We are certainly unable to conclude that C's behaviour was because of his disability but

that is not what we are required to do in any event. The issue is whether the warning related to disability. Given that this was at the very least considered and taken into account we are able to conclude that there was at least a loose relationship between C's disability and the warning that was issued.

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

81. We refer to our findings of fact at paragraphs 20.110 to 20.111 and are entirely satisfied that by issuing this written warning R's purpose was not to violate dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for C. This was an entirely measured response to what C himself admitted was unacceptable behaviour. C also seemed to acknowledge in cross examination that R simply had to take action to address the serious complaints that had been arisen by investigating this matter.

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

82. Following the authorities above, to decide whether any conduct falling within section 26(1)(a) has either of the proscribed effects under section 26(1)(b), a tribunal must consider both (by reason of section 26(4)(a)) whether the putative victim perceives themselves to have suffered the effect (the subjective question) and (by reason of section 26(4)(c)) whether it was reasonable for the conduct to be regarded as having had that effect (the objective question). It must also consider all the other circumstances under section 26(4)(b). The relevance of the subjective question is that if C does not perceive their dignity to have been violated etc the conduct should not be found to have had that effect. The objective question is then relevant and if it was not reasonable for the conduct to be regarded as violating C's dignity etc, then it should not be found to have done so. Firstly C has not really stated that being issued with this written warning was something that violated his dignity or created an intimidating or hostile working environment. He clearly did not agree with the warning given and appealed against it but has not provided any direct evidence of what effect of being issued with this warning had on him. Even if receiving this written warning had the desired effect, taking into account all the circumstances, including whether it was reasonable for being issued with a warning to have had this effect, we conclude that C has failed to make out this complaint. We accept the submissions of Mr Edge that R had a duty to address this complaint from a supplier which had raised a legitimate complaint relating

to the safety of its employees at work. Whatever had caused C to behave as he did, it was completely unacceptable for it to have taken place and to issue a written warning was a proportionate and mild sanction to address the behaviour. The matter was thoroughly investigated, a disciplinary hearing was held, and C had the benefit of an equally thorough appeal at which he could raise any objections. It was handled sensitively and carefully throughout. This complaint of disability related harassment fails and for the reasons set out above we conclude it was also claim that was 'totally without merit'.

<u>Issue 5.1.27 Claim 18SA listening to a recording of C's call with the car company without seeking permission</u>

83. We refer to our findings of fact at paragraph 20.112 above. This allegation is not made out on the facts as C has not shown that SA listened to a recording of C's call with the car company at all. This complaint is dismissed on the facts and again is 'totally without merit'.

<u>Issue 5.1.28 Claim 18, VL deliberately delaying investigation of C's appeal against his warning.</u>

84. We refer to our findings of fact at paragraphs 20.117 to 20.124 above and this allegation also fails on the facts as there was no deliberate attempt by VL to delay investigating C's appeal. We find that VL acted promptly at all times and much of the delay was in fact caused by C himself (e.g. postponing the initial meeting on a number of occasions) and then delaying in providing his consent to an OH referral. The only delay that apparently concerned C was the delay of two weeks in August when VL was on holiday, and we do not accept that delay caused by a short period of annual leave could possibly be conduct of the nature required. It is not even clear to us that C believes this was a delay related to his disability as his allegation as put during the hearing appeared to be that the delay was to prevent him bringing a timely complaint to the Tribunal. This claim is dismissed, and we find that it too is 'totally without merit'.

<u>Issue 5.1.30 Claim 16 Moving C from Project S to Project P, where C had to work with staff based in Poland, after there was racial abuse of the England Soccer Team by Polish fans. C believes that BM or RC was responsible for this (racial harassment)</u>

85. We refer to our findings of fact at paragraphs 20.89 to 20.91 above that it was not BM or RC that was responsible for putting C on Project P but CL and IT. We also found that neither CL nor IT had any knowledge of the incident of racism involving the England football team. We have gone on to consider whether the allocation of C to this project is an act of race related harassment. We conclude firstly that the allocation of C

to Project P had absolutely no relationship to C's race or race more generally. This was a difficult allegation to get to grips with and in itself contains offensive and stereotypical assumptions on C's behalf that he asks this Tribunal to accept: firstly that Polish people are inherently racist and secondly that those making the decision to allocate him to this project also held this racist view of Polish people and acted upon it to place C on this project so that C would be subject to racism himself. He presents no evidence at all to support either of these very serious contentions. We conclude that C had in fact created the connection he now relies upon after the event when he realised that his allocation to this project happened to coincide with an incident of racism involving a Polish football player. This is a deeply troubling and offensive allegation for C to have made with no evidence whatsoever and we entirely dismiss it. This is a claim 'totally without merit'.

