Case Numbers: 2200700/2019
2202130/2019

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr D Matovu		**(1) 2 Temple Gardens Chambers** **(2) Mr N Moody QC** **(3) Mr L Tyler**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 12-25 November 2019; 13-14 January 2020 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Mr M Simon, Ms L Moreton**

On hearing the Claimant in person and Mr R Leiper QC, leading counsel, on behalf of the Respondents, the Tribunal unanimously adjudges that:

(1) The Claimant's complaints of direct and indirect racial discrimination, race-related harassment and victimisation are not well-founded.
(2) Save for the complaint of indirect discrimination and the claims numbered 11.6, 11.8 and 18.8 in the list of issues appended hereto, the Claimant's claims fail for the further reason that they were presented out of time and the Tribunal has no jurisdiction to consider them.
(3) Accordingly, the proceedings are dismissed.

REASONS

Introduction

1 The First Respondents are a set of chambers located at the address in Middle Temple by which they are known.[1] Adopting the traditional language of the Bar, we will refer to them as 'Chambers'. They are an unincorporated association of some 59 self-employed barristers in private practice. The barristers, referred to

[1] Arid debates may be had as to the precise legal status of a set of chambers and/or the correct way to name them in legal proceedings. Fortunately, this is one area on which the parties have managed to avoid disagreement.

(as is usual across the profession) as 'members of Chambers' or 'tenants', are bound by a constitution, which regulates the relationship between them and imposes certain obligations, including that of paying rent and other contributions to the collective outgoings. Under the constitution, certain functions and powers relating to finance and administration are delegated to a management board ('the Board'), for which elections are held periodically. Board members are volunteers and must manage their duties alongside their practices. Key decisions are reserved for the full membership of Chambers at the Annual General Meeting ('AGM') or at an Extraordinary General Meeting ('EGM'). In the usual way, the First Respondents employ staff to perform clerking, administrative and ancillary functions. Besides members and staff, a third category of personnel found in any set of chambers comprises 'pupils' (barristers in their first, second or third six months of practical training (called 'pupillage')) and 'squatters' (barristers who have completed pupillage and are permitted to remain on a short-term basis, but not as members of Chambers).

2 The Second Respondent, Mr Neil Moody QC[2], was the Head of Chambers from July 2015 until July 2019. The role of Head of Chambers is to provide leadership internally and externally. Under the constitution, the Head is appointed by a ballot of members of Chambers and holds office for two years at a time. He or she is *ex officio* Chair of the Board and the AGM.

3 The Third Respondent, Mr Lee Tyler, is and has since 2007 been the Senior Clerk of the First Respondents. In that capacity he is the head of the clerking team. He is answerable to the Board and ultimately, to Chambers as a whole.

4 The Claimant, Mr Daniel Matovu, who is 59 years of age, describes himself as a black African and Ugandan citizen but has lived in the UK since the age of six. Having been educated at Eton and Oxford University, he was called to the Bar in 1985 and in 1987 joined a set of chambers in Inner Temple, where he remained for some 16 years. Over time his practice came to be focussed largely on employment and discrimination work. In 2001 he applied successfully to transfer to Chambers, where he remained for just over 18 years, ending with his expulsion on 29 October 2019.

5 By his claim form in case no. 2200700/2019 presented on 26 February 2019 Mr Matovu brought complaints of direct and indirect racial discrimination, race-related harassment and victimisation against Chambers and Mr Moody. A further claim, under case no. 2202310/2019, presented on 30 May 2019, directed complaints of direct racial discrimination, race-related harassment and victimisation at Mr Tyler. The two claims were consolidated.

6 By their response forms the Respondents resisted the claims on their merits and further pleaded that most were excluded from the Tribunal's jurisdiction on time grounds.

[2] Many QCs (or 'silks') are mentioned in these reasons. In the interests of brevity we will add the title when they are first mentioned but not thereafter. No discourtesy is intended.

7 A third claim, concerned largely with Mr Matovu's expulsion from Chambers, was served on Chambers and a long list of individual Respondents during the course of the hearing before us of the first two claims.

8 At a private preliminary hearing before Employment Judge Hodgson on 24-25 October 2019 many procedural issues were addressed. A number of applications pressed by Mr Matovu failed. One was for the postponement of the final hearing listed for 12-25 November. An unusual application by the Respondents, for an 'unless order' to compel Mr Matovu to serve his witness statement no later than 4 November, was granted (a prior order for exchange by 22 October having been breached).

9 EJ Hodgson encouraged the parties to agree a list of issues. Mr Matovu produced a draft. The Respondents proposed certain changes in correspondence, which Mr Matovu rejected. Eventually, the Respondents decided to accept his list and the parties have proceeded accordingly. The list is attached as an Appendix to these reasons.

10 One important subject not identified in the list of issues was a dispute about 'without prejudice privilege'. This broke down into two distinct parts. First, Mr Matovu said, and the Respondents denied, that an investigation and report by a senior member of Chambers, Mr Michael de Navarro QC, into whether contributions to Chambers should be payable on direct access work attracted privilege. Second, the Respondents said, and Mr Matovu denied, that privilege attached to a private mediation between the parties held on 21 December 2017 and related communications and events. For reasons which we set out below, we hold as to the first matter that no privilege attaches. As to the second, we have reached the opposite conclusion. Accordingly, in these (open) reasons, we explain below in the briefest terms that specified claims fail because the evidence relied on to make them good is inadmissible. Our full reasons are set out in the Confidential Annex attached, which will not be made public.

11 It was not ideal that the without prejudice privilege issues fell to us. One consequence was that the Tribunal had to deal with and resolve consequential procedural questions, such as whether the part of the hearing concerned with acts and events said by the Respondents to be covered by privilege, should be held in private.[3] The intention had been that EJ Hodgson would determine all privilege points but, for want of time, that proved impossible and so the practical solution agreed before him was that the trial Tribunal would hear all the relevant evidence and decide the admissibility issues for itself.

12 The final hearing, confined to liability issues only, came before us on 12 November 2019 with ten days allocated. The Claimant represented himself and Mr Richard Leiper QC appeared for the Respondents. We reserved judgment on day ten and devoted two further days in January to our private deliberations in chambers.

[3] Curiously, there was no corresponding application by Mr Matovu in relation to material which *he* asserted to be privileged.

Management of the Hearing

13 We were faced with a surprising number of procedural applications and disputes in the course of the hearing. On day one Mr Matovu made what he presented as an application for 'consolidation' of the claims with the newly-issued third claim. This was in reality a repackaged version of the application made at the hearing on 24-25 October and renewed on paper on 7 November for postponement of the hearing to enable it to be consolidated with the third claim. Both applications had been refused. (Mr Matovu pressed for written reasons for the latter adjudication, which Acting Regional Employment Judge Wade supplied shortly after the hearing before us began.) We rejected the application. It was an impermissible attempt to revive an application that had been twice argued and twice refused. There was no change of circumstances. And Mr Matovu's interests were not prejudiced: as Mr Leiper rightly pointed out, proceeding with the hearing would not preclude him from leading evidence about events postdating the second claim. He had done precisely that in his witness statement, without objection from the Respondents.

14 Second, again on day one, Mr Matovu asked for a 'racially diverse' panel. This language was clarified to mean 'visibly racially diverse'. The application implicitly renewed (again) the postponement application (there would have been no question of a reconstituted panel being arranged on day one of a ten-day hearing). It was also one which the Tribunal had no power to grant. Tribunal members do, of course, in some circumstances have the power (or duty) to recuse themselves, but self-evidently we could not do so simply because we did not appear to Mr Matovu to be racially diverse. He made no case for recusal. The composition of panels is ordinarily an administrative matter, although one on which the Regional Employment Judge may provide direction on occasions. In this case the application had been made to Judge Wade, who had refused it. We could not but do likewise.

15 Mr Matovu also sought permission on day one to install recording equipment in the hearing room. We refused the application. The case was not out of the ordinary. It was not said that there was any obstacle to either side attending with a note-taker. Maintaining the status quo would not entail any disadvantage to Mr Matovu. No disability or other special need calling for a special adjustment was asserted.

16 Having dealt with a number of other preliminary matters, we adjourned in the middle of day one to read the statements and key documents, with a view to the evidence starting on the afternoon of day two.

