

Case Numbers: 1302114/2022 &
1308045/2022

EMPLOYMENT TRIBUNALS

Claimant
Mr H Ahmed

Respondent
-v- **Department for Work and Pensions**

FINAL MERITS HEARING

(CONDUCTED IN PERSON IN PUBLIC)

Heard at: **Centre City Tower, Birmingham** On: **18 to 22, 25 to 29 September 2023, 12 & 13 October 2023 and in chambers 16 October 2023, 1, 3, 6 & 7 November 2023**

Before: **Employment Judge Perry, Mrs R Pelter & Ms J Keene**

Appearances

For the Claimant:

In person

For the Respondent:

Mr M Paulin (Counsel)

JUDGMENT

1. The complaints concerning Ms Niki Davies, Mrs Laura Galloway, Mr Christopher Lyness, Miss Naomi Minto, Ms Catherine (Cathy) Beck, Mr Mazhar Iqbal, Ms Angela Street, Mr Paul Szyszko and Mr Eric Brown as the alleged perpetrators and the direct race discrimination complaints against Mr Richard Smith (issues 18(d), (e) & (f)) were withdrawn. They are dismissed on withdrawal.
2. As to the claimant's remaining complaints under the Equality Act 2010 the respondent did not contravene part 5 of the Equality Act 2010. The claimant's complaints that the respondent did not make reasonable adjustments for him, discriminated against him because of something arising in consequence of disability, directly discriminated against him and victimised him in breach of Part 5 Equality Act 2010 are dismissed.
3. The claimant's unfair dismissal claim is not well founded. It is dismissed.



4. The respondent has agreed to pay to the claimant the agreed sum of £1,815.20 in relation to unpaid holiday leave due on termination.

REASONS

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THE ISSUES

References below in circular brackets are to the first paragraph (if more than one) of these reasons to which the cross reference refers. Those cross references are provided for the assistance of the reader. The reader is asked to note that sometimes the transposition software used by HMCTS may mean that the cross references are not properly transposed and/or an error generated. References in square brackets are to the page of the bundle, or where preceded by a document reference or the initials of a witness, that document or witness statement.

1. These are two claims that form claims 6 and 8 in a larger series of claims between the parties:-



- 1.1. Claim 6 (claim number 1302114/2022), was issued on 26 April 2022. ACAS early conciliation started and ended on 25 April 2022. Any complaint that occurred before 26 January 2022 (not 15 December 2021 as identified previously) is potentially out of time.
- 1.2. Claim 8 (claim number 1308045/2022), was issued on 4 October 2022. ACAS early conciliation took place between 2 and 4 October 2022. Any complaint that occurred before 3 July 2022 (not 23 May 2022 as identified previously) is potentially out of time.
2. Claim 6. claim came before Employment Judge Algazy KC for a preliminary case management hearing on 27 September 2022 [74-84]. That claim was listed for a final hearing to start on 18 September 2023. Amongst other matters Employment Judge Algazy KC required Mr Ahmed to provide detail of his claims, permitted DWP to lodge an amended response and prepare and updated list of issues [75].
3. Two protected characteristics are relied upon. The first is race. At a hearing on 1 March 2023 [984] Employment Judge Faulkner recorded at §42.1 [990] that Mr Ahmed described his race as Pakistani. The second protected characteristic is disability. Two impairments are relied upon for the purpose of that complaint:-
 - 3.1. a physical impairment Paroxysmal Nocturnal Hemoglobinuria (“PNH”) and
 - 3.2. a mental impairment, depression.
4. DWP (as we shall refer to the respondent) concedes that PNH is a disability. Depression is not conceded and has been the subject of a separate hearing (see (7)).
5. As to the knowledge “defence” there are separate tests for the discrimination because of something arising from disability and the failure to make reasonable adjustments. Following clarification during case management, the only issue that



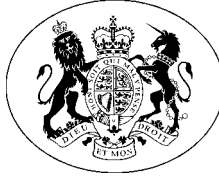
falls for us to determine is when DWP had actual or constructive knowledge of the disability.

6. These two claims and two more were considered at the hearing before Employment Judge Faulkner. Amongst other matters he consolidated claims 6 and 8 (§55), clarified the issues, granted an amendment application in relation to one complaint of victimisation and what forms issue 12(k) before us (§47-50) and reviewed an earlier order concerning the disability issue of depression deciding to list a Preliminary Hearing to determine if depression fell within the meaning of disability.
7. The Preliminary Hearing to determine disability was heard before Employment Judge Craig Kelly. He decided [1013] that Mr Ahmed was not disabled by reason of depression in the period 22 to 25 September 2020 (that period having been agreed as the relevant period by the parties). An issue arises in that regard that we return to below (517). We also address below (19) an issue arising from Employment Judge Craig Kelly's decision being under appeal.
8. Those matters aside Mr Ahmed before us led little evidence regarding the effects the accepted disability had on him day to day. The impact statement he lodged was not within the bundle. We remedied that omission. It added little as it expressly stated it focussed on depression. In his witness statement Mr Ahmed said this:-

“5. I have a blood condition PNH which causes me fatigue and associated stress, and to be susceptible to stress.”

9. In his submissions Mr Ahmed said this:-

“The respondent has conceded that fatigue, stress, anxiety and depressive symptoms (depression) arise out of PNH (see EJ Kelly's judgment on whether my depression was a disability).”

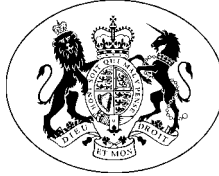


10. That appears to be a reference to this extract from Employment Judge Kelly's reasons:-

"4. PNH is a physical condition, it is a blood abnormality. There is no dispute as to the existence of PNH or that it meets the required definition of disability under the 2010 Act. As to the discrete illness, of depression, which is said to give rise to a disability, that it not accepted by the Respondent.

5. It is recognised by the parties that PNH some of the symptoms that depression would cause, including stress, anxiety and fatigue, but the Claimant argues in this case that depression has itself arisen, which caused a freestanding disability, quite aside from any symptoms that might arise from PNH."

11. We address the Occupational Health (OH and/or OHS) evidence obtained during the course events that concern us and GP MED3 sickness certificates at (115, 223, 267, 353 & 418) below. We return to the impact of the PNH at (512 to 518).
12. A consolidated list of issues was prepared taking into account of matters identified during case management. We asked the DWP to ensure this was revised as the panel noticed that some of the dates that relate to timing were incorrect. The correct dates were agreed and are set out at (1) above. Given different timing issues arose in the two claims we also sought the list of issues be revised to identify which of the two claims each of the complaints stemmed from. During the first part of the hearing (days 1- 10) that was further revised to identify complaints that were withdrawn against individuals. Each revision was copied to Mr Ahmed to ensure he was agreeable and had the opportunity to object having had a chance to consider the same. He did not. Towards the end of the hearing (see (43)) Mr Ahmed confirmed further parts of the direct race discrimination complaints against



Mr Smith were withdrawn (issues 18(d), (e) & (f)). A copy of the final version of the list of issues reflecting the further withdrawals on day 11 is annexed.

Applications and matters arising during the hearing

13. We do not address each and every application made during the course of the hearing. This judgment will be long enough as it is. We focus on the principal ones.
14. At around 3 pm on 5 September 2023, 8 clear working days before this final merits hearing was due to start DWP made an application to convert to hearing to be heard entirely by CVP on the basis that having reviewed the witnesses that it was calling in this case many were addressing brief allegations about them, were briefly involved in grievance and disciplinary processes and that two of its witnesses were off on long-term sick leave (Sarah Haines and Naomi Minto), another (Niki Davies) was working from home for the next 2 to 3 months to undertake care for a relative and Richard Smith, a grievance appeal officer was on pre-booked annual leave. DWP argued that an entirely remote final hearing via CVP would save time, costs and travel expenses; assist with enabling witnesses, particularly those with personal difficulties, to attend to give evidence; and consequently further the overriding objective.
15. On Friday 8 September that application was partially granted by Employment Judge Gaskell who ordered it be conducted as a hybrid hearing (that is in person and remote). At 15:34 that day a notification was sent to the parties by email headed "Bundle Reminder" asking them to ensure the bundle should include certain documents and giving them the log on details to access the remote hearing. Having checked the Tribunal file we identified that attached to that notification were four documents. Three were routine guides sent to the parties. The fourth was titled "1302114.2022.corres.08092023.pdf" being Employment Judge Gaskell's order.



16. An hour after that notification was sent Mr Ahmed objected stating there had been no order that the hearing should take place as a hybrid, referencing his mental illness, that his blood condition caused fatigue and stress that he had social anxiety and he would not be able to participate in a hybrid hearing. He also complained that if an order had been made by the Tribunal that the hearing take place as a hybrid hearing, why he had not been involved in that process. Given the other attachments and the filename given to Employment Judge Gaskell's order we conclude that Mr Ahmed had not opened that order when he responded to the Tribunal not realising what it was.
17. On the first morning of the trial Mr Ahmed sought that Employment Judge Gaskell's order be reconsidered on the basis that conducting a video hearing by CVP would cause issues due to his disability (the video hearing would impact on his social anxiety, and taking into account his blood condition and depression, he would become unnerved by this).
18. Mr Ahmed also objected to Employment Judge Perry chairing the panel on the basis he had undertaken an alternative dispute resolution hearing (ADR) on an earlier claim in this series of complaints (case number 1309303/2020) and had dissuaded the DWP from entering into a settlement.
19. Whilst exploring the bases for those applications a third issue arose: *Was it appropriate for the trial to continue at all, given the appeal against the decision of Employment Judge Craig Kelly's decision was still outstanding?* That issue was raised by the panel on the basis that if the appeal was upheld, many of the determinations we would need to make would need to be re-made in the light of any determinations as to the second disability issue. Both parties were clear they wished to proceed irrespective. Having determined the two points below the Tribunal acceded to that request.

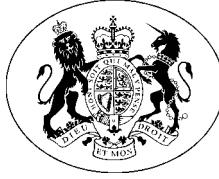


20. As to the hearing being conducted by CVP Mr Ahmed initially told us that the application from DWP had not been copied to him. When he checked he accepted it had been blocked by his email client. That aside DWP accepted when asked by the judge that that issue had not been raised by it at any point prior to early September and thus Mr Ahmed would not have an opportunity to obtain medical evidence addressing the impact it would have on him as he would have had if that application had been made at one of the numerous case management hearings that have taken place. The panel determined on that basis the hearing should be heard in person. As we say below (28-30, 45 & 46) that was subsequently reviewed.
21. As to the application for the recusal of Employment Judge Perry, Mr Ahmed explained the basis for this was that during the ADR hearing on the other claim the rationale and fairness of the disciplinary process undertaken by the DWP was in issue. He explained the dismissal that flowed from that process was in issue in this claim. Mr Ahmed asserted that during the settlement discussion at the ADR hearing Mr Ahmed had sought that no further disciplinary action be taken against him, stated that Employment Judge Perry had interjected and said that was not possible, prejudged matters, that was not fair and because of that he was dismissed.
22. Judge Perry identified that he had no recall of what Mr Ahmed states occurred. DWP had no note and in any event was not prepared to waive privilege. The Judge thus tried to explore with Mr Ahmed the detail of what he said happened. Mr Ahmed explained that DWP had made clear as part of their position statement for the ADR that it wanted to make a fresh start so he had queried how was that compatible with them continuing a disciplinary process against him. He stated that Judge Perry had commented that DWP was entitled to do so. As a result he suggested Judge Perry had formed a view in relation to the merits of the disciplinary case and the DWP's entitlement to bring it and that disciplinary



process led to his dismissal. Mr Ahmed thus suggested that the judge had formed a view on the merits.

23. The DWP did not object to the application and identified that was a matter for the judge but noted there was no suggestion of actual bias.
24. Having adjourned to reflect the Judge gave an oral judgment:-
 - 24.1. There being no suggestion of actual bias I reminded myself that the test for apparent bias was set out by Lord Hope of Craighead in Porter v Magill [2002] UKHL 67. ***'The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'*** The fair-minded observer is to be treated as being informed of all the relevant circumstances, is not complacent but is also not unduly sensitive or suspicious.
 - 24.2. Given the ADR involved a separate claim to the ones before me and settlement discussions are not only commonplace but the Employment Tribunal Rules of Procedure provide for alternative forms of dispute resolution I considered the fair-minded and informed observer would not conclude there was a real possibility of bias on the basis of my involvement in an ADR in another claim.
 - 24.3. Mr Ahmed had suggested that my involvement had subtly changed from undertaking the ADR, to dissuading DWP and then that I had reached a determination on the issue. Given those changes in stance I placed little weight on that. Instead I focussed on the point at which I had had the previous involvement. No claim had been brought about the dismissal at that point nor could it have been as my involvement predated it. There was thus no evidence before me at that point at which I could form a view.

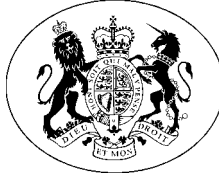


- 24.4. That being so I concluded that a fair minded observer would form the view that absent any evidence upon which I could form a view on the merits, that what I was commenting upon was that the DWP was entitled to proceed with a disciplinary process should they decide to; rather than as Mr Ahmed suggests that I had decided what the view the DWP should take should be.
- 24.5. I took into account the consequences Mr Ahmed suggests that my comments gave rise to were considerable, his dismissal, and that is clearly a factor the fair minded observer would take into account. However given the hearing concerned an ADR that decision was of course was a matter for the DWP.
- 24.6. Taking those matters into account I concluded, the fair-minded and informed observer, would not conclude that there was a real possibility that I was biased and rejected the application to recuse myself.
25. Having considered those points the panel enquired if there were any further adjustments required to allow the hearing to proceed. The parties did not identify any, other than breaks and the matters already discussed regarding how the hearing was conducted.
26. Given Ms Davies' circumstances (see (14)) Mr Ahmed withdrew his claims against her.
27. Mr Paulin also agreed to make changes to his own personal arrangements to enable him to attend in person. The tribunal was grateful to him for facilitating that despite that causing him personal difficulties.
28. Day 2 was spent by the panel reading and a telephone case management hearing was conducted to address any remaining issues. Mr Paulin also partially repeated the previous application concerning conversion of the hearing to CVP. The basis



upon which the application was made was that one of the disciplinary processes that formed the precursor to the events leading to this claim related to the way Mr Ahmed had allegedly conducted himself at one of the previous trials. We were told that as a result and the way Mr Ahmed had conducted himself at later points witnesses were unwilling to give evidence out of fears for their safety. Mr Ahmed made the point he would like to explore with them if they formed that view before they had reached their decisions against him.

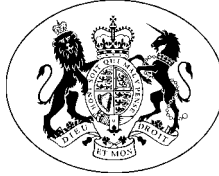
29. During the day the tribunal was informed a member of Mrs Rahman's close family was gravely ill. Whilst an issue subsequently arose whether that person was a blood relation, having been informed of Ms Rahman's difficult situation Mr Ahmed agreed to both Ms Scriven and Ms Rahman attending remotely. He asked that they either attend by telephone or that no video screen is placed in front of him. Video screens were arranged in a manner acceptable to the parties.
30. It was therefore agreed the hearing would be conducted in person at the Tribunal save for Mrs Rahman and Ms Scriven who were permitted to give evidence remotely.
31. The panel also sought to identify where certain documents referenced were within the bundle. These included an appeal against a final written warning heard by Mr Darren Lozano (see (121)), the appeal itself, the notes of the appeal hearing, the HR advice provided to Mr Lozano and his outcome.
32. As the hearing progressed Mr Ahmed confirmed he was withdrawing a number of complaints. During cross examination on day 3 Mr Ahmed stated he was withdrawing his claims against Laura Galloway and Christopher Lyness.
33. He later confirmed that he also withdrew the complaints against Naomi Minto, Cathy Beck, Mazhar Iqbal, Angela Street and Paul Szyszko but that he still wished to cross examine those witnesses.



34. On Day 4 following a request for documents from Mr Ahmed [1030-1063] those documents were provided and added to the bundle before day 5.
35. Just before lunch on day 4 Mr Ahmed indicated he wished to make a further recusal application. We address that at (76 & 77) below. That recusal application never materialised. Also on day 4 he mentioned withdrawing against Mrs Rahman. When the Judge asked if that was so he indicated it was a slip of the tongue. The panel accepted that and treated that a slip of the tongue.
36. On day 5 Mr Ahmed withdrew his claims against Mr Brown. Further, the issue arose that we address at (52).
37. Following an issue arising concerning unauthorised absence and the deduction of pay we were taken to an extract Mr Ahmed provided of DWP's policies. The panel request that DWP provide the relevant policy in full. On the afternoon of day 5 (Friday 22 September 2023) 32 pages of policies were provided by DWP [1064-1095].
38. Over the weekend prior to day 6 Mr Ahmed provided a 7 page pdf enclosing
 - 38.1. Perjury grievance submitted (July 2019)
 - 38.2. Perjury grievance outcome (October 2019)
 - 38.3. Lefort to Downie email (Lefort having stated under oath she didn't have correspondence with Downie)
 - 38.4. Lefort emails (2019 including protected act and "break down of trust")
39. He accepted he had not previously asked the DWP to include them in the bundle and did not set out the detail of when those grievances were completed. He decided not to pursue their addition.



40. On day 7 the Tribunal was told that Mrs Rahman's relative had died and she had been granted bereavement leave for the remainder of the week and a relisting was sought. Mr Ahmed whilst understanding the circumstances of Mrs Rahman objected. The panel asked the DWP to pass on its condolences but queried given the effect that would have had on the tribunal hearing why discretionary bereavement leave had been granted for the remainder of the week without that first being canvassed as a matter of courtesy with the Tribunal. Fortunately, additional dates at which the panel and all parties could attend a week or so later were identified. It was agreed that any evidence that that could not be heard during the original trial window and submissions would be heard during those additional dates.
41. Whilst this was not a claim identified within the list of issues by an email dated 6 September 2023 DWP also conceded a claim for untaken annual leave on termination of employment. On day 8 the tribunal sought to address if those sums were agreed. Essentially 441 hours were accepted as due by DWP which was agreed by Mr Ahmed. He did not agree that he worked 37 hours/week as alleged but instead 35 hours and thus instead of the £5,464.21 offered, the Tribunal calculated he was due £5,776.45. From that it was accepted £3,961.25 had been paid so £1,815.20 was due. DWP was asked to identify any objections to judgment being entered in that sum. It did not. Judgment has been entered accordingly. Mr Ahmed did not wish to provide DWP his bank details so DWP was reminded of their obligation to tender payment by cheque.
42. The evidence such as could be heard was completed by the end of the scheduled day 9 and so the scheduled day 10 was used for panel to read their notes. During their reading the panel identified and thereafter wrote to the parties seeking additional documents be added to the bundle.
43. On day 11 the documents sought by the panel (Mr Ahmed's impact statement and his grievance appeal) were added so the bundle extended to 1099 pages. Ms



Macauley was unable to attend (a relative was critically ill) and so the DWP decided to proceed without calling her to give live evidence. Finally, Mr Ahmed confirmed further parts of the direct race discrimination complaints against Mr Smith were withdrawn (issues 18(d), (e) & (f)).

THE EVIDENCE

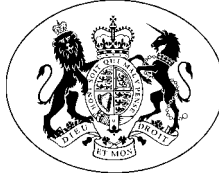
44. During the course of the hearing we heard witness evidence in the following order:-
- 44.1. Mr Hafeez Ahmed, the claimant, who provided what we will describe as his witness statement (2 January 2023) and his supplementary statement (6 April 2023).
 - 44.2. Mr Peter Miles Claimant's line manager who instigated disciplinary process for Claimant's alleged unauthorised absence and against whom Claimant brought grievance; also allegedly deducted 4 days' of Claimant's pay for unauthorised absence
 - 44.3. Mr Eric Brown, a HR advisor who advised Peter Miles and against whom Mr Ahmed brought grievance
 - 44.4. Mrs Victoria Le Fort, a HR advisor who allegedly improperly attempted to influence disciplinary investigation manager, Mr Paul Szyszko
 - 44.5. Ms Angela Street Grievance investigator of Claimant's grievance against Peter Miles & Eric Brown
 - 44.6. Mr Paul Szyszko, a manager appointed to investigate a disciplinary allegation against Claimant concerning unauthorised absence and who it was alleged Mrs Le Fort tried to influence
 - 44.7. Mr Baz Bains, Mr Ahmed's last line manager



- 44.8. Mr Mazhar Iqbal, a Manager who allegedly took the decision to pursue disciplinary process against Mr Ahmed for alleged unauthorised absence
- 44.9. Ms Catherine Beck, a Manager who allegedly did not investigate grievance brought by Mr Ahmed against Laura Walker and Naomi Minto
- 44.10. Mrs Kam Devi, a Manager who allegedly took the decision to pursue disciplinary process against Mr Ahmed for alleged unauthorised absence
- 44.11. Mr David O'Brien Investigator of disciplinary allegation against Mr Ahmed of unauthorised absence
- 44.12. Miss Naomi Minto, a Manager who allegedly conducted absence management process in respect of Mr Ahmed
- 44.13. Mr Richard Smith, the Manager appointed to hear the appeal of Mr Ahmed's grievance against Peter Miles & Eric Brown
- 44.14. Mrs Khushwinder Rahman, the decision maker in respect of disciplinary process for Claimant's alleged unauthorised absence
- 44.15. Ms Stacey Scriven, the Manager appointed to hear Mr Ahmed's disciplinary appeal (against the decision of Mrs Rahman)
45. Mrs Scriven gave evidence remotely for the reasons identified above (see (29)). Having attended Tribunal and relayed difficulties surrounding his personal circumstances the Tribunal permitted Mr O'Brien to give evidence remotely with the agreement of Mr Ahmed.
46. The witnesses for whom we were provided witness statements who were not called were:-



- 46.1. Mr Christopher Lyness, a Manager who allegedly victimised Mr Ahmed (the DWP decided not to call him following the claim against him being withdrawn)
 - 46.2. Ms Sarah Haines Investigator of disciplinary allegation against Mr Ahmed of unauthorised absence (DWP explained why she and Ms Davies were not being called by a letter sent in advance of the hearing - see (14))
 - 46.3. Ms Niki Davies, a decision maker in respect of disciplinary process for Claimant's alleged unauthorised absence (again see (14) above)
 - 46.4. Ms Phillippa (Kate) Macauley, the decision maker in respect of Mr Ahmed's grievance against Mrs Rahman (the Tribunal gave permission for her to give evidence remotely again due to her personal circumstances but due to technical issues this was not possible and DWP decided not to call her)
 - 46.5. Ms Laura Galloway (nee Walker), a Manager who allegedly conducted absence management process in respect of Mr Ahmed. DWP initially intended to call Mrs Galloway but following the claims against her being withdrawn decided not to.
47. The panel had before us a bundle that eventually extended (including pages added during the hearing) to 1099 pages although some additional documents that were not added to the bundle were also lodged. The panel also had before us a chronology, cast list and list of issues. The latter was revised as the claim progressed as we say above.
48. Both Mr Ahmed and Mr Paulin provided written submissions that they were given the option to orally elaborate upon. Copies of the authorities relied upon were exchanged in advance of submissions.



THE FACTS

Our findings below are made on balance of probabilities based on the evidence we heard and documents we were taken to.

Background

49. Mr Ahmed commenced employment with the DWP in September 2007 as a Work Coach. At all the material times that concern us he worked in that role at the Washwood Heath Jobcentre in Birmingham.
50. At the start of the events that principally concern us Mr Ahmed was initially line managed by Mr Peter Miles. He in turn was line managed by Ms Julie Barr. We set out at the relevant below the changes to his line managers (and their managers) over time.
51. From September 2016 Mr Ahmed brought a series of Employment Tribunal claims against the DWP. The DWP accepts they are protected act(s) for the purposes of Mr Ahmed's victimisation complaints.
52. Mr Ahmed alleges that in July 2019 his managers started what he describes as a malicious gross misconduct disciplinary process against him because he had previously taken DWP to an Employment Tribunal. It is not in dispute that disciplinary process was substantially delayed. Before us Mr Ahmed sought to argue that the delay in that investigation and the disciplinary and grievance procedures that followed supported the provisions, criteria or practices that he relied upon in complaint 5. Had Mr Ahmed wished to argue that was so he should have led evidence detailing those events. He did not. Nor did he identify those facts as forming part of the PCP for complaint 5 in his claim form or in the list of issues (that needs to be contrasted to the detail he gave relating to that PCP in the claim form); the claim form for claim 6 (and detail of the complaints that was



attached to it [23]) merely made reference to a later disciplinary process commenced by Mr Miles as a result of Mr Ahmed's absence in September 2020.

53. Instead Mr Ahmed challenged Ms Le Fort (one of DWP's HR business partners) about the July 2019 disciplinary process, her involvement in it and the motivation for it (see (210 on)). She told us she had no substantive involvement in that process.
54. We explained to Mr Ahmed that given Mrs Le Fort told us she had no involvement in that process and given he had not led evidence on it unless we found her evidence was unreliable generally there was little further questioning on that point could add. Further, permitting him to continue to ask her questions on that point because the issue they related to was not one of the issues before the Tribunal and permitting that questioning to continue could give rise to unfairness as DWP was not prepared for them. Further, timing issues would be in play and given they related to earlier claims we would not be in a position to identify if they had already been adjudicated upon.
55. Whilst Mr Ahmed is a litigant in person. Given the previous tribunal claims he had brought by the date of the events that concern us he was clearly aware of basics of tribunal procedure. From the points he took before us was ably able to research the law.
56. Those points aside we told him we would permit him to refer her and DWP's witnesses generally to documents or evidence led in the bundle on that issue if he wished to pursue the point. He did not challenge the witnesses on that evidence.
57. We make no adverse findings against the DWP in that respect. For the reasons we give above it was not clear that the delay in the 2019 proceedings was an issue before us, had Mr Ahmed considered that to be so he could (and we find, would) have sought disclosure and/or inclusion of any documents that were relevant in the



bundle (as he had done previously and also before us), raise that as an issue and/or led detailed evidence in that regard. He did not.

58. That notwithstanding, we asked Mr Ahmed for the details of the various investigators and decision makers in that process and tried to identify a timeline. He told us Brendon Downie was initially appointed as the investigation manager. Mr Downie was later replaced by Ms Sarah Hope. Ms Jill Twigger was appointed as the first disciplinary decision maker. He told us she was replaced by Dez Grant and he in turn by Rachel Musson.
59. Given the absence of the dates from that timeline we asked DWP to locate (if there was one) a chronology of the 2019 disciplinary process from one of the earlier tribunal claims. We set out below extracts of that chronology adopting the abbreviations used in it but adding detail from the cast list enclosed within it where required:-

1.7.19 Elizabeth Ordidge (an Executive Officer (EO) – C’s second level (line manager’s) line manager), filed internal complaint about C’s behaviour whilst at an ET hearing

23.7.20 C informed there will be an investigation

25.7.19 C files counter-grievance against EO (LoI (List of issues) §13a)

Misconduct and grievance investigation meetings were undertaken

19.9.19 Brendon Downie, original investigator & grievance chair dismisses grievance against EO (LoI §5e)

29.10.19 Carly Chapman, grievance appeal chair dismisses C’s grievance appeal (LoI §5f)



15.11.19 Sarah Hope, replacement investigator prepared an investigation report

4.12.19 Invitation letter to disciplinary hearing from Jill Twigger, original disciplinary chair (LoI §5d) [523-524]

18.2.20 Invitation letter to disciplinary hearing from Dez Grant, second disciplinary chair (LoI §5d) [591-592]

19.3.20 C files grievance and asks for Dez Grant to be replaced

22.3.20 – 16.4.20 C conciliates via ACAS

60. We break away from the chronology at that point to note that the 2½ month delay between start of December 2019 and mid February 2020 cannot be explained by the usual Christmas break nor the first national COVID lockdown (which did not start until 26 March 2020). With regard to interruptions caused by COVID the Tribunal reminded the parties that the phased re-opening of schools commenced on 1 June and non-essential shops reopened on 15 June 2020 (both England only). On 23 June 2020 restrictions and the 2 metre social distancing rule were relaxed leading to tiered restrictions being introduced.

61. We also record that by virtue of his disability it was agreed Mr Ahmed was classed as extremely vulnerable. As a result during the first national lockdown he was granted special leave. We return to that at a number of points below and as a specific consequence in this claim at (123).

62. Returning to the chronology:-

22.7.20 Alison Newell, chair of grievance ag DG replaces DG with Rachel Musson (RM),

C says R fail to investigate RM



13.8.20 Invitation letter to disciplinary hearing from RM (LoI §5d) [677-681]

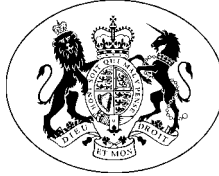
20.8.20 Allegation: PH (it was unclear who this was) fails to investigate RM (LoI §13h)

2.9.20 RM declines to postpone disciplinary hearing (LoI §13i) [736-737] C tells RM he will be suing her and she should resign [734-746]

63. We were told that Mr Ahmed had not attended various disciplinary meetings scheduled by Ms Musson so on Monday 14 September 2020 Ms Musson took the step of attending the Washwood Heath office. DWP suggests that was a final chance for Mr Ahmed to attend the disciplinary meeting. Mr Ahmed declined to attend. It was not in dispute he spoke to Mr Miles. Mr Ahmed said this about that conversation:

“9. On 14/09/2020 I could no longer cope with the effect the protracted first disciplinary process was having on me, including the manner in which it was being conducted [p205]. I informed my line manager Peter Miles that I wanted to go home and would return when a disciplinary decision was returned, effectively a leave of absence. Peter Miles said I could leave work immediately but I told him I would clear my diary then leave, which is what I did. There was no discussion about how my absence was to be covered i.e. no mention my absence was considered sick leave. This took place retrospectively a week into my absence and again on my return to work.

10. My behaviour was not consistent with that of a person who was sick; if I had been sick I would have left work immediately and I wouldn't have given a condition that would dictate my return i.e. when a disciplinary decision was returned.”



64. We accept the essence of large parts of that account because it is supported by that of Mr Miles:-

“8. In the afternoon of the same day Hafeez approached me and explained that he was expecting to be dismissed. He said that it was too stressful and upsetting and he could not handle it and could not be at work. He said that he had seen other people be escorted off the premises and he did not want that to happen to him. He said that he would be off for the rest of the week because he was expecting to get the letter that week. I did offer for him to leave immediately, but he said that he would finish the day and be off from the next day.

9. I accepted Hafeez’s explanation as to why he felt it too stressful to be at work. I did not know the details of the disciplinary, but had some sympathy with him feeling stressed about expecting to be dismissed.”

65. It was not in dispute that Mr Ahmed did not leave immediately, and that Mr Miles accepted that Mr Ahmed would not return until Mr Ahmed had received the decision. Indeed Mr Ahmed put that to Mr Miles in cross examination

“Q: I said I won’t come back until I receive disciplinary decision letter

A: Yes

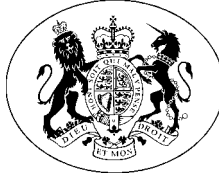
Q: Normally decision in 5d

A; Yes

Q: So expect reply by 21st – 5th working day

A: Yes

Q: If return decision in time chance return on 22nd



A: Yes”

66. As to the period for a disciplinary decision DWP’s disciplinary procedure [730] provides:-

*“7.38. The Decision Maker should normally **make** a decision as soon as possible and **within 5 working days of the meeting**, having consulted with CSHR casework where appropriate, and immediately communicate this in writing to the employee. **An Appeal Manager should be identified and referred to in the letter** so that the employee knows who to appeal to should they wish to do so¹. **Very exceptionally**, for example if the case is very complex, there may be occasions when the Decision Maker needs additional time to consider the evidence and make a decision. In such cases the timescale can be extended by up to 5 working days but they must notify the employee **no later than 10 working days after the meeting.**”*

[our emphasis]

67. It can be seen the 5 day period was not applicable in all cases and actually references the period in which the decision should be made, not as Mr Ahmed suggests, received.
68. Mr Ahmed was then absent from work from 15 September 2020 to 25 September 2020. He later self-certified as sick for the period 15 September 2020 to 21 September 2020. We return to that later at (100 & 101) and again starting at (114).
69. It is common ground Mr Ahmed tried to contact Mr Miles on Tuesday 22 September, his sixth day of absence. Mr Miles accepted DWP’s procedures were that he should have contacted Mr Ahmed in the interim. Mr Miles was later

¹ Whilst we were not taken to the respondent’s grievance procedure it was within the bundle [753-775] we note this provision of the disciplinary procedure in the context of the way the respondent dealt with disciplinary matters in relation to Mr Ahmed’s grievance against Mrs Rahman see (397) below.



sanctioned for that. We do not seek to condone or excuse Mr Miles' behaviour but he had been told by Mr Ahmed that he would not be returning until he received the outcome and thus we accept he did not want to chase Mr Ahmed until then for the same reasons he gave (see (64)) why he permitted Mr Ahmed to leave on 14 September.

70. In circumstances where employees are off ill with stress any attempt to contact them by an employers can be viewed by employees as harassment. That is exactly what Mr Ahmed later alleged DWP managers were doing when they contacted him about his subsequent absence (see for instance (150) regarding his email of 9 November 2020 to Ms Haines). It is understandable that where a manager has been told an employee will be off for a period the manager may be reluctant to contact an employee. Similarly that aside Mr Ahmed should have contacted Mr Miles. He did not. He too was in breach of DWP's procedures. The reasons he subsequently gave for his absence may explain that.
71. Mr Ahmed said this in his email of 1 October [205] ***"I called you on 22/09/2020 at 14:41 to discuss my absence but there was no reply."*** When asked about that Mr Ahmed orally corrected that to him chasing the absence of the decision.
72. Mr Miles did not return Mr Ahmed's call that day. He told us a new district manager had visited the jobcentre and he was detained until late that day dealing with that visit.
73. It was not in dispute that Mr Miles rang Mr Ahmed back the following day (23 September 2020). That was more than a week after Mr Ahmed went absent. It was not in dispute that Mr Miles told Mr Ahmed that he needed to provide a fit note as the absence could no longer be covered by a sickness self-certificate. It was not in dispute that Mr Ahmed queried why he needed a fit note, was told that was because he was off work sick and that Mr Ahmed responded stating he was not off



- sick but was off work because the disciplinary process had lasted for 15 months and had affected his mental state so that he could not cope with being at work.
74. Mr Ahmed argued before us that upon hearing that he was not sick Mr Miles did not instruct him to return to work, effectively giving him permission to be absent.
75. Whilst Mr Ahmed maintained before us he was not sick he failed to address if he was fit to attend work for those 9 days in September. Instead he sought to suggest that because he did not feel the way he did at work at home that meant he was not sick.
76. Having been asked to clarify his position several times by Mr Paulin in relation to how that absence should be covered the Judge put the question another way – was Mr Ahmed fit for work on those days. Mr Ahmed responded firstly stating he was not prepared to go back and when the question was repeated stated the question was unfair and loaded. He then went on to say the Judge was giving DWP ammunition, formulating questions against him, the question was loaded to elicit an answer against him, and was biased. He then indicated he wished to make a second recusal application. That was just before the lunch interval so the Judge indicated he would hear it after lunch.
77. When the Tribunal reconvened Mr Ahmed stated he would make the application later. The judge reminded hm that if an application was to be made it should normally be made at the first opportunity. None was made and indeed at several points thereafter Mr Ahmed indicated he wished to review his position whether he was fit or not.
78. It is convenient at this point for the Tribunal to remind itself that It is not ultimately for an employee to decide if they are sick or not or when they should be treated as such. To do so would mean that employee could avoid attendance management processes. Ultimately how an employer treats absence in whatever form is a



decision for an employer in the light of any medical/OH advice (albeit that in turn is subject to the scrutiny of a Tribunal).

79. That is highly relevant here because as Mr Ahmed pointed out [HA/20] if he was sick his continued absence took him over the trigger point and Mr Miles should have instigated an attendance management process but did not do so. We checked with the parties and it was confirmed before us that DWP's standard absence trigger for staff absence had already been adjusted upwards in Mr Ahmed's case to take account of his disability.
80. Having referenced the discussion 23 September 2020 in paragraph 11 of his witness statement Mr Ahmed said this :-

“12. Peter Miles rang me the next day and told me a disciplinary decision letter had been returned to the office, and claimed that he didn't know what it was. He said he could open it and tell me what the decision was; I declined the offer. Peter Miles was lying by pretending not to know what the disciplinary decision was because the decision maker emailed him earlier that day in order for him to update my personal file [p201].”

81. The reference to the **next day** we find referred to the 24 September because the preceding paragraph of Mr Ahmed's statement referenced the call on 23 September and also because Mr Ahmed references '[p201]' as part of an attempt to allege Mr Miles was already aware of the contents of the outcome. That page reference '[p201]' is a note of an advice from HR to Mr Miles of 24 September (see (93)).
82. In cross examination Mr Miles told us orally he posted the decision to Mr Ahmed on the 23 September and later the same day recorded the decision on the DWP's computer system "SOP" that records attendance and various other HR issues.



83. We return to the dispute when that letter was posted and when Mr Miles became aware of the outcome starting at (86) below.

Ms Musson's disciplinary outcome

84. Ms Musson's decision was dated 21 September 2020 [197-198]. In the absence of evidence to suggest the date was wrong we accept she made the decision within the 7 days allowed by DWP's rules. She sent it to the Washwood Heath office. She concluded:-

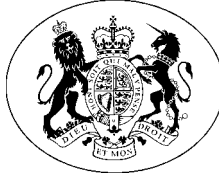
1. Your conduct towards Ms Ordridge was grossly discourteous, aggressive, disrespectful and intimidating, you shouted and called Ms Ordridge a liar, your body language and demeanour was aggressive and amounted to bullying and harassment, such to leave her feeling distressed, scared, vulnerable and in fear for her physical and mental safety.

2. Your conduct in a public place and in the presence of third parties, namely the Department's Counsel, Mr Jack Feeny and Mr William Horwood of Counsel who were present to take a note of the hearing. This was such as to bring the Department into disrepute.

I find the misconduct case substantiated and therefore issue you with a final written warning.

85. She made the consequences clear.

"This warning will remain on your SOP record and I will hold a hard copy for 24 months, from this letter's date; that is until 20th September 2022. Should you commit another act of misconduct within this time, you are likely to be dismissed, or if gross misconduct, unless exceptional circumstances apply, you will be dismissed without notice and without pay



in lieu of notice. It is therefore very important that you improve your standard of conduct and behaviour to that expected of all employees and act professionally at all times.”

86. Given Mr Ahmed alleges Mr Miles was lying about when he became aware of the contents of that decision we now address that. In his witness statement Mr Miles said:

“13. During this call on 23rd September 2020 I also told Hafeez that the decision letter had arrived in the office and he asked me to forward it by post. It was collected by the postal worker that day.”

87. Mr Ahmed was therefore reminded that he had not asked Mr Miles about the discussion on the 24 September and needed to do so. He did not do so.

88. If Mr Miles posted the letter to Mr Ahmed on the 23 September as Mr Miles says he did he would not have been able to offer to open it during the telephone call that Mr Ahmed’s statement suggests took place on 24 September (see (80)).

89. Mr Miles makes clear he was not aware of the contents until 24 September:-

“19. On 24th I also sent an email to Rachel Musson asking for a copy of the decision letter so that I could update SOP and Rachel responded a short time later attaching the letter (pg203). The letter itself is at pg197.”

90. That email of 24 September to Ms Musson was sent at 16:11 and Ms Musson responded at 16:37.

91. That email supports the suggestion that Miles was not aware of the decision, and hence had to ask Ms Musson what the decision was on 24 September. That in turn is also supported by at no point Mr Ahmed alleging the outcome letter he received had been opened when he received it.



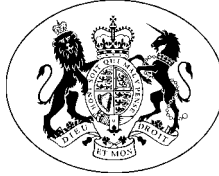
92. Thus, irrespective whether the call between Mr Miles and Mr Ahmed took place on 23 or 24 September we find Mr Miles was not aware of the decision until after 4:37 pm on the 24 September when he received the email from Ms Musson.
93. Mr Miles told us that also on 24 September he took advice from Claire Forster of the HR complex case team via Skype. As Ms Forster was new to the role we were told she was supported by Mr Eric Brown. A note of the HR advice was before us [201]. It was sent at 15:39 on 24 September and recorded:

“You state the individual has been absent due to stress from 15/09/2020 and you have contacted the individual to request a fit note, however, you state the individual informed you he was not sick as his absence was caused by the business. You have stated the individual is awaiting a disciplinary decision letter which you have agreed to post to his home address.

... that the individual may not yet have received the discipline decision letter but that you are aware the decision is a final written warning for gross misconduct.

...”

94. Mr Miles stated that after he given the background to the case he told us Mr Brown said something to the effect that he **“knew all about”** Mr Ahmed. Mr Miles said he did not consider this shocking or surprising as he knew by that point that Mr Ahmed had made previous claims to the Employment Tribunal and there was an ongoing disciplinary. Further Mr Miles told us that that during the call on 23 September Mr Ahmed had said he had something big planned so Mr Miles thought his intention was to resign and then claim constructive dismissal. Mr Miles told us Mr Brown had responded to the effect of **“I bet you’ve got your fingers crossed about that”**. Mr Miles felt that comment was inappropriate because it prejudged his view of the situation when he was trying to remain impartial and unbiased.



95. The key takeaways Mr Miles was given within that discussion with HR were:-
- 95.1. To contact Mr Ahmed to identify if he had received the discipline letter (and if not to inform him of the contents),
 - 95.2. to find out if Mr Ahmed agreed his absence was due to sickness,
 - 95.3. to issue a self-certificate form to Mr Ahmed's home address,
 - 95.4. to advise Mr Ahmed that if the self-certification and fit note were not provided within 10 days that the absence could be treated as unauthorised and if so that was automatically gross misconduct, and
 - 95.5. given the possibility that Mr Ahmed was contemplating resigning and bringing a dismissal claim, Mr Miles was to accept a verbal notification of resignation from Mr Ahmed and request he send in written confirmation.
96. We find that if there had been a discussion on 24 September between Mr Ahmed and Mr Miles, it is more likely than not that Mr Ahmed would have referred to it in his email of 1 October (see (113)). He did not. Mr Miles made no reference to the call on 24 September. In contrast Mr Miles specifically referenced calls on 23 and 25 with Mr Ahmed and that the call of the 25th emanated out of Mr Miles' discussion with HR.
97. Given the reminder we gave to Mr Ahmed to ask Mr Miles about the alleged discussion on the 24 September and his failure to do so and the events we relay above we prefer Mr Miles' account and find there was no discussion between them on the 24 September.
98. We find the discussion between HR and Mr Miles on 24 September was not with regard to the disciplinary outcome but instead how Mr Ahmed's absence should be treated. The note of the HR advice was sent at 15:39 on 24 September and Mr Miles was not in a position to record how that absence was to be treated on SOP



at that point because it was not until 4:37 pm on the 24 September Mr Miles had received the contents of Ms Musson's outcome by email (see (89 & 90)).

99. Mr Ahmed told us and we accept that he received the disciplinary outcome by post on Friday 25 September. The same day, Mr Miles having unsuccessfully tried to contact him, Mr Ahmed called Mr Miles back to say had received the outcome and was returning to work the following Monday 28 September.

The return to work meeting of Monday 28 September 2020

100. A return to work meeting was held on Monday 28 September. Mr Miles told us

"21. ... Before I had even asked for it Hafeez produced the self-certificate and gave it to me. I explained that it did not cover all of his absence and asked him whether he wanted to see a GP and get a note. In an effort to be as supportive as possible I suggested that he could put in a request for something like special leave. Hafeez then got aggressive demanding to know whether special leave would be approved. I said it would need to be considered and I would need to consult with my line manager and there may be issues about applying for special leave after the event. He kept saying that it will be rejected, but I explained that I hadn't said that. I explained that he had gone off work with the explanation that he was unable to be at work due to stress and in the absence of any other explanation that it would be treated as time off sick. I had intended to discuss flexi-leave and annual leave with him as well, but because of his reaction once special leave had been mentioned I did not get the opportunity. I returned the self-certificate to him and allowed him some time to decide what he wanted to do."

22. Special leave is usually used for things such as bereavement and is tightly controlled, particularly if it is to be allowed with pay. Although it is at



the manager's discretion, it would be usual to consult with my manager before approving it to ensure consistency."

101. Mr Ahmed accepted he completed a self certificate [240] on 28 September stating he did so in an impaired state [HA/18]. The self certificate was eventually provided by Mr Ahmed to Mr Miles on 5/6 October 2020 (see (114)) and covered 5 days absence from Tuesday 15 to Monday 21 September 2020 [240].
102. Mr Ahmed asserts that self certificate was extracted under duress, saying:-

"14. ... Peter Miles demanded I obtain a fit note from my GP. I reiterated I hadn't been sick. He then started to threaten me with disciplinary action for unauthorised absence. He briefly mentioned it was a possibility to get my absence covered by special leave but that his manager Julie Barr was unlikely to approve it. I was not given the option to cover my absence with annual or flex leave. Peter Miles had a duty of care to give me all the options to cover my leave, considering he knew what had caused the absence and knowing I was in mentally impaired state. This is especially true if the matter was to become a disciplinary issue otherwise. It was also reasonable for me to be told that any application for special leave would be granted, instead of him telling me it was unlikely to be approved, as that was a deterrent to me applying for it."*

103. We find the context and references to special leave and Ms Barr in that paragraph were references to the return to work discussion on 28 September. Given what he states he was told Ms Barr's stance was likely to be at [HA/61] Mr Ahmed said **"It can also reasonably be inferred that if I had applied for special, annual or flex leave to cover the 4 days absence it would have been granted, but managers/HR/GLD had an agenda to dismiss me."**
104. Mr Ahmed continued:-



“18. While it is true I completed a sickness self-cert to cover 5 days of my absence on 28/09/2020 [p240] it is also true I did this while I was in an impaired mental state and under duress. The self-cert cited depression, anxiety and stress (mental impairments) and fatigue, weakness and stress (symptoms of my blood condition). Prior to completing the self-cert I had previously told Peter Miles on at least 5 separate occasions I was not/had not been sick, and had only completed it because I was being pressured/bullied by him under threat of disciplinary action. I was already on a final written warning and this added to the stress of the situation. ... [see (106) below]

19. Peter Miles then started to demand I provide a fit note for the 4 days absence that were not covered by the self-cert i.e. for the period 22/09/2020 to 25/09/2020. I did not want to lie to my GP to obtain a fit note, because I viewed that as dishonest, fraud and against the civil service code of conduct.”

105. Despite those assertions in his witness statement Mr Ahmed did not challenge Mr Miles about what Mr Miles was alleged to have said, the manner this was done, or Mr Miles’ assertion that Mr Ahmed volunteered the self certificate at the start of the return to work meeting on 28 September.
106. Mr Ahmed also sought to assert [AH/18] he subsequently sought to retract the self certificate. He told us this was not until 23 June 2021 (9 months later) when he emailed various managers, including Ms Kam Devi, to rescind the self-certificate on the basis **“... I had not been sick and that I had completed it under duress, and while in an impaired mental state, but she didn’t [288/9]”**. He did not however explain to us why he was fit to be at work if his mental state was impaired. We return to that starting at (194) below.



