



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr H Hinds **AND**

Ministry of Justice

Heard at: London Central

On: 6, 7, 8 June & 1 to 9 November
2016; and 10, 11 November 2016 &
26 & 27 January 2017(chambers)

Before: Employment Judge D A Pearl
Ms L Chung
Mr M Javed

Representation

For the Claimant: Mr M Jackson (Counsel)

For the Respondent: Mr M Purchase (Counsel)

JUDGMENT

- 1 The claim of unfair dismissal fails and is dismissed.
- 2 The claims of direct race discrimination, harassment and victimisation fail and are dismissed.
- 3 The holiday pay claim is dismissed.

RESERVED REASONS

1 By ET1s received on 9 June and 22 June 2015 the Claimant claimed constructive unfair dismissal and race discrimination, victimisation and harassment. The details are relatively sparse and further information was in due course provided by the Claimant. There was an initial preliminary hearing for case management on 6 October 2015 and a further hearing took place on 17 November 2015. By this date the further information had not been given. There was a third preliminary hearing conducted by the current Employment Judge on 28 April 2016, which was under seven weeks before the start of the listed

hearing. On this occasion the parties presented an agreed draft list of issues. The hearing was described as “principally a tidying up session in the light of the Claimant’s recent change of representation.” Some minor amendments and clarifications were made to the draft list of issues but, at this stage, it would have been difficult if not impossible to reject these agreed issues so close to the hearing. The list of issues is annexed marked A.

2 The drafted issues in relation to the Equality Act set out claims of victimisation, direct discrimination and harassment. In all cases the detrimental treatment is said to be that referred to in paragraph 10 of the list of issues. Paragraphs 10(b) to (m) either allege specific matters or grouped allegations of detriment by referring to “the manner” or “the approach” or “investigation” in which it is alleged the Respondent acted in various respects. However, paragraph 10(a) refers to the treatment of the Claimant by his line manager and other employees which is identified at pages 12 to 17 of his further information. We will turn to this again in our conclusions but it is worth noting at this point that these pages in the further information in effect set out a chronology of events which according to the Claimant occurred at work; and we have counted about 60 specific allegations. Given that they are said to be one or more of three potential causes of action, it will immediately be apparent that the tribunal has, potentially, a considerable task before it when adjudicating. As was made clear at the outset of the hearing each of these matters, together with the other claims that can be seen in paragraph 10, is said by the Claimant to be a freestanding cause of action, alternatively part of an act extending over a period.

3 In resolving the issues we have heard evidence from the Claimant and we have received in evidence a statement of a witness. We also heard evidence from Ms McKean, Mr Mead, Mr Copeland, Mr O’Mahoney, Mr Buckle, Mr Davison and Ms Munley from the Respondent. We have studied documents running to over 1350 pages together with some further documents that were handed in during the course of the hearing.

Facts

4 We observe at the outset that the factual background to this case is highly intricate and that it is not our function to resolve each and every disputed issue of fact that has emerged during the course of a long hearing. What follow are our findings that are relevant to the issues in the claim.

2010/2011

5 The Claimant worked in the Mental Health Casework section, in a part of the National Offender Management Service (“NOMS”). The evidence establishes that at both EO level (to which the Claimant was promoted) and at higher managerial levels, decisions of considerable significance and importance are taken in relation to approximately 6000 restricted patients, many of whom are the subject of Hospital Orders. The Claimant began employment in NOMS in June 2010 at the AO level. He was attached to Team 3, which was one of three teams that dealt with the casework for these patients. He had an excellent interim review by his manager on 21 October 2010.

6 In the Claimant's further information (page 63) are three allegations of harassment, victimisation or bullying, as they are described, which relate to September and October 2010. There has been little evidence about this and it may well be that there is little that the Respondent can say about these allegations of over six years ago. Although dealt with in his witness statement as incidents, it is relevant at this point to refer to some of the introductory remarks in that statement. The Claimant maintains that he is pursuing this claim on the basis "that the numerous alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs..." He goes on immediately to say that the common feature to most of his pleaded particulars is that "my managers take turns in either discriminating against or harassing me and that I complained about these instances. In other instances my colleagues are abusive verbally and in emails to me. I was accorded a number of apologies but the abuse continued from the same people despite me informing my managers some of whom carried out the abuse."

7 In relation to these early allegations, the first is that a fellow employee, Ms Etienne, who the Claimant describes as possibly being Afro-Caribbean, wrote a condescending minute about him. The Claimant says that he reported it to Ms McKean (who was the leader of the Mental Health Casework section) and that she reprimanded Ms Etienne. The Claimant says that he left matters there. It is difficult to see how this can support any claim of discrimination or the like. The second matter is that another colleague, Ms Pocknall, (race unspecified) refused to train the Claimant on 17 October 2010. The Claimant alleges that Ms McKean did nothing about this. The third matter is that she ignored the Claimant on another occasion and was rude to him. On this occasion the Claimant acknowledges that Ms McKean reprimanded Ms Pocknall. The tribunal can see no link between any of these early matters involving difficulties with colleagues and the later complaints made by the Claimant.

8 The Claimant was keen for promotion and it seems that he applied in November 2010. He did not obtain it at that time. In January 2011 he asked Ms McKean to give him an update on his promotion prospects and she said that she would. On 14 March 2011 he wrote again to her (page 95) and said that since November's interview he had waited patiently and he was particularly anxious to secure promotion because new employees were starting in his section. Ms McKean replied the next day and told him about the process. She said that he remained on the merit list for EO caseworkers as he had been assessed as meeting the criteria for the post and that there were circumstances in which he would be offered a post. She said that the situation was "no reflection on you as an individual."

9 The Claimant responded on 15 March in an email which acquires considerable importance for the purpose of his victimisation claim. He said that he had no doubt that he was the strongest candidate back in November, that he believed that his inexperience meant that he could not be promoted then but that he was virtually assured he would at some point get a promoted position. He said that he was very confident of his personal abilities as an administrator "... And my university education speaks for me ... I also notice that British black

Caribbean males are alarmingly underrepresented in this department at EO grade something I strongly feel needs to be addressed as women and other groups appear to be represented and seen on a wider scale."

10 Ms McKean replied and said that there would be vacancies and she referred again to the redeployment procedures. She accepted that it was a frustrating time for people in NOMS, as well as the wider civil service, who wished to progress. She ended her email by saying: "you may be interested to read the NOMS Staff Diversity Report which was published this week, and is on the Intranet." This report is R1 and is entitled Annual Staff Diversity Review 2009/10. It was published in March 2011 and related to a period when NOMS was under a statutory public sector requirement to publish data on employment functions and the impact they have, inter alia, on different racial groups. On page 4 there is a recognition that BME staff were less likely to be promoted across all grades; and this was most pronounced at the administrative senior management level. The Claimant's overall case is that Ms McKean, as well as a range of other managers who subsequently came to hear of or read his email, took his comments amiss, to the extent that they subsequently victimised him. We will later give our conclusions as to whether or not there is any evidence to support this claim.

11 We pause at this point to note that it is no easy matter trying to match up the various allegations contained in the witness statement with those in the relevant pages of the further information that have become incorporated in the list of issues. Thus, to take one example, there is an allegation against Mr Buckle (the first allegation on page 62 on the 13th page of the further information) concerning a conversation about heavy-metal music on 16 September 2010. This does not appear the Claimant's witness statement. Another example is that the witness statement sets out detrimental treatment that the Claimant says he was subject to after he sent the email to Ms McKean on 15 March 2011. He says that he was sent to Coventry and that he received hostile looks from Mr Buckle, with whom Ms McKean must have shared the email, and also other colleagues. These points do not occur in the further information. At a later point in these Reasons we will give our conclusions as to the reliability of the Claimant's evidence. As a matter of factual finding, we are unable to find that he was sent to Coventry, as he has alleged, and we are also unable to accept that Mr Buckle was making a racially stereotypical comment when in September 2010 he is said to have spoken to the Claimant about their respective tastes in music. We accept Mr Buckle's firm denial that he made any similar comments.

12 The Claimant received another good appraisal on 25 May 2011. About a month later he was promoted. There was some confusion as to whether or not his promotion was permanent and this was raised with HR. The written evidence indicates that he was told that it was permanent. We also note page 108 that shows that Ms McKean had an understanding that no NOMS appointments were being made on a permanent basis, although she thought it was good news if that understanding on her part was wrong.

13 The Claimant alleges that after his promotion Mr Buckle became hostile towards him and that between June and September 2011: (a) he kicked the back

of his chair as he walked past; and (b) he asked the Claimant where his parents were from and, on being told, said "a lot of people from the Caribbean come over here to scrounge and then go back to their country."

14 Mr Buckle categorically denies making any such comment. A notable feature of this point in the chronology is that the Claimant made a clear complaint against others and asked to be moved to a different team. On 6 September (page 110) and at a time which would have been under an hour after the alleged comments he made, Mr Buckle wrote to the Claimant, whom he managed. He started by referring to some examples of escorted and overnight leave requests and commented that during his training the Claimant would not have been shown these forms. "I'm sending this not in any way as a criticism of what you have done to date, but hopefully as examples you can look at to help develop your own submissions to myself." The other matters in the email relate to operational issues and there is no criticism of the Claimant. Mr Buckle said he hoped that the emails helped "... I know that there is a lot to take in but I have every confidence in you to deliver."

15 The response from the Claimant 11 minutes later was as follows. "John thanks for this. As you know I am unsettled in this team. I was as an AO and feel that way as an EO. There is not a fit. I would be best fitted into Graham's team as I found the 2 week experience there fulfilling, helpful and enriching. I find my experience in team 3 draining with accusation upon accusation, hostility, stares, looks, uncomfortable silences and loud voices."

16 There were further issues with colleagues which are documented and eventually Ms McKean met with the Claimant to discuss what are described in her email as his continuing concerns about working in team 3. The email chain shows that it was the Claimant's email of 1 December 2011 which led directly to the meeting. In this email he set out that he was being undermined by a colleague, Mr Singh, who was openly questioning his decision and seeking support from other caseworkers. He refused to carry out a request from a manager. The Claimant felt undermined and disrespected in team 3. "This cannot continue a minute longer. I am happy in my work but unable to efficiently manage my caseload because of the insolence of Mr Singh and lack of show of support from the managers."

17 As far as the tribunal can tell, this would have been the first opportunity at which the Claimant, at the 3 December meeting with Ms McKean, could have set out to her in person all the matters that were concerning him. She wrote to him on 6 December 2011 at pages 118 to 119, in which she records that the Claimant had raised additional issues to those set out in his 1 December email. She records the Claimant complaining that John Buckle discussed errors with him in a different way to the manner he adopted with others. He said that Mr Buckle had had a go at him. Otherwise, there are no other concerns raised although it was clear that the Claimant was making complaints about his manager and that he must have mentioned discrimination: see page 119. The text suggests that this is restricted to the way in which errors were pointed out and there is no evidence anywhere in the case, from either party, that at this meeting the Claimant made

Ms McKean aware of such allegations as the “scroungers comment” or kicking the back of his chair.

