

Neutral Citation Number: [2025] EAT 163

Case No: EA-2022-001227-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 November 2025

Before:

HIS HONOUR JUDGE BARKLEM

Between :

MR K KHAN

Appellant

- and -

THE CABINET OFFICE

Respondent

Mr K Khan the Appellant in person
Tom Kirk (instructed by Government Legal Department) for the **Respondent**

Hearing date: 5 August 2025

JUDGMENT

SUMMARY

RACE DISCRIMINATION

VICTIMISATION

After just three days of employment with the respondent the claimant was suspended. He was subsequently dismissed and an appeal against that dismissal was unsuccessful. He brought claims of discrimination and victimisation which were adjudicated upon by an employment tribunal, which found against him in relation to all his claims.

He sought to resurrect the case by bringing complaints to the respondent public correspondence unit, largely reiterating points which had been live certainly by the end of the employment tribunal hearing. There was also an issue regarding a USB stick, the property of the claimant, which had been retained by the respondent. At the time of the first tribunal, it was believed that the respondent had the USB stick concerned, but due to Covid it was unable to be retrieved. It was subsequently determined to have been lost, and the claimant was offered a replacement which he refused. It transpired in the present proceedings that the respondent had purported to return the actual stick but this had been rejected by the claimant as not being the correct one.

A second employment tribunal dismissed the claims on the basis of either being out of time or falling foul of the Henderson v Henderson principle, namely that all matters which were or could have been determined in earlier proceedings cannot be the subject of subsequent proceedings.

The EAT held that the employment judge was entitled to find that all the allegations in the second claim were out of time, a finding which had not been the subject of appeal. However, on the merits, the employment “judge’s” rejection of the claims was open to her and contained no error of law.

HIS HONOUR JUDGE BARKLEM:

1. In this judgment, I will refer to the parties as they were before the employment tribunal.
2. This Full Hearing was to determine those aspects of the claimant's appeal as were permitted to proceed by an order of Mr Bruce Carr KC, sitting as a deputy judge of the high court, at a Preliminary Hearing held on 17 July 2024. Those were (in whole or part) grounds 2, 3 and 7.
3. This appeal comes almost six years following the claimant's very brief employment with the respondent. He commenced employment on 23 September 2019. The role to which he was appointed was different from that for which he had applied – although within the same grade - and this caused dissatisfaction which he quickly voiced.
4. After just three full days of employment, the claimant was suspended on 26 September 2019. He was found to be using a personal USB memory stick to download official material, which was regarded as a security breach. He was summarily dismissed on 12 November 2019, an appeal from that decision being dismissed on 30 March 2020. Concerns arose as to security issues more generally and reports were sent to the Police.
5. The claimant brought an Employment Tribunal claim which was heard by a panel chaired by Employment Judge Stout, as she then was, over 4 days in November 2020 ("the Stout tribunal"). Mr Kirk, who has represented the Respondent before me, also did so before the Stout tribunal. That tribunal gave its judgment with written reasons dated 25 November 2020. The reasons run to 47 pages and set out in detail the facts surrounding the claimant's brief employment and its termination.
6. The Stout tribunal dismissed all the claimant's claims of discrimination based on race and age, and of victimisation.
7. I gratefully adopt from those reasons the following summary of the facts surrounding the claimant's brief period of employment with the respondent which will provide the necessary context to the present appeal.

“16. The Claimant commenced employment with the Respondent on 23 September 2019.

17. He had originally applied for an Executive Assistant to Deputy Director role (Grade B and B1) on 17 April 2019. He was provisionally offered and accepted the role in May 2019, subject to Pre-Employment Checks being carried out. These included Counter Terrorism Checks (CTC).

18. On 19 July 2019 the Claimant was informed that the original role was not available because of a change in business need and he was offered a role in policy instead as Grants Centre of Excellence Development Officer, with Olli Jokinen as his line manager. The Claimant responded that he would be happy to take up the new role.

19. On 6 September 2019 he was sent a statement of terms and conditions which did not refer to the policy role, but described the post as a “Grade Band B1” or “Executive Assistant to Deputy Director” (i.e the same job title as that for which he had originally applied). The Claimant accepted this contract and arrangements were made for him to meet with Olli Jokinen on his first day of work, which was agreed to be 23 September 2019.

The Claimant’s role at the Respondent (Discrimination Issues (a) and (b))

20. The Claimant’s contract provided for a probationary period of 6 months during which the Claimant could be terminated at any time if his service was unsatisfactory and it was clear he would not be able to reach the required standard by the end of the probationary period. Summary termination for gross misconduct was also permitted at any time. The contract contained a mobility clause, but nothing about flexibility in

job roles (other than a provision for written notification within 28 days of any change in terms and conditions).

21. The Respondent's witnesses gave consistent evidence, which we accept, that a Grade B1 appointment in the Cabinet Office is to a flexible executive officer role and that employees are regularly moved between roles with little or no notice, but this was not explained to the Claimant in advance of his joining the team. The Respondent's usual practice when a change of role is required is for the change to be discussed with the employee and usually they agree to it. If they do not, however, it is made clear to them that it is not a request but a requirement. Mr Whitehouse-Hayes gave evidence to this effect, both as to him being required to cover John Connolly's role without any notice shortly after the Claimant joined the Respondent, and as to his requiring Sean Pithouse (who joined after the Claimant on 14 October) to take over the Claimant's role while the Claimant was suspended (from 22 October). Mr Whitehouse-Hayes was clear that if Mr Pithouse had said he did not want to do the role, he would have been told that it was a requirement and he needed to do it.