107. During the meeting on 28 September Mr Miles also relayed to Mr Ahmed the comments made by Mr Brown to Mr Miles during their discussion on 24 September including the comment about him keeping his fingers crossed for Mr Ahmed to resign (see (92)). Mr Miles told us he told Mr Ahmed in confidence to empathise with him and to show that he was unbiased.
108. On the day he returned to work (28 September 2020) Mr Ahmed also appealed Ms Musson's disciplinary decision (this was not included in our bundle but following a request from the Tribunal we were provided with a copy of what formed pages 777-779 of a bundle from an earlier claim). We address the appeal at (121) below.
109. Mr Miles told us [PM/24] that by 30 September Mr Ahmed had not reverted to him ***"with an alternative solution"*** so they met again. Mr Miles' view was that Mr Ahmed ***"... was not willing to pursue or explore other options and I said that in that case it would have to be considered as sickness, but if he wanted to make request for it to be treated as something else then this is his chance, so it was now with him. Hafeez said that I was choosing to treat it as sickness, and I responded that I had had advice from HR. ..."***
110. Mr Miles also stated that later that day Mr Ahmed queried whether the correct reason for his warning had been added to SOP. At 16:17 Mr Miles queried with Ms Musson how the sanction should be recorded on SOP. She responded 15 minutes or so later that the primary reason was "bullying" [203].
111. Also on 30 September 2020 at 16:05 Mr Ahmed emailed Mr Miles challenging him about the way he was treating the absence as sickness [206]. Mr Miles responded the next day (1 October) briefly setting out his position and a timeline and stating

"On Monday 14/09/20 you told me that you would be sick for the rest of that week with stress pending the receipt of your decision letter.



On Wednesday 23/09/20 I informed you that you would need a statement of fitness for work from a medical practitioner as your absence could no longer be covered by self-certification.

On Friday 25/09/20 you told me you were feeling better and would be returning to work on Monday 28/09/20.

You need to provide a self-certificate and/or a statement of fitness for work to cover the absence of 15-25/09/20 by Friday 9th October 2020. Failure to provide certification for your absence may result in it being treated as unauthorised. As we discussed this is a disciplinary matter and may be referred to a decision maker.” [206].

112. Mr Ahmed accepts [AH/27] that when an individual has someone has been off work with stress the DWP’s normal procedure was to make an OH referral and to arrange a Stress Risk Assessment. The OH referral was also made on 1 October and scheduled for 9 October. The Stress Risk Assessment was arranged for 12 October.
113. At around 5:45 pm on 1 October Mr Ahmed responded to Mr Miles setting out his position referencing their discussions on 14, 21, 23 and 25 September, the attempted call from Mr Ahmed on 22 September and the meeting on 30 September. He made no mention of the return to work meeting on 28 September or the alleged conversation on 24 September. Amongst other matters he referenced the comments Mr Miles reported to him from HR on 25 September, alleged that HR were plotting to dismiss him, that was victimisation and then referenced how at their meeting on 30 September he had stated how he felt badly treated by managers because he had made Employment Tribunal claims [205]. He continued:-

“We had a meeting yesterday, 30/09/2020, and you did mention that the department could treat my period of absence from 22/09/2020 to



25/09/2020 as special leave, and that along with self-certifying my sick leave from 14/09/2020 [to] 18/09/2020, my whole absence would be covered. I asked would the special leave be approved and you told me it would go to Julie, even though the signature on the decision would be yours. You said Julie was unlikely to agree as it would set a precedent. This prompted me sending the email you received yesterday.

...

If Julie, HR and yourself want to pursue disciplinary action that is your prerogative. It is disappointing that no one considered pursuing an OHS or stress reduction plan, to address my welfare and wellbeing with the same vigour disciplinaries and formal action are pursued against me. If this had been done and the disciplinary process concluded in a reasonable timescale the absence in question would not have arisen.”

114. On the evening of 5 October Mr Ahmed left a self certificate on Mr Miles’ desk for the period 15 - 21 September 2020 inclusive only. The copy we have [240] states it was dated by Mr Ahmed on 28 September, the date of his return to work meeting. That supports Mr Miles’ account that it was originally proffered by Mr Ahmed at the return to work meeting on 28 September. Mr Miles told us he received and signed it on 6 October. The nature of the illness was described as **“Depression, anxiety, stress, fatigue, weakness – due to bullying & ‘mobbing’ by managers”** and the reason this prevented him from working as **“Could not concentrate/focus on work tasks/too upset to work. Too fatigued and tired to work.”**

The OH advice of 9 October 2020

115. The OH referral of 1 October resulted in an advice dated Friday 9 October [58 with duplicates at 208 & 304]. It recorded the reason for Mr Ahmed’s referral **“... regarding his recent short term absence due to stress.”** We find that was



what Mr Miles viewed as the reason for the absence when making the referral.

That is supported by the contents of the advice:-

“Current Issues

Hafeez reported work related stress for 15 months. He says he has been subject to disciplinary action which has dragged on and effected his mental health. He feels his welfare has been neglected during this time. Hafeez advised that he is appealing the disciplinary decision and has started a grievance as he feels discriminated against. He tells me that he is constantly thinking about this and it affects his sleep and he is tired the following day. He says he feels paranoid emails from work will be negative he has difficulty concentrating, has difficulty focusing and feels overburdened. He also reports stress to result in him feeling nauseous. He tells me he has not discussed this with his doctor and he does not wish to take medication.

...

*Hafeez advised that PNH can result in him feeling fatigued and he can experience anaemia although at the moment he does not know what his blood count is. **He advised that if he ill or overstressed he loses blood and becomes anaemic as a result.** He tells me he last had his blood checked in July. He reported an episodes of chest pain over the summer for which he was assessed and diagnosed with costochondritis. This is inflammation of the cartilage that joins the ribs to the sternum. He tells me symptoms of shortness of breath and chest pain wax and wane and he has commenced physiotherapy treatment. This condition generally improves on its own after a few weeks although it can last for several months in some cases.*



OH Opinion

Hafeez's reporting today suggests he is experiencing work related stress attributed to disciplinary matters. This appears to be all consuming such that it is affecting his sleep and daily activity at work and home. A validated psychological wellbeing assessment undertaken today suggests he may be experiencing symptoms of moderately severe depression and moderate anxiety and he has been advised to consider emotional support which can be provided with PAM Assist.

...

I recommend that you complete a stress risk assessment with him. ...

I recommend management discuss work duties with him bearing in mind that his ability to concentrate and focus may be impaired until stress matters have been resolved, and this could impact on pace of work and work performance. Any additional training needs should be identified. I recommend that management monitor his workload to ensure it remains manageable and to reduce risk of him feeling overwhelmed. I also recommend regular management meetings as a supportive measure in order that any work issues can be discussed and dealt with at an early opportunity."

[Our emphasis]

116. It concluded stating no routine OH review was required.
117. Also on 9 October Mr Miles emailed Mr Ahmed [183] acknowledging the self certificate for 15 to 21 September and reminding him of the need for certification for the period 22 to 25 September 2020. Mr Miles extended the deadline for Mr Ahmed to provide that to 13 October. Mr Ahmed replied on 12 October stating he

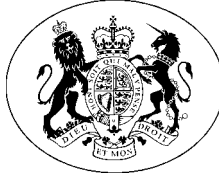


had already given his response, asking for the name of the HR advisor who had made the **“fingers crossed”** comment and amongst other matters repeated he considered his treatment was victimisation and illegal [183].

118. Ahead of the meeting later on Monday 12 October to carry out the Stress Risk Assessment Mr Miles sent the OH report to Mr Ahmed. A copy of the Stress Risk Assessment and a Stress Management Plan were before us [210]. On the basis that Mr Miles was not challenged about either and they were dated 12 October we accept that at that they were completed that day and at that meeting the OH report either was or could have been discussed,
119. Mr Ahmed did not comply with the 13 October (extended) ‘deadline’ to supply the certification for the period 22 to 25 September 2020. Mr Miles told us and we accept that he discussed the matter with his line manager, Ms Barr, who in turn discussed it with Mrs Le Fort and a decision was taken. Whilst Mrs Le Fort makes no reference to that discussion, two letters dated 16 October that we refer to at (127-128) make clear that those decisions were to:-
- 119.1. commence an investigation for unauthorised absence and
- 119.2. deduct pay for those four days as the absence was unauthorised.
120. Before we turn to the investigation process we first address events that occurred in the interim.

Mr Lozano’s disciplinary appeal outcome

121. Mr Darren Lozano was appointed to hear the disciplinary appeal. The appeal meeting took place on 14 October 2020 and was minuted [1030-1036] A HR advice also dated 14 October 2020 was before us [1029]. That made clear Mr Lozano was considering reducing the level of the misconduct and the penalty. On 21 October 2020 Mr Lozano provided his outcome [795]. He decided the 2 year



final warning for gross misconduct issued on 21 September 2020 [177] by Ms Musson should be downgraded to a 1 year final warning. Mr Lozano's rationale was as follows:-

“The Employment Tribunal was adjourned as you were Upset, this was a stressful and pressurised situation where feelings were running high, all parties involved were in stressed and anxious state of mind. I cannot identify any clear examples of aggressive behaviour such as bad language, gesturing or specific threats. However, there is evidence to show that you were intimidating and disrespectful and deliberately provocative towards a colleague. You positioned yourself in a corridor / doorway so that individuals had to pass by you after you had repeatedly called them a liar, you were staring at individuals which made them feel distressed, scared and vulnerable.

Your behaviour and conduct was not in line with Standards of Behaviour, you were not, professional and did not treat colleagues With respect. Your actions did bring the Department into Disrepute. However, taking into account the circumstances of the situation the misconduct should be classed as serious misconduct and not gross.

The final written warning should be issued for a period of 12 months from the date of the original Decision letter 21st September 2020.”

122. Mr Ahmed confirmed to us that he received that decision.
123. The period that the final written warning applied to was later extended so it expired on 11 January 2022 to take into account of Mr Ahmed being granted a period of special leave by virtue of being extremely vulnerable during the pandemic. DWP's rationale was set out in Mrs Devi's letter to Mr Ahmed dated 4 November [803] in which she also set out the relevant extracts from its policies:-



“12.1. If an employee is on special leave for a period of time and they are in a review period following a formal warning for either unsatisfactory attendance, poor performance or misconduct (i.e. a live warning is in place) it is recognised that they are not at work to be able to demonstrate improvements.

12.2. Any live warning will be suspended during the period of special leave and resume when they return to work. ... “

124. That was a policy that applied to all staff.
125. Mr Ahmed told us he did not receive Mrs Devi’s letter dated 4 November 2021 [803]. The letter was addressed to him marked “Personal” at Washwood Heath Jobcentre. By that time Mr Ahmed was off work ill and did not return. Whilst no evidence has been provided to say Mr Ahmed received it other than as part of disclosure on a number of occasions through the hearing Mr Ahmed asserted documents had not been received by him only for us to identify that they had when the matters were investigated by us we thus place little weight on that assertion. In any event, that in our view is a side issue, the extension of the period of the final warning has no relevance to whether the incidents complained of before us could have triggered the final stage of the disciplinary procedure.
126. Ms Devi told us that she was informed of the changes in guidance in relation to live warnings on all colleagues by an unnamed HR Business Partner. She also told us that shortly after 11 January 2022 she was told by a HR Business Partner that the live warning needed to be extended again only for to be later told that was not required.

The disciplinary process regarding “unauthorised absence”

127. On 16 October 2020 Mr Miles sent two letters to Mr Ahmed by email. The first letter [216] notified him that:-



- 127.1. informing him that pay was being deducted for 4 days and
- 127.2. an investigation was to be undertaken in relation to the unauthorised absence [221]. The allegation under investigation read as follows:-

“I am writing to advise you that I am investigating possible gross misconduct by yourself in that you were absent from 22/09/2020 to 25/09/2020 due to sickness and have failed to provide medical evidence for this period. This period has therefore been classed as unauthorised absence and your pay is being deducted for these dates”.

128. The second letter of 16 October invited Mr Ahmed to an interview on 26 October 2020 in relation to the investigation [221].

DWP’s internal procedures

129. The relevant parts of DWP’s procedures that were before us included:-

Standards of Behaviour Procedures [1065 following]

“Unauthorised Absence

23. If the manager has not been notified by the locally agreed time on the first day of absence, they should:

- try to contact the employee by telephone repeatedly*
- consider contacting their next of kin, or visiting them at their home address on the first day of absence, if the employee is not on the telephone (where there is any reason for concern for the employee’s wellbeing, e.g. a history of mental ill health, the manager may wish to seek HR advice or speak to the Employee Assistance Provider, before visiting the employee at home)*



- *visit them at home on day 2 of the absence if the employee has not made contact by the expected time*
- *write to them using the unauthorised absence letter 1. If the manager is still unable to contact the employee, the manager must send this letter by recorded delivery.*
- *ensure that letters are adapted to suit individual cases, but as a minimum include:*
 - *Details of the concern*
 - *A deadline by which the employee should contact the manager with an explanation of their absence. (A reasonable amount of time would be five working days from the date of the letter)*
 - *A warning that the employee's absence is regarded as unauthorised*
 - *An indication of the possible consequences, i.e. loss of pay and disciplinary action if the employee fails to make contact or fails to comply with the procedure for notifying sick absence*
 - *Advice that the Employee Assistance Provider can offer help if they need it*
 - *keep a note of the action taken to find out the reason for the absence*
 - *if no contact within 5 days of sending the first letter write again using the unauthorised absence letter 2. The manager must send this letter by recorded delivery.*

24. If these attempts fail to make contact with the employee, the manager should record the unauthorised absence by the 5th day of unauthorised absence. The manager should then take action under the Discipline



Procedures and invite the employee to an investigatory meeting under gross misconduct.”

Standards of Behaviour Advice [1091 following]

“Q2 How is Unauthorised Absence recorded?”

The manager will need to record the unauthorised absence by the fifth working day of unauthorised absence to stop payment from the first day. Pay should be suspended until the manager makes contact with the employee and until appropriate evidence for absence is provided by the employee. Search SOP Guidance - myHub for instruction on how to record unauthorised absence.

If a reply is still not forthcoming within 5 working days from the date of the letter, the manager must take account of all the circumstances and consider whether or not dismissal action is appropriate.” [1092]

Attendance Management Procedures [654 following]

“15. For sickness absences of 8 consecutive calendar days or more, the employee must provide a ‘Fit Note’ from their GP. This should be submitted to the line manager as soon as possible. Employees are allowed ten working days to produce (backdated) medical evidence.” [659]

...

31. There are two levels of formal warning before dismissal is considered:

(a) First written warning – this is followed by a 6-months review period when absence must be below 50% of the employee’s normal trigger point for attendance to be considered satisfactory. If the review is passed, the



employee comes out of formal action, but then starts a 12-months sustained Improvement Period;

(b) Final written warning – when attendance is unsatisfactory during a first written warning review period or sustained improvement period. This is also followed by a 6-months review period when absence must be below 50% of the employee’s normal trigger point for attendance to be considered satisfactory. If this second review is passed, the employee comes out of formal action but then starts a 12-months sustained Improvement Period;

(c) Consideration of dismissal/demotion - when the employee reaches or exceeds their trigger point following a final written warning, or whilst in a sustained improvement period following a final written warning or when a continuous sickness absence can no longer be supported. [662-663]

How to: Assess the level of misconduct and decide a discipline penalty [741 following]

...

Minor Misconduct [746-747]

Description	Examples of Misconduct – these examples are not exhaustive	Possible Outcome
An isolated example of misconduct which falls short of the standards expected. First offence and minor in nature	Poor timekeeping/failure to follow flexi procedures ...	Informal discussion ...
More serious minor misconduct may	Minor breaches of the Civil Service Code or Standards of Behaviour policy such as	The normal penalty



result in immediate formal action	inappropriate behaviour on social media sites or in public where the department can be identified	will be a First Written warning.
...
	Short duration of unauthorised absence	

Serious Misconduct [747-748]

Description	Examples of Misconduct – these examples are not exhaustive	Possible Outcome
Repeated minor offences or significant breaches of the standards expected. It will require formal management action, but is not of itself serious enough to amount to gross misconduct in the case of a first offence. ...	Repetition of minor misconduct which the employee has already been warned about ... If Managers are considering escalating to serious misconduct following previous informal action for minor misconduct, they should seek advice from CSHR Casework. Serious misuse of departmental assets such as phone / photocopiers / PC / laptop Abuse of sick leave provisions Being unfit to work through using drugs/alcohol while at work ...	The normal penalty will be a First Written warning, unless the misconduct is after a First Written Warning has been given and is still live, in which case the manager should consider a Final Written Warning Final Written Warnings are appropriate where the misconduct has serious consequences for the department but does not amount to Gross Misconduct ...

Gross Misconduct [749-750]

Description	Examples of Misconduct – these examples are not exhaustive	Possible Outcome
Gross misconduct is serious enough to destroy the working relationship between the employee and employer and the likely sanction is dismissal. Repeated acts of serious misconduct are included and have the same	Failure to return from a period of unpaid special leave or unauthorised absence Deliberate and gross misuse or damage to departmental property Physical violence or threatening behaviour All cases of sexual harassment, and more serious cases of bullying, harassment and discrimination Being unfit to work	The normal penalty will be Dismissal (with or without notice). If managers accept mitigation put forward by the employee this may mean it can be reduced to a Final Written Warning. Final Written Warnings are normally given for a minimum of 12 months but exceptionally may be extended to a maximum of 24 months.



status as gross
misconduct

through using drugs/alcohol while ...
at work

...

...

Special leave policy [860]

“In administering this policy, employees and their managers are expected always to discuss whether it is appropriate to use Annual Leave or Flexi Leave for all or part of the absence before considering Special Leave.

[866]

...

Special leave Advice [870]

...

Q2. How does an employee apply for special leave? [871]

Individuals should discuss any requests for leave with their manager as soon as possible.

However, a decision cannot be made, and normally time off may not be taken, until a formal application has been made by the employee on SOP and authorised by a manager on SOP.”

Events after Mr Miles’ two letters of 16 October 2020

130. As a result of the above Mr Ahmed wrote a number of emails essentially questioning why given the absence had already been categorised as unauthorised and his pay was to be deducted what was the purpose of the investigation? Mr Miles replied to say the purpose of the investigation was to collect evidence and record the facts to determine whether there was a case to answer or not [223-224].



Mr Ahmed thus complained before us that the deduction of his pay pre-determined matters (was putting the cart before the horse) and should have awaited the disciplinary outcome. He referred to this as “*Double jeopardy*” (see (731)).

131. On Sunday 18 October 2020 Mr Ahmed emailed Mr Miles with a grievance against him. Mr Ahmed also copied in his line manager, Ms Barr. Mr Miles received that the following working day, Monday 19 October [230] along with a number of other emails.
132. We heard that DWP’s grievance procedure [753-775] included a grievance form (see (345) albeit the form was not included in the bundle). DWP did not take a point at the time that grievance was submitted that it was not on the proper form.
133. We find that Mr Miles spoke to Ms Barr and it was agreed it was inappropriate for him to conduct the investigation into the alleged misconduct. Mr Miles therefore emailed Mr Ahmed on 20 October 2020 to say that Ms Barr had asked the District Appeal Manager to appoint an alternative Investigation Manager [238]. Mr Miles had no further decision making involvement in relation to the disciplinary procedure.
134. As we say several times in what follows, Mr Ahmed repeatedly copied almost all of his subsequent grievances/complaints to the parties who were the subject of them, in some cases to the managers of the person complained about and in one case a minister of the crown and senior civil servant. In addition, in advance of lodging grievances/complaints Mr Ahmed repeatedly threatened to do so. He subsequently sought to argue before us that some of the individuals should cease to play any part in any process against him, and as to others refused to engage in the processes they undertook (at least until the grievance had been addressed). We find those grievances were a response to decisions he did not like and he made similar responses to other actions he did not like (see for instance his response to



reactivation of the disciplinary investigation by Ms Haines (191 & 192)). Further, his complaints normally created a delay which he then complained about.

135. As to the grievances we find there was no good reason for Mr Ahmed to complain direct to the individuals concerned other than to try to intimidate them and/or to remove them from the process (see (624)). We address even when he later went off sick his ability to appraise himself of DWP's procedures at (284). That did not apply in relation to the grievance concerning Mr Miles. Mr Ahmed was at work at the time. As we will see that is an example of Mr Ahmed picking and choosing which of DWP's procedures he wished to follow/complain about.

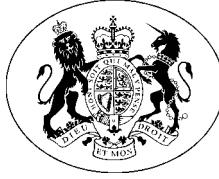
136. In around December 2020 Mr Mazhar Iqbal moved to Washwood Heath Job Centre, and around that time he became Mr Ahmed's line manager. He remained in that role until April 2022. Save for a week at the end of that period Mr Iqbal was managed by Ms Kam Devi. Mr Iqbal told us he had no involvement with Mr Ahmed prior to him moving to Washwood Heath

Mr Ahmed's grievance

137. Mr Ahmed's grievance against Mr Miles of 18 October 2020 [230-232] also included a grievance concerning the HR caseworker whose comments Mr Miles had passed to Mr Ahmed on 28 September. The "caseworker" concerned was Mr Brown. The complaints about the delay in the disciplinary process aside the complaints about Mr Miles centred on:-

137.1. Mr Miles' failure to follow DWP procedures including Keeping in Touch

137.2. Mr Ahmed feeling pressured to submit a self-cert for sickness for the period 15/09/2020 to 21/09/2020 even though he had informed Mr Miles he did not consider himself sick



- 137.3. Mr Miles failing to take account of the length of the disciplinary process and his mental state
- 137.4. Mr Miles' failure to fully address how the absence could be covered or to consider making a reasonable adjustment
- 137.5. Issues concerning the OH referral
- 137.6. Mr Miles taking the role of investigation manager
- 137.7. Mr Miles prejudging the outcome of the investigation by deciding the period 22/09/2020 to 25/09/2020 was sick leave, that Mr Ahmed's absence was unauthorised and deducting pay, and
- 137.8. Mr Miles treating the unauthorised absence as gross rather than minor misconduct.
138. Mr Ahmed also argues [HA/30] that Mr Miles ignored that Mr Ahmed had sought and received management permission to be absent, had not been instructed to return to work at anytime during my absence, and his absence was therefore not unauthorised.
139. The complaints concerning the HR advisor, Mr Brown, related to the comments made by Mr Brown that Mr Miles had replayed to Mr Ahmed on 28 September (see our findings starting at (93) & at (107)). Mr Ahmed summarised his complaint against Mr Brown in the grievance as concerning

"... the negative view the HR caseworker had of me, which could only be as a result of his knowledge of me taking legal action against the department. Pete told me the case manager had also pre-prepared various plans of action to take against me on my return to work. This shocked me as it showed an intention of bad faith against me."



140. Mr Brown told us he checked DWP's records for Mr Ahmed and confirmed that he had never dealt with any aspect of his claims either before or after that call. He told us he did not remember making that comment, but accepted that he might have done.
141. Mr Ahmed alleged that at that point Mr Brown was giving Mr Miles advice Mr Brown knew that Mr Ahmed was Asian and Muslim and that Mr Ahmed had previously taken DWP to an Employment Tribunal. Whilst Mr Ahmed was not a party to that call he references this information being on the PC screen Mr Brown was viewing during the call, and the comments "We know all about Mr Ahmed" and "...we have 25 records for Mr Ahmed" as recorded in the note of the grievance investigation meeting with Mr Brown [414] (see (161.1)) below.
142. Mr Ahmed subsequently withdrew all save for one of the direct discrimination complaints against Mr Brown. He thus did not challenge Mr Brown about the comments made and instead focussed on the way the absence could have been treated, that he had been given permission, that Mr Brown did not have full circumstances and thus could not advise, and mitigation.
143. The comments which Mr Brown did not positively dispute making were unprofessional. He was subsequently given what equated to words of advice for them. That Mr Miles did not consider the comments appropriate and thus shared them with Mr Ahmed when he did not need to share that reinforces the weight we give to Mr Miles who we considered to be a frank and highly credible witness.
144. Mr Ahmed's grievance concluded:-

"Pete and HR's behaviour towards me is discrimination and victimisation. I am being badly treated because of taking legal action against the department. The goal is to see me dismissed and I am being charged with gross misconduct even though the allegation, if proven, is minor misconduct. My pay is being deducted with no forewarning that this would



happen and prior to a fair procedure being completed to determine the true facts or legality of the action being taken (unlawful deduction from wages is illegal).”

The disciplinary investigation

145. Following the grievance being lodged against Mr Miles, Ms Bev Moore was initially appointed as investigation officer. She wrote to Mr Ahmed on 23 October 2020 [241]

“I am writing to advise you that I am investigating possible gross misconduct by yourself in that you were absent from 22/09/2020 to 25/09/2020 due to sickness and have failed to provide medical evidence for this period. This period has therefore been classed as unauthorised absence and your pay is being deducted for these dates.”

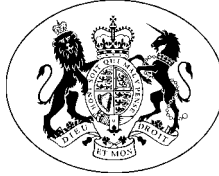
146. Mr Ahmed told us Ms Moore worked at the same office as Mr Miles and like Mr Miles reported to Ms Barr. He states that Ms Moore told him she was not comfortable conducting the disciplinary investigation in those circumstances and that someone else would be assigned.
147. On 27 October 2020 Ms Sarah Haines was appointed as the investigator of the into Mr Ahmed’s unauthorised absence.
148. Shortly afterwards the second national lockdown started. It lasted for four weeks between 5 November and 2 December 2020.
149. During that lockdown on 9 November Ms Haines received an email from Mr Ahmed [257] saying that he had been told by his managers to go home as he was in the shielding group for Covid-19 and that he would deal with the investigation when management told him to return to work. He went on to state that he did not want any correspondence sent to his home address, informed her that the 4 days



of his allegedly unauthorised absence were not taken as sick leave and that he had informed his manager both of his absence and the reason for his absence.

150. In a second email 4 minutes later he reinforced that stating that he would view any paperwork sent to his home address as harassment [256-257]. We read the first as a reasonably civil request. That cannot be said of the latter.
151. Ms Haines acknowledged both Mr Ahmed's emails and stated that she would await contact from him upon his return to work. [256]
152. On 7 December, Mr Ahmed emailed Ms Haines to tell her that he had returned to work and that he had raised a grievance in relation to being investigated for gross misconduct for Unauthorised Absence. He requested as a reasonable adjustment that the disciplinary process be suspended until the completion of the grievance process. He additionally requested that she send him copies of his latest Welcome Back discussion and all documents related to his alleged Unauthorised Absence stating he had previously requested them [255-256].
153. A few minutes before 9:00 pm that day (just under 6 hours after his request) Ms Haines agreed to Mr Ahmed's request to suspend the investigation until the completion of his grievance and in doing so stated she had previously sent him the documents requested. She asked him to inform her when the grievance was concluded [254-255].
154. An exchange of emails then ensued between them surrounding the notes of and whether a Welcome Back Discussion was held. In that exchange Mr Ahmed took issue with what he viewed as Ms Haines forming the opinion that a Welcome Back Discussion was not held, without hearing his version of events. For brevity we abbreviate the parties names. The relevant extracts are [252-255]:-

SH to HA (7 December 2020 20:58):



“... I have previously sent you all of the documents that you have requested and the Guidance you requested apart from a copy of your latest Welcome Back Discussion which I am unable to provide as the information I currently hold is that your Line Manager attempted to conduct your Welcome Back Discussion upon your return to work, but you were undecided whether you wished to declare the absence as sick or as an alternative reason. A Welcome Back Discussion was therefore not conducted at this point to allow for clarification. Then 2 days after this conversation, a further discussion was held between yourself and your Line Manager, where you disputed what the absence should be recorded as, I am not in possession of a completed Welcome Back Discussion Template, although I am currently satisfied that one was held.”

HA to SH (8 December 2020 10:44):

“A welcome back discussion was conducted but you have reached a conclusion that one was not conducted based upon information from my previous line manager without hearing my version of events.”

SH to HA (8 December 2020 10:52)

“I am not in possession of a completed Welcome Back Discussion Template, although I am currently satisfied that one was held. So I am actually agreeing with you that one was held.”

HA to SH (8 December 2020 12:49):

“Your email states ‘A Welcome Back Discussion was therefore not conducted.’ You reached this conclusion by only hearing one version of events.”

SH to HA (9 December 2020 10:42):



*“My email in context states: ‘the information I currently hold is that your Line Manager attempted to conduct your Welcome Back Discussion upon your return to work, but you were undecided whether you wished to declare the absence as sick or as an alternative reason. **A Welcome Back Discussion was therefore not conducted at this point to allow for clarification. Then 2 days after this conversation, a further discussion was held between yourself and your Line Manager, where you disputed what the absence should be recorded as, I am not in possession of a completed Welcome Back Discussion Template, although I am currently satisfied that one was held.**’ ”*

[Original emphasis]

155. Mr Ahmed responded repeating his position, sought all documents produced during the unauthorised absence process and stated ***“the only alternative explanation is that I am being targeted again by management and HR.”*** [252]
156. On our reading the message Ms Haines was trying to convey was that the welcome back (return to work) meeting had been held but to allow him to decide how he wished the reason for his absence to be recorded, the meeting record had not been completed (we do not propose to speculate if ***“concluded”*** should be substituted for the word ***“conducted”*** in Ms Haines’ email [255]) but in any event she identified the appropriate template had not been completed. Within the exchange she subsequently sought to indicate that the view he came to was a misunderstanding on his part and she agreed with him that one was held.
157. We find on a fair reading he had either misunderstood or misread what she had said. We find he took exception to the comment she made on that single point and continued to argue that she had formed a view based on one version of events and was unable to move away from that whatever the clarification she provided.



158. As part of that exchange on 9 December he made a request for all the paperwork she had to be sent to him. As a result of that request she sent him a copy of his Stress Management Plan and OH Consultation Report on 10 December 2020. He then took issue with why she had those documents.
159. We return to the issue concerning those documents and the disciplinary investigation starting at (182) but next turn to the grievance and how that was addressed.

The grievance investigation by Mrs Street

160. In about November 2020 Mrs Street was approached to undertake the investigation into Mr Ahmed's grievance. She investigated two issues:-
- 160.1. That DWP's HR guidance 'time off' sickness/unauthorised absence not followed by the line manager and
- 160.2. Discrimination and victimisation following alleged comments made by a HR case worker.
161. She interviewed:-
- 161.1. Mr Miles. That meeting was held remotely on 26 November 2020 due to COVID (notes start at [306]). Mr Miles gave her a chronology of events that he had previously prepared [194]. He told us while the notes were not verbatim, they were a fair record of the conversation.
- 161.2. Mr Ahmed on 16 December 2020 (notes start at [401])
- 161.3. Mr Brown on 16 December 2020 (notes start at [413])
- 161.4. Ms Forster on 30 December 2020 via Teams (notes start at [415]). (She the HR colleague Mr Brown was supporting when the call to HR came in from Mr Miles and she had initially picked up the call).



162. The third national lockdown commenced on 6 January 2021. It ended by a four step process:-
- 162.1. On 8 March schools in England reopened.
 - 162.2. On 12 April non-essential retail reopened.
 - 162.3. On 17 May mixing restrictions (indoor and outdoor) were removed.
 - 162.4. On 19 July most legal limits on social contact were removed.
163. Whilst in paragraph 16 of her witness statement Mrs Street stated her undated decision [417] was sent to Mr Ahmed on 11 January 2021, her email of 6 April [423] suggests that referred to her sending notes of the interviews she conducted with Mr Miles, Mr Brown & Ms Foster. The emails identify her decision was not sent until 4 February 2021 [424]. We find that it was sent on that later date.
164. Ms Street partially upheld Mr Ahmed's grievance in respect of two points:-
- 164.1. Mr Miles should have adhered more closely to DWP's Keeping in Touch policy and contacted Mr Ahmed sooner.
 - 164.2. The comments alleged to have been made by Mr Brown on the balance of probabilities were made, but had no impact on the final decision / advice given by HR.
165. However, in respect of Mr Miles' decision to instigate the disciplinary process against Mr Ahmed, she determined that Mr Ahmed had said during the interview that his absence was mental health / stress related, that was clearly sickness absence and so Mr Miles had no other option but to record it as such. As a result Ms Street did not uphold that aspect of Mr Ahmed's grievance.
166. Her rationale in relation to that point and for her conclusion at (164.1) was:-



“... HA made the decision to go home himself as his mental health was affected whilst waiting for the decision. The line manager treated the period as sick leave due to HA citing his mental health being affected. As PM was aware of HA’s state of mental health and as a duty of care to him he should have discussed a ‘keeping in touch’ arrangement with HA. 22/9/20 HA attempted contact with PM. PM states he was aware HA had called requesting a call back however he stated he was busy with a visitor to the office and did not call HA back until the next day. Knowing HA had left the office due to his mental health being affected PM should have made time to contact HA on the same day.

Conclusion

PM had no alternative but to treat the period 15/9/20 to 25/9/20 as a period of sickness. HA made the decision to go home to await the decision letter so special leave could not be considered. As HA stated his mental health was affected PM correctly treated the period as sickness however PM did not follow the ‘keeping in touch’ procedure. PM should have agreed the frequency of KIT as a duty of care to HA and returned the call to HA on 22/9/20.”

April 2021 Washwood Heath Line Management Changes

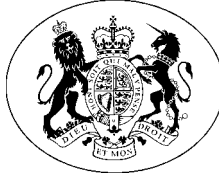
167. In April 2021 Mrs Devi was appointed to Ms Barr’s former role (as a Senior Executive Officer (SEO)) and Washwood Heath Job Centre became as one of the Job centres she was responsible for. At the same time Ms Barr was promoted to a Grade 7 post and thereafter Mrs Devi reported to Ms Barr. Mr Ahmed continued to be line managed by Mr Iqbal who in turn reported to Mrs Devi.
168. Mrs Devi told us as part of the handover she received when she took over from Ms Barr she was informed that Mr Ahmed had raised a grievance against Mr Miles in relation to how the absence was recorded and treated as unauthorised, that a



decision had been made, an appeal was in progress and that was being dealt with by Mr Smith. We turn next to the appeal conducted by Mr Smith.

The grievance appeal conducted by Mr Smith

169. On 7 April 2021 [1096] (although the document before us was undated the date this was done was not in dispute) Mr Ahmed appealed Mrs Street's decision. Whilst this was 2 months after Mrs Street's decision was sent to him, it was a few days before step 2 of the third national lockdown took effect (see (162.2) above) and no doubt in part because of that and Mr Ahmed being on special leave (he was clinically extremely vulnerable) DWP took no point at the time about that delay.
170. The grievance appeal asserted the outcome had not address two points:-
- 170.1. Mr Ahmed was not sick for the period in question (22/09/2020 – 25/09/2020).
- 170.2. That HR had pre-prepared various plans of action for Mr Miles to take on Mr Ahmed's return from absence, which Mr Ahmed asserts was HR acting in bad faith.
171. The appeal also raised:-
- 171.1. the failure of the investigation to deal with the involvement of Mr Miles's managers with regards to advice given with regards to unauthorised absence/deducting wages and
- 171.2. challenged three aspects of the decision
- "1. The conclusion Pete Miles had no choice but to treat my absence during the period 22/09/2020 – 25/09/2020 as sickness. I informed Pete I was not sick for this period and OHS advised him my absence was not a*



medical issue; DWP Guidance also confirms this [intranet link given]. Awarding special leave and offsetting my absences with annual leave were options open to him. The decision to treat my absence as sick was not open to him.

2. The conclusion “Pete Miles followed the correct process in treating the period 15/9/20 – 25/9/20 as unauthorised absence.” This is incorrect. The period treated as unauthorised and for failing to provide medical evidence for (i.e. the allegation of gross misconduct against me), was from 22/09/2020 to 25/09/2020. According to the guidance for unauthorised absence, for the absence to qualify as gross misconduct it must exceed 5 days. My alleged unauthorised absence was for 4 days. Further, medical evidence is required for sickness absence, Peter Miles and HR were both made aware I was not sick. This makes the requirement to provide medical evidence redundant.

3. The conclusion that it was fair and lawful for my wages to be deducted for unauthorised absence. Pete Miles witness statement confirms he gave his authorisation for me to leave work until a disciplinary decision was returned. He did not at any time during my absence instruct me to return to work. It is clear there was no unauthorised absence and the decision to deduct my wages ahead of any proper investigation shows prejudice and bad faith by Pete Miles and everyone else involved in the decision making process.”

172. Mr Richard Smith was appointed as the grievance appeal manager. Mr Smith met with Mr Ahmed by Microsoft Teams on 28 April 2021. It was minuted [1045-1050]. Following the connection dropping Mr Smith rejoined the meeting. Mr Ahmed sought to relay his view of the purpose of the meeting. Mr Smith sought to clarify his role. In the note of the meeting shown in red to identify a revision, Mr Ahmed is recorded as having said **“Your behaviour is upsetting and you are not**



conducting your role as an Appeal Manager properly. Your behaviour is biased against me and has upset me. I am not continuing with this meeting”.

173. Mr Smith’s outcome [264-265] puts what Mr Ahmed said slightly differently ***“You ended our meeting prematurely stating the following “I do not want to discuss this any further as it will form part of my Racial Discrimination Case, see you in June. You are defending Pete”.***
174. Mr Smith told us that by that time that Mr Ahmed had made his view plain and also threatened a further tribunal claim against DWP. As a result Mr Smith considered there was no point in him raising matters that he had intended, including discussing alternative means of classifying the absence and instead decided to proceed to reach a decision based on what he had heard and been sent.
175. Mr Ahmed had and also having had an opportunity to raise any matters within the appeal and at the meeting, and having expressed the view he had before he terminated the call, we find that Mr Smith was entitled to proceed on that basis.
176. On 12 May 2021, 5 weeks or so after Mrs Street’s decision and a few days before step 3 of the COVID process (see (162.3) above) Mr Smith issued his decision [460-1] in respect of Mr Ahmed’s grievance appeal. Mr Smith did not uphold Mr Ahmed’s appeal. His reasoning was as follows:-

“I do accept that the precursor to your absence from work was the fact that you were waiting for a decision linked to another investigation that may have resulted in your dismissal from DWP. The letter relating to this was due into the office on or around this time and I have no doubt that this was causing you anxiety. You told me of your concerns around being potentially dismissed while on duty in your office and you were struggling to come to terms with that. You stated in our meeting that there had been ‘2 investigation Managers and 3 DMs at G7 and G6, but no-one could tell me what my misconduct was’. My issue with this is that as you informed



me, you failed to meet with the Decision Maker on 2 occasions ahead of this decision being made. Regardless of what the decision might have been, had you met with the Decision Maker, you would have been able to understand the issues you were facing and have been able to state your side of the case. You did not take up this opportunity and my view here is that you exacerbated the stress and anxiety yourself by not engaging in the process.

This resulted in the conversation with your Line manager Peter Miles on 14th September when you stated that due to the stress of the situation, you would not be in work for the rest of the week. It was clear from our discussion that there was nothing stated at that point in your discussion around how that absence from work would be treated. In my view because of the nature of the absence, I do agree with the Decision makers view that Peter Miles was right to treat the period 15 September to 25 September 2020 as a period of sickness.

Attendance at work carries a personal responsibility. There is a requirement for you as an individual DWP member of staff to keep in touch with your Line manager during absence periods. The reason that Angela Street partially upheld your decision was because your Line Manager Peter Miles did not follow the Keeping in touch procedures during your absence period. I do feel however that there was not enough focus on your part aside from the call you made on 22 September, to keep your Line Manager informed of your own situation and progress towards making a return to work. You stated in our meeting that you had no intention of returning to work until you were aware of the decision linked to the disciplinary case but I can find no reference to a similar discussion with Peter Miles, only that you would be absent for the “rest of the week” from 15 September.



On your return to work you stated that there was a "mention" of potential alternatives to sick absence but these do not appear to have been perused [sic.] and you provided a medical certificate to cover self-certified leave from 15 to 21 September. You stated in our meeting that you felt that you were "under duress, I was pressured and was being bullied and intimidated" Aside from conversations and requests for a medical certificate I can find no evidence to back up this allegation and given the fact that I feel the correct action was taken I also think that you were given adequate time to provide a further medical certificate to cover the period from 22 to 25 September. This was not forthcoming and resulted in unauthorised absence procedures being followed and a withdrawal of salary for the period."

177. Mr Smith then went on to recount what we say above about how the meeting ended. He then relayed that his role required him to consider both sides of the case.
178. The words Mr Smith asserts Mr Ahmed used were not recorded in the non verbatim meeting notes. Given that is so neither side appears to accept the original notes (the original notes before us having been amended in red to add comments from Mr Ahmed). The words Mr Smith asserts Mr Ahmed used as relayed in his outcome however tally with what Mr Ahmed alleges in his witness statement, his claim before us and in the list of issues (Mr Ahmed initially alleged that Mr Smith's decision was an act of victimisation and race discrimination). On that basis we prefer the account in Mr Smith's outcome to that in the amendment put forward by Mr Ahmed.
179. As to the allegation of discrimination/victimisation against Mr Smith, Mr Ahmed said this:-



“38. Richard Smith wanted me to face a gross misconduct disciplinary because of my previous ET claims and because I was Asian. In his decision letter he takes the word of Peter Miles (White) over my word (Asian) without any reasoning why he preferred Peter Miles word over mine i.e. When Peter Miles claims I said, on 25/09/2020, “I am no longer sick.” This is something investigation manager David O’Brien did as well [p383].

39. If I had been white Angela Street and Richard Smith would have treated me differently.”

180. That repeated a point Mr Smith tried to address during the hearing, that Mr Ahmed was conflating the grievance and disciplinary processes.
181. Mr Ahmed confirmed before us he no longer sought to argue that Mr Smith discriminated him directly on racial grounds.

The re-started disciplinary investigation

182. Despite having been sent the grievance appeal outcome in mid-May we can find no trace of Mr Ahmed informing Ms Haines of the outcome as she had requested the previous December (see (152-153)).
183. On 16 June 2021 Mr Iqbal contacted HR regarding Mr Ahmed’s absence and querying the status of the warning. Despite being specifically asked, he was unable to tell us why he raised that question at that point. The note of that discussion [266] relayed a number of errors including Mr Ahmed’s unauthorised absence had been appealed, that the appeal had not been upheld but did not say the sanction had been changed. Those failures by Mr Iqbal aside, shortly afterwards Mr Ahmed was referred to OH by Mr Iqbal. We return to this starting at (223).



184. The following day 17 June 2021 Ms Haines emailed Mr Ahmed [274-275]:-

“Dear Hafeez

I hope you are well?

As you have now returned to work, the Investigation for your case now needs to be actioned.

As requested, as a reasonable adjustment I suspended the Investigation until the completion of your current Grievance regarding being investigated for Gross Misconduct for Unauthorised Absence. Can you please inform me if your Grievance has reached a conclusion, so that I may send you a letter inviting you to an Investigation Meeting.”

185. Mr Ahmed thus queried how Ms Haines knew he had returned to work and if her knowledge of that had emanated from the DWP’s HR department either as a result of Mr Iqbal’s prompt or otherwise. Whilst he makes wider points, he suggests that supports his argument that HR and DWP’s staff generally were seeking to remove him.

186. Mr Ahmed responded to Ms Haines 30 minutes later [273-274]

“You will be aware I have been back at work for some time. Did HR/government legal tell you to push ahead with your sham investigation? Instructing, causing, inducing or knowingly helping someone to commit an unlawful act of unlawful discrimination/victimisation is unlawful under the Equality Act 2010. I am going to action against your treatment of me.

You can contact HR or government legal and they will inform you of the status of my grievance.



Please inform me how you came in to position of my OHS report. This is private and covered by the DPA. I expect a satisfactory response by tomorrow or I will be forced to raise a grievance.

I have also previously requested all the documentation in relation to my alleged unauthorised absence. Please send me this together with the published guidance on unauthorised absence.”

187. Ms Haines responded the following day 18 June 2021 [271-273]:-

“Dear Hafeez

I hope you are well?

I have only recently become aware that you have returned to work, as due to my own Personal Circumstances I have not been available. Throughout my contact with you, I have treated you fairly and with respect and accommodated your requests. The reason I enquired as to whether or not your Grievance had reached a conclusion was because that was why the Investigation was suspended at your request, pending an outcome of your Grievance.

...”

188. She then relayed her version of their interactions and provided the documents requested before concluding:-

“As I have now changed role I will no longer be conducting this Investigation and another colleague will be appointed.”

189. Ms Haines was replaced a few days later by Mr Paul Szyszko (see (205)).

190. Mr Ahmed responded to Ms Haines a few days later at 12:46 on 23 June 2021 [271]:-



“Dear Sarah,

My right to confidentiality and privacy has been breached, a disciplinary offence. I am going to raise a grievance about this today and also report it to the Information Commissioner.

As you well know there was no unauthorised absence: I was given permission to leave work by my manager Pete Miles. During the grievance procedure he has confirmed this to be the case. I was not instructed to return to work at any point.

I did not inform my manager at any point that I was sick, this is why the OHS report you have illegally obtained was produced. It confirms my period of absence was not medically related.

The sick note I have signed was done under duress while Pete Miles was bullying me, threatening me with disciplinary action. I told Pete Miles on at least 5 occasions I was not sick during the period in question but he continued with his threats.

You will know all this because you spoke with Pete Miles and saw the evidence he provided of our communications.

You will also know the published Unauthorised Absence procedure hasn't been followed but you/HR have victimised me using a sham disciplinary procedure. This wouldn't have happened if I was white.

I am going to make a claim under the EqA2010 for Racial Discrimination and Victimisation,

...”



191. Mr Ahmed explained the reference to the breach of his right to confidentiality and privacy was that Mr Miles and Ms Haines gaining access to his private OH report [HA/43]. When we explained one of the reasons for the involvement of OH was to act as, an albeit permeable barrier, between employer and employee so that employers could gain access to the medical advice they required to comply with their legal obligations without having access to the entirety of an employee's medical records if not relevant (and even then whilst subject to the legal restrictions concerning consent for access to medical records). Mr Ahmed accepted the point and did not pursue it. That aside Mr Ahmed does not explain why given he was aware of that breach months before why he only sought to raise it again when there was a suggestion the disciplinary process was to be restarted. We find in raising that issue at that point it was a reaction to the disciplinary process being recommenced. That was a similar response to that we address at (134).
192. The messages from Mr Ahmed to Ms Haines were a wholly unreasonable reaction to a polite enquiry from her. That too reflected the way he responded over a length time period to managers when instructed to do something or something was done that he disagreed with (Mr Miles, Ms Haines, Miss Minto and Mrs Rahman amongst others).
193. Further in December 2020 (see (152)) Mr Ahmed had complied with Ms Haines' earlier request to let her know when he returned to work. We are unclear when he returned to work after the third national lockdown but it is clear that in June 2021 she became aware the grievance had been concluded via other means. It is unsurprising if this came to HR's attention that they addressed it. Indeed given the complaints Mr Ahmed makes about delay and the stress he alleged the delay was causing him, his failure to adhere to the request from Ms Haines to let her know when the grievance had been concluded was a contributing factor to the delay and its alleged consequences.