17 At 2.00 p.m. on day two Mr Mutovu sought to renew his 'consolidation' application. He produced in support a document from the Employment Appeal Tribunal ('EAT'), prepared that morning in great haste by His Honour Judge Shanks, who had been asked by Mr Matovu to deal with the case on the 'sift' as a matter of extreme urgency. The appeal before him sought to challenge the decision of EJ Hodgson to refuse Mr Matovu's postponement application. Judge Shanks commented to the effect that he was in no position to intervene but offered the suggestion that Mr Matovu be permitted to renew his application before us

when the hearing resumed. It eventually emerged, but only after we were forced to press Mr Matovu for clarity on the matter, that he had not made the EAT aware in his communication(s) sent to it on day one following the adjournment that he had made the application to us that day and received an adjudication upon it. We found this troubling. The (further) renewed application added nothing. We rejected it, relying on the reasons already given. We also refused the application made immediately after our ruling, for the proceedings to be halted pending a further visit to the EAT. EJ Hodgson's decision had been challenged before the EAT without success. We could see no arguable ground for appealing against our decision. Mr Matovu's evidence finally started well after 3.00 p.m. on day two.

18 It was necessary for us to manage time carefully to ensure that the evidence and closing submissions were completed within the 10-day allocation. Mr Matovu's evidence took longer than we had hoped. Mr Leiper needed to cover the entire narrative and unfortunately Mr Matovu's answers tended to be long and frequently did not address the questions posed. Cross-examination of him ended on the afternoon of day four. Mr Matovu then insisted on being allowed time to prepare re-examination (of himself), so that his evidence did not end until some way into the morning of day five. It was agreed throughout that the Respondents' evidence must be completed on day nine at the latest, leaving day 10 (a Monday) for submissions. There were 10 witnesses on the Respondents' side and it was not until the morning of day nine that Mr Matovu announced that he did not intend to cross-examine two of them. We reminded Mr Matovu at several points of the need to keep up to speed. We agreed a timetable with both counsel and adjusted it from time to time. Ultimately, we were constrained to limit time for cross-examination of one witness, Mr Moody. His evidence began at 11.45 a.m. on day five and ended just after 3.00 p.m. on day six. Cross-examination lasted rather more than seven-and-a-half hours. At lunchtime on day six it was agreed and noted that completion of the evidence of Mr Moody and Ms Helen Wolstenholme (for whom an hour would be needed) would occupy that afternoon, two further substantial witnesses would fill day seven, four briefer witnesses (all of whom were expected at that stage to be called and cross-examined) would account for day eight and a final, substantial witness would give evidence on day nine. Mr Matovu was told that there was now no room for further slippage. He was subsequently given 30-minute and 15-minute warnings and, at 3.05 p.m. the cross-examination of Mr Moody was stopped. We were reluctant to impose the guillotine but felt it necessary to do so as we had ceased to have confidence that, without our intervention, the hearing would be completed in the ample time allotted.

19 There was, as we have mentioned, a disagreement over the Respondents' application for the evidence relating to matters which they alleged to be covered by privilege to be heard in private. The material arose out of the mediation between the parties of 21 December 2017 and related matters. Given that it was agreed that the admissibility issue was to be decided at the end of the hearing (see above), we had difficulty in following Mr Matovu's objection. It seemed to us self-evident that, to put the matter at its lowest, there was a strong possibility of the Tribunal holding that the evidence was privileged. In that event, any prior public airing of it would be seen to have prejudiced the Respondents. Conversely, if the ultimate decision on privilege went in Mr Matovu's favour, the Tribunal would publish its reasons for that

determination, including all necessary factual findings. In the circumstances we had no doubt that the Respondents' application must be granted.

20 There was also a procedural disagreement at the end of the hearing. The evidence was completed in the middle of Friday, 22 November (day 9). It was agreed that the parties would present written submissions on Monday, 25 November and supplement them with oral argument.[4] In the usual way, counsel would exchange their submissions and deliver copies to the Tribunal. Mr Leiper proposed delivery and exchange of submissions by 10.00 and Mr Matovu voiced no dissent. We made no formal order as there seemed no need to do so. The agreement was that oral submissions would follow at 2.00 p.m., with up to an hour being allowed on each side. Mr Leiper duly delivered his submissions (46 pages, double-spaced, small font) to the Tribunal at 10.00 a.m. on Monday, 25 November but unfortunately Mr Matovu was not in a position to do likewise. His submissions (11 pages, single-spaced, small font) were sent to the Tribunal at 1.38 p.m. and no doubt counsel exchanged their documents at or about that time. The result of Mr Matovu's tardiness was that neither advocate could devote more than the briefest attention to the written submissions of the other. Both focussed overwhelmingly on emphasising and developing their main contentions. At the end of oral argument, Mr Matovu applied for permission to supplement his submissions in order to address Mr Leiper's points. Mr Leiper opposed the application and we agreed with him. Appropriate arrangements had been made for the presentation of closing argument. Ample time had been allowed for the work to be done. To grant the application would extend the process and inflate the Respondents' costs. There was some factual detail to master but the case was not complex, factually or legally. There was no reason to depart from the (standard) procedure which had been agreed and doing so would be contrary to the overriding objective. Accordingly, the application was refused.

21 After the end of the hearing, and despite our clear ruling on day ten, correspondence followed from Mr Matovu together with what appeared to be lengthy supplementary closing submissions. The Tribunal had refused permission for these and they remain, unread, on the file.

The Relevant Law

Direct Discrimination

22 By the Equality Act 2010 ('the 2010 Act'), s13, direct discrimination is defined thus:

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

23 In *Nagarajan* v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

[4] At an earlier point in the hearing Mr Matovu had tentatively suggested that closing submissions should be put off to some unspecified future date to give him more time to prepare. We signalled that we were not attracted by the idea and it was not pressed.

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu v Akwiwu* [2014] ICR 571 CA, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.

Indirect discrimination

24 2010 Act, s19, so far as material, provides:

> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
> **(c) it puts, or would put, B at that disadvantage, and**
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**

25 By s23(1) and (2)(a) it is provided that, for the purposes of claims under ss13 and 19, there must be no material difference between the circumstances of the Claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the Claimant's and comparator's abilities.

Harassment

26 The 2010 Act defines harassment in s26, the material subsections being the following:

> **(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.**
>
> **…**
>
> **(3) In deciding whether conduct has the effect referred to in sub-section (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.**

> **(4) The relevant protected characteristics are –**
> **…**
> **race …**

27 In *R (Equal Opportunities Commission) v Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the 'related to' wording (in the Sex Discrimination Act 1975) did not require a 'causative' nexus between the protected characteristic and the conduct under consideration: an 'associative' connection was sufficient. Burton J did not doubt or question the concession. The EHRC Code of Practice on Employment (2011), which does not claim to be an authoritative statement of the law (see para 1.13), deals with the 'related to' link at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic.

28 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are, we think, ensured by the other elements of the statutory definition. Two points in particular can be made. First, the Claimant must show that the conduct was unwanted. Some claims will fail on the Tribunal's finding that he was a willing participant in the activity complained of. Moreover, it seems to us self-evident and necessarily implicit that any behaviour on which a claim rests must be (a) of a sort to which a reasonable objection can be raised and (b) voluntary, or at the very least such that the Respondent can properly and lawfully bring it to an end.

29 Secondly, the requirement for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect (subsection (4)(b) and (c)) connotes an objective approach, albeit entailing one subjective factor, the perception of the complainant (s26(4)(a)). Here the Tribunal is equipped with the means of weighing all relevant considerations to achieve a just solution.

30 Central to the objective test is the question of gravity. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry v Grant* [2011] ICR 1390 CA (para 47):

> **Furthermore, even if in fact the disclosure was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' … is a distortion of language which brings discrimination law into disrepute.**

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was

intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

Victimisation

31 By the 2010 Act, s27, victimisation is defined thus:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because –**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act –**
>
> **…**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

32 When considering whether a claimant has been subjected to particular treatment 'because' he has done a protected act, the Tribunal must focus on "the real reason, the core reason" for the treatment; a 'but for' causal test is not appropriate: *Chief Constable of West Yorkshire v Khan* [2001] ICR 1065 HL, para 77 (*per* Lord Scott of Foscote). On the other hand, the fact of the protected act need not be the sole reason: it is enough if it contributed materially to the outcome (see *Nagarajan*, cited above).