18 In relation to the complaints against his manager, at least those of which she was aware, Ms McKean advised the Claimant that he could make a formal complaint using the grievance procedure although she stated that in the absence of evidence she thought the outcome would not be favourable. Nevertheless it was a matter for him and any investigation would be carried out by somebody outside his management chain. She also suggested mediation and sent him some details of that. Earlier in the email she dealt with specific operational issues concerning colleagues and Mr Singh and we need not recite this detail.

19 It is clear that he asked her to move him to another team: “you said you had tried to make conversation with others in Team 3, but they were on a different wavelength, and you noted differences between your colleagues in terms of educational attainment.” She also recorded that the Claimant felt that if he could not be moved he felt he considered he was being pushed out of his job. She said nobody was trying to do this and that there were no complaints about his casework performance. Both he and his managers and colleagues should seek to work together. The essence of her decision not to move him was set out in the following paragraph: “... Although you may not be working with the people with whom you choose to work, you are here to do a particular job and I was not prepared to move you to another team in line with your preferences. As I noted, many people may prefer to be in a different team, but moving one person had a knock-on effect on others and would cause disruption across the Section.”

20 Given that the Claimant was seeking a move, it is surprising that he did not at this meeting refer to the specific allegations against Mr Buckle we have noted above and which he has raised in the litigation. His reply to Ms McKean was that he appreciated her response. “I do think the problem stems from my being an educated, quiet individual and there being no similar personality in the team which results in misunderstanding from the group. In conclusion I will continue as I am with a view to using the mediation route should things deteriorate further. As it is I will follow MHCS processes as they are as I don’t want to cause upset by suggesting improvements as evidenced here. I do appreciate your work.”

21 We pause here to note that in the further information there are about a further 10 specific allegations between October and December 2011 directed against Mr Singh (twice), Mr Mead, Ms Dougan, Ms Green, Mr Picot, Ms Marsh, Ms McKean and Mr Buckle (twice). Earlier in the list of issues (page 57) acts of bullying in the period to December 2011 are specified as Mr Buckle criticising his work and subordinate staff questioning his work. This is specifically said to have begun after he wrote the 15 March 2011 email. At page 58 he says Ms McKean did nothing about this email. At this point, we can find with some degree of certainty that by the end of 2011 the Claimant’s relationships with others in the team were not always good.

2012

22 In mid-January 2012 the Claimant fractured his ankle and he was off work until May. He acknowledges positive emails from the team wishing him well. There is one email dated 5 April 2012 from Mr Buckle that ends "Love, John" that he says is sarcastic. We note that the body of the email is in notably sympathetic terms. This is one of the claims or allegations in the list of issues and there are in total seven specified items of detriment for 2012. One of them was the "love, John" email in April. The other six in the list run from 14 September to 18 December 2012.

23 The Claimant was at work for three weeks after his return in May and then went off sick again until July. He took some further time off in August. He applied for an interview for a further EO post at Band 5, but did not attend the interview that was fixed for 13 September. In the witness statement he states that this was because of the previous discrimination, in particular from Mr Buckle. On 13 September he was told of an allegation by Ms Etienne that he had barged into her and the next day Mr Buckle told him that she had made a serious complaint against and that the allegation was of a criminal assault. Because the possibility of dismissal for gross misconduct was mentioned, the Claimant states in the list of issues that he felt harassed; and in his witness statement he says that he felt threatened by what Mr Buckle had told him. There is no reason for us to doubt that he felt this way at the time.

24 The documents show that on 14 September Ms Etienne raised a formal complaint against the Claimant and asked for disciplinary action to be taken against him (page 196). "He has technically assaulted me in the office as I was leaving yesterday, by deliberately barging into me, causing great discomfort and pain to my arm which is still the case today." She said that she did not want the Claimant sitting near her. On the same day Mr Buckle was told in an email that Ms Etienne was still upset; and that the Claimant had a problem with his attitude and demeanour. An investigation was commissioned on 17 September. He was interviewed on 27 September: pages 185 to 188. He denied having any physical contact with Ms Etienne on the 13th. On 29 October Ms McKean informed him that she was taking no disciplinary action. Two days later she clarified that there had been no evidence to substantiate the allegation made against him.

25 In September the Claimant raised a formal grievance against Ms Etienne on the basis that she had made a vexatious claim against him. The adjudication on 31 October decided that there was no evidence that the Claimant had been subject to harassment or bullying from Ms Etienne, or that she had aided or abetted or attempted to aid or abet any other person to act in such a manner: see page 157. A recommendation was made that they should not sit unnecessarily close to each other.

26 Complaint is also made by the Claimant of an email at page 164, dated 19 September 2012, from Mr Davison. This dealt with his request earlier in the year for a footstool. Mr Davison noted that a workstation assessment had to be completed by a trained OH adviser before specialist equipment could be ordered. He said that "Linda is seeking to arrange the appointment... As a priority; a

purchase order for the appointment has been put in place. Linda will notify you as soon as an appointment has been raised. I ask you to be patient. Specifically, you are not a badger Linda, who is doing her best to bring forward the appointment.”

27 On 7 December Claimant took a colleague, Mr Shuter, to task for not completing a piece of work. He, in turn, defended himself and said “so don’t blame me for this.” He threatened that if he received any more emails of that sort he would file an official complaint against the Claimant and he ended: “I’m not here to be at YOUR beck and call.” Mr Mead, the manager, then wrote and asked both of them to calm down and he said that they had both made valid points.

28 The next incident appears to be on 18 December in an email trail that begins at page 243. Mr Mead had become the line manager for the Claimant in early November 2012. There is an allegation by the Claimant that Mr Mead accused him of making an error in front of others on 9 November. There was further criticism voiced on 18 December and the Claimant pointed out that he should not make these criticisms in front of others. In the course of the short email he referred to a reference number. In response, Mr Mead took issue with the Claimant, stated that he had given him the reference number and: “nothing I said was untrue and I object strongly to suggesting I lied. “This was a reference to the Claimant having used the term “untrue statements” in his initial email. Mr Mead remained angry and in a subsequent email on that day he drew attention to this phrase. “Under no circumstances do I expect to be addressed in that way especially when I am correct.” In the next email the Claimant again put his point of view. By the time of the next response, Mr Mead seems to have calmed down and he said that they should both take on board points the other had made. He said they clearly had a different style of working. He hoped that this would be the last time that such a situation would arise; and he was keen to develop a good working relationship with the Claimant.

29 In his witness statement the Claimant refers to applications he made for both a Band 5 and a Band 6 post at the end of 2012 and in 2013. He was successful in neither application. He alleges that this was because of discrimination but these are not issues to be decided. He also accuses Mr Buckle of blocking the Band 5 position.

2013

30 For the post for which he was interviewed, the Claimant requested feedback and this was provided on 3 May 2013, page 265. Although not referred to in his witness statement, the list of issues (page 62) alleges that in verbal feedback concerning the post in Mr Buckle's team, the Claimant was told by him that he could not expect promotion as he had made race allegations against the section. There is no evidence anywhere in the case to substantiate the claim that Mr Buckle made such a dramatic admission of victimisation on this occasion or at any other time. We will deal below with questions concerning the reliability of witness evidence. At this point we record that the allegation is inherently improbable, reflected nowhere else in the evidence and that we accept Mr Buckle’s clear denial.

31 The Claimant alleges that on 31 May 2013 Mr Mead sent him a patronising email which in part was aggressive and he comments in his witness statement "it appeared to me he had taken the place of Mr Buckle and Mr Singh." The email can be read at page 266 and the tribunal is unable to find any ground to criticise the language that Mr Mead used. The Claimant responded and said that he would do his best. Mr Mead replied and said that his best was all any one can ask for; and he acknowledged that he and the team had a large amount of extra work. The tone of these emails is studiously polite. We were also taken to emails between the Claimant and Mr Buckle on 13 and 14 June. Again, there seems nothing unusual or criticisable in these emails.

32 In the next part of the chronology there are nine allegations running from 7 June 2013 to 22 August 2013 (eight at page 65 and one at page 62.) The first is that at a team meeting Mr Buckle used ideas of the Claimant and put them for the team. The Claimant was not acknowledged as the source of the ideas. He wrote to Mr Mead on 7 June, saying that a lot of the ideas that Mr Buckle had used at the meeting "were obviously things you and I discussed and my idea. Is it possible you could acknowledge these ideas for my next SPDR please? Unless you think otherwise that is." The Claimant may be complaining about the lack of a reply, but it is not immediately obvious that one was called for and, in any event he ended the email by saying that he was happy to discuss it in a meeting the next Wednesday.

33 The next matter in the list of issues, which is undated, is that he had to remain at a faulty workstation for four weeks because Mr Buckle would not move him, seemingly because a move would take the Claimant too close to Ms Etienne. The tribunal has received little evidence about this topic from the Claimant but Mr Buckle has dealt with it at paragraph 20 of his witness statement. He did wish to move the Claimant but another team leader objected on the grounds set out above. Mr Buckle sets out the rationale for his decision at that point and there seems no good ground to criticise it.

34 The Claimant alleges that on 19 June 2013 Mr Buckle said to the Claimant "sunshine, you come here." In his witness statement the Claimant gives further detail and the gist of this is that Mr Buckle criticised him over a piece of work; the Claimant considered that he was being spoken to aggressively; and he then walked away. It was at this point that Mr Buckle is said to have used the phrase quoted above. Mr Buckle acknowledges that he and the Claimant were having a series of arguments and he does not believe that he used the term "sunshine."

35 The contemporaneous emails cast some light on this. In his email on that day the Claimant sets out his account and alleges that Mr Buckle had been scrutinising him for a long time. He referred to their having a strained relationship and that he had previously wished to move team. He did not allege discrimination or make any reference to race, but he said he was unhappy, felt unprotected and wanted to be moved, as two others has in the past been moved (Sara and Sheeba.)

36 There are then two emails from Ms McKean and, in reply, from Mr Davison, Deputy Director and Head of Offender Management and Public Protection Group. Ms McKean updated him on what had happened so far and she noted that Mr Buckle had come to her first to say that he had had a “bust up” with the Claimant. For his part, Mr Hines is said to have acknowledged the seriousness of the error that he had made. Mediation was discussed. Ms McKean also noted that the Claimant’s performance was lacking as he had many overdue items. Mr Buckle was then seen again and he contended that the Claimant was difficult to deal with. He and Ms McKean noted that he did not respond well to criticism. She told Mr Davison that she was considering requesting mediation or moving the Claimant to another team. Mr Davison in response gave his initial thoughts, as he put it. The Claimant should not be moved just because he cannot get on with his team leader. He would find someone in a new team not to get on with “... particularly given the disparaging remarks he has made in the past about the academic attainment of some of his colleagues.” He immediately asked, however, whether it was right that two other individuals had been moved because they could not get on with Mr Buckle. His further advice can be seen in the email at page 278 and he also asked whether there were witnesses to the “sunshine” remark.

37 On 21 June Ms McKean wrote and suggested mediation to the Claimant. She said that moving to another team would have wider implications and she preferred to resolve the matter through mediation. The Claimant replied and told Ms McKean that he did not have a good relationship with Mr Mead or anyone else in Team 3. He thought mediation was a great idea, he asked for counselling and he said that being in this team was affecting his mental and physical health. He asked to be moved again citing the precedent of Sara.

