EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107591/2019 (A)

Held in Glasgow via Cloud Video Platform (CVP) on 18, 19, 20, 21, 22, 25, 26, 27, 28, 29 October, 1, 2, 3, 8 and 9 November 2021

1, 2, 7, 8, 9, 13, 14, 15, 16, 20, 21, 22, 23, 28, 29, 30 May, 3, 4, 5, 6, 13, 17June, Members' Meetings 21 June, 18 July and 12 August 2024

Employment Judge R Gall
Tribunal Members P O'Hagan & J McCaig

Mr E Veizi	**Claimant** **Represented by:** **Mr A Elesinnia - Barrister [Instructed by Strand Solicitors]**
Glasgow City Council	**Respondent** **Represented by:** **Ms F Ross - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:

1. The claim of unfair dismissal is successful. Remedy will be determined at a Hearing to be fixed.

2. The claims of discrimination, the protected characteristic being race (national origin) are unsuccessful and are dismissed.

3. A Preliminary Hearing for case management purposes will be set down in order to make arrangements for the remedy hearing.

REASONS

1. This was a claim of unfair dismissal and of discrimination brought by the claimant. The protected characteristic involved is that of race, the aspect

founded upon being the national origin of the claimant. He is an Albanian national. He is a British citizen.

2. This hearing was in respect of liability alone. A hearing on remedy would be set down in the event of success on the part of the claimant.

3. The claimant was represented by Mr Elesinnla, barrister. The respondents were represented by Ms Ross, solicitor. The claimant gave evidence on his own behalf. For the respondents, the following people, identified by their roles at the relevant time, gave evidence:

- Carol Paterson, the claimant's line manager, Team Leader, Temporary Accommodation Development Service ("TADS")
- Gary Quinn, TADS Team Leader
- Willie Kelly, Homelessness Service Manager
- Angela Smart, Senior HR Officer
- Leigh Anne O'Neill, Corporate Fraud and Investigation Officer
- Francis Scott, Senior Audit Manager within Corporate Fraud
- Christina Heuston, Head of Corporate Services for Social Work
- Gordon Mackay, Senior Officer Employee Relations
- Christine Jany, Senior HR Officer
- Alan Robertson, Community Homelessness Manager,
- Yvonne Kerr, Assistant Service Manager, Children and Families
- Annmarie McDougall, Senior Homelessness Worker,
- Ann-Marie Rafferty, Assistant Chief Officer, Public Protection
- Jane MacAskill, HR Officer
- Gerry Mearns, Team Leader for Social Work Training, and

- Jim McBride, Head of Adult Services, Homeless, Addictions and Criminal Justice Services.

The following are relevantly mentioned at this point for reference purposes

- Sokol Zefaj, friend of the claimant, said to have been involved in criminal matters
- RSBI, an organisation which supplied goods to the flats used for temporary accommodation purposes.
- David Bell, the claimant's Trade Union representative who accompanied him at the investigatory and disciplinary stages.
- Lynn Kerr, TAD officer some of whose record of work was considered during Mr Robertson's investigation and
- Sharon Murphy, Corporate Fraud team member.
- Carol McCaig, Practice Audit. Carried out a report on the Temporary Accommodation Service in November 2018

4. The hearing in the case took place over many days. There was much evidence. During the hearing, objections were taken at various points to questions or lines of evidence. Time was taken to hear argument. Adjournments took place for consideration and for decisions to be reached. Those were then conveyed to parties. The hearing was temporarily halted during the claimant's evidence due to an application for recusal made on his behalf. That application was refused. The claimant appealed that decision to the Employment Appeal Tribunal ("EAT"). The EAT refused the appeal on this point and remitted the case to the Tribunal to continue the hearing, and also to deal with a proposed amendment for the respondents which had been the subject of a successful cross appeal.

5. That background helps explain the length of the hearing and also the gap in hearing dates between 2021 and 2024. That gap period was also contributed to by the need to identify continued hearing dates suitable to all witnesses, parties, representatives and the Tribunal.

6. The length of the hearing and the substantial amount of evidence has led to this Judgment taking longer to produce than it would have been hoped, although the likely timeframe was mentioned at conclusion of the hearing.

7. A joint bundle or file of documents was lodged with the Tribunal. There was also a file or bundle which was referred to as the "pleadings bundle". It contained forms ET1, ET3 and various Orders, responses and Preliminary Hearing Notes. References to page numbers in the Judgment are to the main file unless expressly stated to be in the pleadings file

Brief outline of positions

8. The positions of the parties, in very broad summary are now set out.

9. The claimant maintained that he had been unfairly dismissed in terms of the Employment Rights Act 1996 ("ERA"). Dismissal was said to have been on the grounds of misconduct. There were 2 elements to the misconduct. Those were (1) double ordering of white goods and household items for personal gain and (2) misuse by the claimant of his email account with the respondents by using it for personal purposes. The claimant took issue with the suspension, the investigation, the respondents' behaviour during the investigation, the dismissal itself and the identity of the person chairing the disciplinary hearing. He also claimed, broadly put, that the process leading to dismissal, including the investigation, the dismissal itself and the respondents' actings in relation to complaints he made following dismissal were discriminatory. The claims made under the Equality Act 2010 ("EQA") were of direct discrimination and of victimisation. The claimant said that the actings of the respondents were so unreasonable and atypical that an inference of discrimination should be made. He founded on 2 emails expressly mentioning that he was an Albanian national. He said the respondents had suppressed documents which would have exonerated him.

10. The respondents said that they met the requirements under well-established case law for this to have been a fair dismissal. The claimant had accepted that he had breached policies and procedures in relation to use of his email account with the respondents. They denied that the facts were such that an

inference of race discrimination should be drawn. If such an inference was made, they submitted that the evidence showed that they did not contravene the relevant provisions of the EQA.

Facts

11. The following are the relevant and essential facts as found by the Tribunal. Where there was a conflict in the evidence before the Tribunal, the Tribunal has determined that on the balance of probabilities.

Background

12. The claimant was employed by the respondents from 14 January 2001 until 5 April 2019. He was born on 23 July 1975. The claimant is a white British citizen of Albanian national origin. He was, prior to his dismissal, employed as a Temporary Accommodation Development Officer ("TAD").

13. There are between 7,000 and 8,000 people employed by the respondents within Social Work Services. The respondents employ over 20,000 people in total.

14. The respondents have a stock of individual temporary furnished flats ("TFF") which are made available for occupation by homeless households. The role of a TAD involves overseeing and managing of those properties in the time prior to or between lets, at which point the properties are known as "voids". A TAD will inspect the void, note any work required on it to bring it up to standard and also note any household and white goods required in the property. Such household items might be a kettle, hoover or heater, for example. White goods might be a washing machine or fridge freezer, for example.

15. The TAD then instructs that any such work is carried out and orders any such goods for the void. There is then a final inspection carried out by the TAD prior to occupation of the void. The organisation from whom household and white goods are generally ordered is RSBI.

16. During the time in which the void property is being made ready for relet RSBI will have access to the void. They will have a set of keys. Those carrying out

remedial work will also have a set of keys. There is no "sign in/sign out" system in respect of keys.

17. There is a paper file for each property managed by a TAD. There is also an electronic system of record keeping on which details of voids are kept, with progress on any work being done noted upon that. The electronic system is known as URS or Servitor. If information is sought from Servitor, it can be searched by entering the property address, however not by entering the name of the TAD.

18. There is an element of pressure on a TAD to ensure that voids are made ready for relet as soon as is possible.

19. The claimant worked on the South side of Glasgow. His workload was in line with that of other TADs.

TAD management

20. The claimant's line manager was Carol Paterson. Prior to becoming a Team Leader she had been a TAD.

21. Supervision meetings were held between a Team Manger and a TAD approximately every 6 weeks. These meetings provided an opportunity for discussion on voids being managed by the TAD and on any general issues which either the manager or the TAD wished to raise, including any training requests or requirements. Notes of supervision meetings between the claimant and Ms Paterson appeared at pages 1353 to 1369 and also at pages 1710 and 1711.

22. There were also regular team meetings held, generally every 6 weeks. Notes of team meetings held on 8 November 2017, 1 February 2018 and 12 April 2018 appeared at pages 1485 – 1490. The claimant had not attended any of those meetings. Team Leaders also met around 6 weekly with RSBI. Such a meeting provided a chance for any issue to be raised by one party or the other.

23. At page 328 an email appeared. It was sent from Ms Paterson to TAD team members on 22 January 2018. It set out a procedure agreed with RSBI which was to be followed in the event of a void being left by RSBI in an unsatisfactory standard. In that scenario, the email confirmed that any complaints were to be emailed by the TAD to one of 3 named individuals within RSBI, the email being copied to the team leader.

24. There was no equivalent set procedure laid down in writing detailing what a TAD was to do if white goods or household items ordered from RSBI were not in the void on inspection after the date on which they were said to have been delivered.

25. The practice which was expected to be followed was that if goods were said to have been delivered but were not present at the premises, RSBI would be contacted by the TAD by email, with a copy of the email going to the Team Leader.

26. Ms Paterson had been a TADs team leader since a point in 2014, managing the claimant since that time until his dismissal. She had a good working relationship with the claimant and got on well with him. There were no issues between the claimant and Ms Paterson during their time of working together. Her management style was relatively "light touch" insofar as the claimant was concerned.

27. The claimant had raised an Employment Tribunal claim against the respondents in 2013, referred to in this Judgment as "the first protected act". He disclosed that he had brought an Employment Tribunal claim to Ms Paterson when she became his team leader. He did not inform her of the nature of the claim and she was unaware that there had been a protected act. Ms Paterson had no interest in or knowledge of the detail of this claim. Awareness of there having been a previous Employment Tribunal claim brought by the claimant did not affect her interaction towards or decisions made in respect of the claimant. The claimant had raised an issue in relation to his previous manager in 2014, stating to the respondents that she had

behaved in a racist way, referred to in this Judgment as "the second protected act". Ms Paterson did not know of this protected act.

Events leading to initial investigation

28. In June 2017 two points of concern were raised with the claimant by Ms Paterson. Relevant emails exchanged between Ms Paterson and the claimant in relation to one property appeared at pages 1712 and 1714. A new washing machine, fridge freezer and floor coverings were ordered by the claimant for a flat which was being returned to the landlord. In that circumstance the respondents would not order items for the flat. The claimant said that he could not remember much about the matter and that *"if its* (sic) *raised on error then is an honest mistake".* The other matter was dealt with in supervision. The notes appeared at page 1710. It is said there that additional white goods had been ordered by the claimant in error. The new job was to be cancelled by the claimant or he was to have the white goods refunded. These matters proceeded no further.

29. On 10 April 2018 there was a supervision meeting between the claimant and Ms Paterson. The notes appeared at pages 1367 and 1368. Ms Paterson noticed anomalies. She was conscious of the points raised with the claimant in June of 2017. In the circumstances she decided to draw these matters to the attention of her line manager, Gary Quinn. She did not inform the claimant of that decision.

30. Mr Quinn asked Ms Paterson to carry out a review of the voids for which the claimant was responsible. She did that. Ms Paterson was concerned that this review raised an issue with a property at 664 Pollokshaws Road which had remained in void status for a few months after it ought to have been available for let, having had a "clean and set" carried out. A clean and set is part of the final preparation for occupation of a void. Photographs she had been supplied with by RSBI appeared to show that the property had been occupied in the period when it appeared ready to be let and ought to have been let to a homeless household. In addition, there were instances where duplicate goods, such as washing machines and freezers, had been ordered for some

properties in circumstances where there did not seem to be any explanation as to the need for the second order. Ms Paterson passed the information she had from the review to Mr Quinn. She did this at some point towards the end of May or in early June 2018.

31. Ms Paterson did not speak to the claimant in relation to the enquiries she was making and the information she was gathering.

Progress in the initial investigation

32. Mr Quinn had had relatively little day to day involvement with the claimant prior to receiving the information in relation to the claimant from Ms Paterson. He was unaware of the first protected act. Whilst he knew there had been some sort of issue between the claimant and his former line manager, he did not know the nature of that and was unaware of the second protected act. Mr Quinn was a TAD team leader for around 4 ½ years. His line manager was Willie Kelly. Ms Paterson reported to Mr Quinn her concerns from her review of files as to the claimant possibly letting out a void without the knowledge of the respondents and as to his double ordering of goods, possibly misappropriating the goods originally ordered. Mr Quinn decided to bring this to the attention of Mr Kelly.

33. Mr Kelly had little knowledge of the claimant prior to this matter coming to his attention. He was aware of the first and second protected acts. They did not influence his actings in the matters with which this Tribunal was concerned.

34. Mr Kelly did not investigate any matter himself. He acted in a liaison type of role, as service manager, communicating with Mr McBride as Service Head during the investigation to inform him of developments. A manager such as Mr Kelly having an oversight of a type of process such as this and so communicating is relatively common practice within the respondents, although not provided for in the Disciplinary Policy.

35. Mr Kelly referred the issues identified initially by Ms Paterson to the respondents' internal audit team, also known as the Corporate Fraud team.

That reference arose after an exchange of emails between Mr Kelly and Mr McBride.

36. Mr McBride was Mr Kelly's line manager and the section head. He ultimately chaired the disciplinary hearing and took the decision to dismiss the claimant.

37. The emails just mentioned appeared at pages 41, 42 and 43 of the file. The email from Mr Kelly to Mr McBride of 15 May 2018 read:-

"Re our conversation today Gary spoke to me that he has evidence that our TADS worker Edmir Veizi could possibly be subletting one of our TFFs and possibly double ordering white goods think washing machines, fridges and bed bases and it is suspected he is misappropriating them we have some evidence to this effect.

Suggesting we appoint an independent/objective person to review the evidence and advise us as to whether we need to investigate."

38. On 8 June Mr Kelly suggested to Mr McBride, in the chain of emails at the pages just mentioned, that Corporate Fraud were spoken to "*and let them get on with it*". Mr McBride confirmed by email of 10 June that this should happen.

39. Mr Quinn had met with Mr Kelly on 15 May. At Mr Kelly's request Mr Quinn summarised that meeting in an email which appeared at page 41 of the file. That email referred to it appearing that double ordering had taken place in relation to a property at Dowancraig Drive. It was stated that from a review of the claimant's recent caseload activity 4 issues of double ordering had been identified requiring further investigation. It also said that it appeared a void at 644 Pollokshaws Road for which the claimant was responsible appeared to have been occupied. The email also referred to a further point having been discussed, namely that, independently of the audit, ex tenants of a property for which the claimant had responsibility had complained about theft of a dining table they had brought to the property.

40. By email of 11 June (page 44) Mr Kelly made initial contact with Ms O'Neill (Leigh) of internal audit/Corporate Fraud. He met with her later that day. She asked him to provide her with identifiers for the claimant. She asked that Mr

Kelly provide his full name, date of birth and any other employment details of which he was aware. Mr Kelly said that the claimant was formerly known by a different name and that he would try to find that out for Corporate Fraud. He wrote by email to Ms Smart (Angela) of HR after that meeting, copying in Ms O'Neill. That email (at page 45) read:

"Leigh the proper spelling of his name Edi Veizi that's what's on outlook.

Angela,

*We are perusing (*sic*) the above Temporary Accommodation (TAD) Worker for suspected fraud he's an Albanian National and his name is spelt on outlook as above.*

We are working with Corporate Fraud on this Leigh-Anne O'Neill can you supply Leigh with identifiers from his personnel file things like date of birth, home address and anything else you might think might help the investigators please."

41. Mr Kelly believed that referring to the claimant being an Albanian national might assist HR identify the correct person and spelling of the claimant's name to enable details to be passed to Corporate Fraud.

42. This email was sent on as part of a chain of emails to Mr Mackay and Mr McBride, pages 47 of the file being that chain including Mr Mackay, and pages 48 and 49 being the chain including Mr McBride.

43. Mr McBride, Mr Mackay, Ms Smart and Ms O'Neill did not challenge or question Mr Kelly's reference to the claimant being an Albanian national nor did they make any reference to it either on receipt of the emails or subsequently. They did not register the reference as being present in the email. It had no impact or bearing upon their handling of the email or their subsequent actings in relation to the claimant or matters affecting him as referred to in this Judgment. They recognised in giving evidence at the Tribunal hearing that they ought to have challenged Mr Kelly on his inclusion of this information in his email.

44. Corporate Fraud then began their work on 11 June 2018, gathering information and any documents they considered relevant. They have powers to check the email accounts of employees for potentially relevant information.

45. Mr Kelly was not involved in the work carried out by Corporate Fraud. He did not decide to suspend the claimant. He did not decide to refer the matters involving the claimant to a disciplinary hearing. He did not decide to dismiss the claimant. He did not co-ordinate any plan of action to achieve those outcomes. Others who were involved in or took those decisions were not influenced by Mr Kelly, save that Ms Heuston, who made the decision to suspend the claimant, had from Mr Mackay the information about the respondents' concerns in relation both to the claimant double ordering goods for personal gain and letting out of void properties. Mr Mackay had received that information from Mr Kelly. The information Mr Kelly gave to him was factually accurate, save that he made an error in referring to a possible issue of letting out of flats, rather than of a flat.

Respondents' Provisions and Protocol re Precautionary Suspension

46. At page 10 of the file in a section containing "Conditions of Service Discipline and Appeals Procedure" ("DAP") provisions relating to, amongst other elements, suspension were set out. The following passages are relevantly set out at this stage:

"3.1.1 Precautionary Suspension

In some cases, managers may need to apply "precautionary suspension" to an employee if: (relevant to the claimant)

"an investigation is needed into charges of gross misconduct or irregularity;

If the period of suspension is likely to extend over a period of time, the employee must be contacted at least every two weeks, to explain why and to give an indication of when the investigation is likely to be completed."

Suspension

47. The respondents also have in place a Protocol detailing to relevant personnel the procedure which *"should be applied when a decision has been taken to respond to a potential misconduct situation".* It is not available to employees and is not part of any policy or procedure or contractual documentation. It is headed *"Protocol for Precautionary Relocation, Redeployment or Suspension" ("PRRS").* A copy of the Protocol was at pages 59 and 60 of the file. Paragraph 1 of the Protocol states that the manager should complete a pro forma Incident Report. That completed in respect of the claimant appeared at pages 61 and 62 of the file. The pro forma is to be submitted to the Head of Service or Nominated Officer and Employee Relations Team setting out the argument for PRRS. The Protocol goes on to state *"Only in exceptional circumstances will PRRS be endorsed retrospectively without a formal report being submitted, e.g. an incident of an emergency nature that requires an immediate response or an incident outwith normal hours."*

48. Notwithstanding the terms of the Protocol as set out, it is more often than not the case that the PRRS form is completed after suspension has been decided upon. The information which then appears in the form will reflect the details of the incident and the reason why suspension should be considered, as those were given to the person who made the decision to suspend.

49. In this instance Ms Heuston made the decision to suspend. She was at the time the Head of Corporate Services for Social Work Services within the respondents' organisation. She made the decision to suspend the claimant on 14 June 2018, after discussion with Mr Mackay. Suspension does not occur in practice within the respondents' organisation other than by decision of the Head of Service.

50. The key basis of the decision by Ms Heuston was that the allegations concerned possible theft. She was of the view that there was a risk to the organisation and its clients and concluded that suspension was the appropriate decision to make. Ms Heuston had no knowledge of the first or second protected acts when she made her decision.

51. The claimant was not spoken with prior to suspension to obtain his comments on the allegations. Sometimes such contact will take place before suspension, often it will not.

52. Mr Mackay confirmed Ms Heuston's decision to suspend to Mr Kelly by email of 14 June, page 56 of the file. With that email he sent to Mr Kelly the pro forma for completion by him. Mr Kelly completed it and returned it to Mr Mackay some 50 minutes later.

53. A copy of the proforma completed by Mr Kelly appeared at pages 61 and 62. There is a Section at page 61 where a question is asked of and is answered by Mr Kelly. That is:

Question - Has the employee been subject of previous investigation or have there been serious issues in the past subject of discussion with the employee regarding their conduct/practice?

Answer - YES

1. Mr Veizi owns property in Glasgow suspected he was letting his properties to homeless service users in Glasgow through his workplace. Outcome unknown.

*2. Spoke about a previous manager on social media and later accused her of being racist. Outcome I don't think the manager (Carol Gallagher) took ant (*sic*) further action.*

54. There was a factual basis for the information entered on the pro forma by Mr Kelly. The documents at pages 30, 31 and 32 confirmed disciplinary steps taken in relation to the two matters referred to. As mentioned, Ms Heuston did not have the PRRS form at time of making the decision to suspend the claimant. The information Mr Kelly provided in answer to the question asked as to previous investigations or serious issues played no part in the decision to suspend the claimant.

55. At page 62, the pro forma shows information being requested from the person completing it. It shows the responses of Mr Kelly to the request made. The details are:

Request - *Provide details of the incident clarifying witnesses and what exactly was witnessed. Provide as much information as possible.*

Response - *The Temporary Accommodation Team maintain the cities (*sic*) stock of Temporary Furnished Flats they order furniture, white goods, make sure repairs are completed and that the flats meet health and safety standards.*

1. *It had been noted that Mr Veizi had been double ordering white goods the white goods he double ordered had went missing (hence reordering) he was not reporting this to his managers nor following proper procedures around double ordering. This was investigated in the first instance by his managers above Carol Paterson and Joyce Miller*

2. *We also have reason to believe that on more than one occasion Mr Veizi was letting furnished flats for his own gain and we have documentary and picture evidence to confirm our suspicions.*

56. In fact, the information and photographs on which comment two as to possible letting by the claimant was made related to one flat, the address being 664 Pollokshaws Road, Glasgow.

57. In the late morning of 14 June, Mr McBride asked Mr Kelly to communicate to the claimant that he was suspended. Mr Kelly did this that day. He then wrote to the claimant confirming the decision and its implications. A copy of that letter was at pages 65 and 66 of the file. This was the first time that the claimant was aware of the potential issues which the respondents had with his actions.

58. That letter contained the following passages:

"Whilst the investigation into the allegations is ongoing you are under strict instruction not to discuss the issues with staff or service users within the Council. If any contact is attempted this may be seen as a direct breach of an instruction which may be considered as a matter under the Council's Discipline and Appeals Procedure. This instruction is intended to safeguard all parties by ensuring a fair and confidential process.

During the course of the investigation an officer will be appointed as your support/welfare contact. S/he will contact you on a weekly basis to offer you support and to update you on the progress of the investigation.

You may find it helpful in the circumstances to access a confidential counselling service, Workplace Options, which you can contact directly on a Free Phone Number (number given) *where you can speak to a professional counsellor."*

59. The respondents routinely carry out a check to ascertain if there are current or previous investigations or disciplinary actions recorded when an employee is potentially to be suspended. In the temporary absence of Mr Mackay, the records were checked by senior HR officer Ms Jany.

60. Ms Jany sent an email to Mr Mackay on 15 June 2018 so that he had the information she had found. A copy of that email appeared at page 75 of the file. In addition to mentioning the possible identity of the investigator and support person who she understood might be appointed by Mr McBride, Ms Jany said *"Also EV was prev investigated on benefit fraud a few years ago the file may be downstairs in the basement etc."*

61. Mr Mackay subsequently checked the database of the respondents and found an instance of previous disciplinary action. In March 2004 a final warning was issued to the claimant. This is shown in the log page which appeared at page 524 of the file. The matter was detailed in an investigatory report which was at pages 349 to 368 of the file. The description by Ms Jany of this being an investigation *"on benefit fraud"* had a basis in fact.

62. A second disciplinary matter became known to Mr Mackay. At some point there had been an issue, he understood, around an inappropriate text or email sent by the claimant to his manager. Mr Mackay understood that a verbal warning was issued to the claimant.

63. Mr Mackay was unaware of the first protected act until the claimant mentioned the Employment Tribunal claim at the disciplinary hearing.

64. Mr Mackay did not discuss either of these previous disciplinary matters or their outcomes with any person, including Mr Kelly. Ms Jany did not discuss with any other person the matter of which she had become aware.

65. The steps taken by Mr Mackay and Ms Jany as detailed in relation to the claimant are steps which they would have taken in relation to any employee in the circumstances which existed in relation to the claimant.

Discussions with Police Scotland

66. Mr Kelly had limited personal interaction with the claimant prior to intimating to him that the respondents had decided to suspend him. Mr Kelly had concerns as, in his view, TAD personnel were very apprehensive when he met with them a few weeks earlier. In an email of 11 June to Mr McBride (page 48) he highlights this to Mr McBride. He also expresses his own view that the claimant is very intimidating. Mr McBride's reply of 12 June is also at page 48. The reply is:

"Willie,

All joking aside yes we need to ensure that staff and yourself do not feel threatened by him and we need to emphasise or (sic) *concerns, possibly to the police"*

67. There was no contact with the police by Mr Kelly or Mr McBride or at their instigation pursuant to this. They did not speak with the claimant regarding this.

68. Mr Quinn provided support to Ms Paterson during the time of the investigation and the disciplinary process. This was as he considered that she found it

stressful and that she struggled to cope with the burden of being involved in disciplinary matters in relation to one of her team members. He regarded her as anxious and stressed due to this situation.

69. At an early point in the Corporate Fraud investigation an issue arose which caused serious concern to one of the employees carrying out that investigation. One of the information gathering exercises was in relation to properties with which the claimant had a connection. It transpired that he was linked to a property in Newton Mearns. Another individual was also linked to that property. He was Sokol Zefaj. Press reports in relation to Mr Zefaj appeared at pages 1628 to 1631 of the file. Those reports became known to the member of staff. The reports referred to Mr Zefaj as being accused in an email of operating brothels, gun running and drug dealing. They referred to a murdered woman as being *"married to an Albanian criminal Sokol Zefaj".* There was reference to an Albanian organised crime gang.

70. The staff member was worried because of the connection which seemed to exist between the claimant and Mr Zefaj through them being linked to the same property. She expressed concerns as to her name appearing on any documentation which might be produced in the investigation and which might be part of information leading to dismissal of the claimant. She was worried about being identified on such documentation.

71. These concerns became known to Francis Scott who was senior audit manager within Corporate Fraud. He had a connection within Police Scotland due to having worked with them on a previous investigation.

72. On 26 June in an email which appeared at page 268 of the file, Mr Scott wrote to his connection. He sought advice. He referred to a "*whistleblow call"*. That is how Corporate Fraud label any referral to them. There was reference to an allegation that the claimant was subletting a TFF and *"arranging for white goods to be ordered through the council for his own properties".* The email went on to say:

"The employee is called Edi Veizi (although he has used the names Edmir Muharremi and Eddy Shkodra) and is Albanian. When our fraud team

*checked out his previous addresses he was linked to (*Newton Mearns address*) - our fraud teams record show that this address was also linked to another Albanian, Sokol Zefaj, and that he was involved with Albanian organised crime including drug dealing, operating brothels and gun running. Google searches also showed that Sokol Zefaj was the partner of Lynda Spence who was murdered a few years ago.*

When our staff noticed the connection between Edi Veizi and Sokol Zefaj, they became very concerned of any implications of them being involved in the investigation (eg having their name known to the Albanian underworld if Edi Veizi loses his job and is reported to the police for theft.) We have taken them off this one for the time being and I was asked to check this out with the police for some advice on it – should we proceed with our enquiries, is this linked to anything Police Scotland have looked at etc."

73. The concern arose from the connection between the claimant and Mr Zefaj disclosed by the common link to the property and the reference in relation to Mr Zefaj to organised crime. In looking for advice on the situation from the police Mr Scott regarded it as relevant to mention the fact that both the claimant and Mr Zefaj were Albanian. This was as he thought it might be helpful by way of background and might assist the police establish and confirm to him whether there was any connection between the two gentlemen., particularly one about which they should have concerns. He was also keen to know whether the Corporate Fraud investigation could or should proceed and whether there was advice Police Scotland could provide.

74. The prime issue for Mr Scott and what prompted him to make contact with Police Scotland was the safeguarding of his team member and her worries given the potential link due to the same address appearing for both gentlemen.

75. The information in the email was believed by Mr Scott to be true. At the time of writing the email he did not have any connection or contact with anyone other than Ms O'Neill and Ms Murphy of Corporate Fraud and the team member who had expressed concerns in relation to this matter. He would

have sent an email in similar circumstances with the same information, including as to national origin as a secondary piece of information, if the people subject of his enquiry to Police Scotland were not of Albanian national origin, but other circumstances were the same, unless the fact they were of the same national origin could be taken from their names.

76. A meeting subsequently took place between Police Scotland and the respondents. Mr Scott, Ms Murphy, Mr Mackay and Ms Heuston attended the meeting. Police Scotland confirmed that the claimant was not someone they were looking at from the point of view of investigation. The respondents were asked if they wished to make any report to the police. They said they did not. This was as they were at information gathering stage and had no information in relation to any crime which merited reporting to the police.

77. The claimant had no knowledge of this email or of any meeting with Police Scotland. The interaction between the respondents and Police Scotland played no part in the disciplinary process whether by way of providing information or input into the decisions made or otherwise.

Investigation by Corporate Fraud

78. Corporate Fraud confirmed the details of properties owned personally by the claimant and checked if any goods ordered by him in his employment were shown as having been delivered to any of those addresses, of which there were 10. Ms O'Neill met with Ms Paterson, who subsequently sent on information as to the void properties managed by the claimant.

79. Corporate Fraud checked the Servitor system. It is not possible to search Servitor by reference to an employee to trace what work on a property or what white goods for a property that employee has ordered. Any search is "property based". Ms Paterson supplied the claimant's employee number to corporate fraud. That enabled them, and subsequently Mr Robertson, to confirm any work instructed or goods ordered as emanating from the claimant in that an employee number is how the source of the instruction is identified.

80. By email of 20 June appearing at page 90 Ms O'Neill sought reports from Servitor for 12 properties. Papers for the relevant properties as submitted to Corporate Fraud appeared in the file as follows:

1. 664 Pollokshaws Road, 91-115
2. 34 Ladymuir Crescent, 118-161
3. 18 Maxwell Drive, 164-181
4. 140 Haughburn Road, 184-213
5. 4 Raithburn Road, 216-231
6. 15 Dowancraig Drive, 233-252.
7. 70 Meiklerigg Crescent, 259-267
8. 1439 Paisley Road West, 271-279

81. The documents for the first 7 of those properties were sent to Corporate Fraud on 25 June 2018. They included documents at pages 236, 237 and 239 (relating to Dowancraig Drive) which bore to be dated 28 June 2018, after the date on which they had been sent therefore. It would be unusual for goods to take more than a day or two from time of the order being placed to being delivered. The order for the goods referred to at pages 236, 237, 238 and 239 was placed on 26 or 28 March 2018 according to those documents. Documents for the eighth property were sent on by email of 27 June 2018.

82. Relevant information was gathered in this investigation as would be the case in any similar investigation. This extended to obtaining the claimant's laptop so that any relevant evidence could be obtained from that source. Corporate Fraud essentially gather information in these situations.

83. No interview with the claimant was carried out by Corporate Fraud. Any allegation referred to Corporate Fraud is investigated by them. On occasion the employee involved will be interviewed around this point if management approval for that step is obtained. Each case is considered on its merits. Ms

O'Neill went on leave on 27 June 2018, passing any information and papers she had to Ms Murphy.

84. Corporate Fraud prepared a note at conclusion of their work in this matter. A copy of it appeared at pages 525-528 of the file. It is undated, however was prepared towards the end of June 2018.

85. The note sets out at 526, 527 and 528 their summary of points in relation to property files reviewed by them. At page 525 carrying on to 526 a further issue is recorded. From checking the claimant's use of his email account with the respondents, Corporate Fraud identified several emails which related to personal matters of the claimant and his family sent to and from his work email address, sometimes being sent there from his personal non-work email address. Documents relating to personal matters of the claimant and his family were also attached to emails in some instances.

86. A summary in relation to 8 properties was provided in bullet point format by Corporate Fraud. The properties were those noted above.

87. There were issues and concerns both about email use and about double ordering and management of properties raised in the note. Those in relation to the properties are now summarised.

88. Pollokshaws Road - the length of time between responsibility for the void commencing and completion with availability for let was mentioned, together with some photos which were said to indicate that there may have been a tenant in the property, the tenant not being one placed there by the respondents. Reordering of goods already supplied was also subject of one of the bullet points.

89. Maxwell Drive - noted as being a property where an initial inspection had stated that the washing machine and fridge freezer were confirmed as being "clean" with no replacement therefore being required. It subsequently became clear that the initial inspection had been carried out by a colleague of the claimant. Replacements of the washing machine and fridge freezer were ordered by the claimant notwithstanding his colleague's confirmation that no

such replacements were necessary. It later became clear that the claimant had not seen the items prior to ordering replacements.

90. Meiklerigg Crescent – goods had been ordered at a point where the flat was to be handed back to the landlord

91. Raithburn Road – the issue of possible double ordering arose, with goods including a washing machine ordered and delivered on 12 March 2018. A second order of a washing machine was noted as submitted on 27 March, completed on 3 April. There was reference to a disposal on 13 February of items including a washing machine and to a disposal sheet dated 3 April, which had no items noted on it as being disposed.

92. Dowancraig Drive – The note recorded that there was an inspection on 27 February 2018. The washing machine and fridge were stated as not requiring replacement when the initial inspection was carried out. The information at page 527 states *"RSBI note on 19/3/18 that no f/freezer or washing machine in flat and on disposal note 5/3/18 state f/freezer and washing machine disposed".* The claimant is stated to have ordered items, including a washing machine and fridge freezer, on 26 March. It is said that he cancelled this on 29 March, that however being one day after RSBI completed the order just mentioned. A further order of 9 April is recorded, that being for items including a washing machine and fridge freezer.

93. Paisley Road West – 4 bed bases had been ordered despite the property being at the point of being handed back to the landlord.

94. Ladymuir Crescent. - goods are noted as being ordered at a time when the property was being handed back to the landlord.

95. Haughburn Road – At initial inspection the washing machine, fridge freezer and cooker were identified as being *"ok".* It was noted that a first order for goods was placed 20 December 2017. That was said not to include a washing machine and fridge freezer and cooker. In fact the order of 20 December did include those three items. There was a second order for the same items, also including a further washing machine, fridge freezer and cooker, subsequently

placed on 6 February 2018. A file note dated 6 February 2018 stated that RSBI had left the door open and that all household goods and furniture had gone. The Corporate Fraud note stated that there was no police report, no note that RSBI had been advised and that it was unknown if the manager had been advised, *"just a 2nd order placed".*

96. The Corporate Fraud report did not set out any conclusion or recommendation.

Respondents' Policy - Investigation

97. At page 10 of the file in the DAP the following extracts appear and are now relevantly now set out:

*"**Stage 1 – Investigation***

Before taking any action, a manager, with support from HR if required, will carry out a thorough investigation of the situation or complaint. This could involve talking to different people who may have been involved, and keeping a record of, and taking into account, the statements of any witnesses. The manager should do this as soon as possible after the event(s) whilst memories are still fresh in people's minds.