194. Thirty minutes after his email to Ms Haines of 23 June 2021, at 13:12, Mr Ahmed emailed various managers, including his then second level line manager Ms Devi, seeking to rescind his 28 September/ 5/6 October self-certificate. His rationale was that “... ***I had not been sick and that I had completed it under duress, and while in an impaired mental state***” [288-289].
195. Mr Ahmed complains that request was not granted and the decision to refer the potential unauthorised absence for investigation had already been made before Mrs Devi took over. We agree. The decision to investigate his absence as unauthorised (and the deduction of his wages) took place in October 2020. It was merely put on hold at his request ending his grievance being concluded.
196. As we state above (167), Ms Devi became his second level line manager in April 2021. His request to rescind the self certificate was made 8½ months after Mr Miles received and dated the self certificate (6 October 2020) and just over 8 months after he was made the subject of a disciplinary investigation (16 October 2020).
197. Having taken HR advice Ms Devi told us she responded to Mr Ahmed on 28 June 2021 advising him that if his self certificate was withdrawn it would lead to the whole period of his absence being unauthorised and that a deduction from his salary would be made as a consequence [287-288]. She accepted before us that ultimately this would have been within her discretion, but she would have to have a good reason to depart from the advice received from HR. She concluded that email by asking him to confirm if he wanted to withdraw his self-certification.
198. Mr Ahmed did not respond until 7 weeks or so later (18 August [287]) asking to be reimbursed for the deductions to his wages for the period 22 to 25 September 2020 on the basis that the decision to make deduction had been made before any investigation into the matter.



199. Mr Ahmed asserts that during the summer of 2021 Mrs Devi and Mr Iqbal were trying to progress the disciplinary case against him. Before us Mr Ahmed also suggested that in her email of 28 June 2021 Mrs Devi was trying to make allegation even worse as part of a concerted attempt to remove him. He suggested that was linked to her actions in relation to the attendance management process we refer to starting at (353).
200. We find Mrs Devi was merely pointing out what the effect of his request would be in the light of the way DWP viewed his failure to provide a “reason” for the absence and that she was duty bound to do so.
201. As to the complaint that Mrs Devi and/or Mr Iqbal were actioning the disciplinary process and part of the management/HR campaign to force him out Mr Iqbal told us that by the time he became Mr Ahmed’s line manager the grievance process was already ongoing, and he had no involvement in it or the decision to postpone the disciplinary process pending the outcome of the grievance process. Similarly Mrs Devi was not appointed as a decision maker.
202. Mr Ahmed’s complaint does not say expressly what actions of theirs he complains about. As to Mr Iqbal it appears to be suggested it was as a result of his involvement the disciplinary process was re-started. Mr Ahmed had asked for it to be delayed pending the outcomes of his grievance and its appeal. He had agreed to inform Ms Haines when that was concluded. He did not. Even if Mr Iqbal did play a part in that being restarted Mr Iqbal was doing no more than what Mr Ahmed himself had agreed to do 6 months before to Ms Haines and avoiding the further delays Mr Ahmed also complains about.
203. The only other involvement we can trace Mrs Devi having had around this time was her forwarding the disciplinary papers to Mr Paul Szyszko. We return to this in a few paragraphs time. No allegation was put to her that she forwarded papers that should not have forwarded, omitted relevant papers or made comments she

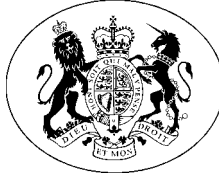


should not have. She was however asked why HR could not have sent the documents to Mr Szyszko. She told us she had been sent the papers by Ms Haines and the normal process was that she should as the countersigning manager. It is difficult to see how given the complaint against Ms Ahmed's direct line manager, Mr Miles, why she as his second level manager and the recipient of the papers by Ms Haines, that it was inappropriate for her to have forwarded those papers to the person appointed to investigate. Indeed the evidence before us indeed suggests she was the proper person to refer the investigation to him/her (see (220)). Those matters being so being so the evidence before us does not suggest that she was trying to make the allegation worse or was part of a HR/management campaign to force Mr Ahmed out.

204. We return to Mr Iqbal's involvement at (223 & 228-235) below but for the avoidance of doubt in the light of his response DWP did not withdraw the self certificate, reduce Mr Ahmed's pay further or reimburse him as he had sought.

Mr Szyszko's involvement

205. On 24 June 2021 Mr Paul Szyszko was appointed in place of Ms Haines as the investigator of the disciplinary investigation into Mr Ahmed's unauthorised absence. Mr Szyszko told us he was informed of this by Mrs Devi on 24 June 2021 [276] and he was sent various documents by her.
206. DWP suggests Mr Szyszko was appointed because he was a Buyer & Partnership Manager for Cambridge, Huntingdon, Ely & Wisbech and thus was an independent manager with no involvement or knowledge of the preceding claims.
207. On 29 June, Mr Szyszko emailed Mrs Devi querying when he might receive a call from HR in relation to the investigation as he wanted to know the precise issue he was required to investigate [277].



208. Mr Szyszko's email to Mrs Devi referencing his expectation of a call from HR suggests to us that contact with the individual's line and/or second level manager and HR was standard DWP practice. Using our considerable experience as an industrial relations jury that is the usual practice. Indeed, we find that the role of HR in such cases is in part to provide support to decision makers on the process(es) they were undertaking, to advise what the processes were and to ensure they were followed. In this case we were told and accept that HR business partners acted as the first point of reference for colleagues to point them to policies and HR caseworkers addressed technical queries.
209. At the point he emailed Mrs Devi we find that the evidence before us does not support the suggestion Mr Szyszko had any knowledge of Mr Ahmed or of his previous claims.
210. We find the outcome of that email to Mrs Devi was that on 2 July 2021, Mrs Le Fort emailed Mr Szyszko asking him to call her so she could give him the details of the caseworker who would be supporting him in the investigation [280].
211. Mr Ahmed challenged Mrs Le Fort and Mr Szyszko about Mrs Le Fort's involvement and the appointment and briefing of Mr Szyszko. Mr Ahmed referenced her knowledge of and involvement in his earlier Tribunal claims, suggested that she was instrumental in organising or at least participated in what he alleged was a HR/management campaign to force him out and she was attempting to improperly influence the investigation by Mr Szyszko (and others).
212. Mr Szyszko was replaced, only after a challenge to his appointment was made by Mr Ahmed. Mr Ahmed articulated his complaint about Mr Szyszko and Mrs Le Fort thus:-

"45 ... He was replaced because he was caught being groomed and improperly influenced by HR adviser Victoria Leforte (sic.) [p280], who was on a blind crusade to see me dismissed, because she felt personally



offended that I had brought, and succeeded in, a previous ET claim. I have never met her personally, but I had seen numerous emails were she gave incompetent and biased advice to managers, and others, influencing unfair action against me. She was part of a campaign to demonise me because I was Asian and brought ET claims against the employer. Paul Szyszko disciplinary investigation letter appears to be missing from the bundle produced by the respondents solicitor.

46. ...Paul Szyszko had already been assigned a HR adviser, Mo Hoare [p283], and Victoria Leforte (sic.) had no business seeking out or communicating with an investigation manager who had been chosen to ensure independence of local district. She claims she wanted to “inform him who his HR adviser was” [p280] ...”

213. Mrs Le Fort invited him to a Microsoft Teams Meeting on 5 July 2021 [278-281].
214. Both Mr Szyszko and Mrs Le Fort told us within that meeting they discussed the logistics of the investigation and Mr Szyszko's queries. They both refuted the suggestion put by Mr Ahmed that Mrs Le Fort sought to influence (Mr Ahmed used the word groom) Mr Szyszko's outcome.
215. Following their Teams meeting Mr Szyszko sought the advice of a HR Caseworker, Ms Hoare. The minute of that advice of 5 July [283-284] indicated that Mr Szyszko was told that the purpose of the investigation was to identify whether unauthorised absence, sickness or special leave was how the absence should be recorded as (DWP's position is that holiday and flex leave had not been sought by Mr Ahmed and it was his responsibility to seek that) and they could discuss the matter again after he had met Mr Ahmed.
216. There were further discussions between Mr Szyszko and Ms Hoare on 6 and 7 July [285-286] regarding the detail to be included in the letters Mr Szyszko was to send to Mr Ahmed.



217. We also had before us what appeared to be an extract from DWP's records (although what these were we were not precisely told – the bundle index refers to them as emails but if so they are merely extracts and the headers are not given). They are dated 6 to 9 July [278] although they are not in order.
218. They appear to support what Mr Szyszko's witness statement records; namely on 8 July, he received an email from Mr Ahmed querying who had assigned Mr Szyszko to investigate his case and asserting that Mr Ahmed had not had any unauthorised absence from work.
219. Mrs Le Fort told us [VLF/6] that on 9 July 2021, she was also contacted by Mr Szyszko to clarify if there were any grievances raised by Mr Ahmed. The extract of the email chain we have [278] suggests Mr Szyszko had identified grievances had been raised this from an email received from Mr Ahmed, Mr Szyszko had checked with Ms Hoare who held that information, had been directed by her to Ms Devi but her "out of office" stated she was on leave so Ms Hoare had suggested he contact Mrs Le Fort. She replied saying she that she did not have this information.
220. That in our judgment suggests that the first and principal point of contact for that information was Mrs Devi as Mr Ahmed's second level (line manager's) manager and that supports any involvement from her in referring the disciplinary investigation to Mr Szyszko from what have seen, was not improper.
221. Mr Ahmed was invited to an investigation meeting on 19 July. Mr Szyszko told us Mr Ahmed refused to meet with him [PS/10]. Mr Ahmed told us he complained about the involvement of Mrs Le Fort and Mr Szyszko [HA/46]. Again we were provided little detail of that complaint against them save that Mr Ahmed told us Mrs Le Fort involved herself:-

"...to ensure the case went forward to a disciplinary for consideration of my dismissal. There is no other reason for her to get involved. Paul Szyszko allowed his independence to be compromised but because I am



Asian he didn't treat me with the same professionalism as if I had been White. When I objected to Paul Szyzsko being groomed by Victoria Leforte he was replaced. Paul Szysko was also advised by Kam Devi to contact Suzanne Lloyd, another HR adviser who had intimate knowledge of my previous ET claims, to obtain advice about dealing with my case. There was no reason for Suzanne Lloyd to get involved either as Paul Szyzsko already had a HR point of contact in Mo Hoare."

222. As we say Mr Szysko was replaced by Mr David O'Brien as the disciplinary investigator on 1 September 2021.

OH referral July 2021

223. In the interim, on 13 July 2021 OH provided an advice to Mr Iqbal [827-828]. Under the heading "background" OH explained

"Hafeez Ahmed was referred due to management health concerns and was contacted by telephone today. A post consultation briefing call took place with Mazhar Iqbal."

224. The OH advice continued under the heading "Current Issues":-

"As you are aware, Hafeez Ahmed is under the care of his GP due to underlying health condition (paroxysmal nocturnal haemoglobinuria-PNH). He is on prescription supplementary medication to help with improve his symptoms. He describes symptoms of constant chronic fatigue, severe insomnia, reduced levels of concentration and explained bruising/bleeding, shortness of breath – sometimes, that he has received hospital treatment in the past when his condition was highly exacerbated. Hafeez Ahmed informs me of other intervention as advised by his Specialist which may likely help in reducing flares up of his condition, but he states that he was unable to opt for this treatment plan due to their



complicated effects and he tries to remain proactive in managing his condition. Hafeez Ahmed identifies that stress factor is one of the major triggers of his condition as this could lead to severe exacerbation of his condition. Hafeez states that he was shielding during the period of Covid-19 lock down, but he has been able to return to work in a single small office.”

OH Opinion

Given the nature of Hafeez Ahmed’s underlying medical condition, it is reasonably foreseeable that he will have further exacerbation of his symptoms periodically, however, it is impossible to predict the severity or time scale of any future episode however if medical advice and treatment plans are followed it is likely that the risk of exhibition would be somewhat reduced.

As you may be aware, individuals with this condition experience disabling fatigue during episodes of flares up which this is likely to improve once the underlying contributory factor is treated/managed.

Emotionally, a PNH diagnosis can be quite overwhelming as such implementing a self -help tips and coping strategies is likely to be of benefit. A signpost to Pam Life was discussed.”

225. The OH advice went on to state:-

“[Mr] Ahmed is fit for work with adjustments

...[Mr] Ahmed has a health condition that makes him more vulnerable to viral and pathogenic infections such as Covid-19 infection.”

226. It recommended home working if operationally feasible, that



“It may benefit Mr Ahmed, if his line manager completes a stress risk assessment so that appropriate adjustments or control measures can be implemented to support him in the workplace. For example; pacing and management of his workload, flexible start and finish time, regular rest breaks +/- PC micro breaks.

he

“... be assigned an experienced member of staff a workplace buddy/mentor for a regular support and supervision, who he can confidentially meet on a regular basis to discuss complex cases and to assist him”

he be given

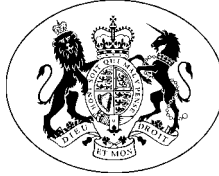
“Support with aids memoir and tasks diary to help to meet the requirement of his duties. Protected time to catch up with admin work when necessary.

We discussed the importance of taking regular work breaks and healthy lifestyle measures to assist him in terms of his work life balance.”

and that

“... [Mr] Ahmed remains emotionally vulnerable due to his ongoing health conditions, [and] ... that Mr Ahmed would benefit from support to make positive lifestyle changes, therefore I have advised him to self-refer to PAM LIFE.”

227. No further OH review was identified as needed.
228. Mr Ahmed complains [AH/93] that Mr Iqbal did not discuss the report with him or act upon the advice. He also states that Mr Iqbal ignored his Stress Reduction Plans although he does give the specifics of how. Whilst the evidence before us



was that Mr Ahmed was at work at the time of that OH report given that lack of those specifics and they do not directly form part of the specific complaints before us we do not intend to address them further.

229. What is apparent is that the relationship between Mr Iqbal and Mr Ahmed also broke down. Mr Ahmed told us [HA/97] that was as a result of Mr Iqbal telling him that another manager had complained about him not getting on with his work. Mr Ahmed raised a grievance about the other manager, which Mr Ahmed suggests Mr Iqbal tried to suppress and then lied to the grievance decision maker. Again he gave little detail.
230. Mr Iqbal's position was that the grievance Mr Ahmed raised was against a colleague and Mr Ahmed named Mr Iqbal as a witness. Mr Iqbal provided a witness statement and Mr Ahmed was not happy with it because he felt that Mr Iqbal had lied in his statement. Mr Iqbal denies that. We were not taken to the contents of that complaint or told what happened. Again as it did not form the basis of specific complaints before us and so again we do not intend to address them further.
231. The final straw for the working relationship between Mr Iqbal and Mr Ahmed took place during Mr Ahmed's absence that started in October 2021 (see (242)). Mr Ahmed states Mr Iqbal asked him for a fit note. Mr Ahmed told us [HA/97] he responded by sending "... **him a text calling him a liar and not to contact me again.**" Again that is part of a common theme on Mr Ahmed's part. Whatever the justification, behaviour like that from an employee to a manager is unacceptable.
232. That Mr Ahmed felt he could respond in that way reinforces the point we make at (259) that by the end of 2021 Mr Ahmed's dissatisfaction with DWP and his managers, whoever they were, was such that his relationship with DWP and the managers they appointed to manage him had irretrievably broken down by this point.



233. Mr Ahmed then made a complaint about Mr Iqbal and as a result Mrs Laura Galloway (nee Walker) managed him for period from 3 November 2021 to 7 January 2022 (see (248)). By that point Mr Ahmed had gone on sick leave so she was essentially managing Mr Ahmed's sickness absence.
234. Whilst those matters did not form part of the issues before us and as we say insufficient detail was given of what was said or done, by whom and when that Mr Ahmed complains about what they do show is whether Mr Iqbal lied or not, that not only was Mr Ahmed was quick to complain about individuals irrespective of their seniority, when their view did not accord with his own, but was prepared to allege the individual was lying rather than mistaken, without providing a basis explaining why.
235. Returning to the complaint that Mr Iqbal was part of the management/HR campaign to force Mr Ahmed out when Mr Ahmed started a period of sick leave in the Autumn Mr Iqbal asserts he actioned that in the normal way by seeking a sick note. The evidence before us does not suggest that he was doing anything other than follow standard procedures. We find the evidence does not support the assertion Mr Iqbal was part of a HR/management campaign to force Mr Ahmed out.

The investigation by Mr O'Brien

236. As we state above on 1 September 2021, Mr O'Brien was appointed as the disciplinary investigator in relation to the matters concerning Mr Ahmed. He was appointed by Mr Darren Priest, a Grade 7 Manager. We return to Mr Ahmed's complaint about Mr Priest at (430-431). Mr O'Brien was sent all the documents and information in rotation to the investigation regarding Mr Ahmed by the previous disciplinary manager, Mr Szyszko, via email on 3 September.



237. On 8 September, Mr O'Brien wrote to Mr Ahmed [330-331 & 350-352] stating that he had been appointed as the Independent investigation Manager and he was to investigate Mr Ahmed's :-

"... unauthorised absence covering the period of the 21/9/20 to 25/09/20 which was deemed as gross misconduct.

... The investigation report will show whether, on the balance of probability, there is a case to answer."

238. Mr Ahmed alleges that disciplinary investigation letter was materially different from the original allegation against him in that unlike Mr Miles' letter there was no mention of his misconduct being the failure to provide medical evidence for the period of absence (see (127)).
239. On 9 September, Mr Ahmed emailed Mr O'Brien stating that he had previously requested that investigations (including this one) be deferred until the completion of the outstanding grievances (although he did not specify which) on the basis this was *"a reasonable adjustment for his disability"*. He also reiterated that he did not take any unauthorised absence and any absence he did take was with his manager's permission [331 & 354].
240. Mr O'Brien responded that day asking Mr Ahmed to explain how the investigation would impact upon his disability. Mr Ahmed responded that he was *"... in a very stressful situation with ongoing grievances, an investigation and pending tribunal cases. Your investigation is another stress. My condition causes fatigue, and associated stress and is exacerbated by stress. ... If you went ahead with your investigation you would disadvantage me in my preparation and presentation of my defence."* [333 & 355]
241. Mr O'Brien sought advice from HR (Ms Hoare). He told us [DOB/7] on 29 September 2021 he was advised he could proceed with his investigation given Mr



Ahmed's outstanding grievances had been completed [316-317]. Whilst the email from Ms Hoare that he took us to referenced an update on the grievances that she would send on to him, we were not taken to that.

The start of Mr Ahmed's long term sickness absence

242. In the meantime Mr Ahmed was on sick leave from Monday 13 to Friday 17 September, annual leave from Tuesday 28 September to Friday 8 October and then on Monday 11 October he commenced a period of sick leave from which he did not return prior to his subsequent dismissal.
243. On 29 September, Mr O'Brien sent Mr Ahmed an invitation to an investigation meeting. It was scheduled for 15 October 2021 via Microsoft Teams [333-334, 357-358]. Mr O'Brien also informed Mr Ahmed that he was due to be on leave until the 14 October.
244. On his return from leave on 14 October, Mr O'Brien told us having checked if Mr Ahmed had accepted his invitation to the investigation meeting, he found he had not. Mr O'Brien then identified Mr Ahmed had been offline for 16 days and so checked with HR to see if Mr Ahmed had been on annual or sick leave and sought details of Mr Ahmed's line manager [314].
245. It is worth noting that after his contact with Mr O'Brien on 9 September Mr Ahmed was only in work on Monday 20, Tuesday 21 and Friday 24 September 2021 in the 9 month period prior to his dismissal.
246. We find given those absences Mr Ahmed did not see Mr O'Brien's e-mail of the 29 September. Mr O'Brien told us it was not until 15 October that Ms Hoare told him that Mr Ahmed was absent and she would speak to his line manager to identify if an OH assessment had been arranged to establish if he could return to work and if there were any reasonable adjustments that could be put in place to support him [313].



247. Ms Hoare updated Mr O'Brien on 21 October to say she was still awaiting a decision [318]. On 10 November, Ms Hoare informed Mr O'Brien that because Mr Ahmed was off sick, the decision had been taken to pause the investigation [322]. Mr O'Brien told us he made no attempt to contact Mr Ahmed because he did not have Mr Ahmed's home address and because Mr Ahmed had stated on a previous occasion that if he received anything from the Department through the post when he was absent from work, he would deem that as harassment [POB/15] (see (150)).

Mrs Galloway's line management of Mr Ahmed

248. On Wednesday 3 November 2021 Mrs Laura Galloway (nee Walker) took over Mr Ahmed's line management from Mr Iqbal. She managed Mr Ahmed (and his absence from work) until 7 January 2022 when she in turn was replaced by Ms Naomi Minto (see (268)).
249. A copy of Mrs Galloway's text exchanges and discussions with Mr Ahmed start at [805].
250. Mrs Galloway contacted Mr Ahmed by text on 3 November to inform him of her appointment, to attempt to arrange a Keeping in Touch ("KIT") call on Friday 5 November, to discuss arrangements for him supplying a MED3 (his self-certificate for his absence could only extend to 17 October 2021) and on the basis he had been absent for 28 calendar days by that point, to give the correct notice for formal absence review on Thursday 11 November.
251. Mr Ahmed replied and over various text asked for a self-certification form and for a copy of the attendance management procedure, stating that he would send in a sick note for the period 18 October to 19 November 2021 [805] and that he could only attend by telephone, and seeking to record the call. Mrs Galloway responded stating she did not feel comfortable with the recording of their discussion and declined to consent, but accepted he was entitled to a copy of the notes and he



could propose additions if he felt anything had been missed. Mr Ahmed repeated his request for a recording.

252. On 4 November 2021 Mr Ahmed's final written warning was extended (see (124)).
253. The KIT call with Mrs Galloway went ahead on 5 November. A lengthy minute was before us at [805-806]. Mr Ahmed explained at length the factors impacting on him. Mrs Galloway agreed to take advice on the recording and complete an OH referral.
254. The HR advice regarding the recording was received on 10 November [807] –
 - 254.1. it was reasonable for the meeting to be recorded,
 - 254.2. if Mrs Galloway did not feel comfortable with the meeting being recorded she was under no obligation to agree, and
 - 254.3. if so Mr Ahmed still wished the meeting to be recorded then it would be appropriate to ask another manager who would feel comfortable with it being recorded to hold the meeting and who would take the case to take forward.
255. On 12, 16 and 17 November 2021 Mrs Galloway texted Mr Ahmed to arrange a KIT call. She received no response until 17 November when Mr Ahmed texted to say he hadn't been well for the last few days due to his blood condition and was unable to have a keeping in touch conversation as he was still unwell. Given Mr Ahmed's complaint about Mr Miles not holding KIT calls and the importance of them he did not explain why he did not complain about Mrs Galloway's failure to hold such calls. In contrast when Miss Minto did not attend a call he took issue with it. We find he was being selective as to when to attend calls or not and if he want to complain or not.
256. Mrs Galloway replied thanking him for responding, sympathised with him not feeling well and scheduled a keeping in touch call for Monday 22 November.



257. On 22 November Mrs Galloway held that telephone KIT discussion with Mr Ahmed. Mrs Galloway's witness statement [LG/15] and notes [808-809] record:-
- 257.1. He updated her regarding his depression, saying that his condition had not changed since their last meeting on 5 November. Mr Ahmed also referenced that he had been unable to participate their meeting on 17 November due to an episode of his blood condition, that he had again seen his GP regarding his depression and that he had been issued with a further fit note to cover the period until 30 December 2021².
- 257.2. Mr Ahmed explained he was unwilling to return to work as long as he was being investigated "unfairly" for the unauthorised absence, if someone told him the basis for the allegation (that he had taken an unauthorised absence) he would return to work and participate in the investigation process but without that Mr Ahmed felt that if he were to participate in the process, without being told the basis of the allegation, he would be treated as having accepted the allegation if the matter proceeded to an Employment Tribunal.
- 257.3. that they discussed the 28-day review meeting, her discomfort with that being audio recorded and that Mr Ahmed opting instead to complete the 28 day review via correspondence so there was no scope for issues to be misrepresented when they had been put in writing.
- 257.4. Mrs Galloway also agreed to post him a letter by the following day (23 November) containing questions regarding what could be done to support Mr Ahmed's return to work and Mr Ahmed would respond by 6 December.
- 257.5. That also they discussed Mr Ahmed's OH report (the last report we were referred to was that of 13 July 2021) and because his circumstances might

² That MED3 sick note was for the period 15 November to 30 December 2021, can be found at [810] and gave the reason or the absence as "depression".



have changed since then, that a new stress risk assessment was appropriate. Mrs Galloway agreed to send one out in blank to him, asked him to indicate his stressors and his suggestions for any work adjustments which could be made and agreed they would discuss that at a KIT meeting following its receipt by her.

- 257.6. They agreed Mrs Galloway could make a further OH referral and
- 257.7. Mr Ahmed requested no further correspondence be sent to his personal email address.
258. The point we summarise Mr Ahmed making at (257.2) are at odds with various matters Mr Ahmed makes elsewhere.
- 258.1. Firstly, it is at odds with a complaint he made about Mrs Galloway in his witness statement [HA/99] ***“She didn’t do enough to progress the disciplinary that was the cause of my absence disciplinary, and that I considered I could make a speedy return to work once that was resolved”***. That is in turn at odds with Mr Ahmed previously seeking a delay to the disciplinary investigation on 9 September because he was ill. DWP had agreed to that (see (240) and the following paragraphs) and his witness statement [HA/47] where when speaking of Mr O’Brien he stated ***“When he resumed his investigation in early 2022 I did not want to take part as I knew it was all a sham; I was going to be found guilty of misconduct no matter what.”*** That was not just Mr Ahmed’s view at the time he wrote his statement. He made it clear in the email he sent on 25 January 2022 to Mr O’Brien (see (288)).
- 258.2. Secondly, Mr Ahmed complains he did not know the basis of the allegation. Whilst the way that was phrased changed over at the time we find that as at 22 November he had been told the basis of that (see (237)). We find he knew enough about the allegation to assert that the



investigation was unfair. We find the issue was that he did not agree with it and considered it unfair, baseless and given his pay had been deducted prejudged.

- 258.3. Thirdly, whilst Mr Ahmed asked Mrs Galloway not to send correspondence via his personal email address and instead use the post at various points he complained about hard copy post being sent to home address and how managers had obtained his home address (see (150) the email of 9 November 2020 to Ms Haines and what Mr O'Brien told us prior to then [POB/15] see (247))
259. We find those points demonstrate that by that point Mr Ahmed was adopting entirely juxtaposing views on a number of issues. By this time (the end of November 2021) we found above (231 & 232) that Mr Ahmed's working relationship with a number of his managers and DWP had irretrievably broken down. One example of that is that we find by then whenever a manager asked him to do something he did not want to do Mr Ahmed was obstructive and/or complained about the manager and/or the process being unduly protracted by DWP.
260. On 24 November 2021 Mrs Galloway received confirmation the OH appointment was arranged for 17 December at 11:00 am by phone and she texted Mr Ahmed to inform him of this. The notes record Mr Ahmed confirmed receipt of this message. The following day she sent Mr Ahmed correspondence regarding the 28 day review including the invitation letter and copies of various DWP procedures (all [810]).
261. There was an issue with Mrs Galloway holding the KIT call on 30 November 2021. She apologised to Mr Ahmed. He accepted the apology. That aside on 9 January he complained about the way she had managed his absence (see (282)). It was



re-scheduled for the following day, 1 December [811]. The notes record during that call Mr Ahmed repeated his earlier view that there:-

“... needs to be some movement on departments side regarding the outstanding cases. He cant see situation changing for the better until that happens. States he wants to come back to work but cant see that happening until the department has been proactive. States he is not worried about work presa [sic.] regarding returning its more the stuff with investigations. He states he can see himself relapsing and being more ill if not resolved. Confirmed happy to accept correspondence on the cases by post while at home. Confirmed Hafeez has received contact from OHS to confirm that OHS appointment has been rebooked for 16th December. Has received 28-day review pack and will complete and send back by 8th December. Stress risk assessment received will complete the risk assessment ready for discussion following OHS. Latest med 3 till 30/12/2021 will have another review with GP around that time. Confirmed to support him we have discussed OHS which is now booked, we’ve discussed stress risk assessment which is in process and that I will prompt David Bryan regarding progressing his case once I have confirmed its correct person. Nothing additional that could be done to support at this time.”

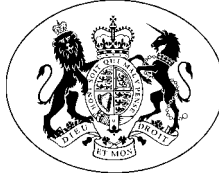
262. The next keeping in touch meeting was originally scheduled for 8 December. That had to be rescheduled for the following day. The minutes [811-812] record that:-

“...I have advised Hafeez that his 2 month review is due from 11/12/2021, I offered the option of a another review by correspondence or to use the responses to his 28 day responses an amalgamate them into 1 review. Hafeez stated that as nothing significant had changed since he wrote his 28 day review responses he felt it was better to combine the reviews. I



stated I'd write to Hafeez to confirm this discussion and that he could sign to confirm he was happy to proceed that way. ..."

263. The minutes also record that she asked Mr Ahmed if there was anything else she could do to support him. He replied there was none. Thus at that point the notes record Mr Ahmed had agreed to combine the 28 day and 2 month reviews.
264. The next KIT meeting took place on 15 December [812]. On 16 December Mr Ahmed reported that the OH appointment scheduled for that day had been cancelled and rescheduled for 5 January 2022. Also on 16 December Mrs Galloway made contact with Mr O'Brien to inform him that Mr Ahmed had told her that his outstanding case was contributing to his poor mental health and that Mr Ahmed would prefer postal contact in relation to the investigation and provided him with Mr Ahmed's postal address [336 & 359]. The following day (17 December) Mr O'Brien responded to her to say that due to his personal circumstances he would not be back in the office until mid-January [360].
265. There was a further KIT meeting on 22 December 2021 [813]. It recorded no change in Mr Ahmed's position but that the OH appointment had been cancelled by the OH provider because the nurse had rung in sick and it had been rescheduled for 5 January 2022. Mr Ahmed was given a further reminder about his responses to the 28 day review.
266. On 3 January 2022, Mr Ahmed emailed his MED3 sick note to Mrs Galloway [847]. It identified the reason for his absence as mixed anxiety and depressive disorder and related to the period 30/12/21 – 27/01/22. In addition Mr Ahmed sent to Mrs Galloway photos of his responses to the 28-day reviews [841-846].
267. On 5 January 2022 DWP's OH advisors reported [290]. Having set out that the reason for the referral was stated to be his long term sickness absence the report continued:-



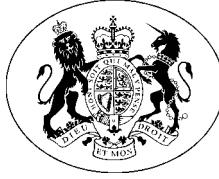
“Current Issues

... He mentions he has been off due to a relapse of symptoms of depression cause work related stress. He reports management are fully aware of his work-related stress issues. He states if his work-related stress issues were resolved successfully, he would be at work. He confirms his blood abnormality that management are aware of and states this is not a barrier to work for him. He tells me he has been taken medication for his mental health however due to side effects this remains under review with his GP. ... he also reports since his absence began in Septemeber 2021 he has not had any follow up review via management

...

OH Opinion

From the history obtained today and with symptoms reported it appears that Hafeez continues to feel his work-related stress issues been unresolved are a barrier to return to work for him. I have completed a mental health assessment with him today using a well validated tool. Results of this show he has moderate to severe levels of depression and mild levels of anxiety. Stress is not an illness nor is it a diagnosis, it is a collection of symptoms individuals may show in response to excessive pressures placed upon them. However, if the stressors become too excessive and prolonged, mental, and physical illness may develop. He has been advised of the benefits of exercise possible for his mental health and the benefits of relaxation therapies such as deep breathing and music therapy. It is prudent that he is contacting healthy minds as this is likely to provide some support for him. ...



Management Advice

.... he can actively support his own mental health by reflecting on the causes of stress/poor mental health, and by taking ownership of practical steps to help address these triggers. This process can also help management to open dialogue with employees, understand their needs and experiences and ultimately better support their mental health.”

Miss Minto’s line management of Mr Ahmed

268. On 7 January 2022 a KIT meeting took place at which Mr Ahmed was informed Miss Minto would be taking over his line management from Mrs Galloway. Thereafter Miss Minto was his line manager until April 2022. The notes also recorded Mrs Galloway explained that Mr O’Brien needed to work from home and was seeking advice on how to print and post correspondence to Mr Ahmed. Mr Ahmed was unhappy because he didn’t feel it was acceptable in that Mr O’Brien was putting his own needs before those of Mr Ahmed, and if Mr O’Brien was not capable for whatever reason of dealing with the investigation immediately that he should step aside and a new investigating manager be appointed. Mr Ahmed stated that if had not received an update in a week he would complain [814].
269. Whilst that issue arose because Mr O’Brien needed to work from home, that would not have arisen but for Mr Ahmed’s request for postal contact (see (264)). It appears DWP took the view a change of decision maker would cause a delay and so that was not done. Instead around 8 January 2022, Mr O’Brien contacted Mrs Galloway to ask whether Mr Ahmed would be happy if his minute taker who was working in the office could send him the questions to help with his investigation. She agreed to speak to Mr Ahmed [337].
270. A meeting to address the stress reduction plan (SRP) between Miss Minto and Mr Ahmed was scheduled for 13 January. Mr Ahmed texted her that day to say he would be unable to take part in the meeting as he had been unwell and his blood



condition had been triggered. She thanked him for letting her know and sent an invitation to a 3-month review on 21 January via recorded delivery [815].

271. On 13 January, Mr O'Brien told us that he chased Mrs Galloway for a response to his proposal of 8 January. He told us she told him Mr Ahmed had told her he was not happy with the situation and so Mr O'Brien stated he would contact HR for advice. We return to that advice at (286).
272. On 14 January, Miss Minto texted Mr Ahmed asking if he could attend if she re-scheduled the SRP meeting for 18 January. Mr Ahmed replied to say that he **"hope to be recovered enough to attend by them. Can u confirm I have had a 28 day or 2-month review? Thanks"** [815]. That is in contravention to what the notes of the call on 9 December record Mr Ahmed as having agreed [811-812] (see (262 & 263)).
273. On 17 January, Miss Minto replied to say that she understood that he had completed a 28 day absence review via correspondence and that he had agreed to amalgamate the 2 and 3 month absence reviews. Mr Ahmed in turn responded stating he did not agree to amalgamate the 2 and 3 month reviews and requested a copy of the 28-day review [815].
274. Miss Minto replied the following day (18 January) agreeing to post to him a copy of his 28 day review and that having read through his notes, she corrected her earlier error to say he had agreed to amalgamate the 28-day and 2-month review and as such, they should proceed with his 3 month review which was scheduled for 21 January. That prompted the following response from Mr Ahmed: **"Dear Naomi, Please do not tell me what I did or didn't agree with if you weren't part of the conversation. I haven't had a 2 month review. So follow DWP process. Thanks"** [815]. Given Mrs Galloway's notes were clear on the issue and the contradictory positions adopted by Mr Ahmed on a number of issues we accept



that what she recorded in her note of the discussion of 9 December was accurate and agreed.

275. Miss Minto responded stating she had been in touch with HR and they had advised that they continue with the 3 month review as planned and to note the reasons why the 2 month review had not occurred as planned.

276. Mr Ahmed responded [815-816]:-

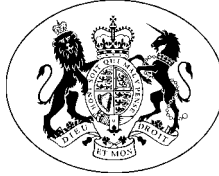
“Dear Naomi [sic]. Please follow DWP procedure. The 2 month review precedes the 3 month review. These are welfare meetings and need to take place sequentially. If the 2 month review has been delayed then that is through no fault of mine. If you continue to insist on not following DWP process I am going to raise a grievance. You also arranged a meeting for a SRP today at 1230pm but you failed to attend. This is unacceptable. Management's behaviour towards me is rude, dismissive and unprofessional.”

277. Miss Minto responded setting out the advice she had received. She then continued:-

“In regards to the SRP meeting, you did not confirm your attendance with me so the meeting did not take place. As you expressed you were feeling unwell last week, I did not want to overload you by scheduling the SRP and the 3 month review within a few days of each other if you were not feeling well enough. As you did not come back to me to confirm attendance, I assumed you were not well enough to take part in the meeting. If you would like to reschedule the SRP for sometime this week I am happy to do so. Alternatively we can focus on the 3 month review and plan the SRP for the following week. Please confirm your attendance at this Friday's review meeting and let me know if you would like to carry out the SRP prior to this. Thank you.”



278. The final text that day (18 January 2022) was from Mr Ahmed responding ***“HR have racially bullied me and victimised me due to previous ET claims so I am not interested in their opinion on anything. I did confirm today's meeting”*** [816].
279. We find the interpretation Miss Minto placed on the position regarding the SRP in her text of 19 January was a reasonable one in the light of what Mr Ahmed had said (and also what he had not said) in his text of 14 January. He had expressed a hope to be recovered by the 18 January but did not as he suggested, confirm that despite the various exchanges in the interim. That also leads us to conclude that little weight should be placed on the interpretation Mr Ahmed placed on events in the face of that contradictory contemporaneous evidence.
280. Over the next few days the dispute whether 2 or 3 month review should proceed and if Mr Ahmed had confirmed his attendance at the SRP continued. On 19 January Miss Minto texted Mr Ahmed ***“Hi Hafeez, you had said that you hope to be better by then, which I did not take as confirmation of your attendance.”*** She then continued: ***“I cannot comment on what has happened with previous managers or HR. I would hope that we can build a relationship afresh and work together to help you return to work. In order for us to move forward, please confirm whether or not you can attend the 3 month review meeting on Friday and whether or not you would like me to reschedule your SRP for this week or next.”*** [816]
281. Mr Ahmed responded that day stating ***“Hi Naomi [sic.]. I confirmed the SRP meeting and expected it to go ahead but you did not attend. Actions like this will damage the relationship because the SRP was important to my welfare and return to work. All I have asked is for the 2 month review to take place, as per guidance. It is not for you or HR to change attendance management procedures or to ignore the 2 month review or combine it with the 3 month review, making it redundant. Confirm a 2 month review and I will attend. This***



will facilitate my return to work.” We find that response failed to definitively and/or directly answer either question.

282. The same day (Wednesday 19 January) Mr Ahmed sent a text message [816-817]:-

"Hi This is grievance. I have been absent from work due to depression caused by work related stress since September 2021. The 2 managers dealing with my absence, Laura Walker and Naimoi [sic.] Minto, have both neglected my welfare. Welfare calls and meetings have routinely been delayed and missed. No meaningful action has been taken to address the issues causing my absence. A meeting arranged to complete a Stress Reduction Plan on 18th January was missed by Naiomi [sic.] Minto and she has not following DWP procedures by failing to conduct the 2 month review before the 3 month review. The monthly reviews are sequential and build on each other. I am not being helped and supported in order to return to work. Managers are failing in their duty of care towards me. Hafeez Ahmed".

283. That grievance was not lodged on the DWP's required form nor was it sent to Miss Minto's manager. Mr Ahmed told us he was receiving help from colleagues at various points and thus even though he was on sick leave and thus did not have direct access to DWP's computer systems (and thus its procedure documents) we find his correspondence demonstrated he knew or could find out what DWP's procedures were.
284. These issues predating Mr Ahmed's absence aside, we find Mr Ahmed knew (or given our findings elsewhere could have found out) what DWP's policies were concerning grievances. We find he chose not to follow them and repeatedly chose to copy or send emails to the member of staff against whom he raised those grievances.



285. We find that he sent that “grievance” to Miss Minto (as he repeatedly did to others) to either harr y or intimidate her/them or to lead her/them/their managers to conclude there was a conflict, that they should/could no longer act and thereby obstruct the process (see (624)). As will later become apparent that included him threatening to and copying in very senior managers/officials with the same objective. Further that was a repeated tactic on his part when he was met with someone who did something he did not agree with. The only notable exception to that was Mrs Galloway whom he first complained about only after she had ceased to be his line manager.
286. On 20 January, Mr O’Brien received the advice he had requested from HR with regards to pursuing his investigation. He followed the course he had suggested on 8 January and asked his colleague to send questions to Mr Ahmed. The letter and questions were sent to Mr Ahmed by recorded delivery on 24 January [338-339 repeated at 362-364]. The two questions asked were:
- 286.1. Can you give the reason for your absence for the period 22/09/20 to 25/09/20?
- 286.2. On your return to work did your Line Manager speak to you about how that period of absence would be treated. What options were you given i.e. Annual, Special Leave, etc.
287. On 24 January 2022 Miss Minto held a Microsoft Teams call with Ms Aimee Cornelius, a local HR Business Partner, to discuss Mr Ahmed’s case. Again, she was advised to continue with a 3-month review. She also had a text message exchange with Mr Ahmed regarding arranging a KIT call. He asked what the meeting was about. She indicated it was to discuss his 2 and 3 month reviews and how they communicate going forward. He replied that he was waiting for a copy of the 28 day review and confirmation his grievance was being dealt with. Suffice to say the discussion did not take matters forward other than for her to say she would



post certain documents to him, to set an agenda for calls and for him to repeat his position [817].

288. On 25 January, Mr O'Brien told us he received a reply to the two questions he posed from Mr Ahmed's personal e-mail address [365]. We could not verify where that email came from as the address was redacted. The response relayed that Mr Ahmed had sought and was given permission from Mr Miles for the period of absence. Mr Miles had accepted that in the witness statement he gave as part of Ms Street's grievance investigation. Mr Ahmed went on to argue his absence therefore was not unauthorised and given his wage had been deducted ahead of any investigation, the investigation was thus a sham and thus he did not intend to take part in it. He alleged that the deduction from his wages would not have taken place if he was white and he accused Mr O'Brien, the Government Legal Department (GLD) HR and management of bullying him ***"under the guise of unauthorised absence while you know the allegation is untrue. I am not going to give your racist bullying and victimisation any validity or legitimacy by taking part in your sham investigation."*** In addition, Mr Ahmed stated he was going to raise a grievance against Mr O'Brien for having taken more than 3 months to investigate. Finally as a post script the email stated ***"Please do not respond via this email as your email will go straight to the junk folder, which I do not check."*** [365]

289. The exchanges between Mr Ahmed, Mr O'Brien and Miss Minto in January and those (or the absence of exchanges which include the failure/refusal to provide his sick note to his line manager) that we are about to relay that occurred with Miss Minto in February & March merely reinforce the view that by the end of November 2021 Mr Ahmed was refusing to engage either civilly or at all with his managers or to undertake any instructions he did not agree with. Mr Ahmed himself described those exchanges as confrontational and Miss Minto's failure to chase up the grievance he raised against her despite a request from him to do so irretrievably



damaged their working relationship [HA/102]. We set out extracts of those exchanges to demonstrate the extent of that.

290. Following Mr Ahmed's 25 January email, Mr O'Brien told us he sought advice from HR and as a result decided not to reply to Mr Ahmed's email on the basis Mr Ahmed had given his account and understanding of the events leading up to this period of absence.
291. On 1 February 2022 Miss Minto had a series of text messages with Mr Ahmed within which he stated amongst other matters that he had not received the 28 day review documents and ***"If I do not receive a satisfactory update on my grievance by the end of the day I will raise another grievance and copy every manager in your line manager chain up. to Peter Schofield."*** [818]
292. On 3 February Miss Minto held a telephone call with Ms Cornelius to discuss the case and the difficulties she was having engaging with Mr Ahmed. She was advised as previously to contact Mr Ahmed and also to contact the complex case team in HR. Miss Minto then made two telephone calls to Mr Ahmed around 12:30 to check if he was intending to attend their 3 month review meeting. There was no answer or response. She then made two telephone calls to Mr Ahmed at the time appointed for the 3 month review. Again there was no answer. A text exchange between them followed. Mr Ahmed [818] :-

"Stop harassing me. I 'm waiting for management to contact me regarding my grievance of 20/01/2022, as per the departments grievance procedure. I am going to raise a separate grievance about your treatment of me. "

"Your behaviour is making me more sick"

293. Miss Minto responded [818]:



“Hi Hafeez, I called you twice this morning to confirm your attendance at the meeting we had scheduled for today. You did not answer. I called twice during the scheduled appointment time in case you had decided to attend. As I have mentioned previously, I am not part of the grievance process and cannot offer any advice, guidance or updates in relation to it”

294. Mr Ahmed [819]:-

“I'm going to raise a bullying and harassment grievance against you. You also lied to me saying you would send me the 28 day review”

“Your behaviour is unacceptable ”

295. On 4 February Mr O'Brien interviewed Mr Miles. It was minuted [341-342; 366-369]. Mr Miles provided a chronology of the discussions he had with Mr Ahmed around the time of the events [370-372]. He could not recall when that was made exactly. The next day Mr Miles was sent a copy of the minutes to approve. On 9 February, Mr Miles replied making one “small amendment” to the meeting notes [366].

296. On 9 February Miss Minto submitted a request for advice from the DWP's complex case team. It was resubmitted on 14 February and a Teams meeting held with Ms Emma Rutter. The advice received was to arrange a 3 month case conference with HR to request an up to date sick note to continue to document all attempts to engage with Mr Ahmed and to contact the complex case team again at 4 months [819].

297. Miss Minto texted Mr Ahmed on 14 February asking him if he had a current fit note, that his previous one ran out on 27 January and for him to submit this via email as soon as possible. Mr Ahmed's response was to ask for Ms Cathy Beck's email address. Ms Beck had replaced Ms Barr in June 2021 and was Mrs Devi's line manager.

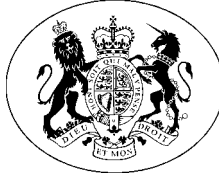


298. On 15 February 2022 Miss Minto attended a meeting with Ms Sandra Davies to look at Mr Ahmed's "AMP" file, we identified from the context used in correspondence this included matters such as OH reports. Miss Minto's note and witness statement record she was advised to include records of letters being sent out by recorded delivery, complete a new OH referral and 3-Month Case Conference.
299. Also that day Mr Ahmed sent Miss Minto a reminder asking for Ms Beck's email address so he could provide his sick note to her not Miss Minto, and asking his grievance of 20 January to be chased to facilitate his return to work. She responded asking him to send his sick note to her as his line manager. She continued (all [819])

"Although you are welcome to email Cathy, I will still require you to forward the sick note to me and engage with the meetings I have setup for you. I am still waiting for you to arrange a phone call with me as part of your Keeping in Touch arrangements. As your sick note is now more than two weeks overdue, I have set a deadline for this to be received by Friday 18th Feb. As we have not received an up-to-date fit note your absence is currently unauthorised."

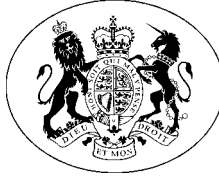
300. Mr Ahmed responded [819 - 820]:-

"Dear Naiomi [sic.] You have refused to give me Cathy's email, even though I asked you twice. I will obtain Cathy's email from another source. I believe she is a DWP Ambassador for fair treatment. I will submit my bullying and harassment grievance against you at the same time I provide her with my sick note. I do not want you accessing any information about me from SOP, my amp file or any other source. Your behaviour amounts to bullying and harassment. You also lied to me about providing a copy of my 28 day review. You shouldn't lie to your staff."



“Further, as my sick note ran out on 27/01/2022 you haven't given an explanation why it has taken you until 14/02/2022 to request it. Do you think this is consistent with your duty of care? Or is waiting over 2 weeks before requesting it part of DWP guidance. ... I am going to submit an ET claim about my treatment. I only get treated badly because I am Asian and have made previous ET claims. You can then try to excuse your behaviour by claiming you were only following HR advice. Your actions are not legitimate management actions because you haven't followed DWP procedure. The fact you feel the need to lie in your communications and refuse to address my legitimate concerns shows this.”