<u>Issue 5.1.31 Claim 16: member of Project P Team based in Poland making C telling C he needed to request an admin account then saying he did not need it, thereby sending him on a "wild goose chase" (race discrimination). The perpetrators are said to be CT, GL and LS who were employed by R but who left to work for "[Client K]"</u>

86. Our findings of fact above about this issue are set out at paragraphs 20.92 to 20.97 above. We accepted the submissions of R that at its height this amounted to a decision by Client K that it did not want to allow R the access it wanted to carry out the testing it had commissioned. Whilst C was the tester assigned to do this testing, the decision related to granting access to R to the systems of Client K. C was clearly frustrated that he was unable to get the access he felt he needed (and indeed may have been correct that to do the role to the best of his abilities he needed this) but ultimately the level of access to be granted is a decision solely for the client, not R as the provider of services. This was not related to C or C's race or religion at all but was a purely commercial decision about the level of access. Therefore, as it was not related to race it cannot have amounted to an act of race related harassment. We also conclude that whatever took place did not have the purposes and was unlikely to have had the required effect taking into account all the circumstances. This claim is one that is dismissed, and we conclude is 'totally without merit'.

<u>Victimisation</u>

87. C relies on the various protected acts he carried out that were relied upon in Claims 1-6 (paragraph 6.1.1 of the List of Issues). However, we accept the general submission of R made at the start of this hearing that C has really failed to set out a positive case as to which protected act he relied upon in relation to each act of detriment or to make any

connection at all between those acts of detriment and the earlier protected acts. We note that the Tribunal in Claims 1-6 found that C had done PAs in relation to the matters set out at paragraphs 5.2.1; 5.2.4-5.2.8; 5.210-5.2.12 and 5.2.19 of the List of Issues in that judgment and our findings of fact about these are at paragraphs 20.7 to 20.9 above.

88. C makes 14 allegations of detrimental treatment which he says took place because he did a protected act. Many of these duplicate the acts relied upon in relation to complaints of direct discrimination and harassment. However, we have considered each act of detriment relied upon and gone on to determine whether R subjected C to the detriment complained of (which is set out at paragraphs 6.2.1 to 6.2.16 of the LOI) and then gone on to decide whether any of this was because of the protected act. The provisions on the two-stage burden of proof set out at Section 136 EQA apply in victimisation cases. Once C establishes a prima facie case of victimisation, the burden of proof shifts to R to show that the contravention did not occur. To discharge the burden of proof, there must be cogent evidence that the treatment was in “no sense whatsoever” because of the protected act. We set out below our conclusions on these matters for each allegation listed in the LOI with reference to each paragraph number whether the allegation is listed:

<u>Issue 6.2.3 claim 9: removing C’s car allowance (C says that it was DA who made this decision);</u>

89. We refer to our findings of fact at paragraphs 20.16 to 20.27 above which deals with the specific period in question. C’s car allowance was removed on 5 February 2021, and this was a detriment to him. However, for broadly the same reasons as set out at paragraphs 44 to 46 above in relation to his complaint of direct race discrimination, we conclude that C has not met the first stage of showing a prima facie case that this was because of him having raised a protected act. There is simply no evidence at all that any protected act played any part in the decision of DA, and we accepted the submission of R as to what the reason was. Although the manager involved at this time knew of a protected act in relation to a grievance raised against her on 16 January 2019 (almost 2 years earlier), this of itself is insufficient for us to draw and inference that this was the reason why the allowance was removed. It is very clear why this took place. Even if burden had shifted it, R would have discharged that burden. This treatment was not because of a protected act. This allegation of victimisation is dismissed. We also conclude that this was a complaint made ‘totally without merit’.

<u>Issue 6.2.4 claim 10: including issues raised as harassment at paragraphs 5.1.10 to 5.1.12 namely:</u>

Issue 5.1.10 Claim 10 R removing C from certain “slack channels”;

90. For the same reasons as set out at paragraph 70 above, this claim is dismissed. We were not satisfied that IT removing C from slack channels was in any way a detriment. C had adduced no evidence nor even put to IT that he had any knowledge of any protected acts made by C. This treatment was not because of any protected act it is dismissed and is a claim ‘totally without merit’.