3.1.2 Theft, fraud or embezzlement

If the situation relates to possible misappropriation, fraud or embezzlement, managers should seek advice from their Service HR contact before starting any investigation, or notifying the employee. In these cases, it may be necessary to involve the Internal Audit team, the police and even the Chief Executive.

3.1.3 Notifying the Employee

The manager will write to the employee, explaining the nature of the situation, allegation or complaint and advising them of their right to representation. They will be asked to attend an investigatory hearing, and given reasonable time to prepare their case – within their normal working hours.

3.1.4 Investigatory meeting

After carrying out their initial investigation, the manager should interview the employee about the allegation(s) and/or complaint(s) made against them.

Investigation by Mr Robertson

98. At the end of June or beginning of July 2018 Mr Robertson was asked by Mr McBride to carry out an investigation into allegations, firstly that the claimant had rented out a furnished flat, a void, and secondly that he had double ordered white goods for personal gain. In making that appointment Mr McBride was acting, in effect, under delegated authority from Ms Rafferty, Assistant Chief Officer. Prior to being asked to carry out the investigation into these matters, Mr Robertson had no involvement with the claimant in his work and had had no direct contact with him of which he was aware.

99. Mr Robertson had carried out one investigation previously. The matters which he investigated in relation to the claimant were as noted above. A third allegation in relation to misuse by the claimant of his work email account was investigated by Ms Kerr as detailed below. Mr Mackay was Mr Robertson's advisor from HR during the time of the investigation.

100. By letter of 4 July (pages 284 and 285 of the file) the respondents wrote to the claimant informing him that Mr Robertson had been appointed to conduct the investigation. He was advised that Mr Robertson would be in contact to arrange an interview in relation to the allegation and that the claimant could be accompanied at that meeting. He was also informed that Annmarie McDougall would be his support worker and would contact him fortnightly to update him on progress of the investigation and to offer him support. The letter also repeated the information previously conveyed as to there being no contact from the claimant with other parties during the investigation and as to contact information for Workplace Options.

101. A further letter was written by Mr Kelly to the claimant on 18 July. A copy of that letter was at pages 292 and 293. It intimated that a third allegation was to be investigated, at that stage by Mr Robertson, it was said. It was said that

the allegation *"relates to the misuse of your Council email account for personal use."* This was the allegation which Ms Kerr investigated. She was asked to investigate it due to the volume of work Mr Robertson had and that which he was carrying out in relation to the other two allegations.

102. In this letter Mr Kelly repeats the instruction to the claimant not to discuss the matter with others. The information as to Workplace Options is also repeated.

103. An interview with the claimant was initially proposed by Mr Robertson for 27 July 2018. His letter of 20 July so suggesting appears at 294 and 295. The claimant was however on holiday at that point and so by letter of 24 July, pages 294 and 295, an alternative date of 27 July was put in place. That was subsequently changed again, the interview taking place on 10 September. Both of those letters repeated the instruction not to contact others and the contact information for Workplace Options.

104. In the investigation of the allegation as to a flat being let out for personal gain, Mr Robertson was only ever aware of one such flat potentially being involved. That was the flat at 664 Pollokshaws Road.

105. Mr Robertson perused the documentation with which he had been supplied. He interviewed the claimant. He also interviewed Ms Paterson. Ms Kerr likewise interviewed the claimant and Ms Paterson. The interviews were conducted with both of these "witnesses" when both Mr Robertson and Ms Kerr were present.

106. Notes of the interview with the claimant appeared at pages 647 – 678. That interview was held on 10 September 2018 as mentioned. The claimant signed the notes of the interview on 19 February 2019. The signature followed a copy of the notes being sent to the claimant by Mr Mackay on 19 December 2018 and alterations then being proposed by the claimant through Mr Bell. The revised notes incorporating those proposed changes were sent to the claimant for signature on 12 February, page 319 of the file. The interview with Ms Paterson took place on 28 August 2018. She signed the notes of the interview on 3 January 2019.

107. At the meeting between Mr Robertson, Ms Kerr and the claimant he was accompanied by David Bell of Unison. Mr Bell was an experienced Trade Union official.

108. Prior to meeting with the claimant Mr Robertson, with Mr Mackay, met with Corporate Fraud. At that meeting the Corporate Fraud report at pages 525 to 527 of the file, referred to above, was passed to Mr Robertson and Mr Mackay, together with files which they understood contained the relevant "back up" information/papers.

109. In relation to the property at Dowancraig Drive it transpired that, for reasons unknown, the papers passed to Mr Robertson and Mr Mackay by Corporate Fraud did not include some of the papers which Corporate Fraud had during their part in the investigation.

110. The papers Corporate Fraud had relating to Dowancraig Drive were those at pages 233 – 252 in the file. Those which Mr Robertson and Mr Mackay received, and believed to be the relevant papers relating to this property, were at pages 1415 – 1426. Of significance, the papers seen by Mr Robertson during his investigation did not include those at pages 236 and 250 of the file. This is a matter returned to in setting out the conclusions of the investigation carried out by Mr Robertson.

111. Mr Robertson had no knowledge of either of the first two protected acts during his time of involvement as investigator.

Investigation interview – Ms Paterson, 28 August 2018

112. As mentioned, Mr Robertson and Ms Kerr interviewed Ms Paterson and the claimant. Notes of this meeting were at pages 632-646.

113. Ms Paterson was asked general questions about the procedure around reordering items when they had been ordered and delivered but were found to be missing. In reply to question 20 she said that a TAD senior would need to authorise a further order for replacements if the respondents had been billed for goods initially supplied. She said, however, that the reorder would not be authorised. In reply to questions 25, 26 and 27 she stated that TAD

officers would follow a particular course if there were missing items. She said that the practice was to update the team manager and to email the supervisor at RSBI. If the matter was not resolved through this being done, there would be a discussion with the TADS senior, with the matter then being escalated into a complaint.

114. Ms Paterson also expressed her view that the clamant was *"quite strong"* in his knowledge of the systems and processes of the teams and had not raised any training or practice concerns with her.

115. When asked about Dowancraig Drive in Question 45, Ms Paterson said the claimant should have come back to her and *"told her"* about reordering as *"there is not an agreed practice to reorder missing items".*

116. In answer to question 51, about Haughburn Road, where it was said that RSBI had left the door to the property open, Ms Paterson said that this should have been reported to the TAD Senior by the TAD officer, with managers senior to her taking the decision as to whether or not to report the matter to the police.

117. In answer to question 57, following upon discussion as to the property at Maxwell Drive, Ms Paterson said *"no"* when asked if multiple orders of white goods for the same property are passed to the senior officer for authorisation or are highlighted in any report for sign off before the order is processed. She stated, however, that *"TAD officers should be raising this with RSBI and the TAD senior before any duplicate orders are processed".*

118. Ms Paterson confirmed that keys for void properties were kept in an unlocked drawer by TAD officers (other than some which were in a key safe), that there were 4 sets of keys, that everyone in the office had access to them and that keys were not signed out and in.

Investigation Interview – the claimant, 10 September 2018

119. The notes of the interview with the claimant were at pages 647-678.

120. The claimant did not raise at the outset of the investigation meeting or during its course any health issues by which he was at that time affected. Mr Bell did

not raise any such matter. There was no contact from the claimant with Mr Robertson prior to this meeting during which the claimant intimated any issue with his health. Had there been, Mr Robertson would have discussed the matter with the claimant and would have pointed him in appropriate directions.

121. During the interview, the claimant confirmed that keys for void flats were kept in an unlocked filing cabinet and that there was no signing in or out of keys. He said that there were 4 sets of keys and that keys were sometimes misplaced or returned very late.

122. There had been an issue, the claimant said, with access to his own computer since January 2018. He had since that time logged on to a colleague's computer, using his own log in details, although on occasion he used the colleague's computer when the colleague was already logged on.

123. In questions 43 – 75 Mr Robertson asked the claimant about reordering of goods if the goods initially ordered were not in the void. He gave explanations as to what would happen in that situation.

124. The claimant said he was *"strongly advised"* by team leaders, Ms Paterson being mentioned by name, not to raise a formal complaint with RSBI and not to raise a complaint. He was *"99% sure"* that this was conveyed by email. He said he emailed or phoned but did not raise a complaint. He went on to say that he had not had access to email since January 2018 and that he had been using everyone else's computers. He said he could not always access emails. He then clarified that he had access to a PC and his email account, but that access to a PC had been limited since January 2018.

125. The claimant then said that if items said to have been delivered were not in the void he would email RSBI. He mentioned the name *"David".* He said he also spoke to him on the phone. He was not sure however whether his email account would show such emails. In reply to question 63 he said that when he emailed or phoned RSBI to say an item was missing from a void, RSBI "*would just say that it was completed*".

126. In response to question 58 the claimant said that he would order items which were missing again as he was under severe pressure to turn the flat around. When asked in question 60 who would make the decision to order a duplicate item such as a washing machine, the claimant said that he is *"1000% positive there was only one team leader who could give advice as the other one was not up to speed and so he was advised to order again".* He said he did not have a team leader for months.

127. The claimant was next asked if he discussed missing items with a team leader if available and whether he was saying that the team leader advised him to raise a duplicate order. He answered by saying that team leaders *"did advise to raise duplicate orders"*. He said that he took the decision to reorder a missing item if a team leader was not available.

128. The following questions and answers are recorded:

"65. Mr Robertson asked Mr Veizi prior to receiving the email he refers to advising not to raise a formal complaint, what was his experiences of raising formal and tracking or monitoring complaint outcomes, did this happen often.

Mr Veizi said the outcome would be that they ordered the item and he would discuss with the team leader and if necessary he would order again.

66. Mr Robertson asked Mr Veizi how often he would have the need to raise a formal complaint.

Mr Veizi said he couldn't remember.

Mr Bell said that if Mr Robertson is information gathering he should know that.

Mr Robertson advised Mr Bell that the purpose of today's meeting was to gather information.

Mr Veizi said that he was following instructions from his Team Leader, he was only following instructions.

67. Mr Robertson said if something, is missing is it the practice to reorder

Mr Veizi said yes.

69. Mr Robertson asked did Mr Veizi raise that with a senior manager.

Mr Veizi said he discusses it with his Team Leader but he doesn't hear back.

70. Mr Robertson clarified with Mr Veizi that he was advising that he discusses his concerns about missing items with his team leader and they don't get back to him.

Mr Veizi said yes.

71. Mr Robertson asked Mr Veizi if the team leaders don't get back to him, who is taking the decision to reorder the missing items

Mr Veizi didn't answer.

72. Mr Robertson asked the question again.

Mr Veizi did not provide an answer.

73 Mr Robertson asked Mr Veizi if he ever contacted the police about the missing items.

Mr Veizi said he never contacts the police about missing items

Mr Veizi said that he has no access to emails so he would phone RSBI and he would order again then move onto the next property.

74. Mr Robertson asked Mr Veizi if he did not have access to his computer to email RSBI, how could he reorder the items, did he not need to access to a computer to process a work order

Mr Veizi didn't answer.

75. Mr Robertson asked the question again.

Mr Veizi did not provide an answer."

129. There was discussion between Mr Robertson and the claimant as to the claimant's training, supervision meetings and team meetings. The claimant said he had had limited training. He said his knowledge on the system was not very strong and that he wanted to improve his knowledge on the URS system. He said he raised this at supervisions and also raised conditions of work, adding he was really under pressure *"to PCs to access and work pressure is affecting his performance".* He said this was recorded in supervision paperwork and that he had raised it at team meetings. When he raised concerns regarding training at supervision meetings and nothing was in place by the next supervision meeting, he did not raise it again, he said.

130. With regard to specific void properties, Mr Robertson raised with the claimant those at Paisley Road West, that at Dowancraig Drive (referred to as Dowancraig Place), Haughburn Road, Maxwell Drive, Raithburn Road and Pollokshaws Road.

131. The concern in relation to the Paisley Road West property was, as mentioned above, as to ordering of 4 bed bases at a time when the property was due to be handed back to the landlord. The claimant said he could not remember why he had ordered 4 bed bases when the property was identified as one to be handed back. He then said he was not advised to hand the property back. He said in the situation where he had ordered beds when the property was being handed back, he would phone RSBI and get the spare beds reallocated. Mr Robertson said that there were no records on the file of this being done. The claimant said he did not know if he had done it in this instance, saying it could have been a common mistake.

132. In the discussion on Dowancraig Drive, in answer to question 107, the claimant said *"there is a bigger file in relation to that property".* On page 1418 of the file on a sheet of paper relating to Dowancraig Drive Mr Robertson wrote *"Bigger File".* Mr Robertson subsequently asked Mr Mackay if there were further papers and was informed that he had everything which Corporate Fraud had passed over.

133. When asked at question115 about ordering or reordering when an item was noted as not required at time of initial inspection or had already been replaced, the claimant said that there were 4 sets of keys and that 3 could go anywhere *"for example RSBI contractors".* He also said that he raised concerns about missing items with his team leader *"continuously"* adding that anyone can have access to the flats. When asked about there being nothing recorded as to raising reordering items with RSBI or team leaders and there being nothing mentioned on the file progress sheet or in the wider file, he said that he had raised this at a team meeting. Asked in question 120 about an order being placed for items despite those items having been said to have been ok and not requiring replacement at time of initial inspection, the claimant replied that there was no facility for him to raise complaints.

134. In the Corporate Fraud report at page 527 the disposal note dated 5 March is recorded. Mr Robertson did not consider or appreciate the significance of this. He made no mention of it to the claimant. He based his questions to the claimant on the premise that goods had, without apparent explanation, gone missing between the time of initial inspection and 19 March when it was recorded that they were not in the property.

135. The initial inspection of Haughburn Road recorded that the washing machine, fridge and cooker did not need to be replaced. The claimant had however submitted an order for replacement of those items. When asked about this, the claimant said that he had changed his mind. He said this could happen as he went along. He said he would not in those circumstances alter the initial inspection sheet. He referenced a lack of training in that regard.

136. The claimant was asked about the fact that he had returned to the property to inspect it, at which point he had recorded that RSBI had left the door open and the goods had gone. He confirmed that he had not been notified that the door had been left open, saying he and others sometimes went out before the completed paperwork came back. Asked whether he had contacted RSBI he said that it was his word against theirs and that *"it is pointless to accuse them".* He said he could not recall how he had escalated his concerns with RSBI. This type of event had happened before, he said.

137. In question 141 Mr Robertson asked if the claimant's team leader had authorised the reordering of the missing items. The claimant said *"yes"*. He confirmed that he would not record that on the file.

138. When asking the claimant about ordering replacement goods for Maxwell Drive, Mr Robertson asked why this happened when a colleague of the claimant had said that the items did not require to be replaced. The claimant said he was *"playing it safe".* He said that the goods needed cleaned and that he didn't want to get complaints so it was *"better to replace it".*

139. At question 148 Mr Robertson highlighted to the claimant a further order for another washing machine, this one placed on 12 June, after the earlier order of 12 April had included a washing machine. The claimant said that if something was not there he would replace it, adding that if it needed cleaning he would rather replace it. When asked if he had discussed with his team leader the fact that 2 washing machines had been ordered although the initial inspection said that the washing machine did not require to be replaced, the claimant said he discussed it *"if he gets the opportunity".*

140. Raithburn Road was referred to by Mr Robertson as being a property where on initial inspection by the claimant a washing machine had been ordered, an order for a further washing machine being later placed by the claimant. The claimant was asked if this was the same as other cases in that on final inspection the washing machine was not in the flat. The claimant replied *"it's not any different".* He added that *"the house keys go everywhere".*

141. Questions 153 – 155 saw the following exchanges:

"Mr Robertson asked Mr Veizi from the sample of cases he was reviewing, would it be fair to conclude that he was in regular contact with RSBI about missing items

Mr Veizi said yes

Mr Robertson asked if this applied to Mr Veizi's peers too.

Mr Veizi said yes, adding that he complains less to RSBI than other workers.

Mr Robertson asked again if there would be a record of these discussions, copy emails or written notes within the case file.

Mr Veizi said no."

142. In relation to Pollokshaws Road, Mr Robertson raised with the claimant the template completed to show on 23 January that all items were ok, this following an extensive work order completed earlier in January. 11 duplicate items were then ordered on 16 April. The claimant said that the items were not there, that the workers were not necessarily looking after the property and that it could have been passed back to the landlord for repair.

143. Due to the property being confirmed as *"OK"* in January and the further work in April, and given photographs taken in April showing signs of the property being inhabited, the claimant was shown the photos and asked whether he had let the property out in the period between January and April. He denied this. He did not raise any issue that the photographs were not of the property at 664 Pollokshaws Road.

144. The claimant was asked what prompted him to revisit the property in April to inspect it. He said could not remember. He was asked why further work would be required at that point given the inspection in January which had confirmed that work had been completed. He said that workers can be careless, that they move items around. He said it looks like RSBI did not do their job.

145. During the investigatory interview with Mr Robertson the claimant accepted that he had on various occasions double ordered goods. He denied having done this for personal gain.

Post Interview pre investigation report

146. Having interviewed Ms Paterson initially and then the claimant, Mr Robertson considered the information he had. There was a conflict between the answers given to him by the clamant and those he had obtained from Ms Paterson in relation to various points.

147. The claimant said he had raised different matters with Ms Paterson and had obtained her authority to proceed with reordering. He also said that he would raise matters if he could get hold of the team leader. He said that he had sent emails to RSBI or that he had spoken with them on the telephone. Ms Paterson had denied having given authority for reordering. Ms Paterson had described the need for the team leader to be alerted if there was an issue such that further ordering of the same goods was required. She said that RSBI should be alerted by email in that circumstance. The claimant said he had been instructed, being 99% sure this was in an email, not to raise complaints with RSBI. The claimant said he had raised some matters at team meetings and in supervisions.

148. Mr Robertson obtained minutes of the team meetings and notes from the supervision meetings. He established that the claimant had not been present at the 3 team meetings on 8/11/17, 1/02/18 and 12/04/18. The supervision meetings notes made no reference to the claimant raising any issues around training, goods being removed from properties or failures by RSBI.

149. Mr Robertson did not return to Ms Paterson to seek her comments on what the claimant had said in his interview. Mr Robertson did not access Servitor or try so to do to check as to whether there was any additional file material in relation to Dowancraig Drive by enquiring with Corporate Fraud or accessing the paper files, notwithstanding the claimant's statement that there was a bigger file for Dowancraig Drive. He proceeded on the basis that he and Mr Mackay had received all the relevant papers from Corporate Fraud, having raised the question with Mr Mackay and been informed he had all the papers He had not however received some papers, including those at pages 236 and 250 of the file.

150. Mr Robertson asked that a comparative sample of work from a different TAD officer was obtained. The records for a TAD officer named Lynn Kerr were obtained for Mr Robertson. Mr Robertson did not select Ms Kerr as the TAD whose records would be considered. There were 5 cases which were said to be comparable and for which papers were made available. Mr Robertson examined them and found no instance of double ordering. He noted an

instance where some work had not been completed by RSBI. The TAD officer had phoned RSBI to chase this up, so indicating by marking a "P" on the summary sheet.

151. Mr Robertson concluded that reordering of goods/double ordering was an issue peculiar to the claimant. Had the perusal of Ms Kerr's files revealed any such instance Mr Robertson would have investigated that element further by making other wider enquiries, looking at the work of other TADs, for example.

152. Mr Quinn also supplied information to Mr Robertson as to any complaints made by the claimant to RSBI. Mr Robertson was informed that the search did not disclose any emails from the claimant to RSBI over the period after 6 July 2016 when records had been computerised. A copy of the relevant email chain appeared at pages 1483 and 1484.

153. Checking of the claimant's email account did not result in any emails to RSBI or to the team leader about missing goods being found.

154. Mr Robertson did not speak with RSBI to explore with them the removal of goods by them from Dowancraig Drive on 5 March 2018 as mentioned in the Corporate Fraud report. This was as he had overlooked that element in the Corporate Fraud note. He did not therefore explore whether this was authorised or unauthorised removal. The removal of goods by RSBI on 5 March from Dowancraig Road, as referred to in the Corporate Fraud report did not confirm of itself that RSBI had stolen these goods.

155. Mr Robertson did not enquire with RSBI as to the claimant's statement that they had left the door to the premises in Haughburn Road open.

156. The view to which Mr Robertson came, as reflected in his report, was that there were instances of double ordering in relation to 6 properties, with the reasons for and circumstances of removal of goods which had led to the reordering being unexplained. He did not find any evidence of personal gain by the claimant. He noted that the claimant had given him explanations as to intimating issues to RSBI and to his team leader which were not supported by evidence and were disputed by his team leader. He had regard to the

claimant's actions and explanations relating to his order of replacement goods, in circumstances where he had not seen the original goods and where a colleague had said that the goods were *"OK".* He also had regard to the claimant's actions and explanations where goods had been confirmed by him as being *"OK",* but replacement goods had then been ordered by him. He noted the information given to him by the team leader as to the practice being to alert both RSBI and the team leader in the event of an issue with missing goods, weighing that against the claimant's position on that point.

157. The claimant gave Mr Robertson varying and inconsistent answers in the investigation process. He referred to emailing or phoning RSBI, mentioning a name at one point and saying he was in regular contact with them regarding missing items. He said he was told by email not to raise a complaint. He said he discussed something being missing with his team leader but did not hear back. He also said he continually raised concerns with his team leader about items going missing. He stated he raised the issue of reordering in a team meeting, said he raised matters with his team leader if he got the opportunity and also said that, prior to the email he said had been sent advising not to raise a complaint, he would discuss the position with his team leader and if necessary would order again.

158. During the period of investigation, on 4 September 2018, Mr Robertson met with Mr Kelly. This was to provide an update. Following this meeting Mr Kelly sent an email to Mr McBride and Ms Heuston setting out his view of the position at that point. That email was at page 299. It was copied to Mr Robertson.

159. The email was factually inaccurate in that it referred to there being nine cases with Mr Robertson. There had only ever been eight with him. Insofar as the email gave what was said to have been Mr Robertson's view of the strength or otherwise of the individual cases, it was inaccurate or misinterpreted Mr Robertson's views. Mr Kelly states that the strongest case was the one relating to letting of property where photos existed. It was said to be *"by far the strongest".* Mr Robertson in fact concluded that there was insufficient

evidence to support a recommendation that that element proceed to a disciplinary hearing. Mr Kelly also states:

*"...and he (*Mr Robertson*) is confident that he can make the cases much more difficult for EV as the hearing progresses".*

Mr Robertson was seeking to obtain facts rather than to do as Mr Kelly described.

160. Mr Kelly also says in the email that he *"would strongly advise"* that they meet with Mr Robertson. No such meeting took place however. Mr Robertson did not meet with either Mr McBride or Ms Heuston in relation to the investigation during the time of his investigation.

161. Mr Robertson did not reply to this email. He received many emails on a daily basis and this one did not register with him when received.

162. As mentioned above, Mr Robertson asked Mr Mackay to obtain a sample of files of a TADs officer to enable him to carry out a comparative case file. At page 302 an email sent on 27 September 2018 by Mr Kelly to Mr McBride appeared. The email sets out Mr Kelly's view of the process being undertaken and of Mr Robertson's approach. It was inaccurate in relation to both. Mr Robertson was unaware of this email being sent.

163. The email states in the first and final paragraphs:

"Alan got his comparison data the other day. If you remember he wanted to compare the work of a good TAD (Lynn Kerr) who does things by the book to EV the idea being that if both are poor we have nothing but if Lynn's work is good in comparison to EV's then we have a good case against him.

Will continue to keep you posted as best I can but we have a good result with the comparison and hopefully we can conclude soon?"

164. The email refers to Mr Robertson receiving eight of Ms Kerr's cases. In fact he received five. Mr Robertson had not sought the files of a *"good TAD"* for comparison purposes. The email refers to Mr Robertson planning to interview Ms Kerr the following week. He did not interview her. The email refers to the

comparison potentially leading to a good case against the claimant and to having a good result with the comparison. Mr Robertson was seeking information to enable him to form a view in the investigation rather than seeking to have a good case against the claimant or to see a good result with the comparison exercise.

165. Mr McBride replied to the email from Mr Kelly on 1 October 2018 saying:

"Willie

Thanks for this. I know we chatted about this. It certainly adds weight to the case but also raised issues about lack of consistency/management overview???"

166. Mr Kelly also referred in his email at page 302 to comments of Mr Bell of which he was aware. Mr Bell had said that he was not happy about two aspects the claimant had spoken to him about pre the investigatory meeting and what then transpired at the investigatory meeting. He referred to Mr Bell not being happy and not having any trust in the claimant. He also says that if it continues Mr Bell may potentially have to reconsider his position. On this element of the email Mr McBride replied

"To be fair I am not surprised David B is feeling the way he does!!!"

Investigation by Ms Kerr

167. There was a significant volume of work involved in the investigation which Mr Robertson was carrying out. When the further element for investigation was identified by Corporate Fraud, that of possible misuse of the claimant's work email account for personal use, it was decided that a second investigator would be asked to handle that aspect. The second investigator was identified as Yvonne Kerr. The claimant was informed of this third allegation at the meeting on 18 July. He was initially informed that Mr Robertson would investigate this matter. That was by letter of 18 July, pages 292 and 293, as mentioned.

168. When she was asked to investigate the issue of possible misuse by the claimant of his work email account in July 2018, Ms Kerr was employed by the respondents as a team leader in the Children and family section, North East Glasgow. She had at that point no knowledge of the claimant. She was unaware of the first and second protected acts until they were mentioned at the disciplinary hearing.

169. Ms Kerr had not previously acted as fact finding officer in an investigation. She was supported by Mr Mackay during this investigation.

170. Mr Mackay provided Ms Kerr with the documents listed at page 607 of the file. Those comprised 74 emails sent to and from the claimant's work email address, together with the claimant's diaries, flexi work records, training record, supervision records and absence records. Ms Kerr also received the Corporate Fraud report however did not meet with Corporate Fraud personnel.

Policies relevant to Ms Kerr's Investigation

171. At pages 1385 – 1396 of the file Staff Guidelines on Information Security appeared. The following extracts were regarded by Ms Kerr as being of particular relevance in relation to her investigation:

(a) Page 1389 Section 2B - (highlighted in red) *"you must not"* (then in black font) *"store your own data, such as photographs or music onto our council network or EDRMS."*

(b) Page 1391 Section 4, which sets out guidance on use of the internet at work. It details that the internet may be used for personal reasons during lunchtimes, before or after work, with provisos as to websites accessed.

(c) Page 1392, Section 5, which states that when sending an email (then highlighted in red) *"you must make sure"* (then in black font) *that you avoid* ***emailing personal data*** (emphasis in document) *or other sensitive information"*

*"**Other key points to remember when using email*** (emphasis in document)

Personal data (then highlighted in red) *must never* (then in black font) ***be sent*** (emphasis in document) *to your home email address.*

(d) Page 1396 *"Failing to comply*

Failure to follow the Information Security Policy or the guidance in this document is a breach of your conditions of employment and can result in disciplinary action, up to and including dismissal in serious cases."

172. Pages 1397 – 1406 of the file contained the respondents' policy and guidelines on *"Acceptable use of our Information and Communications Technology Facilities"* Section 6 of that document, at pages 1400 and 1401, set out *"Guidelines on personal use of our ICT facilities".*

173. It is confirmed there that employees are allowed to use a work device for personal use provided it does not *"hinder our business"* or *"bring us into disrepute"*. It is also confirmed that personal use **must** (emphasis in document) only take place during an employee's own time unless approved by the line manager.

174. The guidelines state that personal use **must not** (emphasis in document) include storing of personal files and also accessing social media, such as Facebook or Twitter for personal reasons. The respondents also state that they will **not accept** (emphasis in document) responsibility for:

"restoring copies from backups on request – as personal storage is not permitted (You have all been instructed to remove any personal files you have from our network – we reserve the right to delete any such files from our system if you have not removed them)".

175. It is confirmed in the section at page 1402 of the file that emails sent from the respondents' email system are the same as sending a business letter on headed paper. It is also confirmed in a section at page 1403 of the file that ICT facilities are not to be used for operating a private business.

176. In section 10 of the guidelines at page 1404 of the file it is said that action will be taken against any individual who breaches the policy or misuses the ICT facilities. That action will be, it is said, *"appropriate to the circumstances and may include disciplinary action, up to, and including dismissal".*

177. At page 1406 of the file details of an annual mandatory course were specified. That is an online course available on Glasgow Online Learning Development (GOLD") and called Information Security. The course is said to be there to remind employees of their responsibilities when using the respondents' equipment and also how to handle and protect the information used by employees at work. The claimant undertook this annual mandatory training as confirmed by his training records, pages 1267 and 1268.

Interviews conducted by Ms Kerr

178. Ms Kerr and Mr Robertson interviewed Ms Paterson, the claimant's team leader and line manager, on 28 August 2018. The section of that interview dealing with the elements of the investigation conducted by Ms Kerr appear at pages 640-646.

179. During perusal of emails and other information, Ms Kerr had noticed the claimant apparently attending meetings and dealing with emails relating to personal matters during working hours. She therefore raised with Ms Paterson the flexi hours built up and used by the claimant. Ms Paterson provided information that the claimant had used flexi hours, building up to 2 days per month, the maximum permitted.

180. Ms Paterson confirmed that she was unaware of the claimant using his email account, the photocopier and scanning facilities for his personal use. She also confirmed that the claimant had carried out the mandatory annual GOLD training and should be clear as to what was expected of him in relation to information security and data protection. Her view was that the claimant would be clear that use of the respondents' email system was for work purposes and not personal matters. She also confirmed that the claimant would only very seldom have any need to interact with solicitors in his job role and that there

would be no work-related reason for the claimant to provide his sort code and bank account information in any work-related email.

181. Ms Kerr and Mr Robertson interviewed the claimant. Mr Bell was present. The section of that interview relating to the element of investigation carried out by Ms Kerr was at pages 664-678 of the file.

182. In this interview Ms Kerr gave the claimant and Mr Bell a copy of the documentation she had. She then went through that paperwork.

183. The claimant said in answer to questions 177 and 178 (pages 664 and 665) that he had been without a tablet from March until June 2018 and could not send or receive emails. He said he had limited time on the computer, and that access was usually in the morning or after hours.

184. When Ms Kerr raised with the claimant at question 206 (page 667) the respondents' policies regarding ICT use, the claimant said he was unfamiliar with them. He initially said he could not remember completing annual training, then that he recalled completing the tests. He said however that he had not fully read all of the contents of the course, just completed the test. He initially said he was unaware of the pop up which appeared on screen at time of every log in and which had to be clicked confirming acceptance of the conditions of use. He then accepted that although he said he had not read it, he agreed to it on a daily basis.

185. Asked about email use, the claimant said to Ms Kerr that he used the respondents' system for moderate personal use during his lunch hour if he did not have access to his personal email. He believed that to be permitted. His position was that he did not send anything sensitive.

186. Ms Kerr asked the claimant about his internet use at work (question 219 at page 670). He said that he did not access gambling sites, usually accessing Auto Trader or holiday destinations, and that he thought he did this during tea breaks. He said he sent an email to a finance company and scanned a document for his sister to apply for a loan. He was helping her as his English was better than hers.

187. Emails received in the claimant's work email account were produced by Ms Kerr in the interview. Those were from 9 commercial companies, such as Facebook, Jet2, Boss and Just Eat. The claimant initially said he did not subscribe to any commercial companies vis his work email address. Ms Kerr said to him that the emails showed that he had subscribed using his work email address. He said that the websites asked for his personal details. He said his personal email account had been hacked and that he had created a new one. Ms Kerr highlighted that despite having a personal email account at all times he had chosen to provide his work email address. The claimant said that he had to provide 2 email addresses to subscribe to the Milano airport newsletter. He said he did not subscribe to Boss, did not give Just Eat his council email and did not subscribe to Facebook. He said he did not know that it was possible to unsubscribe to these companies.

188. When taken to Section 6 of the respondents' guidelines, the claimant then accepted that he had breached the guidelines.

189. After going over with the claimant the emails sent to and from his work email account, including emails relating to nursery vouchers, a parking ticket appeal, his brother's restaurant, PAT testing for a non council property and car hire documents (all detailed at page 671 of the file), the claimant accepted in addressing question 231 that he had been sending sensitive information to unsecure email addresses and that it was inappropriate.

190. Ms Kerr raised at question 239 on page 673 an application for car finance. The claimant confirmed that this related to his sister. It was highlighted that her wage slips, bank account details and other personal information had been scanned onto the respondents' system and then sent to an unsecure email address via the claimant's work email account. The claimant said he did not realise that they would still be on the system. He was asked how he had the time to do what had been set out given his reference earlier in the meeting to being under pressure to complete his work during working hours, He gave no explanation, whilst confirming again that he had breached procedures.

191. At question 245 Ms Kerr asked the claimant about sending on emails from his personal account to his work email account. He is noted as saying that he *"sent on the emails to file the information on his desktop as this is a safe place to store information"* He confirmed *"he stores all this information on his computer as this is a safe filing system that he has used for all his communications on council related* (sic)*"*

192. Various other emails with attachments which had been scanned onto the respondents' system were raised by Ms Kerr with the claimant, together with the time taken to do this and queries as to how this fitted with his work timings. The record of the interview does not disclose the claimant replying substantively to this section of questioning.

193. Ms Kerr raised with the claimant emails in relation to personal litigation in which he was involved. Those emails had been forwarded from his personal email address to his work email address. The documents sent with the emails had been stored on his computer. The claimant accepted in his answer to question 259 at page 676 that there was *"no excuse for keeping that on his computer."*

194. In reply to question 263 at page 677, the following is recorded in the note of the interview:

"Mr Veizi said that if he knew what he had done in breaking confidentiality, he would not have acted in the way he has done. Mr Veizi said he accepts he has misused the Council email however stated that he has never revealed other people's private information."

195. The claimant had said he met with his solicitors outwith working hours. Ms Kerr asked the claimant at question 265 about times of meetings with his solicitors which were within working hours with there being no evidence of annual leave or flexitime being taken to cover those times. The claimant said that the emails did not indicate whether the proposed meetings had gone ahead or not.

Finalisation of Investigation Reports by Mr Robertson and Ms Kerr

196. Mr Robertson and Ms Kerr produced a joint report for submission to Ms Rafferty. Ms Rafferty was to decide whether or not the matter proceeded to a disciplinary hearing.

197. There were two drafts of the report produced prior to the final version as submitted to Ms Rafferty. The drafts were discussed with Mr Mackay to obtain his advice on procedural aspects, such as the documents to submit as appendices to the report and the level of formality to be adopted in the report. Mr Mackay did not have any input into the substance of the report or in relation to the recommendations made. Those were the recommendations of Mr Robertson and Ms Kerr alone, uninfluenced by others within the respondents' organisation. They were not influenced by Mr Kelly or by Mr McBride. There were no meetings in relation to the content of the report between Mr Robertson, Ms Kerr and Mr Kelly or between Mr Robertson, Ms Kerr and Mr McBride.

