EMPLOYMENT TRIBUNALS

Claimant: Mr Cherry

Respondent: London Fire Commissioner

HELD AT: London South (by CVP) **On:** 13-17 January 2025
24-25 January 2025
4 March 2025

BEFORE: Employment Judge Hart, Ms Beeston and Mr Hutchings

REPRESENTATION:
For the claimant: Litigant in person
For the respondent: Mr Uduje (counsel)

JUDGMENT having been sent to the parties on 5 March 2025 and written reasons having been requested by the claimant in accordance with Rule 60(3) of the Employment Tribunal Procedure Rules 2024, the following reasons are provided:

REASONS

INTRODUCTION

1. Mr Cherry (the claimant) was a firefighter who was disabled due to depression. In November 2021 Mr Cherry submitted a grievance in relation to alleged treatment by Mr McGhie (his line manager) between 2017 and 2019 that he said followed disclosure of his depression. Mr Cherry's claim before us was about the respondent's failure to investigate that grievance in December 2020 and April / May 2022 and Mr McGhie's disciplinary allegations against him, and subsequent his suspension, between December 2022 and June 2023.

2. Our unanimous judgment, announced at the hearing, was that:

    2.1 Mr Cherry's complaints of harassment related to disability in relation to Mr Ryan's rejection of his grievance on 17 December 2020, was well-founded and succeeded.

2.2 Mr Cherry's complaints of harassment related to disability in relation to Mr Flower's rejection of his grievance on 21 April 2022 and Mr Fitzgerald's rejection of his grievance on 9 May 2022 were well founded and succeeded.

2.3 Mr Cherry's complaint of victimisation by Mr McGhie in making the disciplinary allegations on 9 December 2022 was well-founded and succeeded.

2.4 Mr Cherry's complaint of victimisation by Mr Davies in suspending Mr Cherry in December 2022 was not well-founded and was dismissed.

2.5 Mr Cherry's complaint of victimisation by Mr Murray and / or Mr Ellis in continuing the suspension on 30-31 March 2023 was well-founded and succeeded.

THE HEARING

3. The hearing was in person. Mr Cherry represented himself; the respondent was represented by Mr Uduje (counsel). They are both thanked for their assistance and representation during the hearing.

4. During the hearing a reasonable adjustment was made for Mr Cherry who became visibly distressed on the attendance of Mr McGhie. Mr McGhie offered not to be present for Mr Cherry's evidence. Thereafter, the Tribunal arranged for Mr McGhie to attend by CVP (from another tribunal room) for the respondent's evidence and gave Mr Cherry the option to attend by CVP (from another tribunal room) when Mr McGhie was giving evidence.

5. We were provided with (or took into account) the following documents:

5.1 A joint agreed hearing bundle of 729 pages (Bundle A), the references to page numbers in this judgment are to the pages in this bundle.

5.2 Extracts from the CMP report into Mr Cherry's grievance[1] (Bundle B).

5.3 Mr McGhie's 'Outcome of Stage 3' disciplinary procedure letter dated 23 July 2024 (1 page) (Bundle C).

5.4 The CMP report into Mr Cherry's grievance: Appendix 4 record of interview with Ms McGhie (13 pages) (Bundle D); record of interview with Mr Ryan (5 pages) (Bundle E); and record of interview with Mr Flower (4 pages) (Bundle F).

5.5 'Roll Call Board H43 Red Watch' (4 pages) (Bundle G).

5.6 Press release: 'London Fire Commissioner takes immediate action in response to culture review' dated 25 November 2022 (electronic version).

5.7 Independent Culture Review of London Fire Brigade by Nazir Afzal OBE, dated November 2022 (92 pages) (Independent Culture Review) (electronic version).

[1] 'A Report into a complaint made by Michael Cherry against S McGhie, L Drawbridge, A Taylor, P Fitzgerald, J Flower, J Ryan, I Dunn, S Healy, S Pearsall, P Shelat, with findings' dated 9 May 2024 by CMP Solutions Ltd (192 pages). The extracts provided were pages 83-107 (consideration of the evidence for allegation 1: bullying, victimisation and discrimination by Mr McGhie) and pages 136-164 (evidence and consideration of the evidence for allegation 4: failure to investigate Mr Cherry's grievance).

5.8 Mr Cherry's timelines for 2017-2019; 2020-2022 and 2022-2024.
5.9 The claimant's and respondent's witness statements.
5.10 An agreed chronology, cast list and pre-reading list.
5.11 An updated schedule of loss.

6. The Claimant gave evidence on his own behalf. The Respondent called Mr McGhie (Station Commander), Mr Robert Davies (Group Commander), Mr Carter (Deputy Assistant Commissioner at the time of these events), Mr Cathersides (HR advisor at the time of these events) and Ms Grantham (Human Resources consultant).

7. On completion of the evidence both parties provided oral submissions. The panel adjourned to deliberate, adding two extra days to the timetable to do so. The panel gave oral judgment and reasons on the 4 March 2025. Written judgment was sent to the parties on 5 March 2025. The claimant requested written reasons on the 17 March 2025.

DOCUMENTATION ISSUES

8. Mr Cherry brought with him to the hearing a small lever arch file containing a significant number of additional documents. The file was separated by 26 tabs but was not in chronological order or paginated. He also had not brought sufficient copies for the Tribunal and did not have access to copying facilities. The respondent was provided with a copy and the tribunal had one copy. The respondent objected to this bundle being admitted on the grounds that the documents were not relevant (since they related to Mr Cherry's grievance against Mr McGhie). The parties were informed at the outset that we had noted the contents but not read them, that if any document became relevant during the proceedings the parties were to inform us and make an application at that point. During the hearing Mr Cherry applied to admit tab 6 which became bundle G. We also took into account tab 24, but only to the extent that it confirmed what evidence Mr Cherry had submitted to the respondent as part of his grievance on 16 November 2020.

9. Following a request by the Tribunal the respondent disclosed at the beginning of day 2 an electronic copy of the CMP Report into Mr Cherry's grievance. Hard copies of the extracts were provided by the Tribunal. Time was provided during the hearing for the claimant to consider this report since it had not been disclosed to him prior to the hearing.

10. At the beginning of day 5 the Tribunal raised some questions about the Independent Culture Review, which the respondent's witnesses had referred to in their evidence. The respondent was ordered to provide the date the report was published, date it was reported in the press, when the review of historic cases was announced, and when the helpline was set up and announced. The Tribunal also asked the parties to address it in submissions as to what, if any, inference should be drawn from the findings in the Independent Culture Review.

CLAIMS / ISSUES

11. At the beginning of the hearing the parties agreed that the issues to be determined were as set out in the Case Management Order of 28 August 2024.

12. The respondent's name was amended by consent to 'London Fire Commissioner'.

FINDINGS OF FACTS

13. We have only made findings of fact in relation to those matters relevant to the issues to be determined. Where there were facts in dispute we have made findings on the balance of probabilities. We confirm that we have taken into account all the documentation and evidence before us and if something was not specifically mentioned that does not mean that we have not considered it as part of our deliberations.

About the claimant

14. Mr Cherry was a fire fighter. He commenced employment with the respondent on 26 April 2005.

15. On or around July 2017 he was diagnosed with depression. The respondent accepted that at all material times he was disabled under the Equality Act 2010.

About the respondent

16. The respondent was responsible for running the operations of the London Fire Brigade. It operates 102 fire stations across its area.

17. At the material time it had a Harassment Complaints Procedure (harassment procedure) which provided that:

    17.1 Paragraph 3.4 - '*firm and fair management should not be viewed as harassment'*: **pg 97**. This included *'bringing to notice shortcomings in work performance…'.* Where a manager is taking action under a respondent policy or procedure, this would not be deemed harassment.

    17.2 Under Section 4 'Procedure for dealing with harassment complaints - local informal action', paragraph 4.1 provided that '*Unless the matter is considered serious enough to merit formal disciplinary action, it will be dealt with locally and informally… without recourse to a managerial or disciplinary investigation*': **pg 97**. Paragraph 4.3 provided that the manager have a preliminary discussion with both parties and resolves the matter informally if satisfied that the complaint does not merit formal disciplinary action. Under paragraph 4.6, if the matter cannot be resolved to the satisfaction of the party concerned then they are entitled to raise a grievance.

17.3 Under Section 5 'Procedure for dealing with serious harassment complaints – formal action', paragraph 5.1 provided that if the complaint was of a serious nature the manager should forward the complaint to a commissioning manager (their group commander or above) who will consider whether *'if substantiated, the conduct complained about would amount to misconduct which would merit at least stage 1 disciplinary action'.* If so paragraph 5.2-4 provided that that they should consult HR and appoint an investigator. For sensitive and complex investigations there was the option to appoint a designated specialist harassment investigator: **pg 98.**

17.4 Under section 6 'Time limits' paragraph 6.1 provided that: *'In the interests of fairness to all concerned, a manager dealing with a complaint of harassment which is suitable for informal local resolution will not consider allegations in which the behaviour complained of ended more than three months before the complaint was made, unless the manager is satisfied that there are good reasons for the delay or the matter is serious.'* (our emphasis)**: pg 100.**

Chronology of events

18. From 24 July 2015 to 8 August 2019 Mr Cherry worked at Twickenham Fire Station. From January 2016 he was line managed by Mr McGhie (Watch Manager).

19. In July 2016 Mr Cherry was diagnosed with depression and placed on Venlafaxine 150mg per day. Mr Cherry informed Mr McGhie of this diagnosis in July 2017 at a return to work meeting. We accept that he should have informed his line manager following diagnosis twelve months earlier. Mr Cherry stated in evidence that the reason he did not do so was because he was unaware that he was required to under the drug and alcohol policy. We found that he was aware that he should have disclosed his diagnosis and that the reason he did not do so was because of 'embarrassment and pride'. This finding was supported by the occupational health (OH) referral: **pg 157.**

20. Mr Cherry alleged that as a result of informing Mr McGhie that he had depression, he was bullied and harassed between 24 September 2017 and 9 June 2019, including being subjected to unfair performance measures (9 personal development plans (PDPs) and other performance action). Mr McGhie responded that this was because Mr Cherry was underperforming at his role and that Mr Cherry had been spoken to prior to his disclosure of his depression in July 2017 about performance concerns. This formed the background to the events which are the subject of this claim. Whether the imposition of these performance measures constituted bullying and harassment was not an issue for us to determine in this case and we made no findings in relation to this issue.