Issue 5.1.11 - R delaying getting C’s 2021 checkpoint for submission to his up line manager;

91. We refer to our findings of fact at paragraph 20.49 above and conclude that it was patently clear that the reason why there was a delay in uploading C’s checkpoint reviews to its online tool was because DA had a new laptop preventing her from doing this. This affected C and other direct reports of DA (presumably many of it not all had not caried out PAs). We were not satisfied that there was any detriment to C because of this as his results had already been shared and discussed with his line manager. We note in addition the reasons of REJ Findlay in her decision to strike out this complaint as a complaint of harassment and concur with these (see pages 510-511). This is a complaint that has no basis and is dismissed as being ‘totally without merit’.

Issue 5.1.12 Claim 10, failing to send C notification that his application for an internal competition, which he had sent on the 4th of February 2021, had been received until after the competition had closed (notified on the 11th of February 2021 when the competition closed on the 8th). C says that this was a weekly competition on R’s intranet re tickets to Wimbledon. C does not know the names of those responsible;

92. We refer to our findings of fact at paragraph 20.46 above. This allegation is not made out on the facts This allegation of victimisation fails for the same reasons as we set out at paragraph 71 above and we also conclude it is ‘totally without merit’.

And 6.2.4 delaying responses to C’s holiday requests

93. We refer to our findings of fact at paragraph 20.48 above. We did not find that there was any delay in approving C’s holiday requests. This allegation was not supported by any evidence linking the response to holiday request to any protected act and it was not even put to any of C’s witnesses. This complaint is dismissed, and we conclude is one that is ‘totally without merit’.

Issue 6.2.9 Claim 14, including allegations made at 5.1.20 (DA trying to obtain C’s medical records then pretending Medigold had asked for them);

94. This allegation is not made out on the facts as per our findings of fact at paragraphs 20.39 to 20.40 above. DA did not try to obtain C's medical records and pretend Medigold had asked for them. The OH report of 30 November 2020 suggested that information be sought from C's GP on the treatment he was obtaining and that a further appointment could then be arranged with OH to further advice (see paragraph 20.38). DA informed C that R would not receive or see the information in his medical records. We also take note on the findings of REJ Findlay in the strike out judgment on the facts behind this complaint (see page 509). This complaint is dismissed on the facts and C has not adduced any evidence making any connection with any PA. This complaint is also 'totally without merit'.

<u>and 5.1.21 above Claim 14, on 28 April 2021, DA telephoning C saying she was concerned about his health but then mentioning things he had not done, causing him stress and anxiety;</u>

95. For similar reasons as are set out above at paragraph 73 in relation to the complaint of disability related harassment this complaint is dismissed. C had adduced no evidence that any behaviour of C was in any way connected to a previous PA. This claim is dismissed and is 'totally without merit'.

<u>Issue 6.2.10 Claim 17, 5.1.22 after C sent a report about a project he worked on between 13 and 16 August 2021, RC and BM failing to reply back to him/run quality assurance check on his report;</u>

96. For very similar reasons as set out above in relation to the complaint of disability related harassment, this complaint is dismissed. There was simply no connection to any protected act and C has failed to even establish the facts behind such a complaint. This is another complaint that is 'totally without merit'.

<u>Issue 6.2.11 Claim 17, encompassing a number of allegations made also as allegations of harassment namely</u>

<u>Issue 5.1.23 Claim 17, on or about 20 August 2021, RC repeatedly questioning why C required a TOOL license for the job;</u>

97. Again, for similar reasons as set out above, this complaint of victimisation fails. This can in no sense be seen as detrimental treatment and the reason why C was asked questions was in order that RC could understand what was required. The reason for this treatment is abundantly clear on its face and is not detrimental at all. This complaint of victimisation is dismissed and is 'totally without merit'.

5.1.24; Matthew Fitch (MF) re "Project B" - MF questioning C when C said there were high risk issues and when MF said he "hadn't found much" and then claiming credit for C's work (C accepts this partially replicates complaints from claims 1-6);

98. We did not find that MF questioned or challenged C about his findings (over and above) general day to day exchanges about work that was being carried out. It is also not the case that MF or anyone else was trying to take credit for C's work. This complaint is not made out at all on the facts and is dismissed. There is no evidence to suggest any connection with a protected act at all. This is clearly a complaint 'totally without merit'.