22. The working day before the Claimant was due to start at the Respondent, i.e. Friday 20 September 2019, at a Senior Leadership Team (SLT) meeting, it was decided that there was a business need for the Claimant to start in an HR officer role. The SLT included Ms McDonald and Mr Connolly. The HR Officer role was to provide HR Support to FEDG, including workforce planning, recruitment, training, on-boarding of new entrants, as well as ensuring all relevant HR paperwork was completed in compliance with policies. This was the role that Miss Kreepa Mehta had been doing and it provided opportunities for exposure to senior employees and promotion as Miss Mehta had been promoted within 10 months of starting in post. It was decided by the SLT that the Claimant should be line managed by Miss Mehta.

Miss Mehta gave unchallenged evidence, which we accept, that the reason the Claimant was moved into her role was because he was the first of the new joiners starting around this time in a similar role and level to her position.

23. Mr Jokinen was informed of the change at 7.38am on the morning of 23 September 2019 (p 185), i.e. only a couple of hours before the Claimant was due to start. Miss Mehta was due to greet the Claimant when he arrived and she was expecting Mr Connolly to meet with the Claimant and explain the role change, but in the event Mr Connolly was held up and it was left to Miss Mehta to first convey the news of the change to the Claimant as he was understandably asking to see Mr Jokinen as previously arranged. Although it is common for employees of the Respondent to be asked to change roles, it was exceptional for this to happen on an employee's first day and communication of the change to the Claimant was in our judgment not handled well.

24. A little later that day there was an opportunity for Mr Connolly to discuss the role in more detail with him. The Claimant was very unhappy about the change of role and Miss Mehta felt that he behaved strangely and in a very disinterested way for the rest of that day. This was an impression that the Claimant also gave to other employees of the Respondent. We return to Miss Mehta's first impressions of the Claimant further below. Miss Mehta let the Claimant go home early at 4.30pm on that first day as he was not yet set up on IT.

25. The next day, 24 September 2019, the Claimant emailed Mr Connolly asking for an appointment to discuss the role, saying it was not the role he applied for, had been offered or accepted. He asked for a discussion of his options going forward with a union representative present if possible. Mr Connolly's correspondence indicates he was disappointed that the Claimant had done this rather than approaching him

informally. He immediately met with the Claimant with Miss Mehta to discuss the role again and urge him to deal with the matter informally because for business reasons the Claimant did need to do the HR role. Mr Connolly also told the Claimant, as he had told others in the department, that he had been diagnosed with cancer and would be taking time off for treatment. However, the Claimant pressed for a formal response to his email, which Mr Connolly provided later that day.

Alleged protected act (a)

26. The Claimant responded early in the morning of 25 September 2019. This email is relied on by the Claimant as his first protected act. In this email the Claimant said that he intended to “challenge the decision to change my role with absolutely zero consultation”. He stated: “I question the legality of this switch and intend to use every means at my disposal to establish the facts”. Referring to Mr Connolly’s having informed him about his cancer, he said “In one of our meetings, you shared very difficult personal details about yourselves – to which I’m sympathetic and wish you the best of luck in overcoming. However, I would appreciate if personal details were kept personal. It is unfair for employees to be weighted down by other employees’ private life.” He suggested that Mr Connolly had “conveyed to me in a belligerent manner that my option is to accept what I am given or pack my bags”. Referring to Mr Connolly having mentioned to the Claimant that he looked as if he was not interested and did not want to be there, he stated, “This fictitious narrative of an unprofessional demeanour seems to be an attempt to intimidate me into submission and possibly a means to kick me out in due time. I will not tolerate this the false narrative that is designed to create a hostile environment for me at the workplace. Due to your seniority and the seniority of the individual who concocted this vicious accusation [he did not name the individual at the time but it is apparent from

Complaint 1 that this is a reference to Tabitha Brufal], it can spread quickly and be perceived as an authoritative assessment. I will inform HR of this rumour which has been spread from that individual to yourself, and now Kreepa has been exposed to this information. I'm not sure who else that individuals have shared this malicious assessment with. I am adamant in taking the most decisive route to stem this damaging campaign and will not be intimidated from challenging problematic individuals regardless of their position.” (sic)

27. Mr Connolly forwarded the Claimant's email to Miss Mehta to seek her views on it before replying, and then sent the whole email chain on to Ms McDonald and Mr Whitehouse-Hayes. Miss Mehta's response indicated that in her view the Claimant's email was 'disproportionate' to the situation. She set out in her email a number of matters that in the first two days had “shocked” her about the Claimant's attitude to getting a role in the Civil Service, including: that he had thought “people in the Civil Service barely do any work”; that “his previous role involved drafting manifestos/papers for a Labour MP and he would like to continue doing this if possible” (which Miss Mehta told him would not be possible because of the requirement for the Civil Service to be impartial); that he asked about having access to information that other people would not; that he had applied for 20-30 roles in the Civil Service and this was the 'most unlikely' for him to have got; and that he had asked her whether 'someone had put her up to selling the HR role to him'. She added that he “has yawned in my face a number of times as well as smrkng and rolling his eyes at a number of things I have said to him. I have tried to maintain a positive attitude and try to overlook these things but I was genuinely surprised at his attitude and to me it does seem that he doesn't really want to be here. I think that he also has

a poor understanding of what Cabinet Office and Civil Service [do] which adds to this.”

28. Miss Mehta was away from the office on 25 September 2019 on a home study day. The Claimant attended IT induction that day.

Miss Mehta’s attitude to the Claimant

29. The Claimant argued at this hearing that Miss Mehta held racist views towards Asian men and that, being of Asian origin herself, she had previously been used by the Respondent as a ‘foil’ or ‘shield’ to cover up discrimination by other employees. The Claimant made these arguments even though he has not brought a claim of discrimination against Miss Mehta herself. We have nonetheless considered them carefully lest they shed some light on the conduct of the Respondent’s other witnesses toward the Claimant.