38 Also on 21 June the Claimant wrote an email of complaint to Mr Buckle because in the previous week, when the Claimant had a few days off work because of his ankle difficulty, Mr Buckle had written to him, asking how he was and when he might be returning. The email of the 21st to Mr Buckle read: “you are not welcome emailing me on my personal email address. I see this as a form of harassment. You are not following the HR guidance in doing this. Should you do this again, I will report you.” Mr Buckle responded that it was not harassment, that the Claimant was required to ring his manager and that he should have followed due process. The Claimant then responded with an intemperate email (see page 283D) in the course of which he said that Mr Buckle’s expression of love then hate might be part of his illness; and that he detested his behaviour. There is a veiled allegation of racial discrimination in this email in the references to “people like me” and also his signing off with these words: “in terms of diversity or behaviour should be resigned to the dinosaur ages.”

39 A few hours later the Claimant apologised to Mr Buckle for his email. Mr Buckle accepted the apology. The Claimant then wrote again and said he realised now that Mr Buckle was correct to communicate with him while he was off sick and that it was within HR rules. Mr Buckle said: “no problem-let’s move on and forget this ...” The next day the Claimant wrote to Ms McKean and asked to keep everything on the backburner as he had made up with Mr Buckle “and I’ll soldier on. Everything is out of my system and team 3 have gotten to know me

and John's little spats. I want to move on now. I think this episode was probably needed to clear the air. The talk yesterday was helpful, thanks."

40 There are two allegations in the list of issues (Ms McKean saying that Mr Buckle was not willing to mediate and her telling the Claimant he was wrong to send an email and she wants him to apologise) that are not referred to at all in his witness statement and there are no relevant papers in the bundle.

41 It is at this point in the chronology, namely about 26 June 2013, that the Claimant in his witness statement says that isolation began to set in, home and social relationships began breaking up "... and I became paranoid." There is also for this day an allegation that a white caseworker in the team, Mr Lott, put on the system a note that the Claimant was responsible for tasks that the Claimant thought Mr Lott should have done. In the witness statement the Claimant says that he was never told that anything was done about this, but it is far from clear that this is said to be an act of discrimination. In the list of issues the Claimant's email 27 June is relied upon. The preceding emails at page 293 are strikingly anodyne. The lower email on that page raises a query as to who should do the work and the Claimant asked Ms McKean in confidence whether she could help. It is a very polite email. She responded in terms that can be read on that page and said that he needed to check the reallocation to see if it been correctly assigned to him. The Claimant then responded: "ok I don't have the list from the 19th but yes thanks."

42 In his witness statement the Claimant moves on to state that: "during August the Managers of MHCS started a full blown campaign of victimisation against me. He notes that at about this time Mr Palmer, a male of Afro-Caribbean descent, was recruited as a Grade 8, Deputy Head of the Quality Assurance Team. The Claimant says this was ironic. He next alleges that on 9 August Mr Buckle used an email of his to accuse him of making an error. He goes on to say that Mr Mead then made certain statements on 9 August and the list of issues claims that these are items of discrimination, victimisation or harassment. We will set out the relevant emails in chronological order.

43 On 1 August an employee of the Nottinghamshire healthcare NHS trust wrote to the Claimant concerning a patient and alleged that he had given verbal permission that the patient may remain out of grounds at Doncaster Royal infirmary. She asked whether he was able to give a written letter of permission. The Claimant replied on 5 August saying that the authority for overnight leave had to come from a senior manager and that she would hear from Mr Buckle soon. Mr Buckle considered that the Claimant had been wrong and wrote to Mr Mead in these terms. "Another case where H's apparent unwillingness to talk to others has led to unauthorised action. It appears from the following that H gave verbal authority for overnight medical leave for a High Secure patient without discussing with anyone but then, when asked for written confirmation, could not do this under his own authority. Hence the email to me (if "FYI" counts as an email as such)." This latter reference was to the Claimant's last mentioned email to the trust being forwarded to Mr Buckle "FYI."

44 On 5 August Ms McKean in an email to Mr Mead at page 308 seems to say that the Claimant had not committed misconduct but that it was another example of poor performance. The managers now decided to take action in regard to what they saw as the Claimant's underperformance, described by Ms McKean in an email of 2 August as "the number of issues we have identified about Hainsley's casework." The email chain documents the main steps. On 7 August Mr Buckle informed Ms McKean that he had met with Mr Mead and also Mr Palmer and one other, that various procedures and materials were being gathered together and that there would be a focus on what was described as "this poor performance issue." The email ends with Mr Buckle saying: "the desired outcome is a Band 4 Caseworker who achieves the required level of output at the required level of quality while supporting and demonstrating the NOMS values, with especial regard to teamwork and consultation."

45 Ms McKean suggested an HR case manager assisting and said that in any event one would be assigned if they reached formal processes. This suggests that that stage had not been reached by this point. Further emails of that day do not take matters much further.

46 The next day, 8 August, Mr Mead wrote an important email. He said that he had been thinking about the situation and he had serious reservations about moving directly to a poor performance procedure "as I do not believe his performance merits formal procedures just yet." He thought that there had been one very serious mistake which might have been dealt with as a stand-alone misconduct issue, but that most of the mistakes were less serious. He then set out examples under eight bullet points. He went on to comment that some of the errors that the Claimant made were also seen being made by other caseworkers from all the teams. He said that the Claimant had addressed most of the concerns that he had raised with him and he noted that there were other staff whose performance was worse than his "and I am concerned that we do not treat him differently than other staff with performance issues. In previous cases where I have instigated poor performance I have usually spoken beforehand with the individual and explained the concerns I have along with a list of the errors I am concerned about. I have agreed with them a short period ... for them to reach the required standard ..." He made the argument that formal performance procedures were unnecessary and that he preferred to highlight all the errors that had come to light during the previous six weeks and give him a two-week period to improve. He thought that this would achieve more than any formal procedure at that stage but that the right had to be reserved to go down the formal route at a later point if necessary.

47 In her response of the same day, Ms McKean noted the range and number of errors and said that they were very large and gave rise to a significant risk of reputational damage. The Claimant's performance was currently unacceptable. She also noted that even if in the past poor performance had not been tackled with another employee, this was not a reason not to tackle it in this case. Her aim was to improve his performance to acceptable levels and she accepted the recommendation to proceed at that point informally.

48 The list of issues claims as discriminatory what Mr Mead told the Claimant on 9 August. In his witness statement the Claimant makes clear that he believes that at this meeting he was being victimised and it will be recalled that it is in August that he says the full-blown campaign of victimisation started. When placed in context, and in particular in light of what Mr Mead had written the day before, it is evident that he was doing his best, as we find, to assist the Claimant. This is further made clear by the note at pages 323 to 325 to which reference should be made.

49 The ensuing emails show (a) that the Claimant sought counselling; (b) that Ms McKean said she would arrange it immediately; (c) he responded by noting the extreme strain being put on his mental health. Mr Buckle had in effect called him a liar by believing the officer of the Health Trust; (d) Mr Buckle offered to move teams; (e) Ms McKean declined the offer and said she would refer the Claimant to OH.

50 By 14 August the Claimant was off sick and he returned on 19 August. He sought a move away from team 3. One of the reasons he gave was that he did not trust most of the team. When told of this, Mr Buckle said that it was very sad and "I do feel for Hainsley." He referred to the possibility of a move and said that this had happened before and "we do need to ensure we are not perceived to be discriminating against Hainsley in some way."

51 In an exchange on 20 August the Claimant said that he had been singled out for criticism. Mr Mead said in response that this was not the case and he briefly gave reasons. On a consideration of all of the evidence, there is no basis to sustain the allegation that the Claimant was singled out and the errors that managers had noted were, we find, genuinely of concern to them.

52 On 21 August the Claimant wrote to Mr Mead and said that his symptoms were coming on again, to which Mr Mead replied immediately that he should take a break. The Claimant then alleged in an email, some half-hour later, that he was being scrutinised more than anyone else. He was the first person to be put "on probation" on a daily basis. Mr Mead responded that this was not the case and in three other cases there had been monitoring to the same level.

53 On 22 August in a relatively lengthy meeting the Claimant returned to this and other complaints in a discussion with Mr Mead. The possibility of sitting away from the team was mooted. On 9 September Mr Mead gave a detailed progress report on the Claimant's work to Mr Buckle. He noted 11 categories of errors over the last 10 days' work and then said the following: "as noted, the majority of these seem to be a failure to understand the correct procedures/use of OMD. Steve Lee has agreed to provide refresher training and Gopala is prepared to act as a mentor which, together, should address most of these issues. There are clearly areas that Hainsley needs to look at and improve on... but I do think that he has done enough to avoid formal poor performance procedures. In the last two meetings I had with him he showed a noticeable change in attitude with no mention of him being singled out and a better understanding of where mistakes had been made and what the monitoring process had been for. Hainsley is prepared for me to keep monitoring his work

but I believe that at the moment QA processes should pick up the main areas although I am happy to check a few more of his cases to be sure he is correcting the errors I have highlighted to him.”

54 Ms McKean responded on the same day, saying: “provided that the refresher training takes place, and the standard of work is maintained (and hopefully improve), then formal poor performance proceedings would not be justified. I think Stuart needs to monitor, but at a reduced level ...”

55 OH reported on 23 September 2013 and stated that the capability issue was the main factor contributing to the Claimant’s psychological symptoms. Regular meetings and feedback were recommended and otherwise the Claimant was fit to work and the outlook was good. There was no underlying medical condition to prevent him carrying out his duties or giving effective service. Mr Mead on 1 October told the Claimant that the monitoring would continue, but on the normal basis that applied to the team. “I think you have made a good effort to sort this out ... and I would like to thank you for your work.”

56 There was probably some sort of incident at the Claimant’s desk on 4 October 2013 when Mr Mead shouted at him. However, it is clear that this occurred during an interaction about a patient’s record and that Mr Mead apologised that day, probably more than once. He sent an email to the Claimant: “once again apologies if I came across as rude. No offence was meant.” The Claimant replied: “apology accepted” and said that they should talk about it next week.

57 On 18 October there was an exchange between the Claimant and Mr Mead that we need not cite, but to which reference should be made. On 29 October Mr Mead sent the Claimant a draft of his midyear review that summarised his assessment of his performance. His conclusion was that the Claimant “has had backlogs during this period, some quite significant, however he is aware of the need to ensure that backlogs are kept down and can usually be relied upon to reduce these as quickly as possible. [He] is a conscientious worker who takes pride in his work, enjoying the role that he is in. Overall, [his] performance marking is an Almost Achieved however if he continues to keep the standard of his work at the required level and ensures that backlogs do not build up I see no reason why he should not merit an achieved marking at the end of the reporting year.”

58 Also on 29 October is an exchange between Mr Mead and Ms McKean in which they agreed not to trigger any warning to the Claimant for his sickness absence, under the rules. Ms McKean agreed that in these circumstances Mr Mead could use his discretion in this way.

59 On the same day the Claimant said he did not think Mr Mead’s report was fair or accurate. He said he had been continually criticised unnecessarily and that he had had to fend off “your aggressive attacks”. Mr Mead replied and said that he was disappointed in the response and he asked for evidence. This was, however, something of a crisis point for him and he wrote to Ms McKean, copying to her what the Claimant had said, and continued: “I’m afraid that I have had

enough of having to manage him. He has questioned my honesty, trustworthiness and now it seems he has the problems given below. Hopefully I will only be here for a few more weeks but I would imagine that any working relationship I had with him has now gone and I would expect it to be quite difficult until I leave."