Protection under the 2010 Act

33 Under Part 5, the 2010 Act protects not only employees and applicants for employment but also various classes of self-employed persons. Among these are Members of the Bar in private practice, who are protected against discrimination, harassment and victimisation by s47(2), (3), (4) and (5). Materially, the provisions concerned with discrimination and victimisation protect barristers from such treatment in the form of being subjected to pressure to leave chambers or any other 'detriment' (see subsections (2)(d) and (e) and (5)(d) and (e)).

34 In the employment law context, a detriment arises where, by reason of the act(s) complained of, a reasonable person would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment (see *eg Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL).

35 The 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**

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

36 On the reversal of the burden of proof we have reminded ourselves of the case-law, including *Igen Ltd v Wong* [2005] IRLR 258 CA, *Madarassy v Nomura International plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions, observing (judgment, para 32) that they have "nothing to offer" where the Tribunal is in a position to make positive findings on the evidence. But if and in so far as it is necessary to have recourse to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered.

37 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. 'Conduct extending over a period' is to be treated as done at the end of the period (s123(3)(a)). Failure to do something is treated as occurring when the person in question decides not to do it (s123(3)(b)). Absent evidence to the contrary, a person is treated as deciding not to do a thing when he does an act inconsistent with it or, if he does no inconsistent act, on the expiry of the period within which he might reasonably be expected to do the thing (s123(4)). The 'just and equitable' discretion is to be used with restraint: its exercise is the exception, not the rule (see *Robertson v Bexley Community Centre* [2003] IRLR 434 CA).

'Without prejudice privilege'

38 The 'without prejudice' rule operates to exclude evidence contained in or associated with communications aimed at compromising a legal dispute. It is founded on two bases: the policy of the law to encourage settlement and the implied agreement of the parties (*Unilever Plc v The Proctor & Gamble Co* [2000] 1 WLR 2436 CA, para 17 (*per* Robert Walker LJ)). The rule "has a wide and compelling effect" (*ibid*, para 21). At a later point in his judgment, the learned judge continued:

> **35. In those circumstances I consider that this court should, in determining this appeal, give effect to the principles stated in the modern cases, especially *Cutts v Head*, *Rush & Tompkins* and *Muller*. Whatever difficulties there are in a complete reconciliation of those cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties (in the words of Lord Griffiths in *Rush & Tompkins* at p.1300)**

> **"to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts."**

39 The rule is subject to exceptions, the most important of which are discussed in the judgment of Robert Walker LJ in *Unilever*, para 23. Of these, the only one of relevance for present purposes arises where, if the veil were not lifted, the privilege would serve as a cloak for "perjury, blackmail or other unambiguous impropriety". But that exception is to be applied "only in the clearest cases of abuse of a privileged position" (*ibid*, para 23(4)).[5]

Oral Evidence and Documents

40 We heard oral evidence from the Claimant and, on behalf of the Respondents, Mr Moody, Mr Tyler, Mr de Navarro, Mr Benjamin Browne QC, Mr Bob Moxon Browne QC, Ms Rehana Azib, Ms Wolstenholme, and Ms Sarah Vaughan Jones QC. We also read and admitted in evidence statements in the names of Ms Caroline Harrison QC and Mr Howard Palmer QC. Both were to have been fielded as 'live' witnesses but, on the morning of day eight of the hearing, Mr Matovu told us that he considered their evidence to be irrelevant and even inadmissible, and that he did not wish to put any questions to them.

41 In addition to oral evidence we read the documents to which we were referred in the agreed bundle which filled nine lever arch files.

42 We were assisted by sundry further documents produced by Mr Leiper and Mr Matovu. These included Mr Leiper's opening note, and the closing submissions on both sides.

The Facts

43 The evidence was, as we have mentioned, detailed and extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts essential to our decision, either agreed or proved on a balance of probabilities, we set out below.

44 We use the words "facts essential to our decision" advisedly. We have consciously omitted to record findings on certain matters. In particular, given our conclusion that that the victimisation claim fails in any event, we decline to address the bad faith defence and so judge it unnecessary to make findings on a number of matters relied upon by the Respondents in support of that defence.

How barristers operate: the chambers system

45 In para 1 we have introduced Chambers and explained the constitutional arrangements under which they operate, which are typical of the profession generally.

[5] See also *Savings & Investment Bank Ltd (in liq) v Finken* [2004] 1 WLR 667 CA (para 57) and, in the employment law context but to like effect, *Woodward v Santander UK Plc* [2010] IRLR 834 EAT, especially at para 62.

46 In the main, barristers receive work, in the form of or briefs to attend court or instructions to advise or draft documents, from solicitors. The instructions may be addressed directly to the barrister, or may be sent to the chambers for the clerk to allocate (subject, if required, to the approval of the instructing solicitor concerned). Junior members of chambers usually cut their teeth on instructions distributed by the clerk, but as they build up experience and contacts, they develop personal practices and receive less and less 'chambers' work. Mr Tyler told us without challenge[6] that unallocated work is generally the preserve of junior practitioners in their first seven years of practice and it was common ground before us that barristers of Mr Matovu's seniority (he joined Chambers in 2001 at 16 years' call)[7] could not ordinarily expect to receive unallocated work at all.

47 In recent times, as an alternative to the traditional model, 'direct access' ('DA') to barristers has also been permitted, subject to certain conditions. Barristers must have Bar Council approval to undertake such work. DA breaks down into 'public access', where instructions come from the lay client, and 'licensed access', where they come from a professional body or institution. At all relevant times Mr Matovu's practice involved a sizeable element of public access work. Practitioners who undertake public access work typically source instructions through an intermediary organisation, which charges a monthly fee for its services.

48 A key figure in any set of chambers is the Senior Clerk. He or she (it must be said that female Senior Clerks are still something of a rarity) typically performs a combination of functions embracing strategy (helping, together with the Head of Chambers and/or Management Board, to monitor the performance of chambers and plan development), line management (of the clerking team and perhaps other staff), finance and administration, marketing and public relations (on behalf of individual members and chambers as a whole), and practice management (supporting and developing individual practices). As barristers' chambers have become larger, clerking teams have expanded. Typically, more senior clerks are nowadays given individual responsibility for particular specialisms or practice groups. So, for example, Mr Paul Cray was the clerk assigned to the Employment Group, while Mr Tyler had primary charge of the Common Law Group.[8]

49 Mr Matovu contended that the public access work he undertook was 'self-generated', rather than 'Chambers work'. It is certainly right that such instructions are not sourced by the relevant barrister's chambers, and will not generally be received as a consequence of a connection between the chambers and the client. But they certainly call on the services of the clerking team and the resources of the chambers. The clerks need to log the work, issue invoices and collect the fees. The premises of the chambers may be needed for 'conferences' (meetings) with public access clients. And the administrative resources of the chambers may need to be deployed (for example, for the preparation and delivery of statements and bundles of documents).

[6] Witness statement, paras 23-24

[7] Barristers' seniority is usually measured in 'years' call', *ie* years since they qualified and were 'called to the Bar' by their Inn of Court.

[8] The Common Law Group consists mainly of members practising in personal injury work.

The main narrative

50 In 2013, Mr Matovu fell into arrears on his monthly Chambers contributions. At the end of 2014, the debt stood at over £10,000. In 2015, through a mediation, terms of agreement were reached covering the discharge of the arrears and unrelated concerns raised by Mr Matovu about the need as he saw it for Chambers to perform better in the areas of equality and diversity.

51 The arrears were duly cleared in December 2015 but, the very next month, Mr Matovu failed once more to pay the contributions owing.[9] Mr Moody wrote to him on 12 January 2016 expressing dismay at the new default and stating in no uncertain terms that Chambers could not be expected to afford him any further latitude. A meeting was set up for 16 January.

52 That meeting was attended by Mr Moody, Mr Matovu and Ms Shona Kelly, Chambers Manager, who took notes. We accept her record as a fair summary of what was said. There was a discussion about Mr Matovu's financial pressures and difficulties with his practice. He complained that he was getting no instructions through Chambers and existing exclusively on DA work. He was resentful of being required to pay contributions on work which, as he saw it, was self-generated. On three occasions during the meeting Mr Moody passed comments to the effect that, if Mr Matovu felt that the arrangements in Chambers were not working for him he might draw his own conclusions. At one point he also remarked that if all his work was derived from DA sources he should "consider his position". Throughout the meeting Mr Moody gave no quarter and reminded Mr Matovu repeatedly of his obligations under the Chambers constitution.