301. On 17 February 2022, Mr Ahmed sent Ms Beck an email to inform her that he had raised a grievance by a text message of 20 January 2022 against Miss Minto [788-789]. Having set out the background he sought that:-
 - 301.1. the disciplinary process against him be completed as a matter of urgency,
 - 301.2. his grievance of 20/01/2022 progressed along with an explanation for its delay and
 - 301.3. the behaviour of Miss Minto was investigated as a bullying and harassment grievance.
302. Mrs Beck was on leave at the time and an automatic reply was sent stating that was so [790].
303. The next item identified in Miss Minto's note of events was on 28 February that a that an OH Case Conference referral had been made and Mr Ahmed had been invited to a 4 month review and a half pay letter sent to him.



The disciplinary investigation outcome

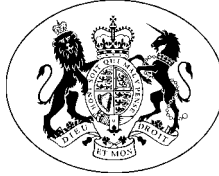
304. Mr O'Brien emailed his disciplinary investigation outcome to Ms Niki Davies on 23 February 2022. She had been appointed as the disciplinary process decision maker [345 & 380]. The conclusion he reached was that there was likely a case to answer for the period of Mr Ahmed's unauthorised absence between 21 and 25 September 2020 [346-349 & 380-384]. His rationale was as follows [348 & 383]:-

"It appears HA's interpretation of his discussion with PM on the 14.9.20 was that PM had given his authority for HA to take the time off until he had received his Disciplinary Outcome letter. There was no mention in the discussion on how this period would be covered i.e. Annual Leave, apply for SPL (paid or Unpaid) or for it to be treated as Sick Leave. The reason for this is PM had only given his permission for HA to leave the office early due to HA stating he was feeling stressed, HA declined the offer and stayed until the end of the day. As HA had stated he was stressed and would be off work the rest of the week, PM was treating this period as sick leave.

On the 15.9.20 with HA not attending the office and following the previous day's conversation regarding HA feeling stressed, PM correctly opened a sick absence for HA on SOP.

In conversations between PM & HA on the 23.9.20 & 25.9.20, HA appears to contradict himself. On the 23.9.20 HA disputes that he is sick but on the 25.9.20 he stated to PM he was no longer sick following reading his disciplinary outcome letter and would return to work on the 28.9.20

At the Welcome Back discussion HA had completed a Self-Certificate for the period 15.9.20 to 21.9.20 but did not have a GP SOFFW for the 4 days not accounted for 22.9.20 to 25.9.20. HA left the meeting with the



Self Cert as he was disputing whether he was sick as he felt his absence was the fault of the department.

Special Leave was discussed but HA did not make a request for SPL.

Throughout the period of the 28.9.20 to 13.10.20, HA supplied a Self-Cert for the period 15.9.20 to 21.9.20 on the 6.10.20 but continued to dispute that he was sick for the period 22.9.20 to 25.9.20 (4 days). PM had given him chances to supply a SOFFW and had also extended the deadline to supply this information but HA did not supply the SOFFW. HA did not take responsibility for what had to be done to resolve this issue but left it with PM to resolve.”

305. Whilst Mr Ahmed complains about the delay in Mr O'Brien providing his conclusions, a variety of reasons that impacted on that. After Mr O'Brien was appointed the investigation was initially placed on hold in mid September at Mr Ahmed's request. Mr Ahmed sought that be lifted in mid December in order to allow him to return to work. The following day (17 December) Mr O'Brien responded to say that due to his personal circumstances he would not be back in the office until mid-January [360]. Mr Ahmed was unhappy with the delay so HR advice was sought. That was received towards the middle of January. Mr O'Brien then wrote to Mr Ahmed and started his investigation. His report was generated approximately a month after he wrote to Mr Ahmed.

Ms Davies as the disciplinary decision maker

306. On 27 February, Ms Davies, the disciplinary process decision maker, emailed Mr O'Brien some questions in relation to his investigation [297-299]. He replied on 4 March 2022 [296-297].
307. On 28 February, Miss Minto referred Mr Ahmed for a OH Case Conference and also sent him an invitation to a 4-month review alongside the half-pay letter that



had been previously advised was to follow [820]. Miss Minto texted him the following day (1 March) to update him. Mr Ahmed responded and an exchange ensued:

"Dear Naiomi. [sic.] This is the third time I have stated I do not want you to look at any of my personal information. I hope you and HR can understand this message " [820]

308. Miss Minto:

"Hi Hafeez, thanks for your response. Until I have been advised otherwise, I will need to access your information in order to continue to manage your absence. I have booked the OHS Case Conference and will be sending out an invite to your 4 month. review. Your 4 month review will be booked for next Friday, specific timings will be included in the letter. Please advise when you have received this and confirm your attendance.

..."

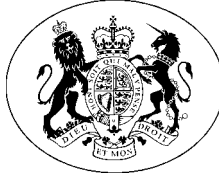
309. Mr Ahmed:-

"... I am not prepared to accept bullying, victimisation and harassment from anyone including yourself, HR and senior managers. ..."

310. Miss Minto:

"...As part of my role as HEO, I am required to send out specific documents at specific times. You will receive the following via post:

- Invite to 4 Month Review*
- RAR Guidance*
- Half Pay Letter*



Thanks”

311. Mr Ahmed:-

H: It's not part of your job as HEO to bully and harrass [sic] me, especially in circumstances when you know I have submitted 2 grievances against you

312. Miss Minto:

“Hafeez, arranging meetings with you and sending you necessary documents does not constitute harassment and bullying. I will only contact you as and when necessary. If you would prefer to have phone conversations, which tend to be quicker and overall less intrusive, I am more than happy to do so. As you have refused to speak to me on the phone, I have no other option but to text you when required. If you would like to arrange a preferred process of communication, I am open to your suggestions. ” [821]

313. Mr Ahmed:-

"You're bullying and harassing me. You can dress it up as management action, if it makes you feel better about your behaviour towards me.

You don't treat me respectfully or even in a humane way. You were on the call with Laura when I said the disciplinary action has been ongoing for 15 months and I am off work with stress and depression as a result of that. You heard when I told Laura once that action is . completed, whatever the outcome, I can move forward to a return to work. You and Laura have done nothing to help me return to work. When I have asked you both to chase up the disciplinary case you have both effectively said its not your job. I think it is your job to take action in these circumstances.



Also you missed the SRP meeting, didn't send the notes of the 28 day review, tried to combine the 2 and 3 month review, have ignored me when I have asked you things, failed to send me Cathy's email... The list goes on.

You are trying to bully me into having a dialogue with you about processes which you have repeatedly failed to comply with. This is abnormal behaviour and is causing me mental distress. You continue to do it even though I have told you you [sic.] are bullying and harassing me. You do not care about my health or wellbeing. If you and Laura had managed my absence properly I would have returned to work well before now. " [821-822]

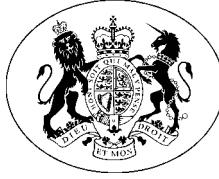
314. Their next exchange was on 3 March [822-823]. Miss Minto:

"Morning Hafeez, Niki Davies would like to meet with you on 11/3/22 at 10am. This will be to discuss the 4 day alleged unauthorised absence from 22nd to 25th September 2020. There will be a note taker present. Niki would like to know firstly if you are able to attend this meeting at the scheduled time and secondly where would be the best place for her to send the invite? Would you prefer to receive this via post or email? She would like to visit your home for a face to face meeting, is this ok or would you prefer Teams?"

The sole purpose of the meeting is to discuss the specific time period stated in the message above."

315. Mr Ahmed:-

"Dear Naiomi. [sic.] I am going to block you now. It is unacceptable for management not to take my concerns about bullying and harassment seriously. This is inconsistent with DWP policy."



316. Miss Minto:

“Hi Hafeez, as I have previously explained I am carrying out actions and contacting you as per guidance. If you have a preferred method of communication please let me know so I can try to accommodate this.”

317. On 3 March a MED3 sick note was received via Ms Beck for the period 28 January to 25 February 2022 [822]. It gave mixed anxiety and depressive disorder as the reason for the absence and was dated 8 January [822]. Miss Minto’s note [822] records that Mr Ahmed refused to send it to her.

318. Ms Davies also wrote to Mr Ahmed on 3 March 2022 inviting him to attend a formal disciplinary meeting on Friday 11 March [293 & 376]. The allegation differed to that investigated by Messrs Miles & O’Brien (see (127) [216-218] & (237) [329-331]) :-

“The formal meeting will consider the allegation that from the 22nd September 2020 up to and including the 25th September 2020, you were absence [sic.] from work without providing either a Statement of Fitness for Work from your GP/medical professional or a request for Special Leave to be considered.

At the end of the meeting I will decide what further action to take. I must make you aware that the allegations concerning your unauthorised absence, may result in Gross Misconduct”

319. Ms Davies accepted in her witness statement [ND/8] that because this was a physical letter and these were normally sent via email (and hyperlinked in the text of the letter) she forgot to include a physical copy of the discipline guidance. She stated that was an oversight on her part but nothing more – because she was under pressure from HR to send the letter that day and did so at the end of what had been a busy day. She asserts that was unintended and was not done maliciously. We accept that was an oversight on her part.



320. By an email of 4 March [374] Mr Ahmed raised a number of issues ranging from the invitation letter not being marked private and confidential, the investigation report not being attached as the DWP Guidance required, the failure to attach the relevant guidance, that the deduction of the 4 days pay was evidence matters had been prejudged, a query how 4 days absence constituted gross misconduct, that Mr Miles had granted him permission to be absent and thus not unauthorised, the disciplinary case against him was therefore a “**sham**” and that he had already raised grievances against Mr Miles and Mr Miles’ HR adviser (Mr Brown) who had been found guilty of wrongdoing. He continued:-

“... (I doubt anything of consequence happened to them because they are white, yet action against me has been pursued).

You and your HR advisers are treating me with disregard because of my race and knowledge of previous ET claims. Do you think the rules don't apply when you are trying to dismiss an Asian, and someone [sic.] who has challenged discrimination by the department? Your actions are bullying.

As a civil servant you are obliged to comply with the civil service code of conduct. Your failure to follow DWP Guidance and employment law means you are in breach of the civil service code. The civil service code states that if you cannot agree to its contents you should resign immediately. You will escape any consequence for your actions due to your white privilege, and every excuse will be made for your behaviour.

I am going to challenge your discrimination and victimisation in an Employment Tribunal. I am not going to wait until the end of any disciplinary procedure, and regardless of the outcome. The matter has been ongoing for 17 months and your failure to comply with DWP guidance has confirmed you have no intention of being fair with me.



Please do not reply by email as your email will go to the junk folder and be deleted.”

321. In her witness statement Ms Davies said this:-

“10. I was extremely taken aback by the tone of the email and the accusation that I had discriminated against him and bullied him. Whilst I accepted that I had missed out the guidance and not marked the correspondence private and confidential, although I had paid for it to be tracked and signed for by the named person, so I felt that was a secure mode of sending. All I had done was contact him to arrange a disciplinary meeting. I had no intention of prejudging the outcome of the disciplinary proceedings nor of discriminating against the Claimant. The Claimant had never met me and therefore did not know my ethnicity. His allegations were therefore entirely unfair and had no relation to what I had done.”

11. [On 4 March] I contacted [Aimee Cornelius of] HR for guidance and raised that I was unhappy with what he had said [374]. I also wanted advice on how to correct my error in relation to the letter that I had forgot to include. I explained that I had not included any investigation documents to my letter because I would ordinarily attach the minutes from the investigation meeting with the employee, but no such meeting had taken place with Mr O’Brien, so I had had nothing to attach.

322. We find the tone and content of his email of 4 March to any colleague (let alone a more senior colleague) was wholly unacceptable and disrespectful irrespective of what had led up to or caused it. It was discourteous and completely lacking in perspective. Further Mr Ahmed made serious allegations of racism without relaying the foundations for them. Contrary to his assertion that Ms Davies had prejudged matters in her email to HR of 6 March [373] Ms Davies repeated that she was unhappy with what had been said but also continued:-



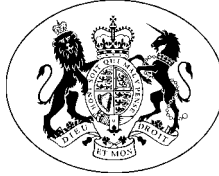
“...as Hafeez points out, he has had his wages already deducted. I actually agree with him as to why am I investigating it when clearly the decision was made re the 4 days absence when his wages were deducted?

This is much bigger than 4 days absence as he is building a case for a tribunal and has already used inappropriate language with me, his various Line Managers and whoever else he has had contact with. Surely that's what should be being investigated and a decision made, on behaviours rather than 4 days absence that he has already been deducted for?

...

I feel this all needs to be managed by one expert team as this is much bigger, as I said, than 4 days absence. I'm not a lawyer or an HR expert, I'm merely a busy SEO who has been given this to decide on 4 days unauthorised absence, which the wage for has already been deducted? ...
”

323. Unbeknownst to Mr Ahmed Ms Davies' she had challenged the deduction of pay issue. In the event that a individual was making assumptions it was Mr Ahmed and not Ms Davies.
324. On 7 March 2022, Ms Hoare contacted to discuss Ms Davies' complaint about Mr Ahmed's email. She told us she was advised that she could complain about this to Mrs Devi, the SEO in Mr Ahmed's line management chain, or raise a grievance but if she did either she could not continue as decision-maker and another would need to be appointed to replace her. We were not told how she decided to proceed but she played no further part.
325. We cannot trace any response from HR to the issue Ms Davies raised in relation to the pay already having been deducted. We find that was because matters had



moved on to addressing whether Ms Davies could continue as disciplinary officer as the discussion of 7 March with Ms Hoare indicates.

326. On 9 March 2022 Miss Minto texted Mr Ahmed asking him to confirm his attendance at the 4 month review meeting on Friday 11 March. She received no response. On 11 March, the day of the review meeting she telephoned him to confirm if he was intending to attend later that day. Again there was no answer or response. She therefore texted him (all [823]):-

Morning Hafeez. Just a reminder that we have our scheduled review meeting this afternoon. I have tried to contact you by phone call to determine if you will be in attendance. I have also text you earlier in the week to find out this information. If you are unable to attend the meeting then you will need to express that and explain the reasons why. If you fail to do so, this will have an affect on our ability to continue to support your sickness absence. Your sick note which you supplied via Cathy Beck has expired. You will need to send in a new one by 17/3/22 or this absence will be classed as unauthorised. Thanks

327. She made a further telephone call again with no response [823].
328. For the record on 25 March, Mr Ahmed sent via Mrs Beck a Fitness to Work form covering the period 25 February 2022 to 25 March 2022 [789 & 853]. Again, he had been asked to forward that to Miss Minto as his line manager and we find was refusing to do so.

Mrs Rahman's appointment as Disciplinary Officer

329. Having been asked by a HR Business Partner to take over Mr Ahmed's disciplinary case on 15 March 2022 Mrs Khushwinder Rahman received an email [291] enclosing a number of documents from Ms Davies:-



“I understand from Aimee Cornelius that you are to be the DM for the outstanding 4 days unauthorised absence case for Hafeez Ahmed

Please find attached everything that was sent to me

*I started my investigation but having invited HA to a meeting via TEAMS to give him the opportunity to add anything or change anything, **he sent me an abusive email and so I have made a complaint and can therefore no longer carry on with the investigation as I am now compromised***

I have also attached a timeline narrative to support you moving forward

Let me know if I can support any further although I am now on leave and will return 28/3/22”

[Our emphasis]

330. The documents enclosed were listed by Mrs Rahman in her witness statement [KR/3] although she did not say that was a definitive list.
331. Mrs Rahman told us that following her appointment she tried to contact Mr Ahmed on two occasions. The first attempt was unsuccessful. She managed to speak to him on 29 March 2022 with the intention of introducing herself. She told us that when she started to explain that she was trying to identify when he was available and was not calling to discuss the case, Mr Ahmed demanded to know why Ms Davies was no longer allocated to his case. Mrs Rahman accepted orally what she told us in her witness statement [KR/5] - she had not been told why there had been a change in decision-maker. Mr Ahmed put to Mrs Rahman the contents of the email to her from Ms Davies of 15 March 2022 [291] in particular the parts emphasised at (329). Mrs Rahman accepted orally that she had seen the email and the emphasised text. She told us that she had not asked Ms Davies, did not



know the detail and but had said she would revert to him why that was so. She accepted she did not because of how the conversation deteriorated.

332. Mrs Rahman states that Mr Ahmed responded angrily, said that DWP was a joke and that she was as useless as everyone else. She told us she felt the call had escalated very quickly, **“as he would not let me talk or respond to him”**. She was not prepared to get into a back-and-forth about the issues, so she told him that she had to terminate the call as they were not going to get anywhere, and that she would write to him.
333. Mr Ahmed’s version of that call is that some days after he criticised Ms Davies Ms Rahman rang him to say that she had replaced Ms Davies her. In his witness statement he said this **“58. ... She was rude, hostile, aggressive and belligerent in her manner towards me on the call, and wouldn’t have spoken to me in the same way if I had been White.”**
334. At no point did Mr Ahmed meet Mrs Rahman, nor did he identify where he had told her he was not white during that call. Whilst as Mr Ahmed correctly suggests his surname is one that is closely associated with Islam that does not preclude the bearer of that name describing themselves as being of any colour, Muslim converts amongst them. Accordingly, the assertion Mrs Rahman knew or believed him to be white and that was the basis for her alleged treatment of him was an assumption by Mr Ahmed.
335. Based on the evidence before us including the contemporaneous texts the contents of which were not challenged, Mr Ahmed’s behaviour in early 2022 to Mr O’Brien, Miss Minto, Ms Davies and Mrs Rahman and others was unacceptable, unfounded and outrageous. We find Mr Ahmed was clearly angry at the way he had been treated by DWP but that did not warrant him speaking to any colleague in the way he did. We find he approached their involvement with a predetermined



- view as to the way they would behave which was unwarranted. As he pointed out and we accepted, Ms Davies view was far from having predetermined matters.
336. Mr Ahmed queried with Mrs Rahman before us how what Ms Davies had said to Mrs Rahman in her email of 15 March (329) was appropriate and given the view expressed by Ms Davies how Mrs Rahman could continue to act.
337. Ms Davies' comments to Mrs Rahman did not relay the detail of what Mr Ahmed had said to her and/or how he had behaved. Had alerting decision makers to complaints or issues been a concern for Mr Ahmed it is surprising he felt it was appropriate to raise with decision makers direct that he was complaining about them and why. In any event on both parties accounts what Ms Davies had complained about was almost immediately demonstrated to Mrs Rahman. We find her response was measured and calm unlike the way Mr Ahmed characterised the way he reacted to matters. Mrs Rahman told us the call between her and Mr Ahmed had been very difficult because he was angry, but she had remained very polite and professional, and she had not raised her voice.
338. We should add at one point before us Mr Ahmed prefaced a question to Mrs Rahman with ***"I don't know if you were daydreaming when Mr Smith gave his evidence ..."***, commented in response to an answer she gave ***"that's total nonsense, complete rubbish, you should be embarrassed to give that answer"***, when she responded told her he was entitled to be treated with courtesy and respect to which to her credit, Mrs Rahman stated ***"that applies to me, you are behaving with self conceit and smugness"***. Mr Ahmed's behaving like that again was unacceptable.
339. We find the reason for the change of decision maker was frankly of no concern to either. Events had moved on. Whilst Mrs Rahman was or ought to have been aware of the reason provided by Ms Davies, that had been some two weeks before and contrary to the allegation made by Mr Ahmed in cross examination



“You were lying to me and this email proves that” we find that she had not recalled the detail when she spoke to Mr Ahmed two weeks later.

340. Mrs Rahman told us she had to deal with allegations and behaviour of that sort all the time. Whilst “all the time” may exaggerate the frequency that occurred we accept the general point she makes.

341. Mr Ahmed asserts :-

“62. I knew Khushwinder would make the decision to dismiss no matter what the truth and facts of the case were and no matter what mitigation I put forward. The decision to dismiss was predetermined, by senior managers, HR and GLD because I was Asian and had brought numerous ET claims. Khushwinder had been selected as decision maker to stave off any accusation that might be made that the dismissal was tainted with racial discrimination.

63. ... She conflated her role of decision maker with the role of investigation manager, which is not in accordance with DWP guidance and the ACAS code of practice, because David O'Brien hadn't done his job properly.”

342. Mrs Rahman told us that she had not had any contact with Mr Ahmed before her involvement in this disciplinary matter. Their first contact was a telephone call. On the basis of the evidence we heard they never met face to face or via video. We find any views Mr Ahmed had about her nationality, religion and even how she otherwise described herself were based on assumptions made by him. Before us he continued to pursue the assumptions he made regarding her based on her name. He repeated his claim she was appointed due to her skin colour, nationality (and religion) in cross examination. We find that was because he had come to the view by the time of Mrs Rahman’s appointment that management and HR wanted



to remove him. He stated as a precursor to one of the questions on that topic *“Maybe I have life experience and I start looking for reasons”*.

343. An issue for us as a tribunal is to identify looking at matters in the round if there are facts from which inferences of discrimination can be drawn. At the outset Mr Ahmed made assumptions about Mrs Rahman concerning the colour of her skin, nationality (and religion) despite not having made like assumptions against the other staff he believed had discriminated against him on the basis of the same protected grounds. Save for the assumptions on his part he did not point us to facts from which we are inclined to infer discrimination as to her appointment.
344. On 30 March, Miss Minto telephoned OH to chase progress on the referral of 1 March. She was advised the referral had been withdrawn due to insufficient information. She made a second referral [823]. She received the resulting OH Report on 14 April from Ms Kelly Giles [793] (see (353)).
345. Also on 30 March Mrs Beck returned from leave and responded [852] to Mr Ahmed’s text to her (see (301)) stating that raising grievances by text was not appropriate as it did not follow the process or include all the information required. She stated that if he wished to pursue the complaint then he needed to put it in writing either using the grievance form (attaching a copy) or in writing including all the required information. She also explained that after seeking HR advice, his line manager would not be changed as she had followed the attendance management policy and would remain responsible for contact with him. Finally, she stated his mental health was a concern to DWP, noted that an unauthorised absence disciplinary meeting had been arranged and she would check if it was being progressed.
346. Mrs Beck received no further response from Mr Ahmed regarding this grievance so it was not pursued. She told us she had no further involvement with him.



347. On 1 April 2022 [BB/1] Mr Baz Bains replaced Mrs Devi at Washwood Heath and became the line manager of Miss Minto, who continued to line manage Mr Ahmed. As part of the handover process Mrs Devi told us she was required to inform Mr Bains of the disciplinary matter involving Mr Ahmed.
348. Ms Rahman wrote to Mr Ahmed on Friday 8 April 2022 [379, 385-387] inviting him to a disciplinary hearing at DWP's Walsall office on 27 April 2022. With the invitation letter Mrs Rahman sent Mr Ahmed a copy of the investigation report, its appendices and DWP's disciplinary policy. Following a request from Mr Ahmed for more information that disciplinary hearing was later rescheduled.
349. Mr Ahmed alleges that at this point, 15 months after the absence occurred, Mrs Rahman's invitation letter changed the allegation against him for the fourth time. He asserts it was the first time it was alleged that he had not provided medical evidence or a request for special, annual or flex leave for the period 22 to 25 September 2020. The allegation in Mrs Rahman's invitation letter was as follows:-

"The formal meeting will consider the allegation that from the 22nd September 2020 up to and including the 25th September 2020, you were absent from work without providing either a Statement of Fitness for Work from your GP/medical professional or a request for Special Leave, Annual Leave or Flex Leave. ...

At the end of the meeting I will decide what further action to take. I must make you aware that the allegations concerning your unauthorised absence, may result in a penalty under Gross Misconduct. As your absence from 22 September 2020 to 25 September 2020 is unexplained, it has been passed to me to decide on whether this period was unauthorised absence."

350. On Monday 11 April 2022, Mr Ahmed replied by email [391-392] requesting copies of five documents:-



1. Ms Davies' disciplinary meeting invitation letter
2. All the correspondence referred to in Mr Miles chronology and Mr O'Brien's investigation report
3. Ms Street's grievance outcome report (including appendices) relating to his alleged unauthorised absence
4. Mr Smith's grievance appeal outcome relating to his alleged unauthorised absence.
5. A copy of the discipline procedure and policy.

and stating that :-

"I found your rude, arrogant and confrontational approach in your phone call to me unprofessional and discourteous. It is not consistent with the department's expected standards of behaviour.

...

I am going to challenge HR and management's racist bullying and victimisation."

351. That email was not marked private. Mrs Rahman told us that was standard practice in relation to matters of that sort and Mr Ahmed would be only too aware of that. Ms Rahman told us as result her deputy had read it. We find irrespective of whether or not that was so, Mr Ahmed having raised points concerning breach of his confidentiality he did not apply the same standards to Mrs Rahman or others in relation to the complaints he made about them.
352. Mrs Rahman then sought guidance from HR [390]. She received a reply the following day. She was advised it would be sensible to send out the documents and change the date of the disciplinary meeting [389]. She told us she did not see



their relevance of the documents relating to the grievance that Mrs Street and Mr Smith had dealt with, to the issue she was to address. Nevertheless, she decided to locate them and send them to Mr Ahmed. She identified them in her witness statement [KR/10] as [398-416, 417-422, 423-424, 459-461]. We return to the issue concerning the documents below (see (370, 379 & 380)).

The OH Report of April 2022

353. On Thursday 14 April 2022 (the day before the Easter Bank Holiday weekend) Miss Minto told us she received Mr Ahmed's OH Report [793 & 851]. It read as follows:-

"I would suggest that due to a lack of engagement from the employee to follow the correct sickness absence process, management may wish to refer to internal sickness absence to identify a practical forward. Please note that further Occupational Health intervention is unlikely to be helpful until any real or perceived employee workplace stressors are addressed."

354. Miss Minto told us that on 20 April she sent Mr Ahmed a text message in which she mentioned that she had sent him an invitation to his next attendance management review meeting, which was scheduled for 21 April, asked him to confirm if he had received it, and asked if he would be attending. She received no response [824].

355. On 21 April, the Attendance Management Meeting (6-month review) took place. Ms Mino and Ms Amanuel Degaga were present (whilst we were not told who she was, it is likely she was a HR advisor). Miss Minto told us the purpose of the meeting was to discuss Mr Ahmed's unsatisfactory levels of absence, the action available and how DWP could continue to support his sickness absence. Mr Ahmed did not attend. Miss Minto told us that during the scheduled meeting, she called Mr Ahmed via Microsoft Teams at 14:02 and 14:15 but she received no response. At 14:23 she sent him a text message to ask if he would be attending



the meeting. Again she did not receive a response [396—397]. A brief note of the meeting was before us [397].

356. Mr Ahmed said this although the date he gives is incorrect:-

“106. Naomi [sic.] Minto persisted in contacting me by text, arranging a “welfare” meeting on 22/04/2022 [p398]. I didn’t attend because of her treatment of me and the live bullying grievance against her. ...”

357. On 22 April 2022, Miss Minto informed Mr Ahmed that she would be referring his case to Ms Saiqua Karim to decide if he should be dismissed, demoted, or whether his sickness absence level could continue to be supported. Miss Minto also told him that she would be leaving Washwood Health and his new line manager would be Mr Baz Bains (who was an SEO grade) [791-792]. In his witness statement immediately following the quote above Mr Ahmed said this:-

“106. ... That same afternoon she referred my case to decision maker Saiqa Karim to consider my dismissal or demotion for sickness absence. DWP were choosing Asian decision makers to dismiss me (Saiqa and Khushwinder); this was to try to prevent me from being able to claim my dismissal was because of my race, but the decision maker being Asian would be an irrelevant factor for any racial discrimination claim. I put grievances in against both Saiqa Karim and Khushwinder that included racial discrimination but I did not hear back about either grievance.”

358. The changes at Washwood Health were wider than Miss Minto leaving. We were told there was a reorganisation in April 2022 and responsibility for Washwood Heath passed from Mrs Beck to Mr Chris Lyness. Mrs Devi also left a few days later (although she continued to report to Ms Beck). Early on Friday 22 April Ms Devi sent Mr Lyness an email [463-464]:-



“Cathy spoke to me about HA that his live warning for unauthorised absence will not be extended.

We followed the advise [sic.] of HRBP at the time and attached guidance.

As he is still off sick I think we should still follow the guidance below and extend it on SOP and continue with DM to make decision on the unauthorised absence.”

359. Mr Lyness replied an hour later: ***“As far as I’m aware that ship has sailed and we are currently pursuing taking him to DM via the AM route, a letter will be issued this morning informing him of that.”*** [463]

360. Mr Ahmed suggests that demonstrates Mrs Devi went behind the instruction she had been given by Ms Beck and was thus taking active steps against him to get the warning extended. He suggests when he asked her to rescind his self certificate her response was to attempt to make the situation worse by suggesting the effect would be that he had 9 days unauthorised absence rather than 4 (see (103-105 & 194-199)). He stated

“52. ... A manager doesn't do this unless they have a personal animosity/problem with the employee. Kam Devi was informed I would be making an ET claim and sought to punish me by attempting to get the existing warning extended and pushed for disciplinary action to resume against me, when she should have had no involvement in the case. Kam devi also knew of my previous ET claims and she was/is friend of Taj Singh who I took to an ET previously. Kam Devi also probably hates me because I am a Muslim and originate from Kashmir.”

361. Mr Ahmed argued [HA/53] that Mr Lyness should have had no knowledge or involvement in any of his cases and suggested as a result of his involvement senior managers were trying to take dismissal action against him via one route or



another. He asserted Mr Lyness “... ***would not have behaved the same way to a person of his own race or to someone who had not brought ET claims. He is a racist and covert bully, and victimised me. He is also a coward; hiding behind a keyboard and plotting in secrecy with his fellow racists how to dismiss me, including getting other Asians to do their dirty work for them.***”

362. Following the reorganisation Mr Lyness took over Mr Ahmed’s line management chain. Given Mrs Devi and Ms Beck were leaving it is understandable Mrs Devi was updating Mr Lyness on what had happened and why. Whilst Mrs Beck, on advice, had come to a view, we find Mrs Devi was concerned about it because as was stated in the email despite the advice she felt it was at odds with the guidance. In part that was a reference to whether the period of the final written warning should be extended due to Mr Ahmed’s absence on the basis of the same rationale as the extension of the warning due to the grant of special leave. That was a perfectly reasonable stance for her to take and it was right and proper if she had a concern that she raised it with Mr Lyness. It was equally right and proper that he was entitled to come to a different view.
363. Those matters and the question of knowledge of the protected acts aside the facts do not support the comments Mr Ahmed made in the quotes we cite at (360 & 361). On the basis of the evidence we had before us they are based on assumptions Mr Ahmed made and a view he had formed about DWP, Mrs Devi and Mr Lyness. Mr Ahmed led no direct evidence other than those assumptions to support the views he came to with regards to them being racially based.
364. Whilst Mrs Devi in her witness statement that she was aware of the grievances and disciplinary processes Mr Ahmed was involved in and that his relations with several managers had broken down, she did not comment on her knowledge of any protected acts. Mr Ahmed did not ask Mrs Devi if she was aware of the earlier tribunal claims that formed the basis of his protected acts or the claims he made against Taj Singh who he told us was a friend of hers. That aside he led no



evidence to suggest a basis on which he could assert Mr Lyness was so aware. We find the assertions made against Mr Lyness and Mrs Devi based on no more than assumptions by Mr Ahmed.

365. Mr Ahmed told us [HA/109] that as a result of Mr Lyness's email the long term sickness absence dismissal and demotion procedure that had been referred to Ms Karim was stopped and his case was referred back to his line manager Mr Bains. That is incorrect. The same day as Mr Lyness' email (22 April) Miss Minto wrote to him [791-792] informing him that the matter was being referred to Ms Karim.

366. We were referred to an email chain between 29 April and 9 May 2022 [470-471] which referred to that dismissal and demotion decision meeting being scheduled for 9 May. There was no formal invitation before us. We find that :-

366.1. The meeting on 9 May 2022 did not go ahead because Mr Ahmed did not attend. He emailed Ms Karim on 9 May 2022 [470-1] that was because she had not sent him documents he had requested:-

“ ...

I am still waiting for you to provide the documents I have requested.

Please provide them as a matter of urgency.

If I do not receive anything in the next 3 days I will raise a grievance against you.

...”

366.2. On 19 May Mr Ahmed wrote the Secretary Of State for Work and Pensions and the DWP's Permanent Secretary asking them to intervene concerning Ms Karim and Mrs Rahman. Again he copied Ms Karim and Mrs Rahman in [490].



- 366.3. On 20 May 2022 Ms Karim wrote to Mr Ahmed agreeing to pause that process as a result of a request from him seeking that as a reasonable adjustment until his cases were concluded [492].
- 366.4. We can find no trace that the dismissal and demotion process was pursued. Instead the evidence suggests Mr Bains who became Mr Ahmed's line manager continued to attempt to conduct attendance management reviews.
367. Mr Bains accepted [BB/3] that prior to her departure in late April 2022 Miss Minto made him aware that Mr Ahmed was not engaging with her and sent him minutes from the scheduled 6-month attendance management meetings, which Mr Ahmed did not attend [396].
368. Mr Bains subsequently arranged an attendance management meeting with Mr Ahmed (see (424 & 629)).
369. Mr Bains accepts that on 28 April 2022, his predecessor, Ms Devi, informed him that Ms Rahman was the decision-maker in an ongoing disciplinary matter concerning Mr Ahmed [462]. He told us he was not aware of the substance of those proceedings at the time, and could not be involved [BB/4]. We were not taken to any evidence to suggest he was.

The re-scheduling of the disciplinary hearing and the grievance against Mrs Rahman

370. On 21 April 2022, Mrs Rahman wrote to Mr Ahmed suggesting that the disciplinary meeting scheduled for 27 April 2022 [393-395] should be cancelled on the basis she was in the process of gathering the evidence that he had requested. She told us she wanted to avoid the situation where Mr Ahmed received the evidence shortly before the meeting and then sought to cancel it on the basis that he did have enough time to look at it.



371. On 30 April 2022, she wrote to Mr Ahmed to reschedule a second disciplinary meeting for 18 May 2022 [465-467]. The allegation within her invitation letter did not substantially differ to that in her invitation letter of 8 April (see (335)):-

“The formal meeting will consider the allegation that from the 22nd September 2020 up to and including the 25th September 2020, you were absent from work without providing either a Statement of Fitness for Work from your (GP/medical Professional or a request for Special Leave, Annual Leave or Flex Leave.

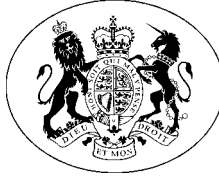
At the end of the meeting will decide what further action to take. I must make you aware that the allegations concerning your unauthorised absence, may result In a penalty under Gross Misconduct. As your absence from 22 September 2020 to 25 September 2020 is unexplained, it has been passed to me to decide on whether this period was unauthorised absence.

...

if you or your companion cannot reasonably attend the meeting, you should propose a new date to allow the meeting to take place within five working days of the original meeting date. If you do not do this, or fail to attend the re-arranged meeting, consideration of the discipline case will go ahead in your absence based on the available information.

...”

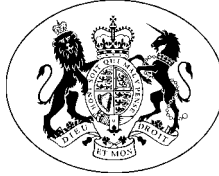
372. On 3 May 2022, Mr Ahmed wrote to Mrs Rahman asking for details of her grade the names of her manager and HR caseworker, querying the nature of the misconduct, alleging amongst other matters that Mr O'Brien's investigation had been incompetent, that he had been biased against Mr Ahmed because he was Asian but also that Mrs Rahman had taken it upon herself to take on the work of



an investigation manager and collate evidence alleging she was ignorant of how to perform her role, that she was intentionally dragging out the process in order to disadvantage him as a Pakistani Muslim, that she was not independent or impartial, was blindly following instructions from HR, that did not exonerate her from treating him unlawfully and she would be held to account [468]. That email as to both tone and content was rude and unacceptable.

373. Mr Ahmed followed that email up later the same day questioning why information concerning a fraud initiative had been included in her letter of 30 April 2022, and alleging that she was bullying him due to his race and his previous claims to the Employment Tribunal and he was going to raise a grievance against her and her HR case worker [468].
374. Mrs Rahman told us [KR/14] that email communication confused her:-
- 374.1. details of the fraud initiative information was provided in all the letters that she had previously sent to him [387, 394, 481] and
- 374.2. she was not aware that Mr Ahmed had brought any previous claims to the Employment Tribunal at that time (she told us in oral evidence the first time she became aware of these was via the grievance he raised against her and that he copied her into on 3 May 2022 [468]).
375. She told us :-

“13. I could not understand where he had formed the view that I was treating him less favourably or bullying him from the limited interaction that we had had. It is also obvious from my name that I, like the Claimant, am an Asian Muslim. I spoke to my line manager, because I was unsettled by the accusation that I was a racist, and they said that they would support me during the process. I decided that I was capable of detaching my feelings and remaining professional, and I wished to see through the case,



as it had been pending for so long, so I continued in my role as decision-maker.”

376. Mrs Rahman told us [KR/15] that on 5 May 2022 the DWP’s HR team contacted her to say that she had been named in an Employment Tribunal claim by Mr Ahmed. She stated at the time she was not aware that he had brought other claims.
377. On 12 May 2022 Mr Ahmed raised a grievance against Mrs Rahman [473]. His covering email [472] said “***The grievance should be treated as an allegation of racist bullying and victimisation. I am going to challenge your treatment of me in an Employmnet [sic.] Tribunal.***” The grievance itself said this:-

“This is a grievance about Khushwinder Rahman.

I want this grievance dealt with under the formal grievance procedure. I do not want mediation or an informal resolution.

Khushwinder is the Decision Maker for a disciplinary investigation into an allegation of unauthorised absence.

She called me on a private number (twice) sometime in late March/early April and displayed a rude arrogant and confrontational approach in the way she was talking to me. She wouldn’t have spoken to me like this if I was white. Her behaviour was unprofessional and grossly discourteous. It was not consistent with the department’s expected standards of behaviour.

Khushwinder then sent me a disciplinary meeting invitation letter informing me she might dismiss me. The letter cited gross misconduct.

I emailed her on 11/04/2022 and asked her to provide me with documents that would enable me to defend myself against the allegation including:



1. Niki Davies' disciplinary meeting invitation letter 2. All the correspondence referred to in Peter Miles chronology in Mike O'Brien's investigation report 3. Angela Streets grievance outcome report (including appendices) relating to my alleged unauthorised absence 4. Richard Smith's grievance appeal outcome relating to my alleged unauthorised absence. 5. A copy of the discipline procedure and policy. It is obvious some of these documents should have formed part of the investigation and included in the investigation report. Khushwinder would have known not including these would disadvantage me.

She replied in writing to inform me she would collate evidence that should have been considered in the investigation report, effectively conflating the roles of investigation manager and decision maker. These roles should be conducted by different people. She postponed the disciplinary meeting; the process has been ongoing for over 18 months and has been investigated as potential gross misconduct. To date I am still waiting to receive documents.

On 03/05/2022, I emailed Khushwinder again asking her amongst other things who her manager was and what level of misconduct the allegation of unauthorised misconduct was being investigated at. I also asked her why GIAA fraud initiative information was included as part of her disciplinary meeting invitation letter to me.

Khushwinder is discriminating against me, together with her HR advisers, because of my of my race and previous ET claims.”

378. Mrs Rahman told us she was upset by these allegations. As we relay above (332) she accepted he had been angry during the call and the call had been difficult but also that she was only gathering evidence because Mr Ahmed had requested it



and she did not consider that that information would form part of her decision. We return to this starting generally at (650) below and specifically starting at (656).

379. On 14 May 2022, Mr Ahmed emailed Mrs Rahman to acknowledge paperwork she had sent but to also say that some of the documents he had requested were missing. He did not specify which. He indicated he had raised a grievance against her and to say that he was not participating in any further dialogue with her until that process had been concluded [474] and Mr Ahmed played no part in the disciplinary process conducted by Mrs Rahman.
380. Mrs Rahman states that whilst she had sent Mr Ahmed all the documents that he had requested [391-392] on 16 May 2022, she wrote to him again, enclosing five documents, and reminding him of the disciplinary meeting on 18 May 2022 [479-481].
381. On 17 May 2022, Mr Ahmed emailed her to say that he had not had enough notice of the meeting and that, as such, she ***“...sought to bully and victimise me ... by not giving me adequate notice of the meeting, especially as you sent me a substantial amount of documents which would take time to analyse and consider. If I had been white you and HR would have followed DWP procedure and employment law. Because I am Pakistani you do not give me due process or treat me in a fair and lawful way. ...”*** [482]
382. That reply was two and half weeks after he had been sent the invitation and the day before the scheduled meeting on 18 May 2022.
383. By time of Mr Ahmed’s letter of 17 May Mrs Rahman told us she felt the situation was somewhat absurd; she had never met Mr Ahmed, seen him or interacted with him outside of the initial phone call. She states he could see from her name that she, like him, was an Asian Muslim. We note that cannot be necessarily inferred.



384. Mrs Rahman told us she took advice from HR [493] and on 18 May wrote to him to inform him she had postponed the meeting for a second time to 27 May 2022 [484-486].
385. On 19 May 2022 Mr Ahmed emailed Mrs Rahman stating that he would contact Therese Coffey (Secretary of State for Work and Pensions) and Schofield Peter (DWP Permanent Secretary) to allege she was harassing him [487]. Two hours later he emailed the Secretary of State and Permanent Secretary raising issues of bullying and victimisation grievances against Saiqa Karim and Mrs Rahman [490] and see (366.2).
386. In the interim Ms Phillippa (Kate) Macauley was appointed to determine Mr Ahmed's grievance against Mrs Rahman. The grievance was sent to her by Ms Rahman. She received it on 13 May 2022. Ms Macauley summarised the grievances thus:-
- 386.1. Ms Rahman had been rude and confrontational with Mr Ahmed,
 - 386.2. that she appeared to be acting as both investigating and deciding officer,
 - 386.3. that the disciplinary meeting had been postponed despite the process having started over 18 months earlier,
 - 386.4. that she had not provided documents that he had requested and
 - 386.5. that he was being discriminated against because of his race and because he had brought Employment Tribunal claims in the past.
387. Ms Macauley stated in her witness statement that Mr Ahmed did not explain why he thought that the treatment that he alleged was discrimination on the basis of his race or the previous claims, nor did he give any detail about the claims that he made:-



“8. After I had read through the grievance, I contacted the Claimant on the same day [508]. I wanted to clarify the basis on which he was saying that he was being discriminated against, given that this was not clear to me from his grievance. I updated him about some upcoming leave and steps that I had taken in relation to HR. Finally, I reminded the Claimant of the availability of the Employee Assistance Programme and how to access this support.”

388. Mrs Rahman told us [KR/18] that given Mr Ahmed had raised the grievance after she had taken up the role and it related to how she had carried out the disciplinary process, there was no pre-existing conflict between them. As a result the grievance did not cloud or impact her role as decision-maker, she was able to put the complaints to one side, to remain professional and to carry out her role fairly and impartially.
389. On 24 May 2022, following Ms Macauley’s return from annual leave, she emailed Mr Ahmed to request his home address in order to post the grievance meeting invitation to him [513]. She did not receive a reply so emailed the invitation to him that day [509] as that required 5 working days’ notice. The meeting was scheduled for 1 June 2022 [511].
390. In the meantime Mr Ahmed did not attend the disciplinary meeting rescheduled for Friday 27 May 2022. Mr Ahmed repeated before us [HA/64] that was because he was waiting for his grievance against her to be dealt with.
391. That point is relevant to delay generally. Mr Ahmed challenged several of DWP’s witnesses against whom he complained asking why they did not proceed to hear the matters that they had been asked to address. Mrs Rahman did just that. The issue was Mr Ahmed refused to participate until it had been determined, declined to engage by lodging mitigation or other documents and then complained when those points were not taken on board.



392. Mr Ahmed also before us complained in addition to changing the allegation against him that Mrs Rahman conflated her role of decision maker with the role of investigation manager, collated evidence that should have been gathered by Mr O'Brien used this in her conclusions, and that was not in accordance with DWP guidance.
393. Mrs Rahman told us she decided to proceed to make her decision on the evidence that was available to her and sought advice from HR. A summary of the discussion call is set out in an email dated 30 May [498-499]. The advice states that Mrs Rahman wanted to discuss her decision. The note focuses on Mr Ahmed's failure to attend and that a warning had been given of the consequences if he did not do so. It then addressed the conclusions Mrs Rahman reached, that no mitigation had been provided and addressed the sanction as follows:-

"We discussed the level of misconduct and confirmed that consideration under gross misconduct was correct. The member of staff was in a final written warning period at the time the unauthorised absence occurred. [link] a short duration of unauthorised absence is an example of more serious minor misconduct, however the member of staff was within a final written warning period. [Link] Q.10 states "Minor misconduct may escalate to Gross Misconduct only where there is already a live Final Written Warning in place and the minor misconduct was committed after this warning was given.

You consider that there is a case to answer, and the case is proven. You have considered all information within the investigation report. The member of staff self-certified part of their absence citing depression, anxiety, stress, fatigue and weakness. You consider that the self-cert signed by the member of staff acknowledges that they were sick during this time. They were provided with opportunity to submit medical evidence for the remainder of their absence and have not done so.



Mitigation has not been provided by the member of staff for you to consider. They did not attend the formal meeting and have not submitted any mitigation in their communications with you.

When considering the level of misconduct, you advised that you have considered [Link] “7.33 ... Dismissal. For gross misconduct or when another incident of misconduct occurs after a final written warning has been given and is still live. And [Link] “The normal penalty will be Dismissal (with or without notice). If managers accept mitigation put forward by the employee this may mean it can be reduced to a Final Written Warning.”

Taking everything into consideration your decision is to dismiss.

Ultimately this is your decision, however from what you have said your decision appears to be in line with Discipline Procedures.”

394. The note then went on to identify the model letter to be used and notice period to be given.

The grievance against Mrs Rahman (continued)

395. On Tuesday 31 May 2022, Mrs Rahman was interviewed by Ms Macauley [505-507]. Mrs Macauley said this in her witness statement:-

“10. ... The meeting proceeded in a relatively straightforward way. Ms Rahman did not appear to be upset, but expressed that she was angry that an allegation had been made with seemingly little or no foundation. I explained the purpose of the meeting and then addressed each allegation in turn with her. She explained that she had called the Claimant to inform him that she was now the decision-maker and denied that she had been rude or arrogant. She described the Claimant as trying to press her into a



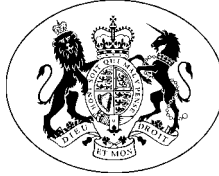
debate about the disciplinary proceedings and not allowing her to speak, and so she had explained that she was going to end the call.

11. The next point I asked her about was her sending the Claimant an invitation to a disciplinary meeting, the Claimant's request for documents in response, her alleged conflation of investigation and decision-maker roles and the delay in the disciplinary process. Ms Rahman explained that she was required to interview the Claimant in order to ensure that she had all of the information, that the meeting had been postponed in order to gather the documents and send them to him, which had taken some time, and that these had been sent to the Claimant on 16 May 2022. She noted that some documents were in her view irrelevant as they related to a grievance about his team leader, not the ongoing disciplinary matter which was about him being absent without medical evidence.

12. Thirdly, I asked her about the email from the Claimant on 3 May 2022. Ms Rahman said that she had used a standard template, which included the fraud initiative information, and had indicated the level of misconduct within the letter.