21. On 20 April 2019 Mr Cherry shared a post that he had received from the 'banter collective' stating: '*My boss hates it when I shorten his name to Dick. Mostly because his name is Steve*…..' (**post 1**): **pg 305.** Mr Cherry stated that the post

was meant as a joke and denied that the post was a reference to Mr McGhie. We found that the only reason Mr Cherry thought it was funny was because 'Steve' was Mr McGhie's first name. The post was made on a national firefighters Facebook page, and would have been seen by thousands, but only those identified as 'friends' by Mr Cherry would have known the identity of the poster and who he was potentially referring to. This post and the other posts below were sent to Mr McGhie by 'friends' of Mr Cherry.

22. On 24 May 2019 Mr Cherry attended a 'welfare' meeting with Mr McGhie and Mr Brown (station manager and Mr McGhie's line manger): **pg 201**. Mr Cherry was informed that his posts / re-posts were not banter and that he needed to be mindful of what he was posting on Facebook in future. It was not disputed that during this meeting Mr Cherry was informed that either he accept a temporary transfer or face a stage 2 disciplinary hearing. By this point relations between Mr Cherry and Mr McGhie had broken down. Mr Cherry agreed to be transferred to Surbiton fire station stating that he felt he had no choice.

23. From 9 June 2019 Mr McGhie was no longer Mr Cherry's line manager and the only contact between them after this date was for a mediation on 3 November 2021.

24. On 8 September 2019 Mr Cherry's posting to Surbiton was concluded and he was signed off on all the outstanding PDPs: **pg 685**. Instead of returning to Twickenham to be line managed by Mr McGhie he was posted to Chelsea fire station. This was without any consultation with Mr Cherry or his agreement. He objected to this transfer since it lengthened his commute (he lived in Sandhurst and would have to commute into Central London) and requested a transfer to Heathrow fire station, but this was refused. Mr Cherry believed that the reason he was posted to Chelsea was because Mr McGhie did not want him to return to Twickenham.

25. On 9 September 2019 Mr Cherry posted that *'there are some very nasty, vindictive, hateful people out there that lie to play their games and get what they want… but say 'its for your best welfare in front of more senior people….. pure evil I think. Reap what you sow… I really hope karma is a real thing' (***Post 2**): **pg 306.** Mr Cherry did not identify Mr McGhie by name but accepted that the post was referring to him claiming 'freedom of speech' to post about his experiences. We do not agree and consider that this was an offensive post.

26. On 7 July 2020 Mr Cherry was signed off sick with 'work related stress': **pg 647**. In July 2020 Mr Cherry attended counselling during which he was informed that the treatment that he said he had received from Mr McGhie whilst at Twickenham constituted bullying. It was this that prompted him to submit a grievance against Mr McGhie.

27. On 5 November 2020 Mr Cherry attended a sickness absence meeting with Mr Woodhams, his line manager at the time: **pg 212**. In the email exchange that followed, Mr Cherry complained about the decision to post him to Chelsea and repeated his request to be posted to Heathrow. He stated that the posting was due to the 'unfair treatment (bullying)' he had received at Twickenham from Mr

McGhie and stated '*I trusted him when I mentioned my depression from a very early age, which he then used against me*'. Whilst the bulk of the complaint was about the transfer decision it was clear that he was also making a serious allegation about Mr McGhie's treatment of him when stationed at Twickenham.

28. On 16 November 2020 Mr Cherry emailed Mr Conlon (Station Commander) attaching a large number of documents in support of his complaint against Mr McGhie. It was not disputed that these emails were treated as Mr Cherry's grievance and that this was a protected act (**issue 3.1.1 and 4.1.1**). These were forwarded to Mr Ryan (Borough Commander) and are referred to in his email of 26 November 2020.

29. On 25 November 2020 Mr Conlon also forwarded to Mr Ryan the email exchange between Mr Cherry and Mr Woodman: **pg 209**. Mr Ryan forwarded this exchange to Ms Gibbs (HR) stating that Mr Cherry was alleging '*bullying and harassment by previous managers*', that having reviewed Mr Cherry's documentation '*he was not persuaded by his argument*' but did not wish to dismiss the complaint out of hand until satisfied that the respondent had accurately applied the correct process.

30. On 9 December 2020 Mr Dunn (Employees Relation Manager) emailed Mr Ryan stating that he had reviewed the information that he provided: **pg 207**. He stated that: *'any of the issues [Mr Cherry] raised relating to when he was based at Twickenham or Surbiton will have taken place more than three months ago and fall outside of the Harassment Complaints Procedure.'* He then went on to refer to the decision to post Mr Cherry to Kingston which was in accordance with the respondent's 'Non-availability for full duties posting procedure' since Mr Cherry was off sick. He concluded '*I therefore do not consider that any of the issues raised by FF Cherry amount to bullying or harassment in accordance with the Brigade's Harassment Complaints Procedure.'*

31. On 17 December 2020 Mr Ryan adopted Mr Dunn's advice and rejected Mr Cherry's grievance: **pg 219 (issue 3.1.1)**. Neither Mr Dunn nor Mr Ryan had had a meeting with Mr Cherry to discuss or clarify his grievance. In the outcome letter Mr Ryan referred to having considered Mr Cherry's correspondence and sought advice and stated that he did not consider any element of the complaint warranted further investigation. The events at Twickenham had taken place more then three months ago and fell outside the harassment procedure and that the posting to Kingston was in accordance with the posting procedure. He adopted the same conclusion as Mr Dunn.

32. On 19 December 2020 Mr Cherry submitted an appeal: **pg 296**. He was informed that there was no right to appeal: **pg 223**. Over the next year Mr Cherry made repeated attempts to get his grievance investigated, including submitting a Subject Access Request (SAR) to obtain further evidence: **pgs 650-694**.

33. On 19 March 2021 Mr Cherry posted on social media about the decision to reject his grievance because it was outside the 3 month time limit stating: '… *So instead of getting punished my antagonist has got promoted and I've been*

fucked over…… he knew the depression I was suffering and used it against me'. In response to a post from another person stating that the *'limit of statute does not apply to letting people know what you think*' and suggesting that he keep a note and send the final draft on his retirement, Mr Cherry wrote '*its like you read my mind… and something else in mind too on the day I retire…*' (**post 3): pg 307.**

34. On 17 December 2021 Mr Cherry received a post stating '*You've just won £100 million … what are you buying first*', Mr Cherry responded with the following post '*the services of an assassin who can't be traced back to me… I have 4 people on my list already*' (**post 4**): **pg 308.**

35. Sometime during 2021 Mr Davies (Group Commander) had a discussion with Mr McGhie about whether he wished to raise a formal grievance about Mr Cherry's social media posts. Mr McGhie responded that he did not want to make it official, he just wanted it to stop. There was no suggestion at this point that Mr McGhie felt under any personal threat or that Mr Cherry was spoken to.

36. On 1 March 2022 Mr Cherry attended a Stage 2 sickness capability meeting with Mr Flower (Borough Commander), Mr Cathersides and Mr Mortimer (HR advisers) and his FBU representative. At the end of the meeting Mr Cherry spoke to Mr Mortimer and Mr Cathersides explaining that had obtained new evidence and requesting that Mr Ryan's decision of 17 December 2020 be reviewed. Mr Cathersides stated that during this discussion Mr Cherry said he would like to see Mr McGhie 'sacked'. Mr Cherry denied that he said this. We preferred the evidence of Mr Cathersides on this occasion. When giving evidence he stated that the 'tone stuck with me', it was a distinctive event and he could not recall anyone saying something similar before. We also considered that the comment was consistent with Mr Cherry's social media posts.

37. On 14 March 2022 Mr Cathersides emailed Mr Cherry stating that: '*I suggest you write to John Flower explaining why you believe the issue should be revisited given the 3 month time limit has passed and include the new evidence*': **pg 723.**

38. Mr Cherry submitted a full lever arch file containing the 'new' documents obtained through the SAR process together with his commentary.

39. On 11 April 2022, between 10am and 3pm, Mr Flower and Mr Cathersides met to review Mr Cherry's new evidence. Mr Cathersides attended to provide HR assistance. We noted that at the time he was a junior member of staff having been engaged on a temporary assignment through an agency for 3 months. His training on equality issues in the fire brigade had been 1 hour of e-learning.

40. In his evidence Mr Cathersides accepted that it was possible to consider a grievance outside the 3 month time limit if the matter was serious, as defined under the harassment policy. He confirmed that Mr Ryan had not been spoken to as to what investigation he had conducted, and that he had not been provided with the material that Mr Cherry had previously submitted. Therefore it was not

clear to him when reviewing the file what constituted 'new' evidence, albeit he accepted that what was received was 'significantly larger' than Mr Cherry's original grievance.

41. It was clear from Mr Cathersides' evidence that he treated the grievance as a review of a decision already taken rather than a fresh consideration of the grievance. He stated this required an 'extra layer of exceptionalism', which he explained meant that in order to reopen the complaint the evidence had to be at a level where there would be 'no choice'. He accepted when pressed that the test he applied was a higher one than that to be applied to a new complaint. He also stated that he expected to see something '*demonstrating the link between Mr Cherry's depression and Mr McGhie, perhaps something malicious*', however he was unable in evidence before us to explain what this link would look like.

42. On 12 April 2022 Mr Flower wrote to Mr Cherry stating that:

'I have reviewed your pack of evidence to the best of my ability and I am unable to ascertain within your presentation why you believe the complaint should be reconsidered after the time limit has expired': **pg 257**

43. On 19 April 2022 Mr Cherry emailed Mr Fitzgerald stating that he wished to raise an informal grievance against Mr Flower**: pgs 262-263** (**issue 4.1.2**). He re-stated his belief that what he had gone through was 'serious' and quoted the provision in the harassment procedure section 6 on time limits.

44. On 26 April 2022 Mr Fitzgerald responded stating that the evidence pack had been passed on to him and that he would review the case with HR: **pg 261.**

45. On 30 April 2022 Mr Cherry responded stating that *'the resolution that I am looking for is for this to be investigated as per policies….*' and that '*I believe that someone regardless to (sic) rank or position should stand to account for the actions against another*': **pg 261.**

46. On 9 May 2022 Mr Fitzgerald emailed Mr Cherry stating that his complaints had been reviewed previously and separately by Mr Ryan and Mr Flower and that it had all been done with full consultation and guidance from HR: **pg 260 (issue 3.1.2)**. He stated that after careful consideration of Mr Cherry's correspondence it was his view that '*it would not be appropriate to overturn the decisions concluded thus far*' and that the matter was now closed.