5.1.25; RC trying to reduce the number of days C had worked;

99. RC did not try to reduce the number of days C had worked. This complaint is dismissed on the facts. There was no connection to any protected act. This complaint is also one that is 'totally without merit'.

Issue 6.2.12 Claim 17, in or about August 2021, BM sending out the report on Project A without telling C it was ready to go out, then telling C to "document his concerns" without explaining that process to him;

100. We refer to our findings of fact and for similar reasons as are set out above in relation to the similar complaint made as an allegation of harassment at 5.1.22 this is dismissed. In relation to the sending out the report without telling C, there was simply no connection with any protected act. It was sent out as part of a standard business process as there was absolutely no requirement for BM to have informed C in advance of doing so. We did not find that BM told C to document his concerns without providing further information. BM directed C to the appropriate place to raise his concerns including a link in his response to C. C had raised no evidence at all to suggest a connection with any PA. This claim is dismissed, and we conclude is one that is 'totally without merit'.

Issue 6.2.13 Claim 17, MF and RC expecting C to write the whole report on "Project B";

101. This complaint is not made out on the facts (see paragraphs 20.75 to 20.78) as C has not shown that either MF or RC expected C to write the whole report on Project B. This had not been communicated to C by either of the two individuals. No evidence has been adduced of any connection with any previous PA in anything that took place in relation to this matter. This claim is dismissed and is also 'totally without merit'.

Issue 6.2.14 Claim 18, 5.1.26; giving C a written warning following his interaction with a car company regarding his company car (this relates to SA) p392;

102. We refer to our findings of fact at paragraphs 20.102 to 20.105 and 20.108 to 20.111. This allegation is made out on the facts, and we were satisfied that this was detrimental treatment. However, we conclude that C has not met the first stage of showing a prima facie case that this was victimisation as there is no evidence at all that SA had any knowledge of any PA at all. The reason why C was issued with the written warning was abundantly clear as we explained at paragraph 49 above. C has not proved primary facts from which the Tribunal could conclude that the detriment was because of the protected act, we do not find that this shifts the burden of proof to explain the reason for it. This treatment was not because of the protected act. This allegation of victimisation is dismissed, and we find is ‘totally without merit’.

5.1.27 Claim 18 ; SA listening to a recording of C’s call with the car company without seeking permission

103. This claim of victimisation is dismissed as not having been made out on the facts (see paragraph 20.112) and is ‘totally without merit’.

5.1.28; Claim 18 VL deliberately delaying investigation of C’s appeal against his warning.

104. For similar reasons as set out at paragraph 84 above this complaint is dismissed. There was no deliberate delay and there is very clearly no connection here with any previous PA. This claim is ‘totally without merit’.

Issue 6.2.16 Claim 16, CL failing to tell C where to send his report for QA purposes

105. This complaint is dismissed on the facts as found at paragraph 20.84 above. This is also a claim ‘totally without merit’.

Reasonable adjustments claim

106. When looking at C’s complaint under sections 20 and 21 EQA, we firstly note that C was a disabled person, and that R was aware that he was a disabled person from 23 June 2020.

107. We were required to look at whether any of the PCPs identified and relied on by C were applied to him and, if so, when this took place. We then had to consider whether any such PCP applied put him at a substantial disadvantage compared to non-disabled people (and what that disadvantage was), considering the appropriate comparator. We then looked at whether R knew that C was placed at this disadvantage

at the relevant time. We finally had to consider what adjustments would have been reasonable to make to avoid any relevant disadvantage.

Were PCPs in place and were they applied to C at the relevant time?

108. We firstly looked at the purported PCPS to see if they were in place and applied at the relevant time. We have looked at the PCPs in a slightly different order.