13. Finally, in relation to the allegation that Ms Rahman and HR advisers had been discriminating against the Claimant, she said that she wanted to know what conduct was said to amount to bullying, that she had only received the case in March 2022 and that she wanted to know the basis for having discriminated against him as a Pakistani Muslim. She said that she found the allegations very upsetting.

14. On 1 June 2022, the Claimant did not attend the scheduled meeting. I wanted to speak to the Claimant, but I was unable to do so as he would not respond to my attempts to contact him.



15. I therefore had to reach my decision based on the evidence that was available to me and decided not to uphold the grievance. In my outcome, I noted that the Claimant had not contacted me and that he had not attended our scheduled meeting. I summarised his allegations and set out my decision that the disciplinary procedure had been correctly followed, in view of the lack of evidence from the Claimant and the account given to me by Ms Rahman of how she had reached her decision in our meeting. There did not appear to be anything amiss about the process that she had applied or followed, as it was appropriate for her to gather all the information before reaching a decision.”

396. Mr Ahmed did not attend the meeting Ms Macauley had scheduled with him on 1 June. She told us he would not respond to her attempts to contact him. She therefore decided to reach her decision based on the evidence that was available to her. Given the account given by Mrs Rahman of how she had reached her decision and Mr Ahmed’s lack of engagement Ms Macauley concluded that it was appropriate for Mrs Rahman to gather the information she had, there did not appear to be anything amiss about the process that she had applied and the disciplinary procedure had been correctly followed. She decided not to uphold the grievance. She sent Mr Ahmed her decision on 1 June 2022 [514-516].
397. DWP’s procedures requires that an appeal manager is named in an outcome letter (see (66) and the footnote to it). Ms Macauley told us no one at the appropriate Grade (Grade 6) was available to hear an appeal so she indicated in the outcome letter that she would let him know the name of the appeal manager in due course. Mrs Rahman was also informed by Ms Macauley on 1 June 2022 that the grievance against her was not upheld [521].
398. The outcome letter was later re-sent on 7 June 2023 [518-520] including the name of Appeal Manager.



399. Mr Ahmed told us he did not receive them. Redacted copies were included in the bundle omitting Mr Ahmed's email address. We sought and were supplied with unredacted versions so the email address they were sent to could be checked. The email address was that Mr Ahmed has been using for correspondence in this claim. We find they were sent to him.

Mrs Rahman's outcome letter

400. Following receipt of the HR advice on 30 May (see (393)), on Wednesday 1 June Mrs Rahman again sought HR advice enclosing a draft of her outcome letter to Mr Ahmed.
401. The Queen's Platinum Jubilee long bank holiday weekend occurred on Thursday 2 and Friday 3 June 2022. The response from HR was timed at 11:02 on 6 June and suggested a few amendments [523-529].
402. On Monday 6 June 2022 (three working days after the re-scheduled disciplinary meeting) Ms Rahman sent a hard copy letter to Mr Ahmed via Washwood Heath Jobcentre [522]. Given he was off ill at the time it was unfortunate that it was unclear from the bundle if it was sent via email or hard copy only. As he subsequently responded to it was however clear he received it.
403. Mrs Rahman explained that if the hearing went ahead and given one of the possible sanctions was dismissal she would have held a discussion with him about accepting a payment in lieu of notice if his employment were to be terminated. Whilst she did not address the question of mitigation generally or to indicate the decision she had come to, she queried "**... if in the event a decision is made to dismiss, would you agree to a payment instead of notice period?**".
404. Mr Ahmed replied on 8 June 2022 by email [532] reiterating his previous allegations, but did not respond to her query regarding the payment in lieu of notice.



405. On Wednesday 15 June 2022, Ms Rahman wrote to Mr Ahmed to inform him of her decision in respect of the disciplinary allegation against him [539-541]. Having referenced the earlier final written warning she found **“that there has been a further failure on your part to maintain acceptable standards of conduct”**. She then set out a chronology of the factors she considered relevant before saying this :-

“Whilst I understand you disputed the circumstances surrounding the absence period, given all the evidence and facts, I am satisfied that the period was correctly treated as sickness. Therefore, as you have failed to provide medical evidence for the period 22nd September to 25th September 2020, this has been treated as unauthorised absence.” [539-540]

406. Ms Rahman stated that whilst Mr Ahmed had not met with her and thus no mitigation had been put forward for his unauthorised absence, given he had been warned the hearing would proceed in his absence, she had proceeded on the basis of the evidence before her.
407. She acknowledged the lengthy delay in concluding the investigation but found that not all factors contributing to that delay were caused by the DWP [540]. Nor did she accept that the delay would have had any bearing on her final decision [540].
408. She told us [KR/33] that it was not up to her to decide whether or not to **“treat”** the unauthorised absence as gross misconduct because that label was decided before the matter was referred to her and she referred us to DWP’s disciplinary procedure [720]. We find she considered that as a mitigation issue but decided to take it into account.
409. She concluded that Mr Ahmed had been absent without authorisation during a period when he was subject to a final written warning and given he had not put forward mitigation for the unauthorised absence he would be dismissed on 12 weeks’ written notice. She stated that notice would expire on 12 September 2022



[539]. That was in contrast to the draft letter she sent to HR on 1 June where she stated that he would receive 13 weeks' payment instead of notice [525].

410. The content of her letter made clear that his SOP record would be amended to show that he was dismissed for repeated misconduct rather than gross misconduct. His dismissal on notice reinforces that view. That is further supported by the record of what she had told HR in order to seek guidance from them on 30 May 2022 [499] **“As dismissal is for repeated misconduct ...”**. That HR record of advice also recorded **“You consider that the self-cert signed by the member of staff acknowledges that they were sick during this time.”**
411. We find Mr Ahmed was dismissed with notice for repeated misconduct whilst a final written warning was live.
412. Mr Ahmed did challenge Mrs Devi about the rescission of the self certificate. She told us she took advice from HR who advised her of the need to warn him of the potential impact to include on the four days. She told us in response to his question that HR advised she had the power to do it. He also asked if he then could ask to deal with it as special, annual or flex leave. She said she would need to ask HR.
413. He did not directly put to Mrs Rahman the rescission of the self certificate. He did challenge her about her ability to consider the options to cover the leave. He did not suggest he had asked that at the time. Nor did he address that in his witness statement. Instead he said **“I knew I could cover my leave. If I had applied they would have granted it.”** The Judge asked Mr Ahmed **“why was the DWP obliged to grant it”**. He responded **“It was common sense – how could it be misconduct if I request it and they refuse it”** before identifying three arguments in support. He was asked if by that point he was aware of the options. He did not accept that. He said that had she read the grievance documents she would have known that I had applied for special leave and therefore there was no point in



applying for it. He accepted he had not raised that direct with Mrs Rahman. His argument with respect to the request being raised in the grievance was in direct conflict to his position at other points.

414. He did however use that as basis of appeal [569]

“The self-certification was completed under duress due to improper pressure from PM while I was in a vulnerable mental state (as evidenced from the contents of the sickness self-certification). I subsequently asked Kam Devi for this self-certification to be withdrawn.”

415. He also argued before us that he only received the final written warning letter on 25 September 2020, which was the last day of his absence and consequently, he wasn't given fair notice of this and it was unreasonable for Mrs Rahman to rely on it to dismiss him. That confuses two points. Mr Ahmed was not disciplined for being absent but for failing to account for his absence. Further it fails to take into account that Mr Ahmed was given until 13 October, after the final warning had been issued (and so was on notice of it) to provide that account and did not.

416. Mrs Rahman states in her decision letter **“Your final written warning period began on 21st September 2020 and ended 11th January 2022.”** She was correct it was extended to that date (see (123)). We address above (125) the issue concerning the dispute whether Mr Ahmed received notice of that extension.

417. In addition to those flaws Mr Ahmed also complains [HA/70] that Mrs Rahman did not give any or proper consideration to mitigation, namely:

417.1. the 4 days absence was disability related (stress, fatigue, depression)

417.2. the absence was the end result of bad treatment by DWP i.e. caused by a gross misconduct disciplinary procedure started in July 2019 dragging on for 15 months, affecting my mental and physical health, or



417.3. his length of service (15 years).

The MED3s and the absence management (cont.)

418. Of the various MED3 sick notes we could locate in the bundle for the absence from October 2021:-

418.1. the first two (dated 18 October for the period from 18 October to 19 November 2021 [809] and dated 15 November for the period from 15 November to 30 December 2021 [810]) gave the reason for the absence as depression

418.2. the last three (dated 30 December 2021 for the period from 30 December 2021 to 27 January 2022 [813], dated 28 January 2022 for the period from 28 January to 25 February 2022 [822] and dated 29 February 2022 for the period from 29 February to 25 March 2022 [856]) gave the reason for the absence mixed anxiety and depressive disorder

419. At this point it is important that we make clear that before reaching our findings throughout this lengthy judgment we stepped back and reflected on events as a whole. In doing so we have also reflected on the reasons for Mr Ahmed's absence as stated in the MED3 sick notes from October 2021 onwards and the PNH more generally. We have taken into account that it is very likely the depression and thereafter mixed anxiety and depressive disorder played a part in what we have found was Mr Ahmed's unacceptable behaviour. We have considerable sympathy for Mr Ahmed in that respect and the position he found himself in. Our sympathy aside, as a fact finding tribunal we have to make determinations based on the facts as we find them.

420. Whilst we were not taken to it Mrs Galloway and Miss Minto were clearly attempting to follow DWP's management of absence policy and a formal absence management process for that sickness absence was ultimately commenced



(although this process was discontinued in light of the decision to dismiss Mr Ahmed) (see above starting at (365)).

421. Mr Bains told us he was unsure when he was informed that Mr Ahmed had been dismissed with notice. We find Mr Bains was made aware of that by 30 June when he was copied into Mr Ahmed's appeal against dismissal [561]. The email of 30 June also stated Mr Bains contacted Mr Ahmed on 24 June 2022 informing Mr Ahmed that Mr Bains was aware an Appeal had been made. Mr Bains was not asked about that and as that does not appear to be relevant to the issues we do not need to determine that.
422. On 17 June 2022, as part of the ongoing attendance management process, Mr Bains sent Mr Ahmed a letter inviting him to a meeting on 29 June 2022 [542]. Mr Ahmed was still employed at the time and so, due to the length of his absence, Mr Bains told us a meeting with him was required. He recorded within that email that ***"I noted that on your last communication with me via text message on 1st June 2022 that you requested 4 weekly welfare calls (keeping in touch calls)."*** Given that was in contrast to Mr Ahmed's position regarding Mr Miles's failure to keep in touch with him during his absence in September 2020 we address Mr Ahmed's explanation for that at (424) below.
423. On Sunday 19 June Mr Ahmed emailed Mrs Scriven [561-562] enclosing his grounds of appeal [565-569]. That included 12 numbered procedural grounds and 5 numbered substantive grounds. On 21 June 2022, Mr Ahmed sent a further email stating he wished to raise an additional point of appeal, namely that the decision-making period ought to be taken to end on 25 September 2020 [545]. We return to this starting at (427).
424. On 29 June 2022, the attendance management meeting took place between Mr Bains, Mr Ahmed and a notetaker [552-558]. Amongst other matters Mr Ahmed asked if there was



“... any point in doing meetings weekly. Because there’s nothing changing. What can I do to speed up the process? I can’t do anything, and I’ve asked numerous times to be dealt with and they haven’t done it. So, there must be a reason for its not being done. I’ve asked the appeal manager to send me the reason why it’s taking so long. The allegation against me is ridiculous. ...” [554].

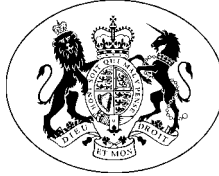
425. Amongst other matters during that meeting Mr Ahmed repeated his assertion that asking him to provide a sick note when he had not been sick was asking him to commit fraud, complained about the delays and asked that the attendance management process be put on hold whilst the appeal against his dismissal took place. He also suggested that Mr Bains could offer him the option to cover that absence with this leave. Specifically:

“Then they’re saying I didn’t request special leave/annual leave/flex leave – that’s true I didn’t request them and wasn’t offered them either. If you wanted to offer me now to cover these 4 days absence, I would take one of those options. If you’re willing to offer me annual leave/ special leave/ or flex leave to cover those 4 days alleged unauthorised absence, I’m willing to take one of them.

...

I didn’t request annual/ flex/ or special leave to cover my 4 days absence and it wasn’t offered to me. The manager had the duty to care towards me before the manager jumped to gross misconduct. He should have said to me that they can cover my leave - flex leave/ special leave/ annual leave. No one has done it to date. What I’m saying to you is that you can offer me that” [555]

426. The outcome was that Mr Bains offered to review the position. After being chased by Mr Ahmed he responded on 8 July 2022 “... **your request goes back to 2020,**



therefore I can't comment, I assume a conversation took place between yourself and your line manager regarding the absence at that time and a decision made." [600]

The disciplinary appeal conducted by Ms Scriven

427. On Thursday 30 June 2022 following his emails of Sunday 19 and Tuesday 21 June 2022 Mr Ahmed again emailed Ms Scriven stating he had not heard anything from her in the intervening 10 days. She responded just under three hours later [561-562], thanking him for his e-mail, apologising for not contacting him by e-mail, stating she was aware he had asked to be contact by post but she did not have any contact details for him, acknowledging she had received his e-mail of 21 June 2022 but stating she had not received his appeal or the attachment sent and so asked him to re-send his appeal with the attachment ASAP, so she could progress this for him.
428. He replied at just after 7:15 pm that day attaching the appeal document. Whilst he stated he had copied the appeal to himself so he knew it had been sent the email enclosing it that we were referred to [563] did not include the full header including her email address so we cannot verify that. That does not explain her delay failing to take action to obtain his address or chase the documents after she received his 21 June 2022 email.
429. By a letter dated 30 June 2022 Ms Scriven also invited Mr Ahmed to an appeal meeting. That was to take place at Stourbridge Jobcentre on 7 July [571]. We were not referred to the email enclosing that letter so cannot verify if it was sent that day (given the document she had requested from Mr Ahmed was not sent until approx. 7:15pm).
430. Within that invitation letter it indicated that Mr Darren Priest would be the notetaker for the appeal meeting. As we state above (236) he appointed Mr O'Brien. When Mr Ahmed before us asked Mrs Scriven about that she told us she had asked him



to be the notetaker simply because he was a grade 7 manager based at same office as her (Stourbridge), that she was not aware that he appointed Mr O'Brien and **“to best of my knowledge he had had no involvement in your case at all”**. Mr Ahmed disputes that the notes Mr Priest made were accurate and argues he was not independent and impartial.

431. The ACAS code states **“6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.”** and with regards to appeals **“43. The appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case.”** There is no suggestion here that Mr Priest had any substantive involvement in the case other than appoint Mr O'Brien and that was so someone with no previous involvement could be appointed and thus out of the area). Mr Ahmed makes no reference to that in his witness statement (nor does it form one of the complaints). The issue as put before us thus related to a complaint about a general failure to follow process and about the notes.

432. DWP's disciplinary procedure gives guidance on what constitutes previous involvement in the appeals section [731]:-

“9.4. The Appeal Manager must not be the Decision Maker, the Decision Maker's line manager. or the employee's countersigning manager unless every one agrees that they can be. Appeal Managers must be demonstrably, impartial and independent of the original case in that they or their line manager must not-have been previously involved in the disputed decision so that they are able to take an objective viewpoint. For example they must not have been involved in the day to day issues and procedures leading up to and raised by the appeal. This ensures that the Appeal Manager brings a fresh mind and independent view to the appeal.”



433. We find that Mr Ahmed confuses having no substantive personal involvement in an issue and having had no knowledge of it. Further, whilst it is not the norm it is not unusual for an investigation officer to be appointed by a disciplinary officer. Mr Priest was at least one stage removed from that.
434. Whilst arguably Mr Ahmed should have raised any objections about Mr Priest as a note taker prior to or at least at the meeting, that would only apply if he was aware of Mr Priest's prior involvement. The evidence before us does not suggest he was. As to the notes, that is an issue concerning the weight we place on them.
435. The invitation letter having set out those practical matters set out that ***"The purpose of the meeting is to examine the decision-making process and decide whether it was reasonable."***
436. Following receipt of the invitation letter Mr Ahmed responded indicating he did not want to meet face-to-face and requested that take place by telephone. Ms Scriven agreed [583-584].
437. On 6 July 2022, (the day before the appeal meeting was due to take place) Mr Ahmed emailed Mr Bains asking him to confirm to Ms Scriven that during the welfare/absence management meeting held on 29 June that he had asked Mr Bains for special, annual or flexi leave to cover the absence and Mr Ahmed was still awaiting a response [601] (see (424-426)). Mr Ahmed copied Ms Scriven in.
438. Mr Bains did not reply until 8 July 2022, the day after the appeal meeting. He told us he had been out of the office for two days [600]. Mr Bains responded stating that he could not comment on the request, as he had only started to manage Mr Ahmed in April 2022, the issue dated back to 2020 and made an assumption the request had been dealt with at the time. The text of Mr Bains' email in reply is set out within Mrs Scriven's outcome which we turn to next.



439. The appeal meeting took place on 7 July 2022, [594-599]. It was conducted by telephone as per Mr Ahmed's request and attended by Ms Scriven, Mr Ahmed and the notetaker, Mr Priest. Ms Scriven told us the appeal meeting was much like any other appeal meeting, other than undertaking it by telephone, it proved difficult, particularly as they had never met before. Having heard the appeal she confirmed that Mr Ahmed wanted the decision sent to him in writing to his home address [599].
440. Mrs Scriven upheld the decision to dismiss on 29 July 2022 [609] concluding amongst other matters:-

1. Irrational / Perverse Misconduct Allegation.

I do not find that the disciplinary allegation against you was irrational and/or perverse.

The disciplinary allegation was clear: you were alleged to have been absent from work without having provided a Statement of Fitness for Work or having applied for any form of leave.

2. The decision does not cover the allegation against me.

The decision-maker considered the evidence and concluded your absence from 22nd September 2020 to 25th September 2020 was sickness absence, The decision-maker then noted that no Fit Note had been provided by you for this sickness absence and so concluded that it was unauthorised. The decision-maker then went on to state in her decision letter that you had been invited to attend a number of meetings with her but had failed to attend. Therefore, the decision-maker had nothing from you by way of mitigation.



In addition, you were given from 22nd September 2020 to 14th June 2022 to account for how you would like to cover your absence for the period 22nd September 2020 to 25th September 2020 but did not do so. Therefore, again all the decision-maker had to go on was an absence that was not accounted for, whether by a Statement of Fitness for Work or otherwise.

Based on the evidence available to the decision-maker, I find that the decision-maker's decision covered the allegation against you.

...

[we address:-

3 - Decision made with no evidence (this relates to the allegation “**...you were absent from work without providing either a Statement of Fitness for Work from your GP/medical professional or a request for Special Leave, Annual Leave or Flex Leave.**” Mr Ahmed alleges

“Where is the evidence PM gave me the option of covering my absence with Special Leave (without saying my application was likely to be refused), Flex Leave or Annual Leave?

Where is the evidence I refused to apply for Special Leave, Flex Leave or Annual Leave?)”

We address this at (567 to 572)

4 - The Decision was prejudged at (580 to 583 & 705)]

...



5. Double Jeopardy

Your point here is that you were subjected to double jeopardy by your manager deducting 4 days' pay for unauthorised absence and then instigating a disciplinary process in respect of this. However, this was in accordance with DWP policies and procedures, which allow for both the deduction of pay for unauthorised absence and the instigation of a disciplinary process (e.g., the DWP's Unauthorised Absence policy refers to informing an absent employee of possible consequences of unauthorised absence as "loss of pay and disciplinary action if the employee fails to make contact or fails to comply with the procedure for notifying sick absence"). Therefore, I find there was no double jeopardy and consequently no procedural error in your pay being deducted for unauthorised absence and a disciplinary process instigated.

6. Relevant Factors were ignored

You have stated the Occupational Health report on you was not considered. The Occupational Health report on you was dated 9th October 2020 and was seen by the decision-maker. This Occupational Health report described that you were suffering from stress and then went on to advise what could be done to alleviate this with an emphasis on reducing work-related stressors. However, it follows that if you were sick during the period 22nd September 2020 to 25th September 2020 you should have provided a Statement of Fitness for Work for that period. This point was part of the decision-maker's decision to dismiss you. Therefore, there was no procedural failure in the decision-maker not making explicit reference to this Occupational Health report in her decision.

...

[we address:-



7 - Inappropriate and Biased DM and 8 - Disciplinary procedure not paused until conclusion of grievance at (660 to 663, 766 & 677)

9 - Allegation at investigation stage different to decision making stage starting at (716),

10 - Excessive Length of Disciplinary Process at (676 & 681)]

...

11. Not taking into account mitigating factors

...

I asked for clarification around the statement that no consideration was given that the 4- day absence was “disability related or as a result of poor treatment by the department” and asked what you meant by disability related and how this impacted you. You confirmed your depression is a symptom of something, an organisational issue resulted from stress and that no regard has been given to this. You also suffer with another condition PNH which is documented in the Occupational Health report and also is associated with stress. Stress was caused by the 15-month Gross Misconduct investigation and subsequent investigation straight after.

When considering your mitigation that you have put forward in the Appeal meeting on the 7th July 2022, including reference to your health conditions, I do not consider that these provide grounds to overturn the decision to dismiss you. Your position is contradictory: on the one hand you are saying your absence is not because you were sick, but then in the appeal hearing you stated the absence was disability related. Moreover, you were given from 22nd September 2020 to 14th June 2022 to account for how you would like to cover your absence for the period 22nd



September 2020 to 25th September 2020 but did not do so, so again the decision-maker could only base her decision on the evidence before her. Therefore, it was appropriate on this basis for the decision-maker to dismiss you for repeated misconduct when you were subject to a final written warning despite your 15 years' service.

12. Not considering other sanctions other than dismissal

... I find no procedural error in this: the decision-maker had weighed up the evidence available to her and concluded your absence was unauthorised; in the context of you being subject to a final written warning, the decision-maker decided your dismissal on notice for this further misconduct was appropriate.

...

[We address the 5 substantive grounds respectively at ((756); ((440 & 547 to 554); (767); (767); and (123 & 125))].

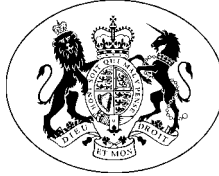
...

Additional point raised on 21st June 2022.

...

On 6th July 2022 you copied me into an email to your line manager Baz Bains, which stated:

'Could you please confirm to Stacey Scriven that, 7 days ago during a welfare / attendance management meeting, I requested from you special leave, annual leave or flex leave to cover my 4 day absence in September 2020, and that at the time of writing you have not responded.'

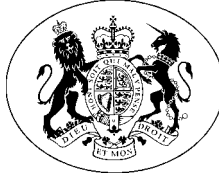


This has been acknowledged by your line manager, in an e-mail to you in which he has stated: -

'Apologies for delayed response as I was out of office from Wednesday and returned today. Yes I can confirm this was a request made from you during your recent welfare call, however I took up my position here at DWP 1st April 2022 and your request goes back to 2020, therefore I can't comment, I assume a conversation took place between yourself and your line manager regarding the absence at that time and a decision made'

In any event, now requesting the 4 day absence is covered by special leave, annual leave or flex leave does not detract from the fact that you did not make such a request at the time of or shortly after the absence, and did not do so when you had the opportunity to do so prior to your dismissal. This reinforces the point that at the time the decision-maker was considering the disciplinary allegation against you, the evidence before her was that your absence was not in any way authorised, whether via a Statement of Fitness for Work or otherwise."

441. Ms Scriven told us that at the time of hearing Mr Ahmed's appeal and reaching her decision, she was not aware that he had previously brought Employment Tribunal proceedings. She accepted she was aware that Mr Ahmed had had disciplinary action taken against him, although she was not aware what for. She asserts her decision not to uphold the appeal was therefore unrelated to any Employment Tribunal proceedings that Mr Ahmed had brought previously.
442. As to Mr Ahmed's request for special, annual or flexi leave, Ms Scriven told us she did not take this into account because this was not made to Mr Bains until just over a week before the appeal hearing was due to take place. That was after the decision to dismiss had been communicated to Mr Ahmed on 15 June 2022. Ms



Scriven told us her role was to consider whether the decision to dismiss him had been correct. Thus, she was only looking at what had happened before the date of dismissal and thus the decision maker was entitled to come to the view she came to. She told us this was based on HR advice

“24. After the meeting, I had a complex case discussion with HR on 19 July 2022 [618]. I also sought further guidance from HR on 11 July 2022 [605-607]. On 22 July 2022, I was advised that the decision about retrospectively seeking leave was for the line manager, that I could consider whether stress had impacted their ability to engage in the process, that the failure to identify the level of misconduct did not change the decision, that two separate processes apply to unauthorised absences [604-605].”

443. That advice to her was thus:-

“We discussed at length, there is no specific time period during which an individual may apply for special leave/annual leave/flexi and it is down to the line manager to make a decision. In this scenario the MoS has had many opportunities to make this request and it may considered reasonable to refuse such a request at this stage.” [604].

444. Both Mr Bains and Ms Scriven told us they assumed that Mr Ahmed had applied before and had been refused. That was wrong. Mr Ahmed had not. Whilst the assumptions of Mr Bains and Ms Scriven were wrong, and both should have checked, we find underlying that assumption was the view that the application should have been made at the time and it was Mr Ahmed’s failure to do so that led to the misconduct proceedings.

445. In relation to the alleged failure to make reasonable adjustments for Mr Ahmed by not applying special, annual or flexi leave to the absence Ms Scriven told us this



was not an issue raised with her by Mr Ahmed and her role was to address the appeal he made.

446. Mr Ahmed asserts she did not identify what his sickness was and also ignored his mitigation namely:

446.1. his absence was disability related

446.2. his absence had been caused by bad treatment by the department (failure in duty of care)

446.3. his long length of service (15 years)

447. He states had mitigation properly been considered properly he would not have been dismissed. He also argues as a senior manager Mrs Scriven had the power to retrospectively cover his absence with special, annual or flex leave but did not do so because he **“... was Asian; if I had been White and not brought previous ET claims she would have covered my absence with special, annual or flex leave”**. [HA/85].

448. He also argued Mrs Scriven took advice from an HR adviser [604], Marie Box, **“... who also demonstrated a closed mind towards me because she was negatively influenced by my race and her knowledge I had previously brought ET claims. This is evidenced by the advice she gave to Stacey Scriven: ...”** [HA/86].

449. Mr Ahmed also complains [HA/78] that Ms Scriven also had a closed mind towards him and was intent on dismissing his appeal without proper consideration of the grounds he had raised, including mitigation. He argued she did not give any consideration to any outcome except dismissal. His rationale for that is that was because she upheld the original decision. He continued that was **“because of my**



race and her knowledge of my previous ET claims. She wouldn't have treated a white person the same way."

450. Mr Ahmed also complains [HA/79 & 88] that whilst Ms Scriven told him the appeal was by way of a review of the procedure and not a rehearing, she then conducted a rehearing, giving him no right of appeal.

451. DWP's procedure says so far as is relevant:-

"9. Appeals

9.1. There is one right of formal challenge against decisions resulting in a penalty in this procedure through an 'appeal'.

...

Appeals - Step 3 -Considering the appeal

9.13. The Appeal Manager should not reconsider the case in detail but should more broadly consider whether the original decision was one that a reasonable, fair-minded person could have reached based on the facts. They should focus on the reasons for the appeal set out in the employee's appeal. If new evidence is made available, the Appeal Manager should consider the impact this may have on the final decision." [731 & 733]

452. The basis on which the appeal would be conducted is repeated in the invitation letter (see (435)). DWP asserts the appeal was conducted as a review. That is also the way we read the notes; what Ms Scriven did was to hear the arguments Mr Ahmed wished to raise. To have done otherwise would have denied him the right of appeal.

453. Ms Scriven asserts that she concluded that [SS/28 & 609-613]:-



- 453.1. double jeopardy did not apply as the DWP's policies allowed for the deduction of both pay and a disciplinary process in the case of an unauthorised absence.
- 453.2. there was no evidence that the decision-maker had acted as investigation manager,
- 453.3. there was no evidence to suggest that outcome had been prejudged,
- 453.4. The grievance about Mrs Rahman's alleged bias had been concluded on 1 June 2022, prior to her decision to dismiss Mr Ahmed, and indicated that no evidence had been provided by the Claimant of bias.
- 453.5. The disciplinary process had in part been delayed by the Claimant declining to attend three scheduled meetings.
- 453.6. Mrs Rahman had seen the OH report of October 2020 which was included in the file that Ms Scriven had received, which said that Mr Ahmed was suffering with stress. She took the view that there was no procedural failure arising from Mrs Rahman not referencing the report in her decision letter.
- 453.7. the allegation against Mr Ahmed was clear, that he had been away from work without either a sick note or having applied for leave to cover that period.
- 453.8. the final written warning had been in place until 11 January 2022.
- 453.9. Mrs Rahman had weighed up the evidence and was entitled to conclude on the available evidence that Mr Ahmed had been sick between 22 and 25 September 2020



- 453.10. There was no evidence that Mr Ahmed had made a request to cover the period using leave at or shortly after the time, or when given the chance to do so before being dismissed and as such, there was no evidence of such a request before Mrs Rahman.
- 453.1. Mrs Rahman's decision was based on repeated misconduct during the period of a live final written warning,
- 453.2. the level of misconduct not having been indicated was not relevant.
- 453.3. the factors Mrs Rahman had used as the basis for her decision were appropriate given the evidence before her.
- 453.4. because Mr Ahmed had not attended the meetings with Mrs Rahman she had no mitigation from him and Mr Ahmed not having accounted for his absence between 22 September 2020 and 14 June 2022 (the day before the day of the dismissal letter), and
- 453.5. it was reasonable for Mrs Rahman to dismiss on the evidence available to her and despite the Claimant's length of service.
454. Ms Scriven also noted there appeared to be a contradiction in the mitigation put forward in the appeal meeting, by Mr Ahmed who had said that he had not been sick and his absence being related to his disability.
455. As to the delay she informed Mr Ahmed she had requested an explanation be sent to him directly.
456. Mr Ahmed's employment terminated on 12 September 2022. We set out at (1) details when he conciliated and brought this claim.

THE LAW & OUR DETERMINATIONS

457. Both parties provided written closing arguments that they expanded on orally.



458. We were referred by DWP to [Basildon & Thurrock NHS Foundation Trust v Weerasinghe](#) [2016] ICR 305, [City of York Council v Grosset](#) [2018] EWCA Civ 1105, [Nagarajan v London Regional Transport](#) [1999] IRLR 572, [Pnaiser v NHS England](#) [2016] IRLR 170, [Robinson v Department for Work and Pensions](#) [2020] EWCA Civ 859, [Homer v Chief Constable of West Yorkshire Police](#) [2012] UKSC 15, [Hardy & Hansons plc v Lax](#) [2005] ICR 1565, [MacCulloch v ICI](#) [2008] IRLR 846, [Akerman-Livingstone v Aster Communities Ltd](#) [2015] UKSC 15, [O'Brien v Bolton St Catherine's Academy](#) [2017] ICR 737, [Griffiths v Secretary of State for Work and Pensions](#) [2015] EWCA Civ 1265, [Northumberland Tyne & Wear NHS Foundation Trust v Ward](#) (UKEAT/0249/18), [Buchanan v Commissioner of Police of the Metropolis](#) UKEAT/0112/16/RN, [Abertawe Bro Morgannwg University Local Health Board v Morgan](#) [2018] EWCA Civ 640, [The Carphone Warehouse Ltd v Martin](#) UKEAT/0371/12, [J v DLA Piper UK LLP](#) [2010] ICR 1052 and [Bexley Community Centre v Robertson](#) [2003] EWCA Civ 576.
459. Mr Ahmed also referred us to [Grosset](#), [Sheikholeslami v The University of Edinburgh](#) [2018] UKEAT 0014/17, [Griffiths v Secretary of State for Work and Pensions](#) [2016] IRLR 216, [Hall v Chief Constable of West Yorkshire Police](#) [2015] IRLR 893, [Meikle v Nottinghamshire County Council](#) [2005] ICR 1, [Williams v The Trustees of Swansea University Pension & Assurance Scheme](#) [2018] UKSC 65, [Lamb v The Business Academy Bexley](#) UKEAT/0226/15 and [The Solicitors Regulation Authority v Mitchell](#) UKEAT/0497/12.
460. We address the legal issues in turn.

The burden of proof

461. Parliament has long acknowledged the difficulties of proving that discrimination has occurred. The burden of proof provisions in the Equality Act 2010 (EqA) thus attempt to address this. Where a claimant has shown on balance the other



required elements of a complaint are made out and the Tribunal has to consider the reason for the alleged treatment

461.1. if a claimant can prove facts from which the tribunal could decide, in the absence of any other explanation, that there has been a contravention of the EqA

461.2. the burden will shift to a respondent to show the discrimination did not occur or that the protected characteristic played no part whatsoever in the decision

462. In undertaking the assessment at the first stage the Tribunal has to consider all the primary facts, not just those advanced by the complainant; save in one respect the total picture has to be looked at³. It is only the explanation which cannot be considered at the first stage of the analysis. Whereas evidence adduced by a respondent can properly be taken into account at the first stage when a tribunal is deciding what the “facts” are in order to see if a *prima facie* case of discrimination has been established by a claimant⁴. Where there are allegations of discrimination over a substantial period of time, a fragmented approach looking at the individual incidents in isolation from one another should be avoided as it omits a consideration of the wider picture⁵.

463. A difference in treatment alone is not sufficient to establish that discrimination could have occurred and passed the burden of proof to a Respondent, similarly

³ see [Hewage v Grampian Health Board](#) [2012] UK SC 37 at [31], and [Laing v Manchester City Council](#) [2006] ICR 1519 at [56 to 59]. “Typically this will involve identifying an actual comparator treated differently or, in the absence of such a comparator, a hypothetical one who would have been treated more favourably. That involves a consideration of all material facts (as opposed to any explanation).” per Elias P in [Laing](#) at [65]). Discrimination complaints “rarely deal with facts which exist in a vacuum and to understand them, a Tribunal has to place them in the context revealed by the whole of the evidence. ... one cannot understand a scene in act III of a play without first having understood what has happened in acts I and II ... since these both provide the context for and cast light on the overall picture.” (see [Kansai v Tullett Prebon Plc](#) UKEAT/0147/16 at [31] where Langstaff J also referred to [Qureshi v Victoria University of Manchester](#) [2001] ICR 863 and [X v Y](#) [2013] a decision of the EAT (UKEAT/0322/12/GE)

⁴ [Ayodele v Citylink Ltd](#) [2017] EWCA Civ 1913 per Singh LJ [67]

⁵ [London Borough of Ealing v Rihal](#) [2004] IRLR 642 CA applied in [Laing](#) [59] and endorsed in [Madarassy v Nomura International](#) [2007] IRLR 246 also CA



unreasonable conduct without more is not enough either. Context is important and adverse inferences may be drawn where appropriate from the surrounding circumstances of a respondent's conduct. If the tribunal is in a position to make positive findings on the evidence one way or the other that is an end to the matter⁶.

464. If a claimant can pass the burden to the respondent, s.136 provides the Tribunal **must** conclude there was discrimination unless the Respondent proves on the balance of probabilities that the conduct or decision in issue was in no sense because of the relevant protected characteristic⁷, that requires a consideration of the subjective reasons which cause the employer to act as he did⁸.

*“At the second stage, the ET must ‘assess not merely whether the [Respondent] has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities’.”*⁹

and cogent evidence is required to discharge that burden.

465. It was made clear in Hewage⁶, by Lord Hope¹⁰ that whilst the burden of proof provision in s.136 EqA is a tool to be used in a case where a tribunal cannot make clear findings about the reason for impugned treatment

“... it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other. ...”

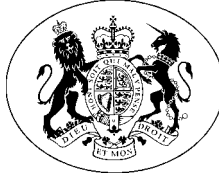
⁶ [Hewage v Grampian Health Board](#) [2012] UK SC 37 at [32]

⁷ see [Ayodele](#)

⁸ see [Shamoon v Chief Constable of the Royal Ulster Constabulary](#) [2003] ICR 337, at [7] per Lord Nicholls.

⁹ see the [Igen](#) guidance at Annex paragraph 12 and [Lainig](#) [51]

¹⁰ approving Underhill P as he then was in [Martin v Devonshires Solicitors](#) [2011] ICR 352 (EAT)



The failure to make adjustments complaints

The legal principles

466. We address this issue first on the basis that if there is a breach of this provision any justification argument in relation to the “something arising from” complaints is likely to fail.
467. Section 39(5) EqA imposes a duty to make reasonable adjustments upon employers. Where such a duty is engaged sections 20, 21 and 22 and Schedule 8 apply. Section 20(2) EqA states that the duty comprises three requirements. Insofar as is relevant for us, where the absence of an auxiliary aid, a physical feature or a provision, criterion or practice (‘PCP’) applied by the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.
468. A substantial disadvantage is one which is more than minor or trivial ¹¹.
469. Paragraph 6.10 of the Equality and Human Rights Commission (EHRC) Code of practice on employment suggests that ‘provision, criterion or practice’ “**should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications ...**” and in line with authorities pre dating the EqA this includes one-off decisions and actions and may also include decisions to do something in the future, such as a policy or criterion that has not yet been applied.

¹¹ s. 212(1) EqA. That reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people. see paragraph 8 of Appendix 1 EqA, EHRC Code; [Sheikhholeslami \[49\]](#)



470. If the duty is engaged the steps it requires to be taken are those that were reasonable to avoid the disadvantage. The question if, and to what extent, the step would be effective to avoid the disadvantage is always an important one ¹²:

"18. ... given the language of section 20(3) - where the steps required are those that are reasonable to avoid the disadvantage - the question whether, and to what extent, the step would be effective to avoid the disadvantage, will inevitably always be an important one ¹³. Thus if there was no prospect of the proposed step succeeding in avoiding the disadvantage, it would not be reasonable to have to take it; conversely, if there was a prospect - even if considerably less than 50 per cent - it could be ¹⁴. The reasonableness of a potential adjustment need not require that it would wholly remove the disadvantage in question: an adjustment may be reasonable if it is likely to ameliorate the damage ¹⁵; a, or some, prospect of avoiding the disadvantage can be sufficient ¹⁶. All that said, the uncertainty of a prospect of success will be one of the factors to weigh in the balance when considering reasonableness ¹⁷."

471. To put it another way:

"... in our judgment an adjustment which gives a Claimant 'a chance' to achieve a desired objective does not necessarily make the adjustment reasonable. The material question for an ET in considering its effect, which is one of the factors to which regard is to be paid in assessing reasonableness, is the extent to which making the adjustment would

¹² [South Warwickshire NHS Foundation Trust v Lee](#) [2018] UKEAT 0287/17 the EAT at [37] (albeit a case on s.15 EqA) repeating the guidance given in [Birmingham City Council v Lawrence](#) [2017] UKEAT/0182/16

¹³ see per HHJ David Richardson at paragraph 59 of [Secretary of State for Work and Pensions \(Jobcentre Plus\) v Higgins](#) [2014] ICR 341 EAT

¹⁴ per HHJ Peter Clark at paragraph 39 of [Romec Ltd v Rudham](#) UKEAT/0069/07

¹⁵ [Noor v Foreign & Commonwealth Office](#) [2011] ICR 695 EAT per HHJ David Richardson at 33

¹⁶ per HHJ McMullen QC at paragraph 50 in [Cumbria Probation Board v Collingwood](#) UKEAT/0079/08 and [Keith J at paragraph 17 in Leeds Teaching Hospital NHS Trust v Foster](#) UKEAT/0552/10

¹⁷ see per Elias LJ in [Griffiths](#) [29] and per Mitting J at paragraph 18 in [South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley](#) UKEAT/0341/15



prevent the PCP having the effect of placing the Claimant at a substantial disadvantage. That enquiry is fact sensitive." ¹⁸

472. Whether a particular adjustment is reasonable is to be judged objectively; it is not simply a question of deciding whether the process of reasoning by which a possible adjustment was considered was reasonable ¹⁹. The focus is on the practical result of measures that can be taken ²⁰. The EHRC Code ¶7.29 states that what is a reasonable step "*depends on all the circumstances of the case.*" before giving a list of factors to be considered.
473. In [Ishola v Transport for London](#) [2020] EWCA Civ 112 Lady Justice Simler referenced at [32] the decision of Langstaff J in [Nottingham City Transport Ltd v Harvey](#) UKEAT/0032/12:-

"18. ... there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustments, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned."

¹⁸ [Lancaster v TBWA Manchester](#) UKEAT/0460/10 at [46] (Slade J presiding)

¹⁹ [Firstgroup Plc v Paulley](#) [2014] EWCA Civ 1573, [2015] 1 WLR 3384, [2014] EWCA Civ 1573

²⁰ [Royal Bank of Scotland v Ashton](#) UKEAT/542/09, [2011] ICR 632 at [24].



474. Lady Justice Simler went on to say that she did not accept the submission that all one-off acts and decisions necessarily qualify as PCPs before saying this:-

“35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits. Mr Jones' response that practice just means "done in practice" begs the question and provides no satisfactory answer. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice". It is just done; and the words "in practice" add nothing.

36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison



of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.

37. ... the concept of a PCP ... does not apply to every act of unfair treatment of a particular employee. That is not the mischief which ... the duty to make reasonable adjustments [is] intended to address; ...

38. In context, ... all three words carried the connotation of a state of affairs ... indicating how similar cases were generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. ... I consider that although a one-off decision or act can be a practice, it is not necessarily one. that, therefore, a one-off decision or act could be a practice, but it was not necessarily one"

475. Mr Ahmed said this

"... This PCP operated more harshly on the Claimant as a result of his PNH disability, by exacerbating his condition and/or making it harder for him to return to work. A reasonable adjustment would have been delivering a timely disciplinary outcome and/or continue paying me full sick pay. (see Lamb v Bexley Academy EAT and Sheikholeslami v University of Edinburgh EAT).



The respondent has conceded that fatigue, stress, anxiety and depressive symptoms (depression) arise out of PNH (see EJ Kelly's judgment on whether my depression was a disability). ...

...

But the employers failure to return a timely disciplinary decision was causing my disability related absence (see Jan 2022 OH report). In the circumstances, returning a timely disciplinary decision or continue paying full sick pay were reasonable adjustments (see Nottingham City Council V Gaynor Meikle (Court of Appeal)).

My case is materially similar to that of Lamb in Lamb v Bexley Academy EAT. My absence was caused by the effect the prolonged gross misconduct disciplinary process had on my PNH (triggering and exacerbating my symptoms to the point I became unfit to work). I could not return to work until a disciplinary decision was returned regarding my alleged unauthorised absence as my symptoms did not allow me to. Once a disciplinary decision been returned (that did not result in my dismissal) I could envisage a swift return to work, as I expected my symptoms to ease to the point I was capable of returning to work. That is what I informed management of. However, it still took almost 12 months for the disciplinary process to conclude.

[Lamb v Bexley EAT para 25] "The Court of Appeal made clear that the fact that an able-bodied and a disabled employee are treated equally and are subject to the same disadvantage when absent for the same period of time does not mean that there can be no disadvantage if the PCP bites harder on the disabled employee than it does on the able-bodied: paragraph 58."



[Lamb v Bexley EAT para 29] “The practice relied on by the Claimant was an asserted practice that was in fact repeated. Just by reference to the investigation in the Claimant’s own case, there was repeated delay: first in the process adopted by Ms Haylett that took some four months from complaint to a potential outcome, and then again in relation to the investigation conducted by Mr Atkinson where a similar delay ensued both at the investigation stage and again at the appeal stage. Even if the Claimant had some responsibility for part of that delay, it seems to us that the Respondent was in charge and responsible for the grievance process and for the extent of the delay. The Respondent’s practice of delay in delivering a timely grievance outcome was capable of being a PCP for these purposes. The Claimant was ot [sic.] contending that she was physically forced to return to work during September 2012 or in the period that followed. It is apparent, and no doubt an inference as a matter of common sense, that she felt pressure to return, perhaps because she was on reduced pay, and in circumstances where her sick pay would come to an end in April 2013.”

476. Mr Paulin argues Mr Ahmed’s own evidence and that of the 9 October 2020 OH report support the proposition that Mr Ahmed was suffering an adverse reaction to workplace issues, and when cross-examining Mrs Le Fort, Mr Ahmed stated: **“Symptoms of stress are not due to an underlying medical condition, they are due to work related issues”**. He went on to say that: **“I have stress because of medical condition and stress because of work – is a double whammy”**. Mr Paulin too pains to emphasise that is a distinct matter from the fact of and matters arising in consequence of his disability. He refers us to J v DLA Piper [2010] I.C.R 1052):-

“41. The facts of the present case make it necessary to make two general points about depression as an impairment. We do so with some caution



since the medical evidence before the Tribunal did not contain any general discussion of depression. We have to rely primarily on the inferences that can be drawn from such medical evidence as there is, together with the Guidance and the case-law and the general knowledge acquired from our own experience of depressive illness in the field of employment law and practice. ...

42. The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at para. 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events".^[5] We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the



context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para. 40 (2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived."

The footnote [5] to that text said this

"But NB that "clinical" depression may also be triggered by adverse circumstances or events, so that the distinction can not be neatly characterised as being between cases where the symptoms can be shown to be caused/triggered by adverse circumstances or events and cases where they cannot."

477. The tribunal went on to make clear that was not to impose a requirement about the nature of the impairment and that it was "clinically well-recognised" involving the precise identification and classification of the impairment but whether there was an impairment at all.
478. On a wider note Mr Paulin also suggested there was no evidence to support the proposition that Ms Rahman or Ms Scriven had in their mind either Mr Ahmed's disability or anything arising in consequence of it, as is necessary to base any claim of discrimination, including a section 15 claim ²¹.

²¹ Nagarajan v London Regional Transport [1999] IRLR 572, HL; Robinson v Department for Work and Pensions [2020] EWCA Civ 859 [55].



Our conclusions

PCP 1

479. Issue (5) (Claim 6) relates to DWP delaying delivering a timely disciplinary outcome. There were unarguably delays. However, in our judgment this was not a practice on the part of the DWP. Instead multiple factors played a part. They included (this is not an exhaustive list) the repeated complaints from Mr Ahmed, the resultant changes of decision makers/investigators, COVID, Mr Ahmed's sickness absence, Mr O'Brien working from home, the contrasting positions adopted by Mr Ahmed (258.1) and what we find was his refusal to co-operate with the absence management process.
480. As the examples of the appeals conducted by Mr Lozano (completed in a month from the date of Ms Musson's outcome – starting at (121)) and Mr Smith (completed 5 weeks or so after Mrs Street's decision - see (176)) demonstrate when those factors were absent, the DWP's decision makers were able to progress matters relatively rapidly.
481. Whilst there were clearly delays on the part of some decision makers and some of those delays related to matters that were within their control on balance we conclude that the delays that arose were as a result of the individual circumstances that arose in each case and thus it could not be said there was an element of repetition about this at least on the part of the DWP. This PCP was not applied and this complaint therefore fails.

PCP 2

482. As to issue (6) (Claim 6) In his skeleton Mr Paulin told us the PCP allegedly applied was DWP reducing Mr Ahmed's wages following 6 months of absence from work & referring or being considered for potential dismissal or demotion following 6 months of absence from work.