30. No evidence was produced by the Claimant to support his case that Miss Mehta was being used as a ‘foil’. He did, however, produce evidence of tweets that Miss Mehta had made in 2012, 2013 and 2015. These tweets show that, several years before Miss Mehta joined the Respondent (which she did in 2018), she was willing to put into the public domain tweets that referred generically to “Asian men”, “Asian people” and ‘freshies’ (which she said meant people who have recently come to this country), and to make derogatory comments about them. However, in each case Miss Mehta was able to give us some context or the context is apparent: the “freshie neighbours” comment was in response to her neighbours drilling next door in the small hours of the morning; the “Asian people” comment was in response to her experience of Asian people not respecting the concept of a queue and the “Asian men” comment was in response to a radio talkshow discussing behaviour of Asian men towards women in nightclubs. While this is material from which in principle an

inference of discriminatory attitude could be drawn, we are not satisfied that it would be appropriate to do so in this case given the age of the tweets and their context, and the fact that we have seen no evidence that would lead us to find that (whatever her personal views) Miss Mehta dealt with the Claimant any differently than she would have dealt with any other new joiner.

31. Miss Mehta did feel uncomfortable with the Claimant and the Claimant suggested that this was because she felt uncomfortable with Asian men and that there was a further tweet by her (which he has not produced for the Tribunal) to that effect. The Claimant said that when asked why he made her feel uncomfortable, she replied only that he was fidgety and that this was not enough to explain her feeling and we should draw an inference of discriminatory attitude on the part of Miss Mehta from this. However, that was not our note of Miss Mehta's evidence. Our note is that when asked this question Ms Mehta said that the Claimant was "irritable, fidgety, mumbling under his breath ... I noticed that he was smirking when he was talking". She continued "it made me feel on edge and the fact that he did not answer questions directly, I thought it was a bit strange – it is not a behaviour that I have come across before, I know that people can be different and I was trying to make him feel welcome but I found those behaviours uncomfortable". These are all behaviours by the Claimant which she noted as odd in her emails at the time. In her witness statement she also gave further examples, including that he had asked her to buy a deodorant for him when she was going to lunch. We witnessed the Claimant behaving in Tribunal in much the way that Miss Mehta described. Although we have cautioned ourselves about this and have not allowed his behaviours to affect in any way our approach to the Claimant's case, we accept that it was these behaviours that made

Miss Mehta feel uncomfortable and in our judgment they provide an adequate explanation for why she felt like that.

32. Even standing back, and taking all the evidence in relation to Miss Mehta in the round, we draw no inference of racially discriminatory attitude on the part of Miss Mehta from any of the evidence presented.

Initial concerns and first suspension notice

33. The employees at the Respondent had recently received training on countering internal fraud, the ‘yellow-hammer leak’ and the need for increased vigilance in the lead-up to Brexit. The Claimant’s behaviour in his first two days at work (as described in part above) ‘rang multiple alarm bells’, to use Mr Whitehouse-Hayes term.

34. At an SLT meeting on the morning of 26 September 2019, Mr Whitehouse-Hayes, Ms McDonald, Mr Connolly, and Mark Cheeseman (a Deputy Director in the Fraud and Policy team) discussed the ‘red flags’ regarding the Claimant, focussing on Miss Mehta’s email of 25 September 2019, in particular the Claimant’s attitude to Mr Connolly’s cancer, his political activities and the number of applications he had made to the Civil Service (which Mr Whitehouse-Hayes said they had been told was a factor that, in conjunction with other factors, might indicate insider threat). It was decided that Mr Whitehouse-Hayes should start investigating the Claimant’s job application and references. Later that day Mr Whitehouse-Hayes, Ms McDonald and the HR Business Partner Jonny Little met. They were already considering suspending the Claimant because of these concerns when Miss Mehta reported that he had inserted a USB stick into his computer, which is against the Respondent’s IT policy. At that point they decided that they definitely had grounds to suspend.

35. Ms Macdonald informed the Claimant that he was being suspended, together with Mr Paterson (who was chosen because he is an ex-police officer). The Claimant has complained that the way the suspension was carried out was intended to humiliate him as it was done publicly, but we find that there was nothing untoward about how it was done. It was an open plan office so people could see what was happening, but it was not inappropriately handled.

36. There were minor discrepancies between Ms McDonald's witness statement for this hearing and the record of the suspension that she made on the day itself (26 September 2019), but we do not find that anything turns on these. What is important about what happened during the suspension so far as the present case is concerned is that the Claimant said nothing to allay anyone's concerns about what he was doing with the USB. Quite the opposite in fact. As is apparently agreed, he did not protest that he had no idea he had done anything wrong, or seek to explain what he was doing, or apologise. This was something that Mr Paterson remarked on at the time, writing in his statement: "He did not ask any questions or provide any explanation of his actions, and was half smiling throughout. After he left, I remarked to Lyn that I found his demeanour very strange and was surprised that he did not say anything else at any point, given the seriousness of what had just happened." Although the Claimant has raised some minor points of dispute with the accounts of Mr Paterson and Ms McDonald, his account accords with the Respondent's on what we regard as the material aspects and there is absolutely nothing to suggest that either Mr Paterson or Ms McDonald were intending to mislead in their statements. The discrepancies are exactly the sort that one expects to find between contemporaneous witness accounts. The Claimant says, and Ms McDonald agrees, that as she was escorting him out of the building he asked about IT security policy. He says this was an

indication that he did not know what he was doing was wrong. However, if it was such an indication, it was a very oblique one and did not make any material difference to the impression he had created for the reasons set out above.