60 On 31 October Mr Mead sent the Claimant an email, reciting 47 items of backlog. On 1 November the Claimant suggested to him that "a well done wouldn't have gone amiss." Mr Mead said that the Claimant had done well in dealing with the backlog, but that his team and helped and that a thank you from the Claimant to them would not have gone amiss. This exchange shows the difficult relationship between them.

61 On 8 November the departmental head of quality assurance, Mr Palmer, took issue with some overtime work that the Claimant had undertaken. He wrote to Mr Mead and Ms McKean: "there is no point paying someone overtime if someone else have to then complete the work they do. You will need to repeat your instructions on the tasks he is being asked to complete, with clear direction that should he submit any further incomplete work he will not be allowed to continue accessing the available overtime."

62 On 20 November nine emails passed between the Claimant and Mr Mead: pages 445 to 444. A routine matter was, over the course of these exchanges, escalated into a question of trust by the Claimant. We do not cite the detailed communications.

63 We also omit quoting the details of the performance review, pages 449 to 461. Bearing in mind the clear difficulties in their relationship, Mr Mead has set out his assessment in fair and measured language. We would refer, for example, to page 455.

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64 In January 2014 Mr Copeland, Band 5 Casework Manager, became the Claimant's line manager. At this point Mr Copeland was temporarily on promotion to Band 6. He saw problems about the backlog and also errors in the Claimant's work. As to backlogs, an email of 13 January at page 463 confirmed that there were backlogs in the team. On 15 January Mr Copeland spoke to Mr Palmer and this is documented in an email to Mr Clark and Ms McKean.

65 On 20 January Mr Copeland and Mr Clark had a meeting with the Claimant. The latter says that this was race discrimination because he was being criticised for his performance at this meeting when others were not. He claimed that they were making bigger errors that he was making. It was harassment as well as discrimination. Mr Copeland has a very different view and says that the meeting was part of an informal process that was designed to improve the Claimant's performance.

66 In resolving these fundamental disputes we find Mr Copeland's note at pages 481-482 to be of assistance. Mr Clark, Head of Team 1, said at the outset

that he was supporting Mr Copeland who was new to his role. The following points emerge from the note. (a) The managers wanted an informal monitoring period because the concerns were about his output, quality of work and attitude. (b) They said they wanted to support the Claimant and help him improve. (c) The Claimant disagreed, said that this was all because of external politics and he was being picked on. (d) The managers denied this was the case and set out details of their concerns. (e) They stipulated that at the end of each day there shall be no more than 20 items in his to do list and nothing over two weeks old. These were targets that he had to meet. He would be given help and assistance and could continue to use a mentor.

67 It is clear from his evidence that Mr Copeland took the advice, or possibly instruction from Ms McKean and that the Claimant's work was agreed not be redistributed. She also agreed or suggested the targets that were now to be set. Nevertheless, he was clear in evidence that a managerial option in January was to subject the Claimant to a formal performance process. "Because I wanted to be fair to the Claimant and I spoke to Ms McKean about that, we did not go down the formal route."

68 Ms McKean was cross-examined at length about the history and all the events leading up to the meeting of 20 January 2014. No doubt on instructions, Mr Jackson put a series of propositions to her. We will return to this in our conclusions. At this point we note that the further monitoring that Ms McKean wanted in January 2014 was said to be because she was racially discriminating against the Claimant. The reason was that he had written the email to her of 15 March 2011. She categorically denied this and we are satisfied that the allegation is groundless. It is completely at variance with what Ms McKean did when she received the email of 15 March and what she then wrote. It is improbable, and possibly irrational, to draw any link between the events of January 2014 or earlier concerns about the Claimant's performance and the 2011 email. The express allegation is that Ms McKean was so affronted by this email that she embarked on a three-year campaign to make life difficult for the Claimant at almost every turn. The necessary implication would have to be that she has also created a false email trail to cover up her real motivation. These are, in our view, wild suggestions that have no basis in the evidence.

69 On 20 January the Claimant raised a note for himself. "They gave me an informal warning about my attitude, output and workload, they're just trying to pass [their] stress on. The team needs more staff and that's the real issue. I've decided I have to leave."

70 On 22 January Mr Copeland in an email told the Claimant that his to do list was up-to-date with no backlog. The Claimant should say if he needed Mr Copeland to sit with him again or if he needed any assistance. The Claimant then thanked him by email.

71 The notes of the 20 January meeting were agreed two days later after discussion between the three managers who were involved. We see no basis to criticise this cooperation which the documents show was aimed at achieving the

clearest text, especially with regard to the Claimant's future performance monitoring.

72 On 23, 24 and 27 January Mr Copeland told the Claimant by email that he had no backlog. A weekly review meeting was to take place on 28 January. The Claimant early in the morning that day asked for a union representative to be present. Mr Copeland said that it was not a disciplinary hearing (as the Claimant had suggested) it was an informal meeting and there was no right to a union representative. It seems from the papers that the Claimant may have spoken to HR and by 11:17 am he said that he was awaiting a response from the union. Mr Copeland said he would have to attend the meeting even if he was unrepresented. This was Ms McKean's view - see page 517.

73 The notes of the meeting are not questioned by the Claimant in his witness statement. Mr Copeland began by noting the "very positive performance over the last week." There is nothing disadvantageous to the Claimant in the notes. He was told that Mr Clark would not be attending future interim reviews. The next one would be on 4 February and this meeting was also positive in tone: see page 538. "You told me that you now feel more organised, which I agree, and in turn more confident."

74 A further review meeting took place on 13 February and the notes at page 554 again strike us as being thoroughly positive. However, on 6 March an email chain from page 560-556 documents a further deterioration in the relationship. The first email from Mr Picot raised two errors to Mr Copeland and he in turn forwarded it to the Claimant with a four line commentary which is expressed in modest terms. The Claimant's short reply is unobjectionable. However the last comment he made was something Mr Copeland wanted to pick up and he said: "please be careful in future and check and see if there is any ongoing tribunal application before opening a new tribunal review." The Claimant took offence at this and in his response suggested that others must also have made mistakes and, in effect, that he was being singled out. Mr Copeland replied as follows. "It was just constructive feedback from Matt which I cannot ignore. He is looking at all work and feeding any errors back to staff, which is his job, so don't take it too much to heart. We all make mistakes, it's feedback given like this that helps us all to avoid making the same mistakes again." This was an emollient email.

75 The response from the Claimant was intemperate. "I do not trust you (management). This is because of the unfair treatment you've meted out to me in the past month and a half. The error you made in giving Derek the wrong fax number from neville black is a basic error and I believe had I done that, it would be said I'm making errors which, from my experience I should not be making, but you made it so it's not an issue. As a result I do not trust you and will not change that opinion. Do I need to explain further?" In his witness statement the Claimant says that at this point his mental health issues were escalating.

76 Mr Copeland wrote to Ms McKean that he would sleep on this "... But the way I am feeling I will not be going for the Band 6 job if I have to continue to line manage Hainsley. I do not deserve his comments. In view of his latest email, I

think it would be a good idea if [Mr Clark] is in attendance at the meeting next week.”

77 On 7 March the Claimant was told that Mr Clark would be coming. He then contacted a union representative who suggested to management that he was entitled to have one present. Mr Copeland on 10 March said that he had no objection (although he denied that there was a formal entitlement to a representative) and he tried to reschedule the meeting. It took place on 11 March and the minutes are at pages 559 to 560.

78 These minutes also opened with a statement that the Claimant had been performing positively since the last meeting and was up-to-date. It was confirmed that no formal warning had been issued and that the review period was under the preliminary action process to monitor performance. Mr Copeland is recorded as saying that over the whole period of review the Claimant had been shown to be able to meet required standards as to output “and this was to his credit.” He was more than able to achieve required standards and they had to be maintained. Although there were documented errors many of them would have been picked up if the Claimant had double read his work. “Aside from the performance standards, output and quality, there remained the question of attitude. Up until very recently, an email exchange of 6 March, [his] attitude had clearly been positive in relation to his work and the monitoring period. However, following the exchange with [Mr Copeland] it had unfortunately from [Mr Copeland’s] perspective inexplicably deteriorated, with a heightened level of tension being introduced ...” The union representative then indicated that a formal grievance was to be made against Mr Copeland, Mr Clark and Ms McKean.

79 The grievance is dated 13 March at pages 604 and following. The grievance officer was Claire Wiggins, Head of Public Protection Partnerships. One of the issues in the case is “the manner in which” she examined the grievance. The relevant Prison Service Order (“PSO”) is at page 943 and it is not in dispute that these Orders apply for historical reasons. At paragraph 1.3 it is stated that where bullying, harassment and discrimination issues are prevalent, reference should be made to PSO 810, which deals with equal opportunities.

80 On 14 March Ms Wiggins reported to Mr Davison (page 620) that she could not investigate such allegations, as they could trigger a formal investigation and that (for reasons she gave) the grievance procedure was not appropriate. This was picked up in her outcome report at page 663. This stated, of the scope of the grievance: “Although some of the issues referred to in the grievance fall outside the three months eligibility criteria, I have considered these incidents as they provided helpful context and indicate a pattern of behaviours by both the employer... and the employee... The grievance include allegations of discrimination on the grounds [of?] ethnic origin, harassment, bullying and victimisation. I explained to HH and FT that these issues could not be settled via the grievance procedure but, would have to be subject to a formal investigation. After some discussion, including some private time between HH and FT, we agreed the scope of the grievance would be to establish the following: *was HH treated differently from other members of staff when he was subject to*

performance monitoring procedures? If he was then there would need to be subsequent investigations to establish if discrimination, harassment, bullying or victimisation underpinned this. If my investigations established HH had not been treated differently to other staff in a similar position, I would not comment on these factors as part of my findings."

81 The grievance findings are dated 7 April 2014 and they need to be read for their full effect. The Claimant's view that he was treated differently from other staff whose performance was similar to his was said to be of critical importance and Ms Wiggins found as follows. "It is evident from the data that other staff were falling below the required standard but, my discussion with his line manager and head of section (LM) indicated these staff were subject to the same performance improvement measures as HH. For reasons of confidentiality the names of these members of staff have not been shared with HH, in the same way as his performance improvement measures were not shared with those not involved in the process. It is therefore likely that HH is unaware of other staff that are subject to informal or formal procedures regarding the quality of their work, nor is it appropriate for me to identify these individuals in this report. It is also possible that some staff who HH asked about any action taken regarding the quality of their work may have chosen not to share this information with him."

82 In her conclusion Ms Wiggins was satisfied that he was not treated differently from other staff who were performing below the required target. She was satisfied he was offered help and support to improve. She accepted that the two episodes of performance improvement measures were found stressful. There had been no 'mistreatment' as set out in the grievance. There were no formal capability procedures instituted and there was no warning to be withdrawn. The minutes were noted clearly, although the term 'informal warning' should not be used in future. He had not been entitled to union representation as the formal capability procedures not been invoked. Her recommendations were that separately from any measures in place to improve performance, he should be offered the opportunity to have a named person, possibly outside the unit, to provide general befriending and social support. This should not replace mentoring or counselling which should still be available.