47. On 10 May 2022 Mr Cherry responded asking for confirmation that the treatment he had received was 'not serious' with reference to the relevant sections in the respondent's policies, and asked whether the respondent had concluded that the *'serious affect it had on his mental health was not important*': **pg 728.** We accepted Mr Cherry's evidence that this email had been deleted from the e-mail chain provided by the respondent as part of its disclosure at **pg 260**.

48. On 17 May 2022 Mr Cherry again emailed Mr Fitzgerald stating that he was looking to progress this to a formal grievance and seeking union advice: **pg 260.**

49. On 26 May 2022 Mr Fitzgerald responded stating that Mr Cherry had already received several responses to the same complaint, the matter remained closed and would not be investigated further. He referred to the respondent having invested a lot of time looking into Mr Cherry's complaint, time that would be '*impossible for me to offer the 1,009 firefighters and FRS staff in my area*' and stated that '*I have not seen evidence that support the seriousness of your claim and can therefore not use further resources (public money) to continually revisit the same issue':* **pg 259.** Mr Cherry stated that he felt that this was dismissive and insulting.

50. On 4 June 2022 Mr Cherry resubmitted his grievance**: pgs 267-273** (**issue 4.1.3**).

51. On 2 August 2022 Mr Pearsall who had been appointed to investigate Mr Cherry's grievance, informed Mr Cherry that it had been rejected because it was 'out of time': **pg 265.**

52. Between 5 and 24 August 2022 Mr Cherry entered into an e-mail exchange with Ms Shelat (HR Adviser), about the failure of the respondent to review his new evidence and consider his case as 'serious': **pgs 278-270.** He was repeatedly informed that his case had already been reviewed and that the respondent could not review evidence that has been viewed previously.

53. On 13 September 2022 Mr Bainton (his then line manager) informed Mr Cherry that he was not to contact Ms Shelat or '*any senior officer on the matter of your grievance*' that doing so would be considered '*completely inappropriate'* and that there may be consequences but that he was '*unable to tell you [Mr Cherry] what they may be*': **pg 274.** Mr Cherry responded that he would think hard before making any contact but may still do so as he felt passionate about the grievance and how poorly he had been treated.

54. On 15 September 2022 Mr Lucas, a colleague who worked with Mr McGhie, had a conversation with Mr Cherry about his retirement plans. He provided a 'Form 10' statement on 29 November 2022 which included the following: **pg 302.**

    'He [Mr Cherry] told me that he was thinking about retirement soon and that he had lots of plans before he left. He told me that his plan was to move to the north of Spain, but he refused to reveal exactly were (sic). This was due to him not wanting anyone to know where he was going to be. I thought this was a strange statement. He then elaborated on this by saying that he had made plans for Mr McGhie, when he retired (due to previous contact with Mr McGhie) and that he wanted to make sure no one knew where he would be moving/retiring too. He told me that this was due to the things that he was planning. He did not tell me any of his plans or where he was moving too, but

I got the impression that FF Cherry still harboured a great amount of dislike/loathing for Mr McGhie'.

55. Mr Cherry agreed in evidence that he had had a conversation with Mr Lucas about retirement plans and that he used the word 'plans' but denied that he had stated that he had 'plans for Mr McGhie'. Although he disputed the account provided by Mr Lucas he admitted that he could not recall the details of the conversation. We noted that he had also not recalled what he said when interviewed by CMP during their investigation (see below): **pg 352.** We considered that the account provided by Mr Lucas was largely accurate and that Mr Cherry did say he had 'plans for Mr McGhie'. This comment was consistent with the social media post on 19 March 2021 where Mr Cherry wrote he had 'something in mind' on retirement. However we also found that Mr Lucas misinterpreted Mr Cherry's intentions. The plans Mr Cherry was referring to was litigation and the reason he did not want people to know where he was moving to was because he was a private person.

56. On 17 September 2022 Mr Cherry emailed Mr Carter (Deputy Assistant Commissioner) asking for his grievance to be reconsidered**: pg 276** (**issue 4.1.4**). In this email he referred to another employment tribunal case but denied that at this date he was also thinking of bringing a case. He admitted that he had sought advice of FBU solicitors. The e-mail was forwarded to Ms Shelat to draft a response and she provided to Mr Carter her correspondence with Mr Cherry.

57. On 22 September 2022 Mr Lucas reported his conversation with Mr Cherry to Mr McGhie. Mr McGhie interpreted this as a threat to his person and his family, he did not complain at the time but did increase security at his home. A few weeks later he informally spoke to a police officer when they met during the Autumn Internationals. He was advised that he should either report the matter formally to the police or go through the internal channels at work and report the matter to Mr Davies.

58. On 11 October 2022 Mr Carter emailed Mr Murray (Borough Commander) stating that he was not inclined to revisit Mr Cherry's case but he was concerned that simply dismissing the complaint would lead to further questions and escalation. He proposed to meet Mr Cherry to discuss a way forward: **pg 286.** Mr Carter informed us that at this stage he was unaware of the extent of evidence that Mr Cherry had collated, having only been provided with email correspondence with Ms Shelat. He was aware that the grievance was 3 months out of time but not aware that Mr Ryan had not met with Mr Cherry prior to rejecting his grievance.

59. On Friday 25 November 2022 Mr Carter met with Mr Cherry. Mr Carter was aware that the Independent Culture Review into the culture of the respondent was due to be published and that its findings included institutional racism / misogyny and poor management culture. He was also aware that the respondent had engaged CMP Solutions Ltd (CMP) (an external third party) to carry out a review of complaints of bullying and discrimination in the last 5 years (historical cases). He decided that Mr Cherry's case should be included in that

review. The Independent Culture Review was published later that day along with the announcement that historical cases were to be reopened. This received considerable media interest over the weekend. On 28 November 2022 staff were provided with a briefing announcing the helpline.

60. On 29 November 2022 Mr McGhie was at a Station Commander Forum and broke down in front of his colleagues. We considered that this breakdown was genuine and we noted that Mr McGhie was referred to counselling. Mr McGhie accepted in evidence that the breakdown was caused by his concern that the case against him would be re-opened and investigated.

61. Mr Fitzgerald adjourned the meeting and contacted Mr Davies who spoke to Mr McGhie. Mr Davies formed the view that the situation was 'snowballing' and affecting Mr McGhie's ability at work and that something needed to be done to make it stop. Mr Lucas was asked to complete a Form 10 witness statement; **pg 302.**

62. On 30 November 2022 Mr Cherry posted a comment on the Independent Culture Review stating that '*my bully knew I suffer with depression and used it against me*' and later in the same post referred to that person being a *'power hungry narcissist*' (post 5): **pg 309**. There was no evidence that Mr Cherry was aware of Mr McGhie's breakdown.

63. On 8 December 2022 Mr Carter informed Mr Cherry that his case had been passed to CMP as one of the historic cases to be reviewed (historic case): **pg 310.**

64. On 9 December 2022 Mr McGhie sent a 'letter of concern' to Mr Davies and provided the social medial posts (posts 1-5) with his own commentary and to Mr Lucas' Form 10 statement: **pgs 305-309 (issue 4.2.1**).

65. Around this time Mr Davies informed us that he had met with PC O'Reilly (from the Metropolitan Police). He did not make a note of this meeting. He says that PC O'Reilly attended the fire station and looked at the social media posts and Form 10 and considered it sufficient to constitute a crime. We did not accept this evidence. Mr Davies only provided this evidence in response to a question from the Tribunal. It was inconsistent with his witness statement which merely stated that at that time he was 'considering involving the police' and made no mention of any conversation with the police. This was a significant omission because Mr Davies referred to this 'conversation' to justify the decision to suspend Mr Cherry (a central issue in the case). Further there was no reference to any meeting with the police in the contemporaneous documentation. It was not referred to in the risk assessment that he conducted on 13 December 2022 (**pgs 314-316)** nor was it referred to in the email exchange with CMP on 19 December 2022, despite CMP recommending that the police be informed (**pg 312)**.

66. On 13 December 2022 Mr Davies completed a suspension risk assessment: **pgs 314-316**. It recorded that the allegation was '*harassment on social media and constant rumour mill, now independently witnessed verbal threat*'. The

grounds for misconduct included '*verbal threat to member of staff could lead to possible criminal investigation*'.

67. The following risk factors were marked as 'highly likely'.

    67.1 Risk factor 1: that the allegation '*may lead to or involve legal (criminal) actio*n'.
    67.2 Risk factor 2: that continued presence at the workplace was '*a risk to the complainant (i.e. physical or emotional well-being)*'
    67.3 Risk factor 3: that continued presence at the workplace was *'a risk to others'*.
    67.4 Risk factor 4: that continued presence at the workplace made it '*difficult for a full and proper investigation of the incident/allegation*'.

68. The following risk factors were marked as 'likely'
    68.1 Risk factor 5: that continued presence at the workplace could cause significant disruption to normal organisational activities (i.e. service provision, emergency response, anxiety for colleagues).
    68.2 Risk factor 6: that continued presence at the workplace posed a conflict of interest or risk to the reputation of the organisation through affecting public confidence.
    68.3 Risk factor 7: that suspension would be in the public interest.

69. Risk factor 8, could the allegation place the organisation at risk should the individual be required to respond to an incident, was marked 'unlikely'.

70. On 16 December 2022 Mr Davies informed CMP that Mr McGhie had confirmed that he wanted the 'threats' against him to be progressed to an investigation (the live case): **pg 312.**

71. On 19 December 2022 CMP referred to the serious nature of the threats and advised that an official referral be made to the police as soon as possible: **pg 312.** Further in the email CMP 'strongly recommend(ed)' that Mr Cherry be suspended since he was currently at work and even though at a different station he had made serious threats: **pg 312.**

72. On 22 December 2022 Mr Ellis (Deputy Commissioner) informed Mr Cherry that he was suspended due to 'harassment and threat' to Mr McGhie: **pg 319**.

73. On 27 January 2023 CMP concluded its initial review of Mr Cherry's historic grievance and recommended that Mr Cherry's case be investigated: **pgs 451-459**.

74. On 2 February 2023 Mr Cherry was interviewed by CMP in relation to the 'live' complaint against him. He explained that what he meant by having plans for Mr McGhie was '*litigation and submission of evidence for investigation by CMP*'. He stated that the social media posts reflected how he felt and had not named Mr McGhie. He stated that the 'assassin' social media post was his sense of humour and had not been directed at Mr McGhie: **pgs 114-118**.