198. Draft one of the report appeared at pages 540-571 ("the first report"). The second draft ("the second report") appeared at pages 572-603. The report which was submitted to Ms Rafferty was dated 1 March 2019 ("the final report"). It appeared at pages 604-631. The appendices which accompanied the final report appeared at pages 632-1490 of the file.

199. The final report took from time of appointment of Mr Robertson at end of June or early July 2018 until 1 March 2019, some 8 months, to be produced. This was attributed by Mr Robertson and Ms Kerr to the volume of work involved, including volume of documentation, the need to speak with witnesses and to have statements of witnesses approved, their other day-to-day work (including in Mr Robertson's case dealing with the need to rehouse many people urgently following upon the Glasgow Art School fire), and unavailability of various people involved, including the claimant on occasion, due to annual leave or sickness absences.

200. In course of the move to production of the final report, Mr Robertson sent a copy of the first report to Ms Kerr on 4 December 2018. A copy of the email

is at page 308 of the file. Thereafter, on 6 December 2018, Mr Robertson sent a copy of the first report to Mr Mackay. A copy of that email was at page 306 of the file. In that email Mr Robertson asks Mr Mackay to *"have a look over and let us know if this is going in the right direction."* He also says:

"good for us to get a chat on how we include the appendices, due to the large number of them. If we were to include them all it could take the report to well over 150 pages, when including the witness statements."

201. When sending the first report to Mr Mackay, Mr Robertson also sent a copy of it to Mr Kelly and Ms Kerr. Unknown to Mr Robertson, Ms Kerr and Mr Mackay, Mr Kelly then forwarded Mr Robertson's email with the first report attached, to Mr McBride on 11 December. His covering email said:

"Jim,

Sending you this as a preview of what's to come in the EV report meeting Alan and co tomorrow to finalise."

202. There was a personal assistant in Mr McBride's office who screened emails for Mr McBride and helped him manage his inbox as he received many emails each day. Mr McBride received this email, however, did not pay it particular attention. He did not reply to it. He did not read the report in any detail. Mr McBride was appointed chair of the disciplinary hearing, as later detailed, around the beginning of March 2019.

203. Mr Robertson and Ms Kerr met with Mr Mackay at some point between 11 December and 19 December. Mr Kelly was not present. That meeting led to the second report being produced, an update on the first report. Mr Robertson sent a copy of the second report to Mr Mackay on 19 December 2018. He copied in Ms Kerr and Mr Kelly. Mr Robertson refers to 3 areas which have yet to be finalised and to the fact that he still has to start his chronology, Ms Kerr having completed hers. That email is at page 311.

204. Mr Kelly, again unknown to Mr Mackay, Mr Robertson and Ms Kerr, sent Mr Robertson's email with accompanying report, to Mr McBride. That email is also at page 311. It was sent on on 19 December with the following email:

"Hello Jim

This is where we are at with EV report it's almost done other than appendix's (sic) *we would hope to have a hearing in January?"*

205. Mr McBride received this email. He did not read the report in any detail. He did not reply to the email.

206. Part of the discussion with Mr Mackay involved obtaining his advice regarding the appendices to the report. The appendices as proposed appeared at pages 314 and 315. They included the Corporate Fraud report at proposed appendix 3. Proposed appendix 19 was an email from RSBI in relation to complaints raised. Proposed appendix 22 was a comparative sample of void property files.

207. In discussion, Mr Mackay expressed his view that what should be included in the appendices were those documents considered essential for the report. He was conscious of the length of the report and the extent of the appendices as proposed at that time.

208. On the basis of the view from Mr Mackay as HR advisor to the investigators, proposed appendices 3, 19 and 22 were removed. His view was that the Corporate Fraud report could be omitted as it included some elements which Mr Robertson had decided were not to be included in his report. His report essentially superseded the Corporate Fraud report, Mr Mackay considered. He therefore did not believe it should be included. In relation to appendix 22, he advised Mr Robertson to leave it out, however to confirm in the report that a comparison had been done. The final report so confirmed at page 608. The appendices to the final report were listed at pages 630 and 631. The items originally in the appendices and ultimately omitted were omitted for the reasons mentioned and on advice as stated. It was Mr Robertson's decision to omit them on advice from Mr Mackay. They were not deliberately omitted by way of suppression of evidence.

209. A further email was sent by Mr Robertson to Ms Kerr and Mr Mackay on 18 February 2019 as the report reached its final iteration. The email was also

copied to Mr Kelly. A copy of the email was at page 320 of the file. Mr Robertson, Ms Kerr and Mr Mackay met the following day to discuss finalisation of the report, obtaining further general advice from Mr Mackay on the style and format rather than the substance of the final report.

210. Unknown to Mr Robertson, Ms Kerr and Mr Mackay Mr Kelly forwarded that email, with attachment, to Mr McBride on 19 February 2019. A copy of his email appeared at page 320. His accompanying note read:

"Morning,

Just to give you a heads up this should be the last meeting with Gordon on EV case. Alan and Yvonne finished the report and that's the Appendices just about finished guessing they will be looking for a date and Chair Person soon."

Final Investigation Report

211. The final report dated 1 March 2019 appeared, as mentioned, at pages 604-631. The documents in the appendices appeared at pages 632-1490.. The 3 allegations made were detailed, with relevant recommendations, at page 629. Those are:

"Allegation 1: Mr Veizi has misused Glasgow City Council's email for personal use.

Allegation 2: Mr Veizi has been double ordering furniture and white goods for personal gain.

Based on the evidence gathered there is a case to answer for both these allegations under the Council's Discipline and Appeals procedure and a hearing should be convened.

Allegation 3: Mr Veizi has been letting Glasgow City Council furnished flats.

There is insufficient evidence and therefore no case to answer."

212. The final report detailed the background and set out the documents which Mr Robertson and Ms Kerr had viewed. It detailed who had been interviewed, namely Ms Paterson and the claimant.

213. Ms Kerr set out a chronology of events summarising the emails and scanning activity which she had identified. That appeared at pages 609-614.

214. Mr Robertson summarised the positions in respect of the void properties at pages 616-618. Two columns were shown, one headed *"Event"* and another headed *"Evidence".* The properties involved, with costs said to be associated with the double ordering of goods, were those at 1439 Paisley Road West, 15 Dowancraig Drive (£707.73 and £929.65), 140 Haughburn Road (including void work, £6824.89 and £2129.86), 18 Maxwell Drive (£3502.32 and £432.22), 4 Raithburn Road (£385.53) and 664 Pollokshaws Road (£550.49).

215. When providing the note of evidence in relation to Dowancraig Drive, Mr Robertson did not mention the final bullet point in the Corporate Fraud report at page 527 in relation to the disposal note of 5 March 2018. This was due to his failure to realise and appreciate the potential significance of this bullet point. He had overlooked it.

216. The final report then set out, in relation to each of the allegations, a summary of the evidence. That relating to allegation 1 appeared at page 619 of the file. That relating to allegations 2 and 3 appeared at pages 620 and 621.

217. Pages 623-625 each had two columns on them into which Mr Robertson and Ms Kerr had placed information. The columns were headed *"Supporting Evidence"* and *"Conflicting Evidence".*

218. The conclusions drawn by Mr Robertson and Ms Kerr were at pages 627 and 628. Their recommendations were at page 629 as mentioned. The appendices detailing documents considered were at pages 630 and 631, again as mentioned.

219. Ms Kerr and Mr Robertson accurately summarised and reflected the evidence before them, save for Mr Robertson not including any mention of the reference in the Corporate Fraud to the disposal note of 5 March 2018 relative to

Dowancraig Drive. The responses of the claimant to the allegations and admission by him in relation to the misuse of the respondents' email account were also accurately summarised and reflected by them.

220. The evidence in relation to double ordering or household and white goods for personal gain confirmed that double ordering had occurred on several occasions. That was accepted by the claimant. There was, however, no evidence of where the items originally in place or initially ordered had gone, including there being no evidence that the claimant had taken them or gained personally from their removal. The claimant had adopted various and inconsistent positions in the investigation as to whether he required prior approval to reorder and had obtained that, whether he had to raise missing items with RSBI and his team leader and had done so, whether he had done so by email or telephone calls, whether he had been instructed by email not to do so, whether he had access to emails or not and whether he had raised missing items at supervision and team meetings or otherwise with his team leader.

221. Mr Robertson did not include reference to 2 properties to which Corporate Fraud had referred in their report in his recommendation to proceed to a disciplinary hearing. He concluded during his investigation that, in relation to those properties, there was no basis for there to be a recommendation to proceed to a disciplinary hearing. He also so concluded in relation to the allegation that the claimant had let out property for personal gain as mentioned above.

Decision to Proceed to a Disciplinary Hearing and to appoint Mr McBride as Chair

222. The investigation report was submitted to Ms Rafferty as Assistant Chief Officer in order that she could determine whether it was appropriate or not to convene a disciplinary hearing. It was passed to her as one of the most senior managers due to the perceived seriousness of the matters involved. Ms Rafferty had no prior knowledge of or interaction with the claimant. She did not know of either the first or second protected acts.

223. Ms Rafferty read the investigation report and considered it together with the papers which were referred to in it and produced with it. She met with Mr Mackay as the HR representative as part of this exercise.

224. The conclusion reached by Ms Rafferty was that there were grounds to proceed to a disciplinary hearing. That conclusion was reached by her without any involvement in the taking of the decision by Mr Kelly or Mr McBride and without contact from them in that regard. She had not had sight of any of the first or second investigation reports, only seeing the final report.

225. Ms Rafferty's view in relation to allegation two specifically was that the investigation report confirmed that there had been double ordering of goods by the claimant in relation to properties he was responsible for managing and that goods had then gone missing from these properties without proper explanation. A disciplinary hearing was appropriate in her view to hear more about this and to determine the outcome.

226. Ms Rafferty spoke with Mr Mackay regarding the appointment of the chair for the disciplinary hearing who would make the decision on its outcome. Ms Rafferty herself was one possibility. She was in overall charge of the department involved. She was however due to retire in June of 2019. In that circumstance, Mr McBride was regarded by Mr Mackay, and also by Ms Rafferty, as being the appropriate person to take the hearing. They were both unaware of the emails between Mr Kelly and Mr McBride during the investigation phase providing information by way of updates and also of the fact that Mr Kelly had sent to Mr McBride a copy of the first, second and final investigation reports.

227. Mr McBride was not actively involved in the investigation. His involvement in this stage was minimal. He had, through the emails he received from Mr Kelly, knowledge of progress. He also had Mr Kelly's views on particular aspects of how the investigation was going and Mr Kelly's reading of the approach being taken in the investigation at different point. He had responded as set out above to the email at page 302. That was the extent of his involvement.

228. Mr McBride was asked to be the chair of the disciplinary hearing and accepted that role. He had previous experience as an investigator, however had not previously been chair of a disciplinary hearing. He said to Mr Mackay that he had an awareness of the allegations and mentioned receipt of emails from Mr Kelly, however did not provide full details of the level of awareness and of the content of emails received from Mr Kelly or of his reply. Had he done so, Mr Mackay would have been of the view that Mr McBride should not be appointed chair of the disciplinary hearing and would have said this.

Support Officer for the Claimant

229. In mid June 2018 just after the claimant was suspended Mr Kelly contacted Annemarie McDougall and asked her to be support contact for the claimant during the period of his suspension from work. She had not previously acted in such a role. At the time she managed a small team of workers in the homelessness service. She had no knowledge of the claimant at this point.

230. Ms McDougall had no understanding of what the role of support contact involved. Mr Kelly did not explain that to her. It was Ms McDougall's assumption that in the role she would act as she would if an employee in her team was absent through ill health with contact being from the claimant to her.

231. Mr Kelly wrote to the claimant on 4 July as mentioned above, the letter being at pages 284 and 285. He stated that Ms McDougall would contact the claimant fortnightly to update him on progress in the investigation and to offer him support. Ms McDougall was not however informed of this task or responsibility by Mr Kelly or anyone within the respondents' organisation. She expected the claimant to make contact with her.

232. On 8 August 2018 Ms McDougall sent an email to Mr Kelly and Mr Mackay saying that she had not been contacted by the claimant, saying she just thought she would bring that to their attention. A copy of that email and the chain associated with it appeared at page 295. Mr Mackay replied, also on 8 August, stating that the claimant was on leave and not expected back until 8 September. He did not mention that Ms McDougall was expected to contact the claimant. Mr Kelly did not reply.

233. Ms McDougall's next interaction was when she sent an email on 28 September 2018 to Mr Kelly, Mr Robertson and Mr MacKay. That email was at page 301 and read *"I just wanted to update you that I haven't had any contact from Eddi as was the arrangement while he is off."*

234. Ms McDougall then made contact with Mr Kelly by telephone to seek clarification of the position given that there had been no contact. She was informed by Mr Kelly that she should be contacting the claimant. She indicated that she was unclear as to how she would do this as she did not have the claimant's contact information. By email of 3 October Mr Mackay sent the claimant's mobile number to Ms McDougall, the only additional comment in his email being "*Let me know how you get on*".

235. After 3 October, Ms McDougall tried to contact the claimant, but without success. She discussed the situation with Mr Mackay. Mr Mackay emailed her on 14 December 2018 saying that she should keep contacting the claimant every week *"even if he does not answer or reply to your messages."* He advised her to keep a record of each call, which she had not been doing up to that point. He added: *"For info- if you do happen to speak to him can you advise him that the investigation is almost complete and should be concluded in January".*

236. The Contact Record thereafter kept by Ms McDougall was at pages 321-323 of the file. She commenced it by noting that she had tried to contact the claimant on 12 December but that there was no answer. That was also the position on 19 December, although Ms McDougall left her contact details.

237. Ms McDougall spoke with the claimant for the first time when she telephoned him on 9 January 2019. She updated him and the claimant said he was fine. Ms McDougall was then absent on sick leave on 16 and 23 January and did not phone the claimant. No-one else phoned on her behalf. She apologised and updated the claimant on a call on 31 January.

238. On 8 February Ms McDougall spoke with the claimant at the second time of trying. He said that he had not been sleeping well, had visited his GP and had been prescribed some medication to assist in the short term. He said he did

not require further assistance at that time and that he appreciated the weekly calls. Ms McDougall agreed to call him the following week. Ms McDougall's calls to the claimant were not answered by him on 13, 14 and 27 February. She left voicemail messages for him on those occasions. She also left a voicemail message on 4 March having been unable to speak to the claimant.

239. On 7 March there was a reasonably lengthy call between Ms McDougall and the claimant. As confirmed in the note of that call at page 323, the claimant said that he was unwell, had been back to his GP and had been prescribed additional medication for stress. He said he had been admitted to hospital following overdose attempts. He attributed this to personal issues with his daughter with which he was dealing and also to the investigation which he regarded as having dragged on for too long. He said he had received updates saying the investigation was nearing conclusion but it had not, and conclusion seemed to be moving further away. Ms McDougall said she was really concerned and explored the availability to the claimant of support from people around him. She also raised the possibility of a referral being made to Workplace Options. The claimant said he had used the service previously and was not keen on it, although would contact them himself if he wished to follow that up.

240. Ms McDougall contacted HR and also the claimant's union representative Mr Bell to pass on her concerns.

241. The claimant remained suspended until 3 April 2019 when the disciplinary hearing commenced. Ms McDougall did not make contact with him in the 3 intervening weeks.

242. Ms McDougall's actions in relation to providing support for the claimant were the same as her actions would have been for anyone else.

Period leading up to the Disciplinary Hearing

243. On 8 March 2019 Mr Mackay wrote to the claimant intimating that there was to be a disciplinary hearing on a date to be advised. The contact information for Workplace Options was provided in this letter, which was at page 324.

244. By letter of 13 March, pages 325 and 326 of the file, Mr McBride wrote to the claimant intimating that the disciplinary hearing had been set down for 3-5 April 2019. The letter confirmed that Ms Kerr and Mr Robertson would present the management case, that Ms Paterson would be a witness and that Mr McBride would chair the hearing. It enclosed a copy of the final investigation report and appendices. The claimant was alerted to the possibility of making written submissions and calling witnesses. He was reminded not to make contact with other staff members to discuss the case. He was also informed that he could be represented and that disposal, including a decision to dismiss could result.

245. The claimant collected the papers for the hearing on 14 March. The claimant saw Mr Mackay at that time. He made no comment to Mr Mackay about his health or ability or otherwise to attend and participate in the disciplinary hearing. Mr Mackay confirmed that the papers had been picked up by the claimant by email sent that day to Mr McBride. He copied it to Ms Kerr, Mr Robertson and Mr Kelly. That email was at page 327 as was the reply from Mr McBride of later that day. Mr McBride's reply was *"AH well!!!!"*

246. Mr Robertson had been informed by the claimant in the investigatory interview that his team leader had sent him an email instructing him not to follow the agreed complaints procedure when items were missing from flats. Mr Robertson initially understood that there was no such email. On 1 April 2019, just 2 days before the disciplinary hearing was scheduled to start, Ms Paterson located an email and sent it to Mr Robertson saying:

"Hi Alan,

I think this is the email Edi may have been referring to and refers to the standard of flats and not missing items."

247. That email was at page 332. The email to which Ms Paterson referred was at page 333. It was an email of 22 January 2018 from Ms Paterson to TAD officers, including the claimant. That email read:

"Hi folks,

After our recent liaison meeting with RSBI, it has been agreed that any complaints regarding the unsatisfactory standard of a TFF should be emailed to Eddie, David & Matt.

Gary Sherry has agreed that any complaints will be resolved no later than the day after the complaint is made.

Can I please ask that you copy Joyce and I into your email to allow us to monitor the level of complaints."

248. Mr Robertson sent on the email from Ms Paterson to Mr Mackay on 1 April. He asked (page 332) whether there was a process by which the respondents could introduce the email rather than having Mr Bell or the claimant introduce it. He mentioned that it could relate to a particular page (page 18) in the report, although said that the investigation report was talking about missing items, and not the general condition of the flats. He copied that email to Mr Kelly and Ms Kerr.

249. On 2 April, unknown to Mr Mackay, Mr Robertson and Ms Kerr, Mr Kelly sent the email from Mr Robertson to Mr McBride. His covering email was at page 331 and read:

"Morning Jim,

See below for your information apparently it's being claimed that Carol Paterson TADS TL had sent on email telling TADS not to complain to RSBI when either work was substandard in TFF's or things like white goods went missing or not delivered seems she found the email and it's not saying not to complain but it seems it's trying to organise the complaints.

They are worried that EV/David Bell will produce this email and claim they were told not to complain and Alan is trying to fit it into his report to make it ineffective.

They spoke to Carol Paterson yesterday she's a witness and she was a disaster never read her statement, email below all came up thinking maybe David Bell been intimidating them a wee bit Gary speaking to Carol today."

250. Mr McBride replied to Mr Kelly later that day. That email was also at page 331. Mr McBride said:

"Arghhhhh Does Gordon know this"

251. On the same page the exchange between Mr Kelly and Mr McBride continued and concluded. Mr Kelly replied: *"Don't worry they know and getting sorted".* Mr McBride replied: *"cheers".*

252. Mr Kelly's interpretation of what was happening was not correct. Mr Robertson was exploring with Mr Mackay the potential inclusion of the email, bringing it into the papers for the disciplinary hearing. He did not seek to make the email ineffective in any way. In response to Mr Robertson's email, Mr Mackay advised him that the email from Ms Paterson was not relevant to his investigation in that it related to the quality of work at the flats and not to missing goods. The email was not therefore made available for the disciplinary hearing. It was not suppressed. It was regarded as not being of relevance to the issues to be discussed and determined at the disciplinary hearing.

253. No coaching of Ms Paterson was undertaken in relation to the content of her statement/witness evidence at the disciplinary hearing. It is unclear to whom Mr Kelly was referring in his email to Mr McBride of 2 April when he states that *"They spoke with Carol Paterson".* Mr Mackay always suggests to investigating officers that they meet prospective witnesses prior to a disciplinary hearing for the purpose of ensuring that each witness has read their statement and is aware of the format of the hearing. This is to try to ensure that the witness is prepared for the hearing. It is not to "rehearse" or discuss the content of the evidence. It is also unclear whether Mr Quinn spoke with Ms Paterson on 2 April as referred to by Mr Kelly. If he did so, it was not to coach her in relation to giving evidence but rather to support and reassure her as to the process involved.

Disciplinary Hearing

254. The disciplinary hearing was held on 3-5 April 2019. The claimant was present and was accompanied by Mr Bell. The allegations were spoken to by Mr Robertson and Ms Kerr. There was witness evidence from Ms Paterson and also from Ms Miller, a team leader. Evidence on behalf of the claimant as to the bed bases at Pollokshaws Road was given by Kevin McDonald, housing officer. The hearing was chaired by Mr McBride. The management note of the hearing appeared at pages 1562-1601. It is an accurate summary of the hearing.

255. Neither the claimant or Mr Bell made mention at the disciplinary hearing of any health issue on the part of the claimant affecting his participation in, or understanding of, the proceedings. As stated above, he had not mentioned any such issue when he collected papers from the respondents prior to the hearing and had not spoken with Mr Robertson about his health.

256. For the hearing and at it, Mr McBride had the same papers as had the claimant. In addition however, he had had sight of a report carried out into the Temporary Accommodation Service in November 2018 by Ms McCaig of Practice Audit. A copy of that report appeared at pages 529-539. The claimant was unaware of this work by Ms McCaig, of the document she had produced and of its conclusions.

257. The report from Ms McCaig was referred to, without specifically naming Ms McCaig, by Mr McBride in his comments in the disciplinary hearing recorded at page 1595 when he said *"Following the investigation there has been an audit of TADS and an action plan put in place. The entire team required a review and he was not singled out."*

258. The report from Ms McCaig did not specifically mention an issue with reordering of goods. At paragraph 5.4 on page 531, however, having referred to 40% of 50 voids scrutinised having jobs which were delayed Ms McCaig said:

"There are a wide range of reasons for this. Not least, when Tad's workers received notification that the job was finished, the final inspection would show that the job was either incomplete, to a poor standard or that ordered items were missing. This occasioned workers to submit a complaint to have the job completed..."

259. At paragraph 7.7 on page 536, she said:

"Financial governance may also be improved by the use of asset numbers on equipment ordered. For example if a new fridge is ordered there is nothing to safeguard that equipment from theft or even to help in the detection of theft. In flats with a safe key any of the TADS workers or any number of tradesmen can come and go at will during the refurbishment period."

260. At paragraph 9.4, having detailed improvements desired and benefits of those, she said:

"This improvement cannot be achieved without scrutiny and review of our working arrangements with City Building and RSBI..."

261. Prior to commencement of the hearing the claimant submitted a document. That was at pages 334 and 335.It was a submission setting out comments he wished to make in relation to the allegations and background. Mr McBride accepted the document. Mr Robertson and Ms Kerr were given copies of it. At the invitation of Mr McBride, the claimant read that towards the end of the disciplinary hearing as later detailed.

262. On day 1 of the disciplinary hearing, Mr Robertson firstly spoke to his investigation report. He took in turn each of the 6 properties he regarded as providing a basis for the recommendation he had made in the final report. He summarised the claimant's position as he had given that at time of the fact finding interview with him. There was, at the end of the summary Mr Robertson gave to the hearing of the position with each property, an opportunity for the claimant, Mr Bell and Mr McBride to ask questions of each other and of Mr Robertson. That was also an opportunity for any further relevant points to be placed before the hearing. Ms Paterson gave evidence,

answering questions from Mr Robertson. Mr Bell then asked her questions on the claimant's behalf. The claimant, Mr Robertson and Mr McBride then clarified points or asked questions of Ms Paterson.

263. Ms Kerr summarised the investigation she had carried out and the claimant's position as he had set that out to her in the fact finding interview. There were then questions and discussions involving Mr Bell, the claimant, Mr McBride and Ms Kerr. Again, any further relevant points could be placed before the hearing.

264. On day 2 of the disciplinary hearing, Mr McDonald gave evidence, being questioned by Mr Bell and being available for questioning by others at the hearing. There was further discussion and the claimant read out and spoke to his statement. Mr McBride asked the claimant questions arising from his written and verbal statements.

265. On day 3 of the disciplinary hearing Ms Miller gave evidence and was asked questions by Mr Robertson, Mr Bell, the claimant and Mr McBride. Thereafter Mr Robertson, Ms Kerr and Mr Bell for the claimant summed up their respective positions. The hearing adjourned for a period of around an hour. Mr McBride then returned and intimated his decision.

266. Mr Robertson's summary of the position on each property is now reflected, together with what are viewed to be key elements of the subsequent exchanges at the hearing.

Mr Robertson's areas of report

Paisley Road West

267. This property was being handed back yet 4 bed bases were ordered. At the hearing the claimant said this was an error but said that he had agreed with the housing officer that the bed bases would be used by the incoming tenant. This was confirmed by Mr McDonald, housing officer, who gave evidence. Mr Robertson said at the hearing that proper procedure was to contact RSBI and have the items reallocated or returned to RSBI. The claimant said that contacting RSBI is time consuming and that it was cheaper for the bed basses

to remain. He had not personally gained. He said that he had discussed balancing the cost implications with his team leader.

Dowancraig Drive

268. Mr Robertson's findings were summarised as being:

> *"2 washing machines and 2 fridges were ordered by Mr Veizi, supplied and fitted for the TFF when originally assessed as being ok and not required to be replaced. There is also no evidence Mr Veizi discussed ordering or was given authorisation from his team leader to reorder the missing items. There is also no evidence that Mr Veizi emailed RSBI, copying in the TADs Team leaders regarding the missing items."*

269. The presentation from Mr Robertson highlighted the claimant's varying and inconsistent statements at the fact finding interview when being asked about raising issues in relation to missing goods. It noted Ms Paterson's statement as to agreed procedure being to email RSBI and to copy in team leaders.

270. This was the property in relation to which Mr Robertson did not have some documents, including those at pages 236 and 250 of the file. He had however had the Corporate Fraud report which at 527 stated that on a disposal note of 5 March (the document at page 250) the fridge freezer and washing machine had been disposed of.

271. Questions were put to the claimant (page 1567) on the basis that he had ordered goods for Dowancraig Drive when there were such goods already there. His response that RSBI had cleared them out was challenged on the basis that this would not be done with TAD approval. The questioning and discussion on this point proceeded on an incorrect factual footing in that, contrary to the position put to the claimant, there had been disposal of items on 5 March by RSBI, evidenced by the reference in the Corporate Fraud report and the disposal note.

272. Although the claimant said that an order had been cancelled on 29 March, Mr Robertson presented the information he had from Ms Miller via Mr Quinn (at page 1424), that the order had been completed on 29 March.

273. Issues regarding other missing household goods such a vacuum cleaner and kettle were raised.

274. The claimant said RSBI had 2 sets of workers who delivered and cleared the property and that there 4 sets of keys.

275. Mr McBride concluded this part of the disciplinary hearing, his words being summarised at page 1569:

"Need to balance (sic) *on what EV recollects over time. He will need to consider the paperwork and what it suggests. Accepts that the process was not followed regarding repairs, he does accept errors and oversight, but on balance if items were deemed ok, so why reorder them. Can RSBI over-ride inspections, clarification will be sought on this. EV also said they have discretion over CR4 code, this also requires clarification."*

276. Mr McBride then sent an email to Mr Quinn, copying in Mr Kelly asking as to the points just mentioned. The email was sent on 3 April and appeared at page 336 of the file. The content of the email is shown in italics, it read:

Question *"At today's hearing reference was made to a TADs worker submitting a CR4 form to RSBI where they would have discretion to override the inspection report? Example being a fridge deemed ok but RSBI replacing this without any discussion with tads? It was suggested that this enabled to over ride anything within inspection?*

Answer *If the work orders are put through the system then will go through as ordered. They cannot be revoked or altered on the system by them alone. I've confirmed with RSBI that they can only be changed after discussion with TADs."*

277. This email was shared with the claimant and Mr Bell the following day, as confirmed at page 1592. Having seen the email Mr Bell said that Ms Paterson had said discussions (with TADs) may occur later. The claimant commented that, *"you rarely get consultation with RSBI. They don't call. They carry out the work and then they advise TAD Officer."* Mr Bell said that Ms Paterson had taken a different position to Mr Quinn and had said this could happen on

occasions. Mr Robertson said that Ms Paterson had said there could be *"an instance".* Mr McBride said that Ms Paterson had said it was very rare and that she could not recollect an instance, the default position being that set out in Mr Quinn's email.

Haughburn Road

278. Mr Robertson set out what was covered in his interviews with the claimant and with Ms Paterson in relation to this property, details of the main points of that being set out above. His findings were:

"Mr Veizi ordered 2 additional washing machines, 1 cooker and 1 fridge which were supplied and fitted for the property when they were originally assessed as being ok and not requiring to be replaced. There is no evidence to conclude that RSBI left the door of the TFF open or that Mr Veizi discussed the case with his team leader before reordering multiple items. There is also no evidence that Mr Veizi emailed RSBI, copying in the TADs Team leaders regarding the missing items."

279. In the discussion after these were confirmed by Mr Robertson as his findings, the claimant said he advised Ms Miller of the situation of the door being left open and that she had said to reorder the items. He also said that RSBI deny responsibility so he did not call them. He stated that the washing machine and fridge were fine, but that he changed his mind later. He accepted he had not changed the initial inspection sheet after he had changed his mind. His position to the hearing was that he believed Ms Paterson to have been off sick and that Ms Miller told him to reorder and that they could not argue with RSBI. The claimant said that it was common for RSBI to leave doors unlocked and that he had raised this practice with team leaders. He said he recorded it in his notes, going on to say he should have taken notes and noted the named contact at RSBI, but was following team leader's instructions.

Ms Miller's evidence at the disciplinary hearing

280. When Ms Miller came to give evidence to the disciplinary hearing she was asked about this property at Haughburn Road and possible authorisation by

her of the claimant reordering. The passage is at page 1596. She agreed that the agreed process across the team for missing items was that the concern would be discussed with the team leader, thereafter an email would be sent to RSBI and the team leader copied in. The claimant did not challenge her at the disciplinary hearing on that being the process which should be followed. She said she had not authorised the claimant to double order goods which were missing in circumstances where RSBI said they had been supplied and fitted and a bill rendered. Her statement was that she did not think she was involved in authorising replacement of stolen/missing goods for Haughburn Road and did not give authorisation to the claimant. Mr Bell challenged her saying she had previously said she did authorise the claimant to reorder. She said she did not recall that. Mr Robertson said he had checked Ms Paterson's absence or otherwise and that she had not been off at the point in question. The claimant said that he was not 100% sure it was that week that Ms Paterson was off but that she was not in the office.

Maxwell Drive

281. This property was initially inspected by a TADs officer other than the claimant. The cooker washing machine and fridge freezer were assessed as not requiring to be replaced. Without visiting the property, the claimant decided to order replacements of those items. Mr Robertson confirmed that in total 2 washing machines,1 cooker and 1 fridge had been ordered, despite the view on initial inspection. There was no evidence of discussion with or authorisation from a team leader and no evidence of RSBI being emailed with a copy to the team leader.

282. In the discussion at the hearing, the claimant said that although he had not visited the flat, he had used his judgment to play it safe. He could not recall if he had raised this point with his colleague. He did not say that he had raised it with his manager. His position was that his manager advised TADs to use their discretion.

283. Mr McBride commented on the cost of replacement, particularly as against cleaning an item. The following exchange is then recorded at page 1573, between Mr Robertson ("AR"), the claimant ("EV") and Mr McBride ("JM"):

"AR One month later a washing machine was reordered.

EV It was missing. Team leaders advised not to raise complaints to RSBI through URS system for missing items. So he called or sent an email.

AR But the file states white goods were fine and were replaced. A month later they were replaced again, there was no urgency to get the flat turned around. There is no evidence of a call or emails to RSBI.

EV Lately they were told not to use URS system so made a phone call or sent an email but that delayed the process and his team leader would pull him up for the delay. It was a long void so the quickest decision was to reorder and move on.

AR there are no complaints as issues did not happen. There is no evidence of EV emailing RSBI or team leaders over 2 years.

EV That was what he was advised, to use the URS procedure but then not to because it would look bad on the statistics. When they moved to the new office told not to use URS complaints procedure but to use email or phone call. He used phone calls.

JM Was he instructed to do that by team leader

EV Yes. Then they were advised the instruction was to send an email.

AR To send an email to RSBI needed a PC

EV He had an issue with emails, he sent emails over this time but for quickness he phoned RSBI

JM If telephone calls were made there is no evidence of them

EV TL3 form raised, without it not recorded.....????"

Raithburn Avenue

284. Mr Robertson's findings are set out as being:

> *"2 washing machines were ordered by Mr Veizi and supplied and fitted when only 1 was required on the original TAD Initial Inspection template. There is no evidence that Mr Veizi discussed ordering or was given authorisation from his team leader to reorder the missing item. There is also no evidence that Mr Veizi emailed RSBI, copying in the TADS team leader regarding the missing items".*

285. In the discussion which followed the claimant said he was advised not to look at costs. He had been told not to raise a complaint. He said that the *"Complaints process was to email RSBI".* He reiterated that he was told not to complain. When asked why he did not keep records to keep himself right, the claimant said that as a TADs worker he kept himself away from arguments in the office. He went on to say, as noted at page 1575, *"If he has to get a flat ready he would do the same thing again and reorder to get property available rather than argue."* Mr McBride said there was no record of these matters being raised in supervision or at team meetings. Mr Bell said that the supervision notes were unsigned.

Pollokshaws Road

286. Findings reported by Mr Robertson were that 2 washing machines were ordered by Mr Veizi and supplied and fitted when only 1 was required on the TAD Initial Inspection template. There was said to be no evidence that the claimant discussed ordering or was given authorisation from his team leader to reorder the missing item and that there was no evidence he had emailed RSBI, copying in his team leader about the missing item. The property was at void status for over 5 months with limited work required.

287. When it was highlighted in the discussion that there were no emails or anything raising concerns, the claimant said that he should manage his paperwork better and referred to the URS system.

288. Although the allegation as to the claimant renting out properties for personal gain did not proceed to the disciplinary hearing, Mr McBride nevertheless asked the claimant in a passage at page 1576 about photos which he described as showing that the property looked lived in. The claimant said that all keys were with RSBI and LRT, saying that all the keys were away. He did not take any issue with the photographs on the basis that they were not of this property.

289. Mr Robertson summed up at page 1577 of the file. He referred to double ordering by the claimant having taken place on multiple occasions. Examination of files for 6 properties had revealed that 8 washing machines, 4 fridges and 2 cookers were ordered with many other household items.

290. The claimant accepted that he had ordered duplicate items on multiple occasions but denied that there had been personal gain.