83 The grounds of appeal were set out by the Claimant at page 655 and Mr Davison heard the appeal. He is the Deputy Director and Head of Offender Management and Public Protection Group. His conclusion on the appeal is set out at pages 660-661 and dated 15 May.

84 Before this date the Respondent received a complaint from a third party concerning the Claimant. This was on 24 April at page 679. The Claimant defended himself and made some counter-allegations. Mr Copeland did not take the matter further and we find that there is no other relevance to the claims.

85 On 6 and 7 May there were a number of communications about work matters from Mr Copeland to the Claimant. On 19 May Mr O'Mahoney became responsible for Team 1 and therefore the Claimant's line manager. The Claimant was on leave from 19 to 29 May and was sick from 10 June to 3 July. Ms Munley was Mr O'Mahoney's line manager, having taken over from Mr Clark as the team

leader for Team 1 on 31 March. The Claimant's further information makes three allegations against Ms Munley and Mr O'Mahoney. (1) On 16 May Ms Munley said that he had made mistakes and that she did not see him as one of her strongest caseworkers. (2) On 14 July Mr O'Mahoney asked him if he had only been in the civil service for four years and said that managers had been discussing him. (3) A refusal to allow the Claimant to have a telephone OH consultation. Other relevant allegations in the list of issues are: (4) preventing the Claimant from working overtime in May 2014; (5) the Claimant being graded 'not achieved' in May 2014.; (6) the way he was treated while off sick after 10 June 2014; (7) on 2 May it is alleged in the witness statement that Ms Munley said to him at the conclusion of the conversation that she bet "you must have had a lot of kids around that you don't know about."

86 The communications about work matters we have referred to are at pages 704 and 707 and other examples are 709, 710 and 711. The Claimant did not raise the complaint numbered 7 in the above paragraph. The allegation is of a highly offensive comment. Ms Munley categorically denied making a racially offensive comment of this sort and we are not satisfied that the Claimant establishes that the remark was spoken.

87 The documentation from May to July is sparse and after about three weeks off work there was a return to work form filled out on 4 July 2014. The cause of absence was said to be "workplace stress". The notes of the return to work interview are at page 766 and the Claimant met with Mr O'Mahoney. An OH referral had been made. The Claimant explained that his absence was due to stress occasioned by historical work issues. Mr O'Mahoney raised an occasion when he had telephoned the Claimant at home to enquire about his health and the Claimant had been hostile. The response was that the manager should not have telephoned once or twice a week. This problem arose again later. In any event, when asked, the Claimant said there were no other reasonable adjustments that he sought. We find that Mr O'Mahoney was prepared to offer additional support and he said as much in the phone call.

88 On 7 July the Claimant took seven days annual leave and then he went sick.¹ On 18 July Mr O'Mahoney telephoned him. The Claimant said he would be seeing his GP the next week and he still had workplace stress. The manager raised, sensibly in our view, the question of how much contact should be made with him in the light of the discussion at the return to work interview. At this point it does not seem that any agreement was reached. On 21 and 22 July the Claimant telephoned the office. On this last occasion the note from Ms Munley states "he wondered if there was an option for a telephone [OH] interview." (See (3) in paragraph 92 above.) She said that she would find out. He could telephone OH himself to see if this was possible. There is no possible discrimination in these exchanges which we consider are accurately recorded in the telephone log.

¹ We will return to these leave days in the holiday pay section of our Conclusions.

89 On 23 July he telephoned and it was noted that an arrangement had been made with OH. As to future contact, the Claimant suggested to Mr O'Mahoney that it could be deferred for three weeks and the latter agreed.

90 Mr O'Mahoney therefore called him on 14 August and referred to his arranging counselling sessions, if they were required. "Mr Hinds stated bluntly that he did not want work doing anything for him." He also said that he was not well. "Management are all the same and you are in that web and will go back and tell them everything." Mr O'Mahoney has, we find, accurately recorded this comment. It graphically illustrates the Claimant's state of mind.

91 On 10 September Mr O'Mahoney tried four times to telephone the Claimant but without success. On 11 September they spoke about counselling and the Claimant asked for the next contact to be made in a fortnight. On 6 October he declined a home visit from Mr O'Mahoney.

92 On 17 October they spoke and Ms Munley telephoned on 28 October. There is nothing of note in these calls. Mr O'Mahoney called again on 28 November and he noted the Claimant as being argumentative and rude. He said that he did not trust any of the managers and that he could not return to work at that point. Mr O'Mahoney noted contemporaneously that the behaviour exhibited was "antagonistic, rude and dismissive."

93 On 28 November OH reported – pages 827 to 829. The Claimant's strong views were noted by the OH adviser and she advised a referral for harassment/bullying intervention. He was unfit to work and there was no likely return to work date. Counselling had been offered but was refused. The Claimant had been referred by his GP for psychological assessment in July but no appointment had yet emerged. On 9 December and 3 January there were further calls on which nothing turns.

94 On 10 December the Claimant's union representative informed him that after January there could be a capability hearing. On the same day Ms Munley wrote to the Claimant at pages 837 to 838, having recently spoken to him. It is a considerate and reasonable letter. She said they could meet informally to discuss issues; or a bespoke referral for mediation could be made.

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95 Mr O'Mahoney wrote on 16 January and said that the Respondent would initiate an OHP/ill-health retirement referral for further advice. The Claimant was told that he could consent to this, although the referral could also be made without any such consent.

96 On 26 January the Claimant wrote to the managers. He alleged that the telephone call of 20 November left him in a distressed state and that the 16 January letter was a threatening letter. He alleged that Ms Munley distrusted him and he used a formula that suggested racial discrimination on the part of management; and he then alleged that he had given numerous opportunities for perceptions and behaviour of "certain staff" to be changed, but they had failed to

take these up. He referred to prejudice. Ms Munley replied on 23 February and declined to engage in lengthy correspondence with him. She said that a referral had been made to Capita about possible ill-health retirement.

97 On 27 February Mr O'Mahoney telephoned him. There is nothing unreasonable about the matters that the manager raised but on this occasion the Claimant complained that he had not been called earlier. In this telephone call Mr O'Mahoney referred to his earlier complaints about excessive contact as well as recent email contact. It is also clear from those emails that the Claimant knew that management found his 26 January letter to be offensive; and in this telephone call Mr O'Mahoney also made reference to the expressed mistrust of managers. We further note that the Claimant's letter had not asked for a response.

98 The managers telephoned him on 27 March. An OH report was awaited. The interaction appears polite. Also on 27 March the Claimant asked for annual leave to be paid so that he did not lose it. The report from OH (pages 861 to 862) was received by the managers via HR on 13 April. It suggested a phased return to work. HR gave advice at the same time as they copied the report to managers on 13 April and suggested that the Claimant be spoken to and then taken through the report. It was said that there were various options available and that these included a return to the casework team, a move to an alternative role or dismissal if the first two possibilities could not be achieved. The emails in the bundle show that efforts were then made to look for alternative posts for the Claimant, but these were unsuccessful.

99 The Claimant could not be contacted by telephone so Ms Munley wrote to him on 30 April at page 868. The letter discussed return to work and a possible meeting to be held on 6 May.

100 On 2 May the Claimant complained that there had been no communication since 28 March and that this had led to a further psychological relapse. As we have noted, managers were not sent the OH report until 13 April and they then consider their response. In replying to the Claimant Ms Munley made a similar point and she suggested a meeting. He then said that he was not fit to attend a meeting. He also asked why he had not been told of the office move. The relevant emails here are on page 878. The Claimant on 11 May asked why he had not received his payslip for April. The response from Ms Munley on 12 May stated that not everybody had received a payslip after the office move. When this arrives it would be sent on and if he did not receive it he should contact Mr O'Mahoney. She then asked about the return to work meeting and whether he would be able to attend. It was in response that the Claimant wrote as follows. "What move?? Have you moved offices without informing me? I am suffering from physical and mental issues. I will inform you when I'm fit enough to see you."

101 The response to this was: "You responded to my letter informing you of the move already so you are aware of this information." This was a reference to Ms Munley's 30 April letter that had clearly told the Claimant about the office move.

102 On 29 May the Claimant resigned, alleging serious and fundamental breaches of contract. He set out eight specific grounds and we will set them out in our conclusions.

103 In cross examination the Claimant stated that he felt that he was not wanted by the Respondent and that this was the case two weeks before he received the letter of 30 April. He was asked about the two emails that he had sent on 11 and 12 May above. The Claimant told us, by reference to the second of those two emails, that “I did not want to leave my career.”

Submissions

104 We are grateful to Counsel for their detailed submissions and we will refer to some of them below.

The Law

105 Section 13(1) of the Equality Act 2010 provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

The Claimant’s race is a protected characteristic.

Section 23(1) provides that: “On a comparison of case for the purposes of section 13 ... there must be no material difference between the circumstances relating to each case.”

Section 136(2) provides that: 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. It is then provided that this subsection does not apply if A shows that A did not contravene the provision.

Section 26 provides that “(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.”

Section 27(1) in its material part provides that A victimises 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.

As to burden of proof, the older law in Igen Ltd v Wong [2005] IRLR 258 still applies and the guidance is as follows (all references to sex discrimination apply equally to all the protected characteristics):

“ (1) Pursuant to section 63A of the Sex Discrimination Act 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of section 41 or 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as ‘such facts’.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that ‘he or she would not have fitted in’.

(4) In deciding whether the Applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word ‘could’ in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.

(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since ‘no discrimination whatsoever’ is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.”

There was further analysis of the burden of proof provisions made by Elias J in **Laing v Manchester City Council** [2006] IRLR 748, as well a re-consideration of burden of proof issues by the Court of Appeal in **Madarassy**. In the event, this latter case has confirmed the Laing analysis. In particular, we refer to paragraphs 56 to 58 and 68 to 79. Paragraph 57, in relation to the first stage analysis, directs us to consider all the evidence. “‘Could conclude’ ... must mean that ‘a reasonable tribunal could properly conclude’ from all the evidence before it.” Mummery LJ returned to the theme in dealing with the competing arguments that have emerged concerning the words “in the absence of an adequate explanation.” All the evidence has to be considered in deciding whether there is a sufficient prima facie case to require an explanation. The factor which the section “... stipulates shall not form part of the material from which inferences may be drawn at the first stage is ‘the absence of an adequate explanation ...’ ” These passages clarify the law.

Conclusions

Broad Themes

106 The way the case has been pleaded is that the incorporated allegations contained in the further information alone could call for 180 adjudications - 60 claims, each one put in three ways. This is disproportionate but it is also unnecessary. There are a number of broad generalisations that we would make at the outset based on the totality of the evidence and the facts that we have found.

The managerial scheme of discrimination

107 There can be no doubt that the Claimant’s case involves allegations of race discrimination being sustained against all or most of the managers with whom he came into contact. He also has raised other allegations against other members of the workforce. If we concentrate on the allegations in the further information (pages 13 to 17, annexed to the list of issues) 16 individuals are named as having behaved in a way towards the Claimant that is actionable under the Equality Act. About nine held managerial positions.