75. On 18 January 2023 and 1 March 2023 Mr McGhie was interviewed by CMP in relation to the 'live' complaint against Mr Cherry. He explained why he felt threatened and harassed by Mr Cherry, with reference to the social media posts, the conversation with Mr Lucas and stated that there were many witnesses to Mr Cherry's 'resentment' towards him: **pgs 342-346**.

76. On 9 March 2023 CMP provided Ms Grantham (HR Project Lead) with the outcome report on the live case: **pgs 358-372**. CMP concluded that there was no evidence to support the allegation of bullying / harassment against Mr Cherry, '*by way of direct verbal threats, social media posts and threats to SM [Mr McGhie] via a third party*'. Ms Grantham disagreed with this conclusion and considered that some avenues of enquiry had been overlooked.

77. On 24 March 2023 Ms Grantham emailed Mr Carter '*to put together a revised SRA [risk assessment] to lift Mike's [Mr Cherry's] suspension*'. On 27 March 2023 Mr Carter completed the risk assessment identifying Mr Cherry as 'unlikely' risk in relation to risk factors 1 and 2 and 'highly unlikely' risk in relation to risk factors 3-8: **pgs 377 - 378**. This risk assessment was sent to Mr Smith (Deputy Commissioner) who signed it off on 28 March 2023, however it was not actioned: **pgs 378, 383, 391**.

78. On 28 March 2023 Ms Grantham emailed Mr Davis (Deputy Assistance Commissioner) expressing concern about the impact on Mr McGhie of being informed that his complaint against Mr Cherry had been closed and that Mr Cherry's complaint against him was being reinvestigated: **pgs 415-416.** On 29 March 2023 Mr Davis responded stating that he had spoken to Mr McGhie's line manager who had confirmed that '*this will have a significant impact on the welfare of Stephen [Mr McGhie]*': **pg 414**. He expressed concern that the suspension would be lifted before the respondent could ensure that welfare support was in place. He then referred to being informed that morning that Mr McGhie had had initial discussions with the police who had indicated that '*they will investigate and take seriously the threats made against him*'. We found that this was a reference to the informal conversation that Mr McGhie had had in the autumn of 2022 since Mr McGhie confirmed in his evidence that he did not have a further conversation with the police until June 2023.

79. Later that morning Ms Grantham emailed Mr Carter and Mr Davis informing them of the decision to review both CMP reports and asking them to hold off on lifting the suspension until legal counsel had been spoken to: **pg 417.** In a briefing note for counsel she stated '*CMP is recommending a re investigation of the historic case and no further action for the live case <u>which doesn't feel right. It means that MC [Mr Cherry] has "won" both cases and SM [Mr McGhie] has "lost" both cases'</u>* (our emphasis): **pgs 443, 444-445.**

80. On 30 March 2023 Ms Grantham emailed Ms Nicol (Interim Assistant Director of People Services) stating that a meeting had taken place with CMP and that they had advised that the investigation of the historic case include the live case in order to take a '*holistic approach because it was clear there were avenues that weren't pursued in either cases'*: **pg 435**. Ms Grantham then stated that CMP were also asked for advice about the revised suspension risk assessment

and recorded that the CMP adviser '*made the point that there is a risk of contamination of the evidence / witnesses if we lift the suspension on Mike [Mr Cherry] but of course, it is a business decision on what to do*.' Ms Grantham forwarded this e-mail to Ms Robinson, the respondent's legal counsel, and requested her final legal comments.

81. The same day Mr Murray completed another risk assessment identifying Mr Cherry as 'very high' risk in relation to risk factors 1 and 2; 'unlikely' risk in relation to risk factors 4 and 5; and 'highly unlikely' risk in relation to risk factors 3, 5, 6 and 8: **pg 471**.

82. On 31 March 2023 Mr Carter emailed Ms Grantham stating that, having spoken to Mr Murray, he did not feel it was appropriate to ask him to review the risk assessment: **pg 420.** This was because:
- *'He hasn't seen and isn't privy to the outcome report from either case; and*
- *His RA [risk assessment] would be largely based on a rushed verbal conversation with CMP. All we have in writing at the moment is the one outcome where Mr Cherry was a respondent stating there was "insufficient evidence to uphold the allegation".*

I think we ought to either, get a revised written recommendation from CMP if their position has changed, or have the RA amended by someone who has seen both outcome reports'.

83. The same day Mr Ellis signed the revised suspension risk assessment to continue Mr Cherry's suspension **(issue 4.2.3).** His reasons for continuing the suspension were as follows: **pg 474**

'a) SM [Mr McGhie] feels vulnerable and is concerned about the safety of himself and his family because of MC's [Mr Cherry] behaviour;
b) having sought input from Legal, they have advised that as an employer we have a duty of care to protect the most vulnerable person in these two cases; and
c) SM has already contacted the police who are allegedly taking the threats seriously but want to know the outcome of the live case before proceeding further'.

84. On 3 April 2023 Ms Robinson provided the following legal advice: '*careful consideration would need to be given to the continuation of his [Mr Cherry's] suspension given the original conclusion of the CMP report, although it may be that in subsequent discussions the CMP conclusion has been amended or it has been decided by LFC [the respondent] that the recommendation be departed from with a rationale for that decision and any subsequent suspension should this be the case':* **pgs 434-435.**

85. On or around 23 May 2023 CMP provided their response to Ms Grantham's position that certain avenues had not been explored in the review of the live case against Mr Cherry: **pg 431.** It was clear from this response that CMP did not change its view that there was no case to answer and despite Ms Grantham's continued concerns (see her emails of 24 and 30 May 2023 **pg 429**) a decision was made to accept the CMP recommendations.

86. On 1 June 2023 Mr Cherry was informed that CMP had found no case to answer in relation to the live case against him and that his suspension was lifted: **pg 480**.

87. On 9 June 2023 Mr McGhie met with PC O'Reilly from the Metropolitan Police. He was informed that Mr Cherry could not be charged with harassment due to the six month statutory time limit but that he could be charged with 'malicious communications': **pg 508.** Mr McGhie informed us he decided not to pursue this complaint because of the difficulty of proving that Mr Cherry's social media posts were directed at him.

88. On 5 July 2023 Mr Davies emailed PC O'Reilly to ask him what action would have taken place had Mr McGhie's complaint not been out of time: **pg 517**. PC O'Reilly emailed back stating that the behaviour of Mr Cherry, and the fact that Mr McGhie had asked for it to stop, meant that it could have been considered as harassment. There was no reference in this email exchange to Mr Davies having met, and been advised by, PC O'Reilly in or around December 2022. We also note that there was no evidence that Mr McGhie had asked for it to stop until he submitted his complaint, therefore PC O'Reilly's view may have been based on a misunderstanding.

89. On 5 June 2023 Mr Cherry commenced ACAS early conciliation. He received the ACAS early conciliation certificate on 8 June 2023: **pg 11**. On 13 June 2023 Mr Cherry presented his claim form: **pgs 12-24**.

90. On 9 May 2024 the investigation into Mr Cherry's historic complaints by CMP concluded that he had been subject to bullying and discriminatory behaviours by Mr McGhie, as a result of his diagnosis for depression, in the implementation of unfair performance measures: **Bundle B**. Mr McGhie was referred to a stage 3 disciplinary hearing that took place on 22 July 2024. This concluded that the allegations were not proven and that no disciplinary action was to be taken against him: **Bundle C**.

RELEVANT LAW

Harassment related to disability

91. Section 26 of the Equality Act 2010 (EA 2010) defines harassment as where:

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

(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.'

92. 'Unwanted' means essentially the same as 'unwelcome' or 'uninvited'.

93. Violation of dignity and creation of intimidating etc environment are significant and strong words. It is a high bar, requiring intention and effects that are serious and marked and not those which are, though real, truly of lesser consequence: **Grant v HM Land Registry** [2011] ECWA Civ 769.

94. Purpose and effect are alternatives and should be considered separately. Purpose requires intention, whereas effect is unintentional. Effect requires consideration of a subjective question, whether the claimant perceives themselves to have suffered the effect in question and an objective question as to whether it was reasonable for the claimant to consider that the treatment had that effect: **Pemberton v Inwood** [2018] CR 1292**; Richmond Pharmacology v Dhaliwal** [2009] IRLR 336.

95. 'Related to' is a broad term that does not require a direct causal link but only a connection or association: **R (EOC) v Secretary of Trade and Industry** [2007] ICR 1234. It is a broader test than 'because of' a protected characteristic required for direct discrimination, but it has its limits, there must still be a relationship between the unwanted conduct and the protected characteristic: **Blanc de Provence Ltd v Ha** [2024] IRLR 184; **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** [202] IRLR 495.

96. Where the complaint concerns a failure to investigate a grievance, it is the motivation of the decision-makers and not the original perpetrators that the tribunal needs to focus on: **Unite the Union v Nailard** [2019] ICR 28**; Quitongo v Airdrieonians Football Club** [2024] EAT 201. For example the tribunal should consider whether the failure to investigate was due to illness or incompetence, or was it 'really indicative of silently taking sides with the perpetrator': **Conteh v Parking Partners Ltd** [2011] ICR 341 (quoted with approval in Nailard).

Victimisation

97. The relevant provisions of section 27 of the EA 2010 provides that:

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

98. Detriment means some form of disadvantage, to be assessed from the view point of the worker: **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 (HL).

99. When considering the reason for the detriment, the tribunal is considering the mental processes of the discriminator. Discrimination may be, and often is, unconscious and unintended, therefore the Tribunal's decision will often depend on what inference it is proper to draw from all the relevant surrounding circumstances: see **Qureshi v Victoria University of Manchester** [2001] ICR 863 EAT and **Anya v University of Oxford** [2001] EWCA Civ 405. It is well established that it is not necessary for the protected act to be the sole reason, if it has significantly influenced the reason for the treatment, victimisation is made out: **Nagarajan v London Regional Transport** [1999] IRLR 572 (HL). Further, an employer can be well meaning but still discriminate: **Amnesty International v Ahmed** (UKEAT 0447/08).