PCP 4.2.1 Claim 7 : not telling C what meetings were about in advance;

109. We refer to our findings of fact at paragraph 20.36 above as to what took place in relation to this allegation which relates to one occasion on 30 November 2020 about a meeting to be held on 3 December 2020. We conclude that this omission of BM on one occasion to tell C what the meeting was about is simply incapable of amounting to a provision, criteria or practice. C acknowledged that usual practice within R was to provide information in a calendar invite about what a meeting was to be about. We saw examples of this very practice in place in at R in relation to meetings he was involved with (one of which is referred to at paragraph 20.30 above). This claim for a failure to make reasonable adjustments can therefore go no further as there was no PCP that was applied to C. However even if this were capable of being a practice, there is absolutely no evidence at all (medical or otherwise) to suggest that not indicating what the meeting was about placed C at a substantial disadvantage compared to non disabled people and what that disadvantage was let alone that R knew or should have known of this. C never at any time made a request that an adjustment be made to the way he was invited to meetings in relation to BM or anyone else. The complaint of failure to make a reasonable adjustment based on this PCP is misconceived for these reasons and is dismissed. We conclude it is 'totally without merit'.

PCP 4.2.3 Claim 17: RC repeatedly questioning C about why he needed access to a TOOL license on or about 20 August 2021

110. For very similar reasons as set out above, we conclude that this matter is entirely incapable of amounting to a PCP that was applied to C. It related to a very specific incident which took place on 20 August 2021 (see paragraph 20.73 above). There was no practice at all to complain of but an exchange of messages about a request made by C. Even if this could in any way be said to be a practice, C has adduced no evidence medical or otherwise to suggest that asking questions in this manner placed him at a substantial disadvantage let alone that RC did or should have known that this was the case. The complaint of failure to make reasonable adjustments based on this alleged PCP is again entirely misconceived and is dismissed. It is 'totally without merit'.

<u>PCP 4.2.2 Claim 7: expecting C to work "usual hours"</u>

111. C confirmed that the application of this PCP related to a request made during the meeting with DA on 26 November 2020 to work different hours. Whilst we acknowledged the points made by R about the fact that R had provided C on a number of occasions with information about its flexible working policy and encouraged an application, we were satisfied that there was a practice in place at this time that C and others in the XFR team would work usual or standard working hours. DA confirms in her e mail to C sent on 26 November 2020 that the XFR operated a core hours operating model and that non standard working arrangements were not an IBM offering (see paragraph 20.32). Even with the potential for a flexible working arrangement to be requested, there was still a practice that the usual hours of working were confirmed as being 9am to 1730pm. It is less clear that this practice was definitively applied to C at this time given the information he had been provided with already and was reminded with about the opportunity to make a request to take flexible working. However, we were broadly satisfied that this was a PCP that was applied to C at this time.

<u>PCP 4.2.5 Claim 16: Sending C's reports to BM and RC for "QA" (Quality Assurance)</u>

112. This claim appears to relate to C's request on 16 September 2021 that the practice of having reports QAd by either BM or RC be bypassed and that a report he prepared in relation to client B go straight to the US team for QA. We were satisfied that this was a practice in operation at the time and was applied to C on 16 September 2021. We heard much about the process of QA and what was involved during the hearing and during the exchange between C and CL at this time CL confirmed that it was the "*standard practice*" for reports to be QAd first by the local EU team and so informed C that he should send his report to BM or RC for that QA to take place (see paragraph 20.84).

<u>If applied, Did any of the above PCPs place C at a substantial disadvantage when compared to non-disabled people?</u>

<u>PCP 4.2.2 Claim 7: expecting C to work "usual hours"</u>

113. Having concluded that this PCP was applied to C as at 26 November 202, we had to go on to consider whether the application of the PCP put C at a substantial disadvantage when compared to non disabled people. On this matter we conclude that C has not shown any such disadvantage to him by the application of the policy. We conclude this because:

113.1 The only medical evidence that existed at the time this request was made was the report of Dr Agrawal (see paragraph 20.15). This provided the diagnosis of mixed anxiety and depressive disorder but made no comment at all about what if any impact C's working hours had on his condition. There is no mention at all of excessive working hours or time spent at work causing any difficulties at all with Dr Agrawal noting complaints made by C about him not getting credit for work, being passed over for promotion etc. It noted that C's health condition does not affect his work. The additional medical report of Dr Weadick which was drafted following an assessment on 30 November 2020 specifically addressed the question of what workplace adjustments were needed and concluded that none were required (see paragraphs 20.37 and 20.38).