291. The explanations from the claimant of steps said to have been taken to complain, difficulties with emails, instructions said to have been given by team leaders and raising of issues said to have occurred at team meetings and supervisions were detailed. The note also reflects there being no trace of any complaints to RSBI or copies of complaints being sent to the team leader from a review of the claimant's email account, no evidence of anything of this type being raised at supervisions and absence of the claimant from the last three team meetings. It mentions the position of the team leader as to practice within the team if there was an issue of this type and the need for authorisation to be obtained, which had not been given in the instances being addressed.

292. The claimant and Mr Bell reiterated that there had been no personal gain. The claimant accepted that he cut corners *"as procedures were long".* He said he did not get a *"clear steer"* from team leaders with regard to double ordering. *"If he was in any doubt he reordered."*

Ms Paterson's evidence to the disciplinary hearing

293. Ms Paterson was asked questions by Mr Robertson. She confirmed that the claimant had not raised concerns about missing goods in supervision

meetings and that she had not given him authority to double order missing white goods or other furniture items which RSBI had advised had been supplied and billed. She also confirmed the agreed process in the event of there being missing goods was to notify the team leader, email RSBI and copy in the team leader. This statement as to the agreed process was not challenged by the claimant or Mr Bell. Her position was that the claimant had not notified her of his view that RSBI had left the door open to the property in Haughburn Road and that she had not authorised him to replace the missing items.

294. In response to questions from Mr Bell, Mr Robertson, Mr McBride and the claimant, Ms Paterson confirmed (1) that there was no written process for ordering goods, saying that if staff were unsure they should come and ask, (2) that supervision notes were emailed to the claimant (3) that there was not a huge amount of missing items, and that if there was a problem the team leader should be approached. She added that this had been the position since she was a TAD officer (4) that there were 6 weekly meetings with RSBI when issues could be raised, with TADs being emailed or spoken to at team meetings prior to those meetings as to issues (5) that RSBI did not have responsibility or authority to replace items without authority from a TADs officer, with there being a very rare and genuine reason required before they removed items from a flat. The claimant said that RSBI had removed fridges due to their condition and in particular in circumstances where a CR4 form (completed in the case of a refurbishment) was in place (6) that she would expect the fact that RSBI had not locked a front door to be raised with a team leader *"straightaway".* This was as if it was not the fault of a TAD then it would be a cost to RSBI and (7) the claimant's workload was not in excess of that of his colleagues.

295. The claimant and his representative did not challenge Ms Paterson's evidence on these matters, other than saying that RSBI had removed fridges without authority when a CR4 (refurbishment) situation pertained, as mentioned above. That was the matter which Mr McBride had checked out via the email exchange referred to above, which appeared at page 336 of the file.

Ms Kerr's areas of Report

296. Ms Kerr provided information as to the investigation she had carried out. Her report and the discussions with Mr McBride, Mr Bell and the claimant are at pages 1583-1591 of the file.

297. Ms Kerr described the categories of use she had established by the claimant of his work email account, (1) emails sent to there from commercial companies as result of subscriptions by the claimant's work email account, (2) personal emails sent by him from that account, with significant material of a confidential nature involved, (3) emails from external companies to that account, with scanned documents forwarded, (4) personal confidential material held including scanned documents, (5) confidential information held in relation to litigation in which he was involved in a personal capacity and (6) storing of private business information. She also noted that although the claimant had said that he did not have access to Outlook or a PC, evidence by way of a volume of emails sent and scanned showed that he did have access to the system. Ms Kerr also spoke about emails sent by the claimant and flexi time misuse on matters other than the respondents' business and meetings which she believed the claimant had had with his lawyer without time off having been authorised.

298. The claimant's responses to Ms Kerr on these matters was explained by her, including his initial denial of having subscribed to the companies who had sent material to him, his statement as to lack of familiarity with the respondents' guidelines and his subsequent acceptance of having breached the guidelines.

299. The claimant said to the hearing that he did not subscribe to companies. He said he had a lack of knowledge of the respondents' guidelines and policies. He explained how it had come about that he used his work email address whilst in Milan airport.

300. Ms Kerr's explained her findings and the claimant's comments to her in relation to the second category, that of personal emails sent to and from his work email address which were unrelated to work and which were for his own

personal or business use. The claimant then said that the facts spoke for themselves and acknowledged that he had breached procedures.

301. Sensitive documents relating to the claimant's sister, including wage slips and a detailed bank statement and which had been scanned were then raised by Ms Kerr at the hearing. The claimant said that he had his sister's permission to scan the documents and that the arrangement was in connection with a car he needed for work. He said he did not take tea breaks or cigarette breaks.

302. Discussion followed regarding the extent of the claimant's knowledge of IT, the extent of documentation sent to and from his work email account and the volume and sensitive nature of material scanned and held on the respondents' system. The claimant said that he forwarded emails to store them and did not think that any harm or damage to the respondents' system would result. He explained the help he gave to his brother's business by storing and printing documents and when he did this. There was discussion regarding other elements of IT use including emails about PAT testing in properties owned by the claimant, contact made with the claimant at his work email address by someone he knew, emails about a litigation in which he had been involved and also as to the timing of this IT use and time spent upon it.

303. The claimant acknowledged that he had misused the respondents' email system, but said he had not disclosed personal information. It was highlighted to him that if stored on the respondents' system others had access to it. He said that if he had known about the breach of policy he would have stored the information elsewhere.

304. Training was raised and the claimant confirmed that he had completed the mandatory GOLD training. He said however that he had completed it with help from colleagues He said that the main policy was about how information was stored and about not sharing information with other organisations and that it had nothing to do with personal use or profit. He accepted, however, that he should not have done what he had done. He said that there was moderate use of the respondents' system and that he did not think he would cause the system harm. When it was put to him at that point by Mr McBride

at page 1588 that this was not moderate use and that he had a fair insight into what he was doing, the claimant replied, *"Yes".*

305. There followed discussion in relation to time taken by the claimant for interaction with his lawyers, use of flexitime by him for this and whether this was authorised. The fact that this had been raised in supervision meetings was highlighted.

306. At page 1590 of the file, Mr McBride is recorded as accepting Mr Bell's comment regarding how long a task actually took but said he would need to consider the use of flexi and IT resources for personal reasons.

307. Prior to summing up taking place, Mr McBride raised with the claimant the fact that he had completed the training on IT and data protection and was aware of the policies. The claimant said *"Yes".*

308. At page 1591 the final exchanges in relation to this allegation occurred. Mr Bell said, *"EV does not deny that he stored information he had some technical difficulties but had managed to use the system whereby he sent emails etc. Accepts that flexi records did not coincide with the meeting with solicitor. The large volume did not impact on his job as a TADS officer. The time involved has not been great."*

309. The claimant is noted as saying *"He has been naive and stupid and was not acceptable. He should not have stored the info on his desk top. It was sensitive and personal information which was stored and scanned and he shouldn't have done this. He did ask his team leader for time off."*

310. Mr McBride asks if the claimant acknowledged the respondents' resources and time used and the work done during core time. The claimant is recorded as saying, *"Agreed".*

311. The first day of the hearing concluded with Mr McBride highlighting that the claimant's written submission contained serious allegations, with it being noted that those would be talked through the following day.

Claimant's written and oral submission to the disciplinary hearing

312. In his statement to the disciplinary hearing, which was at pages 1593 and 1594 of the file, the claimant said he accepted the allegation with regard to emails, but not that relating to white goods, an allegation he described as false. In relation to the email issue, the claimant said that if he had a better understanding he would not have done it.

313. He referred to the impact suspension had had on him, saying he was under stress and anxiety and was on medication. His family and daughter were also affected. He mentioned the negative impact on himself and his partner.

314. The claimant said he had defended himself 4 years ago against another accusation. He felt discriminated against and was standing up for himself. He stated that he was from an ethnic minority and was the only such person working in TADS and the only person accused. Other TADS workers' cases would be the same as or worse than his. The respondents were said by him to be the total opposite of being caring. He had been isolated for 10 months with no-one calling him and no-one caring. He asked why the police were not involved, saying he would do anything to clear his name.

315. In relation to the statement by Ms Paterson and time off, the claimant said he was away for personal reasons and not in relation to his lawyer or his business. He said that he was told by his team leader that he could go and make up the time.

316. Prior to a discussion around his written and oral statements, the claimant said that he had made a mess of his work but that this was due to a lack of training and maybe laziness with regard to the emails, but that he was not dishonest. He agreed he should have known better with regard to the email issue, did not know the consequences and should have paid more attention to his work. He said he had liked working for the respondents for 19 years.

317. In his written statement (pages 334 and 335) which he read out, the claimant confirmed that he vehemently denied the allegations. He said that he had

never had any training and had learnt as he went along. In paragraph 5 of his statement he wrote:

"I feel and believe that these allegations are a "witch hunt" and are racially motivated. I feel and believe that I am being discriminated against by superiors whom I am not wishing to name at this moment. I reserve the right to do so in the event I take matters further."

318. In relation to what the claimant referred to as the allegation that he had reordered white goods which went missing, the claimant emphasised that there was pressure to ensure swift turnaround of void flats. He said that when it was brought to his attention that goods were not dispatched, he reordered to allow the flat to be available. He stated he spoke with team leaders who appeared to brush off his enquiry. He described normal practice and the impression he got as being that he should not waste their time, he should just reorder. He said there was no set procedure in place of which he was aware or in which he was trained. He was discouraged from following the complaints procedure. It is more, he said, that there appeared to be issues with goods not being delivered rather than that they went missing. He highlighted that the keys were accessible by various parties.

319. The claimant referred to the upset caused to him and the need for him to be on medication due to the allegations, including the allegation of theft. He said that the respondents have not once given him any support or opportunity to clear the allegations. He stated:

"Again, I made to wonder if this is something to do with my ethnic background and an occurrence of institutional racism. Four to five years ago I experienced this and took my said employers to an Employment Tribunal and was settled in my favour. I feel this has caused an underlying current of the "witch hunt" I referred to earlier."

320. Saying that at no time did he order goods for personal gain, he went on to assert that his employment record with the respondents had been impeccable and that his team leaders had no grievances in relation to his performance or behaviour.

321. He then said:

"There was also a ridiculous and ludicrous allegation that I was subletting flats for personal gain and then this allegation was immediately withdrawn. "Mud was thrown at me in the hope it would stick". This is definitely a case of someone having it in for me. Again I can provide names but will not due to the fact I may require producing these at further judicial hearings."

322. The claimant then set out his position as to having worked often without breaks and more than set hours and to having sought team leader's consent to leave the building on the very rare occasion that was necessary for personal reasons. He stated he then made up any such time taken. He accepted that he has used the email address for convenience and had printed off a document occasionally. He said many council employees do the same, referring to it as a common practice, and asked if there was to be a check on all the respondents' employees in this regard. He also accepted that it was an error on his part and said that he was not aware it was a serious offence and misuse of duties.

323. Mr McBride listened to the claimant's oral statement and read his written document. He gave them appropriate consideration and treated them seriously. At the disciplinary hearing the dialogue between Mr McBride, Mr Bell and the claimant in relation to the assertions made by the claimant as to race discrimination is shown at pages 1594 and 1595.

324. Mr McBride referred to the allegations which the claimant made of a witch hunt and of racially motivated discrimination. He said these were very serious allegations and asked the claimant why they were raised now and not prior to his document submitted for this hearing. He wished to understand why it was that if the claimant was of this view it had not been highlighted until this point.

325. In reply the claimant said that racial comments were made about where he came from and about being a drug dealer and fraudster. He took them as a joke but did not like to hear them. He did not report them, although questioned himself as to whether he should report them. He said he did not take it further as he wanted to let it go in case he was made out to be a liar.

326. Mr McBride asked about the previous case to which the claimant had referred. The claimant said he was overlooked for a post due to his ethnic background and that he had taken it to an Employment Tribunal. Mr McBride sought to clarify this with the claimant asking if he was challenging things currently as he believed that the current situation was related to what had happened 4/5 years ago. The claimant confirmed that this was correct.

327. When asked why he believed this to be a witch hunt and whether he had formalised his feeling over how he had been treated by his managers, the claimant said he had not raised a complaint as he did not wish to make a big deal of it. He had the names of 3 supervisors, he said, which he had not disclosed but would disclose only to Mr McBride. He said in response to a further query that he had not highlighted these issues before this point as he did not wish it to affect his job, He now wished to clear his name. Mr McBride said it was difficult to move this forward without further details. The claimant did not provide any names to Mr McBride at this point. Specifically the claimant did not mention Mr Kelly's name at any point in this hearing in relation to allegations of racially discriminatory behaviour by Mr Kelly towards him.

328. In relation to providing names to Mr McBride the claimant said that if he gave names nothing would be done, so what was the point? Mr McBride said that the claimant had made serious allegations and that the department would investigate them, but that the claimant had not raised anything previously over how he has been treated. The claimant said that he *"will just let it go".*

329. The claimant then mentioned a friend and said that the respondents did not like him raising concerns as to the way his friend was treated in the department and that Mr Kelly was not happy he raised concerns legally. Mr McBride asked for the name of the friend in order to look into the case. The claimant gave Mr McBride his friend's name.

330. The claimant had raised his view that other TADs were not investigated and asked if he was picked randomly or for historical reasons. Mr McBride said that he was not picked randomly. He went on to say that following the investigation there had been an audit of TADs and an action plan had been

put in place. He said the entire team required a review and that the claimant was not singled out. That was a reference by Mr McBride to the work done and report submitted by Ms McCaig.

331. That day's proceedings concluded with the following exchange, JM being Mr McBride and EV being the claimant:

> *"JM The main issue around his letter is the serious allegations and the views he expressed relating to his ethnic background. But as Mr Veizi is not willing to expand on his allegations he cannot do anymore but his letter will be noted. If he had more information then he could progress.*
>
> *EV He can give him one name but he has no evidence. Rumours were said in the office that he wanted him out of the Department.*
>
> *JM He has the opportunity to progress this if he wishes."*

332. Mr McBride listened to the claimant in a respectful fashion. He sought to encourage the claimant to give him information to enable him to investigate the allegations he made as to discriminatory behaviour. Mr McBride was reasonable in seeking to understand why it was that the claimant was making allegations of race discrimination at this point in the disciplinary process having not raised mentioned it at any prior stage. There was no valid foundation for the view that Mr McBride was inferring that the claimant was *"playing the race card"* by so enquiring.

333. Mr McBride had not been aware of the first protected act (the previous Employment Tribunal claim) until the claimant raised it at the disciplinary hearing. He was unaware of the second protected act.

334. The following day Ms Miller gave evidence to the disciplinary hearing. Details of that are set out above. Mr Robertson, Ms Kerr and Mr Bell summed up.

335. Mr Robertson's summary appears at page 1598 of the file. He detailed the number of additional appliances he said had been ordered, also referring to many other household items involved. He noted the claimant's position that

there was no personal gain. He also noted the claimant's reference to many people having access to keys, however said that the claimant offered no further explanation as to where the new white goods had gone. There was no trace of an email to the claimant advising him not to follow the complaints procedure regarding missing items. The claimant had referred to phoning RSBI or emailing them. There was no evidence to support that. There was also evidence that pointed away from there being an issue with the claimant having access to email, notwithstanding his position on that. There was no evidence of any issue being raised by the claimant at team meetings or at supervisions despite his claims to the contrary. The evidence from the team leaders as to no authorisation being given to the claimant for reordering was highlighted, together with their evidence as to the agreed procedure of emailing RSBI and copying in the team leader if a missing item issue arose.

336. Ms Kerr reiterated the position as to emails being sent to and from the claimant's work account, documents being scanned and stored and the nature of the emails and documents involved. The claimant's accessing of social media and subscription to commercial entities' mailing lists were mentioned. The policies said to have been breached were referenced.

337. Mr Bell said that the claimant conceded that his record keeping and work practices were poor. He said there was no structured or procedural way to work and that he had had little training. There was poor interaction or control by the team leaders and staff members did not offer support.

338. Supervisions were referred to as being a snapshot. The claimant had not been put on a PIP which had been discussed and would have been helpful. There had only been one supervision in 2016.

339. Ms Paterson had said that RSBI could remove goods without speaking to TADs, but that this was very rare. Procedures were very poor. Mr McDonald had confirmed the bed bases were left at the property. This was a practice error with no dishonest intent.

340. Misuse of email was accepted as having occurred. It was pointed out that the claimant did not think he was doing any harm.

341. Mr McBride was urged to take into account the claimant's 19 years of service and what was said to be his unblemished record. In fact the claimant had received a final warning in 2004 and a verbal warning in 2014 as mentioned above. Neither of those matters played any part however in the decision made by Mr McBride.

342. The claimant's personal circumstances were also referred to, loss of employment being something which it was said would have a severe detrimental effect on him and his family.

343. Mr McBride asked the claimant and Mr Bell if they had had a fair hearing. The claimant said he was happy with the 3 days however wished witnesses were more honest. Mr Bell replied *"yes"* to the question. Had the claimant been aware of the emails from Mr Kelly referred to in this Judgment and of the emails from him which had been sent to Mr McBride, with Mr McBride's responses, he would not have agreed that the hearing had been a fair one.

Decision at Disciplinary Hearing

344. After an adjournment of around an hour Mr McBride returned and announced his decision. It was Mr McBride who reached the decision. He made the decision during the adjournment and upon the evidence on the allegations that came before him at the disciplinary hearing. He did not take the decision to dismiss the claimant because of any protected act. It was not taken because of the national origin of the claimant.

345. The note of what Mr McBride said appeared at page 1601. It said:

"These were serious issues involving a significant departure from the TADS and IT procedures and it was correct to investigate them and bring them to a disciplinary hearing.

I was satisfied that on multiple occasions you ordered duplicate items totalling thousands of pounds which had been delivered then went missing from the properties you managed. You were unable to provide any evidence, with the exception of the property at 1439 Paisley Road West, where the missing items

went to. Your claim that the other missing items from the other properties were removed by RSBI I did not find credible.

Although there is evidence that items went missing from various properties on numerous occasions, you were unable to provide evidence to support your claim that you had forwarded email correspondence and raised concerns personally to management about the missing items and the reordering of duplicate items. Furthermore, you failed to provide evidence that you raised complaints or concerns with management about RSBI regarding the missing items.

I was satisfied that you breached the Council's guidelines on ICT and information Security. The evidence confirmed that these breaches were unrelated to Council business, were frequent and sustained over a prolonged period of time. This was despite completing relevant training and being aware of regular staff communications highlighting the importance of complying with the guidelines. I was also satisfied that you misused the Council's flexitime scheme by claiming time for non-Council related business.

I noted your admission to misusing the ICT systems and your expression of regret over your actions. I do not believe however that you have reflected on your actions as your admission only came about because you were caught.

The Council rightly places a high degree of trust and confidence in its officers working within social work services. The serious nature of the complaints found against you, I determined to be a matter of gross misconduct and have no trust or confidence in you discharging your professional responsibilities as a Temporary Accommodation Development Officer. Therefore it was appropriate to summarily dismiss you from the Council's employment."

346. Mr McBride was conscious of the claimant's length of service and of his then clear disciplinary record. Those were positive aspects, however did not weigh sufficiently in his mind to lead him not to dismiss the claimant. He considered whether a final written warning was appropriate, however came to the view that dismissal was the relevant sanction given the "offences". His decision to dismiss was based on there being two "offences". If either one of the

"offences" had stood on its own, he would have considered possible dismissal on the basis that he saw each of the offences as potentially amounting to gross misconduct on a stand-alone basis. He would then however have considered whether the appropriate sanction was dismissal or final written warning.

347. It was Mr McBride's belief on the basis of documentation and oral evidence before him at the disciplinary hearing that the claimant was responsible for double ordering of white goods and household items for personal gain. He based this conclusion on a combination of elements. He had regard to the instances of goods being ordered, going missing from premises for which the claimant was responsible and then being reordered. He also had in mind occasions when goods were reordered although the goods originally in the premises had been confirmed as being satisfactory. The claimant's varying and inconsistent accounts as to whether or not he had made contact with RSBI and as to how had done so if he had, were also viewed as relevant. The claimant's differing statements as to whether he should make contact with his team leader, had done so, did not require so to do, and had raised issues at team meetings or in supervisions were also in Mr McBride's mind. He had information before him from Ms Paterson and Ms Miller on the latter points which did not confirm the claimant's version of events and practices. He was therefore not satisfied as to the explanation given by the claimant as to where the goods had gone when they went missing. He regarded there as being nothing to support the claimant's version of events. He concluded on the information and documentation before him that the claimant had, on various occasions, double ordered the goods and items and, given the explanations or lack of them provided by the claimant, that he had done so for personal gain.

348. It was relevant in Mr McBride's view to the decision he took to dismiss the claimant that the claimant had said at one point at the disciplinary hearing that he would act again as he had in reordering goods.

349. There was additional cost for the respondents associated with replacement of goods, given that liability to pay for the original goods also existed. Those

additional costs were also in Mr McBride's mind when he considered the "offence" and the sanction to be imposed.

350. In relation to the issue of misuse by the claimant of his work email account Mr McBride had regard to all the claimant had said, including the admission by him. He weighed that in coming to his decision. He was of the view from the claimant's comments during the hearing that the claimant did not appreciate the serious nature of the issue and the risks to the respondents' systems potentially resulting from his actions. He considered that the claimant had had relevant regular training in policies and procedures in relation to IT use.

351. At time of dismissal the right to appeal was explained and it was confirmed that a letter would follow confirming dismissal. That letter was dated 11 April 2019 and appeared at pages 341 and 342. It confirmed the decision and the grounds as those are set out above. It confirmed the right of appeal and how to proceed with an appeal.

352. In making the decision to dismiss and in expressing his view that the claimant's position that items missing from properties had been removed by RSBI Mr McBride did not have information before him as to disposal of goods by RSBI from Dowancraig Drive on 5 March 2018, supported by the document at page 250 of the file.

Appeal

353. Having received the letter from the respondents confirming the outcome of the disciplinary hearing, the claimant intimated an appeal. His trade union representative, Mr Bell, did this in terms of an email at page 1535. The grounds he gave were that the disposal was severe and excessive. The claimant then submitted a far fuller letter of appeal on 29 April 2019. That appeared at pages 1538-1553. He submitted additional grounds of appeal by letter of 15 May, pages 1558-1559.

354. The respondents acknowledged the letters from the claimant, their letter of 23 May 2019 being at page 1560. A hearing was to take place on 12 June on the basis that this was the first available date for the Personnel Appeals

Committee to sit. That appeals body consists of 3 elected members and it is difficult to identify dates for any such hearing as the availability of those to sit on the appeals committee is limited.

355. The claimant withdrew his appeal by letter of 6 June, a copy of which was at page 1613.

356. The claimant withdrew his claims to this Tribunal of:

(1) The respondents failing to deal with the claimant's appeal properly or at all, said to have been an act of direct discrimination

(2) The respondents falsely claiming to be investigating his complaint on 6 June when the report dismissing his complaint had been written on 5 June, said to have been an act of direct discrimination

(3) Delay by the respondents in convening the appeal, originally said to have been a detriment to which he was subjected because he had done a protected act

(4) Failure by the respondents to acknowledge or deal with the allegations set out in his appeal promptly, also said to have been a detriment to which he was subjected because he had done a protected act.

(5) Failure by the respondents to inform him that the investigation report had been written on 5 June 2019, also said to have a detriment to which he was subjected because he had done a protected act and

(6) Failure to inform him of the outcome to the investigation in a timely manner, also said to have been a detriment to which he was subjected because of having done a protected act.

In those circumstances no specific findings in fact are made in relation to those matters.

357. The claimant also withdrew the claims reflected at issues 27, 28 and 29. No findings in fact are made in relation to the matters set out there.

Investigation under Bullying and Harassment Policy

358. The respondents were of the view that the claimant raised in his letters of appeal matters that would be dealt with at the appeal hearing. Their view in relation to paragraph 44 of his letter of 29 April, however, was that he raised a matter which required investigation prior to the appeals hearing. They wished to avoid a situation where the appeals hearing convened, however then might have to adjourn to enable an investigation into the allegations the claimant made in paragraph 44. Their actings in proceeding in this way reflected their normal or standard way of handling this type of situation.

359. Paragraph 44 read:

"The same pre-existing and racially and sexually discriminatory view applies to Ms Miller who repeatedly discriminated me (sic) *by calling me a "drug dealer" because of my Albanian national origin in front of colleagues repeatedly. I also had to put up with 2 admin workers Toni and John who would call me the "Albanian Mafia Guy" and make fun of my accent. Albanian is my first language and English is my second language. This was the daily racial discrimination, humiliation, intimidation, bullying and harassment that I had to put up with in the office. This was very demeaning, belittling and humiliating for me to endure, yet I just worked hard and got on with my work as I was brought up to do."*

360. The respondents' Bullying and Harassment Policy appeared at pages 22-29 of the file. The statement of commitment at page 22 gave examples of behaviour which might cause distress. It refers to behaviours because of someone's ethnic or national background as one such example.

361. At page 28 of the file part of the Bullying and Harassment policy headed *"Modified Procedure for ex-employees"* appeared. It states that if an employee has left employment then the complaint should be made in writing to the Head of Service. The procedure states that the Head of Service or nominated officer will arrange to investigate and respond in writing.

362. In this case, Mr Mackay nominated Mr Mearns as the person to deal with this matter. He emailed Mr Mearns on 29 May, the email being at page 345. With that email he sent a copy of paragraph 44 of the claimant's letter of 29 April. He did not send him any further element of that letter. The claimant was informed by letter of 6 June from Ms MacAskill, HR Officer, (page 1614) that the allegations he made were being investigated in accordance with the modified procedure.

363. The investigation by Mr Mearns continued to a conclusion notwithstanding the withdrawal of his appeal by the claimant.

364. The respondents' practice when the modified procedure is applied is that the former employee is not interviewed. The person tasked with responding will investigate the complaint and will reply in writing. That person will not send to the ex-employee a copy of any report prepared or of any statements taken. That is what happened when Mr Mearns carried out this role in relation to the complaint made by the claimant. Prior to being contacted by Mr Mackay in relation to the role mentioned, Mr Mearns had no knowledge of the claimant. He was unaware of the disciplinary proceedings involving the claimant and what they entailed, other than the basis of dismissal as set out in the email from Mr Mackay. He did not know of the first, second, third or fourth protected acts.

365. Mr Mearns had carried out previous investigations for the respondents, having 14 years of so doing. This however was the first investigation he carried out where the employee was no longer employed by the respondents. It was his first investigation under the modified procedure. That procedure does not lay down a mandatory course for to be followed by the person carrying out an investigation under it. Mr Mearns followed what he understood to be the appropriate procedure in that he interviewed the 3 people named by the claimant, asking them questions about the allegations. He understood from Mr Mackay that speaking to the claimant as part of the investigative procedure was not necessary under the modified procedure.

366. Mr Mearns came to a view upon the allegations and completed a report. Ms MacAskill, HR Officer, wrote to the claimant on 4 September 2019 intimating the decision which Mr Mearns reached. A copy of that letter was at page 1627.

367. The 3 people named by the claimant were Toni, John and Ms Miller. Mr Mearns carried out an interview with Toni and one with John, both on 4 June. Notes of those interviews were at pages 1602-1605. Ms Miller was absent on maternity leave at that point. On her return to work, she was interviewed by Mr Mearns on 19 July 2019. A copy of the notes of that interview was at pages 1621 and 1622.

368. The claimant had referred to the comment he attributed to Ms Miller being made repeatedly and in front of colleagues. He referred to daily racial discrimination.

369. Ms Miller had been the claimant's team manager for a period. When asked about the allegations by Mr Mearns she said that the described behaviour had not happened and that she was both shocked and angered by the allegation. She said she had not heard anything of this type and that her relationship with the claimant was *"fine".* She said she had not heard anything inappropriate or out of the ordinary in the behaviour of work colleagues towards the claimant.

370. Toni and John worked in a different team to the claimant, although within the same office building. Each of them described to Mr Mearns having little contact with the claimant. They said he came into their office to use the photocopier. They each strongly denied the allegations as to name calling and making fun of the claimant's accent. Toni expressed herself *"perplexed and hurt"* that the allegations against her had been made. John said the allegations were *"rubbish".*

371. Mr Mearns undertook the investigation because there had been allegations made by the claimant in paragraph 44 of his letter of appeal. He carried out what he believed to be a fair investigation under the modified procedure. He did not regard the modified procedure as enabling him to contact others in the office to see if they were aware of the behaviours described by the claimant.

He did not regard the policy as enabling or requiring him to speak with the claimant having interviewed those about whom complaints were made. The course he followed in carrying out the investigation was, in his view a reasonable and correct one in terms of the applicable policy. It is one he would have followed if the complainant was someone other than the claimant or if the matters complained of by a former employee were ones falling under any different element of the Bullying and Harassment policy and being dealt with under the modified procedure.

372. The allegations made by the claimant were weighed by Mr Mearns in relation to the statements he had taken from the 3 people mentioned. The view to which he came was that there was no evidence to support the allegations. He kept in mind that the claimant referred to the behaviour occurring over a sustained period in what was an open office environment. He noted that the claimant had not referred to others being aware of the behaviour. Ms Miller as the team leader had said she would have acted upon the conduct if she had been aware of it.

373. The final report prepared by Mr Mearns was at pages 1623-1626. Although the date on the first page is 26 June 2019, the correct date of the report is that shown on the final page, 26 July 2019. The report was not sent to the claimant as the party complaining. That is in line with the respondents' standard practice in such a situation under the modified procedure.

374. The view reached by Mr Mearns, set out at page 1625, was that the allegations did *"not hold up".* He described them as appearing to be unsubstantiated. He mentioned that employees had awareness of reporting mechanisms for matters of the type set out by the claimant, including confidential whistle blowing routes. He highlighted that no dates, times or witnesses were given, referencing other staff being around and there being only limited interaction between the claimant and the 3 people specified. He said the behaviour described was *"shocking"* yet there was not, he said*, "one single piece of evidence to support this claim".* Mr Mearns referred to the service records of the 3 people the claimant had mentioned and his view that use of terms such as *"Albanian Mafia Guy"* was not part of their vocabulary

and that they would not tolerate anyone making fun of accents. He said *"It should be noted that what appears to be unsubstantiated accusations have caused undue stress to the three respondents which does seem extremely unfair".* Referring to the allegations he said, *"Indeed they seem of a vexatious nature in terms of attempting to bring council employees into disrepute therefore the complaint about Bullying and Harassment cannot be upheld".*

375. As mentioned above Ms MacAskill wrote to the claimant on 4 September 2019 intimating the outcome of the investigations into the claimant's allegations. The delay between completion of the report by Mr Mearns on 26 July and the letter to the claimant on 4 September was caused by Ms MacAskill having annual and special leave due to caring responsibilities in the period mentioned. Ms MacAskill also worked on a part-time basis. Unfortunately none of Ms MacAskill's colleagues covered this area of her work in her absence and so time passed between completion of the report and notification of the outcome to the claimant.

376. The letter from Ms MacAskill of 4 September contained the following as its penultimate paragraph:

"An independent manager was appointed to investigate the allegations. This involved a thorough impartial investigation including the interviewing of the respondents and examination of all the information and evidence surrounding the allegations to determine if bullying and harassment had taken place. In this circumstance the appointed investigator has concluded that the bullying and harassment did not take place and therefore your complaint is rejected."

377. The involvement of Mr Mearns and the investigation carried out by him came about as a result of the allegations made in paragraph 44 of the claimant's letter of 29 April 2019. That was the reason he carried out the investigation. It led to his report. How Mr Mearns went about his investigation and the conclusion to which he came were not predetermined or influenced by the national origin of the claimant or by the nature or content of the allegations made by him, the protected act. The manner of the investigation and the decision upon the allegation were not "because of the protected act". It did not

have a significant influence in the sense of being more than trivial. Mr Mearns would have proceeded in the same fashion if the complainer was of a different national origin to the claimant or if the allegations were of a different nature.

Training

378. The respondents do not have regular, structured training for personnel in relation to the EQA and matters of equal opportunities.

Other potentially relevant matters

379. At pages 1718 and 1719 an email sent by the claimant to Mr Kelly appeared. It was dated 14 October 2013. The email commences:

"Dear Willie

I refer to your email dated 11/10/2013 requesting me to report for work today"

380. This email from Mr Kelly was not traced and was not available for the Tribunal.

381. In his email to Mr Kelly, the claimant narrates issues he has been having with his manager, Carol Hughes. This is a separate individual from Carol Paterson referred to elsewhere in this Judgment. He says that he has been affected by work related stress and had proposed taking time off unpaid. Ms Hughes, it is said, was not prepared to agree to this. The claimant says that he then obtained a sick line from his doctor. He refers to a threat made to him that his pay would be stopped from a particular date if he did not return to work, notwithstanding the sick line extending beyond the date by which it had been specified he required to return if he was to avoid his pay being stopped. That threat refers back to the email the claimant says he received from Mr Kelly of 11 October.

382. Mr Kelly was not responsible for management of the claimant's absence. It is entirely unclear why he would be sending an email to the claimant regarding his absence or return to work, assuming he did send such an email. He did not have power to stop pay in the circumstances described by the claimant and did not do so.

383. If Mr Kelly did receive the email in October 2013, it was not a factor in any of his actions as described in this Judgment. It was a matter of which he had lost all memory by 2018.

384. There was no concerted plan or campaign by Mr Kelly, Mr Robertson, Ms Kerr, Mr MacKay, Mr McBride, Ms Paterson, Mr Quinn or others to discriminate against the claimant or to bring his employment with the respondents to an end, whether acting individually trying to persuade others or acting in concert.

385. After termination of his employment with them the respondents received requests for references in respect of the claimant. Whilst an element of claim initially made related to one of those requests, that was withdrawn and so no findings in fact are made in relation to it.

386. The respondents espouse a zero tolerance policy in relation to discrimination and discriminatory behaviour. They profess to be an equal opportunities employer.

Acting in concert

387. During the phases of initial checking, investigation, disciplinary hearing, appeal and investigation under the Bullying and Harassment Policy, and all actions associated with those aspects, all as referred to in this Judgment, there was not a concerted plan and no acting in concert to try to achieve the dismissal of the claimant from his post.

Order Compliance/Non Compliance

388. In course of the period prior to the hearing there were different applications made by the parties seeking Orders from the Employment Tribunal. One such application was made by the claimant seeking an Order for production of documents. This followed exchanges where there had been requests made and responses sent by the respondents with certain documents being supplied on a voluntary basis.

389. Prior to an Order being issued the respondents had been asked by the claimant to produce:

"Each and every correspondence communicated and or exchanged (whether by email, note of telephone calls (hand written or typed) or documents exchanged) between Mr Kelly and Miss Leigh-Anne O'Neill, Corporate Fraud & Investigations Officer relating to the claimant and or the allegations and or investigation against him."

390. The respondents had replied to this request by sending on documents. The request and response appeared at page 88 of the pleadings file. They also said in answer to a further request made, this reply also appearing at page 88:

"Sharon Murphy took over from Miss O'Neill in the Corporate Fraud Team and collated the information. Sharon Murphy did not keep paper or electronic copies of any documents once she had finished collating all the information and handed everything over to Social Work Services."