100. In **Martin v Devonshires Solicitors** [2011] ICR 352, EAT, the EAT accepted that there will be, in principle, cases where an employer subjected the employee to some a detriment in response to the doing of a protected act but where it could be said, as a matter of common sense and justice, that the reason for the dismissal was not the protected act but the manner in which the protected act was done. In other words was there '*some feature of it which can properly be treated as separable*'. In considering this possibility the EAT cautioned that employees are often objectively unreasonable in the manner in which they bring a complaint and that this would not take it outside the protection of the victimisation provisions. Therefore tribunals should distinguish between ordinary reasonableness and those which clearly take the conduct outside the protection of the victimisation provisions. The facts in Martin was the repeated making of false allegations that had been investigated and that the employee refused to accept were unfounded. She was dismissed due to the impact this was having on her colleagues.

Burden of Proof

101. Section 136 of the EA 2010 provides that:

> '*(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.'*

102. Thus the burden of proof is initially on the claimant to establish primary facts from which the tribunal could decide in the absence of any other explanation that discrimination took place (stage 1). It is important to note the word 'could'; it is not necessary for the tribunal to reach a definitive conclusion. The burden then shifts to the Respondent to prove, on the balance of probabilities, with reference to cogent evidence, that the treatment was in no sense whatsoever because of, or related to, the protected characteristic / protected act (stage

2). This provision was introduced because it was recognised that it is rare to find direct evidence of discrimination and that it was often difficult for claimants to prove the employer's reason or motivation for doing something. In considering this issue we had regards to the guidelines set out in **Igen Ltd (Formerly Leeds Career Guidance) and Oth v Wong** [2005] ICR 931.

103. It is not sufficient for the claimant merely to prove less favourable treatment and a protected characteristic, something more is required: **Madarassy v Normura International Plc** [2007] EWCA Civ 33 (CA). Unfair and unreasonable treatment on its own is not enough to shift the burden of proof: **Glasgow City Council v Zafar** [1998] IRLR 26 (HL).

Failure to call decision-makers as witnesses

104. The failure by a respondent to call key decision-makers as witnesses to explain their decision does not automatically give rise to an adverse inference such as to shift the burden of proof onto the respondent: **Efobi v Royal Mail Group Ltd [2021] ICR 1263 (SC).** This is because at stage 1 the burden of proof is on the claimant. Whether or not it would be proper to draw an adverse inference depends on the context and particular circumstances. Relevant considerations would include whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the points on which the witness could potentially have given relevant evidence and the significant of those points in the context for case as a whole. Tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense.

105. At stage 2, when the burden of proof is on the respondent, a respondent who chooses not to call key decision makers will face substantial difficulty in discharging that burden: **Bennett v Mitac Europe Ltd** [2022] IRLR 25. The EAT provided guidance on how the burden of proof applies at stage 2 to the failure to call witnesses. In particular:

105.1 That the fact that a decision taker is not called to give evidence does not necessarily mean that the required cogent evidence cannot be provided: paragraph 51(6).
105.2 There may be compelling documentary evidence or others might be able to give convincing evidence that they know the reason why the decision was taken: paragraph 51(7).
105.3 That tribunals should take into account why a decision maker was not called to give evidence. There may be a compelling reason such as illness or death but distances should not be assumed to be an insurmountable barrier: paragraph 51(7).
105.4 That where no reason or an unconvincing reason is given, particularly careful analysis is required of the evidence to determine whether, on balance of probabilities, it is sufficiently cogent to prove that the protected characteristic was not a material factor in the decision taken. Tribunals should bear in mind the possibility that a witness has not been called because their evidence would be damaging, particularly where a

respondent is reticent to explain why the decision-maker has not attended: paragraphs 51(7-8).

Time Limits

106. Section 123 of the EA 2010 provides that:

> *'(1) … a complaint . not be brought after the end of—*
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable.*
> *…..*
> *(3) For the purposes of this section—*
> *(a) conduct extending over a period is to be treated as done at the end of the period…'*

107. The leading authority on the meaning of conduct 'extending over a period' (often referred to as a continuous act) is **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 (CA). This held that tribunals should focus on the substance of the complaints and whether the Respondent *'was responsible for an ongoing situation or continuing state of affairs'.* It is clear from that case that it need not be the same discriminator nor the same cause of action.

108. Tribunals have the 'widest possible' discretion to extend time under the EA 2010: **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194 (CA). The Court of Appeal stated that there is no requirement that the tribunal has to be satisfied that there was a good reason for the delay, let alone that time could not be extended in the absence of an explanation of the delay from the claimant, although the length of the delay and whether there was any explanation or apparent reason for the delay and the nature of any such reason were relevant matters to which the tribunal ought to have regard. However, there is a limit to a tribunal's discretion in that time limits should be applied strictly and there is no presumption that time will be extended: **Robertson v Bexley Community Centre (trading as Leisure Link)** [2003] IRLR 434.

109. In terms of reasons for the delay, tribunals have taken into account pursuing internal grievance procedures prior to issuing proceedings, albeit this is not automatically a reason for extending time limits: **Robertson v Post Office** [2000] IRLR 804 (EAT).

DISCUSSION AND CONCLUSION

110. Mr Cherry says his disability was depression. The respondent accepted that Mr Cherry was disabled under the EA 2010 at all material times.

111. In relation to the historical complaint, whether or not Mr Cherry was harassed or discriminated against by Mr McGhie in the implementation of the PDPs and other performance measures on grounds of his disability, are not issues in the

case before us. We noted the difference of view of CMP which concluded, following investigation, that there was a case to answer and the internal disciplinary panel which concluded that the allegations were not proven. During the hearing we heard some evidence from both Mr Cherry and Mr McGhie in relation to the matters that gave rise to the historic grievance, however we have not received sufficient evidence (either in terms of documents or witnesses) from which to draw a conclusion either way. Nor do we draw any inference from the conclusions of the CMP investigators, we accept we are not bound by the opinions of a third party. Equally we do not draw any inference from the stage 3 disciplinary panel conclusions. We have not been provided with the notes of the disciplinary panel hearing and do not know why they reached this conclusion.

112. When discussing this case, we were also very conscious of the background of the Independent Culture Review which found that there was a culture of institutional racism and misogyny, and serious failings in the respondent's response to bullying and harassment complaints. We noted that there was less evidence from this review of discrimination relating to disability in particular mental health, albeit it did acknowledge that there were considerable challenges around neurodiversity (pg 53 of that report). The chapter on mental health focused on the tragic suicide of a trainee firefighter and how to take steps to prevent recurrence. However we found that it is likely that a culture that considered that women should not be firefighters and that women physically could not do the job was likely to also be unsympathetic towards those with mental health conditions 'perceived' (wrongly) as impacting on their ability to do the job. Therefore in the context of the claimant's case at the time of these events the respondent had a workplace culture which permitted the sort of abuse of managerial power that Mr Cherry complains about and a culture that refused to take bullying and harassment complaints seriously. However the mere fact that that culture existed does not mean that it was applied in Mr Cherry's case. We have preferred to focus on the evidence before us to reach our own view on the issues that we have to determine rather than draw any adverse inference from the Independent Culture Review.

HARASSMENT RELATED TO DISABILITY (EQUALITY ACT 2010 SECTION 26)

Did Mr Ryan refuse to investigate the Claimant's grievance of November 2020, which included complaints of disability discrimination and bullying? (issue 3.1.1)

113. This gave rise to a preliminary question as to whether Mr Cherry's grievance was serious enough to require investigation under the harassment procedure.

114. The harassment procedure provided that if the substantiated complaint would be serious enough to merit formal disciplinary action, then it should be investigated by an investigator in accordance with Section 5. If the substantiated complaint would not be serious enough to warrant a section 5 investigation then it could be dealt with locally and informally by the manager under Section 4. 'Serious' was defined as meriting disciplinary action (a formal written warning and above). It was clear from these provisions that determining

whether or not a complaint was 'serious' was the first issue that should be considered in order to determine whether or not a complaint was formally investigated.

115. Section 6 provided that complaints should only be considered if submitted within three months, but it was clear from the wording of that provision that it only applies to section 4 complaints i.e. those that were suitable for informal local resolution. In any event it also specifically stated that the time limit did not apply if the 'matter is serious'.

116. In our view it should have been obvious to the decision-makers that a complaint of bullying and harassment against a line manager following disclosure of depression could have led to disciplinary action, if substantiated. It therefore required investigation under Section 5. This was conceded by Ms Grantham under cross examination.

117. Whilst we accepted, according to the email dated 26 November 2020, that Mr Ryan appeared to have read the documentation provided by Mr Cherry we do not consider that this constituted an investigation. We would have expected an investigation to have involved carrying out reasonable enquiries into Mr Cherry's complaint, including as a minimum conducting an investigation meeting with Mr Cherry and with Mr McGhie and making a decision as to whether the complaint was substantiated or not. Since there was no formal investigation into the substance of Mr Cherry's complaint, as was required where a complaint was 'serious' under Section 5, we have concluded that Mr Ryan did refuse to investigate Mr Cherry's grievance.

Was the refusal to investigate unwanted conduct?

118. We considered that the refusal to investigate was unwanted conduct, since Mr Cherry wanted his complaint to be treated seriously and to be investigated. Not only did he seek to appeal the decision but over the next 2 years he repeatedly attempted get his grievance heard. By not investigating the grievance when first raised, the respondent failed both Mr Cherry and Mr McGhie, since the matter was not swiftly resolved but allowed to fester.

Was the refusal to investigate harassment?

119. We did not consider that the failure to investigate had the purpose or effect of violating Mr Cherry's dignity. Nor did we consider that it had the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for Mr Cherry. We do not know Mr Dunn's or Mr Ryan's motives but consider it unlikely that their rejection of the grievance was intended to create such an environment. However we did find that it had the effect of doing so.

120. We found that Mr Cherry considered that this created a hostile etc. environment for him. He was upset by this decision and sought to appeal it on 31 December 2020 and continued to pursue his complaint thereafter. We found that it was reasonable for him to see the refusal as creating a hostile etc. environment since it was contrary to the harassment procedure, his expectation that his complaint would be investigated and that he would be invited to a meeting to

discuss the matter. Instead his complaint was rejected without providing any substantive reason (other than that it was out of time) and he was informed that he had no right to appeal. It was therefore dismissive of Mr Cherry's complaint and signaled to him that what had happened to him was not serious enough to investigate.

Did it relate to disability?

121. We noted that 'related to' is a broad concept that does not require a direct causal link. However the mere fact that Mr Cherry's emails in November 2020 alleged harassment and disability discrimination with reference to his depression was not sufficient. It was the motivation of the decision-makers and not the motivation of the original alleged perpetrator that we needed to focus on. In other words what was Mr Dunn's and Mr Ryan's reasons for refusing to investigate the grievance.