53 Following the meeting, Mr Moody referred Mr Matovu's complaint about the charging of contributions on DA work to the Board, which concluded that there was no reason to change the system.

54 On 23 March 2016 Mr Moody wrote to Mr Matovu asking him to explain a home-made invoice which had been sent to a DA client in respect of a piece of work which he had recently undertaken. This was doubly irregular: first; because it was a departure from the standard procedure, whereby clerks send Chambers invoices under the Chambers letterhead to recover fees (on all types of work, whether DA or conventional); and second, because Mr Matovu did not tell the clerks, or anyone else in Chambers, what he had done. (The invoice had come to light purely as a consequence of the client raising a query about it with the clerks.) In his reply of the following day, Mr Matovu offered no explanation other than the comment that his intention had been to recover payment promptly, and complained of being "bullied and harassed" and "singled out" by Mr Moody's inquiry.

55 In the meantime, Mr Matovu had made it clear (see *eg* his letter to Mr Moody of 26 February 2016) that the disagreement about the charging of contributions needed to be resolved. He returned to the same subject in his email of 24 March.

[9] Payment was due on 8 January.

56 A meeting was held on 12 April 2016. Those present were Mr Moody, Ms Vaughan Jones, Mr Matovu and Ms Jacqueline Perry QC, a senior member of Chambers who attended as Mr Matovu's companion. There was a disagreement about the purpose of the meeting. Mr Moody's intention was to discuss the home-made invoice. Mr Matovu wished to address the contributions issue and other matters. Mr Moody struck a conciliatory tone. He did not press the matter of the invoice or restrict the scope of the meeting. Mr Matovu re-stated his view that it was unfair to levy contributions on DA work. He complained of being bullied and harassed and unsympathetically treated in relation to financial matters and the home-made invoice. In addition, he alleged that the 2015 mediation agreement had not been honoured. Mr Matovu's manner during the meeting was agitated. He warned that if he was not listened to he would take matters further. Mr Moody said more than once that he was sorry if Mr Matovu felt bullied. He apologised if prior communications had seemed sharp and stressed that his only intention had been to ensure that there was no return to the problem of unpaid contributions. He stressed that he was always available to offer support on other matters, including concerns about Mr Matovu's practice.

57 On 14 April 2016 Mr Matovu sent a lengthy letter dated 31 March to Mr Moody, in which many of the matters which he had raised on 12 April were repeated. He included the explicit assertion that the contributions policy was racially discriminatory, either directly or indirectly and proposed a "fair compromise" based on excusing members of Chambers from contributions on DA work "generated outside Chambers with no clerking input" but continuing to levy contributions on DA instructions "generated through Chambers."

58 On 2 May 2016, Mr Moody wrote a full and detailed reply to Mr Matovu. He rejected the allegations of bullying and harassment and explained why he had acted as he had in relation to the unpaid contributions in January 2016 and in relation to the home-made invoice. He renewed his offer of support to assist in developing and strengthening Mr Matovu's practice, repeating his earlier proposal to hold a practice review. He made some observations in relation to equality and diversity and expressed a willingness to discuss that aspect further. As to Chambers contributions on DA work, he said that the Board was willing to reconsider Mr Matovu's points and allow him to address a meeting of the Board on the subject, if he so wished. Separately, he requested his permission to refer the question whether the current policy was discriminatory to the Chambers Equality & Diversity Officers for their consideration. Finally, he expressed the view that his letter had provided a basis for "a good and friendly working relationship".

59 On 30 September 2016, Mr Matovu replied. He returned to the themes addressed in the prior correspondence but with particular emphasis on the issue of Chambers contributions. Mr Moody replied very promptly and a meeting was set up for 19 October.

60 That meeting was attended by the same individuals as those present on 12 April, together with Ms Kelly who took a note. Again, attention focused in particular on the contributions issue. Mr Matovu went so far as to say that, if it was resolved satisfactorily, his other concerns could be put aside. It was agreed that another meeting would be held soon.

61 A meeting was arranged for 15 November. Without the agreement of Mr Moody or the Board, Mr Matovu approached Ms Kelly and instructed her to arrange for recording equipment to be available at the meeting. It seems that he took this step because, owing to a personal crisis, the individual who was to have accompanied him was unable to do so. When Mr Moody learned of Mr Matovu's instruction he countermanded it, presuming, no doubt, that Ms Kelly would apprise Mr Matovu of what he had decided. She did not do so. As a result, Mr Matovu attended the meeting (at which Mr Moody, Ms Vaughan Jones and Ms Kelly were also present) expecting the equipment to be in place and was disappointed. He became very angry and alleged that he had been "ambushed". He rejected repeated suggestions by Ms Vaughan Jones that the meeting could be recorded by mobile phone. Eventually, faced with a tirade which showed no signs of abating, Mr Moody walked out, commenting that without trust progress was not possible. The meeting was abandoned.

62 For some weeks after 15 November Mr Moody felt unable to deal with Mr Matovu and Ms Vaughan Jones agreed to deputise for him.

63 On 29 November 2016 Ms Vaughan Jones wrote to Mr Matovu informing him that the Board would be considering the question of contributions at its meeting on Monday, 19 December. She stated that regard would be had to the correspondence which had passed on the subject and gave him the opportunity to set out further observations in writing. She also said that he would be welcome to address the Board at the meeting, if he wished. The letter was left in Mr Matovu's pigeon hole in Chambers. He did not reply and Ms Vaughan Jones sent a chasing email on 15 December. Mr Matovu responded the following day (the Friday), stating that he "would be prepared" to speak at the Board meeting but asked to be provided with all the information which it would be taking into account. He added:

> **I do not know, for example, if any enquiries are made to find out the balance of the work provided to others as between Chambers generated work and other work. Nor do I know what different income have in the past not attracted contributions. It would be helpful to be given all such information before I speak to the Board.**

Ms Vaughan Jones replied later the same day. Her message included this:

> **The Board has the information as to your earnings which is provided periodically to the Board and also as to the earnings received from direct access work over the past three financial years by those [members of Chambers] who do such work. You will be aware of that information in your own case. Information relating to other [members of Chambers] is confidential.**
>
> **We have not sought information about "the balance of work provided to others as between Chambers generated work and other work". We do not at the moment see such information as necessary to make a decision about your liability to pay contributions, though we are prepared to listen to what you have to say on this point.**

64 By the morning of 16 December 2016, material assembled in readiness for the Board meeting, in addition to what was already in Mr Matovu's possession, comprised an opinion from leading counsel on the question whether the contributions policy was discriminatory, some information from the Internet about a DA intermediary service for barristers, annual receipts figures for members of

Chambers for the years ending September 2013, 2014, 2015 and August 2016, a one-page note prepared by Mr Tyler and a six-page note dated 16 December 2016 prepared by Ms Emily Saunderson, a member of Chambers. Ms Vaughan Jones spoke by telephone with Mr Moody and it was agreed that this material would not be shared with Mr Matovu, at least until Mr Moody had been able to review it, which would not be before the day of the meeting itself. All items except for the opinion were sent (with redactions where necessary)[10] to Mr Matovu on 20 December, the day after the Board meeting. The decision to release them was taken at the Board meeting.

65 As agreed, Mr Matovu addressed the Board meeting. He was free to make his points on the contributions issue and was not disadvantaged by the fact that some material was not released to him until the following day. To the contrary, he achieved a successful outcome in that the Board decided to invite Mr de Navarro, a senior practitioner who had never been a member of the Board, to look into his complaints and produce a report. And, of course, he had the relevant material in good time to prepare for his contribution to Mr de Navarro's inquiry, which followed early in the New Year.

66 Mr de Navarro conducted an inquiry which focussed largely on the contributions issue. In his report of 15 January 2017 he concluded that DA work should continue to be liable to Chambers contributions in the same way as conventional work and that Mr Matovu was not an exceptional case warranting a departure from the ordinary rule. On the latter point, he observed that, although the complaint had been based on Mr Matovu's contention that he was receiving no conventional work, or virtually none, figures supplied by Mr Tyler (and not disputed by Mr Matovu) showed that more than one third of his income from 2016 had been derived from conventional instructions. Finally on the subject of Chambers finance, Mr de Navarro proposed that consideration be given to the re-introduction of the 'personal allowance', a threshold of monthly income to be crossed before Chambers contributions were levied. He felt that such an adjustment would assist members "going through a rough patch" and diminish any sense of unfairness among lower earners.