391. What are described as *"all the other papers collated by the Corporate Fraud Team, which Sharon Murphy passed to Social Work"* are then detailed and confirmed as being sent on.

392. Thereafter the claimant obtained an Order from the Employment Tribunal for production of documents.

393. The relevant part of the Order dated 16 January 2020 was paragraph 1d. It appeared at page 130 of the pleadings file and read:

"Copies of the notes and/or minutes of the telephone conversation(s) or meeting(s) (whether typed or handwritten) held between Mr Kelly and Ms O'Neill to discuss the claimant on 11 June 2018".

394. The response to the Order appeared at page 155 of the pleadings file and read:

"There are no copies of the notes or minutes of the telephone conversation(s) or meeting(s) held between Mr Kelly and Ms O'Neill. This was because the meeting on 11 June 2018 was a first meeting with Internal Audit."

395. There were notes of some type taken by Ms O'Neill of the meeting she had with Mr Kelly. She had passed those to Ms Murphy. The respondents had not located any such notes, despite checks carried out.

396. The Tribunal heard submissions on compliance/noncompliance with the Order. Those are noted, together with the decision of the Tribunal on this matter, below.

The issues

397. The issues for determination by the Tribunal initially included the issue of time bar. The respondents confirmed at time of submissions that they were not insisting on their plea that elements of the claim were time barred. Time bar is a matter which goes to jurisdiction and so must be considered by the Tribunal even where parties do not take the point. It is appropriate therefore that the Tribunal record that it is of the view that the claim was not affected by time bar.

398. In addition to the issues listed below, which had been agreed between the parties, the Tribunal also considered the question of whether there had been compliance with the Tribunal Order of 16 January 2020. If there had not been compliance the question of sanction arose for determination.

399. The agreed issues as adjusted to reflect the withdrawal by the claimant of certain elements of claim and withdrawal by the respondents of their plea of time bar are now set out:

Unfair dismissal

1. Was the reason for the Claimant's dismissal on 5 April 2019 misconduct and therefore a fair reason pursuant to section 98(2) of the ERA?

2. If so, did the Respondent act reasonably in treating misconduct as sufficient reason for dismissing the Claimant, applying section 98(4) ERA and in particular applying the *Burchell* test as follows:

3. Did the Respondent believe the Claimant to be guilty of misconduct?

4. Did the Respondent have reasonable grounds for believing the Claimant was guilty of that misconduct?

5. Did the Respondent conduct a reasonable investigation into the allegations of misconduct, such that it was reasonable in the circumstances to reach its findings having consideration for the:

   (a) size and administrative resources of the Respondent; and

   (b) equity and substantial merits of the case.

6. In considering the Burchell test, the Claimant relies on the following to argue the dismissal was unfair:

   (a) The Respondent's alleged failure to raise the issue of double ordering with the Claimant during supervision;

   (b) The Respondent's alleged failure to establish whether or not the Claimant’s double ordering was normal practice within the department;

   (c) The Respondent's alleged failure to raise concerns that the Claimant was not following departmental procedure (the existence of such procedure is denied by the Claimant) in relation to authorisation for replacing lost or stolen items during supervision;

   (d) The Respondent's alleged failure to analyse the Claimant’s colleagues’ work to establish whether or not they were working in the same way as the Claimant or whether they were adopting a different practice;

   (e) The Respondent's alleged failure to establish whether or not the Claimant’s colleagues re-ordered items in the same way that he did or

whether they informed the Team Leader and sought authorisation before they did so;

(f) The Respondent's alleged failure to establish whether RSBI was responsible for shortfalls in the delivery of items ordered and if there was a system in place to verify what RSBI delivered;

(g) The Respondent's alleged failure to take any steps to ascertain whether the Claimant's colleagues also had properties from which white goods had been stolen and the frequency of these occurrences;

(h) The Respondent's alleged failure to establish whether RSBI's staff were responsible for the thefts or responsible for compromising the security of the properties by failing to properly secure them;

(i) The Respondent's alleged failure to establish what happened to the white goods removed from the properties by RSBI;

(j) The Respondent's alleged failure to establish when, who and in what circumstances white goods were removed from the properties;

(k) The Respondent's alleged failure to compare the Claimant's computer use with that of his colleagues;

(l) The Respondent's counter-fraud department's alleged failure to conduct any or any reasonable investigation into the claimant's alleged misconduct;

(m) The Respondent's alleged failure to contact the police to investigate the Claimant's alleged criminal conduct; although Mr Scott did contact the police on 26 June 2018 but did he provide false, defamatory and racially discriminatory information;

(n) The Respondent's allegation against the Claimant that he was letting out its properties for personal gain which the Claimant alleges was made without any evidence to support it;

(o) The Respondent alleged failure to investigate the Claimant's claims that the investigation was a racially motivated "witch hunt" and an act of victimisation;

(p) Mr Kelly's, Mr Scott's and Mr McBride's alleged preconceived hostility towards the claimant based on his Albanian nationality;

(q) The alleged involvement of Mr McBride in the investigatory stages of the disciplinary process; and

(r) The fact Mr McBride chaired the disciplinary hearing despite his alleged involvement in the investigatory stages of the disciplinary process as referred to at paragraphs 9-25, 28-33, 40-44, 48-54 and 56-58 of the Claimant's amended Particulars of Claim.

Direct Race Discrimination

7. Did the Respondent treat the Claimant less favourably than it treated or would have treated another person of a different race, in the same material circumstances as the Claimant, by carrying the following alleged acts of direct discrimination (and the matters set out in paragraph 6 above)?

(a) Dismissing the Claimant

(b) Failing to investigate the Claimant's complaints of racial discrimination, victimisation and sex discrimination set out in the appeal in a timely manner or at all;

(c) The Respondent's decision to limit its investigation to paragraph 44 of his appeal document and to classify this as bullying and harassment;

(d) The failure to interview the Claimant as part of the bullying and harassment investigation process;

(e) The perfunctory nature of this investigation;

(f) The conclusion of this investigation;

(g) The Respondent's failure to convey the outcome of this investigation to the Claimant in a timely manner;

(h) The Respondent's failure to provide the Claimant with the investigation interviews of the report;

8. If the Claimant received the treatment set out in paragraph 7.1-7.10 above, was this treatment less favourable than the treatment given to the comparator identified by the Claimant, being a hypothetical comparator of a white British employee who is not of Albanian national origin?

9. Whether the comparator referred to at paragraph 8 above is the correct comparator for the purposes of section 23 of EqA 2010.

10. If the Respondent did treat the Claimant less favourably than the identified comparators, whether this was because of his race in that the alleged acts of less favourable treatment were unreasonable and atypical.

Victimisation

11. Do the following alleged acts by the Claimant amount to protected acts within the meaning of s27(a), (c) and (d) of the EqA:

(a) The racial discrimination claim which the Claimant brought against the Respondent in or around 2013 (Case number 410188/2013) ("the First Protected Act");

(b) The Claimant's allegation against his then line manager, Carol Hughes, in or around 2014 ("the Second Protected Act");

(c) The Claimant's written submission that he presented at the disciplinary hearing on 3 April 2019 ("the Third Protected Act");

(d) The fact that the Claimant raised the issue of racial discrimination and victimisation at the disciplinary hearing between 3-5 April 2019 ("the Fourth Protected Act").

(e) The Claimant's written appeal document lodged on 29 April 2019 ("the Fifth Protected Act").

(f) The Claimant's claim for race discrimination lodged on 2 July 2019 under Case number 4107591/2019 ("the Sixth Protected Act").

First Protected Act

12. In relation to the First Protected Act, was the Claimant subjected to the following detriments:

(a) Suspension

(b) Disciplinary Investigation

(c) Disciplinary Process

(d) Dismissal

13. Do the matters set out at 12.1 – 12.4 above constitute detriments?

14. Should it be concluded on the basis of the following alleged matters that the Claimant was subjected to these alleged detriments because he carried out the First Protected Act:

(a) Willie Kelly was instrumental in all of the processes set out at 12.1 – 12.4 above.

(b) Willie Kelly expressly referred to a protected act that the Claimant had done as a reason for the suspension.

(c) Willie Kelly was responsible for influencing the investigation so that it was not an even-handed enquiry.

(d) Willie Kelly made up allegations against the Claimant to the effect that his Team Leaders found him intimidating to Jim McBride who said that these concerns should be reported to the police.

(e) Willie Kelly was the driving force behind the whole investigation.

(f) Willie Kelly and Mr McBride were determined to make sure that the Claimant was dismissed.

Second Protected Act

15. In relation to the Second Protected Act, was the Claimant subjected to the following detriments:

    (a) Suspension

    (b) Disciplinary Investigation

    (c) Disciplinary Process

    (d) Dismissal

16. Do the matters set out at 15.1 – 15.4 above constitute detriments?

17. Should it be concluded on the basis of the following alleged matters that the Claimant was subjected to these alleged detriments because he carried out the Second Protected Act:

    (a) Mr Kelly expressly referred to this protected act as a reason for the Claimant's suspension

    (b) Mr Kelly was involved in the investigation and the disciplinary process by seeking to influence the other people involved to the detriment of the Claimant.

Third Protected Act

18. In relation to the Third Protected Act, was the Claimant subjected to the following detriments:

    (a) Being accused by Jim McBride of playing the race card inferentially

    (b) Dismissal

19. Do the matters set out at 18.1 and 18.2 constitute detriments?

20. Should it be concluded on the basis of the following alleged matters that the Claimant was subjected to these alleged detriments because he carried out the Third Protected Act:

(a) Mr McBride failed to investigate the Claimant's allegations of race discrimination despite the Respondent's alleged zero tolerance policy of racism;

(b) Mr McBride lied to the Claimant that there had been a full audit of the Claimant's fellow TADS officers

(c) Mr McBride failed to tell the Claimant that he had been involved in the investigation which was only concerned in the finding of evidence of the Claimant's guilt

(d) Mr McBride failed to tell the Claimant that he had recommended that the Claimant be reported to the police because other employees had allegedly said that they were afraid of him based on Mr Kelly's perception

(e) Mr McBride dismissed the Claimant using personal language which was unnecessary and humiliating.

Fourth Protected Act

21. In relation to the Fourth Protected Act, was the Claimant subjected to the following detriments:

(a) Being accused by Jim McBride of playing the race card inferentially

(b) Dismissal

22. Do the matters set out at 21.1 and 21.2 constitute detriments?

23. Should it be concluded on the basis of the following alleged matters that the Claimant was subjected to these alleged detriments because he carried out the Fourth Protected Act:

(a) Mr McBride failed to investigate the Claimant's allegations of race discrimination despite the Respondent's alleged zero tolerance policy of racism;

(b) Mr McBride lied to the Claimant that there had been a full audit of the Claimant's fellow TADS officers

(c) Mr McBride failed to tell the Claimant that he had been involved in the investigation which was only concerned in the finding of evidence of the Claimant's guilt

(d) Mr McBride failed to tell the Claimant that he had recommended that the Claimant be reported to the police because other employees had allegedly said that they were afraid of him based on Mr Kelly's perception

(e) Mr McBride dismissed the Claimant using personal language which was unnecessary and humiliating.

Fifth Protected Act

24. In relation to the Fifth Protected Act, was the Claimant subjected to the following detriments:

(a) Failure to investigate the allegations in a timely manner

(b) Failure to investigate all of the allegations properly or at all

(c) Failure to interview the Claimant

(d) Failing to inform the Claimant that the investigation report had been written on 5 June 2019

(e) The conclusions of the investigation

25. Do the matters set out at 24.1 – 24.10 constitute detriments?

26. Was the Claimant subjected to these alleged detriments because he carried out the Fifth Protected Act on the basis that these actions were *"unreasonable, atypical and unexplained"*?

Applicable Law

400. The claims were of unfair dismissal under the ERA and victimisation under the EQA. There was a very large of measure agreement between the parties on the applicable law. The Tribunal regarded the applicable law as having been referred to by parties in their submissions.

Unfair Dismissal

401. Section 98 of ERA provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason or principal reason for dismissal and that the reason was (for the purposes of this case) a reason falling within subsection (2) of that section. In this case the reason was said to relate to the conduct/misconduct of the employee. It was therefore a potentially fair reason.

402. In determining whether a dismissal was fair, the burden of proof is neutral. Subsection (4) of Section 98 states that where the employer has fulfilled the requirements just stated:

"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"

403. The case was one in which unfair dismissal was claimed. The legal test was therefore that in terms of Section 98 of ERA. There was no claim of wrongful dismissal.

404. The well-known case of *British Homes Stores v Burchell ("Burchell")* 1978 IRLR 379 establishes the tests which are to be applied by the Tribunal in reaching its conclusions. Those are (a) whether the employer had a

reasonable suspicion amounting to a belief that the employee was "guilty" of the misconduct at that time, (b) whether that belief was based on reasonable grounds and (c) whether at the time the employer formed that belief on those grounds the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The Employment Tribunal must then consider whether the decision to dismiss fell within the band of reasonable responses of a reasonable employer. This latter element of the test is confirmed by *Iceland Frozen Foods Ltd v Jones ("Iceland Frozen Foods")* 1983 ICR 17.

405. The decision to dismiss is taken on facts known to the employer, in the form of the decision maker, at the time of dismissal. There may be facts which emerge at the Employment Tribunal hearing which would potentially lead the Employment Tribunal to different conclusion to that already reached by the employer. That, however, is not a course properly open to the Employment Tribunal. *W Devis & Sons Ltd v Atkins ("Devis")* 1977 AC 931 confirms this, as does *Ferodo Ltd v Barnes* 1976ICR 439.

406. It is the information known to the decision maker which is key. That is confirmed in *Orr v Milton Keynes Council ("Orr")* 2011EWCA Civ 62.

407. Further, the Employment Tribunal is not to substitute its view for that of the employer. If the decision to dismiss lies within the band of reasonable responses of a reasonable employer then the Employment Tribunal cannot find the dismissal to have been unfair. That is confirmed in case law, *Foley v Post Office* 2000ICR 1283 and *Iceland Frozen Foods* being two well-known authorities confirming this principle.

408. *Strouthos v London Underground Ltd ("Strouthos")* underlines that allegations or charges taken to a disciplinary hearing should be precisely framed and that an employee should only be found guilty of the "offence" with which he has been charged. The circumstances in which an employer can go beyond the charge are very limited. The principle that an employee should know the case against him was highlighted in *Spink v Express Foods Ltd ("Spink")* 1990 IRLR 320.

409. The case of *A v B ("A v B")* 2003 IRLR 405 confirms that "reasonableness" is the standard to be applied in assessing an investigation which has been carried out by an employer. An Employment Tribunal should keep in mind the seriousness of the "charge(s)" involved and the possible impact on the career of the employee involved. If an allegation is one of serious criminality, then a careful investigation, which pays as much attention to evidence which might indicate innocence as it does to evidence possibly supporting guilt, is appropriate. The standard ultimately remains reasonableness. The case of *Salford Royal NHS Foundation Trust v Roldan ("Roldan")* 2010 ICR 1457 underlined the need for a careful investigation where the serious consequence of dismissal might be the outcome of the disciplinary process with, in that case, criminal charges and deportation also potentially flowing from it.

410. *Shrestha v Genesis Housing Association ("Shrestha")* confirms that an employer does not require to investigate every incident and every explanation put forward by an employee. In that case consideration was given to the defences provided by the employee. The employer concluded that the explanations advanced did not give a believable reason for the issue which had arisen. The Court of Appeal upheld the Employment Tribunal's decision that no further investigation by the employer was necessary in the circumstances.

411. The range of reasonable responses test applies to the issue of whether the investigation by the employer was a reasonable one. That is confirmed in the case of *J Sainsbury plc v Hitt ("Hitt")* 2003 ICR 111.

412. Any procedural flaws must be considered in light of the standard to be applied, that of a reasonable investigation, one within the "band" as mentioned above. The weight to be given by an Employment Tribunal to breaches of procedure will vary, depending on the circumstances.

413. If there are defects in disciplinary procedures, the Tribunal should assess whether a fair process had taken place. It should have regard to the nature of the defect and its seriousness, bearing in mind the principles detailed above.

This approach is reflected in *Fuller v Lloyds' Bank plc ("Fuller")* 1991 IRLR 336.

414. Delay in dismissal procedures, if unreasonable, can lead to a dismissal being unfair (*RSPCA v Cruden ("Cruden")* 1986 ICR 205). That can be so even in circumstances where the delay has not prejudiced the employee. A further case in this area is that of *Syles v London Borough of Southwark ("Styles")* 2006 UKEAT 0112_06_1204. In that case *Cruden* was cited to the EAT. There had been delays, and the Employment Tribunal was troubled by that. It considered potential prejudice and accepted that prejudice was not essential for a dismissal to be considered unfair due to delays. In the circumstances of the case, and especially as there was a course of misconduct with some instances being relatively recent, delays involving the claimant having been suspended for a lengthy period were not regarded by the Employment Tribunal as leading to an unfair dismissal. The EAT did not interfere with this finding.

415. *Westminster City Council v Cabaj ("Cabaj")* 1966 ICR 960 held that not every plain and significant breach of agreed disciplinary procedures would be certain to result in an unfair dismissal. The Employment Tribunal should consider whether any such failure denied the employee the chance to show that the reason for dismissal was not sufficient. The Employment Tribunal should determine that on the facts.

416. The ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) ("the ACAS Code") is of significance. It is something which a Tribunal must take into account where its provisions are relevant to the case before the Tribunal. The Code provides practical guidance to employers and employees. Basic requirements for fairness are detailed in the Code. Failure to follow the Code can see and adjustment made to compensation by the Tribunal.

417. Paragraph 5 of the ACAS Code states that *"it is important to carry out the necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case."*

418. The ACAS Code states in paragraph 6 that *"where practicable, different people should carry out the investigation and disciplinary hearing".* This is of significance in that it is important in assessment of impartiality. It is for the Employment Tribunal to assess the situation and to determine the question of impartiality or bias looking to the facts and circumstances in the case. *Whitbread plc (t/a Whitbread Medway Inns v Hall ("Hall")* 2001 ICR 699 was a case where the person chairing the disciplinary hearing had initiated the investigation and held a degree of hostility towards the employee. The dismissal was held to have been unfair. It is for the Employment Tribunal ultimately to decide in all the facts and circumstances of a case whether any involvement as investigator renders it fatal to then sit as chair and decision maker in the disciplinary hearing.

419. Paragraph 11 of the ACAS Code, in referring to the disciplinary hearing, states that it should be held "*without unreasonable delay".*

Discrimination

420. The claims made were of direct discrimination, the relevant provision being Section 13 of EQA and of victimisation, the relevant provision being Section 27 of EQA. Those Sections read, insofar as relevant to this case:

Section 13 -

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

Section 27:

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

421. There are 2 other relevant Sections in EQA to set out. Those are, again insofar as relevant to this case:

Section 23 (1) -

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

Section 136 -

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Burden of Proof

422. Section 136 therefore provides that if a claimant has proved facts from which an Employment Tribunal could conclude that an unlawful act of discrimination has occurred, it is for the respondent to satisfy the Tribunal that there was a non-discriminatory explanation for that act, in that the treatment was in no sense whatsoever on the protected ground. This “two stage” approach

applies, relevantly in this case, to claims both of direct discrimination and of victimisation.

423. The first stage in considering the burden of proof therefore involves assessment by the Employment Tribunal of whether there are facts are proved by the claimant which amount to sufficient evidence from which discrimination can be presumed or inferred, though not necessarily proved.

424. The second stage involves assessment by the Employment Tribunal of whether the respondent has proved on the balance of probabilities that the treatment was in no sense whatsoever because of the protected characteristic, or protected act in the instance of the claim of victimisation.

425. There are several well known cases in this area of law. The main ones regarded as being relevant in this case are *Igen Ltd v Wong ("Igen")* 2005 ICR 931, *Laing v Manchester City Council ("Laing")* 2006 ICR 1519, *Madarassy v Nomura International plc ("Madarassy")* 2007 ICR 867 *Efobi v Royal Mail Group Ltd ("Efobi")* 2021 ICR 1263, *Hewage v Grampian Health Board ("Hewage")* 2012 ICR 1054, *Shamoon Chief Constable of the Royal Ulster Constabulary ("Shamoon")* 2003 ICR 337, *Brown v London Borough of Croydon and another ("Brown")* EAT 0672/05, *Anya v Oxford University and another ("Anya")* 2001 EWCA 405, *Field v Steve Pye and Co (KL) Ltd and others ("Field")* 2002 EAT 68 and *Bahl v Law Society ("Bahl")* 2003 IRLR 640. The statute is the touchstone, with helpful guidance through case law.

426. If the burden of proof provisions apply, carrying out their application can be a difficult exercise. Higher Courts have emphasised that the focus of an Employment Tribunal must be *"the question whether or not they can properly and fairly infer… discrimination". (Laing")* The provisions *"need not be applied in an overly mechanical or schematic way"* (*Khan v Home Office* 2008 EWCA Civ 578).

427. *Hewage* saw the Supreme Court comment that *"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."

428. There are instances where the first stage can, in effect, be bypassed, with the Employment Tribunal considering the second stage, the *"reason why"* as its principal concern in this area. That is particularly so when there is, as here, a hypothetical comparator involved. For a successful claim of direct discrimination, the claimant must have been treated less favourably than his comparator. There is potential difficulty in there being clear evidence as to whether or not a hypothetical comparator would have been treated less favourably. Often there is a meshing of issues. As Lord Nicholls said in *Shamoon*, *"Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."*

429. If an Employment Tribunal concludes that there were discriminatory reasons for the treatment of a claimant, then that is almost certainly going to lead to a finding that the treatment was less favourable than would the treatment which would have been involved in the case of a comparator. That is confirmed in *Shamoon.*

430. *Laing* also confirmed that it was not necessarily an error in law for the Tribunal to proceed on the basis that the burden had shifted and then to consider the explanation, if one was advanced, by the respondent.

431. *Field* was a case where the EAT expressed the view that if the evidence realistically suggested discrimination had occurred, the Employment Tribunal should consider the position careful before moving straight to the *"reason why",* the second stage. In those circumstances the burden of proof would have shifted to the respondent. If, however, the Employment Tribunal's decision was that there was nothing to suggest discrimination had taken place and also that the respondent had shown a non-discriminatory reason for the alleged discriminatory conduct, then the claim had in reality failed at time of application of the first stage of the test. In that circumstance, the EAT favoured the Employment Tribunal confirming that the claim had failed at the first stage

and thereafter confirming that the non-discriminatory reason for the treatment was accepted by it.

432. Although this is recognised as a difficult area of law, an Employment Tribunal must take care to analyse the evidence and to consider application of the burden of proof provisions as best it can.

Inferences from evidence

433. In considering the evidence, an Employment Tribunal must focus on the thinking of the person who is alleged to have discriminated, rather than the thinking of someone who may have provided information but who has not made the decision. That is confirmed in the case of *Reynolds and others v CLFIS (UK) Ltd ("Reynolds")* 2015 ICR 1010.

434. An Employment Tribunal must keep in mind that only infrequently is there obvious evidence of discrimination, with admissions of such behaviour being very rare indeed. The Employment Tribunal must generally therefore consider what inferences can properly be drawn from facts found. If facts are found from which inferences of the claimant having been treated less favourably on a protected ground can be drawn, then the burden of proof shifts to the respondents.

435. It is relevant to mention *Nagarajan v London Regional Transport ("Nagarajan")* 1999 ICR 877, from the Judgment in which the following extract is quoted *"All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make up. Moreover, we do not always recognise our own prejudices. Many people are unable, or even unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim, members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason he acted as he did".*

436. There is often reference, in this regard, to the helpful passage in *Madarassy* where Lord Mummery states *"the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

437. The case of *Denman v Commission of Equality and Human Rights and ors ("Denman")* 2010 EWCA Civ 1279 confirmed that the *"more"* required need not be a great deal.

438. Unreasonable conduct by an employer does not, of itself lead to the burden of proof shifting. That is confirmed in *Glasgow City Council v Zafar ("Zafar")* 1998 ICR 120. In that case the comment made in the Court of Session that it could *"not be inferred let alone presumed"* that an employer who had acted unreasonably towards one employee would have acted reasonably towards a different employee in the same circumstances was approved in the House of Lords.

439. *Bahl* saw the Court of Appeal adhere to and reiterate the position on this point as set out in *Zafar.* The Court of Appeal stated its view that discrimination could be inferred from unreasonable treatment if there was no explanation for it. It was the absence of explanation which was the basis for the inference.

440. In *Brown* the EAT confirmed, in dealing with the situation of a hypothetical comparator, that if an employer has acted in a way which would be quite atypical for an employer to act, then the burden of proof is likely to transfer. This contrasts with the position where an employer acted in a way which would appear to be perfectly sensible and to be in line with the way most employers would act. In the latter situation the burden is unlikely to transfer.

Explanation by the respondent

441. In considering the explanation which a respondent advances for the treatment founded upon, there are relevant comments in previous cases.

442. In *Chief Constable of Kent Constabulary v Bowler* EAT 0214/16, The EAT said *"All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal, or they may be explanations that arise from a tribunal's own findings".*

443. In *Laing,* the" EAT said *"if [the tribunal] is satisfied that that the reason given by the employer is a genuine one and does not disclose conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race." It was also highlighted that "the tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to let form rule over substance."*

Hypothetical Comparator

444. Looking to the terms of Section 23 of EQA there must be no material difference between the circumstances relating to the case of a claimant and that of the comparator. The hypothetical comparator must be someone constructed whose circumstances are materially the same as the claimant, save that the comparator does not have the protected characteristic.

Direct Discrimination

445. A successful claim of direct discrimination requires that less favourable treatment is found to have occurred and that such treatment must have been because of the (in this case) national origin of the claimant. The Employment Tribunal must consider and determine what in its view was the conscious or subconscious reason of the respondents for the treatment. That is confirmed in *Amnesty International v Ahmed* 2009 IRLR 884.

Victimisation

446. For a claim of victimisation to be successful, a claimant must establish that that there was a protected act. He must establish that there was a detriment. He must satisfy the Employment Tribunal that the detriment was because of the protected act.

447. If there are clear facts found by the Employment Tribunal that lead it to the decision that there was no protected act, or that there was no detriment, or that any detriment was not because of the protected act, then that element of claim is unsuccessful without the burden of proof provisions being applied.

448. In assessing whether a detriment was *"because"* of a protected act, the test is whether the protected act had a significant influence on the action or decision made. A significant influence is an influence *"which is more than trivial".*

Submissions

449. Both parties tendered written submissions and spoke to them. Mr Elesinnla first made submissions on behalf of the claimant. As would normally be the case, Mr Elesinnla having been the first to make his submissions then had the opportunity to respond to the submissions from Ms Ross. Having made general points on the evidence and the law, Ms Ross addressed the Tribunal on the points detailed in the list of issues A summary of the parties' respective positions follows. The Tribunal has taken the submissions of both parties into account in its deliberations.

Submissions for the claimant

450. Both elements of the claim should be successful, Mr Elesinnla submitted.

451. In relation to the claim of discrimination, Mr Elesinnla cited *Igen, Brown, Hewage, Laing, Field, Madarrassy, Denman, Zafar, Shamoon, Bahl, Efobi* and *Anya.* In his submission relating to unfair dismissal, he cited *Strouthos, Spink, Fuller, A v B Watson v University of Strathclyde ("Watson")* 2011 IRLR 458 and Roldan.

452. The claimant's case was, he submitted, unassailable and had to succeed.

453. Mr Elesinnla said that the respondents' unreasonable behaviour was established beyond argument and that stage one of the burden of proof provisions was met. He said that three aspects required to be considered – the identification of the allegation, the investigation by the respondents and their decision to dismiss the claimant. Victimisation and post-employment issues also required to be dealt with.

454. In commenting on the evidence, the Tribunal was urged to accept the claimant's evidence as credible. It was consistent with the documents and should be entirely accepted. It should be kept in mind that English was his second language. The respondents' witnesses, on the other hand, were said to have been evasive and dishonest, and in some instances to have deliberately tried to mislead the Tribunal. Mr Mearns, Ms Kerr and Ms O'Neill were said however to have done their best to give honest evidence.

455. Mr Elesinnla set out his view as to why the respondents' witnesses were not credible. He said that explanations for behaviour given by them did not satisfy the stage two test and did not discharge the onus he submitted had passed to the respondents in terms of Section 136 of EQA.

456. The respondents had been applying a stereotypical view of Albanians in their treatment of the claimant, Mr Elesinnla said. Mr Kelly's actions should be considered. He had written various emails, including one referring to the claimant's national origin when that had nothing to do with the matter with which he was dealing. He had reported the claimant as being intimidating without any proper basis for that view. He had been behind the suspension of the claimant. That process was attacked. The allegations against the claimant had been deliberately exaggerated.

457. Documents had been with Mr Robertson who had suppressed them. Exculpatory evidence was not given to the claimant. Mr McBride had had Ms McCaig's report by the time of the disciplinary hearing. It was not a review of double ordering or escalation procedure. No part of it was disclosed to the claimant.

458. The respondents had acted in an unreasonable manner. It had to be borne in mind that the allegations in relation to goods, were essentially of theft. That was a very serious charge, one with potential criminal consequences and career threatening implications, as well as the immediate potential job loss.

459. Mr Elesinnla was condemnatory of the respondents' actings and failings in very plain terms. He referred to the emails from Mr Kelly and to his evidence about the emails, as contrasted with the evidence from Mr Robertson in this area. The Tribunal should accept the position as having accurately reflected in the emails. They *"spilled the beans".*

460. There was a clear issue with the position regarding Dowancriag Drive and disposal of goods in that case by RSBI. If that was so, it could be the case in relation to other properties. No checks had been undertaken. Obvious lines of enquiry had not been pursued. RSBI had not been spoken with. Other TADs had not been spoken with in relation to missing goods, double ordering, and the escalation process.

461. Although the charge was of stealing, Mr Robertson had accepted that he could not find evidence of the claimant stealing. Despite this Ms Rafferty had regarded there as being a case for there to be a disciplinary hearing. That was unreasonable, Mr Elesinnla submitted.

462. Mr McBride had been involved in the investigation and had received the draft reports. He had commented in emails in the lead up to the disciplinary hearing. He then sat as chair of the disciplinary hearing.

463. The entire process had been contrary to any reasonable view as to how such a procedure should properly be conducted. It was contrary to any objective standard and the principles set out in case authorities. The Tribunal had to ask itself why it was that the respondents had behaved so unreasonably. What had led them to forget the proper way to behave?

464. There had been no contact by the respondents with the claimant for some time despite their confirmation initially that this would happen. The claimant's health had suffered greatly. The claimant said he had informed Mr Robertson

of his health issues in July 2019 and this should be accepted. The matter had not been mentioned by the respondents at the disciplinary hearing despite the respondents being aware of it.

465. Mr McBride had then proceeded at the disciplinary hearing on the basis that it was for the claimant to prove that he had not stolen the goods. He had accepted that he should not have sat as chair. For him to do so was a breach of natural justice and entirely unfair. Mr Elesinnla referred to *Watson.* The issue was not whether he was biased in reality, but rather whether it would appear to a sensible person that he was. Mr McBride himself had accepted that he was in that category.

466. Although the claimant had accepted at the time of the disciplinary hearing that he had had a fair hearing, he did not at that point have knowledge of the emails and background actions which had been going on.

467. This was all way below the standard of any reasonable employer, it was submitted. In relation to the claim of discrimination, however, the Tribunal was the arbiter rather than the range of reasonable responses of an employer being considered.

468. There had, Mr Elesinnla said, been coaching of Ms Paterson before the disciplinary hearing. She had, he said, accepted that, although anyone who might have been involved in coaching her had denied so doing. He referred to Mr Kelly's email at page 331. That, he said, confirmed the position.

469. Racially discriminatory conduct had occurred without objection being taken to it. Senior leaders had so acted. The Tribunal should not accept any explanation from any respondents' witness who said that they had not read offending emails. It should view carefully evidence from those who said that they could not remember important matters.

470. The respondents had not adhered to the ACAS Code of Conduct. They did not have a reasonable belief that the claimant had stolen goods. Even if they did, they had no reasonable grounds for that belief.

471. Applying *Brown* enabled the Tribunal to move to stage two in the burden of proof provisions. This was as the whole procedure and the handling of the matter by the respondents had been atypical. The respondents could not discharge the onus on them.

472. If *"something more"* was required to shift the burden, Mr Elesinnla pointed to what he said was the failure to comply with the Order from the Tribunal, what he said was the dishonest case set out in paragraph 26 of the response form where Mr Robertson was said to have been given information from Ms Murphy and the failure to call Ms Murphy, who still worked for the respondents, he said. He referred to the amendment procedure which had been dealt with at the first part of this hearing.

473. The involvement of Mr Scott and his interaction with Police Scotland together with the terms used in his email was also relevant. The reference to the claimant ordering goods to furnish his own properties was a gratuitous falsehood, Mr Elesinnla said. It was not backed up by the Corporate Fraud report. The reference to the claimant being Albanian was said by Mr Elesinnla to be salacious. There was no good reason for there to be any link suggested between the claimant and Mr Zefaj. At some point Mr Zefaj had lived at one of the claimant's properties. The implication in the email was that the claimant had links to what was described as the Albanian underworld. That was based on a stereotype. It could not be justified.

474. The Tribunal should keep in mind in assessing the case the change in the respondents' position when they amended paragraph 26. It had become inconvenient to say that documents had been given by corporate fraud to Mr Robertson and so the respondents had, Mr Elesinnla stated, *"shifted their case to meet exigencies".*

475. The two *"offences"* had each contributed to the decision to dismiss Mr McBride had said. Whilst the claimant had admitted having breached the policies in relation to IT, the whole disciplinary process was fatally flawed.

476. Mr Mearns had admitted victimising the claimant when he gave his evidence, Mr Elesinnla said. He had understood the question and had confirmed his

reply in re-examination. He was being honest. He had confirmed the real reason he had acted as he did.

477. Mr Elesinnla confirmed that certain allegations were no longer insisted upon. Those have been omitted by the Tribunal in its consideration and have been omitted from the issues as detailed above.

478. As to whether the Order of 16 January 2020 had been complied with, Mr Elesinnla said there was a clear breach of it. The response was false.

Submissions for respondents

479. Ms Ross submitted that the claim should be dismissed in its entirety. She produced a table setting out dates, events which it was said had occurred on those dates and witnesses or documents said to support those entries.

480. The evidence of the respondents' witnesses should be accepted as credible and reliable, she submitted. There had been, understandably she said, some aspects which they were unable to recall. They were being asked to recollect events from some 6 years previously. Their evidence in cross examination making any concession as to racism in particular should be considered keeping in mind their answers in re-examination when context was given to some elements on which questions were based. The claimant had largely given his evidence in chief in 2021 by contrast.