122. In this case neither Mr Ryan nor Mr Dunn attended to give evidence. We reminded ourselves that the mere fact that key witnesses had not been called does not automatically give rise to an adverse inference sufficient to shift the burden of proof at stage 1, it all depended on the context and particular circumstances.

123. We took into account the following circumstances:

123.1 The complaint was obviously a serious one which fell under section 5 and therefore should have been investigated. Whilst at stage 1 we could not take into account the explanation of the respondent, we could take into account that the respondent apparently acted contrary to its own harassment procedure in that Mr Cherry's grievance was rejected for being out of time without consideration as to whether it was 'serious'. There may be a non-discriminatory reason for this, such as mistake or incompetence, but there was also the possibility that the respondent was seeking to avoid an investigation into Mr Cherry's complaint of disability discrimination because the decision-makers wanted to protect Mr McGhie from a serious allegation of discrimination.

123.2 That it was not just Mr Ryan (the decision-maker) who did not attend to give evidence but also Mr Dunn (who advised him). The respondent also did not call other key decision makers: Mr Flower, Mr Fitzgerald and Mr Ellis. The respondent was asked at the outset of this hearing to provide an explanation as to why those identified as discriminators had not been called. We were informed in closing that they had retired and a deliberate decision was made by the respondent not to ask them to attend to provide evidence. The respondent provided no further explanation as to why they had adopted this approach. We were surprised by this decision since we did not consider that the mere fact that the decision-makers had retired meant that they would not be available to attend a hearing to explain the decisions that they had made, particularly because they could have done so by video.

123.3 The contemporaneous documentation relied on by the respondent did not explain whether Mr Dunn and / or Mr Ryan had considered if Mr Cherry's complaint was serious and if they did why they concluded that it was not. Therefore their evidence was not only relevant in that it concerns a central issue in the case, but there was no other evidence that has a bearing on this point.

123.4 We had not been provided with any evidence as to what, if any experience Mr Ryan or Mr Dunn had on investigating discrimination issues and / or what training they had received. Mr McGhie admitted that his training was 'very poor at the time'. The potential lack of experience or training was relevant in that it permits an environment where discriminatory decisions may occur.

124. Taking the above into account we considered that there was evidence from which we could conclude discrimination in the absence of the respondent's explanation. Therefore the burden of proof shifted to the respondent to prove, on balance of probabilities with reference to cogent evidence, that the treatment was in no sense whatsoever related to the protected characteristic of depression.

125. Our view of the reasons provided by the respondent on the material before us was as follows:

125.1 We accepted that the complaint was submitted 18 months after Mr Cherry has stopped working with Mr McGhie. However, the 3 month time limit in the harassment procedure only applied to non-serious complaints that were considered suitable for informal action under section 4. Further the provision specifically stated that the time limit did not apply to cases which are 'serious'. Mr Ryan in his email dated 25 November 2020 stated that having looked at the documentation *'I am not persuaded by his argument'* but does not explain why. He went on to state that he did not wish to dismiss it out of hand '*until satisfied that we have accurately applied process at all stages*'. In his outcome letter Mr Ryan merely referred to the complaint being out of time and therefore falling outside the harassment procedure. There was no reference in the internal email correspondence or in the outcome letter to any consideration as to whether or not the complaint, if substantiated, was serious and required investigation. Nor was there any reference as to whether they were acting under a mistaken belief that the three month time limit applied to all cases regardless of their seriousness. Therefore this was not a case where there was compelling documentary evidence that explained the decisions made. We considered that it was at least possible that the time limit was used to avoid conducting an investigation in order to protect Mr McGhie from a complaint connected to Mr Cherry's disability, since if substantiated the allegation could result in disciplinary action against him.

125.2 In cross examination the respondent put that the matters about which Mr Cherry was complaining did not meet the definition of harassment under

the harassment procedure. This was because it was a complaint that fell under paragraphs 3.4 and 3.5 of the harassment procedure, which excluded complaints about management action under a respondent's policy or procedure. We did not find that this was the reason why Mr Cherry's grievance was not investigated. Mr Ryan's outcome letter did not state that Mr Cherry's grievance was rejected for this reason and none of the respondent's witnesses gave evidence on this point. In fact, to the contrary, Ms Grantham accepted that the complaint was serious and should have been dealt with under Section 5 (and this was also the conclusion of the CMP).

125.3 We also took into account that the reason provided by the respondent for the absence of the decision-makers (that they had retired) was not convincing. They could have given evidence by video. Further the respondent's deliberate decision not to ask them to attend gave rise to the possibility that it considered that their evidence would be damaging.

126. The burden of proof at this stage was on the respondent and in the absence of the decision-makers we concluded that the evidence was insufficiently cogent to prove on the balance of probabilities that Mr Cherry's disability was not a material factor in the decision taken. Therefore this complaint succeeded, subject to our consideration on time limits (see below).

The refusal of Mr Flower and Mr Fitzgerald in or around April 2022 to investigate the Claimant's grievance when resubmitted in March 2022 (issue 3.1.2).

127. Again we interpreted the refusal to investigate as the refusal to formally investigate under Section 5 of the harassment procedure. Whilst we accepted Mr Cathersides' evidence that Mr Flowers read the large folder of documentation provided by Mr Cherry we do not consider that this constituted an investigation since no enquiries were made into the complaint. The respondent did not ascertain what constituted new documentation nor was Mr Ryan contacted to explain the basis of the decision that he had made. Nor was there any meeting with Mr Cherry or Mr McGhie. Therefore we found as a fact that Mr Flower and Mr Fitzgerald refused to investigate Mr Cherry's grievance in or around April 2022.

Was the refusal to investigate unwanted conduct and harassment?

128. We considered that this was unwanted conduct that had the effect of creating a hostile etc. environment for Mr Cherry for the same reasons as above. Indeed the refusal to accept that time limits did not apply to serious complaints and that the wrong test had been applied by Mr Ryan in his original decision, was an aggravating factor.

Did it relate to Mr Cherry's protected characteristic?

129. We reminded ourselves that the burden of proof was initially on Mr Cherry to establish primary facts from which the tribunal could decide in the absence of any other explanation that harassment took place (stage 1).

130. We did not draw an adverse inference from the fact that Mr Flower spent only one day to review the evidence that Mr Cherry had provided. We considered that this was sufficient time to undertake an overview of the evidence in the large lever arch file.

131. We took into account the following circumstances:

    131.1 By this point there could be no doubt that Mr Cherry's grievances were about disability discrimination and harassment and he had put together a file of documentation in support. It would have been obvious that this was a serious allegation and not a matter to be dismissed without investigation.

    131.2 The respondent appeared to have acted contrary to the harassment procedure, since there was no provision requiring the test of 'exceptionalism' to be applied to a grievance that was out of time and / or subject to a review.

    131.3 Neither Mr Flower nor Mr Fitzgerald, the two decision-makers, attended to give evidence. We noted that Mr Fitzgerald was now living in Canada, but that would not have prevented him attending as a witness by video. The respondent made a deliberate decision not to call them. As stated above we considered the number of witnesses who were not called to be suspicious. We did not consider Mr Cathersides to be a decision-maker, he was present as an advisor only. At the time he was a junior member of HR, provided by an agency and had limited experience of working for the respondent or its procedures.

    131.4 No explanation had been provided in relation to the decision by Mr Fitzgerald to delete Mr Cherry's e-mail of 10 May 2022 referring to the impact on his mental health from the email chain disclosed by the respondent. This was a curious deletion and whilst not determinative, could suggest (in the absence of an explanation) that the deletion was deliberate.

132. Taking the above into account we considered that there was evidence from which we could conclude discrimination in the absence of the respondent's explanation. Therefore the burden of proof shifted to the respondent to prove, on balance of probabilities with reference to cogent evidence, that the treatment was in no sense whatsoever related to the protected characteristic of depression.

133. Our view of the reasons provided by the respondent in relation to Mr Flower's decision were as follows:

133.1 According to Mr Cathersides, Mr Cherry's grievance was rejected by Mr Flower because it did not meet the test of 'exceptionalism'. He was unable to explain why this test was applied, if indeed it was, given that it was not referred to in the harassment procedure or in Mr Flower's email rejecting Mr Cherry's grievance. Further there were no notes of the meeting between Mr Flower and Mr Cathersides or other documents corroborating or explaining the advice given.

133.2 In his rejection letter Mr Flower dismissed Mr Cherry's complaint in one sentence, on the basis that Mr Cherry had not explained why the complaint '*should be reconsidered after the time limit has expired'*. Mr Flower reached this conclusion without speaking to Mr Cherry. Mr Flower did not explain if he considered that the complaint was serious, and if he did why he considered no investigation was required. Indeed it was not known whether he was aware, or attempted to make himself aware, of what (if any) investigation Mr Ryan had conducted.

133.3 Mr Flower also did not address Mr Cherry's 'new evidence' in his rejection letter. Mr Cathersides admitted that he did not know what documents in the large lever arch file were new evidence and that Mr Ryan had not been contacted to ascertain what constituted new evidence.

133.4 We did not consider that the reason for Mr Flower's non attendance as a witness to be convincing (retired and now lived in Canada), since he could have given evidence by video. Further we considered that the attendance of Mr Cathersides to be indicative of the respondent's attitude towards Mr Cherry's complaint. At the time he was a junior member of staff and new to the organisation. He had received limited equal opportunities training and yet was allocated to provide assistance on a complex discrimination complaint. He was not in a position to assess the evidence that Mr Cherry had compiled or to explain to us the reason for Mr Flower's decision.

134. Our view of the reasons provided by the respondent in relation to Mr Fitzgerald's decision were as follows:

134.1 Mr Fitzgerald dismissed Mr Cherry's complaint in one paragraph, on the basis that having carefully considered Mr Cherry's correspondence '*it would not be appropriate to overturn the decisions concluded thus far' going on to state 'this matter is deemed closed*'. Mr Cherry in his emails to Mr Fitzgerald had specifically referred to the provisions in the harassment procedure on time limits and stated that he considered that his case was serious. Mr Fitzgerald did not addressed this issue at all in his decision of 9 May 2022 other than refer to the previous decisions being on HR advice. In relation to his later email of 26 May 2022, which referred to Mr Cherry failing to provide evidence to support the seriousness of his claim, this raised the question as to why Mr Fitzgerald reached this view given the serious nature of the subject matter that Mr

Cherry was complaining about and the evidence that Mr Cherry had compiled.