108 The Claimant’s case involves a consistent course of discriminatory conduct towards him on the part of his managers and also managers elsewhere. If this were true, it would necessarily follow that the witnesses who have given evidence have done so dishonestly and, further, that in the course of their

evidence they have almost certainly covered up for their colleagues. Further, because they rely on what they said in emails, these email chains would also have to be treated as self-serving, exculpatory and dishonest in their attempt to create a false documentary trail.

109 Such conduct is not, in general terms, unthinkable or impossible. In any event, a lesser degree of discriminatory behaviour could, feasibly, lie behind such allegations. But, at this point in our conclusions, we wish to note the breadth of the Claimant's allegations and also our conclusion that they are not made out. Mr Jackson recognises the extent of the allegations in submitting in paragraph 24 of his closing submission: "In light of Mr Hinds's evidence regarding his case that there was a collusion between more senior managers to ensure that he was subjected to discriminatory acts, reference may also need to be had to section 111 EqA for the purposes as to whether any person was instructed, caused or induced to act in a discriminatory way."

110 As will become clear, we reject the claim that the managers were colluding so as to achieve a targeted and consistent course of discriminatory conduct directed at the Claimant.

Ms McKean

111 She is the most senior manager who had consistent dealings with either the Claimant or his circumstances and she is the focus of a large part of the claim. She is said to have orchestrated the discrimination. We reject this and the evidence is to the contrary. There is a specific focus in the Claimant's case on Ms McKean which is central to that case and which we now touch upon.

112 The 15 March 2011 email. This is relied on as a protected act, which we are prepared to accept it is, and our findings are set out at paragraphs 9 and 10. All the claims of victimisation go back to this email. All the other discrimination (or harassment) claims in the alternative that are raised against Ms McKean also have to be traced to the same document.

113 The Claimant's case is (a) unsustainable on the evidence and (b) inherently improbable. His suggestion that Ms McKean resented what he had written immediately runs counter to the response that she gave him when she referred him to the Diversity Report. Beyond this, it is just as improbable that she would have harboured a grievance against the Claimant for the next 4 to 5 years. During this period the Claimant never once referred back to the exchange of emails. The allegation that they are the source of her animus towards him is, so far as we are concerned, a perplexing one. It is evident that the claim is, as we have commented, close to irrational. There is, quite simply, nothing in the direct evidence or even circumstantially that could support the claim. It is based on nothing but supposition.

Credibility issues

114 The tribunal is concerned with assessing reliability of evidence and we prefer that term to 'credibility'. Moreover, whichever term is used, credibility in

this sense is not indivisible. A witness can be correct about one matter and wrong about another. The difficulty that we find with the Claimant's evidence is that in the course of five years, when his relations with managers and others were never easy, he has, we conclude, convinced himself that the Respondent has been persecuting him. We treat his evidence with some caution for that reason. It does not mean that he is wrong about everything but some points of his evidence are clearly unreliable and we will refer to them below.

Constructive unfair dismissal

115 We deal with this first as it is at the top of the list of issues. The way the matter is set out there is as follows. The Claimant resigned on 29 May 2015. The fundamental breach of the implied term of trust and confidence is said to have happened after 10 June 2014 and these matters are relied upon:

- The manner in which he was treated while off sick.
- The approach of the Respondent to the Claimant's performance at work in 2014
- The manner of dealing with his grievance of 13 March 2014 and the subsequent appeal
- The decision in May 2014 to prevent him working overtime
- The not achieved grading in the 2014 year end report

An earlier matter related to these is refusing trade union representation at meetings from 9 August 2013 to 4 February 2014.

Even earlier matters relied upon are:

- The way the Respondent dealt with Claimant's complaints about mental health problems from 6 September 2011 onwards
- Bullying after the 15 March 2011 email and the manner that this was dealt with
- The manner in which the Claimant was treated after his return to work in May 2012

116 What this amounts to is that the Claimant is relying on the entirety of his account to ground a breach of the implied term of trust and confidence. Mr Jackson seems to recognise this because in his submission he refers to "a campaign of unpleasant treatment against him" "after this point..." We understand 'this point' to be the summer/autumn of 2011: see paragraphs 6 to 9 of his written submission.

117 If the Claimant fails in this broad catalogue of contractual breaches, he may yet still contend for a constructive dismissal based on what he does establish and, in particular, the alleged last straw in 2015 after the final OH report.

118 We therefore turn to our findings and we start with the period 2010 to March 2011, dealt with in paragraphs 7 to 10 above. There is no possibility of

any of the matters relied on amounting to a breach of contract by the Respondent, even less a fundamental breach.

119 In paragraph 11 we were unable to accept the allegation of a stereotypical comment about heavy-metal music or of being sent to Coventry. In paragraph 12 we noted his good appraisal in May 2011 and the Claimant's subsequent promotion.

120 The complaints of Mr Buckle kicking his chair and of making the 'scroungers' comment are not upheld. The bullying allegations in 2011 have not been made out and there is no sensible criticism to be made of the way Ms McKean dealt with the concerns that the Claimant raised.

121 In 2012, after the return to work in May, our findings are in paragraphs 23 to 29. In relation to Ms Etienne there is no breach of contract or criticism that we can find that could be voiced against the Respondent. Nothing in paragraphs 26 or 27 is relevant to the constructive dismissal claim.

122 By this point it is evident that the Claimant was experiencing multiple problems with some of his colleagues, but we have concluded that the Respondent reacted in a proper manner. Nor do we consider that the Claimant would be entitled to claim a constructive dismissal in May 2015 based on some criticism of the Respondent that happened after September 2012. There is, however, nothing in the facts which are established up to the end of 2012 that could support a constructive dismissal at any point in that chronology.

123 In paragraph 30 we dealt with an allegation of victimisation that we have rejected. In our next two paragraphs we rejected allegations concerning particular emails. The other events of 2013, up to August, have either been exaggerated or mischaracterised by the Claimant.

124 It was in August that the managers moved to deal with his underperformance, as they saw it. This is not expressly referred to in the context of constructive dismissal in the list of issues, but it is very relevant to what is alleged about performance in 2014. We conclude that the performance concerns in 2013 were genuine and had nothing at all to do with the Claimant's race. Nor did managers act unreasonably towards him. It is evident that Mr Mead did not want a formal procedure and persuaded Ms McKean to agree with this. The concerns that the managers were aware of, however, were real and were genuinely believed to warrant action. The Claimant was not being singled out, in any event. There are other pointers to the managers acting reasonably: see, for example, paragraphs 57 and 58 above.

125 Therefore, by the conclusion of 2013 (paragraph 63 of our findings) there is nothing in the evidence that could support a constructive dismissal.

126 2014 also provides no basis for a repudiatory breach of contract, either in individual acts or when taken cumulatively. The Claimant has never accepted that his performance was sometimes lacking, but we conclude that it was. Nor has he accepted the patent reasonableness, as we have found, of the manner in

which the managers dealt with his performance. He was praised, for example, for dealing with the backlogs. He was never put into a formal capability procedure.

127 The course of events in 2014 is set out above and we will not repeat the chronology. We have rejected the allegations made against Ms Wiggins and the way that she dealt with the grievance. We can see no reasonable grounds to criticise either her conclusions or how she reached them. The same applies to the appeal. As to the alleged decision to prevent the Claimant from working overtime in May 2014, we agree with the Respondent that no such decision can be traced to that time. If it was one taken earlier as a result of what we recorded at paragraph 61 above in November 2013, there is no valid criticism to be made of the Respondent.

128 We therefore come to what might be regarded as the real nub of the constructive dismissal case, the events after 19 May 2014 (paragraph 85 above). By 4 July the Claimant was attributing stress to historical work issues and had already fallen into further dispute with the employer over the ways in which he was contacted when absent sick. We can see no basis to criticise either of the two managers. Clearly, by 14 August the Claimant was expressing suspicion and hostility, but this is a reflection of what he had come to believe; it does not have any objective justification in the evidence. We have looked carefully at Mr Jackson's oral submissions where he dealt with this part of the chronology, but we are not persuaded that any criticism of the Respondent can be fairly established.

129 In the Claimant's interactions with managers in 2014 to 2015, there are three identifiable tones to his correspondence and phone conversations. Sometimes he is very polite. On other occasions he is rude and antagonistic. In the third group, he is very correct, but perhaps a little curt. We conclude that he never trusted the managers and that this sometimes spilled over into hostility. Allowance needs to be made for the unfortunate mental strain he was experiencing. This is all a far cry from establishing the basis for a constructive dismissal.

130 We start with a summary of the relevant principles. Section 95(1)(c) brings in the concept of constructive dismissal and the Western Excavating v Sharp principle. This is that there must be a breach going to the root of the contract (a repudiatory breach) by the Respondent; the employee must leave in response to the breach, without affirmation, waiver, or undue delay. Employees are further entitled to rely upon the "last straw" doctrine and the parties correctly draw attention to **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** which also refers to a much earlier Court of Appeal decision, **Lewis v Motor World Garages Ltd.** Dyson LJ began by setting out the implied term:

'That the employer should not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

The test of whether there has been a breach of the implied term of trust and confidence is objective. In this regard, Lord Nicholls' speech in Malik v BCCI [1997] IRLR 462, 464 is apt:

'The conduct relied on as constituting the breach must impinge on the relationship in the sense that looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.'

131 A relatively minor act may be sufficient to entitle the employee to resign. Some of the series of acts may be quite trivial but cumulatively the acts taken together must amount to a breach of the implied term. The final straw act does not have to have the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. The final straw used in isolation need not be unreasonable or blameworthy conduct. If the act relied upon is entirely innocuous, it cannot be a final straw, even if it is so interpreted by the employee. The test of whether the employee's trust and confidence have been undermined is objective. These principles are taken from the headnote in Omilaju in the IRLR.

132 When applied to the communications during the Claimant's absence, we find it impossible to conclude that, analysed objectively, what the managers did destroyed or seriously damaged the necessary trust and confidence, or was likely to do so. There is nothing in the correspondence and emails of 10 December 2014 or January 2015 for which the Respondent could be criticised. The proposal that ill health retirement should be examined was perfectly reasonable. The OH position at this point was not optimistic. By 27 February 2015 the relationship had deteriorated but no blame for this can be cast at the Respondent. Things had calmed down by late March. Then, the OH report was received on 13 April. It was, in our view, entirely reasonable to hold off contacting the Claimant until important enquiries about job roles had been made. The delay was 17 days. There is no fundamental, or any contractual breach here. The Claimant had demonstrated that he was perfectly capable of emailing or telephoning the managers. The delay has to be taken in conjunction with the earlier acts on which the employee relies, but our findings do not assist him in this regard. It is, we conclude, not possible to regard the delay here as amounting to a breach of the implied term of trust and confidence. This is, in our judgment, a long way from a last straw case. The most that can be said is that a holding letter would have been in order, but there was no obligation to write in those terms. If the Claimant was concerned, he could have raised a simple enquiry by telephone or email.

133 We finally refer to the facts set out in paragraphs 100 and 101. The Claimant seems to have been troubled about late notification of the office move, but Ms Munley's reply is apt and suggests that he had forgotten what she had earlier written. In any event, we conclude that there is no last straw, no breach of

the implied term when the facts are viewed objectively and no basis for the claim of constructive dismissal.