483. In the list of issues before us and as identified initially by Employment Judge Algazy KC [82] was identified as ***“Did the Respondent apply a provision, criterion or practice of considering the dismissal and demotion of an employee who has been on sickness absence for six months?”***.
484. Mr Ahmed did not take us to DWP’s procedures in that regard to identify if either limb of that practice was routinely applied by reference to that period of absence. We extract above (129) the relevant provision concerning dismissal/demotion. A first written warning ensued after 6 months and dismissal/demotion 6 months after that. We could not locate the “sick leave and sick pay guidance” within the bundle that is referred to at [654].
485. Adopting Mr Paulin’s version (as this is the most beneficial for Mr Ahmed) and the first limb, pay, the evidence before us (303) was that this reduced although at the 4 month point rather than as alleged 6 months. As to the second limb, we found at (419) that DWP was applying an absence management process. However, DWP’s procedures did permit provide for considering the dismissal and demotion of an employee who has been on sickness absence for six months. Those matters aside:-

Substantial disadvantage

486. Any disadvantage has to flow from the disability. Here we find it did not. The reasons given in Mr Ahmed’s MED3 certificates were not PNH but depression and mixed anxiety and depressive disorder (418). The MED3s make no mention of PNH and we were not referred to any medical evidence that references that. As the OH report of April 2022 (353) made plain ***“further Occupational Health intervention is unlikely to be helpful until any real or perceived employee workplace stressors are addressed”***. That appears to us to reinforce that view. Whilst Mr Ahmed asserts the reasons given in the MED3s were related to the PNH



that is for him to show that and short of assertion he has not done so. Further, they were expressly rejected as disabilities by Employment Judge Kelly.

487. That aside as to limb 2 at least, the formal sick absence process was commenced on advice from OH due to **“a lack of engagement from the employee to follow the correct sickness absence process, ... to identify a practical forward”** (see (353)).
488. For those reasons that complaint also fails.

PCP 3

489. Issue (7) (Claim 8) was said to be DWP's requirement to attend work / attend work in prolonged stressful work environment. Again, we find no such PCP was applied. Mr Ahmed himself indicated as much when he repeatedly told us it was the stress from the disciplinary process not the work environment that caused him to be absent in September 2020. That is reinforced by what Mr Ahmed told us about the initial disciplinary process that led to the absence in September 2020 Mr Ahmed made clear at the time and before us that when he received his decision he could return.
490. Looking behind that what Mr Ahmed appears to argue is that the disciplinary process was the stressful work environment caused by the disciplinary and/or absence management process. That may be so but that for the same reasons we give as to disadvantage at (486) Mr Ahmed has failed to show that link. Further that does not prevent an employer taking disciplinary or absence management processes. Indeed given Mr Ahmed argued in relation to his complaint concerning Mr Miles that failing to follow the KIT process whilst he was absent was important for his welfare and that the formal process was activated following the express April 2022 OH advice (353). That being so this head would fall at the reasonableness stage on the basis that action was undertaken on advice.



491. If as is argued the process was stressful because it was prolonged again we find on balance that was not a PCP on DWP's part but due to a number of factors including the lack of engagement of Mr Ahmed.
492. We address the issue of its duration and the contrasting position Mr Ahmed adopted in relation to it when we addressed PCP 1.
493. That complaint also fails. Accordingly, the failure to make reasonable adjustments complaints do not succeed.

The something arising from disability complaints

The legal principles

494. Section 15 EqA provides:-

“(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.”

495. Traditionally the most useful guidance to be found in one place on the proper approach to determining section 15 claims, was the decision of Simler P, as she then was, in *Pnaiser*²² where she drew together the threads of the previous

²² [Pnaiser v NHS England & Another](#) [2016] IRLR 170 at [31 (a)-(i)]



authorities²³. 'Defences' in the wider sense aside, there are three basic elements to a s. 15 complaint:

495.1. a disability

495.2. something arising in consequence of the complainant's disability and

495.3. unfavourable treatment

496. As to the unfavourable treatment the tribunal must ask itself whether the complainant was treated unfavourably in the respects relied on and if so by whom. No question of comparison arises²⁴.

497. The three elements require an investigation of two distinct links in the chain:

497.1. did A treat B unfavourably **because of** an (identified) something? and

497.2. did that something arise **in consequence** of B's disability?²⁵

498. It does not matter precisely in which order these questions are addressed²⁶. That will depend on the facts²⁷.

499. The first 'causative' issue requires the Tribunal to determine is what caused the treatment complained of, or what was the reason for it. That involves an examination of the alleged discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found just as it is in a direct discrimination case. Again, just as there may be more than

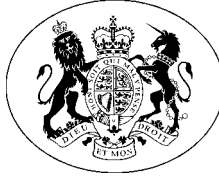
²³ including *IPC Media Ltd v Millar* [2013] IRLR 707, *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* [2015] UKEAT 0397/14, [2016] ICR 305 per Langstaff P and *Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893

²⁴ *Pnaiser* [31(a)], *Griffiths*/25

²⁵ [*Sheikholeslami*/62 & *Grosset*/36]

²⁶ *Weerasinghe*

²⁷ *Pnaiser* [31(i)]



one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s. 15 case.

500. The ‘something’ that gives rise to the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. This is not a binary question; was the treatment done *because of his/her disability or because of some other reason*. Both reasons might be in play²⁸. Again, as in direct discrimination motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment²⁹.
501. The second link requires the question of “in consequence of” the disability to be considered (rather than because of)³⁰. The respondent is not required to know of the link or the something. In any event it has a defence under s.15(2) EqA.
502. This is a looser connection such that more than one link in the relevant chain of consequences of the disability may require consideration. Whether something can properly be said to arise in consequence of disability is an objective question to be robustly assessed in each case by the Tribunal in light of the evidence.³¹ The more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact³². It does not depend on the thought processes of the alleged discriminator³³.
503. In *Robinson v Department for Work and Pensions* [2020] EWCA Civ 859, the Court of Appeal confirmed that in a claim under s.15 that the focus needs to be on the reasons for the treatment itself and it is not enough for a claimant to argue that

²⁸ [Sheikholeslami](#) [62, 66]; [Grosset](#) [37]; [Pnaiser](#) [31(b)]

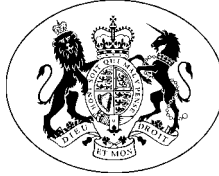
²⁹ [Naqarajan](#) (see above)

³⁰ [Pnaiser](#) [31(g)] [City of York Council v Grosset](#) [2018] EWCA Civ 1105 [2018] IRLR 746, [2018] WLR(D) 296, [2018] ICR 1492, (CA) [38]

³¹ [Sheikholeslami](#) [62, 66]; [Grosset](#) [38]

³² [Pnaiser](#) [31(e)]

³³ [Pnaiser](#) [31(d) (f)]



“but for” their disability they would not have been put in a situation that led to unfavourable treatment:-

“55. Both s.13 and s. 15 use the same phrase “because of”. One requires A to have treated B less favourably than a comparator would have been treated because of a protected characteristic (s.13), the other to have treated him unfavourably because of something arising in consequence of a disability (s.15). One difference between the sections is that s 13 explicitly involves a comparison between how the Claimant and other persons without the protected characteristic are treated – “less favourable treatment” – whereas s 15 refers only to “unfavourable treatment”. But both sections require the ET to ascertain whether the treatment (whether less favourable or unfavourable) was because of the protected characteristic and, as such, require a tribunal to look at the thought processes of the decision -maker(s) concerned”.

In so doing the CA approved the comments of Underhill LJ in *Dunn v Secretary of State for Justice* [2019] IRLR 298.

504. The EHRC Code provides:-

“5.9. The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.

Example:

A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by



cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the 'something' (that is, the loss of temper) that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker. ...”

505. If a claimant shows the other elements of s.15 are satisfied there are two “defences” to a s.15 claim, knowledge and “justification”.
506. Knowledge. The language of s. 15(2) makes clear that the knowledge required is of the disability only and does not extend to a requirement of knowledge that the ‘something’ leading to the unfavourable treatment is a consequence of the disability³⁴. Had this been required the statute would have said so as it does for the knowledge required for a reasonable adjustments complaint. An employer does not have to be aware that an employee's loss of temper was due to her cancer, only that the employer should be aware that she suffers from cancer³⁵.
507. Justification (s.15(1)(b)). In contrast to indirect discrimination in s.15 complaints a respondent has to justify the unfavourable treatment rather than a PCP. The relevant legal principles can be summarised thus³⁶:

“(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 863 at [31].

(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (Case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied

³⁴ [Pnaiser](#) [31(h)]

³⁵ [Grosset](#) [51]

³⁶ [MacCulloch v Imperial Chemical Industries plc](#) [2008] ICR 1334 EAT [10]



that the measures must ‘correspond to a real need ... are appropriate with a view to achieving the objectives pursued and are necessary to that end’ (para 36). This involves the application of the proportionality principle, which is the language used in regulation 3 itself. It has subsequently been emphasised that the reference to ‘necessary’ means ‘reasonably necessary’: see Rainey v Greater Glasgow Health Board (HL) [\[1987\] ICR 129](#) per Lord Keith of Kinkel at pp 142-143.

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [\[2005\] IRLR 726](#) per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no ‘range of reasonable response’ test in this context: Hardys & Hansons plc v Lax [\[2005\] IRLR 726](#), CA.”

508. Whilst it is for the alleged perpetrator to justify the unfavourable treatment practice the authorities make clear that the alleged perpetrator is not required to provide evidence of justification; Tribunals are expected to use their common sense, reasoned and rational judgment. What may not be argued in support are subjective impressions or stereotyped assumptions³⁷. Thus in [Ministry of Justice v](#)

³⁷ see *Elias J in Seldon v Clarkson Wright and Jakes* [2009] IRLR 267 EAT at [73] affirmed by the Court of Appeal and Supreme Court and in [Homer](#) [2009] IRLR 601 EAT per Elias (now LJ) at [48] and also paragraph 4.26 of the Code.



[O'Brien](#) [2013] ICR 499 following a reference to the European Court the SC adopted the ECJ's guidance which is encapsulated in the summary of AG Kokott:-

*“62. The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective pursued ...”*³⁸

509. The authorities³⁹ thus suggest that the proportionality assessment requires the Tribunal as a minimum to critically evaluate: -

- 509.1. Whether the employer's reasons demonstrated a real need to take the action in question⁴⁰.
- 509.2. Whilst business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test⁴¹.
- 509.3. Establishing that an aim is capable of being a legitimate aim is only the beginning of the story. It is then, for the tribunal, according an appropriate margin of discretion, to decide whether it is legitimate in the circumstances

³⁸ see [Del Cerro Alonso \(Free movement of persons\)](#) [2007] EUECJ C-307/05, [2008] ICR 145 para 58, and [Angé Serrano v European Parliament \(Case C-496/08P\)](#) [2010] ECR I-1793, para 44. Albeit that is essentially a restatement of [R. \(Elias\) v Secretary of State of Defence](#)[2006] EWCA Civ 1293, [2006] 1 WLR 3213 where Mummery LJ gave the following guidance on what was required :-

“[151] ... the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.”

Which in turn is a repeat of his view in [Hardy & Hansons plc v Lax](#) [2005] IRLR 726 CA at [31 & 32], a view that was endorsed by Lady Hale in [Homer](#) at [20-23].

³⁹ [Northumberland Tyne & Wear NHS Foundation Trust v Ward](#) [2019] UKEAT 0249/18 [66]; Scott/57 & 58 citing are most usefully and comprehensively summarised in [Hardys & Hansons Plc v Lax](#) [2005] ICR 1565, [MacCulloch v Imperial Chemical Industries Plc](#) [2008] UKEAT 0119/08, [2008] IRLR 846, [2008] ICR 133410 and [Dutton v The Governing Body of Woodslee Primary School](#) UKEAT/0305/15. The cases of [Ali](#), cited by the Claimant, and also [Grossett](#) at [54] confirm that.

⁴⁰ [Dutton/9\(a\)](#)

⁴¹ [Cross v British Airways plc](#) [2005] IRLR 423EAT and [CA in Woodcock v Cumbria Primary Care Trust](#) [2012] IRLR 491



of the case. For this purpose, an aim must at least be rational and, if it is not, the employment tribunal is entitled to say so ⁴²; and

- 509.4. If so, to make its own objective assessment of whether the reasonable needs of the undertaking which include the systems of work, their feasibility or otherwise, the practical problems which may or may not arise from the matter in issue in a particular business, the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action outweigh the discriminatory effect of the employer's measure on those sharing the relevant protected characteristic, including the claimant ⁴³.
- 509.5. The more serious the disparate adverse impact, the more cogent must be the justification for it ⁴⁴.
- 509.6. The question is an objective one so it is no bar to the act being justified if the alleged perpetrator had not turned its mind to the question of proportionality at the time and thus matters that have come to light after the event can be relied upon ⁴⁵.
510. Unlike unfair dismissal there is no margin of discretion or 'range of reasonable response' test here allowing a significant latitude of judgment for the employer. The test under section 15(1)(b) EqA is an objective one, and the Tribunal must make its own assessment ⁴⁶.

⁴² [The Lord Chancellor v McCloud](#) [2018] EWCA Civ 2844, [2019] ICR 1489 [86] approved Lady Hale's comments at para. 59 of [Seldon v Clarkson Wright & Jakes](#) [2012] ICR 716, [2012] IRLR 590, [2012] UKSC 16 (SC)

⁴³ [Hensman v Ministry of Defence](#) UKEAT/0067/14 [41 to 44]; [MacCulloch](#) [10(3)]; and per [Sedley LJ](#) in [Allonby](#)

⁴⁴ [Dutton](#) 9(b) [MacCulloch](#) [10(3)] [Hardys](#) per [Pill LJ](#) at paras 19-34, [Thomas LJ](#) at 54-55 and [Gage LJ](#) at 60

⁴⁵ [Cadman v Health and Safety Executive](#) [2004] IRLR 971

⁴⁶ see [Hardys](#) [31-34], and [Homer](#) [20] and [24]-[26] per [Baroness Hale of Richmond JSC](#), with whom the other members of the Court agreed. [Grosset](#) [54] [MacCulloch](#)/11



Our Conclusions

511. Disability having been previously conceded/dismissed we turn first to the somethings.

The “somethings”

Issue 9(a)(i) [Claim 6] - 4 (four) days’ absence from work in September 2020

512. The burden is on Mr Ahmed to show that the absence from 22 to 25 September 2020 arose from the PNH (or if his appeal succeeds, depression).
513. We find that on 14 September 2020 Mr Ahmed told Mr Miles that he could no longer cope with the effect the protracted first disciplinary process was having on him, told Mr Miles that he wanted to go home and that he would return when he had received the disciplinary outcome. We find that as a result Mr Miles concluded that Mr Ahmed was not fit to undertake his role and he was entitled to come to that view. In the absence of another explanation being provided by Mr Ahmed, Mr Miles was entitled to consider that reason applied to the period 15 to 25 September 2020 (the whole of the absence) ⁴⁷. See also (564).
514. Neither the self certificate nor subsequent OH report referred to the reason for the absence as being PNH nor as is more relevant to our decision, that the absence arose from the PNH. What Mr Ahmed sought to argue before us was that the stress worsened his PNH or as he put it in his skeleton ***“his disability symptoms being triggered/exacerbated by the inordinate length of stress he was under due to prolonged gross misconduct disciplinary proceedings against him”***.
515. In essence the way Mr Ahmed argues this issue before us was that the stress at work led to a worsening of his systems and that led the ***4 (four) days’ absence from work in September 2020..*** To succeed he would have needed to show the

⁴⁷ Mr Ahmed suggests that self certificate was obtained under duress. We reject that view for the reasons we give starting at (573).



disability gave rise to a something (although there may be more than one) and that a something caused the unfavourable treatment alleged. Accordingly on his own case the absence did not arise from his disability but the stress. He would have thus needed to show the disability gave rise to a susceptibility to stress, and the stress gave rise to his absence and that the unfavourable treatment. That is not the way he put his case in the extensive case management. In any event the only basis he advances for those two somethings acting in concert was an assertion, not medical evidence. That complaint therefore fails.

Issue 9(a)(ii) [Claim 6] – Mr Ahmed's absence from work for 6 months

516. Mr Ahmed suggests [HA/4] that absence was because of his depression. That view is supported by Employment Judge Kelly recording in his reasons that it was agreed that Mr Ahmed was first prescribed anti-depressants in or around September/October 2021 when his first sick note was submitted. We can find no trace of any evidence led to support the suggestion that that the absence was related to the PNH. Neither the sick notes provided (see (418)) nor the only OH advice that addresses the issue after the start of that absence (see (267)) make any reference to it. Indeed they are all based on depression or mixed anxiety and depressive disorder. Accordingly, his ***absence from work for 6 months*** cannot succeed as a “something”. That complaint must also fail.
517. A wider point arises from both these issues. The issue whether depression was a disability within the meaning of s.6 EqA was determined at the Preliminary Hearing on 24 May 2023. Within his judgment Employment Judge Kelly recorded that the relevant time for that question had been agreed as the period 22 to 25 September 2020.
518. The second of the somethings argued above can only relate to the 6 month period from 18 October 2021 [809] when Mr Ahmed went off work sick. It appears to us that both parties were in error when they agreed that period, Given that was issued



was determined by reference to their agreement that may be something the parties wish to consider. We will leave it and how they do so to them but that being so rather than conclude our deliberations on this complaint at this stage we continue.

The unfavourable treatment

519. Of the six alleged acts of unfavourable treatment based on our findings above and viewed objectively noting a comparison exercise is not part of the question four of those acts were acts of unfavourable or detrimental treatment and they were caused by one of the two somethings:-
- 519.1. Issue 8(a) [Claim 6] Treating Mr Ahmed's absence from work in September 2020 as a gross misconduct disciplinary issue for unauthorised absence.
 - 519.2. Issue 8(b) [Claim 6] deciding to deduct wages for 4 days of absence from work in September 2020 for unauthorised absence ⁴⁸.
 - 519.3. Issue 8(c) [Claim 6] reducing Mr Ahmed's wages following 6 months of absence from work.
 - 519.4. Issue 8(e) [Claim 8] finding Mr Ahmed guilty of 4 days unauthorised absence and dismissing him for repeat misconduct effective from 12 September 2022 as a result.
520. Whilst Mr Paulin suggested as to issue 8(a) DWO did not treat Mr Ahmed in that way from the outset as we say above even if we disregard the alleged verbal warnings, by the time of the letter of 16 October 2020 (see (127)) Mr Ahmed was warned that could be treated as gross misconduct.
521. However as to the remaining two allegations:-

⁴⁸ see also our determinations at (696) and (747)



- 521.1. 8(d) [Claim 6] referring or being considered for potential dismissal or demotion following 6 months of absence from work. As we say at (484) that is not what DWP's procedures entailed. Dismissal or demotion would only be triggered after a further stage of the process. Further, whilst a referral was made no substantive action was taken on it. For the reasons we give above (see (353 & 487)) the formal absence management process was commenced on advice from OH due to ***“a lack of engagement from the employee to follow the correct sickness absence process, ... to identify a practical forward”***. Further and in contrast to the other acts of unfavourable treatment above Mr Ahmed has not satisfactorily explained what the detriment he suffered from that referral was given it was not continued and how expressly that detriment affected him.
- 521.2. 8(f) [Claim 8] Not upholding Mr Ahmed's appeal against dismissal. Whilst we accept it may be inferred that Mr Ahmed was put to a detriment Mr Ahmed has not shown how that treatment was caused by one of the “somethings”. For the reasons we give starting at (409 to 411) the reason Mr Ahmed was dismissed was not because he was absent but because he was absent without authorisation and he had failed to account for that absence during a period when he was subject to a final written warning. Nor has he shown how the failure to uphold the appeal was caused by the absence. In both cases the multiple causal links that the law permits have not been shown, the burden being on him to do so.

The connections

522. As to Issues 8(a), 8(b) and 8(e) we positively found for the reasons we give starting at (582) above that the cause of the alleged unfavourable treatment was Mr Ahmed's failure to provide a MED3 certificate from his GP or another form of authorisation of the absence such that the absence was treated as unauthorised



(see (579)). In the light of that positive determination we find neither of the two somethings (the **4 (four) days' absence from work in September 2020** or his **absence from work for 6 months**) had any material influence whatsoever on the unfavourable treatment.

523. As to Issue 8(c) [Claim 6] reducing Mr Ahmed's wages following 6 months of absence from work that in our view clearly flowed from Mr Ahmed's absence but for the reasons we give at (486) above that did not arise in consequence of his PNH. Accordingly that complaint must also fail.

524. Notwithstanding that we address for completeness the justification 'defence'.

Justification

525. Eight legitimate aims are relied upon:-

525.1. Ensuring that DWP is properly informed and updated about employee absences.

525.2. Encouraging staff to return to work from absences in a timely fashion.

525.3. Managing staff absences fairly.

525.4. Effectively enforcing DWP's absence management policy.

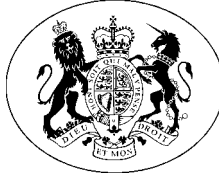
525.5. Dealing with unauthorised absence.

525.6. Dealing with repeat instances of misconduct.

525.7. Providing a reliable service to the general public.

525.8. The proper use of public funds.

526. We find that all those aims are legitimate. As a department of state DWP is obliged to ensure the proper use of public funds when exercising its obligations to perform its public functions. In order to be able to provide the functions with which it



statutorily tasked DWP has to provide a reliable service to the public and to do so has to be able to manage staff absences, to be informed of the reasons for those absences, to likewise address unauthorised absence and misconduct (and/or its repeat) and enforce its absence policies and encourage staff to return in a timely manner DWP is entitled to be properly informed and updated about employee absences.

527. Turning to the acts of unfavourable treatment that we found occurred and were caused by a something, we find they were all relevant and necessary to achieve those aims:
- 527.1. 8(a) Treating Mr Ahmed's absence from work as a disciplinary issue and (given he repeatedly failed to comply with requests and warnings) escalating that to gross misconduct matter
 - 527.2. 8(b) having failed to provide an explanation (and evidence) to explain his absence deducting his wages for the period of absence for which no adequate reason was provided
 - 527.3. 8(c) disciplining Mr Ahmed, finding him guilty of 4 days unauthorised absence and dismissing him as a result.
 - 527.4. 8(e) Reducing Mr Ahmed's wages following 6 months of absence
528. As to 8(a), (b) & (c) we found that the application of DWP's absence policy required that an employee provide a suitable explanation for an absence and evidence of that. Where that was not provided this was treated as a disciplinary issue. Where that continued the seriousness of the failure to comply was escalated to the potential for dismissal and/or wages being withheld or deducted.
529. In the absence of such provisions it is extremely difficult to see how the attendance of staff could be properly managed, a reliable service provided to the public and



the waste of public funds avoided. We find they were applied to achieve those aims. Before they were applied requests were made and then a warning given. Given the staged process adopted/need to safeguard the public purse they were proportionate; again they were only applied if it was necessary to do so.

530. Similarly, as to 8(e) DWP's policies provided that for long term absences, wages were initially halved and then not paid at all. We do not propose to repeat here the caselaw concerning adjustments and their interplay with facilitating a return to work other than to say that the payment of sick pay can in certain circumstances be a reasonable adjustment. Here such provisions existed. We were not taken to what they were by either party. It was not in dispute that after a period pay was reduced. A balance has to be struck incentivising staff on long term absence to return, the provision of a reliable service and the use of public funds. Those aims are legitimate. Wages continued to be paid over and above statutory sick pay for a period. That cannot continue indefinitely. Again a balancing exercise is required.
531. Balancing the discriminatory effect against the needs of undertaking we consider that each of the four acts or unfavourable treatment was necessary in order to achieve the aims identified. We find there was a clear need for those requirements and they were linked to achieving those goals. For the reasons we give they were necessary and in our view proportionate. It is very difficult to see how the aims could be achieved without them. For the public policy reasons we give above those aims inherently need to be given significant weight when balancing the need for them against the impact they had on Mr Ahmed.
532. In our judgment Mr Ahmed has not addressed in sufficient detail why the impact those factors had on him if any outweighed the significant that should be given to them in order to achieve the aims.
533. Mr Ahmed did not address why it was not possible for him to provide a reason for his absence, or for him to seek to take holiday, flex, leave or special leave given



we find he was or given his knowledge of DWP's policies ought to have been aware of and why that outweighed the need for that policy

534. Having failed to do so, despite warnings, he did not address why he was entitled to be paid when he had not been at work and why that should outweigh the need to be able to enforce compliance with rules via disciplinary processes including dismissal in order to manage and regulate the behaviour and attendance of staff given the impact that would have on the performance of its public functions and on the public purse if not.
535. Nor did he address why the impact on him was such that it outweighed the need to limit absence pay (which is ordinarily paid to allow staff a period such they can recuperate without suffering financial loss such they can ultimately return to work), that absence pay was in excess of statutory sick pay and again the effect this had on the public purse.
536. In each case we concluded that the treatment was proportionate, relevant and necessary to achieve the legitimate aims.
537. Accordingly the s.15 complaints all fail.

The victimisation complaints

The legal principles

538. Section 27 EqA provides:

“(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.



...”

539. There is no dispute here that Mr Ahmed did protected act(s).
540. Detriment has been given a wide meaning by the courts⁴⁹ and is assessed objectively. That is how it would be perceived by a reasonable litigant⁵⁰. In making that assessment we must bear in mind that an unjustified sense of grievance cannot constitute detriment⁵¹, and whilst it is not a defence per se that the employer behaved honestly and reasonably, save in the most unusual circumstances, it will not be objectively reasonable for an employee to view distress and worry caused by honest and reasonable conduct of the employer as a detriment⁵². A person may be treated less favourably and yet suffer no detriment.

Our conclusions

The complaints about Mr Miles

541. Whilst Mr Ahmed told us Mr Miles **“13. ... knew I had been subjected to a disciplinary procedure that had lasted 15 months ...”** he did not allege so far as we can identify that Mr Miles was aware his previous tribunal claims included complaints under the EqA (it is only his previous Tribunal complaints that are argued as protected acts here).
542. Mr Miles told us

⁴⁹ Lord Hoffman in *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830 at [53]. Brandon LJ in *Ministry of Defence v Jeremiah* [1979] IRLR 436 CA, a case involving the interpretation of the 1975 Sex Discrimination Act, stated “... I do not regard the expression ‘subjecting to any other detriment’, as used in s.6(2)(b), as meaning anything more than ‘putting under a disadvantage’ ” and went on to say that was a question of fact for the Tribunal. adopted and approved by the HL in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 which in turn referred often to another HL decision in *Chief Constable of West Yorkshire Police v Khan* (as above).

⁵⁰ *Ministry of Defence v Jeremiah* (as above) [31] per Brightman LJ approved in *Chief Constable of West Yorkshire Police v Khan* (as above)

⁵¹ *Shamoon v Chief Constable of Royal Ulster Constabulary* (as above) per Lord Hope [35].

⁵² *Pothecary Witham Weld (a firm) & Anor v. Bullimore & Anor* [2010] IRLR 572, [2010] ICR 1008, [2010] UKEAT 0158/09 at [19(3)] applying *Derbyshire v. St. Helens Metropolitan Borough Council* [2001] ICR 841



“4. ... when I moved back to Washwood Heath in April 2020. We were not particular friends, but we had a cordial relationship and would say “hello” and speak to each other occasionally.

5. When I became Hafeez’s manager I was not aware that he had an ongoing disciplinary procedure. Hafeez himself made me aware of his disability shortly after I became his manager.

6. I only became aware of the ongoing disciplinary around a week before 14th September 2020 when Rachel Musson called me ...

...

16. On 24th September 2022 I contacted complex cases and had a conversation with Claire Forster via Skype. Eric Brown was also on the call to assist Claire as I understood that Claire was new to the role. I started to give some background to the case and Eric Brown said something to the effect that he “knew all about Hafeez”. I did not consider this shocking or surprising as I knew by this point that there had been previous claims in the Employment Tribunal and there was also the ongoing disciplinary, so it would not be surprising for his name to be known in the complex case team.”

543. The EqA provides that victimisation occurs where the perpetrator’s reason for subjecting the complainant to the treatment complained of falls within ss.27(1)(a) or (b) (see (538)). Where the alleged perpetrator does not know or believe that a protected act has been done it is difficult to see how the perpetrator’s reason for putting the complainant to a detriment can fall within ss.27(1)(a) or (b).

544. Mr Miles was not asked and nor was it alleged he was aware what the Tribunal complaints he was aware related to or included. Whilst he was the only individual against whom victimisation was alleged who gave evidence before Mrs Le Fort



(see (620)) Mr Ahmed without prompting clearly knew as we say what was required to be asked of her. It follows he knew or ought to have known to ask the same questions of Mr Miles. His reasons for any treatment cannot therefore fall within s.27(1) and the victimisation complaints so far as they relate to him must fail. Notwithstanding that we have gone on to consider the detriments alleged against him.

545. We address the first two issues together:-

545.1. 12(a) [Claim 8] treating Mr Ahmed's alleged unauthorised absence in September 2020 as potential gross misconduct, and

545.2. 12(b) [Claim 6] Mr Miles' ⁵³ retrospective decision to treat Mr Ahmed's period of absence as unauthorised, in the knowledge that permission for his absence had been given in advance.

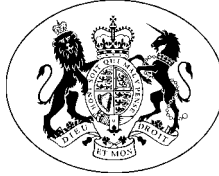
546. We address the various elements of these complaints in turn.

Permission for the absence

547. Mr Ahmed argues he left work with Mr Miles' permission, having told Mr Miles he was going to go home when he had finished his work that day and he would not return until he received the outcome of the disciplinary from Ms Musson. He thus argues that Mr Miles authorised the whole of his absence. Mr Ahmed argues that Mr Miles's failure to contact him until 23 September or to instruct him during the call that day to return reinforces his argument that he had permission to be absent.

548. In that discussion on 23 September Mr Ahmed was told he would need to provide a sick note. He responded by stating he was not sick. Mr Ahmed asserts [HA/14] ***“Upon hearing I was not sick Peter Miles still didn't instruct me to return to***

⁵³ The complaint against Mr Brown was withdrawn.



work, effectively giving me his continued authorisation to be absent, and in the knowledge I was stating I wasn't sick."

549. Mr Miles accepted that Mr Ahmed was told he could leave work on 14 September. He also accepted that he did not instruct Mr Ahmed to return to work during the absence. We find that was because Mr Ahmed had made clear to Mr Miles that he would not be returning until he had received Ms Musson's disciplinary outcome for the reasons we set out at (63-65).
550. We do not seek to condone Mr Miles's failure to contact Mr Ahmed during that absence, it was a breach of DWP's procedures. However, we do accept he did so because he knew the situation was stressful for Mr Ahmed, he did not want to make that worse. The tricky situation that gives rise to is ably demonstrated by two of Mr Ahmed's subsequent complaints that he was being harassed. In November 2020 Mr Ahmed complained to Ms Haines that he would view any paperwork sent to his home address as harassment (see (150)) and later still that Miss Minto's attempts to arrange various meetings was also harassment. Mr Miles thus only contacted Mr Ahmed to respond to Mr Ahmed's call or when he had information to seek or convey.
551. The difficulty with Mr Ahmed's argument is that it relies upon him being given an open ended permission to be absent by Mr Miles. That is something no employer would do and Mr Ahmed has not shown to our satisfaction that Mr Miles had the power to sanction that. The difficulty of that is demonstrated by Mr Ahmed's suggestion that Mr Miles had to seek Ms Barr's approval to grant special leave etc and she was unlikely to grant that.
552. Mr Ahmed counters that arguing DWP's procedures set a time limit of 5 days for Ms Musson to make her decision so it was not open ended. Whilst DWP's procedures do refer to a period of 5 days for the decision to ***ordinarily*** be made



there were exceptions to that (see (66)). Even if that is correct it does not address the period of the absence that is in issue here, days 6-9.

553. Even if Mr Ahmed was given permission to go home, we find that was not a blanket permission for Mr Ahmed to stay at home indefinitely. Nor did it exempt him from complying with DWP's duty to report or its requirement for him to provide a reason for the absence. Mr Ahmed did not suggest that there had been any discussion about the obligation on him to keep in touch or the obligation he had to provide a reason for his absence had been waived before he left on 14 September.
554. We find by 23 September (if not before) Mr Ahmed was or ought to have been aware that he needed to provide a reason for his absence. That was long before any disciplinary steps were contemplated. That was repeated at the return to work meeting on 28 September.

The need to provide the reason for the absence/a sick note

555. Mr Ahmed asserts he was not sick during the period 15-25 September and had made that plain to Mr Miles in their discussion on 23 September. He also said:-

"10. My behaviour was not consistent with that of a person who was sick; if I had been sick I would have left work immediately and I wouldn't have given a condition that would dictate my return i.e. when a disciplinary decision was returned."

556. We find Mr Miles addressed Mr Ahmed's reason for his absence at their return to work meeting on 28 September. We find that he had told Mr Ahmed again that he would need to account for the absence. By 30 September Mr Ahmed had not done so and so he was told by Mr Miles that the absence would be considered as sickness, but if he wanted to make request for it to be treated as something else then that was his opportunity to do so (see (109)).



557. We find by that time (30 September) Mr Ahmed was fixed in his view as is demonstrated by the contents of his email (see (113)).
558. By his letter of 1 October Mr Miles repeated to Mr Ahmed that he needed to provide a self certificate or MED3 sick note by 9 October. Mr Ahmed provided a self certificate on 5/6 October but not for the whole of the period.
559. On 9 October Mr Miles emailed Mr Ahmed [183] acknowledging the self certificate for 15 to 21 September and reminding him of the need for certification for the period 22 to 25 September 2020. He extended the deadline for Mr Ahmed to do so to 13 October. Mr Ahmed's reply of on 12 October was that he had already given his response. That reinforces our view that Mr Ahmed was fixed in his view by this point.
560. We find based on Mr Miles' discussion with Mr Ahmed on 23 September (see (73), with HR on 24 September (see (93)) and his email of 1 October to Mr Ahmed (see (111)) that he considered Mr Ahmed had been absent due to stress. The subsequent referral to OH, the OH report and stress risk assessment all further reinforce that that was the view Mr Miles had at the time.
561. We find given what Mr Ahmed told Mr Miles on 14 September that Mr Miles was entitled to reach that conclusion. Whilst Mr Ahmed's view was that he was not sick, Mr Ahmed refused to satisfactorily address the question before us whether he was not fit for work. Instead Mr Ahmed argued that he was fit to do everything but work, suggesting if he went into work it could make his symptoms worse, but maintaining he was not sick. That avoids the point. If work makes an individual ill then the individual is not fit to attend work.
562. Given Mr Ahmed told us it was the stress of receiving the disciplinary decision whilst he was at work and the possibility of being walking off the premises that was the concern for him given the limited likelihood he would receive the decision the same day we find that his continuing to work that day does not support Mr



Ahmed's argument that his conduct was inconsistent with him being sick (see (555)).

563. In the absence of contradictory evidence being provided we find Mr Miles was entitled to hold and maintain the view that Mr Ahmed was unfit for work for the period 15 to 25 September 2020 inclusive.
564. In addition to those points Mr Ahmed stating he intended to remain off work until he had received the outcome of the disciplinary process led us to conclude that the same reason for the absence was at play for the whole of the absence. That being so, in the absence of evidence pointing the other way, the provision of a self certificate for the first part of the period of the absence (15-21 September) (see (114)) leads us to the conclusion that the reason for the absence given in the self certificate would thus apply to the whole period of the absence. No such countervailing evidence was provided. We find the reason for the absence given in the self certificate was at play for the whole of the absence.
565. In reaching that view we have taken into account Mr Ahmed's assertion that since it was decided he was sick, DWP's attendance management procedures should have been triggered. It was common ground that
- 565.1. Mr Ahmed's trigger point had been increased above the normal threshold as an adjustment and
- 565.2. following the 15-25 September absence Mr Ahmed would have passed the adjusted trigger point.
566. By the time that should have been addressed a return to work meeting had been held, Mr Ahmed was back at work and the issue was being dealt with via a disciplinary route. No explanation was provided by DWP why its attendance management procedures were not followed. It is not for us to speculate why. If it had been in our view all that would have done would have been to expedite the



subsequent attendance management process. We considered if that detracts from DWP's view that the absence 22-25 September should be treated as sickness in the absence of an alternative explanation being provided and concluded that the failure to action an attendance management process did not.

Alternative explanations for the absence

567. We heard and accepted that in addition to that being treated as sick leave Mr Ahmed could have asked to use holiday, flexi time or special leave. We found he was expressly told on 30 September that the absence would be considered as sickness, but if he wanted to make request for it to be treated as something else then that was his opportunity to do so (see (109)). At no point did Mr Ahmed expressly do that.
568. At various points Mr Ahmed told us he had sought to suggest that was implied (stating that his grievance was an implicit application) and also that the options should have been explained to him. Those assertions are disingenuous and do him no credit for the following reasons:-
- 568.1. As to the suggestion that was implied, having been expressly told it was for him to account for the absence by 13 October (see (117)), Mr Ahmed should have expressly, not impliedly, done so. He did not. The closest he came to that was that eventually he told us he had impliedly made an application for special leave to cover his 4 days absence in his grievance (see (653)). That grievance was made on 18 October 2020 (see (137)). That was after the time for him to account for his absence had expired.
- 568.2. Those matters aside on the issue of implied applications Mr Ahmed repeatedly complained when assumptions were made. How Mr Miles treated the leave (as sickness) is a case in point. Those complaints demonstrate why it was not for DWP to make assumptions. It was for Mr



Ahmed to expressly make that application as he had been invited to do. He did not.

568.3. As to the suggestion that the options should have been explained to him, Mr Ahmed was a long standing employee and as he has repeatedly demonstrated, that he is well versed in DWP's rules and/or how to locate them. He repeatedly took points that raised technical breaches of DWP's procedures. He was very familiar with them. He clearly in our mind either knew or could have found out the options available to him. He clearly knew about special leave, flexi leave and due to COVID, that he had a large amount of holiday leave to take. He could have investigated any of these further and applied for them. He chose not to.

569. Two further factors reinforce that view:-

569.1. Mr Ahmed accepted special leave was discussed at the return to work meeting on 28 September. Mr Miles told us that conversation broke down because Mr Ahmed wanted a guarantee it would be granted. Mr Ahmed told us he saw no point in applying for something that would be blocked see (100-103). In our judgment he was told he needed to apply, that should have been done expressly by him and we find he did not do so until 29 June 2022 (see (424)). Indeed in that meeting of 29 June 2022 Mr Ahmed accepted he had not applied previously.

569.2. The notes of his appeal meeting with Mr Smith on 28 April 2021 [801]:-

RS – How did you expect the absence to be dealt with? What did you expect Pete to do?

HA – I didn't give it much thought. I have looked at guidance and there is the option of special leave or retrospective Annual leave, at no loss to the department.



RS – Did you discuss this?

HA – we had a short meeting when I received the letter and it was mentioned there.

570. As we say above it was not for DWP in such circumstances to second guess what he was seeking.
571. Whilst Mr Ahmed suggests the possibility to have his absence covered by special leave was mentioned by Mr Miles on 28 September and Mr Miles made clear that Ms Barr was unlikely to approve it. Whilst DWP's policy makes clear other forms of leave should be discussed first. Contrary to what he alleges [HA/14] we find he had the option to apply for special, annual or flex leave. We will thus never know what her view would have been.
572. Looking at those points against the backdrop of the wider circumstances we find that Mr Ahmed's suggestion that the alternative options should have been explained to him and that his request should have been implied are frankly disingenuous and do him no credit.

Duress

573. Mr Ahmed argues that the self certificate was obtained under duress. By that he told us he was in an impaired mental state and only completed it because he was being pressured to do so under threat of disciplinary action despite having told Mr Miles he was not sick (104).
574. Mr Ahmed did not challenge Mr Miles's account that Mr Ahmed had prepared it ready to hand to him at the start of their meeting (see (101, 104 & 105)) and that Mr Ahmed voluntarily attempted to hand that it in on 28 September. Given it was dated 28 September it suggests Mr Ahmed had prepared that before the return to work meeting.



575. Whilst Mr Ahmed was not happy he was being asked for a certificate that covered the period he claimed he was not sick we found above starting at (555) that DWP was entitled to ask him for that certificate and did so. Based on the evidence before us we find that way it did so was also appropriate. The evidence before us does not suggest that Mr Ahmed was under duress to do so. Nor does his argument that his disability impacted upon how he perceived that.
576. Firstly as to the impairment impacting on this issue Mr Ahmed made it clear to us he was fit to work when he returned on 28 September. If he was fit to work that implies he was fit to follow lawful instructions reasonably given. We find the request for an explanation for the absence was a lawful instruction.
577. Secondly, as to duress given the certificate only covered part of the absence, we find that at the return to work meeting on 28 September Mr Miles raised this and he told us he suggested to Mr Ahmed he might want to see a GP and get a sick note (see (100)). We accept that is what was said not least because the certificate was not handed in (until 5/6 October). Given the date it was handed in, was after we find Mr Miles told Mr Ahmed on 30 September that the absence would be considered as sickness, but if he wanted to make request for it to be treated as something else then that was his opportunity to do so (see (109)), Mr Ahmed was told of the alternatives he could apply for. We find he was not being bullied or harassed as he states. He had various options. He was not under duress.
578. Mr Ahmed later sought to retract the self certificate on 23 June 2021. When the consequences of doing so were pointed out to him by Mrs Devi and he was asked to confirm if he wished to do so. He did not (see (106)). Had he felt it was originally obtained under duress we find he would have done so. He did not. In any event the duress he essentially referred to was no more than the requirement to account for his absence which was legitimate and applied to all employees as did the warning that if the absence was not accounted for disciplinary processes would ensue.



Authorisation for the absence

579. For the reasons we give above in the absence of other evidence having been provided to show Mr Ahmed's absence was not sickness related we found Mr Miles was entitled to conclude the absence was due to sickness. That being so without a sicknote or Mr Ahmed having sought and been granted holiday, special or flex leave Mr Miles was entitled to conclude that absence was unauthorised.

Categorising Mr Ahmed's conduct as gross misconduct

580. DWP's *Attendance Management Procedures* provided that employees had **"ten working days to produce (backdated) medical evidence."** and where a reason for an absence had not been provided as here DWP's *Standards of Behaviour Advice* required that a letter be sent and **"If a reply is still not forthcoming within 5 working days from the date of the letter, the manager must take account of all the circumstances and consider whether or not dismissal action is appropriate."** (see (129) in relation to both).

581. We repeat above how Mr Ahmed was asked to provide that information. We find DWP's procedures made clear he had a duty to provide reasons for an absence. Having been asked to do so. He did not.

582. Whilst Mr Ahmed argues his absence was short and thus according to the DWP guidance that should constitute minor misconduct (see (129)) the length of the absence was not what Mr Ahmed was being investigated for. We find the disciplinary charge from October 2020 related to his failure to provide evidence for the period of absence from 22 to 25 September 2020. Because he failed to provide a reason for his absence, the absence was treated as unauthorised (see (580)) and as a result of his continued failure to provide that detail, as falling within the definition of gross misconduct.

583. We should add that whilst by 16 October Mr Ahmed was under a final written warning Mr Miles told us that the reason he decided to commence the disciplinary



investigation and deduct Mr Ahmed's pay was that Mr Ahmed had not provided the MED3 certificate and/or a request how that absence be treated. There was no reference to the final written warning by Mr Miles at that point.

584. Accordingly complaints 12(a) and 12(b) fail. DWP were entitled to conclude permission for his absence had not been given in advance, to treat Mr Ahmed's absence as unauthorised absence and in turn as potential gross misconduct.
585. Before we move away from the victimisation complaints against Mr Miles we have considered whether, our determination at (544) aside, the previous tribunal claims (the protected acts) formed any part in his decision making. For the reasons we give above the conclusions he came to on those points were ones he was entitled to come to in the circumstances based on the evidence before him and his rationales for reaching them were clear. He gave Mr Ahmed repeated opportunities to provide the information requested and in our view was trying to do his best for Mr Ahmed. In our judgment they were in no sense influenced by the protected acts. Similarly, nor did race play a part; he would have come to the same views whether Mr Ahmed had raised grievances or not or was of another race or not.
586. For those reasons the victimisation complaints against Mr Miles fail.

The complaints about Mr Smith

587. In his witness statement Mr Ahmed stated:-

"37. Richard Smith knew I had made ET claims and he was negatively influenced by these and that is one of the reasons he did not deal with the grounds of my appeal properly. He defended the actions of managers involved in a live ET claim (for discrimination), not relevant to the matter he was required to decide, during the grievance appeal meeting. This should have had no relevance on my grievance appeal or his decision



making but the fact he tried to defend managers involved in a live ET claim shows he was influenced by this in his grievance appeal decision.”

588. Mr Smith in cross examination told us that he had no prior knowledge of Mr Ahmed of the background to Mr Ahmed’s complaints. He accepted he became aware of the other cases Mr Ahmed was engaged in and his Employment Tribunal claims. However, he stated he did not know the detail.
589. The EqA provides that victimisation occurs where the perpetrator’s reason for subjecting the complainant to the treatment complained of falls within ss.27(1)(a) or (b) (see (538)). Where the alleged perpetrator does not know or believe that a protected act has been done it is difficult to see how the perpetrator’s reason for putting the complainant to a detriment can fall within ss.27(1)(a) or (b).
590. Here Mr Smith told us he did not know what the Tribunal complaints related to, expressly refuting knowing the detail of them. He was not asked about what he believed they included. He was cross examined after Mrs Le Fort (see (620)). No basis to contradict his evidence was put other than assertion and we find he was a credible witness. Given that was so we accept his evidence and find he was not aware, and on the basis he was not challenged and had denied knowledge, nor did he believe that Mr Ahmed’s previous Tribunal claims included complaints under the EqA. The rationale we give at (543) again applies. Mr Smith’s reasons for any treatment cannot therefore fall within s.27(1) and the victimisation complaints so far as they relate to him must fail. Notwithstanding that we have gone on to consider the detriments alleged against him.
591. Complaint 12(c) [Claim 6] concerns Mr Smith not dealing with the grounds of Mr Ahmed’s grievance appeal of 7 April 2021 properly ⁵⁴:-

⁵⁴ These complaints are all duplicated in issues 18(e)(i)-(vii) concerning direct discrimination.



12(c)(i) HR had pre-prepared various plans of action for Pete Miles to take against the Claimant on his return from absence, demonstrating bad faith;

12(c)(ii) The grievance did not deal with Pete Miles' manager's (Julie Barr) involvement i.e., her advice given in regards to unauthorised absence/deducting wages;

12(c)(iii) The conclusion Pete Miles had no choice but to treat the Claimant's absence for the period 22/09/2020 - 25/09/2020 as sickness ignoring that his absence could have been covered with special leave or offsetting his absences with annual leave;

12(c)(v) The conclusion "Pete Miles followed the correct process in treating the period 15/9/20 – 25/9/20 as unauthorised absence."