37. The Claimant was issued with a formal notice of suspension the same day. The notice does not specify the nature of the alleged misconduct, but we find the Claimant understood that he was being suspended because of the USB.

Second suspension notice and investigation (Discrimination Issue (d))

38. Mr Whitehouse-Hayes then began carrying out an investigation, seeking statements from Ms McDonald, Ms Wyatt, Mr Connolly, Miss Mehta and Mr Paterson and also obtaining from Miss Mehta the Claimant's job application form and associated documents such as references.

39. On 1 October 2019 the Claimant was issued with a further notice of suspension which confirmed that his use of IT was being investigated, "and also concerns regarding his behaviours, as outlined in the civil service code, and your stated previous employment". The Claimant responded (p 250) by email with the single line: "Sounds interesting. Looking forward to reading the findings." We observe that, as with the Claimant's behaviour when initially suspended, this very odd response did nothing at all to assuage the Respondent's concerns about his behaviour.

40. Mr Whitehouse-Hayes continued his investigation during the first half of October, keeping the Claimant up to date with progress. On or around 25 October 2019 he completed a Case Summary document that would stand as the investigation report to the appointed Decision Maker Miss Eshelby. He sent this on to the Claimant on 28 October 2019, attaching all the materials and statements relied on (save for the attachments to Mr Connolly's statement). Miss Eshelby invited him to a disciplinary

meeting on 5 November 2019. The letter and Case Summary document identified the three allegations against the Claimant to be:

- (1) On 26 September 2019 the Claimant used an unauthorised data storage device (the USB);
- (2) On or about 24 September 2019 the Claimant misleadingly stated that Mr Connolly had told him to “accept what I am given or pack my bags”; and,
- (3) Concerns regarding his declared employment history on the job application (specifically a discrepancy in dates of work for ‘Grynspan’ as either June 2018 onwards or January to May 2019, the company not being registered on Companies House and a personal email address being provided as referee).

41. The day before the disciplinary meeting Mr Whitehouse-Hayes realised that he had not sent the Claimant the attachments to Mr Connolly’s statement. He did so, offering the Claimant the option of postponing the meeting if he wished, but the Claimant said that he was ready to go ahead.

42. Mr Whitehouse-Hayes did not hold an investigation meeting with the Claimant, but the Respondent’s policy does not require there to be a meeting. Indeed, the ‘flowchart’ in the policy document does not include such a meeting. Mr Whitehouse-Hayes thought this was odd as it was different to the approach in other organisations and in his considerable experience of conducting disciplinary investigations, but having taken HR advice he was satisfied that not having a meeting with the Claimant at the investigation stage was the Respondent’s policy. We note that the Respondent’s policy in this respect, although unusual, is not inconsistent with the ACAS Code of Practice on Discipline and Grievance Procedures. The Claimant referred repeatedly during the hearing to the ‘Toolkit’ document that is referred to in the “How to” guides

which are themselves referred to in the Respondent's disciplinary policy. However, the 'Toolkit' only sets out what should be done if an investigation meeting is held with the person accused, it does not say that such a meeting must be held.

43. The Claimant has complained about the content of Mr Whitehouse-Hayes' Case Summary. We deal with this below when dealing with the substantive allegation in relation to the USB use.

Resignation 4 November 2019 (Discrimination Issue (i))

44. On 4 November 2019 the Claimant resigned, giving one month's notice with his employment due to terminate on 5 December 2019. He stated in his resignation email to Mr Whitehouse-Hayes that he had secured employment elsewhere. The Claimant also wrote in a subsequent email to Mr Whitehouse-Hayes on 28 November 2019 (p 532) that he had had to resign because the Respondent withheld his pay (an issue we deal with below). In these proceedings he contends he resigned because the Respondent had withheld his pay, submitted false evidence, and failed to share documents from the investigation until the day before his disciplinary hearing. The Claimant was not cross-examined on what his reasons for resigning were and, in the light of our conclusions on the other issues, we do not need to make any findings in this regard.

45. Miss Eshelby gave evidence that she took advice from HR at the time as to what to do about the disciplinary proceedings in the light of the Claimant's resignation, and we accept her evidence in this regard as it is reflected in the emails in the bundle around 8 November 2019. The advice was to continue with the disciplinary. This decision was in line with the Respondent's policy, which we understand from Ms McDonald and Mr Whitehouse-Hayes to have been consistently applied since at least 2017, that where an employee resigns when facing fraud or dishonesty allegations,

the disciplinary procedure should be continued because if the allegations are upheld the employee's details are to be entered onto the Internal Fraud Database. (We do not find that Ms McDonald was involved in this decision at the time, as the Claimant suggested. We deal with the implications of her email of 6 December 2019 below.)

Disciplinary hearing and decision (Discrimination Issues (c), (f) and (j))

46. On 5 November 2019 the disciplinary meeting took place, chaired by Miss Eshelby. Miss Eshelby was selected by Ms McDonald, in consultation with Mr Whitehouse-Hayes, to conduct the disciplinary meeting. The Claimant attended the meeting with a trade union representative. Notes were taken of the meeting, which were shared with the Claimant afterwards and the Claimant returned the notes on 8 November 2019 with a number of detailed comments on them. Miss Eshelby considered the Claimant's annotations but saw no reason to change the virtually verbatim notes that had been prepared as she thought they reflected what the Claimant had actually said at the meeting.