481. Ms Ross also said that the claimant's evidence had been contradictory and inconsistent. She analysed elements of his evidence to illustrate this. He had, she said misinterpreted some facts and had not been straightforward in relation, for example, to Mr Zefaj. He had advanced his position about there being a conspiracy to remove him from the job, which extended to involvement by all employees he had encountered in the dismissal process. It seemed that their every action was attributed to his national origin in his view.

482. Ms Ross commented on the evidence from the individual witnesses. Of particular relevance she said that the Tribunal should see Mr Kelly as not particularly precise in his language and not good on detail. Insofar as the

evidence from the respondents' witnesses was divergent to that from the claimant, the Tribunal should accept the evidence from the respondents' witnesses.

483. In relation to evidence about what she described as key factual matters in dispute, she said that the Tribunal should accept the evidence from the respondents' witnesses in relation to the review of properties initially carried out, the visit to the property at Pollokshaws Road, the documents which Mr Robertson had, why certain documents had ultimately not been included in the appendices to the investigation report and as to the limited involvement of and absence of influence from Mr Kelly in the process. Evidence confirming the absence of input into the investigation from Mr Kelly and Mr McBride should also be accepted, as should evidence from several witnesses that there had been no meeting between Mr McBride and Ms Kerr and Mr Robertson, contradicting therefore Mr Kelly's understanding that there had been such contact. Finally, the length of time of the adjournment at the disciplinary hearing should be accepted as having been one hour, as Mr McBride and Mr Mackay had said rather than 10/15 minutes, as the claimant had stated.

484. The parties did not differ much as to the applicable law, Ms Ross said.

485. With regard to the unfair dismissal element of the claim Ms Ross referred to the cases of and points made in *Burchell, Foley, Strouthos, Styles, Shrestha, Fuller, Cabaj, Spinks, Reynolds* and *Hall.* She mentioned *Abernethy v Mott Hay and Anderson* 1974 ICR 323 and the passage in the Judgment stating that if there is more than one conduct related reason for dismissal, the reason for dismissal will be *"the set of facts known to the employer or, it may be, of beliefs held by him which cause him to dismiss the employee".*

486. *Devis and Neary v Dean of Westminster* 1999 IRLR 288 were referenced by Ms Ross. Orr was also mentioned as was *Royal Mail Ltd v Jhuti* 2019 UKSC 55 and *Kong v Gulf International Bank (UK) Ltd* 2021 9WLUK 125. These cases confirmed that it was the motivation of the decision maker which was key other than in a narrow set of circumstances.

487. Ms Ross referred to *BAA Ltd v Davies ("Davies")* UKEATS/0047/11 as authority for the proposition that the Tribunal was not to ask itself whether there were any further investigations which an employer could have carried out or to expect an investigation as might occur in a court case. A Tribunal had to look at what the employer did do and consider the reasonableness of that, rather than look at what it could have done.

488. *Hollister v National Farmers Union* 1979 IRLR 238 saw the Court of Appeal state that breaches of procedure were factors to be taken into account, with weight to be attached to those depending on the circumstances.

489. In coming to its decision as to whether to dismiss or not, the attitude of the employee might be of relevance in deciding whether a repetition was likely. Ms Ross cited *Paul v East Surrey District Health Authority* 1995 IRLR 305 in that regard.

490. Ms Ross then summarised the position as she saw it with regard to dismissal.

491. There had been an initial investigation by the claimant's line manager following identification of anomalies in a supervision meeting. Three allegations of misconduct had then been investigated. Two allegations had proceeded to a disciplinary hearing. The claimant had admitted one of the allegations, the misuse of his work email account. Mr McBride had viewed both allegations as constituting gross misconduct. He had decided to dismiss the claimant.

492. Mr McBride had, Ms Ross submitted, a reasonable suspicion amounting to belief that the claimant was "guilty" of misconduct. His view and belief was based on reasonable grounds which had been formed following a reasonable investigation.

493. Ms Ross narrated the history of events and facts as the respondents had it. This commenced from the time of the earlier anomalies noted and said by the claimant to have occurred due to error on his part. He was to rectify the mistakes. The issue arose again in 2018. Ms Paterson checked for further anomalies. This caused concerns about more anomalies and Ms Heuston

took the decision to suspend the claimant. Ms Ross commented on evidence confirming that the usual processes and decision making had been followed, with the PRRS procedure being a protocol rather than a contractual document. The involvement of Corporate Fraud commenced on 11 June. The claimant was suspended on 14 June. Interviewing the claimant during the initial enquiry stage was not required, said Ms Ross.

494. The Corporate Fraud report confirmed concerns about double ordering and also raised issues as to misuse by the claimant of his work email account. Mr Robertson and Ms Kerr had then conducted their investigations. Those were very detailed. Interviews were carried out, training records and papers examined. This was not a flawless process, however it was reasonable in all the circumstances, Ms Ross submitted. Evidence both supporting and disproving the allegations had been obtained and considered. Through human error, Ms Ross said, Mr Robertson had overlooked some information at page 527. There was no intent to hide the evidence. Had it been made available it would have made little difference to the outcome, it was argued.

495. Ms Ross commented on the time taken during the investigation phase and the reasons for that. In context, delay did not take the investigation outwith the acceptable band, she said.

496. Ms McDougall had misunderstood her role. She had not previously carried out that role.. The claimant did however have access to support, Ms Ross reminded the Tribunal.

497. Ms Rafferty had decided that grounds existed for referral of the matter to a disciplinary hearing. The circumstances of appointment of Mr McBride had been subject of evidence.

498. Two allegations were dealt with at the disciplinary hearing, the first of those being double ordering of white goods and household items for personal gain.

499. The claimant's inconsistent explanations and his position on various matters had led to the view Mr McBride took that the claimant had demonstrated a lack of credibility and authenticity at the disciplinary hearing.

500. It was key, Ms Ross said, that the Tribunal considered the defence and explanations as given by the claimant to the disciplinary hearing rather than those presented to this hearing before the Tribunal.

501. Ms Ross commented on the claimant's position in relation both to his medical condition and to the respondents' knowledge of that.

502. Although the claimant said that he would not now say he had had a fair hearing at the disciplinary stage, he had said that at the time and when he was aware at that point of the level of support from the respondents, the level of contact from Ms McDougall, the absence of referral to Occupational Health and the fact that Mr McBride was not to investigate the allegations of victimisation and discrimination as he was not given names of those involved by the claimant.

503. Mr McBride had the information in the disciplinary hearing pack, as did the claimant. *Orr* confirmed that he was not deemed to have knowledge which Mr Robertson, the Corporate Fraud team or Mr Mackay might have.

504. Mr McBride had explained the basis of his decision in evidence and factors he had taken into account, including lack of accountability and reflection by the claimant. He had been entitled to reach the view he did. It was a decision within the band. The Tribunal should be slow to interfere with it in the absence of any material flaw in the process followed. A right of appeal was given to the claimant. He withdrew his appeal prior to the hearing.

505. Turning to the agreed issues, Ms Ross went through those.

506. She submitted that each of elements in point 6 said to have been failures by the respondents supporting the claim of direct discrimination did not in fact see any failure by the respondents.

507. Double ordering had been raised in supervision. No double ordering had been found when a colleague of the claimant had their work examined. Ms Paterson had not found any instance of double ordering other than by the claimant. Ms McCaig's report had not identified double ordering as an issue. Ms Paterson and subsequently Ms Miller had confirmed the procedure where reordering

was required. None of the respondents' witnesses had said double ordering was common practice. The claimant had not led evidence to support his position on that.

508. The work of the TAD Ms Kerr had been considered. It had not been put in cross examination that there was any process of selection applied to identifying the cases of Ms Kerr to be reviewed.

509. Reasonable steps therefore had been taken to identify normal practice across the team. The claimant had not been treated differently from others. His practice was not reflected across the team. There was a reasonable non-discriminatory reason for the respondents' actions.

510. As far as alleged failures in relation to the position with RSBI being checked out, Ms Ross said that Mr Robertson had checked the files and was satisfied that goods had been delivered. She referred to her written submission which set out in tabular form the information from the investigation report and also her summary of the position.

511. The claimant had largely accepted in cross examination, said Ms Ross, the details in the investigation for properties other than Dowancraig Place. She commented in relation to the evidence upon pages 236 and 250 of the file. Mr Robertson's final position was that he could not recall whether he saw the document at page 236 in his investigation. He had taken reasonable steps to try to ascertain whether and when the order was delivered given the information from the claimant in the sheet at page 1415 and the information from Corporate Fraud. He had obtained the information from Mr Quinn and Ms Miller at pages 1423 and 1424. The disposal by RSBI on 5 March might explain the order placed on 26 March. Given its delivery at the end of March, there remained the issue of the further order placed by the claimant on 9 April. The disposal note did not therefore exonerate the claimant as claimed, either in relation to this property or others. Reference was made to the principle of *Fuller* and to any failure in this regard not being sufficient to render the investigation unfair.

512. The Tribunal should not accept that Mr Robertson had created the documents at 1423 and 1424.

513. Ms Ross said that although Mr McBride had been asked in cross examination about entries in the Corporate Fraud report regarding Raithburn Road which were said to assist the claimant potentially, those had not been raised with Mr Robertson when he gave evidence. The claimant had not given evidence about them. In fact, the claimant had agreed in cross examination with the summary of Mr Robertson at page 617. In any event, Ms Ross submitted, the entry did not relate to any missing items for which the claimant was being investigated and did not explain where missing items had gone.

514. As far as investigation of RSBI was concerned, Ms Ross drew the Tribunal's attention to Mr Robertson's evidence that it was for the claimant to raise this issue with his team leader and RSBI. There was no evidence that the claimant had done so. There had been no escalation of the issue of missing goods by the claimant. Ms Ross referred to *Shrestha.*

515. As to issue 6.4.11, alleged failure to compare the claimant's computer use with that of his colleagues, Ms Ross commented that this was not something raised with Ms Kerr or Mr Mackay in cross examination. Ms Paterson had said his use of email was not considered by her to be normal. The claimant accepted that he had breached policies and procedures.

516. Issue 6.4.12 - Corporate Fraud had gathered information and had limited purpose in their role. The investigation was carried out by Mr Robertson and Ms Kerr.

517. Issue 6.4.13, The failure to contact the police did not support a claim of direct discrimination or of unreasonable behaviour. The contact with the police by Mr Scott was for the purpose of safeguarding of staff. The concern was a potential link between the claimant and Mr Zefaj due to each of them having lived at the property at one point. The information as to the claimant being Albanian was thought to have been of possible relevance. There was no suggestion that the claimant was involved in criminal activity. This element of evidence was of a matter separated from the disciplinary and dismissal

process. The claimant accepted that in cross examination. It did not support the claim of direct discrimination. Mr Scott said he would still contact the police if an employee was British, given the property link, the reference to Mr Zefaj and his involvement with organised crime.

518. 6.4.14 - There was a basis in the photographs and time for which property had been vacant for the allegation of property being let out. The reference to flats in the plural had been an error. The allegation had not proceeded to the disciplinary hearing as Mr Robertson did not regard there as being sufficient evidence to support it.

519. 6.4.15 - The respondents had been unable to investigate the claimant's allegations of a racially motivated witch hunt and victimisation as he had not provided information to Mr McBride. There was no failure, it was submitted.

520. 6.4.16 - Ms Ross said the only evidence which might support pre-conceived hostility was the email from Mr Kelly at page 45. He had explained the position on that.

521. 6.4.17 - Mr McBride's involvement in the investigatory process was minimal. Ms Ross rehearsed the different aspects of that and examined the support for Mr McBride's involvement, including the emails he had received and to which he had replied. She urged the Tribunal to conclude that he was not involved to any significant degree and that there was no basis for suggesting that a British employee not of Albanian national origin would have been treated more favourably.

522. 6.4.18 - The fact that Mr McBride had chaired the disciplinary hearing did not render the dismissal unfair. There was no basis on which to find that his limited involvement in the earlier process or his chairing of the disciplinary hearing was due to the claimant being of Albanian national origin or that a proper comparator would have been treated differently.

523. There were, Ms Ross submitted, no facts which resulted in the burden of proof passing. If it did, the respondents had given non-discriminatory reasons for the conduct.

524. Ms Ross then made submissions upon the issues in relation to direct discrimination.

525. There was no basis for finding that the hypothetical comparator would not have been dismissed, it was submitted. If the identification of discrepancies by Ms Paterson was not discriminatory, then the claims of discrimination fell. What had happened after that point was a normal response to concerns, with no basis for it being said to have been discriminatory. Ms Paterson's actions were not discriminatory, Ms Ross said.

526. The only aspect of the actings which potentially were atypical or unreasonable was the question surrounding the documents at pages 236 and 250. The Tribunal should accept the evidence of the respondents on this topic. The Tribunal should also accept the evidence as to the Corporate Fraud report not being included in the appendices for the final version of the investigation report.

527. As far as Mr Kelly's emails were concerned, they were inaccurate and poorly worded. Ms Rafferty had referred to a lack of competence. That was the likeliest explanation Ms Ross submitted.

528. Issues 7.3 and 7.4 were in relation to the appeal and investigation into bullying and harassment. Paragraph 44 of the claimant's appeal document was a separate matter. The appeal would have dealt with the other points raised. The Bullying and Harassment procedure was the appropriate policy. The respondents had dealt with these aspects appropriately and in line with normal practice. Nothing was done because of the claimant's national origin. The hypothetical comparator would have been dealt with in the same way.

529. The last point made also applied to the allegation which formed the basis of issues 7.6, 7.7, 7.8, 7.9 and 7.10. There had been delay in outcome of Mr Mearns' investigation being sent to the claimant. Ms MacAskill. She had explained the reasons for this in her evidence.

530. Victimisation was a further ground of claim. Protected acts 1, 3 and 5 were accepted as such by the respondents. Ms Ross said the second protected act

had been subject of possible amendment to become a reference to Mr Kelly's belief that the claimant had made an allegation against his then line manager. The fourth protected act referred to the claimant having raised the issue at the disciplinary hearing. It was in fact Mr McBride who had raised it. It was therefore disputed that this constituted a protected act as defined in EQA.

531. Ms Ross confirmed that the respondents accepted that the elements set out as detriments in 12.1-12.4 were detriments, albeit, she said, the reference to *"disciplinary process"* was difficult to understand.

532. Dealing with issue 14.1, Ms Ross said Mr Kelly had not been instrumental in the processes mentioned. She pointed out the others who had dealt with the processes. Ms Heuston had made the decision on suspension, principally on the basis of the allegations of theft. She did not have the PRRS form at that time. Mr Kelly was not, on the evidence she said, instrumental in the investigation, disciplinary process and dismissal.

533. 14.2 - Mr Kelly had not given any protected act as a reason for suspension.

534. 14.3 The Tribunal should accept that the Mr Kelly had not accurately reflected what had been going on in his emails at pages 299 and 302. Those were the only aspects which might indicate influence from him in the investigation. Mr Robertson and Mr Mackay were clear that he did not influence it.

535. 14.4 - The Tribunal had Mr Kelly's evidence on the basis for his email as to the claimant being intimidating. Mr McBride had not said in his email (page 48) that the claimant should be reported to the police. That had been raised as a possibility.

536. 14.5 - Mr Kelly was not the driving force behind the investigation. Ms Ross went over the roles various people had played and decisions they had taken. That did not support the contention advanced.

537. 14.6 -There was no evidence to support the position that Mr Kelly and Mr McBride had been determined to ensure dismissal of the claimant. Mr Kelly had no input into that and Mr McBride's comment as to the position Mr Kelly outlined to him at 302 in relation to Ms Kerr as a comparator "adding weight

to the case" was made sometime before he was appointed chair. His actings did not support him being determined to dismiss the claimant.

538. If this aspect of the claim was to succeed those involved had to know of the protected acts which were said to have been the reason for their actings. Ms Paterson said she did not know the circumstances around it and it was not put to her, Ms Ross said, that she knew that the claimant's earlier case was one of race discrimination. Mr Quinn, Ms Heuston, Mr Robertson, Ms Rafferty and Ms Kerr gave unchallenged evidence that they were unaware of the previous Tribunal claim by the claimant. Both Mr Mackay and Mr McBride said they were unaware of it until the claimant mentioned it at the disciplinary hearing.

539. In relation to the second protected act, Ms Ross reiterated that it was not advanced as a reason for suspension. She repeated her position as to Mr Kelly's lack of involvement in the various stages. Further in relation to the second protected act, Ms Paterson, Mr Quinn, Mr Robertson, Ms Heuston Ms Kerr and Ms Rafferty said they did not know of the protected act. Mr McBride was not asked about this.

540. The third protected act was then addressed by Ms Ross. It was accepted that if they had happened, the elements specified at issue 18.1 and 18.2 were detriments. However, Mr McBride had denied in evidence that he had accused the claimant of playing the race card inferentially. His denial was not challenged in cross examination. Mr Mackay's evidence and that of Ms Kerr, both also unchallenged, supported that of Mr McBride.

541. In relation to issue 20.1, Mr McBride had not failed to investigate the allegations of race discrimination. He had not been given the information by the claimant to enable him so to do.

542. 20.2 - Mr McBride had not lied as to there being a full audit of fellow TADs officers. That was not a challenge put to him in cross examination. It was unclear why the report itself would have been produced to the claimant as it was a wider review for management.

543. 20.3 - Mr McBride did not have any significant involvement in the investigation and the investigation was not only concerned with finding guilt. One allegation had been dropped and allegations in relation to two properties had also been rejected by Mr Robertson. Evidence which might have supported the claimant's position that he had informed team leaders was sought and RSBI were contacted.

544. 20.4 - Mr McBride did not recommend reporting the claimant to the police.

545. 20.5 - Any language used in dismissing someone could be viewed as unnecessary and humiliating. There was however nothing inappropriate in what Mr McBride said. There was nothing to support that he used words as he did because of the protected act.

546. As mentioned, it was denied by the respondents that the fourth protected act was a protected act.

547. The same points made in relation to the third protected act were made in relation to the fourth protected act. In addition, Ms Ross took a general point that it was inconsistent for the claimant to maintain on the one hand that the decision to dismissal was predetermined, yet on the other to maintain that the decision to dismiss was because of the statement he had read out at the disciplinary hearing.

548. The fifth protected act was the allegation within document lodged in support of the appeal. The respondents denied that the claimant was subject to a detriment of his allegations not being dealt with in a timely manner. They would have been dealt with at appeal. The date for that had been set as early as was possible. He had then withdrawn his appeal.

549. 24.5 - The fact that the claimant's allegations had not been investigated was due to withdrawal of his appeal. They would have been heard and dealt with at that point.

550. 24.6 - The claimant was not interviewed as the appeal did not proceed and the issue which was investigated was dealt with under the modified procedure. Mr Mearns had not been aware of the appeal letter, save for

paragraph 44 and so his decision not to interview the claimant was not because of the content of the appeal letter.

551. 24.9 - The claimant not receiving a copy of the investigation report was because that was the usual practice where the modified procedure was involved. Mr Mackay and Ms MacAskill had confirmed that as being the usual practice. It was not therefore because of the appeal document.

552. Ms Ross then submitted that while Mr Mearns might have appeared to accept that reason he had concluded as he did was because of the complaint, the Tribunal should consider his evidence prior to this point. It was clear he did not fully understand the question and was saying that his investigation related solely to paragraph 44.

553. Ms Ross then turned to some points made by the claimant.

554. Ms Murphy no longer worked for the respondents.

555. Mr Kelly's answers showed he understood the concept of direct discrimination, even if he did not give the precise details.

556. It was submitted that Ms Paterson's evidence as to visiting the flat at Pollokshaws Road and indeed hoovering it when Ms Miller was there did not undermine her credibility.

557. There was unchallenged evidence from most of the respondents' witnesses as to limited if any prior knowledge of the claimant. There was no basis for the position that they were motivated by protected acts or by the national origin of the claimant. There was no evidence of previous animosity other than the allegations in relation to Mr Kelly.

558. The Tribunal should also keep in mind that the previous Employment Tribunal case was some 5 years pre the circumstances which led to dismissal. If the respondents were institutionally racist, then they would be unlikely to have waited 19 years to dismiss the claimant, particularly when there was an allegation of gross misconduct in 2004.

559. Ms Ross disputed Mr Elesinnla's explanation of the background to the amendment by the respondents. The amendment permitted had excluded the respondents' proposed pleading that a small number of documents were, in error, omitted from the documents provided to Mr Robertson. It had not been said that no documents had been passed over, just that Mr Robertson did not receive all the documents. There had been no reference in form ET1 to documents being suppressed by the respondents but that had been the claimant's position in this hearing.

560. Ms Ross denied there had been coaching of witnesses for the Tribunal hearing or that witnesses had discussed their evidence. Where evidence matched, it suggested that they had the same recollection rather than that evidence given had then been discussed with a witness who was yet to give evidence.

Response from the claimant

561. Time passing and impact on memories applied to everyone, Mr Elesinnla said, not just the respondents' witnesses.

562. The Tribunal should keep in mind admissions made by respondents' witnesses as to racist behaviour on their own part and the view many of them had that the behaviour of others also amounted to that. There were instances of there being no objection taken to terms of emails. That amounted to those not challenging the emails condoning their terms and being just as culpable. The respondents said they had a zero-tolerance policy on racism, however their actions did not adhere to that.

563. The view of the employer was key. That was Mr McBride. He accepted he should never have been near the disciplinary hearing. He recognised he was biased. That was the opinion of the employer.

564. Appropriate concessions had been made by Mr Robertson as to failings on his part.

565. Ms Paterson's evidence on cleaning the flat was clearly untrue. In relation to coaching, Ms Paterson accepted she had been coached, Mr Elesinnla said.

566. The respondents' witnesses had all been exposed in turn as not telling the truth.

567. Mr Mearns had understood what he had been asked in relation to victimisation.

568. The Tribunal should keep in mind *A v B*. The respondents could not say that the claimant was not given documents but that if he had been, it would not have made any difference. Similarly they could not say that the investigation took nine months but it made no difference. It was manifestly unreasonable behaviour.

569. It seemed to be the case that documents were handed over but those which might have helped the claimant were omitted. There appeared to be a conspiracy between Mr Mckay, Mr Robertson, Ms Murphy and some other unknown person to not hand over documents which might help the claimant.

570. Mr Elesinnla said he continued to dispute the propriety of the amendment permitted.

571. The respondents had clearly failed to meet the *Burchell* test. The dismissal was racially discriminatory. The evidence in cross examination was overwhelming. Inferences had to be drawn from evidence, whether evidence of opinion or directly on point. Where there were admissions of racially discriminatory behaviour that had to be taken into account in drawing inferences.

572. In that regard the admissions by Mr Mackay and Mr Robertson should be in the Tribunal's mind. Mr Mackay had three decades of HR experience. He had accepted that Mr McBride sitting as chair was evidence of bias and poor management practice.

573. Mr McBride accepted he was biased, did not follow due process or natural justice. There was no excuse for him.

574. The case was obvious to any reasonable person. The employer had behaved in an atypical way. The witnesses had confirmed that the way things were

done in the case was not how they were normally done. They were asked why they were doing things that way. No explanations were forthcoming.

575. If the burden of proof had shifted, then in looking for the explanation, the Tribunal would need to find an explanation from Mr McBride for acting inappropriately and unprofessionally. Likewise in relation to Mr Robertson and Mr Kelly. There was no explanation from Mr Kelly other than he didn't know why he did what he did. When Mr Robertson was asked why he did not do the right thing, which he himself had identified, there was no answer. Ms MacAskill said the respondents did a thorough investigation but did not explain why that was her view.

576. Mr Mearns admitted victimisation.

577. The claimant must succeed on the evidence, said Mr Elesinnla on dismissal, on dismissal being an act of discrimination and on victimisation by Mr Mearns. He must succeed against Mr Kelly to the extent Mr Kelly referred to his national origin. If he did not then the Tribunal was not looking at the evidence. It was looking at something else. The evidence was overwhelming. The contemporaneous evidence in the emails was key. The emails *"gave the game away".* They spoke for themselves. They were written when it was not expected that the claimant would see them.

578. Ms Murphy not being called by the respondents as a witness was a matter from which the Tribunal could draw an inference. It also meant that there was no explanation from the respondents for actings to which she might have been able to speak.

Discussion and Decision

General comments

579. This was a case in which the final hearing took place over an extended sitting. It involved 15 days of hearing in October and November 2021. Evidence remained to be heard, however at that time an appeal on particular points was taken. The case was remitted back to this Tribunal. A further 22 days of

hearing took place in May and June 2024. The events upon which the evidence centred took place in 2018 and 2019.

580. Whilst the time taken at the hearing drew a degree of adverse comment from Mr Elesinnla in submission, the hearing involved 16 witnesses for the respondents as well as the claimant himself. There were many documents. There were often challenges to elements of questioning. Those required the Tribunal to hear from both parties, to adjourn and then make its decision known. All of that took time. This was a discrimination case. The Tribunal was therefore keen to ensure that relevant questions were permitted and to provide a degree of latitude to give the best opportunity for the appropriate evidence to be obtained. Further, the decision had been taken that witness statements would not be used. That is line with general practice in Scotland. It does lead to a lengthier hearing with parties, albeit if there are statements the overall time involved in the consideration of the case may not be reduced given that parties and the Tribunal will be required to read the witness statements. The advantage felt to exist in assessment of evidence from witnesses is regarded as supporting the general way of proceeding.

581. An additional issue which occasionally slowed down the hearing was that it was being conducted by video, CVP. Inevitably there were IT problems from time to time which ate into the time available. Parties, representatives and witnesses are thanked for their patience while any such matter was addressed and resolved.

582. There was an inevitability about recollections of some matters of fact having been affected by the passage of time. There were many questions, particularly in cross examination, as to matters of detail. Witnesses were asked to give evidence or to answer questions as to what their thinking was at time decisions were taken, meetings were attended or emails were written, in some cases around 6 years prior to being asked.

583. The Tribunal accepted that witnesses had, in the vast majority of instances, attempted as best they could to give honest answers to questions asked.

584. Comments on evidence given by various witnesses, and the view of the Tribunal upon that, is noted below. It is considered appropriate to mention at this point, the Tribunal's view in general terms of the claimant's evidence.

585. As Mr Elesinnla referred to in his submission, much of the evidence relied upon in support of the claimant's case came from the respondents' witnesses. The Tribunal considered the evidence from the claimant himself in its deliberations, in making its findings and in coming to its conclusions.

586. The Tribunal appreciated from the claimant's evidence how strongly he felt about his dismissal and what he regarded as being the reasons behind it. On occasion he was keener to vent his frustration and anger than to answer the questions he was being asked. He also sometimes used a question as an opportunity to respond by expressing his view of individuals and to advance his theory as to various people having acted in concert against him.

587. In relation to some aspects, particularly as to the need to notify RSBI and the team leader of missing goods, the claimant adopted a different emphasis, if not a different position, in the Tribunal hearing to that which he set out to the investigation meeting and at the disciplinary hearing. His evidence was that his role involved him having autonomy to decide upon reordering and to reorder. On questioning in cross examination he varied his position from having had full autonomy to reorder goods, giving differing explanations of the need for and means of contacting RSBI and the team leader. He said specifically at one point that he was told to email RSBI and to copy the email to the team leader if goods were missing, in line with the position as detailed in the email at page 329.

588. The Tribunal was careful to keep in mind that in assessing the dismissal of the claimant it was to look at the information the respondents had at that time.

Further general point

589. It is worth commenting upon the lack of experience in the disciplinary matters with which they were tasked of those undertaking key roles for the respondents in this case.

590. Mr Robertson had previously carried out one investigation. Ms Kerr had not previously carried out an investigation. Mr McBride had not previously sat as the decision maker in a disciplinary hearing. Ms McDougall had not acted previously as support officer. Mr Mearns had not previously dealt with any matter under the modified procedure, albeit it he had many years of experience in carrying out what might be labelled as *"standard"* investigations.

591. It was troubling that those about to fulfil the roles mentioned were not better equipped through training for those roles. Training in carrying out the work involved for those fulfilling the roles of investigators, support officers, disciplinary and appeal hearers seemed, on the evidence, scant or non-existent.

592. The Tribunal was also concerned that those taking up the roles did not at that point appear to have received any specific guidance or pointers as to carrying out the roles, or direction as to where they might find that. That would no doubt have helped the individuals involved and also would have potentially assisted there being a proper, smoother process, thereby assisting the claimant.

593. Selection of individuals who had experience in the roles might have been better, assuming of course that others who had familiarity and experience in the roles were available to take those up.

Training

594. The Tribunal wishes to state that it had concerns as to a theme running through the evidence of the respondents' witnesses when it came to training in matters of equal opportunities. Witnesses espoused strong values in this area and may well exhibit them in their day-to-day working lives. Witnesses appeared to understand broad principles applicable, however from the evidence there appeared to be a surprising lack of structured, specific and regular training in equal opportunities and in discrimination law. A distinct improvement in this area might well result in staff who were better equipped to deal with issues in the workplace and more readily able to notice and challenge any behaviour which might be discriminatory.

Order compliance/Non Compliance

595. The Tribunal reviewed the documents referred to by parties in their respective submissions as to compliance or noncompliance by the respondents with paragraph 1 (d) n the Order of 16 January 2020.

596. The Tribunal accepted that the respondents had checked the position before replying to the Order. They had sent on documents and had then set out the position in their reply to the relevant paragraph in the Order. That was that there *"are no copies of the notes or minutes of the telephone conversation(s) or meeting(s) held between Mr Kelly and Ms O'Neill".*

597. On the submissions made the Tribunal was satisfied that the respondents had complied with the Order in stating that there are no such notes. They then went on to provide the reason for that being so. This where the concern of the Tribunal and indeed the claimant, lay.

598. The reason given for there being no notes was that this was a first meeting. Ms O'Neill in her evidence said however that she took some notes during the meeting.

599. There was no specific explanation from the respondents as to how the explanation for absence of notes, that it was a first meeting, came to be given in reply to the order.

600. Ms Ross highlighted the various documents which had been handed over and said the respondents had sought to comply with the Order. They had spent a lot of time checking and seeking to comply with the Order. If anything had been missed, although the respondents did not believe that to be the case, it was due to error. There had been no deliberate attempt to withhold documents. It was correct to say at the time that there *"are no copies of notes or minutes".*

601. Mr Elesinnla said however that false information had been given to the Tribunal. He said that had there been an apology and acceptance of the position by the respondents he would have let it be. He was unhappy with the

absence of recognition of the issue by the respondents. They had doubled down.

602. Noncompliance with an Order is a very serious matter. There are various sanctions as explained when an Order is issued. The respondents' solicitors are experienced and will know of the position and their responsibilities. The respondents' internal legal department was the "instructing party".

603. The Employment Tribunal accepted that many documents had been handed over in response both to informal requests and to Tribunal Orders. It accepted that at time of reply it may well have been correct to say that there "*are no copies*". It was prepared to accept that this was not an instance of anything being deliberately withheld or of any attempt being made to mislead the claimant or the Tribunal. Efforts had clearly been made to comply with the Order and earlier requests from the claimant.

604. It remains largely unclear how it came about that the respondents replied to the Order with the explanation that the reason there were at that point no copies of notes or minutes was due to it being a first meeting. The Tribunal was somewhat unhappy about that. It did not, however, believe that there was noncompliance with the Order. The Tribunal concluded that the Order had been complied with, it not being suggested in questioning or evidence that copies of any notes or minutes specified in the relevant part of the Order remained available.

Unfair dismissal

605. The Tribunal accepted Mr McBride's evidence that the reason for dismissal was conduct. He concluded that the claimant's misconduct comprised double ordering of white goods and household items for personal gain, as well as misuse of his work email account.

606. The Tribunal also accepted that the decision to dismiss was that of Mr McBride and that he took it during an adjournment of around one hour after conclusion of the disciplinary hearing.

607. Having heard the evidence and assessing that together with the documents in the case, the view to which the Tribunal came was that Mr McBride did believe the claimant to be guilty of misconduct. The claimant admitted misconduct comprising misuse of his work email account. Mr McBride believed him guilty of the other charge of double ordering for personal gain.

608. Issues 5, 6.1 and 6.2 are dealt with by these paragraphs.

Reasonable Investigation, Fair Dismissal?

609. The Tribunal now turns to issues 6.3 and 6.4, the issues of whether the investigation was a reasonable one and the unfairness or otherwise of the dismissal.,

610. There were two main concerns on the part of the Tribunal when it considered the steps taken by the respondents during the investigation stage.

611. The first of those centred on what it regarded as the failures of Mr Robertson. Those included key elements of not observing the reference in the Corporate Fraud report to disposal of items at Dowancraig Drive, failure to follow up the claimant's reference to there being a bigger file for that property (other than by asking Mr Mackay), failure to ask any questions of anyone at RSBI, failure to make any enquiries of all who had access to keys for properties and the time taken in the investigation.

612. The second main area of concern was as to Mr McBride sitting as decision maker in circumstances where he had had an element of involvement in and awareness of the initial and investigatory stages. The Tribunal could understand why it might be thought that the head of service should be informed that there was a possible issue in his department. It could understand why his having an indication of the broad position as that issue unfolded might be thought to be relevant. It kept in mind that it was assessing whether a fair dismissal under ERA had occurred. In making that assessment it considered the applicable test, rather than simply expressing its own view. It regarded the level of information which Mr McBride as head of service received in this case and his interaction with those providing the information

as unacceptable and inappropriate, applying the relevant test set out above, in circumstances where he then later agreed to sit as decision maker in the disciplinary hearing. That was emphasised when the respondents' staff numbers, and therefore other potential appointees as decision maker in this case, were considered.

613. The latter issue was so fundamental to the principle of fairness, in the view of the Tribunal, that the chairing of the disciplinary hearing and the taking of the decision by Mr McBride was unfair. In the Tribunal's conclusion, even had Mr McBride rejected the charge of double ordering of goods for personal gain as far as the claimant was concerned, and gone on to dismiss the claimant due to admitted misuse of his work email account, that decision could not be seen as fair one in terms of ERA due to the background and extent of involvement and awareness on his part.

614. Mr McBride said he had informed Mr Mackay prior to his appointment that he had an awareness of the allegations and had received emails from Mr Kelly. There was no suggestion however that he had disclosed the content of the emails to Mr Mackay or shown them to him. Mr Mackay was clear that if he had known about the content of the emails he would not have agreed that Mr McBride could or should sit as chair. Further, there was inappropriate interaction by email in the lead up to the disciplinary hearing.

615. There was no suggestion of any determination by Mr McBride to ensure that he was appointed chair. It was a misjudgement, albeit a serious one and one which was fatal to the fairness of the process and decision made in the view of the Tribunal.

616. Teasing apart the events, the Tribunal considered the various stages in the process undertaken by the respondents.

Initial phase

617. There appeared to be a relatively lax management style within the TAD team on the evidence the Tribunal heard. TAD officers such as the claimant were to ensure that properties were available for let as swiftly as was possible.