67 Mr de Navarro also dealt with the wider concerns and complaints which Mr Matovu had raised. He recommended quarterly practice support meetings for Mr Matovu to which Mr Tyler and Mr Cray should contribute. He touched on the subject of equality and diversity but recorded that he was not asked to make a recommendation and did not think it appropriate to do so. In addition, he made some observations concerning the personal dealings between Mr Matovu and Mr Moody, including some mild criticism of both (and despite the fact that he had not invited Mr Moody's comments), and urged all concerned to work to restore harmonious relations.

68 In the short term, Mr de Navarro's hopes showed some signs of being fulfilled. Mr Matovu appeared to accept the report as resolving his complaint about the treatment of DA work and the Board agreed to inquire further into the possibility

[10] As to which no complaint was made

of bringing back the 'personal allowance'. Mr Moody and Mr Matovu had a congenial lunch together on 25 January (their first meeting since 15 November).

69 Ultimately, the Board decided against the 'personal allowance' idea, seemingly on the ground that it would cause unfairness to the higher earners, whose contributions would need to be increased to pay for it.[11]

70 Barristers market their services in a variety of ways. One is through the provision of seminars or similar educational events to which professional clients (solicitors mostly) are invited. The Chambers Common Law Group (made up very largely if not wholly of personal injury practitioners) runs a regular programme of seminars. Two such events were scheduled for 28 June 2017 in London and 5 July 2017 in Leeds. The title was, "What Personal Injury Lawyers Need to Know about Employment Law". There were to be three speakers, of whom one was Ms Wolstenholme. The aim was to attract solicitors practising in the fields of personal injury and employment law.

71 On 21 June one of the speakers withdrew, owing to a bereavement. Ms Wolstenholme spoke with Mr Tyler by telephone to ask about availability of other members of Chambers who might be able to stand in. The reply, which may have been given in one telephone call or two, was that Ms Nina Unthank was available for both dates and Ms Jennifer Gray and Mr Matovu were available for the London event only.[12]

72 It was not in dispute that Ms Unthank was a suitable choice. Ms Wolstenholme contacted her by email on 21 June and learned that she was ready and able to make the Leeds date but could not speak at the London seminar because of a family commitment.

73 Ms Wolstenholme then emailed Ms Gray to ask whether she could do the London talk. She wrote back the following day to say that she was not available and that she did not practise in personal injury law. (She had done at an earlier stage but not since taking a career break, from which she had returned in 2013. She was not a member of the Common Law Group and immigration and employment work were the main elements of her practice.)

74 At that point Ms Wolstenholme decided that she would herself fill the gap left by the withdrawing speaker. She decided against approaching Mr Matovu. In her witness statement, para 24, she gives her reasons. We accept that, rightly or wrongly, she had formed the view, born of experience, that there were risks involved in sharing a speaking platform with him. In particular, she worried that he tended to be under-prepared and was poor at keeping to time.

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[11] The contributions of all would go up by the same percentage and accordingly, in absolute terms, the increase would be greater for those at the higher end of the earnings scale than those lower down.

[12] In making this finding we prefer Ms Wolstenholme's recollection to Mr Tyler's. He thought that he told her that Ms Unthank was available for Leeds only, but that seems inconsistent with Ms Wolstenholme's emails to Ms Unthank of 21 June 2017. Ms Azib in para 123(h) of her report of September 2017 (see below) reached the same view.

75 Mr Matovu became aware on 26 or 27 June that the London speaking opportunity had arisen and was immediately aggrieved that he had not been invited to fill it. When, on 27 June, she learned of his concern, Ms Wolstenholme invited him to speak at the seminar, but after brief reflection he declined on the ground that the offer was made too late.

76 On 28 June Mr Matovu sought Mr Tyler out and confronted him, challenging his nomination of Ms Gray. He replied that he had simply given availability dates for potentially suitable candidates and that he had thought that Ms Gray was one such. Selection had been for Ms Wolstenholme, not him. Mr Matovu would not accept the explanation. He became agitated and hostile. Mr Tyler eventually left the room to seek the protection of the Head of Chambers and Mr Matovu followed him. It turned out that Mr Moody was not in his room. The episode seems to have fizzled out at that point or soon afterwards. On any view, it was exceedingly stressful and unpleasant, particularly for Mr Tyler. He wrote to Mr Moody that evening, describing it as unprecedented in his 27 years of service to Chambers.

77 Mr Moody and Mr Matovu spoke the following day. Mr Moody said that Mr Tyler had been greatly upset by the incident of the day before. Mr Matovu made no admission of fault and renewed the prior complaints about not being supplied with work, the allegedly unfair contributions system and the alleged failure to make progress on equality and diversity. Mr Moody pressed him for clarity as to what action he wished him to take. He replied that he wished to have time to reflect.

78 On 12 July 2017 Mr Matovu and Mr Moody met for a coffee outside Chambers. Mr Matovu produced a formal letter of complaint alleging that he had been "wilfully" subjected to a "clear-cut act of discrimination" by Mr Tyler in putting Ms Gray forward for the speaking opportunity. He contended that the case should be seen as one of gross misconduct.

79 14 July 2017 the Board appointed Ms Azib to investigate Mr Matovu's complaint. Ms Azib, who describes herself as Asian, Muslim and of Pakistani descent, was and is an experienced[13] and respected practitioner specialising in the fields of employment law (including in particular discrimination work) and personal injury law. She was independent of the Board, never having been a member of it. She had always been on good terms with Mr Matovu.

80 Ms Azib conducted interviews between 25 July and 3 August 2017 with five individuals: Mr Matovu, Mr Tyler, Ms Wolstenholme, Mr Christopher Russell (head of the Common Law Group) and Mr Cray. The interviews were thorough and searching. Recordings were made and transcripts prepared. Numerous documents were collated and examined.

81 Ms Azib completed her report on 25 or 26 September. It ran to 52 pages, single-spaced. Appendices filled a further 125 pages. Following full exposition and painstaking analysis of the evidence, Ms Azib concluded that Mr Tyler had done nothing to disadvantage Mr Matovu and had had no such intention. He had simply given a reasonable response to Ms Wolstenholme's inquiry about availability of members of Chambers who might be able to stand in at short notice. Moreover,

[13] She was called to the Bar in 2003.

there was nothing whatsoever in the evidence (that directly bearing on the complaint or the wider background matters canvassed by Mr Matovu) to support an inference of racial discrimination.

82 Ms Azib also commented on two important associated matters. First, in a passage which occupied six pages of the report (pp40-47), she gave detailed reasons for questioning, although she expressed no view and said it was not her place to do so, whether the allegation of race discrimination was made in good faith. Second, she noted the distress which the allegation had caused to Mr Tyler and expressed serious doubts as to whether "any form of working relationship" could exist between him and Mr Matovu in the future (paras 121-123).

83 On 29 September 2017 a committee of three members of Chambers (including Ms Vaughan Jones)[14] met to consider Ms Azib's report and concluded that there was no reason to take any disciplinary action against Mr Tyler. It did not invite the comments of Mr Matovu who, at that stage, would have been unaware of Ms Azib's conclusions.

84 On 3 October 2017 copies of the report were served on Mr Tyler and Mr Matovu.

85 On 4 October 2017 the Board wrote to Mr Matovu asking him, on an interim basis (pending receipt by Chambers of further legal advice), not to "deal with Lee Tyler or ask him to perform any clerking tasks in relation to your practice" and to conduct any "routine clerking matters" by email. For shorthand, we refer to these as the "interim clerking arrangements." Mr Matovu protested and in a further email on behalf of the Board, sent on 9 October, was advised that "full clerking support" continued to be available to him from other members of the clerking team.

86 On 9 October Mr Matovu wrote to the members of the Board dismissing Ms Azib's report as a "whitewash" and complaining of victimisation in respect of the interim clerking arrangements.

87 On 27 October 2017, Mr Matovu complained to the Bar Standards Board ('BSB') that imposition of the interim clerking arrangements amounted to professional misconduct by the Chambers Board members. The complaint was rejected on 15 December, the BSB noting that at all times Chambers had extended full clerking support to Mr Matovu.

88 On 31 October 2019 Ms Vaughan Jones wrote to Mr Matovu. By that stage the possibility of a mediation between the parties had arisen. She proposed that, pending such a mediation, the interim clerking arrangements would continue. Mr Cray would serve as the principal point of contact but Mr Tyler would himself provide clerking services in relation to unallocated work and by responding to any enquiry about Mr Matovu's availability for work, and would "continue to put [his] name forward" in response to general enquiries. We were told, and accept, that Mr Tyler clerked Mr Matovu in this fashion throughout the period of the interim clerking arrangements.