47. Miss Eshelby upheld the allegations about the USB and the Claimant's employment history and decided that the Claimant should be dismissed for gross misconduct. The allegation in relation to Mr Connolly was held not to amount to a disciplinary offence. The dismissal letter informed the Claimant that his last day in service would be 12 November 2019, the date of that letter. Accordingly we find that 12 November 2019 was the effective date of termination of the Claimant's employment. The dismissal letter also said that his details would be entered on the Internal Fraud Database because he had committed misconduct involving dishonesty. This meant that the Claimant's details would be placed on the Civil Service Internal Fraud database for five years and he would be prevented from seeking re-employment with the Civil Service during that period.

48. Our findings in relation to the specific allegations upheld by Miss Eshelby are set out later in this judgment.

49. So far as procedure is concerned, the Claimant has complained that Miss Eshelby did not follow the Respondent's policy with regard to taking account of mitigating factors because she failed to give him an opportunity after the meeting to submit evidence of mitigation. However, in this respect the Claimant had misread the Respondent's policy, which permits the Decision Maker to decide when to ask for mitigating evidence. In the Claimant's case, he had been asked in the letter inviting him to the disciplinary meeting to provide mitigation evidence. He was also given multiple opportunities in the course of the meeting itself to put forward his case and anything else he wanted to add. He also had, and took, the opportunity to advance further points when commenting on the notes of the meeting. One of the agreed issues for this hearing was that the Claimant contended Miss Eshelby had failed to take into account a mitigation document that appears at pp 740-742 of our bundle, but this document was not submitted by the Claimant until the appeal stage so Miss Eshelby could not have taken it into account. At the hearing the Claimant asserted that what Miss Eshelby had failed to take into account were his comments on the meeting notes, but we find as a fact she did take these into account. However, she did not consider that they accurately reflected the meeting, or that they should change her decision.

USB storage device use (Discrimination Issue (e) and Victimisation Issues (c) and (d))

50. So far as the facts concerning this USB incident are concerned, we find as follows:-

51. It is not in dispute that the Claimant attached a USB to his laptop with the intention of taking a headcount document (or, at least, part of it) home. Nor is it in

dispute that this document was, in its complete form, a sensitive confidential document containing personal and financial data of the Respondent's employees. It is also not in dispute that as a matter of fact the Respondent has a policy prohibiting the use of non-encrypted storage devices (such as USB sticks) and that in the Security Breach policy "Installing/use of unapproved software or peripherals on corporate IT platforms" is listed as something that can constitute gross misconduct. What is in dispute is whether the Claimant knew it was wrong to connect a USB with the intention of downloading material to take home, and whether (in broad terms) in the disciplinary proceedings that followed, the Respondent's failure to accept that the Claimant had made an innocent mistake and/or that he did not intend to take sensitive data home and/or to regard these as mitigating features was unlawful discrimination or victimisation.

52. In the letter of 12 November 2019 notifying the Claimant of his dismissal, Miss Eshelby relied on witness evidence from Ceri Wyatt and Miss Mehta as showing that the Claimant knew, or ought to have known, what was right and wrong regarding IT use. She also relied on his own statement that he had intended to remove the sensitive elements from the document before downloading it onto the USB as evidence that he understood the need for data security.

53. Ms Wyatt's statement, given by email and in typed-up form on 27 September 2019, was that on 25 September 2019 she was working close to the Claimant. She stated: "During the day he asked me about what were the rules regarding conflict of interest? I replied that he would need to check as I had not had cause to know and was unaware of the policy details. He also asked did I know what were the rules were regarding the use of memory sticks? I replied that I wasn't sure but he should check as I doubted that their use would be appropriate." At the disciplinary hearing on 5

November 2019 the Claimant disputed Ms Wyatt's account. The Respondent's notes of this and the Claimant's corrections are not entirely consistent, but the essence of the Claimant's case was that he had not asked Ms Wyatt about use of a USB. He said that he had asked her about whether he could take the headcount sheet home and that she had said that she was not sure, from which he took that he may be permitted to take some documents home, but not others – it was “conditional” as he put it. The Claimant then went ahead and connected the USB. He said (both in the Respondent's version of the notes, and more emphatically in his corrections to the Respondent's minutes) that he was intending to delete information from the document so that he had just the headlines (which he regarded as non-sensitive) and which he could then take home to use on his laptop at home (which, he told us at Tribunal, though not the Respondent at the time) had more up-to-date software with which he could better create a ‘pivot table’. He also said, and his trade union representative at the disciplinary meeting emphasised, that he had inserted the USB stick openly in full view of the office and so could not have been intending to hide anything. He also referred (at appeal stage, but not before Miss Eshelby) to having seen employees taking their laptops home and to one other employee using something that looked like a USB (but was not) on their laptop. He gave this evidence by way of explanation for why it had not occurred to him that merely inserting a USB was against the Respondent's policy.

54. In her decision letter, and in further detail in her evidence to this Tribunal, Miss Eshelby explained that she had accepted Ms Wyatt's version of her conversation with the Claimant in preference to that of the Claimant. In any event, what she had considered crucial was that the Claimant, despite agreeing that Ms Wyatt had said that she didn't think it would be appropriate to take a headcount chart out of the office

and that he should ask someone, had gone ahead without checking further and connected the USB with the intention of downloading the document (or part of it) onto it. Miss Eshelby set that out in the decision letter as follows: “When we spoke you did not advise me that your [sic] had sought permission after being advised that it was unlikely to be appropriate.”

55. Miss Eshelby further noted in the letter the Claimant’s case that he had intended to delete the sensitive personal data from the document before removing it from the building but she did not accept this as there was no proof of this.