592. We address these together as they are linked by Mr Ahmed [HA/25]: **"... Peter Miles wasn't interested in what I had to say and was set on following premeditated steps dictated to him by HR and his manager Julie Barr [p239]"** and (iii) and (v) form part of Mr Smith's rationale for (ii).
593. As to HR's action plan whilst we accept that the HR advisor, Mr Brown did make inappropriate comments the complaint of victimisation against him has been withdrawn. As to Mr Miles' involvement he was open and frank with Mr Ahmed about what had occurred in the discussion with Mr Ahmed. In our view that showed he felt the comments were wrong and that he distanced himself from them.
594. Mr Miles accepted [PM/31] he took advice from Ms Barr (who in turn took advice from the group HRBP Mrs Le Fort, who advised to start investigating the unauthorised absence). Whilst she is not specifically named we address Mrs Le Fort's involvement starting at (619).



595. Nor did the original grievance name Ms Barr, it specifically stated it was only against Mr Miles and Mr Brown [231]. The appeal however clearly referenced the involvement of managers (171.1). The involvement of Ms Barr stems from the quote from Mr Ahmed's witness statement at [HA/25] (see (592)) which references [239] which in turn relates to a query from Mr Ahmed asking why Ms Barr had decided that Mr Miles should not conduct the Investigation into Mr Ahmed's alleged misconduct. The context to that was that following Mr Ahmed's grievance against Mr Miles Ms Barr had asked the District Appeal Allocation Manager to find an alternative Investigation Manager. Mr Ahmed wanted to know why Ms Barr had become involved in the disciplinary process when the HR complex case team were dealing with it.
596. As we state above the investigation was sent back to Mr Ahmed's office and Ms Moore, a colleague of Mr Miles, and who reported to Ms Barr was initially appointed to deal with it. Ms Moore declined to become involved.
597. Whilst Mr Smith did not directly address those concerns Mr Ahmed did not specifically relay that he put them in those terms to Mr Smith. The only direct reference to Ms Barr in the amended notes of the meeting was in relation to not approving special leave [1048]. Instead we find the way they were put based on the evidence before us was that there was a plan on the part of HR and managers to discipline Mr Ahmed. The compliant before us is thus in a different form to that before Mr Smith.
598. Mr Smith's role and what he did was to decide if he should uphold Mr Ahmed's grievance appeal. Mrs Street had already determined that the (in)actions of Mr Miles and Mr Brown warranted sanctions and we accept that was done. Mr Smith found that there was no advance agreement how the absence would be treated, that Mr Miles was entitled to treat Mr Ahmed's absence as sickness, that there was a personal responsibility on Mr Ahmed's part to keep in touch (and regarding understanding the reason for the investigation by not engaging in the process) and



when the further medical certificate was not forthcoming that resulted in unauthorised absence procedures being followed and a withdrawal of salary for the period (see (176)).

599. Mr Smith specifically addressed the issue of alternative ways of addressing the absence concluding these were discussed, and spelling mistakes aside, we find he intended to say that these did not appear to have been pursued. He addressed the allegation the sick note had been provided under duress and found the evidence did not support this. He concluded that the correct action had been taken and Mr Ahmed had been given ample time to provide the medical certificate (that his findings identified was required).
600. We find based on what was before him that Mr Smith was entitled to come to the views he came to and that the advice given by HR and steps taken by Mr Miles accorded with DWP's practice generally, namely it was for Mr Ahmed to account for his absence, to evidence that and if not what the consequences were.
601. The next complaint concerning Mr Smith relates to issue 12(c)(iv) namely ignoring DWP Guidance that states stress is not a medical condition; this claim duplicates those at 18(c) & (e)(iv) (see (721) which also identifies that 18(e) has been withdrawn).
602. It is also in similar form to that at 27(i) (claim 8) "For managers to ignore DWP guidance and an occupational health report relating to Mr Ahmed's 4 days absence stating that stress is not an illness but an adverse reaction to work issues". We therefore deal with them together.
603. In his witness statement Mr Ahmed said this :-

"26. [Note: DWP procedures explicitly state stress is not an illness but, in the context of employment, an adverse reaction to pressures of work/work environment [p643]. OH informed managers of the same. My

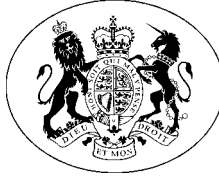


behaviour in going home to await the disciplinary decision that had affected my mental state was entirely consistent with this, as was my returning after the disciplinary decision was returned i.e. the removal of stress].”

604. As to issue 12(c)(iv) we find Mr Smith did not ignore that guidance. He expressly stated he had no doubt that the earlier investigation was causing Mr Ahmed anxiety and that Mr Ahmed was struggling to come to terms with potentially being dismissed while on duty in the office (176). Mr Smith was clear the concern included the number of investigation officers (and the length of the investigation) and that Mr Ahmed was unclear on what the allegations against him were. What Mr Smith found was that Mr Ahmed again did not engage in the process and in so doing he exacerbated the stress and anxiety. Those matters aside Mr Ahmed does not explain how he was put to a detriment by that. That claim accordingly fails.
605. As to 27(i) Mr Ahmed does not expressly identify in the claim or witness statement who those managers were, how he states the guidance and advice was ignored, when that occurred or how that put him at detriment. Without that detail this head also fails. That is reinforced by the potential conflict in the allegation. The extract we quote above from his witness statement explicitly states that he returned when the source of the stress had been removed. The actions of the managers when deciding amongst other matters, to investigate and discipline him related to his actions after he returned and thus after the stress he refers to at [HA/26] had been removed.
606. We address the next two issues together.

12(c)(vi) The Claimant’s absence for 4 days was being treated as potential gross misconduct;

12(c)(vii) The conclusion that it was fair and lawful for the Claimants’ wages to be deducted for unauthorised absence, ahead of a proper investigation,



when the Claimant had been given permission to be absent from work and not instructed to return before he did.

607. We find that Mr Smith expressly did not come to these conclusions. That was not his role. He was being asked to determine if Mr Miles was entitled to come to that view. Mr Smith found Mr Miles was for the reasons we give above.

608. Mr Ahmed raised in cross examination what he considered to be an inconsistency with Mr Smith; in his outcome Mr Smith stated his decision was final and yet in his oral evidence stated that did not mean in future the leave Mr Ahmed took could not be reconsidered.

609. In our judgment Mr Ahmed was conflating two issues

609.1. whether a final decision had been made regarding the disciplinary issues (which was outside the ambit of the Mr Smith's grievance) and

609.2. the issue for Mr Smith, namely was Mr Miles entitled to come to the decisions he did.

610. For those reasons those claims also fail.

611. We address at (697) the deduction of pay and this predetermining the disciplinary issue on that point.

612. Mr Smith accepted ***"5. I knew that there had been ET claims, but I did not know any of the detail. I did not know that there had been a disciplinary investigation before the case was allocated to me and I never knew any of the details. Hafeez himself mentioned other tribunal cases to me, but I tried to steer him away from this by saying that I was not there to discuss other cases."***



613. We accept Mr Smith's account that whilst he was aware of the tribunal claims he was not aware of the detail. Absent knowledge of that detail they could not be protected acts. In any event we accept his account the previous tribunal claims (the protected acts) played no part in his decision making. We find he was entitled to come to the view he came to on those matters came to on those matters and the reasons for the conclusions he came to are clear. His decision was in no sense influenced by the protected acts. The victimisation complaints against him fail.

The complaints about Mrs Devi

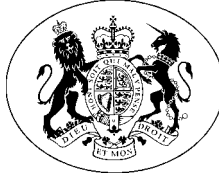
614. At (364) we set out how Mrs Devi accepted she was aware of the grievances and disciplinary processes that Mr Ahmed was involved in and that his relations with several managers had broken down, she did not comment on her knowledge of any protected acts. She was cross examined after Mrs Le Fort (see (620)) and thus he was aware of the need to challenge her directly on that point. He did not.

615. Issue 12(d) (Claim 6) relates to Mrs Devi's⁵⁵ decision of June 2021 to pursue disciplinary action against Mr Ahmed for unauthorised absence after his grievance was partially upheld.

616. Whilst the grievance was found to have been partly upheld, Mr Smith had identified Mr Ahmed had still failed to provide an explanation for his absence despite having been given an opportunity to do so and warned what the consequences could be.

617. Whilst continuing the disciplinary action was potentially detrimental treatment Mr Ahmed did not provide in our view sufficient evidence to show how the decision to pursue disciplinary action against him for unauthorised absence detrimental treatment was linked to the protected acts such that the burden shifted. That aside we are able here to make a positive determination that the decision to pursue the

⁵⁵ The complaint against Mr Iqbal was withdrawn



disciplinary action arose from Mr Ahmed's failure to provide a MED3 certificate or another explanation for the absence having been warned of the need to do so. Absent an explanation for his absence DWP were entitled to treat Mr Ahmed's absence as unauthorised and to pursue disciplinary action against Mr Ahmed. Mr Smith made clear before us that it would still have been open for Mr Ahmed to make an application for leave in some form (or it must follow that medical evidence). He did not until many months after the date for doing so had expired. We find it was Mr Ahmed's failure to do that was what was caused DWP to pursue disciplinary action against Mr Ahmed and his previous claims played no part in that.

618. Before we move away from this issue, that explanation aside, the evidence before us does not in our judgment does not support the claim that the previous tribunal claims (the protected acts) formed any part in Mrs Devi's actions.

The complaints about Mrs Le Fort

619. In contrast to several of the other witnesses against whom Mr Ahmed alleged victimisation, having taken her to a witness statement dated 7 February 2022 she had provided in relation to an earlier claim [1053] Mr Ahmed specifically asked Mrs Le Fort if she knew he had made a protected act. Having initially indicated that that claim and this were the only ones she was aware of she accepted the earlier claim included a complaint of discrimination and was a protected act.
620. That answer aside we find Mr Ahmed was aware what needed to be put to witnesses in in relation to victimisation complaints, (or at least by the point his cross examined Mrs Le Fort). His questions of Mrs Le Fort demonstrated this. She was the third of DWP's witnesses (see (44)). Mr Ahmed was by this time well versed in bringing Tribunal claims, and given our findings was well able to research and raise points of DWP's internal procedures (see (55, 283 & 284)).



621. Mr Ahmed alleged Mrs Le Fort was ***“45. ... on a blind crusade to see me dismissed, because she felt personally offended that I had brought, and succeeded in, a previous ET claim”***.
622. Issue 12(e) [Claim 6] related to Mrs Le Fort improperly attempting to influence Paul Szyszko, the disciplinary investigation manager, in the unauthorised absence case:-
- 622.1. 12(e)(i) denying Mr Ahmed an independent disciplinary investigation manager; and
- 622.2. 12(e)(ii) attempting to influence the outcome of disciplinary procedure (find Mr Ahmed had a case to answer and was guilty).
623. Our findings as to the involvement of Mrs Le Fort are at (119) and then again starting at (210). Contrary to the assertion by Mr Ahmed, we find Mrs Le Fort’s involvement was proper; as a HR business partner she was a first point of contact for decision makers and as Mr Szyszko identified it was routine for HR to become involved. Similarly Ms Hoare.
624. Mr Ahmed’s general challenge to both (and the independence of other decision makers) was that their involvement was part of an overarching to decision to dispense with him as an employee. The evidence before us does not support that conclusion. The number of claims and complaints Mr Ahmed was involved in made it virtually impossible for any HR advisor to have had no prior involvement as Mr Ahmed seems to suggest should have been the case. Knowledge of certain matters was in event necessary to address the basis of the complaints. Further Mr Ahmed’s own actions informing decision makers of prior events and his grievances also made that impossible and also appears to us to suggest he either had no issue with that or was informing them to prevent them having any further involvement and thus obstruct the various processes or to intimidate them.



625. As we found elsewhere whilst Mr Ahmed challenged the independence and behaviour of certain managers, as he himself pointed out referencing Ms Nikki Davies querying the “deduction” from his pay, that did not necessarily affect their ability to be objective and challenge how matters were being addressed. As we state that was something he was not aware of when he raised a grievance about her (see (321)).
626. However beyond that Mr Ahmed alleges Mrs Le Fort and others were trying to influence matters.
627. We find that rather than suggesting any form of influence or prejudgment from HR (or Mr Szyszko) the email chain [278] indicates that having raised a grievance Mr Ahmed Mr Szyszko rightly wanted to understand what it related to. Had he not done so Mr Ahmed rightly could have complained that Mr Szyszko was not fully aware of the circumstances and background. Indeed in our view the note of the Mr Szyszko’s discussion with Ms Hoare on 5 July [283-284] suggested that it was clear part of Mr Szyszko’s role to identify how the absence should be categorised and that he had an open mind.
628. We find that neither of the two substantive allegations 12(e)(i) & (ii) against Mrs Le Fort are made out. They are not supported on the facts. Mrs Le Fort did not deny or attempt to dent Mr Ahmed an independent disciplinary investigation manager. Nor did she attempt to influence the outcome of disciplinary procedure.
629. For the reasons we give we find Mrs Le Fort’s actions were consistent with her role as a HRBP and proper and likewise Mr Szyszko’s as a decision maker. The steps both took were because each was trying to progress matters as best they could. We find the evidence does not support that they were done in any sense due to the protected acts.
630. Like Mrs Devi, that explanation aside, again the evidence before us does not in our judgment does not support the claim that the previous tribunal claims (the



protected acts) formed any part in Mrs Le Fort's actions. The victimisation complaints against her also fail.

The complaints about Miss Minto

631. Ms Minto accepted was aware that Mr Ahmed had made previous tribunal claims. We find this was no later than 15 February 2022 (see (300)). In his witness statement Mr Ahmed did not assert that Miss Minto was aware of the content of his tribunal claims nor did he directly put to her that she was aware what those complaints related to. Instead he asserted he had alleged race discrimination. We find that was a conscious decision to ask the question in that way. Mr Ahmed by that time had asked and seen the panel ask questions concerning this issue once they were raised by him or other witnesses. She was cross examined after Mrs Le Fort (see (620)). If there was evidence Miss Minto was aware of the contents of the previous tribunal claims he would have asked her about that. He did not.
632. Miss Minto accepted he had alleged race discrimination in texts to her. In his witness statement he asserted ***"108. ... She wouldn't have treated me the same if I had been Black, like her, or White."*** The context of the questions he put to her on this point related to complaints about her. He did not point her to an example where he had referenced the content of the tribunal claims. If he had wished to assert that he should have done so directly. He did not. We find she was not so aware. Again, absent that knowledge that claim must fail.
633. The sole allegation of victimisation against her concerns issue 12(g) [Claim 6] Miss Minto's decision to refer Mr Ahmed to a decision-maker for possible dismissal and demotion. We found that occurred on 22 April 2022 (357). We have continued to address the substance of the complaint against her.
634. As we state starting at (520) in relation to issue 8(d) above the reason we found Miss Minto made the referral was because she considered Mr Ahmed was not co-operating and she had received specific OH advice that all other alternatives to



getting to engage having failed that appeared to be the only available course. Based on the evidence before us she was a highly credible, indeed far in a way the most credible of all the witnesses from whom we heard. We find that was the reason she acted as she did and the protected acts played no part in that decision.

635. For those reasons the victimisation complaints against Miss Minto fail.

The complaints about Mr Bains, Mrs Rahman and Ms Scriven

636. Mr Bains told us [BB/4] when he took over as Mr Ahmed's line manager he was made aware by Mrs Devi that there was an ongoing disciplinary matter concerning him where Mrs Rahman was the decision-maker in an [462]. He told us and we accept as they had already commenced and he was not the decision maker he was not aware of the substance of those proceedings at the time. He accepted he was made aware of the content of that internal disciplinary process by Mr Ahmed on 29 June [BB/7] but that he was not aware at the time of managing Mr Ahmed that he had previously brought Employment Tribunal proceedings [BB/16]. Mr Ahmed did not allege Mr Bains was aware of the existence or content of the earlier Employment Tribunal proceedings in his witness statement and nor was he challenged about either. Mr Bains, like Mrs Rahman and Ms Scriven were cross examined after Mrs Le Fort (see (620)). He appeared to us to be a genuine witness and given the absence of either that assertion or challenge we accept he was not aware of either.

637. We address the allegations made against Mrs Rahman's credibility and those underlying the reasons for her actions under challenge at (661 to 665).

638. As we say at (441) whilst Ms Scriven accepted she was aware that Mr Ahmed had had disciplinary action taken against him, she told us she was not aware what that related to and was not aware that he had previously brought Employment Tribunal proceedings. He did not challenge her on that or bring forward evidence to rebut



that other than surmise. We accept she was not aware of that detail. The victimisation complaints insofar as they relate to her must therefore also fail.

639. However, we address Mr Ahmed's complaints against all three as follows.
640. Issue 12(h) [Claim 8] concerned the failure by Mr Bains, Mrs Rahman and Ms Scriven to cover Mr Ahmed's 4 days absence in September 2020 by special, annual or flexi leave or disregard that absence. We do not propose to repeat our determinations at (567 to 572) above save that Mr Ahmed was well versed with DWP procedures and it was (or at the very least ought to have been) clear to Mr Ahmed that it was for him to expressly (rather than impliedly) apply to cover his leave in that manner. Whilst he alleged at points it was implied in his grievance and he did that within his discussion with Mr Bains a few days before the appeal (see (425)) we found he did not do so.
641. We address the assumptions made by Ms Scriven and Mr Bains if that application had been made before starting at (444).
642. If, as Mr Ahmed states he was mentally impaired following his return to work on 28 September 2020 and thus was in no position to apply for some other type of leave etc., he should not have been at work. Yet he told Mr Miles that he was returning to work and then did so.
643. There was no medical evidence from Mr Ahmed's GP or OH that was before us that suggested that he was not fit to work on 28 September 2020. We set out the evidence that dates from shortly after; the OH report of 9 October 2020 at (115). Whilst that identified Mr Ahmed was depressed, and recommended various steps be taken to support Mr Ahmed including a stress risk assessment be undertaken (that was done on 12 October) it did not state he was not fit for work. That claim also fails.

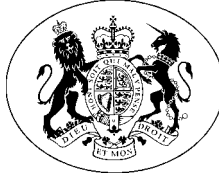


644. Issue 12(i) [Claim 8] relates to Mrs Rahman's decision to dismiss Mr Ahmed. We found above (409 to 411) that she dismissed on the basis of a further act of misconduct during the period of an unexpired warning (not on the basis that Mr Ahmed had committed an act of gross misconduct).
645. Mrs Rahman had given Mr Ahmed repeated opportunities to attend a disciplinary meeting. Having raised a grievance against her he did not participate in that disciplinary hearing (or the grievance). We address first the grievance.
646. Mrs Rahman decided as the grievance related to the way she was conducting the disciplinary she could continue to hear it. We agree that that was a decision that was open to her. The grievance against Mrs Rahman concerned her approach to and conduct of the run up to and holding of the disciplinary hearing. They were also matters that could have formed the basis of any appeal against Mrs Rahman's decision. Mr Ahmed could have chosen to engage in the disciplinary process irrespective of the grievance or appeal. He did not.
647. Within his grievance he complained that she was also undertaking her own investigation, about him being given insufficient time to consider the documents he sought from her and her failure to/delaying the disciplinary hearing so he could do so. Elsewhere he suggested she should have considered those documents without directly identifying their relevance.
648. In the grievance he also complained about her contacting him at the outset (she said she had done so to introduce herself), the way she spoke to him in that call, that she sent him the disciplinary invitation letter and that it cited gross misconduct. As to the latter that was what had been referred to her to address. It is thus unsurprising she did so.
649. Whilst there were changes to the way the charge was put over time we find below, starting at (716), they were not substantive. Mr Ahmed complained that these matters were discriminatory and via his letter of 17 May, acts of victimisation and



bullying, had he been white, he would not have been treated in that way and that he was treated in the way he was because he was Pakistani.

650. As to the issue concerning Mrs Rahman conducting her own investigation from what we could discern these related to the documents Mr Ahmed asked her to provide in his email of 11 April 2022 [391] (see (350)). She told us that whilst she provided those documents [398-416, 417-422, 423-424, 459-461] she did not consider them because they were not relevant. In her view her decision was about whether or not Mr Ahmed had been on sick leave with an appropriate note or was absent from work on another type of leave in September 2020. If those documents were relevant had Mr Ahmed engaged in the process he could have explained how they were. He did not.
651. That highlights a wider point (and a repeated theme) concerning inherent conflicts in Mr Ahmed's stance. In addition to complaining that Mrs Rahman was conducting her own investigation by providing the documents he had sought, he also argued she should have taken them into account when considering mitigation.
652. The latter is also one of the matters from which Mr Ahmed suggests inferences should be drawn (see (695) below). We set out starting at (405) the reasons why we find that Mrs Rahman did address the misconduct allegation in her decision letter and how what we find was the basis on which she determined he was guilty of a repeat of misconduct see (409 to 411).
653. As to the final two inference matters, Mrs Rahman's failure to apply mitigation even though she was aware of mitigating factors from the OH report of 2020 and that she had failed to link his grievance to the decision she had to make. As to the later Mr Ahmed suggested when putting those questions to Mrs Rahman that he did not need to do so as that was implied from his grievance. We found for the reasons we give at (567 to 572) that was not so (see also (639)).



654. As to both when it was put to her in cross examination that she could have taken the OH advice and the length of the disciplinary process into account, Mrs Rahman told us ***“That’s for you to present”***. We agree it was for Mr Ahmed to raise those points. The danger in managers making such assumptions is highlighted by Mr Ahmed’s previous complaints about managers viewing his OH records (e.g. Ms Haines (see (191))) and about making assumptions (e.g. Mr Miles assuming he was sick).
655. For those reasons we decline to draw inference from those matters.
656. Returning now to the way Mrs Rahman conducted herself, she told us [KR/16]
- 656.1. the call between Mr Ahmed and her had been very difficult because he was angry, whereas she had remained very polite and professional, and had not raised her voice, and
- 656.2. she had only gathered the evidence because Mr Ahmed had requested it and she did not consider that that information would form part of her decision.
657. Whilst Mrs Rahman accepted she was upset (see also (378)) Mrs Macauley in her witness statement told us at [PM/10] that whilst Ms Rahman did not appear to be upset, she had expressed that she was angry. We have considered that difference and Mrs Rahman’s reference to the situation starting to appear absurd at [KR/20]. when forming the view we have.
658. The ACAS code provides:-

“Overlapping grievance and disciplinary cases

46. Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal



with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.

659. The ACAS code does not therefore mandate either the suspension of the disciplinary process pending any grievance or that they are dealt with concurrently.
660. Mrs Rahman clearly could have awaited the grievance outcome before proceeding with the disciplinary. She knew when she was due to meet Mrs Macauley. The grievance outcome was sent out on 1 June 2022. It is likely that was only as soon as it was because Mr Ahmed had not attended the grievance meeting, contacted Mrs Macauley or responded to Mrs Macauley's attempts to contact him.
661. The complaints Mr Ahmed made however were all potentially appeal points and could have also been addressed by that route. Mrs Rahman decided to proceed on the basis that ***"18. Despite the Claimant's grievance, I still considered that I was able to remain professional and to carry out my role fairly and impartially."*** One of the issues Mr Ahmed repeatedly raised about managers was that having a grievance raised they simply did not get on with it, instead passed the issue to someone else or awaited the outcome and thus caused delay. In that way it appears he agrees that Mrs Rahman was entitled to proceed but in contrast refused to engage with her. She had clearly given him the opportunity to do so and warned him of the consequences if he did not.
662. The fact that the grievance against her was not upheld supports her decision to proceed. We draw no adverse inferences from her decision to proceed or the upset or anger she felt.
663. We come to that view because Mrs Rahman was a frank and honest witness. Given the weight we attach to her account generally and absent evidence, rather than speculation, to indicate to the contrary, we prefer Mrs Rahman's version of events of their initial discussions. By the time of that discussion we found Mr Ahmed's relationship with DWP and his various line managers had irretrievably



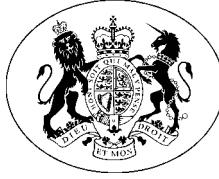
broken down. The extensive emails/texts and other correspondence we have included with various managers and decision makers set out how in our judgment he unreasonably responded and reacted to reasonable requests and unreasonably interpreted reasonable points. We find his perception of his interaction with Mrs Rahman was flawed and his complaint about the way Mrs Rahman spoke to him was part of the continuation of that consistent pattern of behaviour on his account.

664. We find in each case Mrs Rahman had reasonable and proper cause for acting as she did and would not have treated a white (or a Pakistani) member of staff any differently. Further she was entitled to come to the view she came to in the light of the existing final written warning. We find that was the reason she reached the view she came to.
665. As to the influence the protected acts had on her actions, we find Mrs Rahman only became aware of them because Mr Ahmed told her of them and we find they had no influence whatsoever on her actions because she would have acted in the same way with or without knowledge of them. Accordingly, that claim also fails.
666. Issue 12(j) [Claim 8] concerned Ms Scriven's decision to uphold Mr Ahmed's dismissal.
667. Whilst Mr Ahmed put to her the OH advice of 17 August 2017 [62-63]:-

"Current Health Situation

I assessed Mr Ahmed by telephone today; he was referred for Occupational health advice. I understand he is in work with health issues.

Mr Ahmed reports symptoms of stress that he states are entirely due to work related issues, of which his manager is aware. He also describes a history of social anxiety and he completed an online programme 3 months



ago regarding coping strategies. He states this was advised by Birmingham Healthy Minds and he is currently waiting to see if any further treatment or support is required or available. He hasn't seen his GP in recent months regarding the stress and anxiety and I have advised him to do so.

Mr Ahmed also informed me he was diagnosed with Paroxysmal nocturnal haemoglobinuria (PNH) many years ago. This is a rare, chronic, debilitating blood disorder that most frequently presents in early adulthood and is usually continuous throughout the life of the patient. He is not receiving any specific treatment for this.

...

PNH is a lifelong condition. There is potential for him to experience problems in the future, although it is not possible to predict the frequency or severity of such episodes or whether he is likely to require time off work as a result.

The symptoms of stress are not due to an underlying medical condition, they are a reactive response to the perceived work-related issues. They are likely to improve once the issues have been addressed.

The social anxiety is ongoing. More information will be available after his next appointment with Birmingham Healthy Minds.

[Our emphasis]

they were matters he should have raised before Mrs Rahman. Similarly as to points in mitigation. Had Mr Ahmed wished to raise them the onus was on him to do so at the time of the rescheduled disciplinary hearing.



668. DWP accept Ms Scriven proceeded on the basis the appeal was a review rather than rehearing. It relies upon the following extract from its disciplinary procedure [733]:-

“Appeals- Step 3— Considering the appeal

9.13 The Appeal Manager should not reconsider the case in detail but should more broadly consider whether the original decision was one that a reasonable, fair-minded person could have reached based on the facts. They should focus on the reasons for the appeal set out in the employee’s appeal. If new evidence is made available, the Appeal Manager should consider the impact this may have on the final decision.”

669. New evidence in this context is not evidence that was available at the time of the original decision on a relevant issue. Any process requires finality and to allow evidence to be adduced piecemeal prevents that and causes repeat appeals. Thus new evidence does not include the evidence Mr Ahmed could have raised with Mrs Rahman but did not.
670. We summarise what we find was Ms Scriven’s rationale starting at (453).
671. Whilst she did not consider the issue raised concerning Mr Priest because that was not raised before her. We find that neither she nor Mr Priest had realised he had any involvement previously because his involvement was so limited. In any event as we say at (433) Mr Ahmed confuses having no substantive personal involvement in an issue and having had no knowledge of it. Further, we found Mr Priest was sufficiently far removed from the process. As to the notes insofar as there was an issue with them that could be addressed by Mr Ahmed providing his own version/corrections and a view being taken as to which were correct.
672. We found she decided that an application to use an alternative to cover the absence had not been made by Mr Ahmed prior to the disciplinary decision and to



do so after the decision to dismiss was too late as that was what the decision related to.

673. As to mitigation she decided none had been brought forward because Mr Ahmed had not engaged in the process. Item 6 of Mr Ahmed's appeal against dismissal was that the OH report of October 2020 had been ignored. In Mrs Rahman's outcome letter she did not refer directly to that in her decision letter. Instead she merely referencing the self certificate of 6 October 2020 where Mr Ahmed cited the nature of his illness as **depression, anxiety, stress, fatigue, weakness** before also relaying his response to the section, "**what prevented you from working?**" where he stated "**could not concentrate/focus on work tasks/too upset to work. Too fatigued & tired to work.**"

674. The October 2020 OH report identified "**Hafeez's reporting today suggests he is experiencing work related stress attributed to disciplinary matters.**" [58-59]. Ms Scriven decided Mrs Rahman was aware of the OH report of October 2020 because it was in the decision maker's pack Ms Scriven she had been provided with. Ms Scriven went on to conclude:-

"...This Occupational Health report described that you were suffering from stress and then went on to advise what could be done to alleviate this with an emphasis on reducing work-related stressors. However, it follows that if you were sick during the period 22nd September 2020 to 25th September 2020 you should have provided a Statement of Fitness for Work for that period. This point was part of the decision-maker's decision to dismiss you. Therefore, there was no procedural failure in the decision-maker not making explicit reference to this Occupational Health report in her decision." [610]

675. Clearly had Mrs Rahman taken into account the OH report into account it would have been better for Mrs Rahman to have referenced that directly in her decision



letter. That aside Ms Scriven concluded Mrs Rahman had seen it. Ms Scriven clearly considered it and its contents as her rationale makes clear. That OH report did not identify any issues that would relate to the failure to provide an explanation for the absence. The closest the OH report got to that was to say that the stressors could impact on his pace of work and performance. Absent that link that does not explain how that could be a mitigating factor for the failure to provide an explanation for the absence and Ms Scriven was entitled to come to the view she came to in our judgment.

676. As to the other mitigating factors raised in the appeal letter 10 related to the Excessive Length of Disciplinary Process, 11 Not taking into account mitigating factors and 12 Not considering other sanctions other than dismissal. Mr Ahmed complaint's in the narrative to ground 10 related to the delay between the start of the disciplinary process in October 2020 and the outcome of June 2022. In her responses to those three grounds [611-612] Ms Scriven identified the delays to the disciplinary process and required the length of the process be explained to him. we have addressed elsewhere that the delay to that process was in part because of numerous factors including Mr Ahmed's repeated grievances against decision makers (see (479)). As to ground 11 Ms Scriven's decision records
677. As to her comments concerning the grievance about Mrs Rahman whilst Ms Scriven stated that had been concluded on 1 June 2022, prior to Mrs Rahman's decision to dismiss Mr Ahmed, the actuality was that Mrs Rahman had essentially made her decision subject to taking HR advice on 30 May before that outcome (see (393)). Whilst Ms Scriven correctly indicated that no evidence had been provided by Mr Ahmed, the actual issue at play was that Mr Ahmed had not engaged with the process and thus had not been able after the date of the grievance decision to engage with the disciplinary process had he chosen to re-engage. Accordingly, ground 8 of the appeal was that the disciplinary procedure was not paused until the conclusion of grievance. As we say at (660 to 663) Mrs



Rahman was entitled to come to the view that she came to namely to proceed. Furthermore, that is probably an artificial distinction in any event because Mr Ahmed did not engage with the grievance either.

678. Whilst Mr Ahmed alleged the issues of mitigation/explanation were not considered we find that the evidence he advanced within the appeal in that regard had been considered by Ms Scriven but having weighed that she had concluded that did not excuse the failure to provide an explanation for the absence.
679. We address below starting at (754) the other complaints concerning Ms Scriven alone. Those points aside we find she had reasonable and proper cause to come to the view she came to in the circumstances. We find her decision not to uphold his appeal had nothing to do with the protected act or Mr Ahmed's race, nor did she treat him any differently to the way she would have had he been white or not Pakistani.
680. The complaint against her fails.
681. As to 12(k) [Claim 8] the alleged failure of Ms Scriven and Mrs Rahman to provide Mr Ahmed with a chronology / explanation as to why the disciplinary procedure resulting in dismissal took almost 2 years. This references a request in head 10 of Mr Ahmed's appeal [580] ***"I am formally asking for the length of the disciplinary process to be fully explained to me in writing"***. It was addressed in Ms Scriven's outcome of 29 July 2022 [611]:-

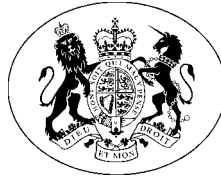
"10. Excessive Length of Disciplinary Process

...

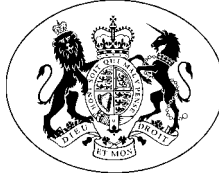
I have requested the length of the disciplinary process to be explained to you, as you have requested. This information will be sent out to you separately and the decision-maker will provide this to you."



682. By 23 September 2022 Mrs Scriven's request had still not been provided to Mr Ahmed and so Mr Ahmed chased a response [638]. On 30 September Ms Scriven informed him that she had contacted Mrs Rahman to follow that up, it was still being prepared and it would be issued as soon as possible [640]. It was eventually provided on 14 November 2022 [642]. Mr Ahmed complains that the response was insufficient and does not address the delays in full. That is not a specific complaint before us. That aside Mrs Rahman explained in cross examination that she could not account for the matters prior to her involvement and when asked why the grievance was not included, indicated that she was not directed to address anything specific and that those were matters he needed to address with other decision makers.
683. The explanation eventually provided was in the form of a very basic chronology that only related to the disciplinary process itself, and not the events leading up to it and took 3½ months to be provided. That limited detail was unhelpful. However the request from Ms Scriven, stemmed from the request from Mr Ahmed. If he had wanted the whole of the process leading up to the disciplinary to be addressed he should have said so explicitly. We find on balance given the view Ms Scriven took in relation to the request that was made, that she would have mandated a response (within reason) to any request from Mr Ahmed for an explanation of the delays.
684. That aside we find it would have been difficult (if not impossible) for Mrs Rahman to have provided the events that preceded her involvement without the assistance of the other individuals involved in the process and/or HR.
685. That aside it is difficult to see what detriment was caused to Mr Ahmed as a result. He had been involved throughout and was in the best position to know which of the delays required further explanation.



686. The lack of detail and delays in the explanation being forwarded, we find they were in no sense caused by the previous claims but the additional work this caused to Mrs Rahman, the lack of clarity in what Mr Ahmed was seeking and insofar as it was wider that the process Mrs Rahman had personally be involved in, the difficulty Mrs Rahman faced providing that without the involvement of others.
687. Again we have again stepped back and considered if the previous tribunal claims (the protected acts) formed any part in the actions of Mr Bains, Mrs Rahman and Ms Scriven. We find they did not. We found that Mr Bains was not aware at the Mr Ahmed had previously brought Employment Tribunal proceedings. Mrs Scriven accepted she was aware that Mr Ahmed had had disciplinary action taken against him, she told us she was not aware what that related to and was not aware that he had previously brought Employment Tribunal proceedings. He did not challenge her on that or bring forward evidence to rebut that other than surmise. We accept she was not aware of that detail. The victimisation complaints insofar as they relate to them two of them must therefore also fail.
688. Whilst he could and should have addressed specifically the elements of the grievances in turn and did not. We find for the reasons we give above the conclusions he came to on those points can be readily discerned and his rationale was clear. The views he reached were ones he was entitled to reach in the circumstances based on the evidence before him and in our judgment were in no sense influenced by the protected acts. Similarly, nor did race play a part; he would have come to the same view irrespective of whether Mr Ahmed had raised grievances or was of a different race.
689. The victimisation complaints against Mrs Rahman also fail.



The direct race discrimination complaints

The legal principles

690. Direct discrimination (like all other forms of discrimination other than harassment) is prohibited by s.39 EqA. Section 13 EqA provides that direct discrimination occurs where because, of a protected characteristic, a person is treated less favourably than another person has been or would have been. That question involves a comparison. The use of “*would*” allows for a hypothetical as well as an actual comparison. In making that comparison s.23 EqA requires that apart from the protected characteristic there must be no material difference between the circumstances of the complainant and the real or hypothetical comparator.
691. It is therefore not sufficient for a claimant to have a protected characteristic and to be treated less favourably for a respondent to be guilty of direct discrimination. Rather the less favourable treatment must be done ‘*because of*’ the protected characteristic. The protected characteristic also need not be the sole or even principal reason for the treatment so long as it has a significant influence (that is *one which is more than trivial*) on the reason for the treatment ⁵⁶.
692. This is not a case where the difference in treatment is indissociable (cannot be distinguished) from a protected characteristic ⁵⁷. The question we have to address is consciously or unconsciously, was the alleged discriminator’s reason for acting as they did? ⁵⁸ Unlike causation, which is a legal conclusion, the reason why a person acted as s/he did is a subjective question and one of fact ⁵⁹.

⁵⁶ [Nagarajan v London Regional Transport](#) 1999 IRLR 572 HL as applied in [Igen v Wong](#) [2005] IRLR 258 at [37]

⁵⁷ An example is [Nagarajan](#) (see above)

⁵⁸ An example is that of the shop keeper given by Lord Phillips in [Governing Body of JFS](#) [2010] 2 AC 728 at [21] “A fat black man goes into a shop to make a purchase. The shop-keeper says ‘I do not serve people like you’. To appraise his conduct it is necessary to know what was the fact that determined his refusal. Was it the fact that the man was fat or the fact that he was black? In the former case the ground of his refusal was not racial; in the latter it was. The reason why the particular fact triggered his reaction is not relevant to the question of the ground upon which he discriminated.”

⁵⁹ [Chief Constable of West Yorkshire Police v Khan](#) [2001] UKHL 48 at [29]



693. The one (subjective) question the tribunal must not concern itself with is *“if the discriminator treated the complainant less favourably on racial grounds, why did he do so?”* That question is irrelevant⁶⁰. Discrimination is not negated by the alleged discriminator’s motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably.

*“... Parliament did not consider that an intention to discriminate on racial grounds was a necessary component of either direct or indirect discrimination. One can act in a discriminatory manner without meaning to do so or realising that one is.”*⁶¹

694. Mr Ahmed refers us to the decision of the EAT in SRA v Mitchell:-

“Evidence of unreasonable and less favourable treatment coupled with a difference in protected characteristic is not sufficient evidence in itself without ‘something more’ to reverse the burden of proof; [the Zafar trap]. ‘Something more’ is required to entitle the Employment Tribunal to infer, in the absence of a satisfactory explanation, a discriminatory reason for the less favourable treatment and thus reverse the burden of proof. In appropriate circumstances the ‘something more’ can be an explanation proffered by the Respondent for the less favourable treatment that is rejected by the Employment Tribunal. The finding that the Respondent had given a false explanation for the less favourable treatment did therefore constitute ‘something more’ and the Employment Tribunal was accordingly entitled, if not bound, to conclude that the Claimant had suffered discrimination.”

695. To that end Mr Ahmed argues that with regards to Mrs Rahman the *“something more”* was

⁶⁰ [R. v Birmingham City Council, ex p. Equal Opportunities Commission](#) [1989] AC 1155, see Lord Goff at 1194.

⁶¹ As Lady Hale put it in [JFS](#) at [57]



- 695.1. *Mrs Rahman's failure to provide a true/adequate explanation for her failure to address the misconduct allegation against me in her decision letter,*
- 695.2. *her failure to determine the proven level of misconduct,*
- 695.3. *her failure to apply mitigation even though she was aware of mitigating factors from the OH report of 2020 and*
- 695.4. *her failure ascertain the relevance of my grievance (an application for special leave to cover my 4 days absence) to the decision she had to make.*

Our conclusions

696. As to issue 15 (a) (claim 6) the excessive time taken to deliver disciplinary outcome we find for the reasons we give starting at (479) above that whilst there were delays in undertaking and providing disciplinary and grievance outcomes there were various reasons at play for these. Having stood back and considered those factors we find Mr Ahmed has not brought forward facts that are sufficient for us to infer that race played a part in those decisions. In any event we have addressed above the reasons that we find we at play in each case for those delays. In our judgment race played no part in those delays.
697. Turning next to issue 15 (b) (claim 6), the deduction of Mr Ahmed's wages by Mr Miles before any formal investigation. We set out at (129) an extract headed "unauthorised absence" from the DWP's Standards of Behaviour Procedures. That procedure requires that the employee should be contacted if an absence is unauthorised and warned of the possible consequences. They expressly include **"... . loss of pay and disciplinary action if the employee fails to make contact or fails to comply with the Procedure for notifying sick absence."**



698. That is a restatement of the basic principle that if an individual does not work they are not entitled to be paid unless they can show they fall within an exemption where the law provides for this – for example sickness and/or holiday.
699. Here Mr Ahmed did not work and thus was not paid. Contrary to his assertion we find for the reasons we give starting at (547) that his absence was not authorised (see specifically (579)).
700. We address starting at (567) Mr Ahmed’s argument that it was not for Mr Miles to assume that Mr Ahmed’s absence was sickness.
701. When Mr Ahmed was asked by the panel having failed on several occasions to answer directly a question put by Mr Paulin if he was fit for work, Mr Ahmed not only refused to answer but indicated that he would consider making an application the judge recuse himself. Whilst that application never manifested Me Ahmed also later went on to state that he could see issues with his argument and reserved his position. On day 12 he told us he was not fit for work until he received the outcome, the reason being he could not return to the environment. When he received the outcome, he was fit to return. That reinforces our view that he was not fit for work.
702. For the reasons we give starting at (564) Mr Ahmed’s subsequent provision of a self certificate for part of the absence, led us to conclude that his non-fitness for work applied to the whole period of that absence and not just the period for which the self certificate was provided.
703. We address starting at (573) Mr Ahmed’s argument that the self certificate was obtained under duress. Having sought to retract it, the consequences of doing so having been pointed out to him by Mrs Devi, he did not do so. Had he considered that to have been obtained under duress we find he would have done so.

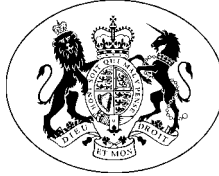


704. In an extract headed “**Q2 How is Unauthorised Absence recorded?**” from The DWP’s Standards of Behaviour Advice it records [1092]:-

“The manager will need to record the unauthorised absence by the fifth working day of unauthorised absence to stop payment from the first day. Pay should be suspended until the manager makes contact with the employee and until appropriate evidence for absence is provided by the employee. Search SOP Guidance - myHub for instruction on how to record unauthorised absence.

If a reply is still not forthcoming within 5 working days from the date of the letter, the manager must take account of all the circumstances and consider whether or not dismissal action is appropriate.” (our emphasis)

705. Whilst Mr Ahmed argues the deduction of pay and the instigation of a disciplinary process was double jeopardy (see (731)) or a prejudgment. We find it was not. We find the default position, absent Mr Ahmed providing appropriate evidence for his absence, was that he would not be paid and if there was still a delay then consideration needed to be given to disciplinary action (and specifically dismissal). If a dispute arose (for instance if the absence was unauthorised) that dispute would need to be considered as part of that disciplinary process. The deduction of pay does not in our judgment lead to the conclusion the matter was prejudged, merely that was the starting point in those circumstances. The second aspect he raises of that argument is treating 4 days absence as gross misconduct in itself suggested the intention to dismiss him was clear from the start of the process [see appeal ground 4 [578-579]. We address this at (580 to 583).
706. For example, if Mr Ahmed had provided, evidence for his absence, the starting point ordinarily would be that he was entitled to be paid for that absence until it was shown through a disciplinary process he was not. In contrast if he had not provided evidence why he had not been at work, the starting point would be that



he was not entitled to be paid for that absence until it was shown through a disciplinary process he was.

707. Thus having failed to account for his absence, the absence was unauthorised and Mr Ahmed was not entitled to be paid for it.
708. That view was that reached by Ms Scriven see her rationale at Appeal Ground 2 – “The decision does not cover the allegation against me” at (440).
709. That being so there was no deduction.
710. Similarly nor was the deduction of pay or the decision to instigate a disciplinary process less favourable treatment. We find Mr Ahmed was treated as any individual would have been, irrespective had they been white, Pakistani or otherwise, in the same circumstances. DWP’s procedures required it. We find Mr Ahmed was treated in the way he was because he was off work, did not provide a reason or otherwise obtain appropriate authorisation for the absence and continued to do so having been warned that his failure to do so could be treated as a disciplinary matter. Given that positive finding we conclude that action was not done because of a protected act and nor did that constitute unfavourable treatment. That complaint therefore fails.
711. Issue 15(c) (claim 6) concerned the allegation that Mr Miles, Ms Haines⁶², and Mr O’Brien treated 4 days of unauthorised absence as gross misconduct. We address this starting at (580).
712. We found that even had this been less favourable treatment or there were facts from which inferences could be drawn that DWP has shown on balance this was done for a non discriminatory reason; Mr Ahmed’s repeated failure to comply with its request to provide an explanation for his absence. That complaint also fails.

⁶² The claim against Mr Szyszko was withdrawn.



713. Issue 15(d) (claim 6) relates to Mrs Le Fort interfering with the independence of the disciplinary process by:-
- 713.1. 15(d)(i) denying Mr Ahmed an independent disciplinary investigation manager,
- 713.2. 15(d)(ii) attempting to influence the outcome of disciplinary procedure (the finding Mr Ahmed had a case to answer and was guilty);
714. This issue is in almost identical terms to the victimisation complaints which we address starting at (619) above. In relation to the victimisation complaints we made a positive determination that not only did the parallel victimisation complaints to issues 15(d)(1) & (ii) not occur, but in any event we found the reason for the treatment was in no sense because of the protected acts. We found at (629) the steps Mrs Le Fort (and Mr Szyszko) took were because each was trying to progress matters as best they could. They were in no sense connected to Mr Ahmed's race. That complaint also fails.
715. Issue 15(g) (claim 6) concerns Mrs Rahman changing the disciplinary charge at the decision-making stage. The disciplinary charges put by Mr Miles on 16 October 2020 and Ms Moore on 23 October 2020 were in substantively identical terms (see (127) and (145)). On 8 September, Mr O'Brien wrote to Mr Ahmed stating that he had been appointed as the Independent investigation Manager and he was to investigate Mr Ahmed's :-

"... unauthorised absence covering the period of the 21/9/20 to 25/09/20 which was deemed as gross misconduct. ..." [330-331 & 350-352]

716. Ms Davies wrote to Mr Ahmed on 3 March 2022 inviting him to attend a formal disciplinary meeting on Friday 11 March to address the matter we relay at (318). Mrs Rahman wrote to Mr Ahmed on 8 April 2022 inviting him to a disciplinary hearing at its Walsall office on 27 April 2022. The set out the disciplinary charge



she was addressing at (349). Save for the words in bold and underlined below which she added (we differentiate between the two for ease of reference (see (718))), the allegation Ms Rahman relayed was identical to the allegation issued by Ms Davies (see (317))

*“The formal meeting will consider the allegation that from the 22nd September 2020 up to and including the 25th September 2020, you were absent from work without providing either a Statement of Fitness for Work from your GP/medical professional or a request for Special Leave, **Annual Leave or Flex Leave.** I have enclosed a copy of the investigation report which may only be shared with your companion. Sharing it with other individuals may be viewed as serious misconduct.”*

At the end of the meeting I will decide what further action to take. I must make you aware that the allegations concerning your unauthorised absence, may result in a penalty under Gross Misconduct. As your absence from 22 September 2020 to 25 September 2020 is unexplained, it has been passed to me to decide on whether this period was unauthorised absence.”

717. We find that whilst the wording of the allegation Mrs Rahman relayed did differ to that issued by Mr Miles, Mr O'Brien & Ms Davies the differences were not material. The fundamental allegation made was that Mr Ahmed was absent between 22 and 25 September 2020 and had not accounted for that absence.
718. On 30 April 2022, Mrs Rahman wrote to Mr Ahmed to reschedule the disciplinary meeting for 18 May 2022 [465-467]. Save for omitting the words underlined above the allegation did not substantially differ to that in her invitation letter of 8 April (see (335)). When she sought to reconvene the meeting via her letter of 27 May 2022 [484-486] she reverted to the wording of her letter of 8 April 2022.