[14] Mr Matovu raised a question at the time as to the impartiality of the committee. It was appointed by Mr Moody on behalf of the Board. So far as we can recall, the point was not pursued before us.

89 It is common ground that Mr Matovu paid half the Chambers contributions which fell due from October 2017. He justified withholding half on the ground that he was being denied "full clerking services." Chambers consistently requested payment in full, as in the case of all other members.[15] By 1 August 2019 Mr Matovu owed more than £19,000.

90 Our findings in relation to the mediation process are set out in the Confidential Annex hereto.

91 On 21 August 2018 Mr Tyler gave notice that he was willing to resume working in direct contact with Mr Matovu.

92 On 5 October 2018 Mr Matovu was notified of the resumption of ordinary clerking arrangements. Mr Tyler took the initiative and sent an email to Mr Matovu proposing a practice review. The offer was initially ignored and, after a chasing email, rejected.

93 During the Chambers AGM on 27 November 2018 Mr Matovu was addressing the meeting when, without warning, another member of Chambers intervened sharply, telling him to "get on with it" and adding a comment to the effect that he had been listening to him for eight years and was sick of it. Mr Moody and Ms Vaughan Jones by word and/or gesture suppressed the interruption and gave the floor back to Mr Matovu, who continued to make his points.

94 On 28 November 2018 Mr Moody sent an email to the member concerned, reminding him of the need for respectful and courteous behaviour towards colleagues.

95 On 29 November 2018 Mr Matovu complained to Mr Moody that he had "allowed" the other member to subject him to a "vitriolic outburst." Mr Moody sent a measured reply, defending his management of the AGM.

96 On 5 April 2019 Mr Matovu completed the Chambers annual staff appraisal form, in which he complained that Mr Tyler was continuing to victimise him by not serving him and that the Board was "happy to condone this unlawful and appalling discriminatory conduct".

97 On 17 April 2019 Mr Tyler made a complaint against Mr Matovu under the Chambers grievance procedure, based on his comments in the staff appraisal document.

98 On 24 April 2019 members of the Board were made aware of first claim form (presented on 26 February).

99 On 1 May 2019 Mr Matovu was informed of Mr Tayler's complaint.

[15] In the evidence mention was made of one member of Chambers who was suddenly bereaved and left with four young children to bring up alone. On compassionate grounds she was excused from paying her Chambers rent for a period. Contributions, however, continued to be levied as usual.

100 Having taken legal advice, the Board decided that it was necessary to appoint an independent investigator to examine Mr Tyler's complaint. Rachel Crasnow QC, a well-known employment law practitioner, was selected. She had no connection with Chambers.

101 Ms Crasnow conducted an investigation, to which Mr Matovu refused to contribute. He described the exercise as, among other things, a "farce", a "charade" and a device to "pull the wool over the [employment] tribunal panellists' eyes."

102 Ms Crasnow produced her report in June 2019. She found no substance in Mr Matovu's allegations against Mr Tyler.

103 A committee of three members of Chambers was set up to adjudicate on Mr Tyler's grievance. It found that Mr Matovu's allegations against him in 2017 and 2019 were baseless and made dishonestly and/or in bad faith. It proposed that steps be taken with a view to Mr Matovu's expulsion from Chambers. As we have recorded, he was expelled on 29 October 2019.

Miscellaneous and 'background' matters

104 Mr Matovu was the only member of Chambers who self-identified as black. Two other black practitioners had been members, and one remains a 'door tenant.'[16] Other racial minorities were and are represented among the membership.[17] There has long been a system of double-blind marking of applications to Chambers. There was no suggestion before us of a policy against appointing black applicants.

105 With one exception, the clerks in Chambers during Mr Matovu's years were uniformly white. Mr Tyler told us of an unsuccessful attempt to diversify the clerking cohort by advertising outside the usual channels.

106 There were and are two black members of the Chambers non-clerking staff. One, the Marketing Executive, joined as a typist some 30 years ago. She reports directly to Mr Tyler.

107 Equality and diversity training is mandatory for all Chambers staff and members of the Board and the Pupillage Committee. Mr Moody invited the Bar Council's Head of Equality and Diversity to Chambers to give in-house training in January 2017 and January 2019. The aim is to repeat the exercise at similar intervals in future.

108 For a number of years Chambers has had an Equality and Diversity Officer.[18]

[16] Door tenants (their names can be seen on the door) maintain a link with the chambers and pay a modest sum for doing so. Typically, they practise elsewhere but find it useful to maintain a foothold in London, for holding conferences and such like.
[17] As were other groups possessing other protected characteristics.
[18] In recent years there seem to have been two such officers in post at any one time.

109 It would be wrong to omit mention of Ms Harrison's illuminating and powerful witness statement. Aside from setting out her own remarkable personal story and the considerable support received from Chambers in connection with it, it covers an issue to do with a 'lateral recruit' application[19] to Chambers in 2013 (as to which we are not asked to make any findings and could not even if asked) and her role as Chair of the Equality & Diversity Working Group set up by Chambers in 2015. On the latter subject she gives detailed and heartfelt evidence of the (modest) progress made (she resigned as Chair in 2017) and what she clearly perceives as the negative and disruptive contribution to the work of the Group by Mr Matovu. The statement is unchallenged. In so far as it consists of assertions of fact, we accept it as true.

Rationale for Primary Findings

110 The witnesses who gave evidence on the Respondents' side were, to our minds, careful and conspicuously frank. Moreover, their evidence, which struck us as plausible and rational, was to a very large extent corroborated by, or at least consistent with, contemporary communications. By contrast, we did not find Mr Matovu in all respects a satisfactory witness,[20] but since the Tribunal's primary focus is necessarily upon the actions and thought processes of the Respondents we do not think it necessary to pass further comment on his evidence.

Secondary Findings and Conclusions

Without prejudice privilege

111 We were and remain puzzled by Mr Matovu's contention that evidence relating to the investigation and report of Mr de Navarro was protected by without prejudice privilege. In the first place, we cannot see what advantage he saw in pursuing the point. The fact of the investigation and its outcome was uncontroversial and, although he disagreed with Mr de Navarro's conclusion that contributions should continue to be paid on direct access work, he did not suggest that there was anything discriminatory or unlawful about it. It seems that his aim, at least when he first took the point, was to exclude certain findings in the report which he may have judged inconvenient (concerning, for example, the balance of his practice as between conventional and DA instructions – although as to that the arithmetic spoke for itself), but these do not go to the merits of any claim we have to decide and, in so far as they might bear on any broader question as to whether he has any legitimate ground for feeling aggrieved, we see no need to address them. Moreover, Mr Matovu did not run his case in a manner consistent with his stated position. He raised no objection to the Respondents' (open) witness statements dealing with Mr de Navarro's investigation or to evidence being given on the subject in public.

112 In any event, we see no merit in Mr Matovu's invocation of privilege. Self-evidently, Mr de Navarro's contribution was not a negotiation or similar

[19] An application by an established practitioner

[20] For example, we were struck by his evasive responses to Mr Leiper's questions about the 'home-made invoice' episode, which recalled his similar reaction when the matter was first raised with him on behalf of Chambers in 2016.

communication aimed at settling a dispute. There was a disagreement between Mr Matovu and the Board concerning the charging of contributions on DA work. Mr de Navarro was asked by the Board to examine the subject and report on it. The hope, no doubt, was that this might ultimately lead to some sort of resolution of the disagreement, but that comes nowhere near to bringing the investigation or the report within the protection of the privilege. Mr de Navarro was independent of the Board. He did not speak for the Board or for Chambers and his report was not the Board's 'case' or Chambers' 'case' to Mr Matovu, let alone a communication aimed at settling a dispute between him and Chambers. He was brought in, with Mr Matovu's agreement, because he was a respected, senior member of Chambers who could be trusted to produce a detached, considered assessment which might inform and enlighten further discussion about the contributions issue.

113 For reasons given in the Confidential Annex, we are satisfied that without prejudice privilege clearly applies to the evidence concerning the mediation of 21 December 2017 and all related communications. Accordingly, the claims identified in the list of issues, paras 11.6, 18.5, 18.6 and 18.7 necessarily fail, it being undisputed that they are unsustainable in the absence of the privileged evidence.