56. This is not an unfair dismissal claim, but we have considered whether Miss Eshelby’s conclusions with regard to the USB stick incident were reasonable, since if they were unreasonable this might be evidence from which we should infer discrimination. However, we consider that Miss Eshelby’s conclusions were reasonable. The Claimant at the time and in this hearing has been overly focused on points such as whether he ought to have known that the mere act of inserting the USB stick was against the Respondent’s policy. This was not, however, what was of principal concern to the Respondent. As a matter of fact, the mere insertion of the USB stick was against the Respondent’s policy, but what Miss Eshelby reasonably considered made the Claimant’s conduct culpable was that that he had proceeded with attempting to download onto a USB stick a sensitive document having been advised that it was probably inappropriate and he ought to ask someone before doing so.

57. We also consider that it was reasonable for Miss Eshelby not to accept the Claimant’s assertions that he had intended to delete the sensitive data. If that were really the case, one would expect him to have done that before downloading the headcount chart onto his desktop (that alone also being a breach of the Respondent’s

standard IT operating procedures in which everything is to be stored in the cloud) or before inserting the USB stick. However, the Claimant did not suggest to Miss Eshelby at any point that he had done or even started doing this. It is right to note that when appealing he did say that he had started deleting data from the headcount document on the desktop, but that is not what he told Miss Eshelby. Based on the material before her it was reasonable for her to reach the conclusion she did.

58. The Claimant has made other complaints about the Respondent's investigation and decision-making process regarding the USB incident, which we also deal with here.

59. Mr Whitehouse-Hayes' Case Summary, which the Claimant was sent before the disciplinary hearing, stated "Use of USB and other portable storage devices is set out at the IT induction". The Claimant alleged that Mr Whitehouse-Hayes was being dishonest when he made that statement, in breach of the Civil Service Code of Conduct. However, Mr Whitehouse-Hayes explained to us that he included this based on his own recollection and experience of undertaking at least two IT inductions with the Respondent. His recollection was that the inductions had been "stringent on IT data storage devices" and it was therefore an assumption on his part that this would have been covered at induction. We found Mr Whitehouse-Hayes to be a frank and genuine witness, who gave clear, straightforward answers to questions and readily accepted where he had made mistakes. He also told us that as someone who is very experienced in dealing with disciplinary investigations, he was always conscious that cases could end up in employment tribunals and that everything he wrote would be disclosable and that his every action may later be scrutinised by a Tribunal. We therefore accept what he said about why he included the point about IT induction in his Case Summary and that he was not being dishonest.

60. At the disciplinary meeting the Claimant disputed that use of USBs had been covered in induction. As a result, as already noted, Miss Eshelby did not rely on what was said at induction in her decision. The Claimant requested that Miss Eshelby should provide him with details as to what was covered at IT induction and she passed that request on to Mr Whitehouse-Hayes. Mr Whitehouse-Hayes, aware that Miss Eshelby had decided not to rely on it, suggested to the HR advisor Mr Pickering on 26 November 2019 that this was a request that did not need to be responded to. The Claimant argued that this was further evidence of Mr Whitehouse-Hayes knowing that he had lied on the Case Summary and trying to cover it up. Mr Whitehouse-Hayes denied that. He said he genuinely did not think that it needed to be investigated given that it had not been relied on, but when the Claimant appealed HR advice was that he needed to investigate. We again accept his evidence on this issue. In addition to the reasons given above for accepting Ms Whitehouse-Hayes' evidence, on this particular point we find what he said entirely plausible and consistent with his other evidence. He was not trying to hide anything. Further, he did subsequently investigate and, after much to-ing and fro-ing with those responsible for IT induction, he established that there was no consistent approach by them to covering this point in induction and therefore it could not be relied on as a reason why the Claimant ought to have known not to use a USB stick. That this should be covered in future inductions was one of the learning points that Mr Whitehouse-Hayes relayed to Ms McDonald on 25 November 2019. He also conveyed this to the Claimant on 4 December 2019, attaching a list of what was covered at IT induction. Mr Whitehouse-Hayes had added to this list as supplied to him by IT that "IT Policy" was covered at IT induction. This reflects his email exchanges with IT personnel and we do not see that this adds anything material at this point. When conveying this to the Claimant

Mr Whitehouse-Hayes made absolutely clear that IT induction had not been relied on in dismissing the Claimant, but the Claimant has nonetheless maintained to this hearing and throughout the hearing complaints about Mr Whitehouse-Hayes' handling of this issue."

8. On 6 March 2021 the claimant wrote to the Cabinet Office Public Correspondence team. This is, as the name suggests, a team which deals with correspondence from members of the public, and would not normally be concerned with employment matters. He also corresponded with the respondent regarding the USB stick the non-return of which was an issue before the Stout tribunal.

9. He subsequently issued a second ET 1 which was received by the employment tribunal on 24 May 2021.

10. The subject matter of the claim was, first the failure to return the USB stick, which he claimed to have been an act of victimisation. Second, five instances which alleged that false reports had been made relating to him to the police.

11. The third set of claims related to events said to have taken place on 25.3.21 all dealing with the "false reports". These are in effect the failure by the Public Correspondence Team to respond to the matters raised by the claimant in his letter of 6 March 2021, the 25 March date being the notional date by which, he says, he should have had a reply in line with the respondent's policies.

12. The respondent served a response to the second claim, asserting that it amounted to a repetition of the previous claim, the claimant thereby being debarred from relitigating matters which had been raised and adjudicated upon in that claim.

13. It said that, in so far as new matters were complained of, they could and should have been raised during the course of the previous hearing and thus in accordance with the rule in **Henderson**

v Henderson, it was vexatious and abuse of process for the claimant to raise them in the second claim.

14. It was also contended that, as the claims had been presented outside the three-month time, it was not just and equitable to extend time, and the tribunal should strike the claim out on that basis.