719. In addition to our finding there was no substantive difference in the disciplinary charge, we also found for the reasons we give at (555) that Mr Ahmed was under a duty to provide reasons for an absence. He did not do so prior to his request to Mr Bains until a few days before the appeal hearing (see (425)). For the reasons starting at (555) Mr Miles was rightly entitled to determine Mr Ahmed was not fit for work and treated his absence as sick leave.
720. We address starting at (567) our conclusions concerning the alternatives to that being treated as sick leave. In essence Mr Ahmed knew or ought to have known that the charge against him was that he had been absent from work without having sought and obtained approval for that absence using one of the categories of authorised absence. That complaint therefore also fails.
721. Issues 18(a) & (b) are no longer pursued. Whilst Mr Ahmed also confirmed the direct race discrimination complaints solely against Mr Smith were withdrawn he specifically limited that to issues 18(d), (e) & (f). That means that issue 18(c) remains, namely, that Mr Smith ignored DWP guidance about stress not being a medical condition. Whilst that is a duplicate of one of the withdrawn direct discrimination complaints against Mr Smith (issue 18(e)(iv)) and thus we might infer that it too was withdrawn, given that was not done expressly we have addressed this complaint starting at (601) above albeit in the context of the victimisation complaint.
722. We found that Mr Smith accepted the earlier investigation was causing Mr Ahmed anxiety, that Mr Ahmed was struggling to come to terms with potentially being dismissed while on duty in the office, and Mr Smith did not ignore the guidance but found that Mr Ahmed did not engage in the process and in so doing he exacerbated the stress and anxiety. Nor as we say above did Mr Ahmed set out what the acts whereby Mr Smith ignored that advice. For those reasons issue 18(c) also fails.



723. Two further direct discrimination complaints from claim 8 remain to be addressed namely issues 21(a) & (b). They duplicate two of the victimisation detriments (12(i) & (j) although issue 21(a) also touches upon issue 8(e) and 21(b) upon issue 8(f). Issues 21(a) & (b) also form part of the unfair dismissal complaints.
724. Issue 21(a) (claim 8) relates to Mrs Rahman's decision to dismiss Mr Ahmed. We address the various points Mr Ahmed suggests that we draw adverse inferences from at (652 & 653). We address in the context of the victimisation complaint starting at (644) how Mrs Rahman was entitled to come to the view she came to at (409 to 411). We find that rationale was the reason she dismissed Mr Ahmed and his race played no part in that decision. That complaint also fails.
725. Issue 21(b) (claim 8) relates to Ms Scriven's decision to uphold Mr Ahmed's dismissal. We have already addressed this starting at (666) albeit again in the context of the victimisation complaint. We found she was conducting an appeal by way of review of the decision maker's decision. It was not an opportunity for new evidence to be provided and she had reasonable and proper cause for coming to the view she came to in the circumstances. We find her decision not to uphold Mr Ahmed's appeal was in no sense connected to Mr Ahmed's race, nor did she treat him any differently to the way she would have had he been white or not Pakistani. That complaint also fails.

The unfair dismissal complaint

The legal principles

726. Where, as here, a claimant was an employee, has been continuously employed for 2 years, and a brought a claim for unfair dismissal within the relevant time limits the employee concerned has the right not to be unfairly dismissed⁶³.

⁶³ s. 94 Employment Rights Act 1996



727. In such cases it is for an employer to show the reason (or, if there was more than one, the principal reason) for dismissal was one of the potentially fair reasons. The potentially fair reason relied upon here is conduct [163 at [31]].
728. The "reason" for dismissal refers to the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss ⁶⁴ (or, as it is sometimes put, what "motivates") the decision ⁶⁵. That includes information coming to a respondent's knowledge on the hearing of any appeal ⁶⁶.
729. If a potentially fair reason is shown by the employer, the Tribunal must then go on to assess the fairness of the dismissal. The starting point for that question is the words of s.98(4) Employment Rights Act 1996 ("ERA"). The burden of doing so is neutral:-

"...the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

730. The Tribunal must not carry out its assessment of the reasonableness of the employer's conduct using its own subjective views as to what was the right course to adopt ⁶⁷; in many, (though not all) cases there is a "**band [sometimes called**

⁶⁴ Per Underhill LJ in [Royal Mail Ltd v Jhuti](#) [2017] EWCA Civ 1632. That is subject to the possible qualifications discussed at [62 & 63] and "it is the [ET's] duty to penetrate through the invention rather than to allow it also to infect its own determination"

⁶⁵ see also [The Co-Operative Group Ltd v Baddeley](#) [2014] EWCA Civ 658 [41]

⁶⁶ Browne-Wilkinson P in [Sillifant v Powell Duffryn Timber Ltd](#) [1983] IRLR 91 (EAT) at [95] approved by Lord Bridge in [West Midlands Co-Operative v Tipton](#) [1986] IRLR 112 (HL)

⁶⁷ [Orr v Milton Keynes](#) [2011] ICR 704 CA



range] of reasonable responses” within which one employer might take one view, and another might quite reasonably take another. The role of the tribunal is to decide in the circumstances of each case whether the decision to dismiss and the procedure adopted fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal and preceding procedure falls within the band the dismissal is fair. If outside the band, unfair⁶⁸.

731. Mr Ahmed raises an issue he describes as **“double jeopardy”**:-

“The fact my wages were deducted for unauthorised absence ahead of an investigation and then followed by a disciplinary procedure for alleged unauthorised absence constituted double jeopardy and was unfair (see R (on the application of Coke-Wallis) v Institute of Chartered Accountants of England & Wales [2011] (Supreme Court)). Investigation manager Paul Syszsko and first Decision maker Niki Davies both agreed that deducting 4 days wage before an investigation did not appear rational. The fact I was subjected to a disciplinary process that resulted in my dismissal after the deduction of my wages 2 years earlier for the same cause of action is double jeopardy. No reasonable employer would have done this and DWP procedures do not allow this.”

Our conclusions

732. We found at (63-64) that on 14 September Mr Ahmed told Mr Miles in essence that he wanted to go home and that he would return when he received the disciplinary outcome. We found that was due to the effect the possibility of being walked out of the office as a result of the outcome of the first disciplinary process.

733. We found that as a result Mr Miles was entitled to conclude that Mr Ahmed was not fit to undertake his role and that Mr Miles took that view. DWP’s failure to action

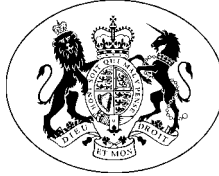
⁶⁸ [Iceland Frozen Foods Ltd v Jones \[1982\] IRLR 439 EAT](#)



that as an attendance management process does not detract from that in our view (see (565 to 566)). That he did so is supported by their exchanges and also documented as being the reason for the later OH advice of 9 October (see (115)).

734. That is reinforced by the contents of the albeit subsequent stress risk assessment and OH report (***“work related stress for 15 months”*** and the opinion therein ***“Hafeez's reporting today suggests he is experiencing work related stress attributed to disciplinary matters. This appears to be all consuming such that it is affecting his sleep and daily activity at work and home”***). That was further supported by Mr Ahmed providing a self certificate for sickness for first part of the period of the absence (15-21 September) (see (114)).⁶⁹
735. For the reasons we give starting at (547) Mr Ahmed was absent during that period, had not been given permission to be absent, it was his responsibility to account for that absence and he had not done so. We address Mr Ahmed's assertion that the self certification was provided under duress starting at (573).
736. Given Mr Ahmed told Mr Miles he would not be returning until he had received the outcome from Ms Musson we find that Mr Miles was entitled to conclude at the start of that absence that Mr Ahmed would not be fit to attend until he received that outcome. We found that the absence continued from 15 to 25 September 2020 inclusive and in the absence of another explanation being provided Mr Miles was entitled consider that reason would apply to the whole period of that absence (see (564)).
737. Neither the self certificate nor the OH report referred to the absence being related to the PNH and that is at odds with Mr Ahmed's account of the reason he gave to Mr Miles (which Mr Miles does not dispute) both at the time and subsequently.

⁶⁹ Mr Ahmed suggests that self certificate was obtained under duress. We reject that view for the reasons we give starting at (573).



738. In the absence of an explanation being provided for that absence, DWP's starting point was that Mr Ahmed was not entitled to be paid until the matter had been investigated and the investigation concluded. For the reasons we give at (705) Mr Ahmed's analysis starts from the premise he was entitled to be paid if he did not turn up for work and/or provide an explanation. That is wrong in our view and runs counter to general working practices and the law. We set out why the provision or absence of the explanation identifies what in our view is the starting point rather than predetermining any subsequent investigation or process and who has the burden of proving or disproving those things at (706).

The issues

739. Issue 27(a) (claim 8) concerned treating the 4 days absence in September 2020 as gross misconduct when DWP guidance indicates 4 days unauthorised absence is only minor misconduct.
740. We found for the reasons we give starting at (582) above that DWP did not treat Mr Ahmed's alleged absence as potential gross misconduct. Instead the disciplinary process (and deduction of his wages) ensued because he failed to provide a reason for his absence, as a result the absence was treated as unauthorised (see (579)) and as a result of his continued failure to provide that detail, as falling within the definition of gross misconduct.
741. Issue 27(b) (claim 8) is that the 4 days absence to be treated as misconduct, gross or otherwise, in circumstances it had been caused by DWP's bad treatment of Mr Ahmed and the absence was disability-related – DWP had subjected Mr Ahmed who was disabled, and suffers from fatigue and stress, to a 15 month disciplinary procedure started in July 2019 with no regard to his welfare.
742. This issue is based on a false premise. As we state above at (649) the disciplinary proceedings related to the failure to account for the absence not the absence itself. Mr Ahmed was dismissed having been absent without authorisation and having



failed to provide an account for that absence during a period when he was subject to a final written warning (409 to 411). As we also state at (576) Mr Ahmed had returned to work by the time he was expected to provide that explanation and was asserting he was fit to work. We found at (732) he was absent because the effect the possibility of being walked out of the office as a result of the outcome of the first disciplinary process was having on him. We found at (737) that was connected to his PNH. This complaint also fails.

743. We address issue 27(c) (claim 8); treating Mr Ahmed's 4 days absence as misconduct when he had sought and obtained his manager Peter Miles' permission before going absent and when he was not instructed to return to work at any point during his absence at (545.2) above
744. We turn to the following three issues together
- 744.1. 27(d) (claim 8) Mr Miles demanding a self-certification / fit note from Mr Ahmed when he was maintaining he was not sick,
- 744.2. 27(g) (claim 8) relates to the managers Mr Miles, Mrs Rahman and Ms Scriven having an expectation that Mr Ahmed fraudulently obtain a fit note from his GP to cover his 4 days absence, and
- 744.3. 27(h) (claim 8) concern Mrs Rahman and Ms Scriven classing Mr Ahmed's 4 day absence as sick when he maintained he was not sick for these days and they had no evidence to support their assertion that he was.
745. We found for the reasons we gave at (555 to 565) that Mr Miles was entitled to form the view that Mr Ahmed needed to provide a reason for his absence and why Mr Miles was entitled to conclude in the absence of a positive alternative explanation being put forward, that it was sickness (560 to 561). Further we found contrary to the assertion made by Mr Ahmed before us, it was for Mr Ahmed to account for his absence and if he wished to assert it was for a reason other than



sickness it was for him to provide evidence to rebut that (see (555) and the following paragraphs). We considered if the failure to action an attendance management process caused us to detract from that view and we decided it did not (565 to 565). We address why Mrs Rahman and Ms Scriven were entitled to come to the views they came to at (766 and 774 to 775).

746. We have already addressed the following three matters starting at (639) above:-
- 746.1. Issue 27(e) (claim 8) treating Mr Ahmed's 4 days absence as misconduct without DWP having first offered Mr Ahmed a fair opportunity to cover his absence by special, annual or flexi leave;
 - 746.2. Issue 27(k) (claim 8) Mr Bains refusing Mr Ahmed special, annual or flexi leave to cover his 4 day absence when he requested it in August 2022 (Ms Scriven been copied in);
 - 746.3. Issue 27(l) (claim 8) Ms Scriven concluding that Mr Ahmed had not requested special, annual or flexi leave when she knew he had but it had been refused;
747. We address issue 27(f) (claim 8) namely Mr Miles deducting 4 days wages from Mr Ahmed for the unauthorised absence and then conduct an investigation into the same unauthorised absence (which Mr Ahmed indicates shows pre-judgment) starting at (697) above.
748. We address starting at (601) issue 27(i) (claim 8) managers ignoring DWP guidance and an occupational health report relating to Mr Ahmed's 4 days absence stating that stress is not an illness but an adverse reaction to work issues.
749. Issue 27(j) (claim 8) concerned Mrs Rahman failing to address the allegation she made in her disciplinary invitation letter in her disciplinary decision. We found she did. We set out what we found was the essence of the allegation against Mr



Ahmed at (717). In her decision she made clear findings on that (see (405)). For those reasons that claim also fails.

750. As to issue 27(m) (claim 8) the disciplinary procedure into alleged unauthorised absence taking almost 2 years to complete, we address the delays concerning the disciplinary procedure and our positive finding as to the reasons for them starting at (479) and (696).
751. We take the next two issues together as they relate directly or indirectly to the failure to make reasonable adjustments or ancillary points:-
- 751.1. Issue 27(n) (claim 8) Mrs Rahman and Ms Scriven ignoring mitigation in that they were aware/or should have been aware the effects of Mr Ahmed's disability and bad treatment by DWP had caused his 4 days absence i.e., Mr Ahmed would not have taken the 4 days absence had the previous disciplinary procedure not taken 15 months;
- 751.2. Issue 27(s) (claim 8) Ms Scriven not making reasonable adjustments for Mr Ahmed and allow him to cover his 4 days absence with special, annual or flexi leave;
752. For the reasons we give at (649 & 742) again this issue is based on a false premise. The disciplinary proceedings related to the failure to account for the absence not the absence itself. Mr Ahmed was dismissed having been absent without authorisation and having failed to provide an account for that absence during a period when he was subject to a final written warning (409 to 411). Thus, the alleged cause and effect issue has no relevance. Nor has Mr Ahmed shown how his failure to provide an account for his absence flows from his disability.
753. Whilst Mr Ahmed criticised Mrs Rahman for her failure to consider the issue of the cause of the 4 days absence [HA/70], he did not raise that with Mrs Rahman directly. He told us orally when putting those questions to Mrs Rahman that he did



not need to do so as that was implied from his grievance. We found for the reasons we give starting at (567) that was not so. Ms Scriven's view on this was clear. She repeated it several times in her decision. ***"[Appeal Ground 11] ... you were given from 22nd September 2020 to 14th June 2022 to account for how you would like to cover your absence for the period 22nd September 2020 to 25th September 2020 but did not do so, so again the decision-maker could only base her decision on the evidence before her."*** [612] Those matters aside we address the failure to make reasonable adjustments starting at (479).

754. As to issue 27(o) (claim 8) Mrs Rahman and Ms Scriven concluding the implied term of trust and confidence between employer and employee had been broken when they had ignored/not properly considered mitigation, we found that Mr Ahmed was dismissed for a repeat of misconduct whilst a final written warning was live (see (410 & 411)) rather than a trust and confidence issue. That decision was upheld on appeal. Whilst we found that relations had broken down at the time that was not the basis on which DWP was proceeding.
755. Issue 27(p) (claim 8) was that Ms Scriven relied on disputed facts to justify dismissing Mr Ahmed without confirming their veracity e.g., the date his previous warning expired, the date Mr Ahmed was informed any further misconduct could result in his dismissal, that Mr Ahmed's grievance against decision maker Mrs Rahman had been heard.
756. In substantive ground 1 of the appeal Mr Ahmed identified that Mrs Rahman referred to a written warning issued on 21st September 2020, failed to mention this warning was appealed and a reduced sanction given on 21st October 2020, that was superseded by the Appeal Outcome letter of 21st September 2020 and made no mention of *"should you commit another act of misconduct whilst the final written warning remained live you were likely to be dismissed."* We find Mrs Rahman clearly referenced both the original outcome and the dates that had been extended to as per Mrs Devi's letter of 4 November 2021 which had superseded



the Appeal Outcome letter (see (123)). She was accordingly clearly aware of both. In that respect we note that whilst Mr Ahmed:-

756.1. states he had not received Mrs Devi's letter of 4 November 2021 and

756.2. challenged her failure to refer to the appeal outcome

he did not challenge the expiry date given by Mrs Rahman under that ground. He did however do so in ground (5).

757. We address the other substantive grounds of the appeal ((2) the challenge to the conclusion his absence from 22 to 25 September 2020 was unauthorised and was for the same reason as the period 15 to 21 September 2020; (3) that the absence for the period 22 to 25 September 2020 was incorrectly treated as sickness; (4) that Mrs Rahman incompetently failed to address the issue if he was absent from work without requesting one of the various alternative forms of leave; and (5) that an incorrect date for the expiry of the warning was given) respectively at ((440 & 547 to 554); (767); (767); and (123 & 125)).

758. As to the date Mr Ahmed was informed any further misconduct could result in his dismissal Ms Musson made clear the consequences of a further act of misconduct in her decision of 21 September 2020 [197-198] (see (85)). Whilst Mr Lozano did not explain what the consequences were in the same terms as Ms Musson the only substantive effect of his decision was to reduce the length of the sanction. We find it therefore was or ought reasonably to have been clear to Mr Ahmed that the same provisions that Ms Musson had set out in her letter applied save that the length of the warning had been reduced. Likewise for Mrs Devi's letter of 4 November 2021.

759. We address Ms Scriven's reference to Mr Ahmed's grievance against Mrs Rahman having been heard by the time of Mrs Rahman's decision at (677).



760. We address why we determined the decision was not prejudged at (580 to 583 & 705).
761. For the reasons we give starting at (766) Ms Scriven was entitled to proceed on the basis of the documents and evidence before her and was entitled to come to the view that she came to. We found her reason to uphold his dismissal was in no sense influenced by victimisation, his race or discrimination arising from his disability but due to there being no grounds to uphold the appeal.
762. We address the next two complaints together.
- 762.1. 27(q) (claim 8) Ms Scriven (as appeal manager) informing Mr Ahmed the appeal was strictly a review and not a rehearing and then going on to make a decision on a matter not addressed by the original decision maker i.e., the clamant did not request annual, special or flexi leave to cover his 4 days absence in September 2020;
- 762.2. 27(r) (claim 8) Ms Scriven denying Mr Ahmed the right to appeal the part of the decision to dismiss referred to in para.27(q) above;
763. DWP accept the appeal proceeded as a review see (668) above. We find Ms Scriven was required to proceed in that way. That is what DWP's procedures provided.
764. As to the point concerning the absence of the right of appeal against a decision only taken at the appeal stage this appears to relate to ground 2 of her decision (see (440)) Ms Scriven was addressing a challenge to Ms Rahman's decision that the absence was sickness related. That did not even form part of the original appeal but was made as an additional point on 21 June 2022.
765. As a matter of principal appeals should only lie against matters raised at any earlier point. Otherwise new points could repeatedly be raised and no decision



would be final. Ms Scriven accepted that ground of appeal. To have done so would have left Mr Ahmed without any right of redress. Ms Scriven concluded that Ms Rahman was entitled to come to the view that she came to. Specifically, she found that having been invited to do so Mr Ahmed had not accounted for that absence and further that that being so Ms Rahman was entitled to come to that view. Her conclusion was one she was entitled to make for the reasons we give at (568.1, 568.2, 639, 653 & 720).

766. Having dealt with the various procedural challenges to the fairness of the dismissal in turn we have again stepped back and looked at matters in the round. The question for us ultimately is that in s.98(4) (see (729 & 730)). Whilst Mrs Rahman could have delayed her disciplinary pending the grievance against her, she had delayed that twice already, Mr Ahmed whilst raising the grievance had repeatedly complained about the delays that resulted from doing just that, she considered the grievance baseless (as latterly did the grievance officer Ms Macauley) and Mr Ahmed could have made representations and raised the subject of his grievance as the basis for an appeal.
767. As to Ms Scriven we address starting at (668 & 669) why she was required to deal with the appeal as a review and thus did not consider evidence not before Mrs Rahman. We now turn to the conclusion she reached regarding appeal ground 11 - Not taking into account mitigating factors. We set out what we consider to be the relevant sections of her rationale at (440). It can be clearly seen from her rationale Mrs Scriven had clearly considered the Mr Ahmed's self certificate and the October 2020 OH report. She considered Mr Ahmed's position regarding whether the absence was sickness to be contradictory (see (454)), he had been given ample opportunity to account for the absence from 22 to 25 September 2020 and had not done so.
768. As to appeal ground 12 - not considering other sanctions other than dismissal Ms Scriven identified Mr Ahmed had been warned as to the potential consequences of



another instance of misconduct, that Mrs Rahman had identified that the absence was unauthorised, at the time that occurred Mr Ahmed was in a final written warning period, Mr Ahmed had put forward no mitigation and despite his 15 years' service, Ms Scriven found no procedural error in Mrs Rahman's decision and concluded that Mrs Rahman was entitled to dismiss Mr Ahmed. Ms Scriven did not consider that there were therefore grounds to overturn the decision to dismiss. Whilst Mr Ahmed disagreed with her conclusions we find that was a decision she was entitled to come to.

769. We now turn to the challenges to the reasonableness of sanction at issues 28 and 29 specifically:-

29(a) When the implied term of trust and confidence could not reasonably have said to be broken e.g., the Claimant had continued to be employed for 2 years after the allegation of unauthorised absence was made against him;

29(b) When mitigation was not considered properly i.e., the impact of the Claimant's disability on the alleged misconduct;

29(c) When the Claimant's alleged unauthorised absence could properly be attributed to the Respondent's failure in its duty of care towards him i.e., the Claimant went absent after being subjected to a disciplinary procedure of inordinate length, with no regard paid to his welfare;

29(d) When the disciplinary decision did not address the disciplinary allegation against the Claimant and the appeal, undertaken as a review, did not give him a right of appeal against a decision only taken at the appeal stage i.e., that the Claimant did not request special, annual or flexi leave to cover his 4 day absence;



29(e) When the Respondent failed to make reasonable adjustments for the Claimant to cover his 4 days absence by special, annual or flexi leave (inadequate investigation).

770. Issue 29(a) is in similar terms to issue 27(o) (see (754)) where we found that Mr Ahmed was dismissed for a repeat of misconduct whilst a final written warning was live (see (410 & 411)) rather than a trust and confidence issue. That decision was upheld on appeal. Whilst we found that relations had broken down at the time that was not the basis on which DWP was proceeding.
771. We address the substance of issues 29(b) & 29(e) starting at (747) above.
772. Issue 29(c) is in like form to 27(b) which we address at (741).
773. As to issue 29(d) we found for the reasons we give starting at (749) that the disciplinary decision did address the disciplinary allegation.
774. Again, before forming our definitive views we stepped back and looked at matters in the round. As we say above we found that the reason Mrs Rahman dismissed Mr Ahmed was because his absence should be treated as sickness, it was unauthorised in that despite requests he had failed to account for his period of absence (409). Mr O'Brien had investigated matters and came to the view there was a case to answer for the reasons we relay at (304). We found for the reasons we give at (547 to 583) that was a view he and in turn she was entitled to come to based on the evidence before them. That being so it fell within the band of reasonable responses. As to sanction we found that occurred during a period when he was subject to a final written warning (411) and so dismissal was a sanction that was open to her.
775. Ms Scriven upheld that decision for the reasons we give starting (427). We found for the reasons we give starting at (766) that was a view she was entitled to come



to based on the evidence before her and it fell within the band of reasonable responses.

Contribution

The legal principles

776. Neither party made detailed written submissions on either this point or the just and equitable reduction issue (s.123(1)). We specifically asked each party to address us orally.
777. We approach the issues of contribution and s.123(1) reduction with the warning about conflating the tests, what conduct had occurred, the matters the respondent was (not) aware of and the causative links at the various times. We address s.123(6) first as not only that requires the action complained of, the respondent's knowledge and the causative link all occurred arose before the dismissal/appeal was decided upon, then s.122(2) which requires the conduct to have occurred before the notice dismissal/appeal was concluded, and finally followed by s.123(1) which can take into account any matters whenever they arise.
778. For both ss. 122(2) and 123(6) the Tribunal also must consider what conduct/action (respectively) of the employee occurred before s/he was dismissed or notice was given. For the compensatory award (s.123(6)) the conduct must also have been culpable or blameworthy and caused or at least contributed to the decision to dismiss. It follows for s.123(6) that the action had occurred and the employer must have been aware of it ⁷⁰.
779. For both ss. 122(2) and 123(6) reductions the function of the Employment Tribunal is to take a broad common-sense view of the situation, and it 'shall' reduce the

⁷⁰ *Nelson v BBC No.2* [1979] IRLR 346 (CA)



basic and compensatory awards if it is just and equitable to do so in the light of its assessment ⁷¹.

780. Whilst the power to reduce for contributory conduct pursuant to s.122(2) (the Basic Award) is wider than s.123(6) and the Tribunal is entitled to take into account any reduction under s.123(1) in assessing what is just and equitable pursuant to s.123(6) normally the reduction will be the same for both ss. 122(2) and 123(6) ⁷².

Our conclusions

781. Whilst the burden is on the respondent to prove on balance the elements of both contributory conduct reductions the tests as we say above are different. We found Mr Ahmed's conduct both as to the failure to provide an explanation for his absence between 22 and 25 September 2020 were both culpable and blameworthy. We found the failure to provide an explanation for the absence was the cause of the dismissal and not the other reasons advanced by Mr Ahmed. Whilst a reduction of 100% is only made in an exceptional case, this is one such instance. It was inevitable Mr Ahmed would be dismissed. We find it is just and equitable that any award be reduced by 100%. Further whilst his wider conduct (as set out in the following paragraph) did not cause of dismissal that can be taken into account in relation to the ss. 122(2) question and reinforces our view in relation to that aspect.

s.123(1) the compensatory award just & equitable reduction

The legal principles

782. Where an employer argues that the employee would not have continued in employment indefinitely had a fair procedure been followed, the Tribunal has to assess, using its common sense, experience and sense of justice how long the

⁷¹ *Hollier v Plysu* [1983] IRLR 260 (CA)

⁷² *Rao v CAA* [1994] IRLR 240 (CA)



employee would have been employed but for the dismissal. The assessment is predictive and thus owes more to assessment and judgment than to hard fact⁷³.

783. The tribunal's role is to assess what the actual employer would have done, on the assumption that the employer would this time have acted fairly though it did not do so beforehand⁷⁴, not what the tribunal would have done if it were the employer or a hypothetical fair employer.
784. The Tribunal must have regard to any material and reliable evidence which might assist when making that assessment, including any evidence from the employee⁷⁵. This includes evidence of misconduct which came to light after the dismissal⁷⁶. It is for the employer to bring forward relevant evidence.
785. The issue is not determined on the balance of probabilities but instead the Tribunal reduces any compensation by a percentage representing the **chance** of losing employment.
786. A degree of uncertainty is an inevitable feature of this exercise. The mere fact that an element of speculation is involved however is not a reason for refusing to have regard to the evidence. It may also be that the evidence available to the Tribunal is so riddled with uncertainty and so unreliable that no sensible prediction can properly be made. A finding the employment would have continued indefinitely should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored⁷⁵.

Our conclusions

787. Irrespective whether there was a procedural failure on the part of the DWP given our findings concerning the length of Mr Ahmed's absence, his refusal to engage with the disciplinary process and with DWP's attempts to manage Mr Ahmeds'

⁷³ [V. v Hertfordshire County Council](#) UKEAT/0427/14 per Langstaff P at [1 & 21-25]

⁷⁴ [Hill v Governing Body of Great Tey Primary School](#) UKEAT 0237/12, [2013] IRLR 274 per Langstaff P

⁷⁵ [Software 2000 Ltd v Andrews](#) [2007] IRLR 568 at [54]

⁷⁶ [Devis v Atkins](#) [1977] IRLR 314 at [39] HL



absence, and what we consider to be Mr Ahmed's wholly unreasonable behaviour to his line managers and the managers appointed to address his disciplinary process we find it is inevitable Mr Ahmed would have been dismissed at a future point in any event. The absence management process could not as we state at (484) have taken place until after the 6 month review and the further 6 month process that would have necessarily followed. Irrespective of the content of the disciplinary process that led to the dismissal if his employment had continued we find it is inevitable that Mr Ahmed's behaviour and refusal to engage with the disciplinary process/DWP's attempts to manage Mr Ahmeds' absence would have given rise to a further disciplinary process. The OH report of April 2022 (see (353)) highlights the issue. The final written warning expired on 11 January 2022 (see (123)). No disciplinary process regarding his behaviour was commenced by that point so the final written warning could not have applied. That aside as we say at (232) by the end of November 2021 his behaviour demonstrated that his relationship with DWP had irretrievably broken down. That continued in relation to Miss Minto (289) and Mrs Rahman (663) amongst others. We envisage adopting the period it took Mrs Rahman to complete the disciplinary process she conducted was 15 March (329) to 15 June (405) that would have taken 3 months to be completed. That aside in our judgment it was inevitable he would have been dismissed by its conclusion.

Timing

788. No point is taken about the unfair dismissal claim being in time. Any timing issues that arise concern the discrimination and victimisation complaints. Given our findings any timing points fall away. We therefore do not propose to make this already long judgment longer by addressing all the specific timing issues. However, on the general question whether we would have exercised our discretion on a just and equitable basis we say this.
789. When assessing whether to exercise any discretion pursuant to s.123(1):-



"... 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."

it is plain from the language used that Parliament has given Tribunal's the widest possible discretion. The only requirement placed upon the Tribunal is that it should not leave out of account any significant factor ⁷⁷.

790. Factors which are almost always relevant to consider when exercising any discretion whether to extend time are

"19. ... (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)." ⁷⁷

791. These claims form part of a series of complaints and Mr Ahmed has failed to explain satisfactorily why he did not bring the claims earlier than he did. He is well versed in Tribunal procedures and time limits and so should have done so on both counts. The failure to provide an explanation is merely one factor amongst all those we need to take into account and has been pointed out it is not determinative.

792. The delays here in bring claims were lengthy. As various witnesses failure to recall dates and specific have shown, those delays have caused prejudice. Time limits in discrimination claims are short for a reason; we are generally considering the factors operating on the mind of the alleged discriminator. Mr Ahmed was or ought reasonably to have been aware of those matters. We find that being so that any

⁷⁷ [Abertawe Bro Morgannwg University Local Health Board v Morgan](#) [2018] ICR 1194 (CA)



prejudice to DWP outweighs that to Mr Ahmed given the delays, the absence of an adequate explanation and Mr Ahmed's knowledge of tribunal procedure and where to find it. Where any complaints were thus out of time we decline to exercise the just and equitable discretion we have in Mr Ahmed's favour.

Summary

793. The holiday pay complaint aside for which compensation has been agreed, the remaining complaints are dismissed on withdrawal, not well founded and dismissed or fail because there was no contravention of part 5 EqA and dismissed.

signed electronically by me
Employment Judge Perry
Dated: 11 June 2024



APPENDIX

The consolidated list of issues (as amended)

Disability

1. The Respondent admits that the Claimant was disabled by way of Paroxysmal Nocturnal Haemoglobinuria.
2. Was the Claimant disabled by way of depression?
3. When did the Respondent know or ought to have known of this disability?

Failure to Make Reasonable Adjustments

4. The Claimant has brought two complaints of a failure to make reasonable adjustments under *Ahmed v DWP* (No.6) (“Case No.6”) and one complaint of a failure to make reasonable adjustments under *Ahmed v DWP* (No.8) (“Case No.8”).
5. In relation to the first complaint [Claim 6]:
 - a. Did the Respondent apply a provision, criterion or practice of a delay in delivering a timely disciplinary outcome?
 - b. Was the Claimant placed at a substantial disadvantage compared to non-disabled persons as a result?
 - i. The Claimant contends that his symptoms were exacerbated and it was harder for him to return to work whilst he awaited the outcome of the disciplinary.
 - c. Did the Respondent fail to take such steps as it is reasonable to have to take to avoid the disadvantage?



- b. Was the Claimant placed at a substantial disadvantage compared to non-disabled persons as a result?
 - i. The Claimant contends that he was more likely to be absent due to due to his disability symptoms of fatigue and stress compared to a non-disabled employee, and be subject to either disciplinary or attendance management procedures, both of which could result in disciplinary sanctions and dismissal.
- c. Did the Respondent fail to take such steps as it is reasonable to have to take to avoid the disadvantage?
 - i. The Claimant contends that the Respondent failed to offer / grant the Claimant special, annual or flexi leave to cover his 4 days' absence in September 2020.

Discrimination Arising From Disability

- 8. Did the Respondent treat the Claimant unfavourably?
 - a. Treating the Claimant's absence from work in September 2020 as a gross misconduct disciplinary issue for unauthorised absence. [Claim 6]
 - b. Deciding to deduct wages for 4 days of absence from work in September 2020 for unauthorised absence. [Claim 6]
 - c. Reducing the Claimant's wages following 6 months of absence from work. [Claim 6]
 - d. Referring or being considered for potential dismissal or demotion following 6 months of absence from work. [Claim 6]
 - e. Finding the Claimant guilty of 4 days unauthorised absence and dismissing him for repeat misconduct effective from 12/09/2022 as a result. [Claim 8]



- f. Not upholding the Claimant's appeal against dismissal [Claim 8].
9. Was any unfavourable treatment the consequence of something arising from the Claimant's disability?
- a. The Claimant avers that the "something arising" was
 - i. 4 (four) days' absence from work in September 2020; and [Claim 6]
 - ii. Absence from work for 6 months [Claim 6]
10. Was any such treatment a proportionate means of achieving a legitimate aim?
- a. Ensuring that the Respondent are properly informed and updated about employee absences.
 - b. Encouraging staff to return to work from absences in a timely fashion.
 - c. Managing staff absences fairly.
 - d. Effectively enforcing the Respondent's absence management policy.
 - e. Dealing with unauthorised absence.
 - f. Dealing with repeat instances of misconduct.
 - g. Providing a reliable service to the general public.
 - h. The proper use of public funds.

Victimisation

11. It is admitted that the following amounted to protected acts:
- a. The Claimant's previous Employment Tribunal cases.
12. Was the Claimant subjected to the following detriments by the Respondent?



- a. Treating his alleged unauthorised absence in September 2020 as potential gross misconduct. [Claim 8]
- b. Peter Miles' and ~~Eric Brown's~~ retrospective decision to treat his period of absence as unauthorised, in the knowledge that permission for his absence had been given in advance. [Claim 6]
- c. Richard Smith not dealing with the grounds of the Claimant's grievance appeal of 7 April 2021 properly:- [Claim 6]
 - i. HR had pre-prepared various plans of action for Pete Miles to take against the Claimant on his return from absence, demonstrating bad faith;
 - ii. The grievance did not deal with Pete Miles' manager's (Julie Barr) involvement i.e., her advice given in regards to unauthorised absence/deducting wages;
 - iii. The conclusion Pete Miles had no choice but to treat the Claimant's absence for the period 22/09/2020 - 25/09/2020 as sickness ignoring that his absence could have been covered with special leave or offsetting his absences with annual leave;
 - iv. Ignoring DWP Guidance that states stress is not a medical condition;
 - v. The conclusion "*Pete Miles followed the correct process in treating the period 15/9/20 – 25/9/20 as unauthorised absence.*"
 - vi. The Claimant's absence for 4 days was being treated as potential gross misconduct;
 - vii. The conclusion that it was fair and lawful for the Claimants' wages to be deducted for unauthorised absence, ahead of a proper



investigation, when the Claimant had been given permission to be absent from work and not instructed to return before he did.

- d. ~~Kam Devi's and Mazhar Iqbal's~~ decision of June 2021 to pursue disciplinary action against the Claimant for unauthorised absence after his related grievance was partially upheld. [Claim 6]
- e. Victoria Le Fort improperly attempting to influence Paul Szyszko, the disciplinary investigation manager, in the unauthorised absence case:- [Claim 6]
 - i. denying the Claimant an independent disciplinary investigation manager; and
 - ii. attempting to influence the outcome of disciplinary procedure (find the Claimant had a case to answer and was guilty).
- f. ~~Grievances relating to the conduct of absence management by Laura Walker and Naomi Minto not being investigated by Cathy Beck.~~ [Claim 6]
- g. Naomi Minto's decision to refer the Claimant to a decision-maker for possible dismissal and demotion. [Claim 6]
- h. Failure by manager Baz Bains, Khushwinder Rahman and Stacey Scriven to cover the Claimant's 4 days absence in September 2020 by special, annual or flexi leave or disregard it. [Claim 8]
- i. Decision maker Khushwinder Rahman's decision to dismiss the Claimant. [Claim 8]
- j. Appeal manager Stacey Scriven's decision to uphold the Claimant's dismissal. [Claim 8]



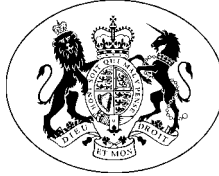
- k. Failure by Stacey Scriven and Khushwinder Rahman to provide the Claimant with a chronology / explanation as to why the disciplinary procedure resulting in dismissal took almost 2 years. [Claim 8]
13. Did the Respondent subject the Claimant to any such detriment because he had done a protected act?

Direct Race Discrimination

14. There are two elements to the Claimant's complaint of direct race discrimination under Case No.6 and one element to the Claimant's complaint of direct race discrimination under Case No.8.
15. Firstly under Case No.6, did the Respondent subject the Claimant to the following treatment? [Claim 6]
- a. Excessive time taken to deliver disciplinary outcome;
 - b. Deduction of the Claimant's wages by Peter Miles before any formal investigation;
 - c. Peter Miles, Sarah Haines, ~~Paul Szysko~~ and David O'Brien treating 4 days of unauthorised absence as gross misconduct;
 - d. Victoria Le Fort interfering with the independence of the disciplinary process by:-
 - i. denying the Claimant an independent disciplinary investigation manager,
 - ii. attempting to influence the outcome of disciplinary procedure (find the Claimant had a case to answer and was guilty);
 - ~~e. Niki Davies not sending the Claimant an investigation report;~~



- ~~f. Niki Davies treating 4 days of unauthorised absence as gross misconduct;~~
- g. Khushwinder Rahman changing the disciplinary charge at the decision-making stage.
16. If so, did the Respondent treat the Claimant less favourably than it treated or would have treated a white employee who took 4 days unauthorised absence in the same circumstances as he did?
17. Was that treatment because of the Claimant's race?
18. Secondly under Case No.6, did the Respondent subject the Claimant to the following treatment? [Claim 6]
- ~~a. Angela Street ignoring DWP guidance about stress not being a medical condition.~~
- ~~b. Angela Street ignoring Peter Miles bullying the Claimant into completing a sickness self-certification for 5 days.~~
- c. Richard Smith ignoring DWP guidance about stress not being a medical condition.
- ~~d. Richard Smith ignoring Peter Miles bullying the Claimant into completing a sickness self-certification for 5 days.~~
- ~~e. Richard Smith not dealing with the grievance appeal properly:-~~
- ~~i. HR had pre-prepared various plans of action for Pete Miles to take against the Claimant on his return from absence, demonstrating bad faith;~~



- ~~ii. The grievance did not deal with Pete Miles' manager's (Julie Barr) involvement i.e., her advice given in regards to unauthorised absence/deducting wages;~~
- ~~iii. The conclusion Pete Miles had no choice but to treat the Claimant's absence for the period 22/09/2020 – 25/09/2020 as sickness ignoring that his absence could have been covered with special leave or offsetting his absences with annual leave;~~
- ~~iv. Ignoring DWP Guidance that states stress is not a medical condition;~~
- ~~v. The conclusion "Pete Miles followed the correct process in treating the period 15/9/20 – 25/9/20 as unauthorised absence.";~~
- ~~vi. The Claimant's absence for 4 days was being treated as potential gross misconduct;~~
- ~~vii. The conclusion that it was fair and lawful for the Claimant's wages to be deducted for unauthorised absence, ahead of a proper investigation, when the Claimant had been given permission to be absent from work and not instructed to return before he did.~~
- ~~f. Richard Smith defending the actions of managers involved in a live Employment Tribunal claim during the grievance appeal meeting.~~

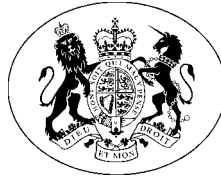
19. If so, did the Respondent treat the Claimant less favourably than it treated or would have treated a white employee who took 4 days unauthorised absence in the same circumstances as he did and then raised a grievance in relation to this treatment?
20. Was that treatment because of the Claimant's race?
21. Under Case No.8, did the Respondent subject the Claimant to the following treatment? [Claim 8]



- a. Khushwinder Rahman's decision to dismiss the Claimant;
 - b. Stacey Scriven's decision to uphold the dismissal of the Claimant.
22. If so, did the Respondent treat the Claimant less favourably than it treated or would have treated a white employee in the same circumstances as the Claimant?
23. Was that treatment because of the Claimant's race?

Unfair dismissal [Claim 8]

24. What was the reason, or principal reason, for the Claimant's dismissal? Was it a potentially fair reason? (Employment Rights Act 1996 ("ERA"), s.98(1), (2)).
- a. The Respondent avers it was for the Claimant's repeat misconduct.
 - b. The Claimant avers it was because the Claimant had made a series of Employment Tribunal claims and the dismissal was an act of victimisation and disability and race discrimination by the Respondent's management and Human Resources.
25. Did the Respondent act reasonably in the circumstances, including its size and administrative resources, in treating the alleged misconduct as a sufficient reason for the Claimant's dismissal? (ERA 1996, s 98(4)).
26. In particular, did the Respondent form:
- a. a genuine belief that the Claimant was guilty of the misconduct alleged;
 - b. on reasonable grounds;
 - c. after such investigation as was reasonable? (*BHS v Burchell* [1978] IRLR 379)
27. The Claimant avers it was unreasonable:-



- a. To treat the Claimant's 4 days absence in September 2020 as gross misconduct when DWP guidance indicates 4 days unauthorised absence is only minor misconduct;
- b. For the 4 days absence to be treated as misconduct, gross or otherwise, in circumstances it had been caused by the Respondent's bad treatment of the Claimant and the absence was disability-related – the Respondent had subjected the disabled Claimant, who suffers from fatigue and stress, to a 15 month disciplinary procedure started in July 2019 with no regard to his welfare;
- c. To treat the Claimant's 4 days absence as misconduct when he had sought and obtained his manager Peter Miles' permission before going absent and when he was not instructed to return to work at any point during his absence;
- d. For manager Peter Miles to demand a self-certification / fit note from the Claimant when the Claimant was maintaining he was not sick;
- e. To treat the Claimant's 4 days absence as misconduct without the Respondent having first offered the claimant a fair opportunity to cover his absence by special, annual or flexi leave;
- f. For manager Peter Miles to deduct 4 days wages from the Claimant for 4 unauthorised absence and then conduct an investigation into the same unauthorised absence – this indicates pre-judgment;
- g. For managers Peter Miles, Khushwinder Rahman and Stacey Scriven to have an expectation that the Claimant fraudulently obtain a fit note from his GP to cover his 4 days absence;
- h. For decision maker Khushwinder Rahman and appeal manager Stacey Scriven to class the Claimant's 4 day absence as sick when he maintained he was not sick for these days and they had no evidence to support their assertion



that he was – since it was decided the Claimant was sick, the attendance management procedures should also have been applied but they were not;

- i. For managers to ignore DWP guidance and an occupational health report relating to the Claimant's 4 days absence stating that stress is not an illness but an adverse reaction to work issues;
- j. For decision maker Khushwinder Rahman not to address the allegation she made in her disciplinary invitation letter in her disciplinary decision;
- k. For manager Bas Bains to refuse the Claimant special, annual or flexi leave to cover his 4 day absence when he requested it in August 2022 (appeal manager Stacey Scriven was copied into the communication);
- l. For appeal manager Stacey Scriven to conclude the Claimant had not requested special, annual or flexi leave when she knew he had but been refused;
- m. For the disciplinary procedure into alleged unauthorised absence to take almost 2 years to complete;
- n. For decision maker Khushwinder Rahman and appeal manager Stacey Scriven to ignore mitigation in that they were aware/or should have been aware the effects of the Claimant's disability and bad treatment by the Respondent had caused his 4 days absence i.e., the Claimant would not have taken the 4 days absence had the previous disciplinary procedure not taken 15 months;
- o. For Khushwinder Rahman and Stacey Scriven to conclude the implied term of trust and confidence between employer and employee had been broken when they had ignored/not properly considered mitigation;
- p. For appeal manager Stacey Scriven to rely on disputed facts to justify dismissing the Claimant without confirming their veracity e.g., the date his



previous warning expired, the date the Claimant was informed any further misconduct could result in his dismissal, that the Claimant's grievance against decision maker Khushwinder Rahman had been heard;

- q. For appeal manager Stacey Scriven to inform the Claimant the appeal was strictly a review and not a rehearing and then go on to make a decision on a matter not addressed by the original decision maker i.e., the claimant did not request annual, special or flexi leave to cover his 4 days absence in September 2020;
 - r. For Stacey Scriven to deny the Claimant the right to appeal the part of the decision to dismiss referred to in para.27(q) above;
 - s. For appeal manager Stacey Scriven not to make reasonable adjustments for the Claimant and allow him to cover his 4 days absence with special, annual or flexi leave;
28. Was dismissal a sanction within the range of reasonable responses open to the Respondent? (ERA 1996, s 98(4))
29. The Claimant avers it was outside of the range of reasonable responses to dismiss the Claimant:-
- a. When the implied term of trust and confidence could not reasonably have said to be broken e.g., the Claimant had continued to be employed for 2 years after the allegation of unauthorised absence was made against him;
 - b. When mitigation was not considered properly i.e., the impact of the Claimant's disability on the alleged misconduct;
 - c. When the Claimant's alleged unauthorised absence could properly be attributed to the Respondent's failure in its duty of care towards him i.e., the



Claimant went absent after being subjected to a disciplinary procedure of inordinate length, with no regard paid to his welfare;

- d. When the disciplinary decision did not address the disciplinary allegation against the Claimant and the appeal, undertaken as a review, did not give him a right of appeal against a decision only taken at the appeal stage i.e., that the Claimant did not request special, annual or flexi leave to cover his 4 day absence;
 - e. When the Respondent failed to make reasonable adjustments for the Claimant to cover his 4 days absence by special, annual or flexi leave (inadequate investigation).
30. Did the Respondent follow a fair procedure? (ERA 1996, s 98(4))

Limitation

31. Which, if any, of the Claimant's claims have been brought in time? The Respondent argues that events prior to 26 January 2022 (Case No.6) and events prior to 3 July 2022 (Case No.8) are out of time.
32. If so, does the conduct complained of amount to conduct extending over a period?
33. If not, is it just and equitable to extend time?

Remedy

34. The Claimant has been given until 25/10/2022 to provide a schedule of loss and that will be the remedy he is seeking (Case No.6).
35. In respect of Case No.8, the Employment Tribunal has ordered that by no later than 28 November 2022 the Claimant must send to the Respondent a document setting out how much compensation for lost earnings or other losses the Claimant is claiming and how the amount has been calculated.