Indirect discrimination

114 In our view, the indirect discrimination complaint is misconceived because it ignores what 2010 Act, s19 says. The claim fails because, apart from anything else,[21] Mr Matovu does not and cannot demonstrate that the (admitted) 'provision, criterion or practice' ('PCP') of charging contributions on DA work 'puts or would put' persons sharing his racial characteristics at a substantial disadvantage in comparison with others who do not (s19(2)(b)). Clearly 'puts' is inapplicable since he was the only black member of Chambers. Nor is there any basis for saying that the PCP 'would' cause particular disadvantage to other black members if there were any. No statistical evidence was led to the effect that black barristers generally undertake a higher proportion of DA work than those of different colour or ethnicity. Rather, Mr Matovu rests his case squarely on a comparison between the effect of the PCP on the black cohort (him) and the non-black cohort (the rest of Chambers). The argument has the merit of simplicity; its demerit is that it is not based on a proper understanding of the law.

Detrimental treatment (direct discrimination)?

115 Under issue 2.1 the detrimental treatment is said to have been (a) the refusal of Ms Vaughan Jones in her email of 16 December 2016 to supply "any information" in response to Mr Matovu's request of 15 December 2016, and (b) the failure of the Board to have regard to 'due process' prior to the meeting of 19 December 2016 in relation to the contributions issue. We find no detriment in either. Ms Vaughan Jones reasonably pointed out that Mr Matovu could be assumed to be aware of the distribution of his recent earnings as between conventional and DA instructions and that such data relating to other members of Chambers were confidential. She did not exclude the possibility of further evidence being gathered on the conventional/DA balance across Chambers if a case for that

[21] It is not necessary to deal with Mr Leiper's further arguments, directed to particular *individual* disadvantage and justification.

was made out at the meeting. It is true that some documents were not supplied to Mr Matovu until 20 December, the day after the meeting, but that occasioned no disadvantage to him. He was able to put forward his points at the meeting and he secured the best outcome that he could reasonably have hoped for, namely the decision to ask Mr de Navarro to conduct an investigation and produce a report.

116 Mr Matovu told us that he thought Ms Vaughan Jones's email was "brusque" and/or "blunt". In our view the wording was entirely unobjectionable. No question of detriment arises based on the style or tone of her email.

117 Turning to issue 2.2, we must start with the observation that an inordinate amount of time and energy was devoted to this part of Mr Matovu's case. It was examined in exhaustive detail by Ms Azib and we pay tribute to her enormously careful and conscientious report, with which we fully agree. With respect to Mr Matovu, we are unable to detect any detriment in this part of the case. The complaint is against Mr Tyler. He received an enquiry about the availability of possible candidates for a speaking opportunity. It was one of, no doubt, countless tasks to call for his attention on the day in question. He replied with three names. Naturally, Mr Matovu does not complain that Mr Tyler mentioned him: his sole complaint is that one of the other names was inappropriate. The claim is on its face unpromising: A does something *favourable* to B but his act is discriminatory because at the same time he extends the same treatment inappropriately (it is said) to C. It is hard to read it as a complaint of *detrimental* treatment. It may be better seen as alleging that Mr Tyler *sought to* disadvantage him by suggesting an unsuitable name alongside his own. But so seen it makes an evidential point only. A claim cannot rest on an intention or a mindset only. Mr Matovu was not disadvantaged by the mention of Ms Gray; he was arguably disadvantaged by Ms Wolstenholme's action in electing not to approach him (until too late), but that disadvantage (if any) stemmed, we find, not from Mr Tyler's action but from the fact that, mindful of previous experiences, Ms Wolstenholme was reluctant to select him. That explains why she approached Ms Unthank and Ms Gray in the first instance and, even after those approaches failed, did not turn to him until she learned that he had found out about the speaking opportunity and was aggrieved not to have been asked. He was very clear that he made no complaint, or at least no allegation of discrimination, against Ms Wolstenholme. It *might* be argued (we do not recall the case being put in quite this way) that there was nonetheless *some* detriment in Mr Tyler's action in that, had he not mentioned Ms Gray, Ms Wolstenholme would have approached Mr Matovu in good time and, in those circumstances, he would have been happy to speak at the seminar. We would in any event reject such a contention. The fact that she did not approach Mr Matovu once she knew (four days before the seminar) that Ms Gray would not participate speaks for itself. We are satisfied that, as Ms Wolstenholme told us, had Mr Tyler put forward Mr Matovu only, she would have decided not to enlist a third speaker at all.

Detrimental treatment (victimisation)?

118 We find no detriment in issue 18.1. On our primary findings there was a misunderstanding. There was no 'agreement' about recording. Mr Matovu asked Ms Kelly to arrange for the meeting to be recorded and she gave him to

understand that that would be done. But when she spoke with Mr Moody he said that recording was not appropriate. She did not pass that back to Mr Matovu. The fact that the recording equipment was not ready might, arguably, have left Mr Matovu disadvantaged had it resulted in a state of affairs in which recording of the meeting was made impossible. But that is not what happened. Ms Vaughan Jones proposed, more than once, that the meeting be recorded by means of a mobile phone. That was a practical and perfectly reasonable suggestion, which would have resolved the procedural disagreement and allowed attention to turn to substance. There was no detriment. Regrettably, instead of accepting Ms Vaughan Jones's suggestion, Mr Matovu persisted in a fierce and entirely unreasonable tirade against Mr Moody which resulted in the meeting being aborted. If he suffered a detriment through the premature termination of the meeting, it was not one to which he was subjected by Mr Moody or Ms Vaughan Jones.

119 As to issue 18.2, the alleged detriment is entirely unsustainable. As we have stated, we are satisfied that Ms Azib produced an admirable report. It was the result of a fair, objective, comprehensive and even-handed investigation. There was no detriment in the process and, rightly, Mr Matovu does not say that he suffered a detriment in the outcome. In any event, such an allegation would be doomed to failure. The fact that he does not agree with Ms Azib's conclusions does not warrant the assertion that they entailed any detriment to him.

120 Under issue 18.3, again we find no detriment. Ms Azib's report had concluded that there was no case for Mr Tyler to answer. The Board rightly and properly accepted her conclusions and released Mr Tyler from the jeopardy in which Mr Matovu's allegation had placed him. It was no possible detriment to Mr Matovu for the Board to take that course. He had no right to comment on the report; his right to have his complaint investigated had been fully satisfied.

121 As to issue 18.4, again, the complaint falls on the primary findings set out above. The Board took the only practical course open to it, namely to engineer a temporary interruption of face-to-face dealings between Mr Matovu and Mr Tyler. It neither required, nor achieved, a cessation of Mr Tyler's clerking services on behalf of Mr Matovu. Mr Tyler continued throughout to clerk Mr Matovu, who also retained at all times his face-to-face working relationship with Mr Cray. There was no detriment to Mr Matovu and it is hard to avoid the thought that, had the Board *not* intervened, he would have been likely to complain that requiring him to maintain direct contact with someone whom he had accused of discrimination was itself a detriment.

122 The claims under issues 18.5, 18.6 and 18.7 rely on evidence which, as already stated, we have found to be inadmissible. That evidence being excluded, they necessarily fail. Our reasons are given in the Confidential Annex. Accordingly, these claims will be examined no further.

123 Again, issue 18.8 discloses no arguable detriment. Mr Tyler had raised a grievance and the only proper course open to the Board was to proceed to investigate it. To do anything else would have put Chambers in breach of its obligations to Mr Tyler.

Harassment: treatment capable of amounting to harassment?

124 Not only was there no detriment, there was also no treatment capable of amounting to harassment. Leaving aside any question of a racial component (to which we will return), the treatment complained of does not come close to satisfying the other demanding requirements of the 2010 Act, s26.

125 We find in issue 11.1 no arguable instance of harassment. The complaint is of frank comments in a private conversation between a practitioner and his Head of Chambers about (among other things) the former's failure to pay his contributions and, in that connection, about difficulties with his practice. The wording of the 2010 Act, s26 is nowhere near engaged. The fact that the remark may have been unwanted and may have caused a degree of upset to Mr Matovu does not make it capable (even if any link to race were found) of amounting to an act of harassment.

126 As to issue 11.2, we refer to our findings above under issue 18.1. Despite the wildly disproportionate reaction of Mr Matovu, the matter complained of did not come close to violating his dignity or producing an environment to which any of the powerful statutory adjectives could sensibly be applied.