15. On April 2022 a preliminary hearing took place before Employment Judge Burns, sitting alone, at the London Central Employment Tribunal.

16. Judge Burns delivered a written judgment with reasons on 22 September 2022, striking out all of the claimant's claims.

17. The claimant appealed, and this has been the hearing of those parts of the appeal which have been permitted to proceed.

18. Ground 2 reads as follows, as permitted:

“For the abuse of process issue, the ET has not given proper broad merit-based consideration as required by *Johnson V Gore Wood and Co* 2002 2 AC 1. The ET did not address or credit the “special circumstances” (*Henderson V Henderson*) referred to by the claimant. The ET did not address the fact the respondent did not claim “unjust harassment” (*Bon Groundworks Limited V Foster*.) The ET did not address or credit the claimants attempt to resolve the issues without litigation. (*James v Public Health Wales*). The judgment contradicts the precedent set by *Johnson*. “

19. Ground 3 reads (as permitted):

“(4) In determining estoppel, the ET misunderstood what constitutes identity as defined by *Virgin Atlantic Airways Limited V Zodiac Seats UK Limited* (2013) UKSC for the USB allegation. This misunderstanding is primarily due to the ET misrepresenting the claimant's allegation.

(5) the ET has made a finding contrary to *Bon Groundworks Limited V Foster* in ruling that a judgment on issues which was (sic) never referred to in the ET 1 or added on by amendment

can give rise to estoppel. The ET has implicitly ruled in paragraph 71 that there can be estoppel from a judgement given in excess of jurisdiction and even from a judgment not given (paragraphs 47 to 49) It has also rule estoppel (sic) can arise from a judgment given on an issue which did not constitute a “necessary ingredient”. The ET’s ruling that it determines its own jurisdiction is contrary to the law and no reasonable tribunal would conclude this to be the case.”

20. Finally, Ground 7:

“(12) the ET misrepresented the allegation and due to this misunderstanding, it is misapplied to the precedent set in Virgin Atlantic Airways of what constitutes identity. The victimisation allegation made concerning the USB in the previous claim and the claim before EJ Burns were not identical in content, timing and place, persons involved, and the protected acts on which it relies. Proper assessment of the evidence before it would not have concluded the allegation are identical (sic)”

21. Mr Carr KC said as follows, regarding these grounds:

“On Ground (2), with some hesitation, I concluded that it was arguable that the Judge had taken to narrow a view on the application of Henderson v Henderson which impacted on the conclusions reached on Issues 7.2(d) and (e).

On Ground (3), it seems to me that there is room for argument on the basis of the comparison of ‘issues’ as between the findings reached by the Stout Tribunal and the matters which the Appellant sought to raise.

I also allowed through Ground (7) as it was in my view arguable that the Judge had not focused on the detriments which the Appellant relied on and which were said to have flowed from the lack of a response to his letter of 6 March 2021.”

22. I have adopted the reasons given by Mr Carr KC as more neatly summarising the legal points under appeal than – with respect - the rather rambling original grounds.

23. Ground 2 concerns issues identified by Judge Burns as 7.2(d) and (e). These are identified in her reasons as follows:

“(d) On 14.11.2019 – the respondent filed a further false report against the claimant to SO15

(e) On or around 21 November 2019, the respondent’s security team filed or was misled into filing false reports against the claimant on an internal report (GCSO Briefing Note – Insider threat)”

24. Ground 3 does not concern specific listed issues but is of general application to the discrimination claim.

25. Ground 7 concerns the non-return of the USB stick, as an act of victimisation,

26. In his skeleton argument Mr Kirk points out that, regardless of the merits of the arguments raised by the claimant, it would make no difference to the outcome, because Judge Burns struck out the entirety of the complaint of race discrimination, which included the specific allegations which fall within grounds 2 and 3. This appears at paras 58 to 67 of Judge Burns reasons which are as follows:

“58. In addition, or in the alternative, I consider this claim should be struck out by the employment tribunal under rule 37(1)(a) on the basis that the claimant has no reasonable prospects of success of a tribunal finding the claim has been brought in time.

59. The claimant found out about the existence of the emails authored by Mr Waller in the first half of October 2020. He waited, however, until 24 April 2021 to contact ACAS to initiate the early conciliation process in connection with the new claims. This was some six months later. The early conciliation process ended on 18 May 2021 and his claim was submitted a few days later on 24 May 2021.

60. Although I asked the Claimant whether he could explain this delay as it is not justified by the explanation that he was waiting for the judgment in the first tribunal hearing to be issued before taking further steps. It was sent to him on 26 November 2020 shortly after the hearing took place. 61. He did not offer any reason why he did not bring his new claim sooner. Instead, he argued that because he had sent a further complaint to the Respondent about the report in 6 March 2021 this created a continuing act under section 123(3)(a) of the Equality Act. In my view, there are no reasonable prospects of him succeeding with this argument. In addition, absent an explanation for the delay in presenting his claim earlier, I conclude that there are no reasonable prospects that a tribunal would extend time on a just and equitable basis to allow the claim to proceed.

62. I add that if the conclusions I have reached about the allegations numbered 7.2 (a) to (c) being covered by issue estoppel, I would also strike them out under rule 37(1)(a) for the same reasons related to them being out of time.

63. I turn finally to the briefing note which is the subject of the new allegation numbered 7.2(e). I have not been provided with a copy of the briefing note. I understand from what the parties told me that it is an internal newsletter for security staff at the respondent which included a summary of the actions taken in connection with the security concerns that the claimant's disciplinary investigation raised. Although not written by Mr Waller, it was based on information provided by Mr Waller. I was told it identifies the actions taken by Mr Waller.