113.2 C himself has not set out why he believed that working the hours of 9-17:30 put him at a substantial disadvantage. He did not explain this at the time of the request and has still failed to adequately explain what disadvantage the working hours caused him even during this hearing. C's own case is that this request to change hours was not related to his health but was made because he was on a particular project and the time zones matched to the request he made (see paragraph 20.30). He reiterated this in oral evidence to the Tribunal and admitted that he did not mention that working these hours put him at a disadvantage and confirmed in fact that he was able to work normal hours, but that the request was refused because of informing C of his disability.

114. Therefore, because C has not shown that he was put to a substantial disadvantage by the application of this PCP, his claim for a failure to make reasonable adjustments to remove such a disadvantage must fail Given the way C pleaded his own case in his claim form, such a claim was bound to fail from the start. Even if such a disadvantage had been shown R was entirely unaware of such disadvantage either actually or constructively. C appears to suggest throughout the hearing that because R was aware of his health issues in general terms (referring to earlier sick notes and the report of Dr Weadick) that R ought to have known about all possible disadvantages that might have applied and made adjustments accordingly. This is not how claim under section 20 and 21 EQA works, and C not only has to show he experienced the disadvantage but R knew or ought reasonably to have been aware of this. C can show neither so his claim for reasonable adjustments fails and we also conclude given this entirely fundamental weakness in this claim that this is a claim 'totally without merit'.

PCP 4.2.5 Claim 16: Sending C's reports to BM and RC for "QA" (Quality Assurance)

115. We have gone on to consider whether the PCP of sending reports for QA to BM or RC that was applied to C caused him a substantial disadvantage compared to those who were not disabled. We concluded that C has entirely failed to show that there was such a disadvantage because:

115.1 As we have outlined above in relation to the PCP relating to working hours in November 2020, there was no medical evidence before this Tribunal which would indicated that the application of this QA process caused any disadvantage to C as a result of his disability. From the statements of the only 2 medical reports that R had at the time, there is no suggestion that the QA process caused C difficulties. Dr Agrawal refers to C not being credit for his work and people passing off work as their own, but this is a general complaint and does not identify the QA process as being a difficulty. Dr Weadick's report mentions work being appropriated by others but identified no workplace adjustments at all let alone any discussion about QA or its effect. We do also take note of the fact that C entirely failed to co-operate with all steps that R tried to take to elicit more information from C in conjunction with its OH team as to what adjustment should or could be made. C simply refused to engage with R about this and refused to take the steps suggested in the OH report which might have led to a further referral (see paragraphs 20.39 to 20.43). His insistence that he was not prepared to take any steps until the mediation suggested by Dr Weadick took place is of no direct relevance to progressing the other more concrete suggestions made by Dr Weadick which might have led to more fruitful discussions on adjustments.

115.2 C did not provide any information at the time and provided no evidence at the hearing to support any finding that the QA process caused any substantial disadvantage and intimated that he should not need to say this at all. We can find no basis for R assuming or working out that BM and RC QAing C's reports caused him a particular difficulty as regards to his mental health. We take note of our findings that the QA process was a standard part of all pen testing at R and that the reports produced by its testers were not the ownership of the tester but were reports produced collaborative by the team. The QA process was an integral part of it and who carried out this QA process and what input they provided was immaterial to the individual testers themselves.

116. Therefore, C's complaint fails on this ground alone and even if substantial disadvantage had been shown it is quite clear that R's manager had absolutely no knowledge of it and given our conclusions above could not be reasonable expected to have known. C admitted that at the time of the request C's managers were unaware of any link with disability.

117. The fact that R subsequently agreed to make this change once it had been requested by C in a discussion that took place in May 2022 following further OH advice from Dr Owum supports the contention that R was unaware of any alleged substantial disadvantage before this time (see paragraphs 20.106 and 20.113 to 20.114). Even when this change was made it was not entirely clear to us that C had shown that this change was in fact connected to his disability. The suggestion by Dr Owum of a change in team dynamic together with the specific request by C to LF on 25 May 2022 was addressed promptly with the change being put in place from 22 June 2022 at least on a trial basis. When C made his request clear it was granted and had this been done at a much earlier stage, we feel it may well have been considered at this time.

118. Therefore, we did not need to go on to consider the steps that would have removed any substantial disadvantage and from when these should have been taken. C's complaint of a failure to make reasonable adjustments in this matter is dismissed largely because of no evidence at all of any disadvantage. We also conclude this claim is 'totally without merit'.

Employment Judge Flood

Date: 28 March 2024

Notes

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