There was no written procedure setting out the steps to be taken if goods went missing from properties. Nevertheless, the Tribunal was satisfied on the evidence that the practice which was to be followed was that the TAD should in that circumstance contact both his team leader and also RSBI to intimate the issue of missing goods, rather than simply proceeding to reorder goods without reference to anyone.

618. In coming to this conclusion, the Tribunal had regard to the evidence from Ms Paterson at time of the investigation and disciplinary hearing, to the claimant's own evidence at those stages and also to the fact that at the disciplinary hearing, Ms Paterson's evidence and that of Ms Miller to this effect was not challenged by the claimant or his representative.

619. In assessing the evidence, the Tribunal kept in mind the questions put to witnesses at the Tribunal hearing and the points made in submission as to the team leaders having an interest in describing this as being the procedure as it would lessen any risk of criticism being directed towards them. It also noted that double ordering had been raised with the claimant in supervision with it being said that he would take steps to rectify the issue. It is accepted that there is no note at that point of any "reminder" as to the system applicable in the situation of missing goods. The conclusion reached by the Tribunal, however, was that above.

620. Two instances of double ordering by the claimant had occurred. Those had been said by him to have been errors. In the circumstances it was understandable that on noticing an anomaly of a similar type, Ms Paterson raised the issue with Mr Quinn as her line manager.

621. Ms Paterson and the claimant had a good working relationship. It was therefore also understandable that she found the situation which then arose stressful and difficult. She was having to look at the work of the claimant, her colleague and team member, in relation to possible misconduct and to inform her line manager of her findings. Mr Quinn confirmed that he required to support Ms Paterson as she was anxious and stressed during this and later stages It may be that this is what Mr Kelly picked up on as later mentioned.

622. The Tribunal was satisfied that at a time such as this when an initial check is being carried out by a manager, it is not generally the case that the employee in question will be informed of this step or indeed will be spoken to as part of it. Speaking with or interviewing the employee is a step generally taken by employers, in the experience of this Tribunal, at the point where it has been established that there is something to investigate on a more formal basis.

623. There was an issue for determination by the Tribunal as to the investigation carried out by Ms Paterson. Her evidence at the Tribunal hearing was that she had checked some 200 properties, comprising those managed by the claimant and also properties on the South side of Glasgow managed by other TADs.

624. The Tribunal did not find that evidence credible on the balance of probabilities. She had been asked by Mr Quinn, as he confirmed at the Tribunal hearing, to undertake a review of the voids managed by the claimant. That was how the matter was referenced in emails. Ms Paterson did not mention a wider review having been undertaken in her meeting with Mr Robertson or in the disciplinary hearing. The reference to this wider investigation in the pleadings was by way of a late amendment. The latter point of itself was not fatal. It was however weighed by the Tribunal in its consideration of the evidence it was prepared to accept. Ms Paterson explained that Servitor did not permit searches by individuals. A search had to be by property, with the officer responsible for instruction of any work being made known by employee works numbers showing as being associated with any such work. There were however physical files which would be available as a means by which the claimant's work would be checked. In addition, supervision notes confirmed the properties he was managing at that time. Looking at the claimant's files on a stand-alone basis is what the Tribunal believed from the evidence that Ms Paterson had done.

625. Although this meant the Tribunal had not accepted Ms Paterson's evidence on an important matter, it did not regard that as fatal to acceptance of the remainder of her evidence.

626. The Tribunal also had regard in assessing her evidence in the round, to her evidence that she had been at the property at Pollokshaws Road In April 2019, had hoovered it and indeed that Ms Miller was also there at that time. This was in relation to an allegation which did not proceed to the disciplinary hearing, that of letting out of the flat by the claimant for personal gain. This element of evidence was hard to accept. It had not previously been mentioned in the investigatory stage. That might have been as there was no specifically relevant question asked. It seemed odd to the Tribunal, however, that if Ms Paterson had indeed had to hoover the flat despite there having a clean and set by RSBI, the issue had not come up, potentially with both the claimant and RSBI. The claimant had said at Tribunal, for the first time, that the photographs were not of the property in Pollokshaws Road. The evidence highlighted from both Ms Paterson and the claimant in relation to this property was unexpected and new. This was the allegation which did not proceed to the disciplinary hearing.

627. There were therefore some concerns as to those parts of the evidence the Tribunal heard from Ms Paterson. It considered her evidence on other matters carefully. Her evidence overall was evaluated on the basis of the content of the evidence, the documentation available, any competing evidence and also consideration of the manner of Ms Paterson in giving her evidence. The Tribunal weighed in its assessment that fact that as team leader she had an element of interest in protecting her own position from criticism.

628. On the latter point, the Tribunal recognised there was a degree of force in Mr Elesinnla's submission that it was in Ms Paterson's interest as team leader to present a picture which was favourable from her point of view. It might not be in her interest to confirm that there was no standard practice when goods went missing as that might reflect badly on her as a manager. In general terms, however, the Tribunal found Ms Paterson to be credible. The Tribunal believed her evidence as to there being a general practice which TADs were expected to follow if goods went missing and that it was as she described. That was to notify RSBI by email and to copy in the team leader. That had

been her evidence at earlier stages. No hint of discriminatory motivation for her actions was detected by the Tribunal.

Suspension

629. The initial checks carried out by Ms Paterson led to the view that there might be an issue and that escalation was appropriate. Although the claimant's position in submission was that suspension was a step taken only after around two months of investigation, the Tribunal did not regard it as appropriate to include within that timeframe the period of time taken up by the initial checks mentioned. The potential issue and its extent were unclear in the initial phase of checking/investigation. Suspension had happened three days after Corporate Fraud had become involved.

630. Mr Kelly was the person involved in collating information around the time of suspension. It is appropriate at this point that the Tribunal's observations on Mr Kelly and his evidence are set out.

Mr Kelly

631. There was some concern on the part of the Tribunal in relation to the evidence given by Mr Kelly. It may well be the case that in fulfilling his career role within Homelessness Services his skills come to the fore. Here, however, he was speaking to events during an investigatory and disciplinary process within the workplace. His skill and capacity in that arena were, it became clear, lacking.

632. Mr Kelly acted in a role which is not to be found specifically provided for in the disciplinary policy of the respondents. He was not the investigator. He was not the person who heard the disciplinary hearing and made the decision in the case. He was the person who initially had contact with Corporate Fraud. He was a person who Mr Robertson kept in the loop as to progress in the investigation. He in turn gave updates to Mr McBride as head of service, and to others, as the investigation process was being carried out. That type of scenario, with the head of service being kept informed, is something which regularly happens, on the evidence.

633. The Tribunal's view on the appropriateness of there being such a channel of communication given that Mr McBride was then the decision maker at the disciplinary hearing is recorded elsewhere.

634. The view the Tribunal formed was that Mr Kelly was a "broad brush" man, certainly with regard to the matters before the Tribunal. At the hearing, he did not seem to be a man for detail and was, on occasion, somewhat casual in the answers he gave. This was also reflected in his actings at time of the matters involving the claimant with which this Tribunal hearing was concerned. His memory of events was not good and he was quite vague in some areas of evidence. This was all consistent with the impression the Tribunal gained as to his approach to matters of detail.

635. Mr Kelly's lack of attention to detail was shown when he completed the PRRS form at pages 61 and 62. He referred to *"flats"* in the plural. There was only one flat involved in the allegation made, and ultimately departed from, that a property was being let out by the claimant. This was accepted by the Tribunal as being an error on the part of Mr Kelly rather than an exaggeration with purpose as the claimant saw it. The form was completed after suspension had been decided upon by Ms Heuston. That was not an unusual scenario according to her, her evidence being that it was the *"norm"*.

636. The main basis on which the decision to suspend was made was that there was an allegation of theft. That evidence from the person who made the decision, Ms Heuston, was accepted by the Tribunal.

637. The Tribunal found it hard to know what to make of evidence about what was said to be the claimant's email going back to an event he said had occurred in 2013. He did not found upon this as being a protected act or indeed as having been an act of discrimination. He said that Mr Kelly had threatened him in an email with stopping his wages if he did not return to work, despite having a sick note in place. That email was not in the file. The claimant said in evidence at Tribunal that he had been contacted on 11 October by a Ms Campbell who ordered him to return to work. He said that the order came from

Mr Kelly. He did not mention Ms Campbell in the email he said he had sent to Mr Kelly on 14 October, the email being at pages 1718 and 1719.

638. The Tribunal's assessment of Mr Kelly's reaction to this situation was that it was genuine and truthful. He could not recall the events and said he would not order someone to return to work if a sick line was in place. He had no power to stop pay. He did not recall receiving the email just mentioned. This evidence was weighed against the evidence from the claimant who was adamant events had happened as he described them. The email gave a similar version, however the claimant's reference to Ms Campbell in evidence and lack of reference to her in the email said to have been sent, taken with the evidence from Mr Kelly and manner of that being given, led the Tribunal to reject this evidence from the claimant as to what had happened in 2013. The Tribunal did not accept that there was a basis for any animus from Mr Kelly towards the claimant said to have flowed from this time. It did not see any evidence of animus which it regarded as being traceable to this alleged exchange.

639. Of more concern to the Tribunal was the email from Mr Kelly of 11 June 2018 at page 45 of the file. This was the email referring to the claimant being an Albanian national. Setting out the Tribunal's view on this is considered relevant at this point given the reference at issue 6.4.16 to alleged preconceived hostility on the part of Mr Kelly towards the claimant due to the claimant's Albanian nationality.

640. There was no doubt that this reference in the email was inappropriate and unnecessary. The context was that of there having been an initial meeting between Mr Kelly and Ms O'Neill from Corporate Fraud. Ms O'Neill had sought information in relation to the claimant, described as identifiers.

641. Mr Kelly said in evidence in chief that his recollection of his thinking was that he believed stating that the claimant was Albanian would assist with spelling of his name. He accepted in cross examination that by 11 June he already had information on the spelling of the claimant's name. He also accepted that

HR, with whom he was corresponding, would have all the employment information, including the correct spelling of the claimant's name.

642. This email and what was to be taken from it was a matter carefully considered by the Tribunal. It had significant relevance to the claim of unfair dismissal and also to the claim of discrimination.

643. Looking at all the relevant evidence and the assessment it made of Mr Kelly on this matter and in general as to his approach to matters, the Tribunal concluded that this was a clumsy and unthinking attempt by Mr Kelly to assist with identification of the claimant. In relation to the claim of discrimination, this email, together with the reason for it being sent in the terms in which it was, were factors in consideration of the burden of proof, whether that had passed to the respondents and whether the respondents had explained the position such that it met the second stage of the test. The Tribunal concluded that the terms of the email were due to a degree of incompetence on the part of Mr Kelly in his interaction. This was the explanation, albeit it was an unfortunate conclusion to reach.

644. Others should have challenged Mr Kelly on his reference to the claimant's national origin and had not done so. The explanations in evidence were that they did not register it at the time. That is an explanation the Tribunal accepted as being accurate, recognising that this was a failing on the part of those who did not notice the reference. Those with whom the absence of challenge was raised at the Tribunal hearing recognised their shortcomings.

645. Mr Kelly also emailed Mr McBride (page 48) expressing the view that the claimant was very intimidating and that Mr Quinn and TADs team leaders were *"very apprehensive".* He said in evidence at Tribunal that this was his perception from discussions where the claimant's name had been mentioned.

646. The Tribunal gauged the contents of the email Mr Kelly sent against the evidence from Ms Paterson and Mr Quinn. They both said that they were on good terms with the claimant. The Tribunal did not read anything into the email in the sense of Mr Kelly being unreasonable or evidencing behaviour which was, or hinted at being, discriminatory. He may have misjudged the

indications he believed he was picking up. Mr Quinn said in evidence that Ms Paterson was stressed and referred to her struggling and being anxious due to the investigation and disciplinary process involving one of her team members. That led to the need for him to support her at different times. It may have been that Mr Kelly interpreted the signs he observed at the outset of this matter as being ones related to fear rather than to general worry, anxiety or stress on the part of Ms Paterson about the situation.

647. As was accepted in evidence, referral of concerns of this type to HR would have been better, rather than alerting Mr McBride. It would have been appropriate for Mr McBride to suggest that as the route to be followed. He was concerned however and the possibility of raising the issue with the police was mentioned. That was not ideal. The claimant was incorrect in saying that Mr McBride recommended reporting this to the police. He also did not take any steps in that regard.

Mr Scott

648. Contrary to the view Mr Elesinnla urged the Tribunal to take, the Tribunal found Mr Scott a straightforward and honest witness. He had become involved when a member of the team for which he was responsible in Corporate Fraud had asked to have her name not appear on any documents relating to investigation into the claimant. This was due to concerns which she had given potential links the investigation had uncovered between the claimant and Mr Zefaj. The concerns had arisen from press and media reports which detailed activities in which it was said Mr Zefaj was involved. Those reports mentioned an address for him which was also an address with which the claimant was associated.

649. The evidence in relation to this matter had no relevance to the investigation or disciplinary process. It is dealt with at this point as Mr Scott is mentioned in issue 6.1.16, together with Mr Kelly and Mr McBride as having preconceived hostility towards the claimant based on his Albanian nationality.

650. Mr Scott wrote the email at page 268 to Police Scotland. The Tribunal was satisfied that it was reasonable to send the email seeking advice in connection

with safeguarding of staff given the information uncovered and the reaction by the member of staff to it. Mr Scott was providing as much information as he could do and wished to know if there was a link such that the enquiry perhaps should not proceed. The link through the address was the major factor. Inclusion of the fact that the claimant was Albanian was not, as the Tribunal determined it on the evidence, given the situation and the explanation, indicative of racial hostility or discrimination. The same step would have been taken in the case of a comparator. Mr Scott was not reporting the claimant to the police or seeking that the claimant be investigated by the police.

Investigation stage

651. Mr Robertson carried out his part in the investigation in addition to his day-to-day job. Ms Kerr also fitted in her part of the investigation in addition to her normal duties. No doubt the work roles of both Mr Robertson and Ms Kerr were demanding. Both of them undertook a large amount of work in their investigations. There were many documents. They produced a detailed report. There were the other elements mentioned in the Judgment above which led to time being taken. The Tribunal regarded these matters as explaining how time had passed. The reasons for this were non discriminatory ones. The investigation commenced at the end of June/beginning of July 2018. The investigation report was submitted to Ms Rafferty on 1 March 2019, 8 months later. That was regarded by the Tribunal as being unreasonable delay, applying the standard of the band of reasonableness, rather than simply the opinion of the Tribunal.

652. Further, Mr Robertson failed to appreciate the potential significance to the investigation of the reference in the Corporate Fraud report to the disposal note confirming disposal of goods by RSBI. He overlooked it. He therefore did not disclose it to the claimant. Had he pursued the matter he would have been aware of removal of goods by RSBI from Dowancraig Drive and therefore of the potential explanation for one of the occasions when goods were reordered. It might also have led to further investigations in other instances

with RSBI as to whether goods had been removed by them from other properties.

653. The fact that this entry was not noticed and understood led to questions being put to the claimant on an erroneous basis at the investigatory and disciplinary stages. The fact that this was not part of the information before Mr McBride contributed to his view that the claimant could not explain where missing goods had gone. Had it been present Mr McBride may not have concluded that it was not credible that missing items had been removed by RSBI, at least in relation to Dowancraig Drive. The explanation of oversight was accepted by the Tribunal. It was a non-discriminatory explanation for the occurrence.

654. Mr Robertson did not include the Corporate Fraud report as one of the appendices to his report, although it had been included in appendices for the two draft reports. He took it out on advice from Mr Mackay on the footing that his report in effect superseded it. Whilst there was a non-discriminatory explanation for the decision taken, the Tribunal concluded that it was an inherent part of a fair investigation in terms of ERA for the claimant to have this report.

655. The claimant had said that there was a larger file for Dowancraig Drive. Mr Robertson wrote this on the papers he had. He did not however ask the claimant any more about this. He asked Mr Mackay whether he had all the papers and was reassured. He could, and in the view of the Tribunal as part of a reasonable investigation should, have followed this up by checking physical files or on Servitor given the information the claimant had given him. This might have opened venues for exploration by him to have a fuller picture.

656. The Tribunal was not persuaded, however, that Mr Robertson had deliberately suppressed documents, whether those comprised the documents at pages 236 or 250, the corporate fraud report at 525-527, other items initially in the appendices or the email from Ms Paterson at page 333. He took advice from or asked questions of Mr Mackay in relation to these matters. The explanation given and accepted for these items not being with claimant was non-discriminatory.

657. There is an overlap here in that assessment of Mr Robertson's evidence in some areas and the investigation carried out by him involves consideration of emails and evidence from Mr Kelly.

Emails sent by Mr Kelly at time of the investigation

658. Mr Kelly sent the email at page 299 which referred to making the claimant's life difficult, to the strongest case and to a possible meeting between Mr McBride and Mr Robertson. He also sent the email at page 302 which discussed the TADs comparator, Lynn Kerr, and referred to a good case and a good result.

659. The Tribunal was satisfied that Mr Kelly's emails to Mr McBride did not accurately reflect the facts or the approach being adopted by Mr Robertson. They reflected Mr Kelly's lack of attention to detail in the view of the Tribunal and his tendency to misunderstand the picture.

660. The Tribunal recognised that the emails at pages 299 and 302 were written around the time of events. The email at page 299 contained factual errors, however, in its reference to 9 cases and to the case *"with the pictures"* being seen as by far the strongest case. That allegation was the one which Mr Robertson decided there was insufficient evidence to recommend proceeding to a disciplinary hearing.

661. The Tribunal also did not regard as accurate Mr Kelly's assessment that Mr Robertson was confident of making the cases more difficult for the claimant as the hearing progressed. It accepted Mr Robertson's rejection of this view of his thinking and approach at that point. It was comfortable having heard from Mr Robertson that he was far more measured and cautious than Mr Kelly was portraying. There were issues with his investigation in the Tribunal's view as detailed in this Judgment. The Tribunal was satisfied, however, that he was not out to make the cases more difficult for the claimant. He did explore various lines of enquiry which might have assisted the claimant. It seemed to the Tribunal that this email was an example of Mr Kelly picking things up wrongly.

662. Similarly, in the email at page 302 in relation to Ms Kerr being a comparator, Mr Kelly again did not accurately represent the position in the view of the Tribunal. Mr Kelly reports a *"good result"* with the comparison. Mr Robertson simply sought a comparison and reacted to the assessment made of information he received. Equally, Mr Kelly's reporting of Mr Robertson's wish that a *"good TAD"* be found for comparison purposes was not regarded, on the evidence the Tribunal heard, as representing Mr Robertson's intentions in seeking a comparator.

663. The Tribunal recognised that there had been some discussion between Mr McBride and Mr Kelly and that contact is commented upon below, as is the fact that Mr McBride is receiving information about the apparent views of Mr Bell upon the claimant.

664. The Tribunal was clear in its mind having regard to the answers given by those said to have met, that Mr Kelly was simply wrong to say that there had been meetings between Mr Robertson and Mr McBride during the disciplinary process.

665. A further email sent by Mr Kelly which commented on what Mr Robertson was allegedly doing was that at page 331. Mr Kelly was also shown, when the terms of the email were *"looked behind"* and the actual position was established, to have misunderstood and therefore to be inaccurately reflecting the facts.

666. Thus, Mr Kelly refers to the email from Ms Paterson which he sends on with the email at page 331 and says that there is worry that the claimant will produce the email and that Mr Robertson is *"trying to fit it into his report to make it ineffective."* In fact, Mr Robertson was seeking to introduce the email rather than the situation be that the claimant introduced it at the hearing. He was advised by Mr Mackay that as the email related to complaints rather than to missing goods, it need not be before the disciplinary hearing.

667. In this email Mr Kelly also refers to Ms Paterson being spoken with and to *"Gary"* speaking with her the next day, presumably Mr Quinn. He refers to Ms Paterson as *"a disaster"* and to her *"not having read her witness statement".*

This led to questions in relation to what was referred to as coaching of Ms Paterson and to opposing submissions on that point. The Tribunal considered those and came to a decision on this point that no coaching had taken place, that being covered below.

Further matters relevant to assessment of the Investigation

668. In weighing up the investigation carried out to assess it against what would comprise an investigation within the band as in *Hitt,* the Tribunal also had regard to the question of alternative explanations for the goods going astray, what investigation was undertaken in relation to that, with the reasons for what was done or not done.

669. There were various sets of keys. They were not generally kept in locked areas. RSBI and others had access to them as well as other TADs. The claimant referred to RSBI removing goods and to doors being left open. Mr Robertson did not explore those matters with RSBI or others. He took the view that the claimant should have raised such things with RSBI and his team leader if there was substance in them. The Tribunal recognised the information Mr Robertson had as to the proper practice in this area, however remained of the view that any reasonable investigation would have cross checked the position, at least with RSBI, by making some enquiries. This was so, in the Tribunal's view, even in circumstances where the disposal note was not something which was appreciated as providing information in that area. Given the seriousness of the allegations, making some enquiries was appropriate as part of a reasonable investigation.

670. Other enquiries were possible, such as checking the claimant's own flats, or seeking so to do, given that the suspicion was that the goods were going astray from the respondents' properties for the claimant's benefit in his own flats. Had that been the only omission, it would not have been likely to have taken the investigation outwith the band. It was certainly a factor, however, in the Tribunal's overall assessment of the investigation and whether it lay within the band.

671. The Tribunal was conscious in making its assessment in this area that the main area of criticism was that of investigation of the position relative to Dowancraig Drive. Mr Robertson's investigation had explored papers and considered oral evidence in relation to other properties and he had taken views as to certain elements which he did not regard as appropriate to recommend proceeding to a disciplinary hearing. The areas mentioned as being relevant for further investigation as part of a reasonable investigation might, however, have disclosed some information which impacted on the investigation of some of the other properties being considered by him.

672. It is accepted that in some instances there was no issue around goods going missing. Replacement goods were ordered for Maxwell Drive by the claimant, without him seeing the goods, in circumstances where a colleague of the claimant had said that the goods originally in the property were ok. The initial order of replacement goods for Haughburn Road followed the claimant having said that the goods originally there were ok. He said he had changed his mind.

673. Mr Robertson was criticised by the claimant for failing to check with colleagues as to the practice if goods went missing and for failing to check the work of colleagues in relation to their handling of the situation where goods went missing.

674. Whilst the Tribunal was of the opinion that a more thorough job might have extended to interviewing colleagues and to seeking more of the paperwork or Servitor information, it noted that Mr Robertson had the information from Ms Paterson and Ms Miller as to the practice applicable and the unusual occurrence of goods going missing. He also had the claimant's varying answers to what practice was and what he done, including at times a recognition of it being appropriate to give notification to RSBI and to the team leader. Some files for the other TAD, Ms Kerr, had been checked and no double ordering had been revealed. Mr Robertson would have dug deeper had such an instance appeared in the sample files he examined.

675. There were therefore explanations put forward for the absence of further investigation with RSBI and other TADs which were accepted by the Tribunal and which were non discriminatory.

676. This was the investigation stage, the outcome being whether to recommend that there be a disciplinary hearing. Mr Robertson did not recommend proceeding to a hearing in relation to two properties which Corporate Fraud had mentioned in their report, Ladymuir Crescent and Meiklewood Crescent. It is appreciated that the claimant maintained in submission that these were not "live issues". They were however matters of potential relevance and could have been subject of comment or recommendation from Mr Robertson. The fact that he did not recommend their inclusion in the matters for disciplinary hearing helped support the view that he was not looking for every matter which might be problematic for the claimant and putting that forward.

677. Similarly, Mr Robertson did not recommend proceeding to a disciplinary hearing in relation to letting out of property for the claimant's own gain. The claimant said that there was no evidence to support this allegation. There was information as to the flat in question being ready for let, however not being let for some months. Photographs suggested someone had been living in the property. Although the claimant disputed at Tribunal that these were photographs of the property involved, this was not a position he adopted in the investigation or at the disciplinary hearing.

678. The Tribunal was satisfied that there was material which warranted the question of letting out of the property for personal gain being explored in the investigation. Mr Robertson came to the view that there was insufficient evidence to make the recommendation that this element proceeded to a disciplinary hearing, again demonstrating an exercise of judgment in favour of the claimant.

679. The view to which the Tribunal came in relation to the documents at pages 236 and 250 was that Mr Robertson did not have them at time of his investigation. It accepted his, and Mr Mackay's, clear evidence in relation to page 250, the disposal document. Had he noticed the reference at page 527

in the Corporate Fraud report, something he should have done as a reasonable investigator, he might well have sought out the disposal sheet itself. Equally the claimant's reference to there being a bigger file should have set him on the trail of papers, which would then have included and uncovered pages 236 and 250. The Tribunal was satisfied that if he had the papers he would have dealt with them in his report and would have made a copy available to the claimant.

680. The Tribunal accepted the non discriminatory explanation that the reason for the failure to enquire further as to disposal of goods from Dowancraig Drive by RSBI was that Mr Robertson had overlooked the bullet point in the Corporate Fraud document.

681. Mr Robertson's evidence in relation to page 236 was less certain. He did obtain a copy of the document which contained the typing when he received page 1423 from Ms Miller via Mr Quinn. He had that when concluding his final report. A copy was available for the claimant. The fact that page 236 was in the same terms, at least insofar as typed, as well as the passage of time, may have caused the confusion for Mr Robertson. His evidence on this matter ultimately was that he could not recall if he had seen the document at page 236 during his investigation. The document at page 236 was dated 28 June. It had however been sent on by email of 25 June.

682. This was a very puzzling area of evidence. Weighing it all, however, the Tribunal accepted Mr Robertson's evidence that he had not withheld the document at page 236 from the claimant or suppressed it. It believed him on that point.

683. The Tribunal also accepted his evidence in relation to other documents said to have been suppressed by him. The items in the appendices, including the Corporate Fraud document, which were not given to the claimant had been excluded from the final report on the advice of HR Similarly, the email as to what was to happen to notify RSBI in the case of unsatisfactory work was not made available to the claimant after advice from HR. The HR advice was based on the relevance of those documents, as viewed by HR, and the

volume of material in the report prior to possible inclusion of those elements. There was no discriminatory reason for these documents not being passed to the claimant.

684. The Tribunal was conscious that there was also Ms Kerr's part to the investigation. There was no significant challenge to its reasonableness during the Tribunal hearing. She had not sent any emails to Mr Kelly during its currency. The claimant had admitted breaches of the policy and guidelines. There was no discriminatory acting by Ms Kerr in carrying out her part in the investigation and in completing her report.

685. The Tribunal would not have regarded that element of the investigation as lying outwith the band of a reasonable investigation, particularly when the claimant admitted breaches of the respondents' provisions and agreed that he had had training in these areas.

686. The cases of *Shrestha* and *Davies* were kept in mind by the Tribunal as it reviewed the evidence and came to conclusions in this area. Both Ms Keer and Mr Robertson spent much time and produced a lengthy report.

687. Nevertheless, the failure by Mr Robertson in overlooking the reference to the disposal note and following it up, the failure to pursue the possibility of there being a bigger file in relation to Dowancraig Road, the failure to interview anyone from RSBI and failure to interview Ms Kerr or any other TAD led the Tribunal to the conclusion that the investigation lay outwith the band.

688. The provision of the ACAS Code as to issues being raised and dealt with promptly was not met in the view of the Tribunal. Its provisions as to the employee being informed of the basis of the problem and being given the opportunity to put their case in response had been met, the Tribunal concluded. The initial checks carried out by Ms Paterson and the work of Corporate Fraud in the lead up to suspension were not such that the claimant required to be notified. Proceeding as the respondents did at those points was regarded as being relatively standard practice by an employer. The claimant was notified when suspension took place and was both aware of and involved in the investigation phase.

Support

689. The respondents' failings on the area of support were also unsatisfactory. It was surprising that Ms McDougall, whose role as support officer this was, did not receive guidance as to what the role required. This led to a lengthy absence of contact with the claimant. There were contact options open to him for support, however he had had an unhelpful experience previously with the providers in question. When support was provided by Ms McDougall, the claimant was not always easy to contact. There was failure by the respondents to handle appropriately the information from the claimant as to the serious nature of his health around March 2018.

690. The Tribunal accepted that Ms McDougall did not initially contact the claimant as she did not believe that this was what the role required. She regarded it as involving there being contact from the claimant with her rather than the other way round. Non discriminatory explanations were given for her failings. They were accepted by the Tribunal as lying behind events.

Decision to proceed to a disciplinary hearing

691. The Tribunal was satisfied that there was a valid basis on which Ms Rafferty could decide that there was sufficient material in the investigation report to support the decision she made to endorse the recommendation that there be a disciplinary hearing in relation to both allegations in respect of which it did proceed. There was not a basis for finding that her decision was discriminatory.

The Disciplinary Hearing

692. Whilst the hearing itself appeared to have been fair and was accepted at the time by the claimant as having been fair, the events *"behind the scenes"* had to be considered by the Tribunal in its assessment of the hearing and its outcome.

693. Keeping the Head of Service, which Mr McBride was, updated on developments in matters of this type is something which does happen within the respondents' organisation. Mr Mackay confirmed that. Mr Kelly was not

therefore doing anything particularly out of the norm in being in contact with information. It was not a discriminatory act.

694. There was however a real difficulty in Mr McBride sitting as chair in those circumstances. That was particularly so when the communications were examined. The terms used and indeed some of the replies, or lack of them, are problematic. They led the Tribunal to the conclusion that the hearing was not a fair one. The events which resulted in that view were so fundamental to fairness that the dismissal was unfair in the view of the Tribunal.

695. When the various emails from Mr Kelly to Mr McBride were put to various witnesses during their evidence, including Mr McBride himself, they all accepted, again including Mr McBride himself, that he should not have chaired the disciplinary hearing. That was also the view of the Tribunal.

696. Whilst Mr McBride said he had informed Mr Mackay at time of his appointment as chair that he had awareness of the allegations from Mr Kelly, the extent of the communication and the emails in question had not been made plain. The Tribunal was content that this was not with any hidden motive on the part of Mr McBride, it was more an issue of naivety on his part. The explanation as to how Mr McBride sitting as chair came about was non discriminatory.

697. Emails from Mr Kelly to Mr McBride, either addressed to or copied to him, were those mentioned above, being those at pages 48, 58, 299, 302, 306, 311, 320 and 328. There was also Mr McBride's response to the email from Mr Mackay at page 327. Mr McBride had received the draft reports with appendices. He said he did not open them. The Tribunal found that hard to accept. It recognised that he may not have poured over them. The issue is that he received them and also that he received, read and interacted with other emails.

698. The setting out by Mr Kelly in the email to Mr McBride at page 302 of Mr Bell's comments about the claimant, accurate or not, was another element in the conclusion of the Tribunal that Mr McBride was not an appropriate person to sit as chair. Mr McBride's response of *"To be fair I'm surprised that David B is feeling the way he does"* simply underlined the point. Similarly, his comment

at the same page in relation to the information Mr Kelly gave to him about the comparison involving Lynn Kerr, that it *"certainly adds weight to the case"* supported the view of the Tribunal that for him to sit rendered the disciplinary hearing and outcome unfair.

699. Mr McBride had had access to and had read the report carried out by Carol McCaig on the TADs department in general. He referenced its contents in the disciplinary hearing. In the view of the Tribunal, he ought to have been open about that and to have made a copy available to the claimant or to have made relevant extracts available.

700. Mr McBride also had flawed information from Mr Robertson. The disposal of goods by RBSI from the property at Dowancraig Drive on 5 March had not been noticed, as detailed above. The impact of this is shown in his comment in announcing his decision. He said that the claimant's claim that other missing items from the other properties were removed by RSBI was not found by him to be credible. That would have been unlikely to have been his view, certainly in relation to Dowancraig Drive, had the disposal note been before him or had the fact of that disposal been known by him.

701. The Tribunal accepted that Mr McBride was acting as fairly as he could at the hearing itself and that he conducted it in an open and fair manner. He gave the claimant and his representative the opportunity to raise points, challenge anything and to ask questions.

702. The evidence from the claimant was that Mr McBride had made fun of him when he read out his statement. The Tribunal was entirely satisfied that this phase of the hearing had not happened as the claimant described it. It noted and assessed the evidence from Mr McBride, Mr Mackay and Ms Kerr as well as that from the claimant. It had regard to the notes of the hearing. The evidence from the respondents' witnesses was consistent and convincing. It was supported by the notes. A further degree of support also existed given that Mr Bell had not objected to the way the claimant was being treated or to any lack of attention being given by Mr McBride to the matters raised.

703. Mr McBride had sought to obtain information from the claimant as to those he said he could identify. The claimant did not name Mr Kelly or anyone else during the disciplinary hearing, in the Tribunal's determination. He was encouraged to provide some detail so that an investigation could be undertaken. He did not do that. That was why there was no investigation into the allegation made during the disciplinary hearing at page 1594 that there had been a *"witch hunt".*

704. It was a legitimate area of questioning for Mr McBride to ask why these points were being made by the claimant at this stage rather than being taken by him at an earlier point. Mr McBride was properly gathering information by this questioning. The Tribunal was satisfied that the questions were not asked in any inappropriate manner or tone.

705. Although it becomes more relevant in relation to the claims of discrimination, the Tribunal was satisfied on the evidence that Mr McBride was not acting as he did during the disciplinary hearing because of any protected act or because of the claimant's national origin. He would have so acted had the claimant been the relevant hypothetical comparator.

706. Somewhat curiously, as the Tribunal saw it, Mr McBride was not cross examined on the evidence from and allegations of the claimant as to his being made fun of or being accused of playing the race card inferentially.

707. The Tribunal also accepted the evidence from Mr McBride and Mr Mackay as to there being around an hour by way of adjournment to make the decision, that the decision was not prepared and that it was the decision of Mr McBride. The claimant suggested that Mr Mackay and Mr McBride had colluded for the purposes of this hearing regarding the evidence about the length of the adjournment. Their recall was to the same effect. That raises no question on its own of any collusion. There was nothing to support that theory of the claimant as being likely to be correct. In addition, the suggestion made on behalf of the claimant during the hearing that Mr McBride had been listening to the evidence of this Tribunal hearing before he came to give his own evidence was also rejected by the Tribunal as being without foundation.

708. The decision reached by Mr McBride was to dismiss the claimant. He did this on the basis of there being two grounds of misconduct. He was able to explain his thinking. The Tribunal accepted the reasons he gave as being credible, on the information he had, and non-discriminatory. He was somewhat unclear in evidence as to what his decision might have been if only one of the allegations was involved. He referred to both as being instances of gross misconduct, saying that dismissal would have had to be considered, together with the possibility of a final warning being issued.

709. In relation to the allegation as to double ordering, Mr McBride concluded that it was for personal gain, not through any positive evidence to that effect. He viewed the absence of satisfactory or credible explanation from the claimant as leading him to that conclusion.

Alleged Coaching of Ms Paterson regarding her evidence at the Disciplinary Hearing

710. Mr Elesinnla submitted that Ms Paterson accepted that she had been coached prior to the disciplinary hearing. The Tribunal did not see the evidence as supporting there having been such a concession or indeed as leading to that conclusion.