64. Unlike the two reports made to SO15 there is no mention of the briefing note in the judgment. In addition, unlike the two reports made to SO15, where the author Mr Waller was present at the hearing, Mr Roberts, the author of the briefing note was not present at the hearing. The claimant did have the opportunity to cross examine Mr Waller about it and did so.

65. Although the circumstances concerning the briefing note are slightly different to the reports, I do not consider these differences lead to a different conclusion. The tribunal had the briefing note adduced in evidence before it and heard evidence about how it. In my judgment, the most likely explanation as to why the judgment did not mention it was because the tribunal considered it to be irrelevant. I conclude this was because they had examined and were able to make findings about Mr Waller's actions themselves and did not therefore need to be concerned with any internal summary of those actions. Had the tribunal considered that the report was important for context, I am confident it would have said so.

66. My decision in relation to the allegation numbered 7.2(e) is therefore the same as for the other allegations concerning the report. It should not be permitted to proceed because it is an abuse of process. In this case, the reason is not because it was previously considered and so is covered by issue estoppel. Instead, I consider it is covered by the rule in *Henderson v Henderson*.

67. This allegation is also out of time. Although it is a month less out of time when compared to the other allegations because the report was only disclosed during the course of the hearing, I do not think this makes a difference when the claimant has not provided any explanation for why the claim is out of time."

27. In the grounds of appeal, there is no challenge to the findings as to allegations being out of time.

28. The claimant's skeleton argument purports to deal with the "Out of Time" point at paras 28 to 32. It does not address the respondent's point that the discrimination claims were struck out in addition to, or in the alternative to the arguments relating to abuse of process, *Henderson* and other points.

29. In my judgment, Mr Kirk is correct to say that, the Judge having struck out the discrimination claims on a separate “additional” or “alternative” basis, the remaining arguments are academic. However, in case I am wrong about that I will deal with them on their merits, albeit briefly.

30. Allegation 7.2(d) concerned a report dated 14.11.2019. At para 51 of her reasons Judge Burns commented that the Stout tribunal did not deal with this, as Mr Waller was not the subject of a discrimination claim. However, the report was in evidence and Mr Waller was cross-examined about it. Judge Burns was wrong as to the date when the claimant first saw the report, but held that this was irrelevant and that he had had time to seek an amendment to the claim.

31. I have seen extracts from the note of evidence before the Stout tribunal. It is clear that the Claimant was specifically asked about his intentions with regard to the questioning of Mr Waller and disclaimed any intention to raise a fresh claim. This supports the findings of Judge Burn at paras 53 and 54 of her reasons, which in summary hold that the claimant was aware of the significance of the report and was aware, too, of his ability to seek to amend to add a claim.

32. Allegation 7.2(e) was concerned with a briefing note, as mentioned above, dated 21.11.19. It was in evidence at the Stout tribunal but there is no reference to it in the reasons. It was clearly a summary of other reports, as distinct from an entirely separate report.

33. Judge Burns held that it, too, should be regarded as subject to the Henderson v Henderson principle because the claimant was aware of it and could, had he wished, raised it as an issue by amendment. For that reason it fell foul of the principle.

34. I have forborne in this judgment from a detailed exposition of the law. The claimant’s skeleton argument makes reference to a number of authorities but makes highly generalised points, without applying them to the facts of the case. Henderson and Henderson, as Judge Burns makes clear, prevents a party from re-litigating issues which have *or could have been* litigated previously.

35. In my judgment, Judge Burns has adopted a reasonable approach to these issues in accordance with the correct principles and has reached conclusions which were open to her.

36. So far as the victimisation claims are concerned, Judge Burns concluded, at paragraph 71 -73 of the reasons, that these were not new claims. Although presented slightly differently they were in reality the old claims raised as new complaints to the Public Correspondence Unit, which were, the respondent says, not responded to due to staff absence. A fresh complaint, she held, cannot re-start issues which have already been litigated. At para 73 she held that the proper time to raise any issues regarding Mr Waller was at the time of the original tribunal.

37. Again, it seems to me that this was a conclusion that she was entitled to reach, on the material before her.

38. I turn finally to the USB stick – Ground 7. It was originally pleaded that the stick was lost. That changed and it was then said that it was retained but because of Covid it was not accessible. Subsequently the respondent confirmed that the stick was indeed lost and a near-identical replacement was sent to the claimant, who refused to accept it.

39. Findings were made by the Stout Tribunal that retention of the USB stick had nothing whatsoever to do with the claimant’s race of any protected acts.

40. In the course of the hearing before me I asked the claimant about the USB stick, and its value. Although initially reluctant he conceded that (although a modern equivalent would have greater capacity) its value would have been around £15.

41. Judge Burns concluded that the conclusions of the Stout tribunal regarding the stick, and, in particular the findings as to the lack of any link between protected acts and/or race, and what happened to the stick were such as to bring the matter within the principle of issue estoppel. She indicated that, had she not done so, the arguments as to the absence of prospects of success and it being a vexatious claim might well have found favour. However, as she made no ruling on these points they are of no assistance to me. The ET1 in the second claim refers baldly to “the respondent not returning my USB” as the relevant act of victimisation”. However, it also asserts that “the respondent had returned the USB but it was the wrong one”. This was confirmed by the claimant

during the hearing before me. Clearly this was on a different occasion from when a replacement was sent and before the second claim was started. The findings of the Stout tribunal as to the lack of any vindictive motive clearly resolved this issue. Moreover the claimant was sent what had been thought to be the stick prior to the second claim, and the sending of a blank replacement in 2021.

42. In my judgment Judge Burns reached conclusions on issue estoppel which she was entitled to, the parties and the issues being the same.

43. Consequently the appeal fails.