134.2 Mr Fitzgerald did not attend to give evidence and again we considered that the reasons for his absence (retirement) was not convincing. He could have given evidence by video.

135. In the absence of the decision-makers we concluded that the evidence provided by the respondent was insufficiently cogent to prove on the balance of probabilities that Mr Cherry's disability was not a material factor in the decisions taken. Therefore this complaint succeeded, subject to our consideration on time limits (see below).

VICTIMISATION (EQUALITY ACT 2010 SECTION 27)

Protected act

136. The respondent accepted that the following were protected acts:
136.1 in or around November 2020 making a grievance/complaint that included allegations of disability discrimination against Mr McGhie **(issue 4.1.1);**
136.2 resubmitting the grievance in March 2022 **(issue 4.1.2);**
136.3 resubmitting the grievance in around June 2022 (**issue 4.1.3**); and
136.4 raising the grievance again with Mr Carter in an email dated approximately September 2022 and / or in a meeting in around September 2022 (**issue 4.1.4**);

Detriment

137. The respondent did not dispute that the following acts took place:

137.1 that Mr McGhie made disciplinary allegations against the Claimant in December 2022 (**issue 4.2.1);**
137.2 that Mr Ellis suspended the Claimant in December 2022 (**issue 4.2.2**); and
137.3 that Mr Ellis maintained the suspension until 3 June 2023 (**issue 4.2.3**).

138. The respondent did not seek to argue that these were not detriments, and we agreed that being subjected to a disciplinary allegation and suspended constituted a detriment.

Reason why

139. The real issue was whether the detriment was done because of one or more of the protected acts made by Mr Cherry.

Did Mr McGhie make disciplinary allegations against the Claimant in December 2022 because he had done / would do a protected act? (issue 4.2.1)

140. Mr McGhie admitted that he was aware that Mr Cherry's grievance was to be reopened and that he was 'going to be investigated again'. It was his concern

about being reinvestigated that led to his breakdown. He had not complained about the various social media posts at the time that he had been informed of them, the last of which had been almost a year before. Nor had he complained about the comments that Mr Cherry had made to Mr Lucas either at the time or on being informed that he should do so by the police a few weeks later.

141. As Mr McGhie admitted he only reported the threats to Mr Davies and made a complaint against Mr Cherry after he thought Mr Cherry's grievance against him was going to be reopened. Given this timing we considered that a tribunal could conclude at stage 1, in the absence of an explanation, that the reason for making the disciplinary allegations was because Mr Cherry had done / would do a protected act.

142. At stage 2, we considered carefully Mr McGhie's explanation for making the disciplinary allegation when he did. We took into account that the discriminatory reason need not be the sole reason as long as it was an operable reason and that motivation may be subconscious.

143. We did not consider that it was reasonable for Mr McGhie and / or the respondent to consider the social media posts as evidence that Mr Cherry intended to physically threaten Mr McGhie. The posts span two years separated by many months, the last in time being December 2021. They were unpleasant and offensive, attacking Mr McGhie's authority and reputation, but they were not on any view physically threatening. The only one that could be construed as physically threatening was the 'assassin' post but there was no evidence that it was aimed at Mr McGhie. It was a single comment on a national social media site, provided to Mr McGhie by a 'friend' who presumably assumed it was a reference to him but without any context or explanation as to why that person formed that view. Mr McGhie himself did not suggest that he considered it to be serious and he did not complain about it at the time. Mr Davies was aware of these posts and also did not take any action at the time.

144. During the CMP investigation Mr McGhie had stated that there were many witnesses to Mr Cherry's 'resentment' towards him: **pg 346**. On being questioned about this by the Tribunal panel, he confirmed that the conversations with firefighters had occurred between 2016 and 2019, when he was still line managing Mr Cherry. There was no evidence to suggest that the 'resentment' during this period had manifested itself into any physical threat towards Mr McGhie. Since that time, the conversations were with managers in relation to Mr Cherry's various grievances. Again there was no evidence of any physical threat being made by Mr Cherry. The only action against Mr McGhie that Mr Cherry had taken was his repeated attempts to have his grievances investigated. He may have wanted Mr McGhie to be 'sacked' but that was very different from an allegation that Mr Cherry posed any physical threat to Mr McGhie or his family. However we do accept that the demonstrable animosity that Mr Cherry had towards Mr McGhie, as evident in some of the social media posts, the fact that it went on for years and that Mr Cherry was not giving up and moving on, was having an emotional impact on Mr McGhie and how he viewed the intentions of Mr Cherry.

145. Nor did we consider the conversation that Mr Cherry had with Mr Lucas to be evidence of any intention by Mr Cherry to physically threaten Mr McGhie. Our view was that the conversation was misinterpreted / misconstrued by Mr Lucas, however we accept that this was the view he formed and that this was what he conveyed to Mr McGhie. We found that Mr McGhie was an honest witness and accepted that he genuinely believed that Mr Cherry was intending to physically harm him, even though we considered objectively that this belief was wrong. His belief was sufficient to cause him to take security measure to protect his person and that of his family, to seek informal advice from police friends and contributed to his eventual breakdown.

146. We considered that against this background, when Mr McGhie learned that Mr Cherry's grievance was going to be reopened (and reinvestigated) it became overwhelming and led to his breakdown. On this basis we concluded that the protected acts and the fact of an investigation formed part of the reason that Mr McGhie decided to complain about the threats when he did.

147. We went on to consider whether it was the manner in which Mr Cherry had done the protected acts, rather than the acts themselves, that was the reason why Mr McGhie made the disciplinary allegations. In other words whether there was 'some feature … which can properly be treated as separable' from the protected act. We considered that it was not for the following reasons:

    147.1 This was not a case where a claimant was persisting in making false allegations that had already been investigated. In Mr Cherry's case prior to December 2022 his allegations had not been investigated nor was there any finding that the allegations were false.

    147.2 Other than the social media posts Mr Cherry was not acting unreasonably in the manner in which he made the complaints. We took into account that employees bringing grievances are often unreasonable in the manner in which they bring or pursue their complaints and that in the days of social media posting insulting comments about the person being complained about was all too commonplace. Although unpleasant and offensive we did not consider that these posts were so unreasonable as to put Mr Cherry outside the protection of the victimisation provisions.

    147.3 Nor did we consider the conversation with Mr Lucas to be separable from the protected act. All Mr Cherry was referring to was taking legal action which of itself was not unreasonable.

148. Taking all the above into account we concluded that part of the reason why Mr McGhie made the disciplinary allegations when he did, was because Mr Cherry's grievance against Mr McGhie was going to be reopened and finally investigated. Therefore we found that this complaint succeeded subject to our consideration of time limits (see below).

Did Mr McGhie and/or Mr Rob Davies suspend the Claimant in December 2022 because Mr Cherry had done a protected act (issue 4.2.2)

149. We found no evidence that Mr McGhie was involved or influenced the decision to suspend Mr Cherry. He was not the decision-maker.

150. We found that the decision to suspend Mr Cherry was made by Mr Davies, and signed off by Mr Ellis. In relation to this decision there was no evidence that Mr Ellis took any active role in the decision, other than approving it.

151. We considered whether there was evidence from which we could conclude that the reason why Mr Davies recommended the suspension of Mr Cherry was because he had submitted multiple grievances. We took into account that something more than the mere fact that Mr Cherry had done a protected act and then been suspended was required.

152. We did not draw any inference from Mr Ellis' non-attendance as a witness, since Mr Davies did attend and in our view was the main decision-maker. He had completed the suspension risk assessment which led to Mr Cherry being suspended.

153. We also did not draw any inference from Mr Davies' evidence that he had spoken to the police prior to completion of this risk assessment when we have found that he had not. We considered that he had become confused when giving evidence and misremembered when he had the conversation with PC O'Reilly. We took into account that these events were three years ago and memories are often fallible.

154. We noted that Mr Cherry had done a number of protected acts (by submitting his various grievances) over the years and that none of them had led to him being suspended. There was no evidence from which an inference could be drawn that the reason he was suspended was because his grievance was re-opened. We therefore concluded that Mr Cherry had failed to prove a prima facie case and that the burden of proof did not transfer to the respondent to provide an explanation.

155. However, even if the burden had shifted to the respondent, we conclusively found that the reason for Mr Cherry's suspension was nothing to do with having submitted a number of grievances and / or the reopening of the investigation into his grievances following the CMP report.

156. We accepted Mr Davies' evidence that the reason for recommending suspension was because of the alleged 'threats' that Mr Cherry had made. Mr McGhie had sent Mr Davies the social media posts and Mr Lucas had completed a Form 10. Therefore there was evidence before Mr Davies that 'threats' had been made. Further we found it likely that although Mr Davies had not personally spoken to PC O'Reilly, that he was informed by Mr McGhie of the conversation with the police at the Autumn Internationals and that he had been informed that the threats were sufficiently serious to constitute a criminal offence. We noted that the risk assessment referred to a 'verbal threat that

could lead to a criminal prosecution' and risk factor 1 identified the risk of criminal action as 'highly likely'. That this was PC O'Reilly's view was supported by his email of 5 July 2023. That the threats were considered to be serious was also supported by the view of CMP who advised on 19 December 2022 that an official referral be made to the police and that Mr Cherry be suspended. We took into account that at this point Mr Davies had not spoken to Mr Cherry and therefore was not aware of any explanation for the alleged threats.

157. We also accepted that Mr Davies was concerned about Mr McGhie's welfare whilst the investigation into the disciplinary allegations was ongoing, and that there was evidence supporting this concern due to Mr McGhie's breakdown.

158. We therefore concluded that the reason for Mr Cherry's suspension was nothing to do with the fact that he had done a protected act, accordingly this complaint did not succeed and was dismissed.

Did Mr Ellis maintain the suspension until 3 June 2023 because Mr Cherry had done a protected act (issue 4.2.3)

159. Between December 2022 and March 2023, there were periodic reviews into Mr Cherry's suspension which was continued. Since the investigation into Mr McGhie's complaint against Mr Cherry was ongoing and there was no change in circumstances, we did not consider that there was any evidence to suggest that the continuation of the suspension was anything to do with Mr Cherry's protected act.

160. The situation however changed on 9 March 2023, when the CMP report' into the live case concluded that there was no case to answer in relation to the threats against Mr McGhie. The CMP report included a summary of the interview with Mr Cherry about the social media posts and the Mr Lucas conversation. He explained that the 'assassin' post was his sense of humour and in any event not directed at Mr McGhie. He also explained that when he informed Mr Lucas that he had 'plans for Mr McGhie' he was referring to litigation: **pgs 116-117**.