134 Mr Purchase raises an alternative defence of affirmation by the Claimant after the alleged breach of implied term between 13 and 30 April. He is right to point out that the Claimant asked about his wage slip on 11 May and said he would be back in contact when he was well enough, on the 12th. We are unsure that this amounts to affirmation in law, but we consider they are clear evidential pointers to there not having been a breach of any implied term. The Claimant's 12 May response does not suggest he was intending to resign. By the 29th his position had changed. Whatever the reason, it could not have been any intervening conduct of the Claimant; and we reject the contention that it followed any breach of the implied term.

Discrimination, harassment, victimisation.

135 Mr Purchase deals summarily with the claims having set out the essential facts for which the Respondent contends. He occupies 10 lines of text in inviting us to dismiss the direct discrimination and harassment claims and a further 10 lines in dealing with victimisation. Mr Jackson is more extensive, but also deals with matters broadly.

136 It is convenient to start with victimisation and the 15 March 2011 email which is said to be a protected act. The Claimant said that British, black Caribbean males were alarmingly underrepresented in the department at EO grade; and he strongly felt this needed to be addressed. His comments about women and other groups seem to be used as a basis for comparison: their problems were being addressed, black Caribbean males were not. There is an implied allegation the Respondent has breached the Act and it may be that this is enough to constitute a protected act. However, the claim is unsustainable for reasons we have already set out. In our view, Mr Jackson's submissions do not deal with the connection between alleged detriments and the email and, in reality, none can be detected anywhere in the evidence. This is a clear case where the Claimant does not get anywhere near raising a prima facie case. No tribunal, properly directed, could find or infer that any matter about which he has complained is linked to or in any sense connected with the protected act of March 2011.

137 Discrimination/harassment. In Paragraph 24 of his submission Mr Jackson refers to collusion. In paragraph 62 he notes that Claimant's case that Ms McKean, whether on her own or in concert with other staff, acted in a discriminatory way; or created an environment where it was known that the Claimant would be treated in a discriminatory way. These passages recognise the way Mr Hinds has put his case and they were reflected in some of the (perfectly proper) questioning of witnesses. The Claimant's principal difficulty is that he has not established any facts which overcome stage 1 of Igen. In that regard we agree with Mr Purchase.

138 As to harassment, his submission is that the Claimant was not subjected to unwanted conduct related to race which had either the purpose or effect of

either violating his dignity or creating the offensive etc environment that contravenes section 26. Mr Purchase says “his race had nothing to do with it.” We agree. Wherever we look in the list of issues, the protected characteristic of race is entirely disconnected from the acts complained about. In a large number of instances the Claimant felt that managers’ actions created an offensive or intimidating environment for him, but such feelings have to be judged against subsection (4). At no point in the chronology was it reasonable for the conduct to have the impermissible effect. The facts we have found acquit the managers on all the charges raised against them. A belief that the Claimant was underperforming was reasonable. So was disciplinary action as well as the less stringent course of informal action. It would occupy many paragraphs to go through all the allegations. We take the view that our detailed factual findings make clear that none of the harassment claims raise a prima facie case. The Claimant fails to establish facts that, consistent with authority, would transfer the burden of proof.

139 The direct discrimination claims fail for the same reason, namely that he establishes no facts from which a tribunal could either find or infer less favourable treatment, whether on an actual or hypothetical basis of comparison. Mr Jackson highlights some instances where he submits the burden of proof has passed to the Respondent. However, a difference in treatment and a difference in race is insufficient. Thus, in relation to the failure to move teams, we have insufficient evidence about any comparable case where a person was moved to draw any useful inferences; and the Respondent’s insistence that race had nothing to do with its decisions is accepted. The performance process is a matter on which we have made extensive findings. The Claimant’s submissions cannot survive those findings, on the basis of which the burden of proof is not transferred. We have accepted the evidence that others were subject to informal action. In a case as extensive as this, there are inevitably criticisms that can be raised at the Respondent’s handling of matters. Nevertheless, the points raised in the closing submission are not compelling. Mr Davison, for example, is criticised for a single email message at the start of the grievance process: page 620 referred to in paragraph 80 above. In our judgment, it is simply not possible to base any claim of direct discrimination on the fact of Mr Davison having written on 14 March 2014 to the Claimant setting out Ms Wiggins’s view of the scope of the grievance.

140 Beyond these examples, the Claimant’s case has to be judged in the round. He asserts that each successive manager continued the racial discrimination perpetrated by the last manager. Every point of dispute or dissatisfaction is cast as either harassment, victimisation or less favourable treatment amounting to direct discrimination. The facts support these claims at no point and for avoidance of doubt, we have been satisfied with the overall accuracy and truth of the Respondent’s answer to the many allegations.

Holiday pay

141 We will deal with this swiftly and hope that we can sidestep the various intricacies to which the parties have referred. The claim is for contractual holiday pay and at paragraph 59 Mr Jackson accepts that it hinges on whether the

Claimant took the annual leave of 7 days in July 2014. “If he did, he was not underpaid.” The leave record at page 840A shows he was on annual leave for these 7 days. The application for leave form at page 820 does not show any application. However, the referral to OH made by his manager relatively soon after the Claimant went sick on 17 July clearly records: “He came back to work after one week’s annual leave and then went absent again on the 17th July, due to the same issue.” This is consistent with page 840A. There is also negative evidence, in that there are no emails from the period of alleged leave. Putting all this together, we consider it unlikely that Mr O’Mahoney would be mistaken about this in the referral and also that page 840A is in error. As the Respondent observes, it is for Mr Hinds to establish a breach of contract and he has failed to do so.

Overall

142 For the above reasons, all these claims fail.

Employment Judge Pearl
14 February 2017

ANNEX A

12

IN THE LONDON CENTRAL EMPLOYMENT TRIBUNAL CASE NUMBERS: 2201964/2015
2202164/2015

BETWEEN

MR HAINSLEY HINES

Claimant

-and-

SECRETARY OF STATE FOR JUSTICE

Respondent

DRAFT LIST OF ISSUES

Constructive Dismissal

1. Was the Respondent in breach of the implied term of trust and confidence?
 - a. In particular, was the alleged delay/failure by the Respondent to follow recommendations made by occupational health in its report dated the 18th March 2015 a breach of the implied term of mutual trust and confidence in its own right or a "final straw" when taken together with any of the following matters:
 - i. the manner in which the Claimant was treated whilst off sick from the 10th June 2014.
 - ii. The Respondent's manner of dealing with the Claimant's complaints about him experiencing mental health problems from 6 September 2011 onwards.
 - iii. the alleged acts of bullying that are said to have taken place following an email sent by the Claimant to Lindsay McKean on 15 March 2011 and the manner in which the Respondent dealt with such alleged bullying;
 - ~~1. This includes, but is not limited to, the allegation made by Jennifer Etienne of an assault by the Claimant, the opportunities made available to the Claimant for promotion and the ways in which colleagues spoke to, and interacted with, the Claimant.~~
 - iv. The manner in which the Claimant was treated following his return to work from sick leave in May 2012.

- v. The investigation by the Respondent of the Claimant for misconduct in September 2012.
 - vi. Whether the Respondent refused inappropriately to allow the Claimant to have a trade union representative at meetings on 9 August 2013, 20 January 2014, 28 January 2014 and on 4 February 2014.
 - vii. The approach of the Respondent to the Claimant's performance at work in 2014.
 - viii. The manner in which the Respondent examined the Claimant's grievance dated 13th March 2014 and the manner in which the Claimant alleges he was treated during the hearing of his grievance appeal on the 17th April 2014.
 - ix. The decision in May 2014 to prevent the Claimant from working overtime
 - x. The Claimant being graded by the Respondent as "not achieved" in his 2014 year end report.
2. Did the Claimant resign at least in part as a result of any repudiatory breach?
 3. Had the Claimant, after the date of any breach that is found, by his conduct or otherwise affirmed ^{or waived} any breach of contract?
 - a. The Respondent avers that by remaining on sick pay without objection to the state of affairs of which he now complains that he had affirmed any such breach.
 4. To what period of notice pay, if any, is the Claimant entitled?

Race discrimination and Victimisation

Victimisation

5. Did the Claimant do a protected act?
 - a. The Claimant avers that his email on 15th March 2011 to Lindsay McKean was a protected act.
 - b. The Respondent disputes that this was a protected act.
6. If yes, was the Claimant subjected to a detriment in the circumstances set out in paragraph 5 below?
7. If yes, was the reason that the Claimant was subjected to a detriment because of the protected act listed in paragraph 5 above?

Direct race discrimination/harassment

8. Did the Respondent, or a person for whom the Respondent is vicariously liable, treat the Claimant less favourably than they treated, or would treat others due to the Claimant's race, in any of the circumstances listed in paragraph 10 below?
9. In the circumstances set out in paragraph 10 below, did the Respondent, or anyone for whom they are vicariously liable, engage in unwanted conduct, relevant to race, for which their purpose, or effect was to violate the Claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for him?

Behaviour complained of

10. The treatment referred to in paragraphs 6, 8 and 9 above is as follows:
 - a. the treatment of the Claimant by Mr Buckle and other employees of the Respondent identified at pp12-17 of the Claimant's Response to the Request for Further Information;
 - b. the alleged acts of bullying that are said to have taken place following an email sent by the Claimant to Lindsay McKean on 15 March 2011 and the manner in which the Respondent dealt with such alleged bullying;
 - ~~i. This includes, but is not limited to, the allegation made by Jennifer Etienne of an assault by the Claimant, the opportunities made available to the Claimant for promotion and the ways in which colleagues spoke to, and interacted with, the Claimant.~~
 - c. the manner in which the Respondent dealt with the Claimant's complaints from September 2011 onwards about him experiencing mental health problems;
 - d. the approach of the Respondent to the Claimant's performance at work;
 - e. the manner in which the Claimant was treated following his return to work from sick leave in May 2012;
 - f. the investigation by the Respondent of the Claimant for misconduct in September 2012;
 - g. whether the Respondent refused inappropriately to allow the Claimant to have a trade union representative at meetings on 9 August 2013, 20 January 2014, 28 January 2014 and on 4 February 2014.

Evidence of race discrimination

On 16 September 2010 John Buckle introduced himself to me. I was at the photocopier and he was waiting to use it. He said "hello my name is John Buckle I head-up one of the teams in the section". He then said "I'm into heavy metal music Black Sabbath that kind of thing. I was a real metal-head in my youth. I don't suppose that's your type of thing". I felt he was making a racial stereotype of what music a black person likes.

Buckle's remark about "Caribbeans as scroungers" on 6 September 2011.

On Friday 9 August 2013 Stewart Mead said to me in a meeting room, alone while giving me my first poor performance monitoring: "Gordon, Lindsay and John want to start gross misconduct proceedings against you but I convinced them not to. I asked them if it was because you had made race allegations in the past or because you are a black male" and John said "yes". The outcome was I went off sick from Monday 12 - 16 August with stress.

Graham Shuter (a member of staff I was indirectly supervising) sent me an aggressive email on 10 December 2012 using capital letter saying he was not at my beck and call.

January 2013 I applied for promotion 1 grade up in Buckle's team but did not receive an interview. In February Buckle gave me feedback on my application. He told me I had made race allegations against the section so could not expect promotion. In March 2013 I used the same application to apply for promotion 2 grades up and received an interview. I did not get the job.