711. Mr Mackay gave evidence that he would encourage managers to meet with a witness prior to a disciplinary hearing to ensure that the witness was comfortable with the statement of their intended evidence and was aware that they would questioned about it. That procedure of itself seemed relatively standard. There was no hint in his evidence that any such step would involve the witness being told what to say, corrected or rehearsed as to what their evidence should be.

712. It was put to Ms Paterson in cross examination that she was involved in several meetings about how she was supposed to give evidence at the disciplinary hearing. She confirmed that she recalled that. It was then put to her that this was fundamentally unfair to the claimant. After hesitation she said it would have been. It was not therefore specifically put to her that she had been told what to say, or what not to say. In reexamination, under reference to questions in cross examination and in relation to the investigatory and

disciplinary meetings, she was asked whether anyone had coached her to give evidence. She replied saying no-one had coached her to do anything. She was next asked if she and others had got together to rehearse their evidence. She responded by saying that definitely did not happen and was totally incorrect.

713. The Tribunal did not regard the passage mentioned as having taken place in cross examination, when she said that she had been at meetings about how she was supposed to give evidence, as a concession by her that she had been coached as to her evidence for the disciplinary hearing.

714. The Tribunal concluded on the evidence that the discussion with Ms Paterson had been of the type outlined by Mr Mackay as being something which he recommended to managers. The email at page 238 from Mr Kelly also referred to Ms Paterson, in unfortunate terminology as a *"disaster"* referring to her as having *"never read her statement".* That was an element taken into account by the Tribunal in coming to the view which it did. It suggested that this was the nature of the issue and failing rather than that she was *"saying the wrong thing"* and would be told what to say on the next occasion.

Conclusion in relation to Unfair Dismissal

715. Having therefore weighed all the elements referred to in the issues, the Tribunal came to its decision. Prior to so doing it remind itself of the principle in *Iceland Frozen Foods.* It also had regard to the ACAS Code and to the delay involved, in particular in the investigation stage, however also the time taken from commencement of the investigation stage to the outcome of the disciplinary hearing.

716. On the basis of the facts and applying ERA and the principles in *Burchell* and *Hitt,* and taking the ACAS Code into account,the Tribunal concluded that the dismissal was unfair.

717. Whilst remedy is for a further hearing, it is worth commenting on the fact that there were two grounds on which dismissal was based and that there was

evidence as to what might have happened had one ground existed in isolation. This is mentioned above.

718. The charge of misuse by the claimant of his work IT account was accepted. If it stood in isolation, Mr McBride's evidence was not, in the view of the Tribunal, conclusive as to the sanction he would have regarded as appropriate. He said that breach of the respondents' policies and guidance was a serious matter, carrying threats and potentially serious consequences. He would have been required to consider whether it amounted on its own to gross misconduct, he said. Had the charge in relation to double ordering for personal gain been viewed in isolation he would also have viewed that as potentially gross misconduct. In each of the cases, if in isolation, Mr McBride said there would have been a debate as to dismissal or a final written warning, with dismissal certainly requiring to be considered.

719. As this was an unfair dismissal a remedy hearing will be set down. A brief case management Preliminary Hearing would assist focusing of the remedy hearing, agreeing dates for it and making any other appropriate arrangements.

Discrimination

720. In considering the evidence before it and in coming to its decision upon whether discrimination had occurred as alleged, the Tribunal recognised that various witnesses had expressed the opinion as to different aspects being in their view discriminatory or, as it tended to be framed in cross examination, as providing extrinsic evidence of racial discrimination. It treated such evidence with caution.

721. It is the role of the Tribunal to reach a decision on these matters. The opinions expressed were sometimes based on a premise of there being particular facts which the Tribunal has not found to be established. In some other instances the opinion was expressed after seeing a document for the first time. Whilst that did not necessarily mean the opinion was to be discounted, it certainly warranted caution being applied in consideration of the weight to be attached to it.

Legal issue

Protected Acts

722. There was an issue in relation to the second and fourth protected acts.

723. The issue relating to the second protected act was that it was pled as being the allegation made by the claimant against his then line manager. In evidence, the claimant said however that he had not accused anyone of being a racist.. The protected act was then dealt with on the basis that it was the belief of Mr Kelly that the claimant had done a protected act. The Tribunal has taken it that this was the protected act to be considered by it.

724. The fourth protected act as set out in the issues was said by the respondents not to be a protected act. They so submitted as the act was said by the claimant to have been the raising by him at the disciplinary hearing of racial discrimination and victimisation at the disciplinary hearing. The evidence, the respondents said, was that Mr McBride had invited the claimant to address the hearing. The claimant had then set out his position. He had not therefore, Ms Ross submitted, "raised" the issue. She pointed out that the written submission being presented comprised the third protected act and so little turned on exclusion or inclusion of the alleged 4th protected act.

725. The Tribunal regarded it as overly technical and over narrow to come to the view that there was not a protected act because the claimant had been invited to explain his position rather than simply launching into that. He had, the Tribunal decided, *"raised"* the points, albeit at the request of the respondents. By his reading out the statement these matters had been placed before the disciplinary hearing. It would, in the view of the Tribunal, be over technical not to have regard to the events and to exclude this point on the basis of a very strict interpretation of the word *"raised"* as pled. The requirements of Section 27 of EQA had been met, the Tribunal concluded.

Direct Discrimination

726. There were 8 acts of direct discrimination which the claimant said had occurred as set out in paragraph 7 of the issues. Paragraph 6 of the issues

related to the dismissal of the claimant and set out elements said to form the basis on which that dismissal was unfair, applying the *Burchell* test. The matters referred to in paragraph 6 of the issues were also said to constitute acts of direct discrimination. The Tribunal took that as a reference to the process of investigation by Mr Robertson and Ms Kerr given that the dismissal was a matter specified in paragraph 7.

727. In relation to the investigation process, the Tribunal first considered the burden of proof provisions.

728. Applying the principles set out above, it regarded there as being facts proved in relation to this allegation from which the Tribunal could decide, in the absence of any other explanation, that the respondents had discriminated against the claimant. Those facts were (a) the reference by Mr Kelly to the claimant's national origin and the absence of challenge from others to inclusion of that in the email, (b) the comments made by Mr Kelly in the emails sent by him bearing to represent steps being taken in the investigation and the basis on which they were being taken (pages 299 and 302) (c) the delay in the investigation which was of such a length as to make it atypical, (d) the emails from Mr Kelly to Mr McBride who subsequently was appointed chair of the disciplinary hearing and the comments in reply from Mr McBride together with the fact that he then sat as chair of the disciplinary hearing (e) the failure to notice the reference to the disposal note in the Corporate Fraud report and (f) the failure to investigate with RSBI any connection they might have with missing goods. In that circumstance the finding of discriminatory conduct would be made, subject to the provisions of Section 136 (3) of EQA, as detailed above.

729. Various witnesses had given their opinion in relation not only to matters with they had involvement but also the actings of others, by way of emails sent for example. This is commented upon above.

730. The Tribunal considered those, conscious always that the witnesses were offering opinion, sometimes on matters which involved a conclusion on a legal point such as to whether discrimination existed by a particular action having

happened. The witnesses were not legally qualified, although in some instances had HR experience over some years. On occasion, as mentioned above, there was a premise put prior to such a question being posed, that premise representing one possible scenario, but not a clear fact. An example was when witnesses were cross examined and asked, in effect, what they made of there being meetings between Mr Robertson and Mr McBride during the investigation stage. Did that demonstrate bias, poor management practice and race discrimination? Mr Kelly had referred to there being such meetings, he believed. Both Mr McBride and Mr Robertson denied there having been any such meetings. The Tribunal concluded that there had been no such meetings.

731. The response in such a scenario had to be weighed carefully. If, as happened on occasion, a different scenario, such as there being no such meetings, was put in re-examination a different answer was given. These opinions or concessions had to be viewed with caution.

732. In passing it is noted that the reference to there being meetings between Mr Robertson and Mr McBride appeared to be another example of Mr Kelly misunderstanding what was going on at the time or wrongly recalling what had happened. The Tribunal's views as to the reliability of Mr Kelly's evidence in general terms are noted above.

Burden of Proof, stage two test

733. The Tribunal then moved on to consider whether the respondents had met stage two of the provisions, by showing that they did not contravene the provision. Had they shown that the treatment was in no sense whatsoever because of a protected characteristic?

734. It was the Tribunal's conclusion that the respondents had met this test in relation to these grounds of claim. The Tribunal looked at the evidence carefully in making its findings in fact. It considered carefully inferences which might be drawn. It examined the reasons given by the respondents for the behaviour which formed the basis for what, under stage one of the test, was discriminatory behaviour.

735. The reasons are, it is believed, set out above. Mr Kelly was trying to assist with identifiers and misguidedly believed that mentioning national origin would assist with correct spelling of the claimant's name. He picked things up wrongly from any discussion with Mr Robertson he reported. He was performing a link/liason role reporting updates to the head of service. Delay was due to day-to-day work pressures, time taken examining substantial papers interviewing witnesses, having statements approved, holidays, and sickness absences. Oversight and human error explained the failure to register and appreciate the potential significance of the reference to the disposal note for Dowancraig Drive in the Corporate Fraud report and hence to investigate the matter further. There was a basis for Mr Robertson to believe that it was not necessary for him to investigate with RSBI. As set out earlier, the Tribunal did not accept that Mr Robertson had suppressed documents by deliberately withholding them from the claimant or the disciplinary chair.

736. It may be appropriate at this point to confirm the relevant hypothetical comparator. The claimant was a white British person of Albanian national origin. The protected characteristic was his national origin. The hypothetical comparator was a white British person of national origin other than Albanian.

737. The Tribunal was also satisfied that the claimant was not treated less favourably than the hypothetical comparator. It was of the view that a relevant comparator would have been treated in the same way. Reasons for behaviour which might be regarded as atypical or unreasonable had been explained by evidence which the Tribunal found credible, the explanations being non-discriminatory. Whether looked on as individual acts or in the round, the Tribunal was convinced on its assessment of oral and documentary evidence that the matters in paragraph 6 of the list of issues did not, on examination, provide a basis for a finding of direct discrimination.

Issue 7

738. Issue 7 asked whether dismissal was an act of direct discrimination. The events which led up to disciplinary hearing were encompassed within

paragraph 6 of the list of issues. The dismissal itself was not an act of direct discrimination in the conclusion of the Tribunal.

739. It was unreasonable for Mr McBride to sit as disciplinary chair given a degree of awareness of and involvement on his part in the prior elements in the process as detailed above. There was atypical behaviour in that Mr Kelly's email at page 331 was sent just prior to the disciplinary hearing. This was Mr Kelly fulfilling the role he believed applicable in updating the head of service, Mr McBride. It was a further example, however, of Mr Kelly's lack of appreciation of how it was appropriate to act. The atypical behaviour was explained by incompetence on the part of Mr Kelly.

740. The Tribunal did not regard the burden of proof as having shifted in relation to this allegation. If it had, the Tribunal was satisfied that the respondents had shown that the reason for dismissal was in no sense whatsoever because of a protected characteristic. Mr McBride gave non-discriminatory reasons for the decision he reached, as detailed above. Further and in any event, the Tribunal was satisfied that the claimant was not treated less favourably than the hypothetical comparator would have been.

741. Direct discrimination was said to have occurred by alleged failure to investigate, in a timely manner or at all the complaints set out in the appeal document. (Issue 7.3)

742. The appeal was arranged for a date which was the first available one given the need to involve elected members. Normal practice had been followed. The appeal would have dealt with the matters in the documents comprising the grounds of appeal. The claimant withdrew the appeal. There were no facts proved on which the burden of proof passed. There was no act of direct discrimination.

743. The decision to limit the investigation to paragraph 44 and to classify it as bullying and harassment was said to be direct discrimination. (Issue 7.4) Again, there were no facts proved on which the burden of proof passed. The Tribunal was satisfied that paragraph 44 raised matters properly dealt with under the bullying and harassment policy. The steps taken were those

normally followed. The claimant was not treated less favourably than the hypothetical comparator would have been.

744. Application of the modified procedure in a standard fashion accounted for the respondents' actions said to have constituted direct discrimination in issues 7.6, 7.7,7.8 and 7.10. There were no facts proved which led to the shifting of the burden of proof. The hypothetical comparator would have been treated in the same manner.

745. Issue 7.9 arose from delay in sending the outcome of the investigation to the claimant. While there had been an element of delay, the Tribunal concluded that there was nothing to provide a basis of fact for the burden of proof to shift. Further if the delay was to be regarded as atypical, Ms MacAskill had explained the reasons why it had taken time for the report to be sent to the claimant. The delay was unfortunate and regrettable. The reasons were accepted by the Tribunal as being genuine. The claimant was not treated less favourably than a hypothetical comparator.

Victimisation

746. There was no issue as to there being acts which would constitute detriments, if they were done because of a protected act. Awareness of the protected act(s) was essential on the part of those said to have subjected the claimant to a detriment. The reason why the detriment had occurred, applying the "more than trivial" standard, then fell to be considered.

747. The burden of proof provisions were also relevant. In applying those, the Tribunal kept in mind the identity of those who were aware of the protected acts at the point where any detriment specified was said to have happened.

Victimisation, the first protected act

748. In relation to the first protected act, the previous raising of an Employment Tribunal claim, of those from whom the Tribunal heard evidence only Mr Kelly knew of it in the context of it being a protected act until the disciplinary hearing. At that point it was mentioned so Mr McBride, Mr Mackay, Mr Robertson and Ms Kerr became aware of it. Ms Paterson was only aware of there having

been an Employment Tribunal claim. She did not have information such that she was aware of there having been a protected act by dint of the claim relating to discrimination.

749. In the view of the Tribunal there were facts in relation to Mr Kelly's actions, from which it could decide in the absence of any other explanation, that the respondents had contravened the relevant provisions of EQA. Those facts comprised the email sent by Mr Kelly referring to the claimant's national origin, the emails sent by him to Mr McBride regarding the investigation and the steps being taken as he believed them to be and also the emails sent by him to Mr McBride replied to by Mr McBride in the period prior to the disciplinary hearing.

750. The Tribunal accepted that there was an explanation from the respondents in relation to Mr Kelly's actions which, applying the second stage of the test, proved that discrimination had not occurred. Reference is made to the passage above in relation to direct discrimination which makes reference to the reasons given and accepted by the Tribunal. The fact that there was a reasonably lengthy period between the first protected act and the detriment said to be because of it was.an element in the consideration of the Tribunal in its assessment on this point and in relation to the second protected act.

751. In relation to any actions of Mr McBride said to be because of the first protected act, the Tribunal did not regard there as being facts which supported there being a prima facie case of victimsation and the burden did not shift in its view. Had it shifted, the Tribunal was satisfied that the respondents had proved that his actings were not discriminatory given the non-discriminatory reasons for his actions, which it accepted.

752. Issue 14 focused largely on Mr Kelly's role in the elements specifically mentioned. The detriments said to be because of the first protected act were broader based.

753. Points raised, issues 14.3 and 14.5 - The Tribunal did not accept that Mr Kelly had been involved in the investigative process in the sense of carrying out or being involved in the carrying out of any of it. He had *"no hand in it".* He had an awareness of what was happening at different times. He misunderstood or

misinterpreted the position and reasons for steps being taken when passing on information to Mr McBride, however. The Tribunal accepted that he did not influence the investigation carried out. Mr Robertson and Ms Kerr, with occasional advice from Mr Mackay, decided on how the investigation would be carried out and then came to a view as to their recommendations in relation to there being a disciplinary hearing and what they would recommend that it would extend to. Mr Kelly was certainly not the driving force behind the whole investigation given the clear roles undertaken by others. The Tribunal did not pick up sense whatsoever of any *"reporting back"* to Mr Kelly at any point or as to there being any direction from him being given.

754. Point raised at issue 14.4 - As the Tribunal saw it on the evidence, Mr Kelly did not invent the allegations against the claimant which he raised with Mr McBride. It appeared far more likely that this was a further example of him misinterpreting things. Mr Quinn said he had to support Ms Paterson who found the situation of investigatory activity and ultimately disciplinary proceedings involving a team member of hers stressful and a source of anxiety. The raising of this by Mr Kelly with Mr McBride was not seen by the Tribunal as being because of, applying the standard applicable, the first or indeed second protected act. Mr McBride did not then say that concerns should be reported to the police. His email reply was in *"softer"* terms. No report to the police by Mr Kelly or others followed.

755. Point at 14.1. The Tribunal could not see that it could be said on the evidence that Mr Kelly was instrumental in all of the processes of suspension, disciplinary investigation, disciplinary process. The aspect with which he had more connection than others was that of suspension. He had not initiated the process of initial investigation. That was something which happened as result of team management activity by Ms Paterson and her referral to Mr Quinn. Mr Kelly had also not suggested or pressed for suspension. It was Ms Smart who had first mentioned suspension as being potentially involved. Mr Kelly had provided Ms Heuston with the information. She had decided to suspend the claimant, the allegation of theft being key. That was a decision she said she would often take in the situation where fraud or theft was alleged to have

occurred. There was a basis in the information available at that point and supplied to her on which that decision could be taken by her. Mr Kelly was the source of that information, however he passed on the concerns of which he was aware from the initial work carried out by Ms Paterson. Ms Heuston was unaware of the first or second protected acts when she made the decision to suspend.

756. Point at 14.2 - Mr Kelly did not refer to a protected act as a reason for suspension. The information in the PRRS form was not with Ms Heuston at time of suspension and insofar as it refers to the issue with the claimant's previous manager, that is in a different part of the form where it would be of relevance to the question asked. It is not in the part of the form which is completed to support the view that suspension should be applicable.

757. Point at 14.6. The Tribunal did not regard the evidence as establishing that Mr Kelly and/or Mr McBride were determined to make sure that the claimant was dismissed. Mr McBride had what the Tribunal viewed as inappropriate awareness and interaction with elements of the investigative process such that he ought not to have sat as chair of the disciplinary hearing. The Tribunal had no sense however of there being an agenda on his part to dismiss the claimant. He had not sought initially to be chair and had accepted that appointment after Ms Rafferty had been considered and ruled out due to imminent retirement. The evidence of his conduct of the disciplinary hearing and his evidence of his decision and reasons for it also assisted the Tribunal in its conclusion that he was not determined to make sure that the claimant was dismissed. Mr Kelly did not have involvement in the disciplinary hearing or decision to dismiss the claimant. He had sent the emails mentioned above, however the Tribunal did not regard those as evincing a determination that the claimant be dismissed.

758. Mr McBride had been unaware of the first protected act until the claimant mentioned it at the disciplinary hearing. Anything he did before that time could not be because of the protected act. Mr Mackay, Mr Robertson and Ms Kerr became aware of it at that time. In addition to Ms Heuston, Mr Quinn, Ms Paterson and Ms Rafferty were unaware of the first protected act.

759. The Tribunal was clear that none of the detriments in point 12 of the issues were because of the first protected act.

Victimisation, the second protected act

760. Picking up the point just mentioned, that of knowledge of the protected act, the Tribunal accepted evidence that Ms Paterson, Mr Quinn, Mr Robertson, Ms Kerr, Ms Heuston, Mr Mackay and Ms Rafferty had no knowledge of the second protected act. It was not a topic covered in evidence in chief with Mr McBride or in cross examination.

761. The protected act came to be Mr Kelly's belief as to the claimant having done a protected act. The only relevant person with knowledge of the protected act was Mr Kelly. For the reasons mentioned above, the Tribunal considered that the first stage of the burden of proof provisions had been met looking to his emails essentially.

762. The Tribunal considered whether the respondents had proved that Mr Kelly's conduct was non discriminatory. It was satisfied that the evidence so established. Specifically in relation to point 17 of the issues, the second protected act was not given as a reason for suspension, as mentioned above.

763. In relation to point 17.2, the Tribunal reflected on Mr Kelly's actings and involvement or lack thereof during the phases of investigation and disciplinary hearing. That has been subject of comment in relation to the first protected act. The Tribunal did not regard Mr Kelly as being involved in the investigation and disciplinary process by seeking to influence the others involved to the detriment of the claimant. It concluded that anything he had done was proved to have been for non discriminatory reasons and therefore not because of the second protected act.

Victimisation, the third protected act

764. This element of claim referred to the protected act of the written submission presented by the claimant at the disciplinary hearing and to detriments of being accused of playing the race card inferentially and of dismissal. The detriments therefore were the acts of Mr McBride mentioned, and he clearly

had awareness of the protected act. They were accepted as detriments if, in relation to the first of those, events had happened as alleged.

765. In applying the burden of proof provisions, the Tribunal did not find that there were facts from which it could decide that the respondents had contravened the provision of EQA as alleged.

766. The Tribunal preferred the evidence as to what happened at the relevant point in the disciplinary hearing as given by Mr McBride, Mr Mackay and Ms Kerr to that given by the claimant. Mr McBride's evidence was that anything he had said did not infer or specifically state to the claimant that he was *"playing the race card".* That evidence was not challenged in cross examination. The evidence from Mr Mackay and Ms Kerr was clear. They did not regard Mr McBride as having accused the claimant of playing the race card inferentially. That evidence was not challenged. This conduct complained of did not happen, they said. The Tribunal weighed the evidence from the claimant in this area together with that just mentioned. It had regard to the matters detailed in point 20 of the issues in coming to its conclusion in relation to this point and whether the claimant's dismissal was because of the third protected act.

767. Turning to the matters at point 20, the Tribunal's findings were:

768. 20.1 The claimant did not provide information to Mr McBride to provide him with a basis for investigation of the claimant's allegations of race discrimination. That was what had led to there being no such specific investigation. It was not a failure on the part of Mr McBride.

769. 20.2 Mr McBride referred at the disciplinary hearing to there having been *"an audit of TADS and an action plan put in place. The entire team required a review and he was not singled out".* That was a reference to the report by Ms McCaig.

770. The Tribunal regarded the information given by Mr McBride upon this matter as being correct rather than a lie. It did not see this point as supporting the case which the claimant sought to make on this point.

771. In the view of the Tribunal the evidence did not show that the investigation was only concerned in the finding of evidence of the claimant's guilt, as was said to the case at point 20.3. As an example to confirm this, Mr Robertson had recommended one allegation of the two he was investigating as being such that it should proceed to a disciplinary hearing, the other as being without sufficient evidence to support it proceeding to a disciplinary hearing. Mr Robertson had also ruled out from the matters potentially before the disciplinary hearing two properties which Corporate Fraud had said might be considered as being ones where issues arose. The Tribunal accepted that Mr McBride had an awareness of and a degree of involvement in the investigative process. That made it inappropriate for him to sit as chair as found above. He was not however involved in the investigatory phase in the way the claimant alleged, from the evidence the Tribunal accepted.

772. 20.4 As stated above, Mr McBride had not recommended that the claimant be reported to the police. This was not therefore something he could be said to have failed to tell the claimant.

773. It was also difficult to see that, if there was any valid criticism in relation to these points, the acts or failings in question could be found to be because of the claimant's statement to the disciplinary hearing.

774. 20.5 The claimant said that unnecessary and humiliating language had been used by Mr McBride in dismissing him and that this was because of the third protected act.

775. The Tribunal kept in mind the information Mr McBride had before him at the time of dismissal. The statement as to items being removed by RSBI not being a credible claim on the part of the claimant was potentially put in a different light when the information as to disposal of goods from Dowancraig Drive by RSBI on 5 March was known. At the time, however, that statement and the remainder of the terms of the explanation given by Mr McBride did not strike the Tribunal as being out of the ordinary given that it was an attempt to provide the basis of his coming to the view which he had. The Tribunal also did not

regard there as being evidence to support the terms used as being because of the third protected act.

Victimisation, fourth protected act.

776. This act was the raising of racial discrimination and victimisation at the disciplinary hearing. The two detriments said to have been because of this protected act were those referred to in relation to the third protected act. The protected act itself seemed to the Tribunal also to be essentially to be in line with the third protected act. Points 23.1-23.5 mirrored those at 20.1-20.5.

777. By the same process of reasoning as in relation to the third protected act, the Tribunal concluded that this claim of victimisation was unsuccessful.

Victimisation, fifth protected act.

778. The fifth protected act was the lodging of the appeal document on 29 April. The detriments upon which the claimant relied at conclusion of the Tribunal hearing were those at 24.4, 24.5, 24.6 24.9 and 24.10. It may assist if those are set out:

24.4 Failure to investigate the allegations in a timely manner

24.5 Failure to investigate all of the allegations properly or at all

24.6 Failure to interview the claimant

24.9 Failure to provide the claimant with the investigation report in a timely manner.

24.10 The conclusions of the investigation.

779. The Tribunal considered the burden of proof provisions in relation to the allegations, both in respect of everything associated with paragraph 44 and also the wider appeal document. It concluded that the facts proved did not support the burden shifting to the respondents. There were protected acts and also detriments. There was not however *"something more".* The Tribunal kept in mind that the "something more" need not be much. It did not regard it as

being present on the evidence and looking to any inferences which might legitimately drawn from that.

780. Turning to the specific elements referred to in the issues, the appeal would have seen the broader allegations within the document from the claimant being investigated and considered. On the evidence the Tribunal heard and accepted, whilst the appeal hearing was not arranged swiftly, it was set down within normal timeframes in practice. Given the need for elected members to be available, a delay of some sort was inevitable unfortunately. There was no indication discernible to the Tribunal that the handling of the arrangements for and timing of the appeal insofar as complained of were because of the protected act.

781. The allegations were not investigated, other than those which were seen as requiring exploration before the appeal hearing. The reason for the allegations other than as mentioned not being investigated however was not because of a decision taken by the respondents. It was attributable to the appeal being withdrawn by the claimant.

782. It might be taken that the points at 24.4 and 24.5 as well as the subsequent live points within paragraph 24 of the issues related to the investigation by Mr Mearns.

783. As mentioned, the respondents decided that the allegations within paragraph 44 of the claimant's appeal document raised issues which were usefully investigated prior to any appeal hearing. They viewed them as falling under the bullying and harassment policy. Given that the claimant was no longer an employee, the modified procedure was regarded as being applicable. These steps were ones which the respondents would generally take in this set of circumstances.

784. The provisions of the modified procedure under the Bullying and Harassment Policy formed the basis of the way the investigation was carried out by Mr Mearns, who was appointed to that role. He had not previously carried out an investigation under the modified procedure. He believed he carried out this investigation following the appropriate procedural route. He was aware only

of paragraph 44 of the appeal document. As he was unaware of any protected act within the other part of the appeal document, any acts or failings on his part could not be because of the remainder of the document.

785. The Tribunal viewed the investigation carried out by Mr Mearns as being done in a timely manner. The claimant's letter was dated 29 April. Mr Mearns was appointed on 29 May. The first 2 interviews were carried out on 4 June. Had the appeal proceeded on 12 June that is as far as the investigative interviews would have gone as Ms Miller was not at work at that point. The final interview, with Ms Miller, proved possible due to the appeal being withdrawn. It was conducted on 19 July and the report was concluded on 26 July. That was not an unreasonable time frame as the Tribunal saw it. There was no suggestion that there was any inaction or slowing down of investigation due to the protected act within paragraph 44.

786. Mr Mearns could have interviewed the claimant. That might well have been helpful. He followed what he understood to be the modified procedure. He believed that no interview with the ex-employee was required or even possible under that procedure. He therefore did not proceed as he did in the investigative process in not interviewing the claimant because the claimant had done a protected act, but rather as he believed that this was what the modified procedure involved and required.

787. The Tribunal came to the same view on the same grounds as to the allegation in issue 24.9, which was that because of the protected act there was a failure to provide the claimant with the investigation report in a timely manner. It was standard practice not to provide an ex-employee with the investigation report and to intimate the outcome by letter. That was the practice having regard to the procedure, which was at page 28. There was a delay between the report being finalised on 26 July and notification being sent to the claimant on 4 September. That was explained by absence from work on the part of Ms MacAskill. There was an unfortunate failure to make arrangements for someone else to be tasked with sending the outcome information to the claimant. The Tribunal did not however regard there as being evidence to support these alleged detriments as being because of a protected act.

788. The remaining matters, 24.5 and 24.10, were both seen as being directed towards the nature and extent of the investigation by Mr Mearns and the conclusions he reached. To provide information as to the reasoning of the Tribunal for the conclusion it came to, it is considered necessary to provide information as to the witness evidence from Mr Mearns.

789. Mr Mearns certainly did an investigation. It involved meeting with and interviewing those whose names had been provided by the claimant. Mr Mearns put the claimant's allegations to each of them. They each rejected the suggestion that they made the remarks the claimant said they did. The information from the claimant was fairly concise. The responses Mr Mearns received were fairly brief. He did not ask much by way of supplementary questions nor did he particularly challenge the interviewees about their replies. He regarded himself constrained by the modified procedure, although did not query whether that was so.

790. The conclusion Mr Mearns reached was that he rejected the allegations as made by the claimant. The factors he viewed as casting doubt on the claimant's assertions as to language used towards him are recorded above. They involve his assessment of the office environment, the culture and it being an open plan office, the fact that it was said that the behaviour had been sustained over a period of time, the absence of any prior reporting of this behaviour and the lack of regular contact between the claimant and two of the three named individuals. He said that there was no evidence to support the claimant's version of events.

791. In evidence in chief he rejected very clearly the suggestion that he had handled the investigation as he had because of allegations made by the claimant in the wider document. The claimant's national origin was of no relevance to him in his investigation, he said. It had no bearing on how he had proceeded as investigating officer. If abusive terminology was used that was unacceptable. He was asked for his reaction to the suggestion that he would have done the investigation differently and that there would have been a different outcome if the complainer was not of Albanian national origin or if there was no allegation of race discrimination. His response was that he would

react very strongly against that. He emphasised the importance to him of non-discriminatory practices and said the suggestion went against his core beliefs and professional standards.

792. In cross examination he accepted that he could have gone back to the claimant to interview him and that his questioning of the three individuals could have been more robust, also accepting that a discriminator would be distinctly unlikely simply to admit his actions. Inferences had to be drawn. He also accepted that an employee, particularly a manager such as Ms Miller was, would be aware of potentially severe consequences if she admitted to using racist language.

793. Mr Mearns answered in cross examination saying he had gathered what he believed was necessary and that he perceived he carried out what he thought was an appropriate investigation. He accepted however that in hindsight it seemed potentially fair that he would go back to the claimant and explain what had been said in response to the allegations and ask if there was anything more the claimant could give him to assist. He thought, however, that the modified procedure meant that he could not do this.

794. He also accepted that in his report describing the claimant as having made what appeared to be *"unsubstantiated allegations",* also referring to them as seeming to be of a *"vexatious nature",* it could be perceived that he had been very strong in his language. He agreed that in hindsight he could have potentially explored more around the situation. When it was put to him that his conclusions were extremely unfair to the claimant he said he could perceive it in a different light now.

795. In cross examination, in a passage of evidence set out in full in Mr Elesinnla's submissions, it was put to him that the reason he had reached the conclusions he had was *"because of Mr Veizi's complaint".* He replied *"Yes, that's what it was solely based upon, around, yes, that paragraph."*

796. In re-examination, in a passage also set out in Mr Elesinnla's submissions, the following two passages appear. *FR* is Ms Ross and *GM* is Mr Mearns.

FR *In relation to the last point that was to you, it was put to you that the reason why you reached your conclusions was because of the claimant's complaint. What is your position as to whether the reason for your conclusions was his complaint?*

GM *The reason was the complaint, not the context, because I had no knowledge of the context or background surrounding the situation, quite clearly with surprisingly three folders of evidence which I've not looked at quite clearly but quite clearly there's significant events around this whole scenario or situation that I'm not aware of so it was solely based around that paragraph that I conducted my investigation.*

Following a challenge to a further question and the view being taken by the Tribunal that there was an issue as to the understanding of the question by the witness, a further question was permitted.

FR *The claimant's complaint as we know was about discriminatory comments made to him by his colleagues.*

GM *Yes*

FR *And it's been suggested to you that you reached the conclusions that you did because he was making those complaints.*

GM *Yes*

797. These passages are set out in full as they provided the basis for the submission for the claimant that there was a clear admission of victimisation. Mr Mearns had, in terms it was said, accepted that he reached his conclusions (to find that the allegations of the claimant were unsubstantiated and of a vexatious nature) because the clamant had made the claim he had, i.e. because he had done the protected act.

798. The respondents maintained that Mr Mearns was not so admitting. Taking his response that way would be inconsistent with his other evidence, they said. He had clearly misunderstood this area of questioning.

799. The Tribunal undertook very careful deliberation in this area before reaching a conclusion. It was conscious of the questions and answers detailed above, both those in cross and reexamination, and also those set out above asked and answered during evidence in chief. It was also conscious of Mr Mearns having been taken to other papers in the file in cross examination. He was asked about Mr Kelly's email at page 45 referring to the claimant being an Albanian national. He was asked in chief about the wider document and said paragraph 44 was the basis of his investigation.

800. Mr Mearns made concessions in cross examination, accepting that a fuller investigative process, asking more challenging questions and going back to the claimant for further comment, would have been a course open to him and would have been fairer to the claimant. He accepted that his words in his conclusions about the complaints could be perceived as being very strong.

801. After closely examining his full evidence and considering the submissions, the Tribunal was convinced that Mr Mearns had been stating in the answers set out that the investigation he had carried out had been undertaken because of the allegations in paragraph 44 of the claimant's document. That was the *"trigger"* for his appointment. It was, in that sense, why he had done what he did. The outcome he had set out addressed paragraph 44; it was based on that paragraph. He was not regarded by the Tribunal in assessing his evidence in full and his demeanour in giving it, as altering his view from the passage at the end of his evidence in chief as detailed above. This was the passage where he said he reacted very strongly to the suggestion that he would have done the investigation differently and that there would have been a different outcome if the complainer was not of Albanian national origin or if there was no allegation of race discrimination.

802. The Tribunal came to the conclusion that in the investigation of the allegations and in the conclusions of investigation there had not been victimisation of the claimant in that any detriment to the claimant was not because of the protected act.

Conclusion

803. The Tribunal reached the view it did in relation to the individual allegations. Prior to finally concluding its deliberations it stood back from the detail and had regard to the overall picture which had appeared during the case. That enabled it to assess whether, seen in the round, discrimination had occurred. If that was the case then individual matters might be seen in a different light.

804. The Tribunal did not alter its view as result of that exercise.

805. It also considered carefully the claimant's allegations that there had been collusion between various employees of the respondents in order to secure termination of his employment. He alleged Mr Kelly was the *"ringmaster"* or *"cheerleader".* He included his trade union representative Mr Bell amongst those he said had colluded.

806. The Tribunal could see no basis on which there was any foundation for the claimant's view in that area.

807. The claims of discrimination are, for the reasons set out above, unsuccessful.

Employment Judge: **R Gall**
Date of Judgment: **15 August 2024**
Entered in register: **19 August 2024**
and copied to parties