161. From this date the respondent were aware of Mr Cherry's explanation, and in particular that the comment made to Mr Lucas about retirement plans was merely referring to Mr Cherry's intention to take legal action. We considered that this significantly changed the assessment of any risk that Mr Cherry posed to Mr McGhie.

162. When considering whether there were primary facts from which the tribunal could decide in the absence of any other explanation that that the reason for continuing Mr Cherry's suspension was because he had done / would do a protected act (stage 1), we considered the following circumstances:

    162.1 Neither Mr Murray (who completed the risk assessment) nor Mr Ellis (who signed it off) attended to give evidence. We were provided with no explanation as to why these two persons did not attend to give evidence other than that Mr Ellis had retired.

162.2 We noted that on 24 March 2023 Ms Grantham had emailed Mr Carter 'to put together a revised SRA to lift Mike's suspension' and on 27 March 2023 Mr Carter had completed a risk assessment which had identified Mr Cherry as being of low risk and recommended that the suspension be lifted. This has been signed off by Mr Smith on 28 Match 2023, but was not actioned. Instead on 30 March 2023, Mr Murray completed another risk assessment which continued to identify Mr Cherry as 'very high' risk and recommended the continuation of his suspension which was signed off by Mr Ellis on 31 March 2023. This change of mind required an explanation.

163. Taking the above into account we considered that there was evidence from which we could conclude victimisation in the absence of the respondent's explanation. Therefore the burden of proof shifted to the respondent to prove, on balance of probabilities with reference to cogent evidence, that the treatment was in no sense whatsoever because of the protected act.

164. Our view of the reasons provided by the respondent on the material before us was:

164.1 We accepted that the respondent did not agree with the CMP conclusion that Mr Cherry had no case to answer in relation to the alleged threats. This much was clear from Ms Grantham's evidence and her attempts to get the matter considered further. What was less clear from her evidence was why she thought Mr Cherry should remain suspended whilst the matter was being reconsidered. Initially she had recommended that the suspension be lifted. Her change of mind appeared to be due to a concern about the impact of the CMP's recommendations on Mr McGhie rather than any real concern that Mr Cherry posed a physical threat to Mr McGhie. Further she expressly stated in her briefing note that the CMP recommendations did not 'feel right' because it meant that Mr Cherry had 'won' both cases and Mr McGhie 'lost' both cases. This suggested to us that Mr Cherry's protected act was at least part of the reason for not lifting the suspension at this point.

164.2 We did not accept that the respondent was acting on CMP advice that the suspension be continued 'due to the risk of contamination of the evidence / witnesses'. The advice was contained in Ms Grantham's email dated 30 March 2023, without explaining why this advice was given or the context for this advice. As presented it was inexplicable, since there was no evidence of Mr Cherry having sought to interfere in either investigation. Indeed he no longer worked at Twickenham fire station and therefore did not have access to any witnesses; whereas Mr McGhie would have been in regular contact as the watch manager. Further the risk assessment completed by Mr Murray identified this risk factor as 'unlikely' and there was no mention of this reason provided by Mr Ellis when he signed off the risk assessment.

164.3 We noted, from Mr Carter's email of 31 March 2023, that Mr Murray had not been provided with either of the CMP outcome reports. We do not

know if Mr Ellis had seen the reports, they are not mentioned in the risk assessment or his reasoning. We were given no explanation as to why the respondent did not provide the decision-maker/s with the CMP investigation report into the alleged threats which included Mr Cherry's explanation for his actions. This was particularly surprising given that Mr Carter had expressly raised with Ms Grantham his concern that Mr Murray had not been provided with the outcome report and recommended that the risk assessment be completed by someone who had seen both reports.

164.4 The reasons provided by Mr Ellis in the risk assessment for continuing the suspension was not supported by the evidence.

164.4.1 Reason 1: that the suspension should be continued due to the Mr McGhie feeling vulnerable. We considered that this was unreasonable given that Mr Cherry had not made any physical threats, and had explained his comment to Mr Lucas. Further he was located at a different fire station and had had no contact with Mr McGhie since 2019. The email from Mr Davis (who had spoken to Mr McGhie's line manager) referred to the outcome of the investigation having a significant impact on Mr McGhie and the need to ensure that welfare support was in place when the suspension was lifted. This was different from a request that Mr Cherry's suspension be continued.

164.4.2 Reason 2: that the respondent had received legal advice as to their duty of care towards Mr McGhie as the most vulnerable person in the two cases. However we have been pointed to no legal advice to suggest that the suspension be continued on this basis. Indeed the legal advice that we have seen, the email from Ms Robinson dated 3 April 2023, cautioned the respondent that careful consideration would need to be given to the continuation of the suspension given the original conclusion of the CMP report, unless that conclusion had been amended. In fact the CMP had not amended its conclusion and did not do so following a further review. Ms Robinson went on to state that if the respondent decided to depart from the CMP conclusion then it would need a rationale for that decision and the continuation of any suspension. In the light of this advice the suggestion that the respondent had been legally advised that the suspension be continued in order to protect Mr McGhie was incorrect. Further there appeared to have been no attempt to assess the impact on Mr Cherry in continuing the suspension in order to assess who was the most vulnerable.

164.4.3 Reason 3: that the suspension should be continued due to the 'threats' against Mr McGhie being taken seriously by the police. We considered that this conclusion was unreasonable given the explanation provided by Mr Cherry during the CMP investigation

and the respondent taking no steps to inform itself of any change in the police view upon receipt of this explanation.

165. We accepted that the mere fact that a decision was unreasonable or wrong does not mean that the decision was for a prohibited reason (in this case victimisation). However the non-attendance of the two key decision-makers to explain why they decided to continue the suspension, which appeared to be both unreasonable and unsupported by the evidence, called for an explanation which the respondent was unable to provide. In the absence of the decision-makers we concluded that the evidence provided by the respondent was insufficiently cogent to prove on the balance of probabilities that Mr Cherry's protected act/s were not a material factor in the decisions taken. Therefore this complaint succeeded.

JURISDICTION

166. The time limit for presenting an employment claim is three months from the date of the last day of an act / omission complained of. Since ACAS early conciliation was commenced on 5 June 2023, the decision to extend Mr Cherry's suspension on or around 31 March 2023 was in time. The other acts found proven were potentially out of time since they happened before 6 March 2023:

167. We considered that the earlier acts were part of a conduct extending over a period of time with the in-time act of victimisation to continue the suspension. Although they were different causes of action, occurring at different times and relate to decisions made by different persons they were all connected to Mr Cherry's grievance and his attempt to get that grievance investigated. In particular:

167.1 The harassment complaints concerning the refusal to investigate his grievance were all linked in that they related to the same grievance. We accept that this continued up to December 2022 when the respondent agreed that CMP would investigate the grievance as a historic complaint. Had there been no further acts by the respondent then these complaints would have been out of time.

167.2 The two victimisation complaints concerning the decision of Mr McGhie to make a disciplinary complaint and the decision to continue Mr Cherry's suspension were linked since the decision to continue the suspension was in relation to that disciplinary complaint.

167.3 We then considered whether the harassment complaints were linked to the victimisation complaints such that there was a continuing state of affairs. We concluded that they were. They were all part of a state of affairs whereby Mr Cherry's complaints were not treated as serious, were dismissed without investigation and when the respondent did agree to investigate led to counter disciplinary allegations against him and the continuation of his suspension after the CMP had stated that there was no case to answer. These were not discrete, or one off, acts. We also noted that the Independent Culture Review found that at the time of these

events there was a culture of refusing to take bullying and harassment complaints seriously. This supported our conclusion that there was a continuing state of affairs of failing to investigate grievances and / or take them seriously.

168. We went on to consider whether, if Mr Cherry's complaints were not part of a continuous act, we would have used our discretion to extend time on a 'just and equitable' basis.

169. We accepted that the delay was significant: the decision of Mr Ryan was 2½ years' old and of Mr Flower and Mr Fitzgerald were 1 year old. We also took into account that Mr Cherry had received legal advice during this period, albeit the contents of this advice was not known nor whether he had been advised as to time limits. Even assuming that he had been so advised, the reason for the delay was his repeated attempts to try to resolve matters internally. There was evidence in the hearing file that Mr Cherry had continuously attempted to get his grievance reopened and spent considerable time emailing HR and gathering new evidence in his attempts to get the respondent to treat his complaint seriously. We also took into account that he was still employed by the respondent and that this was likely to have contributed to his desire to resolve matters internally rather than escalate to an employment tribunal. We noted that one of the social media posts referred to waiting until retirement to take action.

170. We considered the prejudice to the respondent of permitting the out of time complaints against the prejudice to the claimant of not extending jurisdiction in his favour. The respondent stated that the delay meant that it was unable to call its witnesses. We do not accept that submission since the respondent made a decision not to call witnesses and did not call Mr Murray or Mr Ellis despite the complaint against them being in time. Whilst we accepted that the respondent would suffer the prejudice of a declaration that the out of time acts had been found proven and being required to compensate the claimant, the claimant would suffer prejudice of not having his claims determined and having no remedy for the repeated failures of the respondent to investigate his complaints when all he sought to do was obtain an internal resolution. The claimant was a litigant person and we considered on balance, taking into account all the circumstances of this case, the scales tipped in favour of the claimant and have decided to extend our jurisdiction on a just and equitable basis to enable the claims to be determined.

CONCLUSION

171. We concluded that

171.1 Mr Cherry's complaint of harassment related to disability in relation to Mr Ryan's rejection of his grievance on 17 December 2020 was well founded and succeeded.

171.2 Mr Cherry's complaint of harassment related to disability in relation to Mr Flower's rejection of his grievance on 21 April 2022 and Mr Fitzgerald's

rejection of his grievance on 9 May 2022 was well founded and succeeded.

171.3 Mr Cherry's complaint of victimisation by Mr McGhie in making the disciplinary allegations on 9 December 2022 was well-founded and succeeded.

171.4 Mr Cherry's complaint of victimisation by Mr Davies in suspending Mr Cherry in December 2022 was not well-founded and was dismissed.

171.5 Mr Cherry's complaint of victimisation by Mr Murray and / or Mr Ellis in continuing the suspension on 30-31 March 2023 was well-founded and succeeded.

These Reasons have been approved by:

Employment Judge **HART**

Date: 14 April 2025

Reasons to the parties
Date: 15 April 2025