Email 22.8.13 complaining to Mead about the better treatment of Stephen Lott compared to me.

Email 20.11.13 from Mead in response to complaint by Derek Tansill

On 25.3.14 Derek Tansill shouted at me "these papers are not in any order, don't hand me papers unless you put them in order". Also present were Salathiel Leboho (male), and Burty Valydon (male) and Elizabeth Bamigboye. Mr Tansill. Salathiel Leboho said to me "he only talks that way to black people, you should report it to Graham". Tansill walked over and apologised in front of Mr Leboho, Mr Valydon and Ms Bamigboye.

On 2.5.14 at approximately 6:15 Angela Munley came over to my workstation. There was no one else around. She said to me "are you married or have a girlfriend". I said "no". She then said "I bet you have a lot of kids around that you don't know about".

On 16.5.14 Ms Munley took me into a room to discuss a case. She said "you have made a lot of mistakes since I have been here. I do not see you as one of my strongest caseworkers". I said "you know I have made allegations of racism against this section, don't you?" She said yes I do". I said, are you racist". "She said, I am not answering that". She said she had heard I had had problems in other teams but this was a new start. She warned me about my attitude to my work in relation to manager's comments. The case of 3/5685 Ms Munley asked me to write to the RC to

- h. the approach of the Respondent to the Claimant's performance at work in 2014.
- i. The manner in which the Respondent examined the Claimant's grievance dated 13th March 2014 and the manner in which the Claimant alleges he was treated during the hearing of his grievance appeal on the 17th April 2014.
- j. The decision in May 2014 to prevent the Claimant from working overtime
- k. The Claimant being graded by the Respondent as "not achieved" in his 2014 year end report.
- l. The manner in which the Claimant was treated whilst off sick from the 10th June 2014;
- m. The manner in which the Respondent dealt with recommendations made by occupational health in its report dated the 18th March 2015

Jurisdiction

- 11. Are any acts of discrimination within the primary time limit in of section 123(1)(a) or (b), or section 123(3)(a), of the Equality Act 2010, when read with section 140B?
- 12. Notwithstanding the answer to 11, do any of the acts complained of in paragraph 10 amount to conduct extending over a period?
- 13. If any of the acts complained of in paragraph 10 are not within the primary time limit, and do not form part of conduct extending over a period, would it be just and equitable to extend time for those claims to be heard?

Annual leave

- 14. What, if any, annual leave, is the Claimant entitled to in addition to that paid to him by the Respondent?

decline the request. Ms Munley told me she had asked another caseworker about the High Profile case and also confirmed it with Ms McKean then asked me to write to the RC reversing Mr Clark's decision. Ms Munley did not apologise for speaking to me in the meeting room, asking me to explicitly follow Mr Clark's instructions or talking about my "attitude". Neither did I receive an apology from Mr Clark for accusing me of "misdirecting" myself.

On the 3rd of July I was taken into a room by Mr O'Mahoney (my manager). The conversation was friendly it then went onto nationality and religion. Coming from Ireland I asked George "are you from a Catholic or Protestant background" George said "I'm actually from Southern Ireland, the Republic but was brought up a Catholic. I now follow the Islamic faith" I said "that's interesting, do you go to the mosque on Friday's" George said "I do when I can but this job is so busy already I don't think I'll have the time". I said "some Muslims have a name change, is that something you would do" George said "I actually have done, my Muslim name is Amir". I said "why don't you use Amir at work" George said "because I think it may do more harm than good for my career in the Civil Service".

Evidence of Harassment, victimisation and bullying

On Tuesday 7 September 2010 Jenny Etienne wrote a condescending minute about me on the IT system, calling me the AO. I reported it to McKean who reprimanded Etienne.

On the 17.10.2010 Sarah Pocknall during the training process told me she was not going to train me to go back to the manager. The manager said she would ask someone else to train me.

In October 2010 Pocknall (also a casework assistant) spoke to me in single syllables. I took a call for her but she ignored me when I spoke to her. Pocknall said "I'm done with you". I complained to McKean who reprimanded Pocknall.

In October 2011 Harjeet Singh a member of staff I indirectly supervised, told me "I am not doing it" when I asked him to do a task I asked him to do and talked down to me. I told Marsh, and McKean. They did nothing.

On 5.10.2011 I went over to Buckle to talk about a Tribunal patient. I called the Tribunal a "Court". Buckle replied, "you do not call a Tribunal a Court, call it by its name, a Tribunal". Harjeet Singh was present.

In the first week as my manager on 9 November 2013 Stewart Mead aggressively accused me of making errors in a loud voice in the open office. I asked Mead to call me aside in future. He ignored my request and did it again.

On 3.12.11 in a meeting initiated by me Lindsay McKean said "you have had problems with a number of people in the unit. I do not want to upset the balance of the teams by moving people around. If I moved everyone who had interpersonal problems it would set a bad precedent".

On 2.11.2011 in a conversation at my desk with Harjeet Singh (Casework Assistant) about chasing reports Harjeet Singh replied to me using the words "what you have to do and understand". This was heard by Kerry Dougan, Geraldine Marsh, Matthew Picot and Martine Green who were within hearing range.

On 4.11.2011 Kerry Dougan came up to my desk and threw 2 faxes on my desk and walked away. Before Ms Dougan got back to her desk I said "Kerry that's no way to give someone a fax". She turned and said, "caseworkers are supposed to get their own faxes". John Buckle was present as was Matthew Picot and Martine Green but no one said anything.

On 18.11.2011 I asked Martine Green for advice about a downgrade transfer I was working on. Martine Green replied "what you have to do and understand is what a downgrade transfer means. Do you know that?"

On 19.11.11 I spoke to Matthew Picot about an abscond. Matthew Picot replied "what you have to do and understand is what an abscond means".

On 29.11.11 Geraldine Marsh came around to my workstation and said "what you have to do and understand is that you need to prioritise chasing CD reports because yours is falling behind".

On 2.12.2011 Buckle came up to my workstation showing me an alleged error I had made on a Statement I had done. He said "you have made a serious mistake. You have been trained on this. You should know better". He said if I needed retraining I should see Graham. I said I didn't & he left. In comparison John Buckle went to Stephen Loft with one of his mistakes. He said, "sorry to bother you Stephen but I just want to show you an area where you have gone slightly wrong".

On 1.12.11 Harjeet Singh (grade 3 casework assistant) told "I'm not doing it" as a response to asking him to chase CD reports which was apparently a deviation from the agreed processes. John Buckle, Geraldine Marsh, Matthew Picot and Martine Green were nearby when this was said.

On 3.12.11 in a meeting room, Lindsay McKean said "you have had problems with a number of people in the unit. I do not want to upset the balance of the teams by moving you somewhere with someone who does not get along with you". There were no other witnesses.

On 17 September 2012 McKean emailed me asking to meet her and Buckle in a room. She copied in Marsh. This was only to tell me the name of the person doing the Etienne investigation. This email made me feel intimidated.

On 14 September 2012, Buckle told me in a meeting room I could be sacked if found guilty of "barging" into Etienne. I felt harassed by the comment.

On 24 September and 3 December 2011 I complained about the conduct

On 19 September 2012 Gordon Davison sent what I felt was a bullying email not to "badger" Linda.

On 5.4.2012 at 8:23 John Buckle emailed me his sorrow at my dislocated ankle and leg break. I found his unprofessionalism in signing off with "Love" John, sarcastic.

Email 31.10. 2012 the outcome of my stage 1 grievance against Etienne for making malicious accusations was that I sit away from Etienne.

On the 10.12.2012 Email from Graham Shuter "EVER" email. "I am not at YOUR beck and call".

Email 18.12.12 Mead "you have clearly called me a liar".

On the 7 June 2013 Buckle used my ideas in a team meeting telling the team they were his. I emailed Mead about it. I didn't receive a reply.

After the Etienne outcome & even though I complained to Buckle about my faulty workstation he said "you will not be moving with team 3 to the desk allocated to you in next week's move because it is too close to where Jenny sits. You are to remain at your desk until further notice". I stayed at the faulty workstation for a further 4 weeks.

On the 19 June 2013 Buckle said to me in a packed office "sunshine, yes you, come here".

On 25 June Lindsay McKean "John Buckle is not willing to enter mediation with you"

On 25 June Lindsay McKean "you were wrong to send John that email (today), I want you to apologise"

Email 27 June 2013 "as I suspected...the statement was supposed to be done by Stephen Lott but he put my name instead of his".

On 9 August 2013 Stewart Mead "over the past six to seven weeks your errors have come to light". (I sent Buckle the accusatory email on 25.6.13)

On 9 August 2013 Stewart Mead said "John, Lindsay & Gordon want to put you on gross misconduct charges. I convinced them not to".

On 4 October 2013 Mead walked over to my workstation and shouted at me in front of colleagues, saying "I have told you before, you are not senior enough to authorised overnight leave. Go into the patient's file now and amend it". He apologised by email.

On 8.10.13 Mark Clark "I will have to refrain from asking you to do more overtime because of the number of mistakes you have made".

On 20.11.13 Mead walked over to my workstation and said "you have a backlog, Team 1 never have backlogs".

On 12.11.13 Graham Copeland said "you probably don't want to go but I have to ask, do you want to attend Team 1 Christmas meal".

On 20.1.14 Graham Copeland "you will begin a second period of monitoring from 21/1/14 because you have been continually warned about your backlog which has not improved sufficiently".

On 7/3/14 I was in the tea room alone when Mr Copeland walked in. Mr Copeland said to me "because of yesterday's email to me I changed my mind about having the last performance meeting alone with you so I asked Mark to attend".

On 14/3/14 Claire Wiggins told me NOMS would not investigate the allegations of discrimination, victimisation and harassment "because it could trigger a formal investigation".

In November 2013 Munley asked " why do you want a telephone consultation?". "you can go on the underground or busses to get there (to OH). OH assessments must be done in person so they can see your condition. You won't be able to have a telephone consultation. You will receive confirmation of the appointment either by email or in the post".

On 16.5.14 Ms Munley took me into a room to discuss a case. She said " you have made a lot of mistakes since I have been here. I do not see you as one of my strongest caseworkers".

13/5/14 in the grievance appeal, Davison aggressively said "you have trouble taking orders. You can come across as arrogant to your colleagues" He was shouting while he spoke.

On 16/5/14 Mr Copeland said "you have passed the 80% standards set by MHCS for the year, you have achieved combined Team 1 and 3 figures of 81.60% against agreed targets. I have given you a "not achieved" mark for the year".

On 4.7.14 O'Mahoney said "you have only been a Civil Servant for 4 years haven't you?" (this was the first time I had ever spoken to him). Mr O'Mahoney told me managers had been discussing me.

6. State whether the alleged treatment by Mr Buckle and the comments allegedly made by "other staff" were mentioned to Ms McKean when the Claimant asked to move teams. State what response, if any, Ms McKean is alleged to have made to any allegations made.
Yes
7. State whether the Claimant made a complaint or a formal grievance about any decision by Ms McKean not to move the Claimant to a different team. Further, state whether the Claimant's Union, HR or the MoJ's Welfare service were contacted. If so, identify what occurred. If no complaint or grievance or contact with any other body was made, state why not.