127 The same goes for issue 11.3, as to which we have already made secondary findings by reference to issue 2.1. Nothing capable of sustaining an allegation of harassment occurred.

128 Turning to issue 11.4, we repeat what is said above in relation to issue 18.3. In accepting and acting upon Ms Azib's report, the Board self-evidently did nothing capable of constituting harassment of Mr Matovu.

129 The complaint of harassment under issue 11.5 fares no better (see our secondary findings under issue 18.4 above). Nothing happened to which the label of harassment could be attached. If anything, the Board's action was effective to *reduce* the risk of Mr Matovu (or Mr Tyler) feeling harassed in the workplace.

130 As to issue 11.6, as explained above (in relation to the corresponding complaint under issue 18.5), the claim fails because it rests on evidence which is inadmissible. Our reasons are given in the Confidential Annex. This complaint also will be considered no further.

131 The complaint of harassment under issue 11.7 is plainly unsustainable: requiring Mr Matovu to continue to pay contributions in accordance with his agreement with Chambers could not possibly amount to an infringement of the 2010 Act, s26. It is not true that he was denied the clerking services to which he was entitled.

132 Finally, addressing issue 11.8, we are satisfied that there was no possible harassment by Mr Moody or the Board in the way in which the interruption at the AGM on 27 November 2018 was dealt with. The incident was managed and Mr Matovu was able to complete his address to the meeting. The person concerned was not "allowed" to make the interruption and he was taken to task for it afterwards. Mr Matovu did not elect to make any allegation of harassment against

him. That charge, levelled against Mr Moody and the Board, is obviously misplaced.

Direct discrimination/harassment: treatment 'because of' or 'related to' race?

133 Our findings above determine the complaints of direct racial discrimination and harassment: there was no actionable detriment and no treatment capable of amounting to harassment. In any event, we are satisfied that there was no discriminatory treatment[22]. We have found that, for the most part, Mr Matovu fails to establish any good reason for feeling aggrieved, but even if that view is mistaken, the Respondents have given cogent and plausible explanations for their actions which, in our judgment, exclude discrimination. Moreover, no valid (like-for-like) comparison is set up between their treatment of Mr Matovu on the one hand and any other (white or non-black) member(s) of Chambers on the other. No pattern of behaviour is demonstrated pointing to race as a material influence upon the acts or omissions on which the claims hang. Certainly, the 'background' facts relied on by Mr Matovu are eloquent of the stubborn reality that the Bar is adapting to social change more slowly than many other professions. And progress towards diversity among barristers' clerks is, it seems, even slower. But we were shown no evidence of a pattern of Chambers' decisions rejecting strong black candidates for pupillages or tenancies in favour of weaker white candidates. Nor of recruitment arrangements which might be seen as disadvantaging black applicants. Nor of appointments in the clerks' room suggestive of racial bias. The notion, implicit in Mr Matovu's case, of some sort of Chambers 'culture' of race-based prejudice is not made out.

134 The reasons just stated apply to all the direct discrimination and harassment claims. Superfluously perhaps, we will give specific consideration to three. Returning to issues 2.1 and 11.3, we see no reason to infer any racial element. The Respondents' conduct was rational and unremarkable. As to issues 2.2 and 2.3, we are entirely satisfied that Mr Tyler's act of suggesting Ms Gray's name had nothing to do with race. He simply gave a hasty response to Ms Wolstenholme's inquiry about availability, based on a survey of the diary. The idea that he was seeking to disadvantage Mr Matovu, let alone that that purpose was motivated by or linked to race, strikes us as remarkable. To state the obvious, if he had had any such aim he would surely have been careful to *avoid* mentioning him as a possible candidate. As to issue 11.1, we see no reason to think that Mr Moody would have spoken otherwise in like circumstances to a very senior white member of Chambers. It is clear to us that he would not.

135 It would not be proportionate to subject the full canon of complaints to further individual examination. The reasoning in the preceding paragraph applies equally to issues 11.2 (tape recording), 11.4 (accepting Ms Azib's report), 11.5 (temporary clerking arrangements), 11.7 (requiring contributions after 4 October 2017) and 11.8 (handling of the interruption at the AGM). In relation to all, the Respondents behaved in an entirely rational and unremarkable manner. Mr Matovu fails to identify any act or omission suggestive to any extent of a race-based or race-related motivation.

[22] We use that term compendiously to include treatment 'because of' race and 'related to' race.

Victimisation: treatment because of a protected act?

136 We have already found that the victimisation claims fail because no detriment is established. In case that is wrong, we now return to complete the analysis.

137 The protected acts relied on by Mr Matovu are set out in the list of issues at paras 16.1-16.5. We agree with Mr Leiper that the first does not satisfy the statutory language. Mr Matovu's evidence was that he wanted to tape record the meeting of 15 November 2016 because he felt that it would be fair to do so, given that his chosen companion would not be available to attend with him. The communication of his wish for the meeting to be recorded cannot reasonably be interpreted as an implied allegation of a contravention of the 2010 Act (s27(2)(d)) or as some other act done under or for the purposes of the Act (s27(2)(c)).

138 The protected acts set out in the list of issues, paras 16.2 (the complaint against Mr Tyler of 12 July 2017), 16.3 (the preparation of the agenda for the mediation fixed for 21 December 2017), 16.4 (the presentation of the first claim form on 26 February 2019) and 16.5 (repeating in the feedback form the prior allegations of discrimination) are all agreed to be protected acts unless the Tribunal is persuaded by the Respondents' plea of bad faith. We have decided that it is not necessary to deal with that plea since the victimisation claims are in any event untenable on other grounds. Accordingly, our analysis proceeds on the footing that Mr Matovu is entitled to rely on all alleged protected acts bar the first.

139 If, contrary to our view, Mr Matovu was subjected to detrimental treatment, was it, or any of it, because of the protected acts (or any of them)? The question demands a negative answer. Mr Moody directed that the tape recording equipment be not used (issue 18.1) because he regarded it as inappropriate. It had not been used before and he considered that it had no place in an informal meeting between Chambers colleagues. Ms Azib took particular care in conducting her investigation and preparing her report (issue 18.2) precisely because Mr Matovu had made a very serious allegation of discrimination. If, contrary to our view, there was any flaw in the process or execution, we can see no reason whatever for attributing it to the fact that a complaint of discrimination (as opposed to something else) was made. As to issue 18.3, we have already said that the acceptance of the report by the Board was unexceptionable. We see no sensible reason for supposing that its actions were influenced in any way by the fact that discrimination had been alleged. The implementation of the temporary clerking arrangements (issue 18.4) was necessitated by the damage to the relationship between Mr Matovu and Mr Tyler. No doubt that damage was attributed at least in part to the allegation of discrimination, but the *reason* for the Board's act was the ruptured bond, not the antecedent allegation and it would have acted in precisely the same way had the rupture resulted from any cause outwith the protection of the 2010 Act, s27. As to issue 18.8, again the necessary 'because of' link is notably missing. It is plain and obvious that the fact of the protected acts had no bearing whatever upon the Board's act of accepting and processing Mr Tyler's grievance. We see no rational basis for thinking otherwise.

Time

140 In circumstances where, as we have found, there was no unlawful treatment, no question of relevant 'conduct extending over a period' (under the 2010 Act, s123(3)(a)) can arise. Nor will the Tribunal consider exercising its 'just and equitable' discretion to substitute a longer time limit than the standard three months, since it would be idle to do so where the claims in question have been found to be without merit. Accordingly, we dismiss all elements of Mr Matovu's case other than the indirect discrimination claim and the claims under issues 11.6, 18.6 and 18.8 on the further ground that the Tribunal has no jurisdiction to entertain them.

Outcome and Postscript

141 For the reasons stated, all claims fail and the proceedings are dismissed. We have reached our decision without applying the burden of proof provisions. Had we applied them, we would have held that the onus had not transferred to the Respondents and that, even if we were wrong about that, they had amply discharged it.

142 As we survey the wreckage of this bitter and destructive litigation, we cannot but feel dismay at the prospect of the parties renewing hostilities in the pending third claim. We sincerely hope that recent experience will persuade them that there must be a better way to bring their conflict to an end.

EMPLOYMENT JUDGE Snelson
11 Feb 2020

Reasons entered in the Register and copies sent to the parties on: 11/2/2020

..... for Office of the Tribunals